APPEAL NO. 94392

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 7, 1994, a contested case hearing was held. The Hearing Officer determined that respondent (claimant) had an impairment rating (IR) of 19%, based primarily on the opinion of the designated doctor, Dr. P. (The parties stipulated that maximum medical improvement (MMI) had occurred on July 29, 1993.) Appellant (carrier) asserts that the degenerative changes in claimant's back should be separated from the compensable injury in reaching the IR. The file contains no reply by claimant.

DECISION

We affirm.

The only issue in this case is IR. Claimant testified that he felt pain in his back on (date of injury), when loading cement sacks at work. Carrier's TWCC-21, Payment of Compensation or Notice of Refused/Disputed Claim, dated August 9, 1993, indicates that claimant's treating doctor, Dr. M, provided an IR of 10%, although no other record in evidence shows such a rating. The carrier's medical examination by Dr. L resulted in zero percent IR. There was no dispute that the Texas Workers' Compensation Commission (Commission) appointed Dr. P as the designated doctor to determine both MMI and IR.

The hearing in this case was very succinct. Carrier disputed the rating of Dr. P as including degenerative changes that were not part of the injury. On cross-examination of the claimant, carrier brought out claimant's weight and raised the question of medical admonition to lose weight as part of treatment. Claimant, 48 years old, also indicated that he had no problem with his back prior to (date of injury). Claimant said that he saw Dr. P several times, mentioning additional testing and the need to return relative to that. Dr. M, the treating doctor, was acknowledged to have ordered tests for claimant and to have prescribed physical therapy.

Dr. P, in his report of claimant's initial visit for evaluation, said that on April 27, 1993, claimant had not reached MMI. He stated:

> He has pronounced degenerative changes present about this lower back region. That is a consequence of age and deterioration, not of trauma. The trauma may represent an injury superimposed on that degenerative process that allowed it to become symptomatic. The contribution of each cannot be meaningfully quantified.

Dr. P then found MMI on July 29, 1993, with 20% IR, made up of eight percent from Table 49 of Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), and 12% based on range of motion limitations. In a letter to the carrier dated August 17, 1993,

Dr. P stated that his position as to this case had not changed as of the time that he found MMI and gave an IR:

> I cannot separate what component of his symptoms is being contributed by the pre-existing degenerative process and what may be being contributed by the traumatic episode.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. She gave presumptive weight to the reports of the designated doctor, Dr. P, in accordance with the criteria provided in Section 408.125(e). She did modify Dr. P's rating of 20% to 19% as a result of applying the Combined Value Chart of the AMA Guides.

The designated doctor is entitled to presumptive weight only in regard to his opinion as to MMI and IR. *See* Sections 408.122 and 408.125. *Also see* Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993, which said that any question of injury is resolved by the hearing officer as finder of fact, and that no presumption attaches to a designated doctor's opinion in regard to injury. Since there was no issue as to injury in this case, and since the hearing officer did not return the case to the designated doctor with instructions to limit the impairment rating, we can imply that the hearing officer determined that this injury aggravated claimant's pre-existing degenerative back condition. *Compare to* Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993, in which the hearing officer made findings of fact and then asked the designated doctor for a new report limited to the injury the hearing officer had found.

An injury that aggravates a pre-existing condition can be a compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 92010, decided March 5, 1992. The carrier accurately argued at the hearing that Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(e) and (g)(2) state respectively that the assigned IR will be "based on the injury," and that the form to be used shall contain an instruction to the doctor that the IR "shall be based on the compensable injury alone." These references to injury, in the Rules, and aggravation, through a prior Appeals Panel decision, provide a rationale for the hearing officer to decide to follow the designated doctor's opinion based on his statement that at this time he could not separate the effect of symptoms based on the precondition from those of the aggravating injury.

In contrast to this case, Texas Workers' Compensation Commission Appeal No. 93539, decided August 12, 1993, considered various aspects of injury and stressed that Section 401.011(24) called for permanent impairment in IR. The opinion stated, "[w]e therefore cannot agree that the designated doctor's opinion is outweighed simply by the diagnosis of the existence of any of these conditions at any point in time." (The designated doctor had not included in the IR any amount for radiculopathy, vertigo, etc.)

Appeal No. 93539, *supra*, shows that the IR is given by a doctor after MMI has been certified, not at the time of the injury or some time in between. *See also* Section 408.123.

Evidence of impairment based on objective evidence must exist. *See* Section 408.122. In this case, the designated doctor relied on objective evidence, including an MRI which showed disc herniation at L4-5 and spinal stenosis. Dr. P's inability to determine from these objective tests that the effect of the injury was no longer present at the time of his impairment rating may be contrasted to that of the designated doctor in Texas Workers' Compensation Commission Appeal No. 93246, decided May 10, 1993; there, cartilage injured on (date of injury), had been successfully repaired but a pre-condition involving ligament problems in the same knee was still present at time of the IR on November 11, 1992. In that case there was zero percent IR "based on the compensable injury alone."

The evidence sufficiently supports the hearing officer's determination that the great weight of other medical evidence was not contrary to the opinion of the designated doctor. With the designated doctor indicating that evidence of the injury of (date of injury), was still present in the IR of July 29, 1993, the IR assigned was consistent with the 1989 Act and the applicable rules. The decision and order that claimant has 19% IR resulting from the (date of injury), injury are not against the great weight and preponderance of the evidence and are affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge