APPEAL NO. 92549

A contested case hearing was held in (city), Texas, on September 8, 1992, (hearing officer) presiding as hearing officer. She determined that the disputed impairment rating must be resolved by a designated doctor, and so ordered, and that benefits continue to be paid to the respondent (hereinafter called claimant) pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant (hereinafter called self-insured) urges error in the hearing officer's determination that the contribution provision of the Act (Article 8308-4.30) did not apply, that the carrier did not meet the impairment guidelines of Article 8308-4.24, that the claimant's 1985 injury was not a compensable injury under the 1989 Act, and that the carrier may dispute the impairment rating under Article 8308-4.26. Claimant requests the hearing officer's decision be affirmed.

DECISION

Finding error in the decision and order of the hearing officer, we reverse and remand.

What should have been a relatively uncomplicated case went awry largely because the evidence offered by the self-insured did not comport with the requirements of the 1989 Act or implementing Rules. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.2 *et seq*. (TWCC Rules). The issue from the benefit review conference, and agreed to by the parties at the contested case hearing, was: what is the correct impairment rating. A part of that issue as stated at the hearing was whether there was a prior compensable injury in 1985. As the case developed, it became clear that the parties were concerned only with the matter of whether there should be any contribution under Article 8308-4.30 from the 12% whole body impairment rating rendered by the claimant's treating doctor, (Dr. K). In this regard, there was a notation on the bottom of a letter from Dr. K which stated that six percent of the impairment rating related to the 1985 injury and six percent to the (year) injury. There is no indication whatsoever that either party disputed the 12% whole person impairment rating, only whether it should be apportioned between the 1985 and (year) injuries.

Succinctly, the claimant injured his knee in a 1985 work-related injury for another employer. He required knee surgery which was apparently paid for by his then employer and the claimant did not file any workers' compensation claim. He subsequently applied for a position with the (city) Fire Department, met their rigorous physical standards and commenced employment. He suffered a compensable injury to the same knee on (date of injury), while responding to an EMS call and eventually had surgery performed by Dr. K. The record is silent on when and if the claimant returned to work but it is clear that the self-insured paid him benefits under the 1989 Act. In a January 14, 1992 unsigned letter to the claims service apparently handling the matter for the self-insured, Dr. K indicated that, using the Second Edition of the Evaluation of Permanent Impairment Guidelines by the AMA, it would indicate that the claimant had a 12% impairment of the whole person. In a subsequent letter dated March 6, 1992 to the same claims service, Dr. K stated "[t]he whole body impairment rating which I gave to [claimant] did in fact include the injury in 1985, to the

knee as in fact the problems he has in his knee are accumulative." In an addendum to that letter dated March 25, 1992, Dr. K notes "6% impairment for 1985 injury and 6% to (year) injury." There is no narrative history of the claimant's medical condition, any description of any recent clinical evaluations, or any statement regarding maximum medical improvement (MMI). Also in the record is a request by the self-insured (which was approved by the hearing officer) to depose Dr. K and obtain medical records. This was never done because the self-insured did not have time to accomplish the matter. There is no indication of any request for a continuance. Also, there is evidence that the self-insured requested a second doctor's opinion on the claimant's condition and impairment rating but, again the record is silent on any results.

In her discussion section, the hearing officer indicates that the case cannot be disposed of under Article 8308-4.30 "because the Claimant's 1985 injury does not have a documented impairment rating on a Commission prescribed form, the TWCC-69; it is not a compensable injury under the 1989 Act; and moreover, the textual requirement of Article 8308-4.24 . . . is not met." She goes on to state that Article 8308-4.26 provides a means for the carrier to dispute the impairment rating and for its resolution. In her findings of fact, the hearing officer states that the parties agree that the compensable injury has resulted in a percentage of impairment but do not agree on what the correct percentage is and that the claimant has not seen a doctor designated by the Commission to resolve impairment disputes.

We do not agree with the discussion and the implications of the hearing officer's findings set out above. However, we do agree with the thrust of her decision that additional action must be taken to reach an appropriate resolution of this case. First, we do not agree with the hearing officer's implication in her discussion section that a prior contributing injury can only be considered if it is a documented impairment rating on a Commission prescribed form. Initially we note that there are no Commission rules implementing or forms relating to Article 8308-4.30, Contributing Injury. And, we find nothing to lead us to the conclusion that the contributing injury provisions are subject to the designated doctor procedures found in Article 8308-4.26. In this regard, Montford, Barber, Duncan, A Guide to Texas Workers' Comp Reform, Vol 1, Sec.4.30(a), page 4-132, Butterworth Legal Publishers, Austin, Texas 1991, provides:

> The requirement that the contributing injury must have resulted in "documented impairment" seems to require that the impairment from the contributing injury be recorded in medical records. This does not require a prior impairment rating, but it does require some indication that there was at least ". . . anatomic or functional abnormality or loss. . . reasonably presumed to be permanent." (Article 8308.1.03(24). Therefore, the Commission will be required to examine the medical evidence from the earlier injury and make a determination of the extent of the previous injury. It may be necessary to obtain a doctor's opinion to establish the extent of residual impairment resulting from the prior injury and the cumulative impact of the previous and

present injuries on the employee's overall impairment.

We believe this is an informative and reasonable reading of Article 8308-4.30 and is consistent with the purposes to be accomplished by the provision for contribution. To require, for purposes of contribution for prior injuries, that concepts only coming into existence with the 1989 Act be utilized in order to qualify for any contribution would rule out anything prior to the 1989 Act. We can find no indication that such a limited result was intended or is otherwise mandated by the language of Article 8308-4.30. Similarly, although the provisions on contributing injury would not mandate that the provisions of Article 8308-4.24 be met, they may provide a meaningful comparison and might well be encouraged.

We are likewise unclear as to the basis for the hearing officer's comment in her discussion that the 1985 injury was not compensable under the 1989 Act. There was no finding of fact on this matter which would indicate she was making an evidentiary weighing. From the evidence of record, it appears that the claimant was injured in the course and scope of his employment in 1985 and that his employer had workers' compensation coverage. That a claim was not filed for workers' compensation benefits in 1985 or that his employer paid for medical expenses (this was suggested in the record) does not remove the injury from being considered a compensable injury for purposes of Article 8308-4.30. *See generally* Alvarez v. Texas Employers Insurance Association, 450 S.W.2d 114 (Tex. Civ. App.-San Antonio 1970, writ ref'd n.r.e.); Martinez v. Home Indemnity Company, 647 S.W.2d 102 (Tex.App.-Fort Worth, Writ ref'd n.r.e.). Article 8308-1.03(10) defines compensable injury as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Of course, whether a prior injury in any given case triggers contribution is a question of fact and a fact finder can determine from the evidence and surrounding circumstances that a prior injury did not warrant a reduction in benefits for a current injury. *See generally* Wright v. Excalibur Insurance Co. 486 S.W.2d 130 (Tex. Civ. App.-Dallas 1972 no writ); *compare* Lumbermans Mutual Casualty Co. v. Martinez, 763 S.W.2d 621 (Tex. App.-Eastland 1989, error denied).

Of concern to the hearing officer, and to us, is the failure to follow the required procedures of the 1989 Act and implementing rules concerning MMI and impairment rating. The procedures to be followed to establish these very significant events are not complex. However, because of their impact under the 1989 Act, certain steps are mandatory. Article 8308-4.26 states quite clearly that "[a]ll awards of impairment income benefits shall be based on an impairment rating using the impairment guidelines referred to in Section 4.24 of this Act." And, Article 8308-4.24 provides that all determinations of impairment must use a specifically provided AMA guide (one other than the guide used by Dr. K. according to his letter). Further, the brief letters from Dr. K. do not comply with or fulfill the requirements of TWCC Rule 130.1 regarding the certification of either MMI or impairment rating. *See* Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992; Texas Workers' Compensation Commission Appeal No. 92384, decided September 14, 1992. We emphasize that determinations as to MMI and impairment rating are far too important to

be left to speculation and inadequate and questionable documentation.

From our review of the evidence, the parties did not have a dispute concerning the purported 12% impairment rating noted in one of Dr. K's letters. Rather, the contest was over whether or not any part of the 12% could be attributed to the 1985 injury for contribution purposes. Therefore, there does not appear to be any necessity for a designated doctor at this time. However, proper documentation to comply with the requirements of the Act and the TWCC Rules regarding MMI and impairment rating must be obtained to reach the real issue in contention--whether there should be any reduction in impairment income benefits as a result of the prior injury. Consequently, there is no basis at this time for the hearing officer's decision and order that the claimant be examined by a designated doctor. The case is remanded for further consideration and development of the evidence in accordance with this opinion. Pending resolution of the remand, a final decision has not been made in this case.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge