APPEAL NO. 022300
FILED OCTOBER 30, 2002

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 15, 2002. The hearing officer determined that the respondent/cross-appellant's (claimant) impairment rating (IR) is 10%. Both the appellant/cross-respondent (self-insured) and the claimant have appealed this determination. The self-insured responded to the claimant's appeal, however, the appeal file contains no response from the claimant to the self-insured's appeal.

DECISION

We reverse and remand.

The evidence reflects that Dr. P, the carrier-selected doctor, was the first doctor to certify maximum medical improvement (MMI) and IR in this case. Dr. P certified that the claimant reached MMI on August 20, 2001, with a 5% IR. Dr. P's report indicates that 5% was assigned for degenerative changes of the lumbar spine and that no rating was given for loss of range of motion (ROM), as the measurements obtained did not meet the validity 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).

Dr. H was the second doctor to certify MMI/IR as result of a referral from the claimant's treating doctor. Dr. H examined the claimant on September 17, 2001, and certified that he reached MMI on the same date, with a 10% IR; 5% for specific disorders of the lumbar spine and 5% for lateral ROM. Dr. H noted that the claimant's lumbar flexion and extension ROM were invalidated by the straight-leg test. The claimant's treating doctor, Dr. G agreed with this IR.

Dr. R, the designated doctor appointed by the Texas Workers' Compensation Commission (Commission) to resolve the MMI/IR dispute, initially examined the claimant on October 17, 2001. Dr. R determined that the claimant reached MMI on October 17, 2001, with a 7% IR. In his report, Dr. R explained that the 7% IR was awarded for specific disorders of the spine and that the claimant was not assigned a rating for ROM, as the measurements obtained were invalidated by the claimant's sub-optimal effort. Both the claimant and Dr. G disputed the 7% IR. Apparently, the Commission subsequently sent a letter of clarification to Dr. R on December 4, 2001, and he responded in a letter dated December 13, 2001. Neither of these letters is in evidence, although there are several references to them throughout the record. It appears from the references made to the clarification letter that Dr. R supplied additional measurements, which were not included in his original report, and explained that he did not believe that another examination for ROM testing was needed.

For reasons that are unclear from the record, the claimant presented to Dr. R's office on April 3, 2002, for another examination. On this date, Dr. R performed ROM testing and obtained valid ROM measurements. In his report dated April 15, 2002, Dr. R assigned a 19% IR; 13% attributed to ROM and 7% to specific disorders of the spine. On May 8, 2002, the self-insured requested a benefit review conference and disputed the 19% IR on the basis that a reexamination was not ordered by the Commission and should not have been performed.

The hearing officer determined that Dr. R's initial IR could not be adopted because, during the October 17, 2001, examination, Dr. R invalidated ROM test results after obtaining only two ROM measurements and, as the AMA Guides require three measurements, the exam was not performed in accordance with the AMA Guides. The hearing officer found that the April 3, 2002, examination was not ordered by the Commission and was tainted by the claimant's unilateral contact with Dr. R and, consequently the 19% IR cannot be adopted. In deciding to adopt the 10% IR of Dr. H, the hearing officer found that both Dr. H's and Dr. P's ratings were made in accordance with the AMA Guides and that the claimant's treating doctor agreed with the 10% IR assigned by Dr. H. Both parties have appealed this decision. The claimant urges that Dr. R's second IR of 19% should be adopted. The self-insured argues that the hearing officer erred by invalidating Dr. R's first IR and that the 7% IR should be adopted.

The hearing officer erred in determining that the first IR assigned by Dr. R was not made in accordance with the AMA Guides because he did not obtain three ROM measurements. In Texas Workers' Compensation Commission Appeal No. 941299, decided November 9, 1994, the Appeals Panel stated:

> We agree with the carrier that the AMA Guides do not mandate that six attempts to validate ROM testing must be made before a certifying doctor can invalidate ROM testing altogether and assign a zero percent for this aspect of an IR. The language of the AMA Guides on the number of retests is permissive. From this we conclude that the actual number of ROM tests undertaken is properly left to the professional judgment of the doctor provided that at least one attempt at validation after an invalid test is made.

We have also recognized that retesting is a matter of medical judgment and have affirmed where the designated doctor indicated why a retest was not indicated. *See e.g.,* Texas Workers' Compensation Commission Appeal No. 970264, decided March 31, 1997; and Texas Workers' Compensation Commission Appeal No. 981384, decided August 10, 1998. In this case it appears, although as previously noted the letters are not in evidence, that Dr. R was questioned by the Commission regarding retesting and in his response letter indicated his reasons for not retesting. The hearing officer's findings that Dr. R's report was not made in accordance with the AMA Guides and that the great weight of the medical evidence supports the 10% IR assigned by Dr. R are hereby reversed.

It is necessary to remand this case in order for the hearing officer to obtain and consider the letter of clarification sent to Dr. R and his response letter to the Commission. Sections 408.122(c) and 408.125(e) provide that where there is a dispute as to the date of MMI and the IR, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)), the designated doctor's response to a Commission request for clarification is also considered to have presumptive weight as it is part of the designated doctor's opinion. *See* Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. Assuming that Dr. R clarified and resolved the issues presented to him in the letter sent by the Commission, it should be accorded presumptive weight on remand.

We note that Dr. R's letter should also be dispositive on the issue concerning the April 3, 2002, reexamination. From the record before us, we perceive no error in the hearing officer's determination that the second designated doctor report by Dr. R is not entitled to presumptive weight, based on the fact that the examination was initiated by the claimant alone and resulted from unilateral contact by him with Dr. R. However, as the clarification letter and Dr. R's response are not part of the record, the hearing officer should clarify on remand whether the content of these letters affects the underlying bases for determining that the second report is not entitled to presumptive weight.

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 and 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 (self-insured) is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

CEO
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

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Judy L. S. Barnes
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Margaret L. Turner
Appeals Judge