APPEAL NO. 93861

This appeal arises 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 (CCH) was held in this case on September 1, 1993, in (city), Texas, with (hearing officer) presiding. The issues at the CCH were: 1. whether the respondent's (claimant herein) left knee injury was a natural result of his compensable neck injury on (date of injury); 2. what was the claimant's impairment rating as a result of his compensable injury on (date of injury); 3. whether the appellant (a statutorily self-insured political subdivision) (carrier herein) was entitled to contribution, pursuant to Article 8308-4.30 (1989 Act) (now codified as Section 408.084). The hearing officer ruled that the injury to his left knee, resulting from a work hardening program, which was prescribed to cure and relieve the effects of his compensable neck injury, was a natural result of his neck injury. The hearing officer concluded that as result of the combined injuries to the claimant's neck and knee he suffered a 20% physical impairment and that the carrier was not entitled to contribution for a prior injury pursuant to the 1989 Act.

The carrier appeals on several grounds. The carrier argues that the hearing officer erred in finding the claimant's left knee injury was compensable, in finding an impairment rating which included impairment to the claimant's left knee, and in finding that the carrier is not allowed to reduce the impairment rating based upon the claimant's prior condition. The claimant did not file a response to the carrier's request for review.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

The facts of the case are accurately set out in detail in the hearing officer's decision, and we adopt his statement of the evidence for purposes of our decision. Briefly, the claimant suffered a compensable neck injury on (date of injury), while working as a fireman for the self-insured carrier. On July 24, 1991, (Dr. C) performed a C6-7 diskectomy and fusion.

In February 1992, Dr. C prescribed a work hardening program to relieve the effects of the claimant's neck injury and to assist the claimant in returning to the work force. The claimant testified that he injured his left knee while involved in aggressive physical therapy as part of the work hardening program. The injury to the claimant's left knee occurred while he was performing knee exercises under the supervision of a physical therapist.

A dispute arose concerning the claimant's impairment rating as result of his compensable injury, and the Texas Workers' Compensation Commission (Commission) appointed (Dr. O) to serve as the designated doctor. On November 18, 1992, Dr. O, on a Report of Medical Evaluation (TWCC-69), assigned the claimant a 13% impairment rating as a result of the claimant's compensable neck injury of (date of injury). At the request of the Commission the claimant returned to Dr. O on January 4, 1993, and had an additional

examination to specifically include any impairment resulting for the claimant's left knee injury. Dr. O gave the claimant an impairment rating of eight percent as a result of the left knee injury which he stated, when combined with the 13% impairment due to his neck injury, translated into a 20% whole person impairment.

The claimant testified that he had knee surgery on his left knee 25 years ago and that he injured his left knee while serving in the National Guard 20 years ago. The claimant also testifed that his left knee had been asymptomatic for many years and that as a fireman for 23 years he was required to pass, and had passed, annual physical fitness tests.

In Texas Workers' Compensation Commission Appeal No. 93414, decided July 5, 1993, this panel cited with approval the following language from Maryland Casualty Co. v. Sosa, 425 S.W.2d 871 (Tex. Civ. App.-San Antonio 1968, aff'd per curiam, 432 S.W.2d 515 (Tex. 1968)):

> The law is well settled that where an employee sustains a specific compensable injury, he is not limited to compensation allowed for that specific injury if such injury, or proper or necessary treatment therefor, causes other injuries which render the employee incapable of work.

In Appeal No. 93414, *supra*, we affirmed a hearing officer who found that a knee injury caused a subsequent back injury by requiring the claimant to alter his gait, when there was conflicting medical evidence as to causality. Our decision in Appeal No. 93414 is partly predicated on our earlier decision in Texas Workers' Compensation Commission Appeal No. 92538, decided November 25, 1992, cited by the claimant in the present case, and in which we affirmed a hearing officer who found that the claimant's physical therapy treatment for carpal tunnel syndrome had resulted in an injury to her back and hip. Appeal No. 92538 cites our opinion in Texas Workers' Compensation Commission Appeals Panel No. 92540, decided November 19, 1992, where we affirmed the decision of the hearing officer that a heart attack which took place during surgery for the claimant's compensable back surgery was itself compensable. Further, we affirmed the hearing officer in Texas Workers' Compensation Commission Appeal No. 93664, decided September 15, 1993, who held that the claimant had not yet reached maximum medical improvement (MMI) due to depression resulting from her back and neck injuries. In Texas Workers' Compensation Commission No. 92553, decided November 30, 1992, upon which the carrier relies in the present case, we affirmed a hearing officer who found that the claimant's injury to his wrist and thumb were not caused by a fall at home on his unsteady injured knee.

These cases show that the issue of whether the subsequent injury was caused by the compensable injury, or the proper and necessary treatment of it, is generally one of fact. *See* Texas Workers' Compensation Commission Appeal No. 93672, decided September 16, 1993; Texas Workers' Compensation Commission Appeal No. 93855, decided November 8, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer,

as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. 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 for factual sufficiency of the evidence we should 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard we have held in some cases the evidence to be insufficient to support the finding of the hearing officer that the subsequent injury was caused by the compensable injury or treatment thereof. The carrier relies on one particular such case in its appeal--Texas Workers' Compensation Commission Appeal No. 93574, decided August 24, 1993. In Appeal No. 93574, we reversed the hearing officer's holding that the evidence showed that the claimant was not injured in the course and scope of her employment when she fell coming out of the shower at a YWCA to which she had gone to swim as part of her prescribed post-surgery physical therapy. We stated in Appeal No. 93574:

> We agree with the carrier, in that the evidence in this case indisputably shows that the injury to claimant's back and right knee arose from circumstances--i.e., claimant's fall while coming out of shower--which did not constitute medical treatment for her original injury; no injury was alleged or proven to have occurred during the medical treatment (here, physical therapy) itself.

Clearly, in the present case there was sufficient evidence that it was the physical therapy itself which caused the claimant's injury, and based upon such evidence we will not disturb the finding of the hearing officer. Nor are we persuaded by the argument of the carrier that the therapy the claimant was undergoing was not for his compensable injury, when he was exercising his leg rather than his neck, where the medical evidence showed that the work hardening therapy was prescribed for treatment of the claimant's compensable injury. Further, since there was evidence that the purpose of the work hardening therapy was both to relieve the effects of the claimant's "deconditioning" due to his compensable injury, as well as to prepare him to return to work, the therapy in question clearly meets the definition of medical treatment found in Section 408.021. Work hardening physical therapy also falls within the definition of health care found in Section 401.011(19).

Finally, we find no authority to support the assertion of the carrier that it is not liable for the claimant's knee injury because, as far as the carrier knows, it was not the result of

professional negligence. The carrier also argues that it would be inequitable to require the carrier to bear such a loss without any possibility of subrogation. We simply cannot find any authority to support the carrier's position and the carrier cites none.

The carrier argues that the hearing officer erred in including Dr. O's impairment assessment for the claimant's knee in his impairment rating. The carrier first cites Dr. O's report in which he states that he did not originally rate the left knee for impairment because he felt that any problem with the claimant's left knee predated his injury. The carrier argued that the opinion of Dr. O as designated doctor should have been given presumptive weight in this regard. The opinion of a Commission-selected designated doctor is entitled to presumptive weight on the issues of MMI and impairment. Sections 408.122(b) and 408.125(e). It is not given presumptive weight on the issue of the extent of the injury. *See* Texas Workers' Compensation Commission Appeal No. 93246, decided May 10, 1993. This is a matter of fact to be determined by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 92184, decided June 25, 1992; Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. The evidence in the record that the claimant's left knee problem is an aggravation of the claimant's pre-existing condition is sufficient to support the hearing officer's finding that it is part of the claimant's compensable injury and entitled to be considered in rating his impairment. *See* Texas Workers' Compensation Commission Appeal No. 93695, decided September 22, 1993.

Section 408.084 provides that at the request of the 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 an earlier compensable injury. In the present case the carrier failed to prove the threshold question that the claimant's knee injury 20 years ago was a compensable injury. The only support for carrier's contention of the prior injury's compensability was the argument that since there was evidence it had taken place during the claimant's service in the National Guard it therefore must have entitled the claimant to some type of "Federal compensation." The hearing officer was not persuaded by this argument and we see no reason to overturn his finding that there is insufficient evidence to establish that the claimant sustained a prior compensable injury to his left knee.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

CONCURRING OPINION:

As the well reasoned principal opinion states, the issue of whether a subsequent injury was caused by the compensable injury, or the proper and necessary treatment of it, is generally one of fact. It is axiomatic that factual issues can be, and frequently are, very close calls relying on reasonable inferences from the evidence presented. We have repeatedly held, as stated in the principal opinion, that we will not substitute our judgment for that of the fact finder. We have also observed that the mere circumstance that a different fact finder could have drawn different and equally reasonable inferences from the evidence does not provide a sound basis for reversal. Texas Workers' Compensation Commission Appeal No. 92113, decided May 7, 1992. I view the state of the evidence in this case as being subject to differing inferences, and, although the well reasoned brief of the carrier's counsel certainly finds support in the record, I cannot conclude that the hearing officer's finding is not supported by the evidence of record or is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. That said, this decision should not be construed as standing for the proposition that any post injury physical activity by a claimant even under the general auspices of a health care provider, no matter how attenuated from the original injury, will qualify as being "proper or necessary treatment" flowing from the original injury. I simply cannot say under the circumstances present that the physical activity was too removed from the original injury to preclude recovery.

Stark O. Sanders, Jr.
Chief Appeals Judge