APPEAL NO. 931099

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing (CCH) was held on October 29, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were maximum medical improvement (MMI) and impairment rating. The hearing officer found that the claimant reached MMI on February 8, 1993, with zero percent impairment based upon the report of designated doctor selected by the Texas Workers' Compensation Commission (Commission). The appellant (claimant herein) files a request for review contending that the other medical evidence overcame the opinion of the designated doctor and argues that the impairment rating assessed by his treating doctor was more accurate. The respondent (carrier herein) replies that the great weight of the other medical evidence did not overcome the presumptive weight to be given the opinion of the designated doctor and requests that we affirm the decision of the hearing officer.

DECISION

We reverse the hearing officer's decision and remand for additional evidence on the range of motion measurements in the designated doctor's report.

It is undisputed that the claimant suffered a compensable injury on (date of injury). Medical records describe the claimant's injury as taking place when the claimant was driving a van for his employer and it went out of control, veered right and collided with a utility pole. The claimant testified that he was referred by his family doctor to (Dr. V), an internal medicine specialist. Dr. V diagnosed posttraumatic back pain with L5 radiculopathy and an underlying spondylolysis of the L5 and also reported that the claimant complained of left knee pain. Dr. V prescribed medication and physical therapy and sent the claimant to (Dr. A), M.D., an orthopedic surgeon for a consultation. Dr. A indicated that the claimant's prognosis was not good and in a later note to the carrier stated, "I think the patient will eventually end up with surgery." After the patient indicated to Dr. V that he did not want surgery or steroid injections, she certified on a Report of Medical Evaluation (TWCC-69) that he had reached MMI on February 8, 1993, with a five percent impairment rating.

Due to a dispute of Dr. V's certification, the Commission designated (Dr. T), M.D., a medical doctor, of the (city) Impairment Center, to be the designated doctor. In a 26-page report, composed largely of check-off forms and computer-generated charts and graphs, Dr. T outlined his findings. Although Dr. T contended that all range of motion measurements were invalid, the underlying chart for range of motion indicated that two measurements, for lumbar lateral flexion, resulted in valid impairment percentages of three percent for the right and five percent for the left. Dr. T certified that the claimant reached MMI on February 8, 1993, with a zero percent impairment rating. Dr. T also labeled the claimant as a "symptom magnifier."

After his examination by Dr. T the claimant changed his treating doctor to (Dr. G), M.D., a board certified orthopedic surgeon. Dr. G stated in his initial report:

> The orthopedic surgeons that have seen this patient have made the diagnosis of spondylous (sic) with spondylolisthesis. He has also been to the (city) Impairment Center where the same diagnosis was indicated on one page but on the following work-up rated this patient with a zero percent whole person impairment.
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> Based upon this patient's diagnostic testing I would not agree with either the zero percent or the five percent rating. I advise the medical care professionals who have treated this patient prior to this visit to review their records and to more closely examine the AMA Guide as it relates to this patient's diagnosis in consideration of the fact he has restriction of motion and leg pain associated with his injury.

Dr. G later issued a TWCC-69 stating that the claimant reached MMI on August 31, 1993, "without surgical intervention" with an eight percent impairment rating.

The claimant attaches to his request for review an office visit note from Dr. G dated November 17, 1993, stating that surgical intervention is indicated and that the patient will return in four weeks with a surgical decision.

First, we note that we will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Willis, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). While this report was generated after the hearing and may not have been available before the hearing, it appears cumulative in that the fact that surgery had been recommended was in the record at the CCH. In a number of cases we have held that surgery or the scheduling of surgery may require a remand to obtain the designated doctor's opinion on how surgery would affect his MMI opinion, but we also have made clear that the mere speculation concerning or the mere possibility of surgery does not require remand. *Compare* Texas Workers' Compensation Commission Appeal No. 93293, decided June 1, 1993, and Texas Workers' Compensation Commission Appeal No. 93336, decided June 16, 1993, *with* Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993 and Texas Workers' Compensation Commission Appeal No. 93427, decided July 14, 1993.

The facts of the present case are remarkably similar to those in Texas Workers' Compensation Commission Appeal No. 931085, decided January 4, 1994. In that case Dr.

T was also the designated doctor also stated the claimant was a "symptom magnifier" and without explanation also stated that all range of motion measurements were invalid when the underlying chart for range of motion indicated that two measurements, for lumbar lateral flexion resulted in valid impairment percentages. In Appeal No. 931085 we remanded so that the hearing officer could obtain clarification as to why the range of motion values were not included by Dr. T. This holding was consistent with our rulings in Texas Workers' Compensation Commission Appeal No. 931076, decided January 7, 1994, and in Texas Workers' Compensation Commission Appeal No. 93769, decided October 11, 1993. As we stated in Appeal No. 93769:

> Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993, held that in figuring an impairment rating, three factors are to be added together; they are the diagnosis based percentage, the range of motion rating, and neurological deficits. *Also see* "Guides to the Evaluation of Permanent Impairment" third edition, second printing, dated February 1989, published by the American Medical Association (the Guides) at page 71 (Principles of Calculating Impairment) and pages 72 and 74 (the step-by-step approach found in paragraph 3.3a).

This case is reversed and remanded for the hearing officer to inquire of Dr. T regarding the basis of his invalidating impairment indicated in his report due to the claimant's loss of lumbar flexion range of motion. In addition, since the case is being remanded the hearing officer should ascertain whether surgery has taken place, and if so, if this affects the opinion of Dr. T.

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.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge