APPEAL NO. 92610

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On September 24, 1992 and October 12, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent, claimant herein, had an impairment rating of 14% and that it would not be reduced by a prior impairment rating. Carrier asserts that the hearing officer erred in substituting his opinion of the physical condition of the claimant for that of the physicians and in allowing no contribution based on a previous compensable injury to the same area.

DECISION

Finding that the decision is sufficiently supported by the evidence, we affirm.

The issue in this hearing was said to be what is the proper impairment rating. It quickly became clear that the real issue being litigated was whether the carrier could have the impairment rating reduced under the provisions of Article 8308-4.30 of the 1989 Act. This article replaced TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (repealed 1989).

Article 8308-4.30 says in pertinent part:

(a)At the request of the insurance carrier, the commission may order that impairment income benefits and supplemental income benefits be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.

(b)The commission shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section.

Article 8308-4.26 provides in part:

(a)All 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.

Article 8308-1.02 provides at (25), (24), and (32) definitions of impairment rating, impairment, and MMI:

(25)"Impairment rating" means the percentage of permanent impairment of the whole body resulting from a compensable injury.

(24)"Impairment" means any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent.

(32)"Maximum medical improvement" means the earlier of:

(A)the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or

(B)the expiration of 104 weeks from the date income benefits begin to accrue.

Article 8306 §12c of prior law provided:

If an employee who has suffered a previous injury shall suffer a subsequent injury which results in a condition of incapacity to which both injuries or their effects have contributed, the association (Texas Employers' Insurance Association) shall be liable because of such injury only for the compensation to which the subsequent injury would have entitled the injured employee had there been no previous injury; provided that there shall be created a fund known as the "second injury fund" hereinafter described, from which an employee who has suffered a subsequent injury shall be compensated for the combined incapacities resulting from both injuries.

Article 8306, § 12c of prior law sought to determine incapacity to which an injury at issue and another injury had both contributed. Prior law also provided that "the association shall be liable because of such injury only for the compensation to which the subsequent injury would have entitled the injured employee had there been no previous injury." Under the prior law, Transport Ins. Co. v. Mabra, 487 S.W.2d 704 (Tex. 1972) said that to reduce recovery because of another injury the carrier had to prove that the other injury was compensable, that the other injury contributed to the present incapacity, and what the percentage of the contribution was. While the 1989 Act does not measure incapacity and Article 8308-4.30 speaks in terms of "impairment," Article 8308-4.30 contains some of the case law requirements under prior law. The 1989 Act does use different language in saying "the commission may order" a reduction at the request of the carrier. The similarities are sufficient, however, to indicate that the remedy contemplated under the 1989 Act still limits a potential award. While not an issue raised on appeal, the hearing officer's statement that the burden of proof was on the claimant was in error since the overall thrust of Article 8308-4.30 is the same as prior law which placed the burden of proof on the carrier.

Claimant in some manner compensably injured his back in (month year) and again in (month year). After the first injury, a Report of Medical Evaluation, TWCC-69, by Dr. H stated that the claimant had a 14% impairment based on seven percent for L4-5 and seven percent for L5-S1 with MMI of May 30, 1991. Also in evidence was a report of a CAT scan dated March 5, 1991, which indicated a possible narrowing on the left at L4-5. A radiology report dated March 4, 1991 simply said, "there is a suggestion of slight narrowing of the disc at the L4-5 and L5-S1 level. Otherwise, no abnormality."

After claimant's (month year) incident, he saw Dr. G. In claimant's Exhibit No. 2, Dr. G, in a Report of Medical Evaluation, TWCC-69, assessed impairment at 14%. He said in item 13, in part, "[f]lare-up of back pain after lifting 25 lb bag of lead shot on (date of injury). CT scan showed disc herniation at L4-5 involving left side. Increased back and buttock pain." Dr G rated L4-5 seven percent and L3-4 seven percent and MMI was stated as March 26, 1992. (We note that the only CT scan in evidence was that taken after the (month) injury; it addressed the left side of L4-5.) The carrier in its exhibit B offered a copy of a TWCC-69 by Dr. G, also showing l4% impairment with MMI on May 26, 1992; this form in item 13 begins the same as does claimant's Exhibit No. 2 but also differs in saying, "[f]lare-up of back pain in (month). CT scan showed disc herniation at L4-5 involving left side. Resolved and then lifted 25 lb bag of lead shot and had increased back and buttock pain." (emphasis added) An MRI dated December 31, 1991 shows that the herniation of L4-5 was to the right.

Dr. G then, in answer to a letter from the carrier, said in his letter of September 23, 1992, "I believe that the herniation at the L4-5 level seen and rated by [Dr. H] is the same herniation as I rated." The hearing was recessed at claimant's request until October 12, 1992, at which time the claimant returned with claimant's Exhibit No. 3, another letter by Dr. G--dated October 2, 1992--which refers to his rating of seven percent per disc and says that claimant had two levels (L3-4 and L4-5) and says "he would have a total whole body impairment of 14% due to the injury he sustained on (date of injury)."

The claimant provided an opening and closing argument but the record does not show that he was sworn or that he testified. The findings of fact in the hearing officer's decision are all sufficiently supported by the evidence found in the medical records and letters of claimant's treating doctors, H and G; any statements by claimant in his closing argument that refer to facts not in evidence would at most be nonreversible error if considered to be evidence by the hearing officer.

Carrier's assertion that the hearing officer should not have substituted his opinion for that of the medical evidence is without merit. Claridy v. TEIA, 795 S.W.2d 228 (Tex. App.-Waco 1990, writ denied) states that the question of contribution is ordinarily a question of fact. The court referenced various medical opinion evidence provided and concluded that the fact-finder (jury) had rendered a decision within the bounds of the evidence. Transamerica Ins. Co. of Texas v. Hernandez, 769 S.W.2d 608 (Tex. App.-Corpus Christi 1989, writ refused) said that the carrier "had to prove also the amount or percentage of such contribution." (*See* Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992 and Montford, A Guide to Texas Workers' Comp Reform, Vol. 1, Sec. 4.30(a), page 4-133, for guidance indicating that the benefit, not the rating, would be affected if reduction were ordered.) The Hernandez court went on to discuss the disability in question and said that the fact-finder may base its decision on evidence that contradicts the medical evidence offered. The carrier also refers to Article 8308-4.26 to support his argument that the hearing officer should not have substituted his interpretation for that of the physician. The referenced article is not applicable. Article 8308-4.26(g) states:

If the impairment rating is disputed, the commission shall direct the employee to be examined by a designated doctor selected by the mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor selected by the commission. The designated doctor shall report to the commission in writing. If the parties agree on a designated doctor, the commission shall adopt the impairment rating made by the designated doctor. If the commission selects a designated doctor, the report of the designated doctor shall have presumptive weight and the commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary, in which case the commission shall adopt the impairment rating of one of the other doctors.

There is no designated doctor in this case and that article addresses no doctor's opinion as requiring adoption.

The carrier argues that the hearing officer should have allowed contribution and points to specific quotations from Dr. G. As shown earlier in this opinion, Dr. G provided different letters which gave different emphasis to the description of the injury in question; even the TWCC-69s provided to different parties that covered the same matter at the same time varied in content. The sorting of these matters--whether the one injury had resolved prior to the next as seems to be indicated by one TWCC-69 and whether the 14% resulted only from the (month) injury--is the responsibility of the hearing officer. He is the sole judge of the weight and credibility of the evidence, including medical evidence. *See* Article 8308-6.34(e) of the 1989 Act. His conclusion that the injury was at a different location although at the same level of the back was within the evidence offered and is not against the great weight and preponderance of the evidence. While the hearing officer does not refer to Article 8308-4.30(b), *supra*, this conclusion indicates his consideration of the standard therein described as the "cumulative impact" of the injuries on the overall impairment; it indicates that he did not find a cumulative impact of one on the other. *See* Texas Workers' Compensation Commission Appeal No. 92549, decided November 24, 1992, in which a doctor found the injuries to be "accumulative." This conclusion is supported by Dr. G's statement that claimant's impairment was "due to the injury he sustained on (date of injury)" as opposed to Dr. G's earlier statement that said the L4-5 herniation is the same as previously seen. In addition the conclusion is also supported by the reference in the TWCC-69 to the earlier injury as having "resolved." *See* Montford, A Guide to Texas Workers' Compensation Reform, Vol. 1, Sec. 4-30(b), page 4-133, which says about cumulative impact "[t]his appears to require the Commission to take into account the `causal link' between the impairment resulting from the prior injury and the present impairment."

In reviewing Article 8308-4.30 of the 1989 Act we note that it falls under "Chapter B. Income Benefits" of the 1989 Act. Article 8308-4.21 begins Chapter B as follows:

a.An employee is entitled to income benefits to compensate the employee for a compensable injury as provided in this chapter. (emphasis added.)

One of the income benefits in Chapter B is impairment income benefits as provided in Article 8308-4.25 and 4.26. Those benefits are tied to the attainment of MMI. MMI, impairment, and impairment rating are defined in Article 8308-1.02(32), (24), and (25) of the 1989 Act and all speak in regard to "an" injury or "a" compensable injury. In contrast, incapacity was considered under case law, Claridy, *supra*, to encompass injuries to different parts of the body so long as they contributed to the incapacity to work. Apparently in recognition of impairment under the 1989 Act as relating to a compensable injury, the TWCC-69 carries the instruction in item 14 "[i]mpairment rating shall be based on the compensable injury alone." (emphasis added.)

This decision does not require a ruling on whether impairment benefits may only be reduced when a prior compensable injury was to the same body part. The differences between the prior law and the 1989 Act, combined with the peculiar wording of different articles of the 1989 Act which are pertinent to this matter, do raise the question of the extent that Article 8308-4.30 may be applicable in reducing impairment income benefits based on earlier compensable injuries.

The decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge