APPEAL NO. 110854
FILED AUGUST 15, 2011

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 May 25, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer.

The hearing officer resolved the sole disputed issue by determining that the appellant's (claimant) impairment rating (IR) is 11% as assigned by the designated doctor. The claimant appealed the hearing officer's IR determination, contending that the preponderance of the medical evidence is contrary to the designated doctor's IR because he failed to rate the entire compensable injury and that the 19% IR from Dr. K, his treating doctor, should be adopted. The respondent (carrier) responded, urging affirmance and objecting to new evidence submitted by the claimant on appeal.

DECISION

Reversed and remanded.

NEWLY DISCOVERED EVIDENCE

The claimant attached to his appeal various photographs of his face and scalp to demonstrate his appearance in addition to a medical report, dated February 4, 2010, which reflects the results of a videofluoroscopic swallowing evaluation performed on the claimant. Neither the photographs nor the medical report was offered or admitted into evidence at the CCH. The claimant provided no explanation in his appeal as to a reason why the evidence could not have been offered into evidence at the CCH. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; Black v. Wills, 758 S.W.2d 809 (Tex. App.—Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* APD 051405, decided August 9, 2005. Upon review we cannot agree that these documents meet the requirements of newly discovered evidence and they were not considered.

IR

The parties stipulated that the claimant sustained a compensable injury on _____; the claimant reached maximum medical improvement (MMI) on September 9, 2009, as certified by the treating doctor and the designated doctor; and

the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. M as the designated doctor to determine the claimant's IR.

The medical records in evidence reflect that the claimant, a mechanic, fell at work from an airplane wing approximately four feet onto the floor, suffering a traumatic brain injury with severe swelling of the brain. The claimant has undergone four surgeries, including a craniotomy and replacement of skull bone with a synthetic covering at the craniotomy site.

28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides in pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical record and the certifying examination and the doctor assigning the IR shall:

> (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;
>
> (B) document specific laboratory or clinical findings of an impairment;
>
> (C) analyze specific clinical and laboratory findings of an impairment;
>
> (D) compare the results of the analysis with the impairment criteria and provide the following:
>
> (i) [a] description and explanation of specific clinical findings related to each impairment, including [0%] [IRs]; and
>
> (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of the [Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides)]. The doctor's inability to obtain required measurements must be explained.

See APD 110219, decided April 26, 2011.

Dr. M, the designated doctor, appointed only on the issue of IR, examined the claimant on December 29, 2009. In his narrative report dated February 5, 2010, Dr. M diagnosed four conditions as the claimant's work injuries: closed head injury; dementia due to head trauma, without behavioral disturbance; vertigo of central origin; and chronic post-traumatic headaches. However, because Dr. M mistakenly believed that he had been appointed for both MMI and IR issues, Dr. M certified that the claimant had not yet reached MMI and did not assign an IR. A letter of clarification was sent to Dr. M to inform him that the date of MMI was not in dispute and that the claimant's treating doctor had certified the claimant to have reached MMI on September 9, 2009. Dr. M

then responded in a letter dated March 15, 2010, that he needed additional information from the neurologist and neuropsychologist for clarification of their reports before submitting an amended report.

On March 19, 2010, Dr. M re-submitted his Report of Medical Evaluation (DWC-69), certifying that the claimant reached MMI on September 9, 2009 (the stipulated date of MMI) with an 11% IR. The DWC-69 indicated that the date of certification is February 5, 2010, based on the exam of December 29, 2009. In his amended narrative report still dated February 5, 2010, Dr. M diagnosed five conditions as the compensable injury: scar, forehead/temporal areas, bilaterally (disfigurement); closed head injury; dementia due to head trauma, without behavioral disturbance; vertigo of central origin; and chronic post-traumatic headaches. Dr. M assigned impairments for left temporal scar, zygomatic arch deviation, and cerebral impairment: (a) mental status and integrative functioning abnormalities and (b) emotional or behavioral disturbances but not for vertigo of central origin or chronic post-traumatic headaches. Dr. M failed to assess an impairment, which may include a 0% impairment, for all the conditions that he diagnosed.

Dr. K, the claimant's treating doctor, examined the claimant on September 9, 2009, and certified that the claimant reached MMI on that date with a 19% IR. Dr. K diagnosed five conditions as the compensable injury: traumatic brain injury; facial disfigurement from craniotomy; decreased sensation on scalp and face; tinnitus; and temporomandibular joint (TMJ) dysfunction. The hearing officer discussed in his Background Information section of his decision that Dr. K's IR was problematic in her rating of facial disfigurement and tinnitus and was not in accordance with the AMA Guides.

The hearing officer stated in his Background Information section of his decision that "[t]he rating of [Dr. M, the designated doctor] better rates [the claimant's] injury in this case according to the AMA Guides." The hearing officer then adopted Dr. M's assigned IR.

The Appeals Panel has held that an extent-of-injury issue is a threshold issue that must be resolved before issues of MMI and IR can be resolved and that the resolution of the MMI and IR issues will flow from the resolution of the extent issue. *See* APD 032171, decided September 23, 2003.

Rule 130.6 (b)(5) provides:

> When the extent of the injury may not be agreed upon by the parties (based upon documentation provided by the treating doctor and/or insurance carrier or the comments of the employee regarding his/her injury), the designated doctor shall provide multiple certifications of MMI and [IRs] that take into account the various interpretations of the extent of the injury so that when the Division resolves the dispute, there is already

an applicable certification of MMI and [IR] from which to pay benefits as required by the Act.

In APD 002675, decided December 21, 2000, the sole issue before the hearing officer was IR. There were multiple certifications of MMI/IR in which differing body parts were rated as the compensable injury. There was no prior Division determination of the extent of the compensable injury or agreement by the parties. In that case, the Appeals Panel held that "[w]henever the issue is an IR, by necessity the extent of injury is subsumed in that issue." Further, the Appeals Panel held that "[w]hile a designated doctor can state an opinion whether a certain condition is or is not part of the injury," it is the Division "that determines what the injury is and the extent of the injury, not the doctor." The Appeals Panel reversed the hearing officer's decision on IR and remanded the case for the hearing officer to first determine the extent of injury and then for the designated doctor to be advised what the extent of the injury was and to be requested to rate only the compensable injury as determined by the hearing officer. *See also* APD 101539, decided December 27, 2010.

With the issue of IR before him and the assigned IRs in evidence differing as to the extent of the compensable injury, we reverse the hearing officer's determination that the claimant's assigned IR is 11%. There was no stipulation by the parties as to the extent of the compensable injury. Although the hearing officer made statements in his Background Information section of his decision that the claimant suffered a head injury at work which caused serious brain swelling and resulted in a craniotomy and replacement of skull bone with a synthetic covering, the hearing officer erred in failing to add the issue of the extent of the compensable injury and to make any finding of fact and conclusion of law regarding the extent of the compensable injury.

As previously discussed, the Appeals Panel has held that whenever the issue is an IR, by necessity the extent of injury is subsumed in that issue. Accordingly, we remand the case to the hearing officer for the hearing officer to add the issue of extent of injury and to make determinations on extent of injury and IR consistent with this decision.

REMAND INSTRUCTIONS

Dr. M is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine the IR for the compensable injury. The hearing officer is to advise the designated doctor: (1) that the claimant reached MMI on September 9, 2009; (2) which body parts or conditions are in dispute; and (3) to provide multiple certifications of IR that take into account the various body parts and conditions that are in dispute, and that the date of MMI is September 9, 2009.

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond.

We reverse the hearing officer's determination that the claimant's IR is 11% and we remand this case to the hearing officer for the hearing officer to add the issue of extent of injury and to make determinations on extent of injury and IR consistent with this 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 Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

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

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge