APPEAL NO. 030382
FILED APRIL 3, 2003

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 January 17, 2003. With respect to the issues before him, the hearing officer determined that the compensable injury of _____, extends to and includes the respondent's (claimant) left shoulder; and that the claimant reached maximum medical improvement (MMI) on July 10, 2002, with an impairment rating (IR) of 10%, as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In its appeal, the appellant (carrier) asserts error in each of those determinations. The appeal file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

Initially, we consider the new evidence attached to the carrier's appeal, which was not admitted in evidence at the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally* 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). Acknowledging that the doctor's report was created after the date of the hearing, we cannot agree that the evidence meets the requirements of newly discovered evidence in that the carrier did not show that the new evidence submitted for the first time on appeal could not have been obtained prior to the hearing. The document purports to be an opinion, from one of the doctors who treated the claimant, about the cause of his shoulder injury. The carrier could have sought that opinion earlier and it did not demonstrate any efforts to do so. Accordingly, the evidence does not meet the standard for newly discovered evidence and it will not be considered on appeal.

The hearing officer did not err in determining that the claimant's compensable injury of _____, extends to and includes an injury to the left shoulder. That issue presented a question of fact for the hearing officer to resolve. From the hearing officer's discussion, it is apparent that he was persuaded that the claimant sustained his burden of proving that he injured his shoulder while he was participating in a work hardening program. The hearing officer was acting within his province as the fact finder in so finding. Our review of the record does not reveal that the challenged determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We find no merit in the carrier's assertion that a work hardening program, that included exercises with weights to work the upper extremities, was not reasonable and necessary treatment for the claimant's compensable low back

injury. There is no dispute that the claimant was sent to work hardening as a result of his compensable injury and we will not second-guess the nature of the exercise program established for him in work hardening.

The carrier's argument that the hearing officer erred in giving presumptive weight to the designated doctor's MMI date and IR is largely dependent upon the success of its argument that the compensable injury does not include the left shoulder. The carrier argues that the designated doctor was unwilling to provide an alternative rating not considering the left shoulder in the determination of the MMI date and IR, as is required in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(d)(5) (Rule 130.6(d)(5)). If the left shoulder had not been found to be part of the compensable injury, then we agree that the carrier would arguably have demonstrated error on the part of the designated doctor which may have necessitated some additional action on the part of the Commission to resolve the MMI and IR issues. However, given our affirmance of the hearing officer's extent-of-injury determination, we cannot agree that the hearing officer erred in giving presumptive weight to the designated doctor's report or in adopting the July 10, 2002, MMI date and 10% IR.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JAMES W. FISHER
8111 LBJ FREEWAY
DALLAS, TEXAS 75251.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge