APPEAL NO. 950292

On January 17, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The appellant (carrier) appeals the hearing officer's decision that the respondent (claimant) has a 17% impairment rating (IR) as reported by the designated doctor. No response was received from the claimant.

DECISION

Reversed and remanded.

The claimant injured his back at work on (date of injury). An EMG and nerve conduction studies done on June 28, 1991, were normal. An MRI scan done on July 1, 1991, showed minimal degenerative changes at L3-4 and L4-5 with minimal bulging at both levels. An EMG and nerve conduction studies done on September 10, 1991, revealed L4-5 radiculopathy on the right side. A CT scan done on March 6, 1992, showed a mild herniated disc at L3-4 and a mild to moderate herniated disc at L4-5. The medical records do not reflect that the claimant has had back surgery for his injury. They also indicate that the claimant has not worked since his injury.

In an undated Report of Medical Evaluation (TWCC-69), (Dr. HZ), who is the claimant's treating doctor, reported that the claimant was not at maximum medical improvement (MMI) and that the claimant has a 21% IR, composed of seven percent for a specific disorder of the lumbar spine, 13% for abnormal range of motion (ROM), and two percent for "electromyographic impairment". In an oral deposition taken on January 10, 1995, Dr. HZ explained that the two percent impairment was for neurological deficit. (Dr. L) examined the claimant at the request of the carrier and he reported in a TWCC-69 dated September 14, 1992, that he reviewed Dr. HZ's TWCC-69 and that the claimant was not at MMI (he estimated that the claimant would reach MMI in October 1992) and assigned the claimant a 14% IR. He assigned seven percent impairment for specific disorders for each level of herniation in the lumbar spine. The Texas Workers' Compensation Commission (Commission) selected (Dr. A) as the designated doctor and in a TWCC-69 dated September 21, 1993, he reported that he had been requested to evaluate the claimant for IR only. He further reported that the claimant had reached statutory MMI (104 weeks after income benefits began to accrue). Dr. A assigned the claimant a 17% IR composed of seven percent for a specific disorder of the lumbar spine, nine percent for abnormal lumbar ROM, and two percent for motor weakness.

(Dr. HE), who had done the EMG in June 1991, was asked by the carrier to review and comment on the IRs assigned by Drs. HZ, L, and A. Several letters from Dr. HE and his oral deposition taken on August 31, 1994, were in evidence. Dr. HE, who is a board certified neurologist, testified that he is a fellow of the American Academy of Disability-

Evaluating Physicians and is on the Texas Workers' Compensation Advisory Committee of the Texas Medical Association. He disagreed with Dr. HZ's 21% IR because Dr. HZ did not provide all his ROM measurements and because the two percent for neurological deficit was not supported by objective findings. He disagreed with Dr. L's 14% IR because Dr. L used a goniometer to measure ROM and because Dr. L gave a seven percent rating for each unoperated herniated disc level in the lumbar spine instead of just giving a seven percent rating for specific disorders of the lumbar spine. He disagreed with Dr. A's 17% IR because lumbar flexion measurements were not within plus or minus ten percent or five degrees, and because straight leg raising measurements on the right side, which was the tightest side, were not within plus or minus ten percent or five degrees. He also disagreed with Dr. A's assessment of two percent impairment for motor weakness. Dr. HE opined that lumbar flexion measurements and straight leg raising measurements taken by Dr. A did not meet consistency requirements. He testified that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (the Guides), which are required by the 1989 Act to be used in assigning an IR, provide for consistency requirements for not only lumbar flexion and extension and for lateral flexion, but also for straight leg raising measurements. He testified that one cannot apply the straight leg raising validity test until straight leg raising measurements meet the plus or minus 10% or five degree consistency requirement.

On March 15, 1994, Dr. A, the designated doctor, responded to Dr. HE's letter comments on his IR by stating:

> The numbers that were found to represent the true lumbar flexion angle calculated in this office are 50 degrees, 45 degrees and 44 degrees. These numbers are within 6 degrees of each other. Although the Guides mention +/- 10% or 5 degrees, whichever is greater, I do not believe that this patient should be penalized for having the true lumbar flexion angle come out to within 6 degrees rather than 5 degrees. This is a very small difference of 1 degree and I do not believe that it would be proper to disregard these numbers for impairment.

Dr. A went on to state that impairment is not a precise science and that he believes that the Commission "in its discretionary powers, may chose to disregard the 2% impairment resulting from flexion measurement which is +/- 6 degrees rather than +/- 5 degrees as outlined in the Guides." Dr. A disagreed with Dr. HE's opinion that straight leg raising measurements must be within plus or minus ten percent or five degrees of each other in order to apply the straight leg validity test. He said "[t]here is no such requirement for straight leg raising." According to Dr. A's Figure 83c (Lumbar ROM), straight leg raising measurements on the right were 55, 50, and 60.

The hearing officer found that the report of Dr. A, the designated doctor, is not contrary to the great weight of the other medical evidence. She concluded that the claimant's IR is 17% as reported by Dr. A. The carrier contends that the hearing officer erred in basing the claimant's IR on Dr. A's report because it asserts that that report is invalid.

It contends that flexion measurements and straight leg raising measurements did not meet consistency requirements and requests that we reverse the hearing officer's decision and render a decision that the IR assigned by Dr. A is invalid. It also requests that we render a decision that the IR assigned by Dr. HZ and the IR assigned by Dr. L are invalid.

Section 408.125(e) provides that, if the designated doctor is chosen by the Commission the report of the designated doctor shall have presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. Section 408.124 provides that the Guides shall be used for determining the existence and degree of an employee's impairment. Section 3.3a on page 71 of the Guides sets forth general principles of measurement of the spine and it provides, in part, as follows:

> Reproducibility of abnormal motion is currently the only known way to validate optimum effort. The examiner must take at least three consecutive mobility measurements, which must fall within +/- 10% or 5° (whichever is greater) of each other to be considered consistent. Measurements may be repeated up to six times until consecutive measurements fall within this guideline. However, if inconsistency persists, the measurements are invalid and that portion of the examination is then disqualified.

Page 72 of the Guides provides the following instruction:

> 4.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.

Table 83c (Lumbar ROM) on page 77 of the Guides requests the examiner to determine whether each movement measured, including straight leg raising, meets the consistency requirements set forth in the general principles of spine measurement on page 71, that is, the table asks in regard to all movements, including straight leg raising "± 10% or 5°? Yes No."

We conclude that the Guides require that lumbar ROM measurements, including straight leg raising measurements, meet the consistency requirements set forth on page 71 of the Guides. In this case, neither the lumbar flexion measurements nor the straight leg raising measurements on the right taken by Dr. A meet the consistency requirements of ± 10% or 5°, whichever is greater. Dr. A took only three measurements of lumbar flexion and three measurements of straight leg raising on the right. He made no repeat measurements in order to obtain consecutive measurements which would fall within the consistency criteria. In Texas Workers' Compensation Commission Appeal No. 950248, decided April 5, 1995, we affirmed a hearing officer's decision to have the claimant in that case retested for ROM by the designated doctor, and in doing so we stated:

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 [ROM] 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 [ROM] 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 [IR] report and is contemplated in the AMA Guides."

We reverse the decision and order of the hearing officer and remand the case to the hearing officer for further consideration and development of evidence, including further ROM testing by the designated doctor as provided for in the Guides. 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 Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge