APPEAL NO. 92355

A contested case hearing was held in (city), Texas, on June 26, 1992, with (hearing officer) presiding as hearing officer, to consider whether appellant had a heart attack compensable under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.15 (Compensability of heart attacks) (Vernon Supp. 1992) (1989 Act). Finding that appellant had multiple risk factors which predisposed him to heart problems and that his heart attack was the natural progression of his preexisting heart condition or disease, the hearing officer determined that appellant's heart attack was not compensable. In his request for review, appellant challenges the decision below as being contrary to the law and the facts and requests that we reverse and render a decision for him. Respondent urges that we affirm the decision below.

DECISION

Finding the evidence sufficient to support the findings below, we affirm.

According to the testimony of appellant, the only witness, and the affidavits of appellant and two coworkers, he and his fellow crew members from respondent's water and wastewater department drove to a work site at a downtown location along (street) on (date of injury), to repair a broken sewer main. He and the others climbed down the steep creek bank to assess the job, and then climbed back up to return to the truck. The climb back up the bank, a distance of some 50 feet, was difficult because of its steep and slippery condition, but didn't require appellant to crawl on his hands and knees. After leaving the truck area, appellant walked over to a stack of sandbags to move them onto a pallet about 10 feet away for use on the job. After moving approximately three or four of the sandbags, which he estimated to weigh about 90 pounds because they were wet, appellant felt lightheaded, his chest hurt and felt tight, and his jaw began to hurt. He sat down, told his coworkers, and was taken to (Hospital). Appellant, then 36 years of age, said that prior to lifting the sandbags he had never experienced such symptoms. He described his work as being strenuous at times but the job that day was more strenuous than usual. He testified that at that time, his cholesterol level was 300; that his doctor advised it should be 150; that his blood pressure was "borderline;" and that he then weighed 220 pounds. He has since lost 30 pounds, stopped smoking years earlier, and has commenced an exercise and diet program and now "feels great." Appellant said he was treated at the (Hospital) emergency room by (Dr. H) on (date of injury), later seen in his room by (Dr. A), and was released on January 27th to return to work at his regular duties. Since his release he has had three subsequent hospital admissions, and has been seen six to eight times by (Dr. S), an internal medicine specialist.

Appellant's medical evidence consisted of a letter (February 6, 1992) and an affidavit (May 12, 1992) from (Dr. S), M.D., as well as an Initial Medical Report (TWCC-61) signed by (Dr. S) in (month) 1992. The latter exhibit contained no diagnosis, and stated the history as "onset of angina while working," the significant past medical history as "hypercholesterol," and the prognosis as "good," with no medications prescribed. In his letter, (Dr. S) addressed appellant's "cardiac injury" of (date of injury), described it as "a very small area

of diseased cardiac muscle," and opined "to a degree of reasonable medical certainty" that, but for the workplace exertion that day, i.e., climbing up the bank and moving sandbags, appellant "would not have experienced this injury as and when he did due to the natural progression of the minimally diseased area." He stated that appellant was released to full duty because his stress test revealed an ability to reach 75% maximum heart rate "and his ability to perform any job." In his affidavit, (Dr. S) repeated his opinion that had appellant not been exerting himself at work on (date of injury) as he did, which (Dr. S) characterized as "the substantial contributing factor," "there would not have been the increased work on his heart resulting in cardiac demand for coronary bloodflow," and the "injury would not have occurred as and when it did." (Dr. S) said the injury was not "the natural progression of a preexisting heart condition or disease." He recognized appellant had a "second cardiac injury" on (date), and that "there was a 99% occlusion of the left circumflex and other underlying conditions which preceded the cardiac injury of (date of injury) including `borderline' hypertension, family history of cardiac problems, and high cholesterol."

(Dr. H), treated appellant in the emergency room on (date of injury). His records showed appellant's family history as positive for diabetes, hypertension, and coronary disease. (Dr. H's) assessment included chest pain consistent with unstable angina, hypercholesterolemia, abnormal liver function, accelerated hypertension, and obesity. He admitted appellant for monitoring, but decided to withhold lytic agents "unless there is some more definite evidence that this man is suffering a myocardial infarction." The records of (Dr. A), M.D., who saw appellant later that day in his room, contained the additional information that appellant's father had died at age 42 of a myocardial infarction, his sister had undergone coronary bypass surgery at age 40, and appellant had commenced treatment two weeks earlier for high cholesterol (recently greater than 300). His impression included acute inferior wall myocardial infarction treated with thrombolytic therapy, and hypercholesterolemia. A record made by (Dr. S) on January 10th stated that an EKG showed definite inferior lateral myocardial infarction and that a catheterization showed a 99% occlusion of the left circumflex artery.

Another record of (Dr. S) reflected that on (date), appellant complained of "his typical anginal pain" and went to the emergency room at (Hospital) where he was admitted. Two days earlier, he had gone to the (Hospital) emergency room with recurring chest pain but was not admitted. Appellant was again admitted to (Hospital) on April 20th. A consultation report of April 20th by (W.A. R), Jr., M.D., stated his impression as known coronary atherosclerosis and a previous small myocardial infarction.

(Dr. A), who saw appellant on (date of injury), prepared a letter opinion at respondent's request on May 29th which stated he had reviewed appellant's records, as well as appellant's affidavit describing his work activities at the time he experienced pain on (date of injury). (Dr. A) enumerated appellant's "multiple risk factors predisposing him to the development of coronary artery disease," said that physical exertion does not necessarily cause heart attacks, but rather it is the underlying coronary disease which proximately causes them. He said that appellant's job did not cause him to develop the coronary

disease which he said probably developed from appellant's multiple risk factors. (Dr. A) opined: "[w]hile physical exertion can bring about symptoms of angina pectoris, I do not believe that physical exertion necessarily played a role in the pathogenesis of his acute myocardial infarction."

Article 8308-4.15 (1989 Act) provides as follows with respect to the compensability of heart attacks:

"A heart attack is a compensable injury under this Act only if:

(1)the heart attack can be identified as:

(A)occurring at a definite time and place; and

(B)caused by a specific event occurring in the course and scope of employment;

(2)the preponderance of the medical evidence regarding the attack indicates that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack; and

(3)the attack was not triggered solely by emotional stimulus or mental stress factors, unless it was precipitated by sudden a stimulus.

The hearing officer found that on (date of injury) appellant sustained a heart attack while in the course and scope of his employment; had health conditions and multiple risk factors (enumerated) which predisposed appellant to heart problems; that appellant had a severe predisposition to heart disease; that appellant's work did not bring on the heart disease or a predisposition to heart disease; and, that appellant's heart attack was the natural progression of a preexisting heart condition or disease. His conclusion of law, based upon those factual findings, stated that appellant "did not show by a preponderance of the medical evidence regarding the attack that the [appellant's] work was a substantial contributing factor of the attack rather than the natural progression of a preexisting heart condition or disease."

There was evidence that appellant suffered a myocardial infarction (date of injury) while at work lifting sandbags, and an absence of evidence that his attack was triggered solely by emotional or mental stress. Thus, the Article 8308-4.15(1)(A), (B), and (3) elements for a compensable heart attack were satisfied. The medical evidence was in conflict, however, regarding the Article 8308-4.15(2) element, namely whether appellant's work, rather than the natural progression of a preexisting heart condition or disease, was a substantial contributing factor of his attack. There was evidence of preexisting coronary disease, namely, atherosclerosis, and that one coronary vessel was 99% occluded. And, while (Dr. S) felt that appellant's work rather than the natural progression of the disease was

a substantial contributing factor of appellant's heart attack, (Dr. A) opinion was otherwise. There was no medical or other evidence connecting appellant's three subsequent cardiac episodes to his work. Article 8308-6.34(e) designates the hearing officer as the sole judge of the materiality and relevance of the evidence, as well as the weight and credibility it is to be given. As the trier of fact, the hearing officer weighs all the evidence, decides the credence to be given the whole, or any part, of the testimony of witnesses, and resolves conflicts and inconsistencies in the evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W. 2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The hearing officer also judges the weight to be given expert medical testimony, and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 289-290 (Tex.App.-Houston [14th Dist.] 1984, no writ); Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Corpus Christi 1973, no writ).

Appellant asserts that the hearing officer failed to apply the "positional risk test" as indicated by references in his statement of the evidence to the possibility that appellant's heart attack could have happened anywhere and at any time as a result of exertion. Appellant defines the "positional risk test" to mean that if an injury arises within the course and scope of employment it is compensable, notwithstanding that the same type of injury, i.e., assault, murder, choking on food, being accidentally run over, getting hit by a tree limb, and so on, might also been sustained by the employee off the job. Appellant argues that if the preponderance of the medical evidence shows that the exertion on the job substantially contributed to the heart attack, then it is compensable notwithstanding that similar exertion off the job might also have caused the attack. Appellant cites a number of cases, none of which were decided after enactment of the 1989 Act, and contends that the new heart attack statute (Article 8308-4.15) doesn't affect the application of the "positional risk test." We disagree with appellant's contention and find his authorities unpersuasive insofar as they do not discuss the required elements for a compensable heart attack under the 1989 Act.

We have carefully reviewed the hearing officer's statement of the evidence, as well as his findings of fact and conclusions of law, and are convinced he has not misperceived the requirements of Article 8308-4.15. In that regard, however, we do observe that in Finding of Fact No. 4 the hearing officer found that appellant sustained a heart attack "while in the course and scope of his employment on (date of injury)." Article 8308-1.03(10) defines compensable injury to mean "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." While ambiguously phrased, we are satisfied, after reading Finding of Fact No. 4 in the context of the other findings and conclusions, that the hearing officer found that appellant had the heart attack while at work and performing his duties, and not that his heart attack was compensable under the 1989 Act. We further note that appellant did not specifically attack that finding.

Appellant also contends that appellant's heart attack had as a substantial contributing factor his employment duties, and that it was not the natural progression of preexisting heart disease. In the first heart attack case decided by the Appeals Panel, we discussed the new

and more demanding standards for the compensability of heart attacks under the 1989 Act, and we noted the case law that had developed under the prior legislation. Texas Workers' Compensation Commission Appeal No. 91009 (Docket No. redacted) decided September 4, 1991. The four cases cited by appellant were cited in that decision. Not only does the 1989 Act require medical evidence and to the level of a preponderance, but it must indicate "that the employee's work rather than the progression of preexisting heart disease was a substantial contributing factor of the attack . . ." (Emphasis supplied.) Article 8308-4.15(2). We said in Appeal No. 91009 that "the medical evidence must be compared or weighed as to the effect of the work and the natural progression of a preexisting heart condition. Further, the employee's work must be more than a contributing factor of the attack, it must be a substantial contributing factor." *And see* Texas Workers' Compensation Commission Appeal No. 92115 (Docket No. redacted) decided May 4, 1992.

None of the challenged findings and conclusions are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge