APPEAL NO. 93784

This appeal is brought pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 9, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether appellant's (claimant's) osteomyelitis was related to an on-the-job injury of (date of injury), and whether the claimant reached maximum medical improvement (MMI), with an eight percent impairment rating. The hearing officer found that the osteomyelitis was not related to the injury of (date of injury), and that claimant reached MMI on December 8, 1992, with an eight percent impairment rating as certified by the Texas Workers' Compensation Commission (Commission) selected designated doctor. Claimant, on appeal, disagrees with these determinations. Carrier urges affirmance based on the failure of the claimant to meet his burden of proof that his injury of (date of injury), caused or aggravated pre-existing osteomyelitis and that the great weight of the medical evidence is not contrary to the findings of the designated doctor.

It is not disputed that the claimant on (date of injury), suffered a compensable injury to his back when his right foot slipped between the truck and the loading dock while unloading a truck for his employer. (Dr. S), the Commission selected designated doctor, diagnosed spondylosis with an MMI and impairment rating as noted above. The claimant argues that this injury also caused, or at least aggravated, osteomyelitis in his right ankle which in either case is a compensable injury, but was not considered by Dr. S. He further contends that he has not reached MMI because he is still undergoing treatment for his ankle and it may require amputation.

DECISION

The decision of the hearing officer is affirmed.

This evidence in the record consists of the testimony of the claimant and the reports of Dr. S and various treating doctors. Records of the local hospital district disclose that the claimant presented himself for treatment on January 21, 1992, with a complaint of "massive bruising" of the right ankle which he described as a blood vessel problem. He was given antibiotics; his foot and ankle were wrapped in an elastic stocking; and he was referred for further treatment. A progress note of February 10, 1992, places the onset of the claimant's ankle condition at one and one-half years prior when his foot was hit with a pipe. On (date), he was diagnosed by hospital district doctors as having presumed chronic osteomyelitis. This diagnosis was confirmed on July 21, 1992, and it was noted that claimant stated he has had trouble walking on this right foot since the compensable injury in (month year).

(Dr. D), claimant's treating physician for his complaints of back pain as a result of the (date of injury), accident, referred claimant to a specialist and in a note of May 19, 1992 stated:

> I have sent [claimant] to [Dr. B] who is an orthopedic surgeon and also a specialist in the foot and ankle because this patient does have an osteomyelitis of the

calcaneum and talus and the possibility of surgery is there. Again, in my opinion this is a preexisting condition, but this has been aggravated by the injury which she (sic) sustained on (date of injury). Unfortunately I will not be in a position to say how much aggravation has been done by this injury, how much was originally present. . . .

In a letter of June 24, 1992, Dr. D states that:

As far as the injury on (date of injury), in my opinion, within reasonable medical probability this injury caused some soft tissue injuries to the ankle and also must have caused some flare-up of the osteomyelitis. . . .

He confirms this in a later letter wherein he states the osteomyelitis "could have been aggravated or it could have caused flare-up of the osteomyelitis by this accident."

Dr. B, the claimant's treating physician for the osteomyelitis, notes in a consultation of May 5, 1992, that there was no evidence of a general venous insufficiency as the source of the problem and concludes in a letter of (date):

I do not feel that any ankle sprain that would have occurred on (date of injury), could have aggravated his osteomyelitis nor is it the cause of the surgical procedures that I have recommended.

(Dr. W), a referral physician for an evaluation for the claimant's back problems, noted on May 6, 1992, that the accident of (date of injury), "was a minor injury compared to the infection [of the ankle]." Dr. M, a consultant in vascular diseases, states that the sprain of (date of injury), made the ankle "situation worse."

Dr. S stated on March 24, 1993, that the "osteomyelitis was not aggravated by the compensable injury" to the back, right knee and ankle on (date of injury).

The claimant, in his testimony and on appeal, contends that the accident on (date of injury), caused not only a back, ankle and knee injury which was assessed by Dr. S, but also caused his osteomyelitis. Up to this time, he thought he was suffering only from vein problems in his right ankle. It was not until after (date of injury), that he was told he had osteomyelitis. He believes Dr. S's determination of MMI and impairment rating is premature because his ankle problems have not yet been resolved.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1962, no writ). An injury is defined in Section 401.011(26) of the 1989 Act as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." An ordinary disease of life to which the general public is exposed is

not compensable. *See* Texas Workers' Compensation Commission Appeal No. 93744, decided October 1, 1993. To be compensable, the claimant must link the alleged injury to an event at the work place and establish a causal relationship between the injury and the employment. Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. Injury may be proved by the testimony of the claimant alone and medical evidence is not required to establish that a particular job-related activity caused the claimed injury, except in those cases where the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal connection. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility and the inferences to be drawn therefrom. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. Aggravation of a pre-existing condition can be a separate and compensable injury even though the underlying condition that was aggravated may not be compensable. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. However, the mere occurrence of a new or second injury to the same area of the body does not necessarily aggravate a prior injury and become compensable. *See* Texas Workers' Compensation Commission Appeal No. 93246, decided May 10, 1992. An "aggravation" to be compensable must be a new injury and not merely a transient increase in pain from an existing condition. *See* Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. When reviewing a hearing officer's decision 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); Pool v. Ford Motor Company, 715 S.W.2d 629, 630 (Tex. 1986). In the case before us, the claimant asserts a causal connection between osteomyelitis and the (date of injury), accident. Medical evidence, however, is conflicting.[1] In this case, the evidence discloses that the claimant's right ankle was diseased well before (date of injury). It was infected and showed puncture wounds, but was only confirmed after surgical invasion in June 1992 to be osteomyelitis. The hearing officer, as finder of fact, determined that the claimant did not aggravate a pre-existing condition of osteomyelitis. Drs. B and S opined that there was no connection. Dr. D used the word "aggravation" in the sense of flare-up to describe the effect of the (month) incident on the claimant's pre-existing condition. Dr. M said only that the accident made the condition "worse." The hearing officer reviewed this evidence and concluded that there was no compensable aggravation.[2] Under these circumstances, we

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[1] In reviewing this evidence, we note that the opinion of Dr. S, the designated doctor, carries no presumptive validity since this is not a question of MMI or impairment rating. *See* Texas Workers' Compensation Commission Appeal No. 93734, decided April 30, 1993.

[2] The abrasion of the ankle caused by the (date of injury), incident has been treated and apparently resolved.

are unwilling to conclude that the decision of the hearing officer that the compensable injury of (date of injury), did not cause or aggravate the osteomyelitis is not supported by sufficient evidence.

The claimant also disagrees with Dr. S's findings of MMI and impairment rating and believes that his osteomyelitis was caused by, or at least aggravated by, the (date of injury), incident. Section 401.011(30) defines MMI for purposes of this appeal as "the earliest date after which, based on reasonably medical probability, further material recovery from or lasting improvement to an injury can no longer reasonable be anticipated. . . ." The achievement of MMI and degree of impairment is a medical determination. *See* Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992. Because the hearing officer found that the injury of (date of injury), neither caused nor aggravated the claimant's osteomyelitis, it was not part of the "compensable injury" to be considered by the designated doctor in arriving at his determinations. A determination of MMI and impairment rating by a Commission appointed designated doctor is presumptively valid "unless the great weight of the other medical evidence is to the contrary." Section 408.122(b) and 408.125(e).

The hearing officer, after a review of the evidence, found that the great weight of the other medical evidence in this case was not contrary to Dr. S's certification of MMI and impairment rating and therefore gave his report presumptive weight. The hearing officer determined that the claimant reached MMI on December 8, 1992, with an eight percent impairment rating. The evidence is sufficient to support the hearing officer's decision on this issue.

The decision of the hearing officer is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge