APPEAL NO. 950248

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 January 30, 1995, (hearing officer) presiding as hearing officer. She determined that the respondent's (claimant) correct impairment rating (IR) was 16% as certified in an amended report of the Texas Workers' Compensation Commission (Commission)-selected designated doctor. The appellant (carrier) appeals urging that it was error for the hearing officer to request a second examination of the claimant by the designated doctor, rejecting the designated doctor's first IR, and in awarding an IR based upon the designated doctor's second or amended report. No response has been filed by the claimant.

DECISION

Affirmed.

The single issue in the case involved the claimant's correct IR, it being stipulated that the claimant reached maximum medical improvement (MMI) as found by his treating doctor on July 19, 1993. The claimant had sustained a back injury prior to new law coverage under the 1989 Act, and sustained a second compensable back injury on or about (date of injury). The claimant has undergone two back surgeries as a result of his injuries, the last one being December 4, 1992, involving a two-level, 360-degree fusion. As a result of a dispute concerning the claimant's IR, a Commission-selected designated doctor was appointed to examine and evaluate the claimant and assess an IR. (Dr. D), the Commission-selected designated doctor, examined the claimant and the medical records and in a comprehensive report attached to his Report of Medical Evaluation dated November 11, 1993, certified an IR of 14%. As a part of his rating, he stated that no rating was given for forward flexion and extension range of motion as they were "invalidated due to a discrepancy between the tightest straight leg raising and the sum of the lumbar sacral flexion and extension angles." Dr. D did give a two percent rating for lumbar range of motion setting out as one percent each for the right and left lateral bending.

Dr. D's detailed report references using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), in making his report. (Dr. H), one of the claimant's surgeons, vigorously disagreed with Dr. D's IR. A disability determination officer requested that Dr. D review Dr. H's letter and determine if it changed his prior determination. Dr. D responded in a June 1, 1994 letter, explained that the claimant had not satisfied validity criteria on his flexion and extension range of motion, reviewed his previous report, stated he felt he had followed proper guidelines in the AMA Guide, and adhered to 14% IR. Dr. H testified by telephone at the contested case hearing continuing to point out his disagreement with Dr. D's report. In argument at the conclusion of the hearing claimant's assistant argued, among other matters, that Dr. D only tested the claimant on the one occasion in invalidating flexion and extension range of motion and that Dr. D's IR should be thrown out

or done again. Before the hearing closed, the hearing office stated she was going to contact Dr. D regarding the matter of retesting. *See* Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), 3-3a, A.4, pg 72. This was objected to by the carrier. In a letter to Dr. D, dated August 22, 1994, the hearing officer stated:

> I am asking if you retested or re-examined the Claimant at a later date, or if your IR of 14% is just based on the evaluation that was performed on November 8, 1993. If your response would be affirmative as to just the range of motion testing that was performed on November 8th, and you have not retested at a later date, would you please let me know, so that we can reschedule a retesting of the Claimant's range of motion with you as soon as possible.

Dr. D responded on August 30, 1994, stating that his IR of 14% was based on his evaluation on November 8, 1993, and a retesting or reexamination was not performed following that date. He suggested scheduling a retest as soon as possible. His response is not clear as to how many "tests" or "measurements" were done on November 8th, and did not mention anything about observation of optimal performance which might affect his determination. *See* AMA Guides 3.3e2, pg 90. Following one missed appointment, the claimant was examined on October 25, 1994. Dr. D filed another Report of Medical Evaluation in which he assessed a 16% IR stating that the claimant's "lumbar range of motion today is valid as the tightest straight leg raising range of motion, which is 63 degrees, is within 10 degrees of the maximum summation of sacral flexion and extension (58%)." He goes on to give no impairment for right or left lateral bending since they were now within functional limits of normal.

At the time of the hearing officer's determination to write to Dr. D inquiring as to whether any reexamination or retesting had been done, there was no evidence on the matter; rather, it was only commented on during the hearing by the person assisting the claimant, without evidence being presented. Nonetheless, the hearing officer, over objection, stated that she would correspond with Dr. D. Dr. D's subsequent response states that his evaluation was based upon the November 8, 1993, examination and "a retesting or re-examination was not performed following this date." The extent of the testing or whether measurements were repeated and when is not clear from Dr. D's reply. We view the hearing officer's letter of August 22, 1994, as directory; that is, if no reexamination or retesting regarding range of motion had been accomplished, then a reexamination or retesting would have to be scheduled. The carrier appeals this action by the hearing officer arguing that the hearing officer erred as a matter of law in requiring the retesting or that the hearing officer's finding of fact and conclusion of law on this matter was contrary to the great weight and preponderance of evidence.

We have stated that the language of the AMA Guides on the number of retests or reexaminations concerning range of motion is permissive and basically a matter of medical judgment, "provided that at least one attempt at validation after an invalid test is made."

Texas Workers' Compensation Commission Appeal No. 941299, decided November 9, 1994. In that case a benefit review officer had written to a designated doctor erroneously indicating that the designated doctor was required to conduct range of motion tests six times before invalidating any portion of the exam. In Texas Workers' Compensation Commission Appeal No. 941574, decided January 5, 1995, we upheld a hearing officer's rejection of a designated doctor's second report which had been generated as a result of the claimant being sent back to the designated doctor following a benefit review conference because the designated doctor "had not made six attempts to obtain valid range of motion measurements." The hearing officer found that the designated doctor had examined the claimant "several times" before certifying the original IR and that his subsequent amended rating was not done for a valid reason, citing Texas Workers' Compensation Commission Appeal No. 94011, decided February 16, 1994. *See* Texas Workers' Compensation Commission Appeal No. 93207, decided May 3, 1993, and Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992, where we stated a designated doctor may amend a rating for proper reason. *Compare* Texas Workers' Compensation Commission Appeal No. 950077, decided February 27, 1995, where we rejected the notion that it was error for the designated doctor to do more that six repetitions in measuring range of motion.

Although we have rejected the notion that retesting or reexamination must continue to be done until a valid result is reached (Texas Workers' Compensation Commission Appeal No. 92494, decided October 29, 1992), we have approved and held that a hearing officer is not precluded from seeking a reexamination at a later date when range of motion values cannot be obtained on a particular exam. Texas Workers' Compensation Commission Appeal No. 93681, decided September 20, 1993; Texas Workers' Compensation Commission Appeal No. 93837, decided October 29, 1993. In the latter case we stated that "a recheck of range of motion measurement where an initial test is determined to be invalid as outside validation criteria is, in our opinion, a proper reason for a designated doctor to amend an impairment rating report and is contemplated in the AMA Guides." We also noted that appropriate inquires into whether range of motion measurements have been properly accomplished should be made at the earliest stages of the dispute resolution process. Our concern that such matters be clarified as early as possible and as close to the maximum medical improvement (MMI) date arises from several concerns: the need for some degree of finality in MMI and IR determinations as contemplated in the 1989 Act, and the fact that physical conditions may likely change based upon daily variables. Texas Workers' Compensation Commission Appeal No. 94446, decided June 1, 1994. In that case medical evidence was in the record which indicated that regarding range of motion, "a patient may or may not achieve consistency with range of motion measurements, depending on multiple factors which can vary on a daily basis." Of course, there are the unique exceptions where a "properly revised IR should not be sacrificed solely for the expediency of finality." Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994, (range of motion could not be measured due to recency of surgery); Texas Workers' Compensation Commission Appeal No. 94249, decided April 14, 1994, (claimant in a lumbar shell at time of impairment rating).

Although we are concerned with the significant delay in obtaining a "retest or reexamination" for range of motion purposes in this case, given the fact there is considerable dispute on this area of range of motion measuring under the AMA Guides and there is an absence of guidance in this controversial area, together with our previous holdings, we do not find error on the part of the hearing officer. Some degree of retesting, reexamination or remeasurement of range of motion has consistently been recognized in our decisions where there is a validity question. The delay in this case is not so egregious under the particular circumstance as to mandate reversal. Accordingly, the hearing officer's decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge