APPEAL NO. 93246
FILED MAY 10, 1993

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1993). On March 10, 1993, a contested case hearing was held. He (hearing officer) determined that appellant (claimant) had zero percent impairment as a result of his compensable injury of _____. Claimant asserts on appeal that the report of the designated doctor did not follow correct procedures and did not consider that the compensable injury aggravated claimant's condition. Respondent (carrier) replied that no evidence was presented that the designated doctor did not follow the correct AMA guidelines and points out that only two doctor's opinions were provided, the designated doctor's and the treating doctor's; the hearing officer made a factual determination based on sufficient evidence.

DECISION

Finding that the decision of the hearing officer is supported by sufficient evidence of record, we affirm.

Claimant, on _____, while refueling an airplane, slipped and fell striking his left knee on concrete. The medical records indicate no twisting of the knee or blow struck to the side of the knee. An x-ray showed no fracture. The initial medical report indicated that the claimant fell and landed on the left knee; it also showed that results of x-ray showed "mild degenerative changes." The x-ray report itself of _____, stated that the left knee showed "degenerative changes with question of a tiny loose body seen. . . ." On November 12, 1991, the claimant underwent arthroscopic surgery by Dr. C who found a tear of the medial meniscus (cartilage) and removed fragments thereof. Dr. C also repaired a degenerative tear of the lateral meniscus. The operative report of Dr. C concluded by saying that he expected the claimant "to obtain good short term relief . . . ," but, "[o]ver the long term, the degenerative changes noted will be progressive in nature and may indeed cause further problems."

Prior to the injury in question, claimant had had surgery entailing cartilage removal and ligament reconstruction in 1983 followed by a second attempt at reconstruction in 1985. The claimant was out of the state at the time of the hearing and his attorney appeared on his behalf. There was no witness testimony. All documentary evidence presented as to the sole issue of impairment rating was of a medical nature, either medical records or reports of medical personnel on Texas Workers' Compensation Commission forms.

Impairment was addressed by Dr. C who found that maximum medical improvement (MMI) was reached on April 30, 1992 with 24 percent whole body impairment. In item 15 of the TWCC Form 69, Dr. C states "torn meniscus" 20 percent; "arthritis" 15 percent; "amterior (sic) cruciate ligament loss" 15 percent; and "partial loss of flexion" 11 percent, for a total of 61 percent from which the 24 percent whole body rate was reached. (Note

that Dr. C had described in his operative report a medial meniscus tear and a degenerative tear of the lateral meniscus. On the TWCC-69 he does not disclose which meniscus is torn or whether he is referring to both, but in a note dated the same day as the date of MMI, he refers to the torn cartilage as "torn menisci" for 20 percent indicating that he was considering both tears.) Claimant received 18 weeks of impairment income benefits prior to this hearing.

A designated doctor was appointed by the Commission. The hearing officer's opinion treats this designated doctor as selected by the Commission as opposed to having been selected by the parties and there is no evidence in the record to contradict that interpretation. The designated doctor was Dr. S, orthopedic surgeon, who states in a letter dated July 31, 1992, that he evaluated claimant that day. His short letter indicates that he considers the present knee problem to be "old, chronic changes. . . ." He asks for records of the prior surgeries to "corroborate my opinion," which he indicated would result in a low impairment rating in regard to impairment related to this injury.

The designated doctor, consistent with his letter of July 31, 1992, certified on the TWCC-69 that MMI was reached on April 30, 1992, but notes that he awaits prior medical records to assess an impairment rating. His evaluation of the claimant, reported on the TWCC-69 was adequate, listing various tests performed and their results along with his observations of degenerative, sclerotic, and arthritic changes in the knee. In an addendum dated November 11, 1992, the designated doctor, after reviewing claimant's prior medical records, said that they confirmed his evaluation that "the overwhelming majority of his symptoms are related to preexisting degenerative changes." He added that the current injury was "likely cared for with the arthroscopy provided by [Dr. C]." He assessed zero percent impairment "on the basis of this injury."

Counsel for appellant argued at the hearing that there was a question of whether the correct AMA guidelines were used, that there was no issue of contribution, and that the designated doctor did not take into account aggravation of prior injuries by the current injury. As pointed out by the carrier's response, Texas Workers' Compensation Commission Appeal No. 92393, dated September 17, 1992, said:

> In the absence of an issue on impairment rating that is based on the failure of a doctor to use the AMA guides in determining impairment, or in the absence of evidence adduced at the hearing that the doctor assigning an impairment rating did not use the AMA guides, the hearing officer should not require a party to present evidence that the AMA guides were used when the doctor's assigned impairment rating is reported on a Commission prescribed TWCC-69 form.

With no issue that the impairment rating was incorrect because the correct guides were not used and with no evidence presented that such guides were not used, the hearing officer did not err in considering the report of the designated doctor.

Claimant's counsel asserts that the designated doctor did not take into account any aggravation or acceleration of old injuries and that "contribution" procedures in the 1989 Act were not followed. As stated, claimant fell on _____ and MMI was found on April 30, 1992. The only issue is as to impairment rating; there is no issue of whether the claimant was injured in the course and scope of employment.

The designated doctor said that "the overwhelming majority of his symptoms are related to preexisting degenerative changes, as a result of his pevious (sic) tears in the anterior cruciate ligament, medial collateral ligament, and partial menisectomy. I feel that any injury sustained on account of his present Workman's Comp. injury was likely cared for with the arthroscopy provided by [Dr. C]." Did the designated doctor overlook aggravation? While the records provided by claimant are difficult to read in places, several are not and include:

(1) Initial x-ray of _____, which showed "(d)egenerative changes with question of a tiny loose body seen on the frontal film only."

(2) Operative report of Dr. C of November 12, 1991.

a. The medial meniscus was torn--fragments were removed at surgery. (This tear could be the result of the fall in ____.)

b. The lateral meniscus was described as, "degenerative inner rim type tear lateral meniscus was noted and resected. . . ." (There was no comment such as that degenerative tearing had occurred through 3/4 of this cartilage with the final 1/4 torn more recently.) This cartilage is not the medial meniscus referred to in "a" above.

c. There were also chondromalacic changes noted.

d. "Gross scarring postoperative was noted throughout the knee."

"PROGNOSIS: I expect the patient to obtain good short term relief with return to walking activities in a 4-6 week period of time, possible return to work within six weeks. Over the long term, the degenerative changes noted will be progressive in nature and may indeed cause further problems." (emphasis added.)

These records do not point to aggravation of existing injuries found at surgery. The designated doctor is a medical doctor and is allowed to give an opinion as an expert. *See* Carr v. Radkey, 393 S.W.2d 806 (Tex. 1965). He does not decide whether an injury aggravated a prior injury--the hearing officer is the finder of fact. (*See* Article 8308-6.34(e) of the 1989 Act.) The 1989 Act does not restrict the hearing officer to finding a particular

kind of injury only if some doctor or designated doctor puts that injury in a particular category. The hearing officer made no finding of aggravation. Had he done so, he could have sent the report back to the designated doctor to assess impairment consistent therewith. *See* Texas Workers' Compensation Commission Appeal No. 92617, dated January 14, 1993, in which the hearing officer sent a report back for the designated doctor to disregard a particular injury.

Apparently the claimant's counsel wants the Appeals Panel to surmise that any injury to the same area of the body must aggravate a prior injury. Such speculation may be questionable, but if done, it is for the hearing officer as finder of fact to make that call--he did not find aggravation. In this case, while the knee was involved in all instances, the current injury was to the medial meniscus whereas prior injuries were to ligaments and prior surgery had removed some cartilage; the surgery in 1991 found extensive degenerative changes. Do the medical records so forcefully show aggravation that the decision of the hearing officer to make no finding of aggravation is against the great weight and preponderance of the evidence? No.

Even had there been a finding of injury aggravating a past injury, that would not resolve the question of impairment, which was the issue at this hearing. The 1989 Act does not say that the designated doctor must figure impairment without consideration of cause. On the contrary, Article 8308-1.03(24) says, "[i]mpairment 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." (emphasis added) Article 8308-1.03(25) says, "[i]mpairment rating means the percentage of permanent impairment of the whole body resulting from a compensable injury." (emphasis added.) If the designated doctor is to figure impairment without consideration of cause, the current TWCC-69 may need revision since it states, "[i]mpairment rating shall be based on the compensable injury alone. (emphasis added.)

Under the law prior to the 1989 Act, impairment was not the criteria, incapacity was. Even under that standard, Boone v. T.E.I.A., 790 S.W.2d 683 (Tex. App. Tyler 1990, no writ) indicates even that where a prior injury is aggravated, incapacity was a separate question. The court quoted the following in affirming the trial court decision allowing only temporary incapacity:

> Dr. McCarthy testified that Boone, a 65 year-old male, was suffering from a degenerative disease in his lower back at the time he sustained the injury, which was aggravated by the strain injury Boone suffered while on the job with Central. (emphasis added.) McCarthy, when asked on direct examination "all right. In other words, would that [on-the-job] injury be a cause of the disability that he suffers today, in your opinion?" In reply, Dr McCarthy said, "Well, I think in all probability sufficient time has elapsed for him to have, in effect, recovered from the strain injury, but I think he remains symptomatic because of the preexisting degenerative disease in his

back." No other expert medical testimony was adduced at trial. The weight to be given McCarthy's testimony or any portion thereof was for the trial jury to assess.

Claimant's counsel also indicates that contribution procedures were not used. Transport Ins. Co. v. Mabra, 487 S.W.2d 704 (Tex. 1972), states that contribution under the prior law is used to "diminish" the recovery or to "reduce" the recovery. In the case before the Appeals Panel, there was no recovery for impairment, so there is no contribution to consider. In Claridy v. T.E.I.A., 795 S.W.2d 228 (Tex. App.-Waco 1990, writ denied) the principle behind contribution is said to be to prevent double recovery by the employee and to reduce the carrier's liability to the extent of the injury insured. The Claridy court, in discussing the case at the trial court level, showed that the jury first found that the injury was a producing cause of incapacity and then found contribution by another injury. This court also said the question is one of fact for the jury. In the case before us on appeal, there has been no recovery of impairment benefits based on the present injury causing impairment from which to reduce a certain part for past injuries.

As stated, even if evidence had been presented that some acceleration of existing degenerative changes occurred from the fall in _____, the hearing officer, as finder of fact, is responsible for judging the weight and credibility of that evidence. In addition, Article 8308-4.26(g) of the 1989 Act provides for a presumption to be applied that the designated doctor's report should be the basis for an impairment rating (not for a determination as to injury) unless the great weight of other medical evidence is to the contrary. The hearing officer applied that standard in his Finding of Fact No. 13, which said that the great weight of other medical evidence was not contrary to the designated doctor's report. That finding is supported by sufficient evidence of record.

The decision and order of the hearing officer are affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I would reverse and remand this case for further development and consideration of the evidence, based upon two points raised in the appeal: that the procedure for following contribution for prior injuries (as envisioned under Article 8308-4.30) does not appear to have been followed, and further that it cannot be determined if the designated doctor considered that aggravation or exacerbation of any prior conditions or injuries became part of the "compensable injury" in this case.

At the heart of this case is how one interprets the definition of "compensable injury." I would accord this a liberal interpretation which I believe comports with the remedial purpose of workers' compensation laws. *See* Bailey v. American General Insurance Co., 279 S.W.2d 315 (Tex. 1955); *see also* Texas Workers' Compensation Commission Appeals Decision 91001, decided July 31, 1991. Therefore, when a worker falls on his knee in the course and scope of his employment and is entitled to compensation, he has sustained a "compensable injury" to the knee within the meaning of Article 8308-1.03(10). He has sustained damage to the "physical structure" of that knee. I do not believe he has the further burden, in the face of this, to separately go through each ligament and cartilage to prove that an enhancement or aggravation exists in the same location of the body that was compensably injured, simply because he had a preexisting condition. Such previous conditions or injuries do not, as we've said many times, preclude compensability. Pacific Employers' Insurance Co. v. Solomon, 488 S.W.2d 189 (Tex. Civ. App.-Texarkana 1972, writ ref'd n.r.e.).

It is within the scope of the doctor's expertise to assess impairment on the knee injury. Whether or not the full extent of the injury is "compensable" is a legal determination, not a medical one. To the extent that the carrier then wishes to argue that the "sole cause" of the impairment relates to preexisting conditions, and that the injury was not a producing cause, I believe it has this burden. *See* Oswald v. Texas Employers' Insurance Ass'n, 789 S.W.2d 636, 639 (Tex. App.-Texarkana 1990, no writ). Or, should the carrier wish to seek contribution to the cumulative injury for the effect of prior compensable injuries, it must do so under Article 8308-4.30. Carey v. American General Fire & Casualty Co., 827 S.W.2d 631 (Tex. App.-Beaumont 1992, writ denied). I do not believe that the definition of compensable injury represents a substantive change to the old law such that it allows a doctor to "front end load" contribution or sole cause out of an impairment rating.

When the claimant argues that "contribution" is not in issue, the well-taken essence of this complaint is that the 1989 Act does not allow contribution to be deducted at the impairment rating level by the designated doctor. I agree. If the legislature intended the very strict interpretation afforded to the term "compensable injury" as set out in the majority opinion, I question when, under such rationale, Article 8308-4.30 would ever apply. If the cumulative affects of several injuries can be ignored by doctors who are left free to

read compensable injury in its literal, diagnosis-specific sense, there would never be anything to "contribute," because the doctors will have already deducted such injuries from the impairment rating as not compensable.

It is worth noting that one of the architects of the 1989 Act, Senator John Montford, has opined in his treatise A Guide to Texas Workers' Comp Reform, ' 4B.30(a), pg. 4-133, that the appropriate application of Article 8308-4.30 is to reduce the amount of the benefit, not the rating itself. (He also notes on page 4-113, an opinion that contribution cannot be taken out of impairment income benefits without a benefit review conference and determination by the Commission.) I agree with the majority opinion that issues of contribution, aggravation, and extent of a compensable injury should be left to the decision of the hearing officer. These legal issues should not, I believe, be left to the designated doctor to determine through a report that is given statutory presumptive weight, an obligation the Appeals Panel has called upon hearings officers to rather strictly enforce, notwithstanding their discretion under Article 8038-6.34(e). Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992.

The majority opinion notes a dearth of evidence of aggravation. Assuming for purposes of argument that the claimant had that burden in this case, I disagree. Of course, it would have been stronger for the claimant to testify in his own behalf. However, looking at what was in evidence, the designated doctor refers to what he believes to be the compensable injury as "superimposed" on a prior condition. He further records his understanding that the claimant denied instability to his knee prior to his _____ accident. He refers to "changes" he observes in claimant's knee. The degenerative changes are described by the medical evidence in total as "mild" or "early" (notwithstanding the hearing officer's characterization of degenerative changes as "advanced"). I think the prospect of an aggravation is written all over this record.

What I cannot derive in reviewing the designated doctor's opinion is whether he understood that he was free to consider as part of the compensable injury the extent to which the_____ accident may have exacerbated the preexisting conditions, or caused them to become symptomatic. Does he intend to say, as is the practical affect of the hearing officer's decision, that the claimant's knee was in the same shape it would have been even if the August accident and surgery had never occurred? Dr. C, another orthopedic surgeon, filled out the same TWCC-69, with the same cautionary note about restricting the rating to "compensable injury," and found a 24 percent impairment, a percentage the designated doctor says he doesn't dispute. The carrier itself had a five percent reasonable assessment (although the basis for this is not in the record). Thus, I find no factual basis for the observation of the hearing officer in his discussion that Dr. C "obviously" did not base his impairment rating on the compensable injury alone, and that

the designated doctor did, because there is essentially nothing to tell us what either doctor thought a "compensable injury" was. I'd remand the case so that the hearing officer could determine if the designated doctor properly understood what constitutes the scope of a "compensable injury," and whether aggravation of the preexisting injuries occurred.

_____
Susan M. Kelley
Appeals Judge