

APPEAL NO. 950208

This appeal is considered pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (city), Texas, on December 7, 1994, to determine the respondent's (claimant) date of maximum medical improvement (MMI) and impairment rating (IR). The hearing officer, (hearing officer), determined that the claimant reached MMI on April 22, 1994, with a 33% IR as found by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The appellant (carrier) appeals, contending that the designated doctor's report should not be given presumptive weight because the doctor did not follow the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The appeals file does not contain a response from the claimant.

DECISION

We affirm.

The claimant suffered a compensable injury to his back and neck in the course of a motor vehicle accident on (date of injury), which occurred while he was working for (employer). The limited medical records in evidence show claimant treated from January of 1993 with (Dr. T), although reports from this period were not in evidence; he was also referred to (Dr. H) in March of 1993. Dr. H noted bilateral upper extremity numbness and weakness in the left lower extremity but said it was difficult to explain how a minor accident could have caused all these symptoms. No other report of Dr. H is in evidence.

Dr. T wrote on March 15, 1994, that claimant had complained of left arm numbness, cervical spine strain, and neck, shoulder, and back pain. At the carrier's request, the claimant had been seen by (Dr. B) on February 7, 1994, who noted that a July 1992 MRI of the cervical spine showed mild changes at C4-5 and 6, and that an EMG showed a left C7 nerve root irritation and L5 irritation; he recommended a new MRI of the cervical and lumbar spine due to persistent complaints. However, on February 11th Dr. B wrote that he had reviewed claimant's MRIs, and stated that the cervical MRI showed degenerative disc with osteoarthritic changes at C5-6, along with foraminal stenosis, but that claimant did not have "any suggestion of C6." He said the lumbar MRI showed minimal changes with some degeneration at L1-2 and L5-S1 levels with no evidence of disc herniation. Dr. B wrote, "At this time I do not feel that this gentleman has symptomatic disc disease that I can detect clinically," and he found the claimant reached MMI on March 1, 1994, with a two percent IR. Dr. T noted that claimant disagreed with Dr. B's assessment, and he referred claimant for another neurological or orthopedic consultation. On March 30, 1994, (Dr. G) wrote that in his opinion the claimant had "a surgical herniated disc at C5-6" and that a myelogram would be performed.

Because of a dispute over Dr. B's IR, the Commission selected (Dr. SC) as designated doctor. On May 4, 1994, Dr. SC summarized claimant's studies as follows: a

cervical myelogram revealed a disc space reduction at C3-4, C4-5, C5-6, and a protrusion at C3-4; a lumbar myelogram revealed disc bulges at L1-2, L4-5, and a disc protrusion at L5-S1; an EMG was performed but the results were not known at that time. Dr. SC noted that Dr. G had recommended cervical and lumbar surgery and had disagreed with Dr. B's assessment. Dr. SC wrote that an EMG nerve conduction study of the claimant's left lower extremity, as well as range of motion (ROM) studies, would be necessary before an IR could be assessed (the claimant apparently had already reached statutory MMI). On May 12th, Dr. SC wrote that he had seen the claimant again and that his ROM examination and EMG studies had been completed; he found the claimant to have reached MMI on April 22, 1994, with a 33% IR. The IR was calculated as follows: cervical spine, 14% due to loss of ROM, six percent due to the specific disorder from Table 49 of the AMA Guides; lumbar spine, 11% for ROM, and seven percent from Table 49; no further impairment was given due to the radiculopathy noted from the EMG report. The first page of the ROM report attached to Dr. SC's Report of Medical Evaluation (Form TWCC-69) is titled, "Impairment Rating/Disability Evaluation Report CA -- 6000 Spine Motion Analyzer;" the report also states, "This computerized ROM assessment or impairment relating to the loss of range motion (sic) was accomplished according to [the AMA Guides]."

On May 26th, Dr. B wrote that he did not agree with Dr. SC's evaluation, stating that he had not found any limitation of the claimant's neck or back movement. He speculated that something further may have happened between his examination and that of Dr. SC, adding, "Certainly a thirty-three percent whole body [IR] is a markedly disabled person and is different from the person I saw." In addition, at carrier's request, (Dr. ST) reviewed Dr. SC's report. She stated as follows:

. . . [Dr. SC] measured both cervical and lumbar [ROM] on the CA-6000 Spine Motion Analyzer, which is a computerized goniometer. According to the [AMA] Guides, a goniometer can no longer be used to measure spinal ROM. The [AMA] Guides specifically call for, and give instructions, on the use of the single or double inclinometer to measure spinal ROM. On page 71 of the [AMA] Guides, under 3.a - General Principles of Measurement, it states, "Because small, inaccessible spinal joints do not readily lend themselves to external visual observation required by goniometric measurement, standard goniometric techniques for measuring spinal movement can be highly inaccurate. Furthermore, the mobility of spinal segments is confounded by motion above and below the points of measurement. . . ." "Hence, regional spinal motion is a compound motion, and it is essential to measure simultaneously motion of both the upper and lower extremes of that region. For this reason, measurement techniques using an inclinometers (sic) are necessary to obtain reliable spinal mobility measurements." Due to the fact that [Dr. SC] used a goniometer instead of an inclinometer, I believe that both the cervical and lumbar ROM studies must be considered invalid. I would suggest repeat ROM studies be performed using the inclinometer method.

Dr. ST went on to say that she agreed with the six and seven percent impairments given for the specific disorders of the cervical and lumbar spine, respectively.

The hearing officer held that Dr. SC's determination was not against the great weight of the other medical evidence. The carrier argued at the hearing and on appeal that Dr. SC's report was invalid on its face for failure to follow the AMA Guides with respect to use of an inclinometer and, as such, a substantial basis existed to overcome the presumptive weight otherwise accorded the designated doctor's IR and MMI.

We have previously written in Texas Workers' Compensation Commission Appeal No. 93835, decided November 3, 1993, that "[o]ur reading of the AMA Guides . . . does not indicate that we are required to hold this [that the AMA Guides mandate the use of an inclinometer] as a matter of law." That decision reversed the hearing officer's determination that the great weight of the other medical evidence was contrary to the designated doctor's report. Similar determinations have been made in Texas Workers' Compensation Commission Appeal No. 94674, decided July 8, 1994, and in Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993. In reversing the hearing officer's rejection of the designated doctor's report, the panel in the latter case once again emphasized the "special and unique status accorded the medical opinion and evaluation of the designated doctor," and the fact that to overcome such report requires a great weight of the other medical evidence. Compare Texas Workers' Compensation Commission Appeal No. 93932, decided November 29, 1993, which references the AMA Guides' language concerning use of goniometers and inclinometers; that panel affirmed the hearing officer's determination that the designated doctor's report was invalid where he clearly stated he would not use the statutorily mandated version of the AMA Guides and that he did not use any "machinery" in evaluating ROM. We note that in this case the carrier does not contend that the designated doctor used the wrong version of the AMA Guides, but that he failed to correctly follow the instructions.

Our reading of prior Appeals Panel decisions leads to the conclusion that the issue in this case is one of fact. Based upon our review of the evidence, we cannot say that the hearing officer erred in determining that Dr. SC's report was not overcome by the great weight of the other medical evidence. See Section 408.122(b) and 408.125(e). We note that the other medical evidence shows that while Dr. B gave claimant a two percent IR, Dr. ST agreed with Dr. SC's IR for specific disorder, only disagreeing with the methodology by which ROM was measured. Given the nature of the argument raised by the carrier at the hearing, we believe it would have been preferable for the hearing officer to have made an initial finding that the designated doctor's report was in fact not invalidated by the use of the goniometer method, followed by the determinations that it was entitled to presumptive weight and that the great weight of the other medical evidence was not to the contrary. However, based upon a reading of the hearing officer's decision and order as a whole, we believe these findings, while not stated precisely, can nevertheless be implied. See Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. Under the facts of this case, we are unwilling to find that the hearing officer's decision was

not sufficiently supported by the evidence or was so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge