

APPEAL NO. 022931
FILED DECEMBER 18, 2002

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 16, 2002. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) has a 12% impairment rating (IR) in accordance with the reports of Dr. Y, a Texas Workers' Compensation Commission (Commission)-selected designated doctor. The claimant appeals, arguing that this determination was in error because Dr. Y did not properly follow the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and that the determination was against the great weight of the medical evidence. The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and remanded.

We note initially, that the claimant attached new evidence to her appeal. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through a 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. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The claimant did not offer this evidence at the CCH and in fact the evidence did not even exist at the time of the CCH but appears to be created specifically for purposes of appeal. We find that the evidence does not constitute evidence which requires our consideration for the first time on appeal, nor does it require remand for further consideration.

The parties stipulated that the carrier accepted liability for the _____, cervical spine injury to the claimant; that Dr. Y served as a Commission-selected designated doctor for the claimant's compensable injury; and that the claimant reached maximum medical improvement by operation of the 1989 Act on October 6, 1999.

Section 408.125(e), effective for a claim for benefits based on a compensable injury that occurs before June 17, 2001, 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, and that, if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors.

Section 408.124(b) provides that for determining the existence and degree of an employee's impairment, the Commission shall use the AMA Guides. Failure by a designated doctor to properly follow the AMA Guides has led to reversal of a decision on IR based upon the designated doctor's report. See Texas Workers' Compensation Commission Appeal No. 93296, decided May 28, 1993; Texas Workers' Compensation Commission Appeal No. 93769, decided October 11, 1993; Texas Workers' Compensation Commission Appeal No. 931008, decided December 16, 1993; and Texas Workers' Compensation Commission Appeal No. 94181, decided March 24, 1994. The Appeals Panel has previously held that range of motion (ROM) testing is not an indefinite, open-ended process that must continue until valid test results are reached. Texas Workers' Compensation Commission Appeal No. 94004, decided February 11, 1994. The evidence reflects that the designated doctor obtained valid tests results but continued to conduct a second set of tests and used the results to invalidate "due to cross validation variance." We additionally note that the AMA Guides state "only the cervical flexion angle and extension angle need be consistently measured within +/- 10% or 5°, whichever is greater. The final measurement for impairment evaluation is the greatest angle measured." It was improper for the designated doctor to invalidate the ROM testing based on a second set of tests when he had obtained a valid set of test results. His report was therefore not done in accordance with the AMA Guides.

The claimant's treating doctor, Dr. B, also failed to properly apply the AMA Guides, and his IR may not be adopted. Dr. B certified an IR of 29%. To arrive at this figure, Dr. B used in part of Tables 11 and 12 and perhaps Figure 47 of the AMA Guides. The hearing officer determined that Dr. B found "the loss of motion was calculated as 50% of a measured 22% impairment for loss of [motion], based on a statement that half the measured loss was from pain. The report assigned 10% impairment in the left upper extremity, and 7% impairment in the right upper extremity for loss of motor strength along the C5 and C6 nerve roots. There is no medical explanation for the assignment of a neurological impairment under the upper extremity section of the [AMA] Guides rather than the spine section." The hearing officer specifically found that the June 15, 2002, certification of impairment by Dr. B is not in accordance with the relevant version of the AMA Guides. This finding was not appealed by the claimant.

We reverse the hearing officer's determination giving presumptive weight to the current report of the designated doctor and we remand this case for the hearing officer to seek correction from the designated doctor, and for further proceedings consistent with this decision. The hearing officer should allow the parties an opportunity to comment or object to any corrected report or clarification submitted by the designated doctor.

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 (amended June 17, 2001). See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **TRAVELER'S INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge