APPEAL NO. 931098

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq*.), a contested case hearing was held in (city), Texas, on October 18, 1993, (hearing officer) presiding as hearing officer. She determined that the respondent (claimant) injured his right knee and right arm in the course and scope of his employment on (date of injury), at the same time he suffered a compensable back injury, that his impairment rating (IR) was 22% and that contribution from a prior injury was not sufficiently established by medical evidence. The appellant (carrier) urges the evidence is insufficient to support the hearing officer's findings and conclusion that the claimant injured his right knee and right arm on (date of injury), that the hearing officer's finding of a 22% IR is incorrect as was her determination on contribution. No response has been filed.

DECISION

The decision of the hearing officer is affirmed in part and reversed and remanded in part.

The claimant fell several feet from a ladder attached to a buggy on (date of injury), and sustained a compensable injury, basically to his back but later asserted as extending to his knee and arm. He testified he felt pain in his back, neck, arms, leg and head. Being unable to move without serious pain, he was taken to an emergency room by an EMS service. Although the early diagnosis indicated thoracic muscle sprain and strain, he eventually was treated and tested by other doctors with (Dr V), who performed fusion surgery on L4-5 on January 6, 1992, becoming his treating doctor. The surgery was apparently not completely satisfactory as the claimant continued to have considerable back pain. Later medical reports also address the claimant's problem with his knee and right arm which were, according to the claimant and some medical evidence, masked somewhat by the pain and seriousness of his back condition. In any event the claimant's testimony and a reference in a medical report of Dr. V dated November 23, 1992, related the knee and arm problems to the incident of (date of injury). The claimant has not returned to work and his maximum medical improvement (MMI) date indicated in the hearing officer's report was reached at the expiration of 104 weeks. *See* Section 401.011(30)(B). The claimant indicated he is going to school which he should finish "in about 6 months."

Evidence at the contested case hearing established that the claimant had sustained a work-related compensable injury in (year) which ultimately resulted in a laminectomy at L4-5. He also had prior surgery on one of his knees. He stated that the laminectomy healed well, that he has had no problem with his back since, and that he received a full release to work in 1985. Dr. V opined in a report dated July 23, 1993, that: "[m]y feeling is that since he had done well after the initial fusion, that he probably had a solid fusion which was broken down from the fall from his recent injury." In a Report of Medical Evaluation (TWCC-69), Dr. V rendered an IR of 47% setting out 21% for lumbar and 26% for cervical. A (Dr. F) of the Texas Spine Rehabilitation Clinic rendered a whole person rating of 76%. A designated doctor appointed by the Texas Workers' Compensation Commission

(Commission), (Dr. O), rendered an original IR of 10% specifically factoring out 13% for the previous back injury. Dr. O's comprehensive report states in part:

> The only complex issue is obviously his previous back surgery and, indeed, his fusion. Therefore, the impairment he had on account of his previous back injury, the injury of (year), would have to be discounted from his current impairment. This factor, referred to as apportionment (*See* Appendix A of the AMA Guidelines), will obviously lower his impairment. To facilitate the exact calculation of his current impairment, I have therefore initially calculated the combined impairment of (year) injury with the impairment of 1991 injury; from this latter I have subtracted the impairment of (year) and obtained a net impairment for his 1991 injury.

Dr. O's report goes on to explain in detail his method of calculating the IR. A second report subsequently rendered by Dr. O assigned a 22% IR (removing any consideration for any previous injury) and resulted from a letter from the Commission which stated:

> Also, it appears some confusion has arisen regarding the amount of contribution from a prior compensable back injury. It would be appreciated if you would provide us with a new impairment rating to include all injuries sustained on (date of injury). This would include the lumbar and cervical areas of the back, the right arm and the knee. A total body impairment rating should be given in question 16 without subtracting out the impairment rating for the prior compensable injury. In question 17, please list the specific body parts and their rating.
>
> Your report is clear that you have provided a 13% impairment rating by using the 1989 Guides to the Evaluation of Permanent Impairment for the prior compensable injury to the back. The Commission will use that information to determine if we will order a reduction in the income benefit. It is the benefit amount and not the impairment rating which is reduced when there has been a prior compensable injury, and it is the Commission that determines the amount to be reduced.

We do not find merit to the carrier's assertion that the evidence is insufficient to support the hearing officer's finding that the claimant sustained a knee and arm injury resulting from the (date of injury), incident. The report of Dr. V and the claimant's testimony on this issue forms a sufficient basis to uphold the hearing officer's findings. While other facts and circumstances before the hearing officer could reasonably give rise to inferences different from those reached by the hearing officer, this is not a sound basis to disturb her findings or for us to substitute our judgment for that of the fact finder. Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.- El Paso 1991, writ denied). When reviewing a hearing officer's decision on a factual sufficiency basis, we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain,

709 S.W.2d 175, 176 (Tex. 1986). That is not the situation here regarding the issue of knee and arm injury.

The resolution of the issue concerning the IR of 22% as reflected in the designated doctor's modified, second report is much less clear. Of course, we have held that a designated doctor can, under proper circumstances, amend or modify his report on MMI and IR. Texas Workers' Compensation Commission Appeal No. 93831, decided October 29, 1993; Texas Workers' Compensation Commission Appeal No. 93328, decided June 2, 1993. Here, his amendment or modification resulted from the request of the Commission. The question remains, was he properly directed, under the circumstances, to assess a whole body IR without factoring in the effect or contribution of a previous injury to the same area of the back?

An impairment rating under the 1989 Act means the percentage of permanent impairment of the whole body resulting from a compensable injury. Section 401.011(24). Compensable injury is defined as an injury that arises out of and in the course and scope of employment for which compensation is payable. Section 401.011(10). Although the language in the definition of impairment rating and compensable injury seems straight forward, the determination or extent of a compensable injury in a given case is not quite so clear. In rendering an impairment rating under the 1989 Act, a doctor is responsible for rating the compensable injury involved in the particular case and, in doing so, he must also determine, in his professional judgment, what the compensable injury is. This may become particularly difficult where there is a previous injury or condition. Of course, some situations are easy to determine, for example, where a previous injury is concerned with a completely different area of the body and has no connection with a current compensable injury. Where the compensable injury in question is to the same area of the body and involves the same type of injury and amounts to an aggravation or exacerbation of an earlier injury or condition, the lines become somewhat blurred. That was the precise situation here where the claimant injured and underwent surgery for the same area of his back on both the current occasion and in the previous compensable injury. (That is not say that any injury to the same area of the body must necessarily aggravate a prior injury as we determined in Texas Workers' Compensation Commission Appeal No. 93246, decided May 10, 1993). Under such circumstances as here, the focus is on the extent of the claimant's impairment for the current compensable injury which although an injury in its own right, aggravated or exacerbated the prior injury. *See* Texas Workers' Compensation Commission Appeal No. 93454, decided July 21, 1993; Texas Workers' Compensation Commission Appeal No. 92654/92655 decided January 22, 1993. For that matter, although it was not developed in the evidence, a reasonable inference may well rise that if the prior back injury and laminectomy had not occurred, the current compensable injury might not have been as extensive as it turned out to be.

In its position at the hearing and again on appeal, the carrier would require that any effects of a prior injury be discounted in the assessment of impairment rating for the instant compensable injury. We have held that such is not the case under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93889, decided November 17, 1993;

Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993. Rather, as we observed in Appeal 93272, a carrier seeking contribution for the effects of a prior compensable injury can do so under the provisions for contributing injuries as set forth in Section 408.084:

(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.

If, as carrier asserts, the effects of a prior injury were always required, regardless of the circumstances surrounding the injuries in issue, to be discounted in the assessment of impairment, Section 408.084 would seem to be superfluous. We have not and do not so hold. Texas Workers' Compensation Commission Appeal No. 93695, decided September 22, 1993. Therefore, we find no basis to disturb the determination of the hearing officer in according presumptive weight to the second, modified report of Dr. O.

Concerning the issue of contribution, which was specifically raised in this case, we are not able to determine the basis for the hearing officer's finding that "there was insufficient medical evidence to show that Claimant's (year) compensable injury contributed to the whole body impairment assessed as a result of Claimant's (date of injury), injury." The only medical evidence we find in the record specifically addressing this matter is the first report of Dr. O which reports and analyzes a 13% impairment from the (year) back injury. Why this report from the designated doctor, unrebutted by other medical evidence (although it was not entitled to presumptive weight for this purpose), is deemed insufficient is not at all clear to us. As we stated in Texas Workers' Compensation Commission Appeal No. 92549, decided November 24, 1992, a prior or contemporaneous contributing injury can be considered even though it may not be documented under the provision of the 1989 Act. It does need to be recorded in medical records but does not require a prior impairment rating, only that there is some indication that there was at least anatomic or functional abnormality or loss reasonable presumed to be permanent. Appeal 92549, *supra*. Given the report of Dr. O concerning impairment for the prior injury, the absence of contrary medical evidence on the issue, and the uncertainty we have of the basis for the hearing officer's finding and conclusion on this issue, we reverse and remand for further consideration and development of evidence, as deemed appropriate and necessary by the hearing officer, consistent with this opinion. 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 Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge