APPEAL NO. 002621

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 20, 2000. The issue at the CCH was the correct impairment rating (IR) to be assigned to the respondent (claimant) for his back injury.

The hearing officer failed to give presumptive weight to the report of the designated doctor and found that the great weight of the other medical evidence was to the contrary.

The appellant (carrier) has appealed, arguing that the ROM testing in the report adopted by the hearing officer was not performed 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). The carrier argues that there was no evidence presented that the report of the designated doctor with respect to range of motion (ROM) was incorrect. There is no response from the claimant.

DECISION

Reversed and remanded.

We note at the outset, due to similarity of names, that there is no known relationship between either party and/or representative and any of the Appeals Panel judges. The claimant injured his back on _____. It was stipulated that he reached maximum medical improvement (MMI) on December 14, 1999; this was slightly before the claimant would have reached "statutory" MMI.

The claimant had spinal surgery on November 17, 1998, to correct a herniated disc at L4-5; it was also noted when he was being evaluated for this surgery that he had a slight bulge at the L3-4 disc. Medical records indicate that after about six months, the claimant began to experience a reoccurrence of symptomology in his leg and back. The claimant had an MRI in mid 1999, indicating a problem at the L3-4 level, and then a myelogram on November 10, 1999, which showed a large protrusion at L3-4 which compromised the foramen. On November 17, 1999, the claimant's treating doctor, Dr. S, noted that surgical intervention might be the claimant's only hope of relieving his persistent symptoms.

On December 9, 1999, Dr. D, who said he was examining the claimant for a second opinion on surgery, concurred with the need for surgery. However, although Dr. S was furnished with a copy of this report, he completed a Report of Medical Evaluation (TWCC-69) on December 15, 1999, certifying that the claimant had reached MMI on December 14, 1999, with a 21% IR. The attached narrative report specifically mentions that the claimant was being scheduled, at the time, to undergo a spinal fusion at L3-4. Dr. S's report made separate ratings for the L4-5 and L3-4 discs from Table 49 of the AMA Guides. Six percent of the IR related to ROM deficits for lateral movements, with lumbar flexion and extension found invalid.

The IR was apparently disputed by the carrier, and Dr. C examined the claimant as a designated doctor on February 17, 2000. Dr. C's report makes no mention of the records he reviewed, and although he noted that the claimant had surgery at the L4-5 level, there are no comments about the encroaching disc bulge at L3-4 or the pending surgical recommendation. Dr. C assigned a 12% IR, and 10% of this was from Table 49 for the operated disc at L4-5.

The claimant said that he did not begin losing time from work until December 29, 1997. The claimant said that Dr. C did not review his history with him and did not ask him about the recommended surgery. The claimant said he agreed with Dr. S's IR because Dr. S was more familiar with his case.

On March 29, 2000, the claimant was examined for another second opinion by Dr. N, who concurred in the need for surgery at the L3-4 level. Both the reports of Dr. D and Dr. N were described in argument by the parties as part of the second-opinion process for spinal surgery.

A letter from Dr. S dated June 26, 2000, disagreed with Dr. C's IR (although not his MMI date) and noted that the claimant had surgery for his L3-4 disc on June 12, 2000. Although the hearing officer noted that this letter took the surgery at L3-4 into account in assigning an IR, it did not; it merely reiterates Dr. C's previous certification which included an additional seven percent for the L3-4 disc as "unoperated" at the time of his previous certification of MMI and IR. The claimant argued that Table 49 required a disc-by-disc rating, but no medical evidence in support of this interpretation of the AMA Guides was offered.

On August 3, 2000, the Texas Workers' Compensation Commission (Commission) wrote to Dr. C and merely sent Dr. C the letter of Dr. S "for your review." Dr. C was asked if Dr. S's letter changed his IR and to contact the Commission if another examination would be required. Dr. C's short response was that he stood by his 12% IR, which was based upon his exam. His only comment about the subsequent surgery was that the Appeals Panel had established that such would not preclude a prior finding of MMI. The hearing officer commented that the letter drafted by the Commission was poorly drafted because it failed to direct Dr. C's attention to the problem of the claimant's L3-4 disc and to address whether a rating for this condition was in order.

The hearing officer found that the report of Dr. C was against the great weight of the contrary medical evidence. She recited the sequence of events set forth here that led up to the claimant's L3-4 surgery, and noted that this was under active consideration at the time the claimant would have reached MMI. In her discussion, the hearing officer commented that Dr. S's 21% IR, which the hearing officer adopted as the claimant's IR, was "a more fair assessment" of his medical condition prior to statutory MMI.

In this case, the hearing officer's determination that surgery on the claimant's L3-4 disc was under active consideration prior to statutory MMI is supported by the record--indeed, it was under active consideration before the certified MMI date of December 14, 1999. (During the CCH, the parties agreed that this was the case.) Dr. C's certification of IR, however, with a conspicuous failure to mention the pending surgical recommendation, indicates that he may not have had before him the claimant's medical records as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(h) (Rule 130.6(h)). While Dr. C may be right that the occurrence of surgery after statutory MMI may not necessarily change the date of MMI, evaluation of the IR may appropriately allow for the effects of surgery under active consideration at the time of statutory MMI.

We note that under similar facts in Texas Workers' Compensation Commission Appeal No. 990659, decided May 12, 1999, a remand was ordered so that the designated doctor could reexamine the claimant rather than have a prematurely assessed IR given presumptive weight. That, rather than mere solicitation of Dr. C's comments on Dr. S's letter, is what should have occurred before this matter was heard at the CCH.

The hearing officer was right when she noted that the letter from the Commission to Dr. C was imprecise in its direction and request to Dr. C by asking for a response to Dr. S's criticism, when the issue at hand was the L3-4 disc condition. However, the hearing officer sought to address the problem with Dr. C's IR by adopting Dr. S's report in accordance with Section 408.122(c). The hearing officer erred in doing this because an IR adopted by the Commission must be based upon the AMA Guides. Section 408.124. The Appeals Panel has considered, and rejected, the argument that it is appropriate to rate each disc (rather than the regional spinal impairment) under Table 49 of the AMA Guides, as Dr. S has done. *See* Texas Workers' Compensation Commission Appeal No. 941308, decided November 9, 1994; and Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992. The only "extra disc" increment allowed in Table 49 is for additional operative levels and/or subsequent surgeries--and none of these increments amounts to an additional seven percent that was part of Dr. S's assigned the IR for the L3-4 level reiterated in his June 26, 2000, letter. Consequently, although the hearing officer may have been correct in not according presumptive weight to the unamended report of Dr. C, she erred in adopting the report of Dr. S, because it was not in accordance with the AMA Guides.

We accordingly reverse and remand the case for additional development of the evidence, which should include a reexamination of the claimant by Dr. C, to take into account the effects of the second surgery which was under active consideration at the time MMI was originally certified. After this is done, the hearing officer must reconsider the evidence in light of applicable statutes and render a decision.

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.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge