

APPEAL NO. 012138
FILED OCTOBER 25, 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 was held on August 7, 2001. He determined that the appellant (claimant) reached maximum medical improvement (MMI) on October 23, 2000; that his impairment rating (IR) is 13%; and that his average weekly wage (AWW) is \$400.00. On appeal, the claimant expresses disagreement with these determinations. The appeals file contains no response from the respondent (carrier).

DECISION

We affirm in part and reverse and remand in part.

MMI AND IR

The evidence reflects that the claimant sustained a compensable back injury on _____ and had surgery in November 1999. The claimant's back pain persisted, and he underwent a second spinal surgery in May 2000. In October 2000, the claimant's treating doctor, Dr. B, referred him to Dr. D for an IR assignment. Dr. D concluded that the claimant reached MMI on October 23, 2000, with a 47% IR. The 47% was comprised of 10% for lumbar range of motion (ROM), 12% for specific disorders of the spine, and 18% for loss of strength. The claimant was then evaluated by a Texas Workers' Compensation Commission (Commission)-selected designated doctor, Dr. H, who agreed that the claimant reached MMI on October 23, 2000, but assigned a 13% IR. Dr. H assigned 12% for specific disorders of the spine, 1% for impairment of the right lower extremity, and no rating for loss of ROM. Dr. H's report reflects that six ROM measurements were obtained; however, they did not meet the consistency requirements 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 were therefore invalid. Dr. H did not invalidate the claimant's ROM due to straight leg raise (SLR) measurements. The hearing officer found that the report of Dr. H is not contrary to the great weight of the other medical evidence and concluded that the claimant reached MMI on October 23, 2000, with a 13% IR. On appeal, the claimant contends that he has not yet reached MMI and that Dr. H failed to rate his entire injury and repeat ROM testing after obtaining an invalid test. The claimant requests to be reevaluated for purposes of MMI/IR certification.

The AMA Guides at page 72, column 2, require additional ROM testing of the spine if the consistency requirements are not met:

If consistency requirements are *not* met, perform additional tests up to a maximum of six until reproducibility criteria are satisfied. If testing remains

inconsistent after six measurements, consider the test invalid and re-examine at a later date. [Emphasis in original.]

In that regard, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(k) (Rule 130.6(k)) provides:

When performing [ROM] testing, if the AMA Guides specifies that additional testing be performed because of consistency requirements, the designated doctor shall reschedule testing within seven days of the first testing unless there is no clinical basis for retesting and then the designated doctor must document this in the narrative notes with the clinical explanation for not recommending re-examination.

Because the designated doctor gave no explanation in the report for not retesting ROM, the decision is remanded to the hearing officer to direct the designated doctor to retest the claimant.

AWW

The claimant argues that the hearing officer should have based the AWW on the pay received from the employer, and, additionally, the pay received from a temporary service, which the claimant contends actually represents compensation for overtime worked for the employer. The hearing officer was not persuaded by this argument and determined that the claimant had worked four complete weeks for the employer prior to his injury and that the AWW is \$400.00, which is the amount that the claimant received from the employer for each of the four weeks. Section 408.042(b)(2)(B) provides that when an employee has not worked 13 weeks, the AWW is equal to the weekly wage the employer paid a similar employee for similar services. The hearing officer noted that similar employee wage information was not provided; therefore, he used the fair, just, and reasonable method found in Rule 128.3(g) to calculate the claimant's AWW. Nothing in our review of the record reveals that the hearing officer's determination that the claimant's AWW is \$400.00 constitutes reversible error. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, the AWW determination is affirmed.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **TEXAS WORKERS' COMPENSATION INSURANCE FUND** (effective September 1, 2001, the true corporate name is **TEXAS MUTUAL INSURANCE COMPANY**) and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

CONCURRING OPINION:

I concur with the principle decision because the evidence does not reflect the basis upon which the designated doctor determined not to retest the claimant for abnormal range of motion (ROM) at another time. The Appeals Panel has recognized, however, that a designated doctor may have a professional basis for not retesting for abnormal ROM and has not remanded for such retesting where the record contained a sufficient explanation from the designated doctor for departing from the ROM retesting requirements of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. See, e.g., Texas Workers' Compensation Commission Appeal No. 970264, decided March 31, 1997; Texas Workers' Compensation Commission Appeal No. 981384, decided August 10, 1998.

Philip F. O'Neill
Appeals Judge