

## APPEAL NO. 980027

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 December 2, 1997. With respect to the issue before her, the hearing officer determined that the appellant's (claimant) impairment rating (IR) is nine percent as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In his appeal, the claimant states that he wants to "appeal the hearing on 12/2/97." In addition, he asserts that he is being discriminated against on the basis of race and medical condition. In its response, the respondent (carrier) urges affirmance, noting that the hearing officer properly gave the designated doctor's report presumptive weight.

### DECISION

Reversed and remanded.

In this instance, the designated doctor did not include a rating for measured cervical and lumbar range of motion (ROM) deficits based upon his belief that those deficits were not attributable to the claimant's compensable injury. Thus, the key question in this case is whether the designated doctor's decision not to include a rating for loss of ROM was made in accordance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).

It is undisputed that the claimant sustained a compensable injury on \_\_\_\_\_, when he slipped and fell in water on the employer's floor while he was carrying trays back to the kitchen. The claimant testified that he injured his left arm, left elbow, left shoulder, neck, left hip, left knee, and low back in the fall. The parties stipulated that the claimant reached maximum medical improvement (MMI) on August 17, 1995.

On August 17, 1995, (Dr. C) examined the claimant at the request of the carrier. In a Report of Medical Evaluation (TWCC-69) dated August 25, 1995, Dr. C certified that the claimant reached MMI on August 17, 1995, with an IR of zero percent. In the narrative report accompanying his TWCC-69, Dr. C noted that, when he was distracted, the claimant's cervical ROM was "considerably better than the above noted measurements indicate." Therefore, he invalidated the claimant's cervical ROM, stating that the "apparent limitation was primarily due to voluntary restriction." With respect to the lumbar ROM, Dr. C noted that lumbar flexion and extension ROM was invalidated by the straight leg raise test and that the claimant's right and left lateral flexion were normal. Dr. C did not assign any cervical or lumbar specific disorder impairment because at the time of his examination the claimant had not yet had six months of medically documented pain.

The claimant disputed Dr. C's zero percent IR and (Dr. H) was selected by the Commission to serve as the designated doctor. Dr. H examined the claimant on November 14, 1995. In a TWCC-69 dated November 16, 1995, Dr. H certified that the claimant reached MMI on August 17, 1995, with an IR of nine percent, which was comprised of a four percent cervical specific disorder impairment and a five percent lumbar specific disorder impairment under Section II.B. of Table 49 of the AMA Guides. In his narrative report, Dr. H noted that the claimant's ROM testing revealed that he had six percent cervical ROM impairment and six percent lumbar ROM impairment. In his narrative report, Dr. H noted:

The patient had no non-organic physical signs in low back pain present. He was not over-reactive. I did not see any documentable discrepancy in his mobility in his lumbar spine or neck between his effort during examination and him handling himself in the office during the course of the interview and the rest of the physical examination.

Despite the measured ROM deficits and his apparent belief that the claimant was not voluntarily restricting his cervical and lumbar motion, Dr. H did not assign a rating for loss of ROM. He explained his decision not to do so, as follows:

The patient's MRI indicates that there is not a significant pathology that one would expect to decrease his ROM. There is no objective evidence that he has had an injury that would cause a long-term residual in terms of loss of ROM.

In light of the review of the records and [Dr. C's] report as well as the MRI findings, it is my medical opinion that this patient's impairment is a maximum of 9%. However, if the law dictates and if the administrators decided that the patient is entitled to ROM impairment regardless of these factors, then his impairment rating would be 20%.

In her decision, the hearing officer discusses several Appeals Panel decisions that have considered questions of when, if ever, the designated doctor is permitted not to assign a rating for loss of ROM where there are measured ROM limitations. The hearing officer concluded:

I believe I must defer to the designated doctor's recommendations to exclude the Claimant's otherwise valid ROM, particularly since another doctor invalidated the Claimant's ROM based on other observations and particularly as no other doctor has assessed an [IR]. As always, an aggrieved party is free to appeal my Decision, and should an appeal be taken, perhaps the Appeals Panel will provide some specifics concerning the circumstances in which a designated doctor may invalidate valid ROM tests.

Section 408.124(b) mandates that the AMA Guides be used for determining a claimant's IR. In Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993, we recognized that to measure a spinal impairment, the evaluator must follow the protocol established in Chapter 3, which includes diagnosis-related factors and musculoskeletal/neurological factors. In Appeal No. 93296, the designated doctor selected by the Commission would not provide both a Table 49 rating and a ROM rating. The hearing officer's decision giving presumptive weight to that doctor's rating was reversed so that a valid rating following the protocol of the AMA Guides could be obtained. After Appeal No. 93296, as the hearing officer notes, we stated that a designated doctor is not properly applying the AMA Guides if he fails to assign a rating for loss of ROM where a loss is noted in valid testing. Texas Workers' Compensation Commission Appeal No. 941208, decided October 26, 1994; Texas Workers' Compensation Commission Appeal No. 931008, decided December 16, 1993. Nonetheless, we have also noted that otherwise valid ROM measurements can be invalidated by the designated doctor where, based upon his clinical judgment, he determines that the restricted motion is the product of volitional conduct on the part of the claimant, which has been described, among other things, as voluntary restriction, suboptimal effort, exaggerated pain response, and symptom magnification. Texas Workers' Compensation Commission Appeal No. 961097, decided July 17, 1996; Texas Workers' Compensation Commission Appeal No. 960034, decided February 5, 1996.

This case presents the next step in the question of when a designated doctor can make a determination not to provide a rating for measured ROM deficits. Contrary to the cases where the designated doctor observes less than full cooperation and effort on the part of the claimant in the testing, in this instance Dr. H noted that he made no such observations here. Rather, he made the decision not to include a rating for loss of ROM because in essence he did not believe that the ROM deficits were attributable to the compensable injury. In Texas Workers' Compensation Commission Appeal No. 960528, decided April 24, 1996, the Appeals Panel reversed the hearing officer's determination that the claimant's IR was five percent and rendered a new decision that his IR was zero percent as certified by the designated doctor. The five percent at issue in Appeal No. 960528 represented measured ROM deficits. In making the decision not to assign a rating for loss of ROM, the designated doctor stated "I feel that based on the individual's age (50) and his very stocky build and heavy shoulders, this was certainly within the normal range and not the result of pathology or of the injury. I feel that he most probably sustained a cervical strain at the time of the injury, from which I feel he has essentially fully recovered." The hearing officer determined that the claimant's IR was five percent, noting that the designated doctor could not attribute the loss of ROM to anything other than the diagnosis. In reversing and rendering the designated doctor's zero percent IR, the Appeals Panel noted that the designated doctor concluded that no permanent impairment resulted from the compensable injury and, therefore, he properly assigned a zero percent IR.

In Texas Workers' Compensation Commission Appeal No. 970771, decided June 12, 1997, the hearing officer determined that the great weight of the other medical evidence was contrary to the report of the designated doctor and determined that the claimant's IR was five percent as certified by the carrier's doctor. The designated doctor had certified a 23% IR, which included five percent impairment for a specific disorder of the lumbar spine, five percent for extension, eight percent for flexion, three percent for right lateral flexion and three percent for left lateral flexion. In response to a request for clarification, the designated doctor opined that "there is no provision for factoring age and body build of the examinee into the [IR]" under the AMA Guides. The hearing officer stated that he was determining that the great weight of the other medical evidence was contrary to the report of the designated doctor because of the claimant's obesity, his age, and based on the carrier doctor's opinion, with which the claimant's treating doctor agreed, that the claimant's pathology, a lumbar sprain/strain, would not produce a loss of mobility in the lumbar spine. The majority in Appeal No. 970771, concluded that the hearing officer had not adequately stated how the great weight of the other medical evidence was contrary to the report of the designated doctor; therefore, it reversed the determination that the claimant's IR was five percent and rendered a new decision that the claimant's IR was 23%.

In this case, as in Appeal No. 970771, *supra*, it appears that the designated doctor is not finding that the sprain/strain had resolved and that it did not cause any permanent impairment as had the designated doctor in Appeal No. 960528, *supra*. To the contrary, the designated doctor herein assigned specific disorder impairments for both the cervical and lumbar spine. Thus, under the protocol for rating the spine established in the AMA Guides, he was required to test the claimant's ROM and to determine if he had any neurological impairment. The designated doctor herein did do ROM testing as the AMA Guides require; however, he did not assign a rating for the claimant's measured ROM deficits based upon his belief that the claimant's pathology, cervical and lumbar sprain/strains, would not cause a permanent loss of ROM. In essence, the designated doctor is determining that the claimant's admitted ROM deficits were not caused by the compensable injury but are attributable to something else without specifying to what they are attributable. In the absence of an explanation from the designated doctor of what he believes caused the claimant's limited mobility in his cervical and lumbar spine, we are unable to determine whether the claimant's IR was calculated in accordance with the AMA Guides, as it must be under Section 408.124(b). In Texas Workers' Compensation Commission Appeal No. 972697, decided February 12, 1998, the Appeals Panel considered a case very similar to this case. The designated doctor in Appeal No. 972697 conducted ROM testing and measured ROM limitations; however, he did not assign a rating for ROM because he determined that the motion limitation was due to the claimant's "natural body habitus." In Appeal No. 972697, the Appeals Panel reversed and remanded to obtain clarification from the designated doctor. We believe that it is likewise necessary to remand for clarification in this instance in order to have the necessary information to permit a determination of whether he complied with the AMA Guides in making the decision not to include a rating for loss of ROM. In seeking clarification, the hearing officer

should ask Dr. H to state whether the claimant's loss of ROM is the result of the compensable injury. If the designated doctor determines that it is not, he should be asked to explain why the claimant's acknowledged ROM deficits are not the result of the compensable injury. That explanation should include a statement as to what those deficits are attributable. The designated doctor should also be asked to explain how the AMA Guides provide for a consideration of the factors that he believes are causing the claimant's ROM limitation in the calculation of an IR for the spine. Upon receipt of Dr. H's clarification the parties should be permitted to respond before the hearing officer issues a new decision. The hearing officer should then consider all of the information from Dr. H and the response of the parties in determining whether Dr. H's report is entitled to presumptive weight and in determining the claimant's IR.

In his appeal, the claimant makes the bald assertion that he has been discriminated against on the basis of race or medical condition in this case and does not provide any examples of the alleged discrimination. After carefully reviewing the record, we find no evidence to support that assertion. Accordingly, we find no merit in the allegation of discrimination.

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. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Elaine M. Chaney  
Appeals Judge

CONCUR:

Robert W. Potts  
Appeals Judge

Alan C. Ernst

Appeals Judge