APPEAL NO. 93889

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 14, 1993, in (city), Texas, with (hearing officer) presiding. The sole issue at the CCH was the appellant's (claimant herein) correct percentage of whole body impairment. The hearing officer found that the claimant's correct impairment rating was 11% based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals contending the designated doctor's report failed to fairly evaluate his impairment in compliance with rules set out by the Commission. The claimant also complains that the examination of the designated doctor was inadequate. The respondent (carrier herein) filed no response to the claimant's request for review.

DECISION

We reverse and remand the decision of the hearing officer for further evidence and proceedings in accordance with this decision, finding that the designated doctors's report fails to rate the injury sustained by the claimant in full.

The claimant was injured on (date of injury), when he jumped off a bulldozer onto the ground. The claimant reinjured his left knee which had been twice previously injured and operated upon. As a result of his present injury the claimant underwent an anterior cruciate ligament reconstruction of his left knee on September 18, 1991. His treating doctor, (Dr. S), an orthopedic surgeon at (medical school), certified on a Report of Medical Evaluation (TWCC-69) that the claimant had reached maximum medical improvement (MMI) on February 26, 1993, with an impairment rating of 17%. At the request of the carrier the claimant was examined by (Dr. D) who certified on a TWCC-69 that the claimant reached MMI on March 31, 1993, with an impairment rating of 12%. The Commission selected (Dr. K) as the designated doctor. Dr. K certified on a TWCC-69 that the claimant reached MMI on February 26, 1993, with an impairment rating of 11%.

Dr. K stated in the narrative report of his examination of the claimant as follows:

> I think there is a lot of room for llose (sic) interpretation concerning his impairment rating. I think that the majority of his degenerative arthritis would be from a pre-existing condition. This accident probably aggravated it, therefore I would be inclined to give him a small percentage on this, but I would suggest that most of it was pre-existing. Therefore, I would assign him 5% impairment of that knee based on evaluation of his degenerative arthritic changes. I would assign him 9% impairment based on his ROM of 2-125! (sic). I would assign him 15% based on the ACL reconstruction. These are based on the AMA Guides to Permanent Impairment 3rd Edition. Using the combined values chart this would be a 28% impairment rating on the lower extremity which translates into 11% whole body impairment.

I realize that if you totally look at his knee, you could come up with a higher rating, but I would suggest that a majority of that was from previous injuries and, in my mind, not appropriately considered here.

In the present case we face the same question confronted in Texas Workers' Compensation Commission Appeal No. 93695, decided September 22, 1993. In Appeal No. 93695, a designated doctor, on the face of his report, deducted from his impairment rating the contributing effects of a prior compensable injury. We reversed the hearing officer who had based his finding of impairment on the report of the designated doctor, stating that we believed that the only manner in which this can be done is by Commission action through Section 408.084.

Section 408.084 states 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.

This statute makes it clear that it is the Commission, not a doctor assessing impairment, who will determine the extent to which any contributing compensable injury is one for which the claimant "has already been compensated." *See* Texas Workers' Compensation Commission Appeal No. 93835, decided November 3, 1993; Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993; Texas Workers' Compensation Commission Appeal No. 92610, decided December 30, 1992. By failing to fully assess a rating for the pre-existing arthritis in the claimant's knee, the designated doctor has not provided any information from which the proportionate effects of the prior compensable injury could be ascertained. This is further complicated by the fact that it is unclear from the record as to whether either of the claimant's previous knee injuries were compensable. The carrier is not entitled to any contribution due to a noncompensable injury. Texas Workers' Compensation Commission Appeal No. 93861, decided November 15, 1993.

If neither of the two prior injuries were compensable it would certainly be incorrect for the designated doctor to exclude their effects if they were aggravated by the compensable injury. As we stated in Appeal No. 93695, *supra*:

As we have stated many times, an aggravation of a pre-existing condition is an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). A carrier that wishes to assert that a

> pre-existing condition is the sole cause of an incapacity has the burden of proving this. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

See also Appeal No. 93835, *supra*; *compare* Texas Workers' Compensation Commission Appeal No. 93246, decided May 10, 1993.

We believe that based upon our decision in Appeal No. 93695, *supra*, we must reverse the decision of the hearing officer. We believe that the appropriate course of action is to remand the case so that the designated doctor may reassess the claimant's impairment without factoring out, at this stage, contribution from the prior injuries. The hearing officer may develop other evidence as he deems necessary. Contribution or the extent of the compensable injury has not been raised in this case. Any issue as to contribution must be resolved as set forth by the 1989 Act. Section 408.084.

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.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Thomas A. Knapp
Appeals Judge