APPEAL NO. 011095
FILED JUNE 26, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 26, 2001. With regard to the only issue before her, the hearing officer determined that the respondent (claimant) had a 20% impairment rating (IR) as assessed by the designated doctor in his first report.

The appellant (self-insured) appealed, asserting error on a number of grounds, including that the hearing officer denied the "carrier's" right of discovery in refusing to forward a deposition by written questions to the designated doctor, that the hearing officer erred in finding the designated doctor's first report had valid range of motion (ROM), and that the hearing officer erred in failing to require an explanation from the designated doctor for the discrepancies in ROM testing between the first test and the second test. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, and reached maximum medical improvement (MMI) on June 22, 2000. The medical records indicate that the claimant sustained lumbar abnormalities at L2 through L5 with disk herniations at L2-3, L3-4 and L4-5. The claimant has not had spinal surgery. On a Report of Medical Evaluation (TWCC-69) dated May 10, 2000, Dr. G, a self-insured independent medical examination doctor certified MMI with a 0% IR.

Subsequently, Dr. H was appointed as the Texas Workers' Compensation Commission-selected designated doctor. Dr. H, on a TWCC-69 and narrative, both dated June 29, 2000, certified MMI on June 22, 2000, and assessed a 20% IR based on an 8% impairment from Table 49, subsection III A of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and 13% validated ROM impairment as calculated on a figure 83 c worksheet. Dr. S, the self-insured's peer review doctor, in a report dated July 24, 2000, agreed with the Table 49 rating, and, while conceding the ROM testing "met both the consistency and the straight leg raising (SLR) criteria," contending that ROM was not compatible with other areas of the AMA Guides, specifically noting that if the claimant had ankylosis/fusion at all lumbar vertebrae he "would only merit a 12% [IR]." Dr. S suggested retesting for reliability, stating that ROM testing "should be replicable in repeated examinations."

Dr. S's comments were sent to Dr. H, who replied by letter of August 22, 2000, that he agreed with Dr. S "that the lumbar [ROM] should be done again to determine if there is good test re-test reliability." Dr. H reexamined the claimant and, in a report dated

October 18, 2000, certified MMI and assessed a 17% IR, again assessing an 8% impairment from Table 49 and finding validated ROM testing for 10% impairment, giving some fairly substantial difference in his figures from the first test. Dr. S noted the difference in Dr. H's figures between the June 22, 2000, testing and the October 18, 2000, testing and recommended yet a third testing and that unless the figures from the third test "very closely approximate, i.e. within 5E the study done on October 18, 2000, for this patient's lumbar ROM would have to be considered invalid."

The self-insured requested that Dr. S's last comments and an article on ROM testing by Dr. C be sent to Dr. H in a deposition on written questions asking whether Dr. H would wish to amend his report further. The hearing officer by order dated January 18, 2001, and at the CCH and in her decision denied the self-insured's request on a failure of no good cause shown and that no proper reason has been shown by the self-insured to seek further clarification from Dr. H.

The hearing officer, in her Statement of the Evidence, comments:

> Because [Dr. H's] June 22, 2000 examination produced valid ROM studies of the Claimant, there was no proper reason for [Dr. H's] next examination on October 17, 2000. The October 17, 2000 examination by [Dr. H] also produced valid ROM studies, and the Self-Insured's requests to do further clarification to nitpick the results, simply based on [Dr. S's] disagreement, is not compelling.

We agree with the hearing officer's rationale. We further note Dr. S's testimony at the CCH, regarding Dr. H's first report, was that she was concerned that "the [ROM] seemed rather excessive and . . . . that it didn't seem to be in line with the patient's injury." We also note that Dr. S has never actually examined the claimant.

This same situation as the instant case, where the designated doctor had two reports, both having valid ROM testing, was addressed in Texas Workers' Compensation Commission Appeal No. 960687, decided June 20, 1996. In that case, we cited Texas Workers' Compensation Commission Appeal No. 951142, decided August 28, 1995 (where there were two designated doctor's reports, the first having valid ROM testing and the second having invalid ROM testing), stating:

> In Appeal No. 951142, we reversed a hearing officer's decision adopting the IR certified by the designated doctor in a second report, wherein the claimant's ROM testing was invalid, and rendered a new decision that the claimant's IR was the IR certified in the designated doctor's initial report, which included a rating for loss of ROM based upon valid ROM testing. In so doing, we stated:
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> > Once valid ROM test results have been achieved consistent with the AMA Guides, there is no mandate under the AMA

> Guides or otherwise to continue the ROM testing until invalid or different test results are achieved that would negate or change the valid results. Thus, we conclude that Dr. A's second testing of ROM was not necessary as valid ROM testing had already been achieved and was thus not a proper basis to amend his first certification. We therefore decline to substitute invalidated ROM measurements for the previously measured valid ROM.

In Appeal 960687, *supra*, we held that since valid ROM testing had been achieved in the designated doctor's first report, there was no proper basis for the designated doctor to amend his first certification. In this case, the only quarrel with Dr. H's first report (the 20% IR) was that Dr. S, who had never seen the claimant, thought it was "excessive" and did not seem to be "in line with the claimant's injury." We hold that that was not a proper basis upon which to require further ROM testing or for the designated doctor to amend his first certification.

The hearing officer did not err in refusing to approve the self-insured's deposition on written questions to Dr. H pertaining to Dr. H's second examination of the claimant with a change of impairment rating for ROM. That is because the second examination and change of ROM was not done for a proper reason.

For the reasons stated above, we affirm the hearing officer's decision and order.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge