APPEAL NO. 92469

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp.1992) (1989 Act). On July 24, 1992, in (city), Texas, a contested case hearing, initially convened by hearing officer (hearing officer) on July 13th and continued, was reconvened for the determination of the two disputed issues, to wit: (1) whether respondent has reached maximum medical improvement (MMI), and if so, when MMI was reached; and (2) if appellant has reached MMI, what is his impairment rating. The hearing officer found, among other things, that respondent had a preexisting degenerative back disease which was aggravated by the (date of injury) injury; that the designated doctor opined that respondent reached MMI on November 26, 1991, with a 22 percent whole body impairment rating of which 7 percent is directly attributable to the (date of injury) incident; and that respondent has a whole body impairment of 22 percent as the result of the compensable injury suffered on (date of injury). Based on these findings, the hearing officer concluded that respondent reached MMI on November 26, 1991, with whole body impairment of 22 percent due to his compensable injury. Appellant attacks these findings and the consequent conclusion with two contentions, namely, that there is no medical evidence to support a finding that respondent's preexisting degenerative back disease was aggravated by the (date of injury) injury, and that the hearing officer erred in not adopting the designated doctor's 7 percent impairment rating of June 8, 1992. Respondent urges our affirmance of the challenged findings and conclusion.

DECISION

Respondent, a 57-year-old, long distance truck driver, was lifting cases of mustard onto a pallet on (date of injury), when he felt a sudden sharp pain in his back which ran down to his ankles like a shock. He had to sit down for about 15 minutes before continuing to load his truck and drive to his destination. He testified, without controversion, that he had never previously experienced any back injury or problems, nor had he filed any prior workers' compensation claims. As of the hearing date, he said he was in poor condition and unable to sit for the long periods of time required to work as a truck driver, or to do the bending, squatting and lifting required in performing work as a mechanic, his only other skill.

At the benefit review conference (BRC) of June 1, 1992, respondent contended he had not reached MMI and required surgery. The benefit review officer (BRO) considered a Report of Medical Evaluation (TWCC-69) submitted by the agreed designated doctor, (Dr. W), which on its face stated that respondent reached MMI on February 10, 1992, and assigned him a whole body impairment rating of 22 percent. However, appellant there contended that based on the content of (Dr. W)'s written report accompanying the TWCC-69, respondent actually reached MMI on November 26, 1991. Further, appellant there contended that it should pay impairment income benefits for only 7 percent of the 22 percent impairment rating stated on the TWCC-69 because in his written report (Dr. W) indicated that 15 percent of the 22 percent impairment was attributable to preexisting degenerative changes. Respondent there contended the 22 percent rating should be used to determine

his impairment income benefits since he had aggravated a preexisting condition, thus putting appellant on notice of the scope of the compensable injury. Appellant, in effect, seized upon the content of (Dr. W's) accompanying written report to dispute the MMI date and impairment rating stated on the face of the TWCC-69. The BRO recommended that (Dr. W's) determination that MMI was reached on February 10, 1992 be given presumptive weight pursuant to Article 8308-4.25(b), and that temporary income benefits be paid through that date. The BRO also recommended that (Dr. W) was an agreed designated doctor and that the total impairment rating of 22 percent be used to determine the impairment income benefits. Appellant stated at the hearing that subsequent to the BRC, it wrote (Dr. W) seeking a clarification of the MMI date and the impairment rating, whereupon (Dr. W) prepared a second TWCC-69 stating that respondent reached MMI on November 26, 1991, with an impairment rating of 7 percent.

Respondent saw (Dr. H) on July 23, 1991 and was diagnosed as having a mild cervical strain, thoracic spasm, and lumbar strain. He was taken off work for two weeks, provided with medications, and referred to (Dr. Hi), an orthopedist. (Dr. Hi) obtained myelogram and post-myelogram CT scan studies on October 14, 1991, which revealed (1) mild to moderate cervical spondylosis, (2) normal thoracic myelogram and post-myelogram CT scan, T1-T5, (3) a 3mm. asymmetrical posterior protrusion toward the right at L5-S1 without thecal sac or root sheath displacement, and (4) hypertrophic facet disease, L4-5 and L5-S1, with encroachment on the neuroforamina bilaterally. A lumbar discogram with CT scan obtained by (Dr. Hi) on November 19, 1991, revealed a posterior annular tear at L5-S1, which in a later report (Dr. Hi) referred to as a ruptured disc. Respondent received a lumbar steroid injection on December 19th.

On November 26, 1991, respondent's medical records were reviewed and he was examined by (Dr. S) at appellant's request. In his report of December 12, 1991, (Dr. S) diagnosed cervical spondylosis, thoracic spondylosis, lumbar spondylosis, and low back strain by history. He felt respondent demonstrated no positive objective clinical abnormalities. In his report and on a TWCC-69 form, (Dr. S) determined that respondent reached MMI on November 26, 1991, with 0 percent impairment to the whole body.

Appellant offered correspondence which indicated that on January 3, 1992, respondent and appellant agreed to use (Dr. W) as a "designated doctor" rather than proceed to a benefit review conference. By appellant's letter of January 31st, (Dr. W) was advised of (Dr. S's) report and asked to examine respondent, determine whether MMI had been reached, and if so, to complete a TWCC-69. The TWCC-69 signed by (Dr. W) (apparently on February 10, 1992) stated in block 14 that respondent reached MMI on "2/10/92" with a whole body impairment rating of "22%." In block 15 of this form, where the "specific body part/system" and rating is to be listed for an impairment rating of 5 percent or more, (Dr. W) stated: "pre-existing degenerative changes"--"15%", and "disc disruption"--"7%." (Dr. W's) TWCC-69 referred to his attached report dated February 10, 1992. This report diagnosed, among other things, cervical spondylosis with severe disc disruption and moderate stenosis of the spinal canal at C6-C7, bilateral C6-C7 foraminal stenosis,

degenerative changes at C5-6 and C6-7, lumbar spondylosis, lumbar disc disruption at L5-S1, and postural low back pain. The report stated that respondent had reached MMI and had a 22 percent impairment rating for his "single level significant cervical abnormality" and "double level lumbar abnormality." (Dr. W's) report went on to state that in his opinion, respondent's "pre-existing degenerative changes accounted for 15% of the 22% that the patient currently demonstrates and his superimposed injury of (date of injury) could be held responsible for 7% of the 22% permanent impairment rating." He opined that respondent's prognosis for returning to work as a truck driver was poor "due to these degenerative changes." In the February 10th letter transmitting his report to appellant, (Dr. W) said that while respondent has "very significant abnormalities," most "are chronic and degenerative in nature and in no way could have been caused by a (date of injury) injury as described by the patient." This letter went on to say that respondent's MMI date "should be sometime prior to" his February 10, 1992 examination; however, as already noted, (Dr. W) stated the MMI date on the TWCC-69 as "2/10/92."

Respondent visited (Dr. Hi) during the January-April 1992 period complaining of back pain and weighing the risks of surgery. In a report of respondent's visit of April 24, 1992, (Dr. Hi) stated that respondent reported he had been "to two IME doctors both of whom belittle his injury and his present condition," and who believe he has reached MMI and should return to work. This record also stated that neither of those doctors suggested surgery and that (Dr. Hi) will send respondent to (Dr. B) for a second opinion.

After the BRC on June 1, 1992, appellant wrote (Dr. W) on June 5th. This letter first noted that respondent's attorney and appellant had "agreed to use [(Dr. W)] as the designated doctor," and this assertion, later argued by appellant, was not controverted by respondent. The letter pointed up the reference in (Dr. W's) February 10th report regarding an MMI date of some date prior to February 10th and noted that (Dr. S) had used November 26, 1991 as the MMI date. The letter also referred to (Dr. W)'s impairment rating differentiation between respondent's preexisting degenerative changes (15 percent) and the injury impairment (7 percent) and asked (Dr. W) "to complete a corrected TWCC-69 depicting [his] professional opinion with regards to the date of [MMI] and [respondent's] permanent partial disability due to the incident of (date of injury)." In his responding letter of June 8th, (Dr. W) stated he was enclosing a "corrected TWCC-69" to address the issues raised in appellant's letter, stated he had reviewed respondent's records, and expressed his opinions that the MMI date was November 26th, as determined by (Dr. S), and that respondent's "permanent impairment rating is 7% so far as injuries related to this specific accident, which occurred on (date of injury), are concerned." (Dr. W's) corrected TWCC-69 in block 14 stated the MMI date as "11/26/91" and the impairment rating as 7 percent. In block 15, (Dr. W) listed the specific body part/system as "lumbar spine" with a rating of 7 percent.

Respondent also introduced a report dated July 2, 1992, from (Dr. B), an orthopedic surgeon to whom he had been referred by (Dr. Hi). (Dr. B) reviewed the studies, diagnosed a herniated L5 disc, and "felt there is something interfering with the L5 nerve root."

Respondent argued at the hearing that because the parties had agreed to (Dr. W) as the designated doctor, the Commission was obliged to adopt the 22 percent rating and February 10th MMI date stated on his initial TWCC-69, and that it was unfair to permit appellant to go back to (Dr. W) and obtain an earlier MMI date and lesser impairment rating on a corrected TWCC-69. Respondent argued further that his employer took him as he found him; that the impairment attributable to his preexisting degenerative spinal condition was as compensable as the impairment attributable to his (date of injury) injury because he had not suffered any prior back injury or problems before (date of injury); and that the (date of injury) injury aggravated his preexisting condition. He urged that it was unfair to, in effect, permit appellant to obtain a discount for the preexisting condition which did not "surface" until the undisputed injury occurred. Respondent urged the Commission to look beyond (Dr. W's) second TWCC-69 and consider all the medical evidence of his preexisting spinal condition, and argued that absent the (date of injury) injury, he wouldn't have suffered all the subsequent pain.

In Finding of Fact No. 3, the hearing officer found that on (date of injury), respondent suffered a compensable injury to his back. That finding has not been challenged. We have previously said that "an injury that aggravates a preexisting bodily infirmity is compensable provided overexertion or an accident arising out of employment contributed to the incapacity (citation omitted)." Texas Workers' Compensation Commission Appeal No. 92010 (Docket No. redacted') decided March 5, 1992. There was no disputed issue at the hearing concerning the nature and extent of the back injury as such, including whether it consisted of a discrete new injury on (date of injury), the aggravation of a preexisting spinal condition, or both. Nor did appellant adduce evidence or otherwise contend that respondent's preexisting condition was the sole cause of his impairment.

Appellant challenges first the hearing officer's Finding of Fact No. 4--that respondent had a preexisting degenerative back disease which was aggravated by the (date of injury) injury--contending that none of the doctors who examined respondent stated that the injury aggravated the preexisting condition and that there is no basis in the medical evidence for this finding. We have previously observed that evidence of the existence of an injury is not necessarily limited to medical evidence, however, and a claimant's testimony alone can establish the fact of injury. Texas Workers' Compensation Commission Appeal No. 91083 (Docket No. redacted) decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069 (Docket No. redacted) decided April 1, 1992. Respondent argues that his testimony established that he had no prior back injuries or problems before the (date of injury) injury but has had pain ever since, and that (Dr. W's) February 10th report stated the opinion that respondent's "pre-existing degenerative changes accounted for 15% of the 22% that [he] currently demonstrates and his superimposed injury of (date of injury) could be responsible for 7% of the 22% permanent impairment rating." Respondent viewed (Dr. W's) statement that the (date of injury) injury was "superimposed" on the preexisting condition as the equivalent of his opinion that the injury aggravated the preexisting condition. We agree. It seems clear from the evidence that respondent's preexisting spinal condition

was not problematic until he sustained the injury. We note that the first doctor respondent visited after the injury, (Dr. H), found mild cervical strain, thoracic spasm, and lumbar strain with radiation down the lower extremities. (Dr. Hi), the orthopedic surgeon, reported that on (date of injury), respondent's job involved the repeated lifting of weight in the range of 75 to 100 pounds and that as the day progressed, his back began to hurt him all the way from his low back to his shoulders, with radiation into his legs, and that the pain has been continuous since that time. None of the diagnostic medical records appeared to relate one or more of the spinal abnormalities specifically to the (date of injury) injury as such, for example, the lumbar disc disruption at L5-S1. While (Dr. W's) February 10th letter forwarding his first TWCC-69 and accompanying report stated that most of respondent's significant abnormalities are chronic and degenerative in nature and "in no way could have been caused by a (date of injury) injury as described by the patient (emphasis supplied)," he does not say the injury did not aggravate any of those abnormalities. However, in block 15 of his first TWCC-69, (Dr. W) allocated the 7 percent to "disc disruption" but didn't specify whether he was referring to the cervical or lumbar disc disruption. In appellant's January 31, 1992 letter to (Dr. W) advising that he had been agreed to as the designated doctor, appellant advised him that respondent "alleges that while working, he injured his back and complete body as a whole (emphasis supplied)." We are satisfied there is sufficient evidence to support the finding that respondent had a preexisting degenerative back disease which was aggravated by his (date of injury) injury.

Appellant has also challenged the following factual findings and legal conclusion:

FINDINGS OF FACT

9.(Dr. W) opined that the Claimant reached MMI on November 26, 1991, with a 22% whole body impairment of which 7% is directly attributable to the (date of injury), incident.

11.The Claimant has a whole body impairment of 22% as the result of the compensable injury suffered on (date of injury).

CONCLUSIONS OF LAW

4.The Claimant reached MMI on November 26, 1991, with whole body impairment of 22% due to his compensable injury.

Appellant does not take issue with the finding that respondent reached MMI on November 26, 1991 for the obvious reason that appellant suggested that date to (Dr. W) in soliciting his corrected TWCC-69. Appellant first argues that the hearing officer erred in interpreting Article 8308-4.26(g) for the reason that since the parties agreed to (Dr. W's) serving as the designated doctor, the Commission was obliged to adopt his impairment rating. Appellant argues further that (Dr. W's) second TWCC-69, stating the November 26th MMI date and the 7 percent impairment rating, superseded his earlier TWCC-69 and

was his "final word," and that the hearing officer was not free "to second guess an agreed designated doctor" by using the impairment rating from the first TWCC-69 and the MMI date from the second.

Appellant is correct that Article 8308-4.26(g) provides that if the parties agree on a designated doctor for an impairment rating dispute, the Commission shall adopt the impairment rating made by the designated doctor. The record showed that (Dr. W) was requested by the parties to determine whether respondent had reached MMI and, if so, the date. This procedure is countenanced by Article 8308-4.25(b). Appellant's January 31st letter to (Dr. W) sought the determination of MMI but contained no request for nor mention of the determination of an impairment rating. No mention was made in this letter of the assignment of an impairment rating, much less to any differentiation or allocation in the impairment rating between respondent's preexisting conditions and his (date of injury) injury. However, both parties treated the impairment rating issue as if the Commission was required to adopt the rating since they had agreed to (Dr. W) as the designated doctor, and they never took the position that the impairment rating was simply entitled to presumptive weight under either Article 8308-4.25(b) or Article 8308-4.26(g). Nor did the hearing officer make any determinations based upon presumptive weight. We cannot agree with appellant that the hearing officer was required to adopt the determinations in (Dr. W's) second TWCC-69 to the exclusion of the first; nor do we believe he was precluded from considering both TWCC-69 forms together with the accompanying report and correspondence from (Dr. W).

In Texas Workers' Compensation Commission Appeal No. 92441 (Docket No. redacted) decided October 8, 1992, the designated doctor first reported that the claimant had an apparent herniated disc, that the claimant felt he was still disabled, and he agreed with another doctor's opinion that another study and possible surgery were indicated. However, after receiving a videotape showing claimant performing certain activities, the designated doctor, prior to the contested case hearing, prepared a TWCC-69 which determined MMI with no impairment. It seems clear that (Dr. W) amended his initial TWCC-69 to clarify first the MMI date, because he stated the MMI date as "2/10/92" on TWCC-69 while in his letter transmitting the TWCC-69 and accompanying report, he stated the MMI date should be sometime prior to February 10th, the date he evaluated respondent.

As for the apparent impairment rating change, while (Dr. W) did change the ratings appearing in block 14 of the TWCC-69 forms, it seems clear from reading both forms, the report accompanying the first form, and (Dr. W's) letters transmitting them, that he undertook from the outset, without any request by the parties who selected him and without any explanation for his reason, to attempt to allocate impairment ratings for both respondent's preexisting condition and his (date of injury) injury. Article 8308-1.03(24) defines impairment to mean "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." None of (Dr. W's) submissions indicate he appreciated the concept that a compensable injury under the 1989 Act may consist not only of a discrete new injury, but also of the aggravation of a preexisting condition, or both, as was the case with respondent. The parties did not raise

an issue concerning the reduction of respondent's impairment income benefits on account of an earlier compensable injury. *See* Article 8308-4.30; Texas Workers' Compensation Commission Appeal No. 92394 (Docket No. redacted) decided September 17, 1992. Under these circumstances, we do not find that the hearing officer was limited solely to the later TWCC-69 in his determination of the MMI date and the impairment rating. Accordingly, we find no error in the hearing officer's determination of the 22 percent impairment. Read together, Dr. W's) submissions never retracted his opinion that 15 percent of the 22 percent impairment was allocable to the preexisting condition, and that respondent's total whole body impairment was 22 percent.

According to Article 8308-6.34(e), the hearing officer is the sole judge, not only of the relevance and materiality of the evidence, but also of the weight and credibility it is to be given. We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged finding is not 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 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge