

APPEAL NO. 950357

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 8, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. Addressing the disputed issues, the hearing officer determined that the respondent (claimant herein) reached maximum medical improvement (MMI) on September 21, 1994, with a 23% IR as determined by (Dr. E), a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The appellant (carrier herein) appeals these determinations arguing that the report of Dr. E should be disregarded because it is not in compliance with the Guides to the Evaluation of Permanent Impairment, 3d Edition, 2d printing, February 1989 (AMA Guides). The claimant replies that the decision and order of the hearing officer is correct and should be affirmed.

DECISION

We reverse and remand.

It was not disputed that the claimant sustained a compensable back injury on (date of injury), and that Dr. E was selected by the Commission as designated doctor to determine both MMI and IR.

On September 21, 1994, Dr. E completed a Report of Medical Evaluation (TWCC-69) in which he certified MMI as of that date and assigned a 23% IR. The rating consisted of seven percent for a specific disorder of the lumbar spine and 17% for loss of lumbar range of motion (ROM). In an accompanying report, Dr. E stated he arrived at the ROM rating "under formal goniometric testing." Actual measurements of the lumbar ROM testing were entered on a Figure 83c of the AMA Guides and reflect negative number entries.

In its appeal, carrier argues that Dr. E's report is not in compliance with the AMA Guides and hence is invalid because he used a goniometer to measure ROM and the use of negative numbers in ROM testing has been specifically disapproved by the Appeals Panel.

In support of its argument that use of a goniometer is never permitted under the AMA Guides, carrier cites Texas Workers' Compensation Commission Appeal No. 93932, decided November 29, 1992. We disagree. Appeal No. 93932 dealt with a designated doctor who not only refused to use the correct edition of the AMA Guides, but also refused to use any instruments whatsoever to test ROM. In pointing out that a designated doctor is required to comply with the statutorily mandated AMA Guides, the Appeals Panel quoted paragraph 3.3a of the AMA Guides which is also quoted in the carrier's appeal and refers to the measurement of ROM by an inclinometer. The issue of whether only an inclinometer may be used to measure ROM was not raised or addressed in that opinion. Indeed, in Texas Workers' Compensation Commission Appeal No. 93835, decided November 3, 1993, we stated that "[o]ur reading of the AMA Guides . . . does not indicate that we are required to

hold this [mandatory use of an inclinometer] as a matter of law." See also Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993, in which the author judge of Appeal No. 93932 concurred. The Appeals Panel has recently confirmed its view that the AMA Guides do not mandate use of an inclinometer in Texas Workers' Compensation Commission Appeal No. 950208, decided March 24, 1995.

Carrier also argues on appeal that Dr. E's use of negative numbers in the measurement of ROM also invalidates his report. In support of its position, carrier cites Texas Workers' Compensation Commission Appeal No. 941468, decided December 15, 1994, and Texas Workers' Compensation Commission Appeal No. 94970, decided September 1, 1994, as well as page 17 of the AMA Guides which states:

The [ROM] should be recorded on the principle that the neutral position equals 0 degrees. In this method, all joint motions are measured from zero as the starting position, and the degree of motion is added in the direction the position moves from this point.

No evidence was introduced on the mechanics of the goniometer used by Dr. E. We are thus unable to determine whether his measurements were calculated "from zero as the starting position" or whether his use of negative numbers is consistent with measuring motion in one direction. For this reason, we reverse the decision of the hearing officer and remand the case for further explanation from Dr. E of how his use of negative numbers complies with the AMA Guides. The hearing officer may also inquire of Dr. E why he did not use an inclinometer. At this point, we are unwilling to conclude that Dr. E is either unable or unwilling to comply with the AMA Guides. Should clarification not be forthcoming, the appointment of a second designated doctor would be appropriate.

Pending resolution of this 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. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Tommy W. Lueders
Appeals Judge