APPEAL NO. 94494
FILED JUNE 6, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was convened in _____, Texas, on December 15, 1993, with (hearing officer) presiding as hearing officer, to determine the sole disputed issue, namely, the whole body impairment rating (IR) of the respondent (claimant) for his uncontested low back injury. The record was closed on March 21, 1994. The hearing officer, finding that the great weight of the other medical evidence was not contrary to the initial report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission), concluded that the claimant reached maximum medical improvement (MMI) on June 30, 1992, with an IR of 21%. At the hearing, the appellant (carrier) urged the hearing officer to reject the designated doctor's 21% IR and adopt the 13% IR determined by the carrier's doctor. The carrier asserted that it disputed the designated doctor's having assigned 11% impairment for abnormal lumbar range of motion (ROM) but not the 10% impairment assigned for claimant's surgically treated disc lesion. After the hearing adjourned but before the record was closed, the designated doctor, responding to the hearing officer's request for clarification, issued a revised report to delete five percent of the ROM impairment he attributed to a congenital spinal fusion and changing claimant's IR to 15%. On appeal, the carrier contends that the hearing officer should have adopted either the revised report of the designated doctor or the report of the carrier's doctor. In his response, the claimant asserts that the hearing officer's decision should be affirmed because the designated doctor's opinion regarding the congenital spinal defect was uncorroborated.

DECISION

Reversed and remanded for further evidence and findings.

In his response, the claimant suggests that the carrier's appeal may be untimely for the reason that he received his copy of the hearing officer's decision on April 7, 1994, whereas the carrier's appeal states that its attorney received her copy on April 11, 1994. The Commission's records reflect that the hearing officer's decision was transmitted by Commission letter dated April 6, 1994, which was distributed to the parties on April 7, 1994. According to the Commission's rules and policy, a copy of the decision was distributed to the carrier's Austin representative in its box at the Commission's central office in Austin on April 7th and the carrier is deemed to have received that copy not later than five days thereafter. It was the date that the hearing officer's decision was placed in the carrier's box at the Commission's central office, not the date the carrier's attorney received a copy, from which the carrier's 15 days to appeal is calculated. *See* Texas Workers' Compensation Commission Appeal No.

93353, decided June 21, 1993, and Texas Workers' Compensation Commission Appeal No. 93804, decided October 22, 1993. The carrier's appeal was due to be filed no later than April 27, 1993. Since it was mailed on April 25th and received on April 26th, it was timely filed.

That claimant sustained a compensable low back injury on [date of injury], was not in dispute. There were no disputed issues concerning the date claimant reached MMI, the extent of his injury, or of the contribution to his impairment of any prior compensable injury. Claimant, the sole witness, acknowledged he was not a doctor and was not familiar with the "Guides to the Evaluation of Permanent Impairment," third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). (*See* Section 408.124 which requires that the Commission, in determining the existence and degree of an employee's impairment, use the AMA Guides).

Claimant, age 53, testified that he injured his low back lifting and carrying heavy dyes at work on [date of injury]; that after initial treatment by Dr. D, he was treated by Dr. A, a neurosurgeon, who said he had an impinged nerve; and that he eventually had surgery at the L4-5 level during which Dr. A removed a disc and Dr. M, an orthopedic surgeon, performed a spinal fusion. The surgical records were not in evidence. Claimant further testified that Dr. A determined that he had reached MMI as of June 30, 1992, with an 11% IR which he disputed because Dr. A did not test him for flexibility and strength, used no device to measure him, and he, claimant, did not know upon what data the 11% IR was based. The only report of Dr. A concerning claimant's IR was an undated Report of Medical Evaluation (TWCC-69) stating that claimant reached MMI on "6-30-92" with 11% IR consisting of eight percent for "Table 49 IID" and three percent for "Table 50 2 Lumbar." Also in evidence was a June 30, 1992, report from the (Clinic 1) stating that on that date claimant was discharged from the work hardening program which Dr. A had prescribed "due to non-compliance with the rules of the program."

The parties stipulated that Dr. B was the designated doctor selected by the Commission to determine when claimant reached MMI and his IR. Claimant said he was examined once by Dr. B on October 6, 1992, that this exam was thorough, that Dr. B used a device to measure him and wrote down the measurements, and that Dr. B had all of claimant's medical records at the time of the exam. Claimant said that although Dr. B told him in the office that his IR would be 22%, Dr. B's report stated it to be 20%, and that later, Dr. B revised it to 21%. Claimant testified that he agreed with Dr. B's 21% IR. In evidence was Dr. B's TWCC-69 dated "10/20/92" with accompanying narrative report of that date. The TWCC-69 stated that claimant reached MMI on "6-30-92" with an IR of 20%.

A Commission benefit review officer wrote Dr. B on January 29, 1993, asking that he delineate the 20% IR by specific body part and refer to the tables in the AMA Guides. Dr. B's second TWCC-69, dated June 11, 1993, stated claimant's IR as 21%. In his accompanying narrative report of June 10, 1992, Dr. B indicated that 10% of the rating was for claimant's surgically treated disc lesion with residual symptoms (AMA Guides, Table 49); four percent was for abnormal lumbosacral flexion and three percent for abnormal lumbosacral extension (Table 56); and that pursuant to Table 57, claimant had two percent impairment for left side bending and two percent for the right side. He went on to state that his original calculation of 20% was in error because these components of the rating totaled 21% using the combined values chart in the AMA Guides. A letter to the carrier from Dr. O, dated September 8, 1993, pointed out that Dr. B's 20% IR was miscalculated and should be 21%.

Despite the fact that claimant had already been examined by a designated doctor, who was selected by the Commission to resolve the MMI date and IR, the Commission, at the request of the carrier, directed that claimant be examined by Dr. O by its order of October 26, 1993, which stated that the carrier had not yet had its choice of examining doctor. Claimant testified that he was personally examined by Dr. O and was also measured by other personnel. Dr. O's TWCC-69 of December 15, 1993, stated that claimant reached MMI on "6-30-92" with an IR of 13% comprised of 10% for "surgery lumbar spine with residual symptoms" and "3%" for "lumbar [ROM]." In his narrative report of his December 8, 1993, examination, Dr. O's reviewed claimant's medical records stating that a November 11, 1991, lumbar myelogram indicated "a partially sacralized L5 vertebral body;" that a herniated disc at L4-5 caused mild compression of the right L5 nerve root; that on November 25, 1991, claimant underwent facetectomies at L4-5, a total discectomy at L4-5, and interbody fusion; and that x-rays of January 10, 1992, showed posterior lumbar interbody fusion at L3-4 and posterior fusions bilaterally at L3 through S1. Upon physical examination, Dr. O found that claimant's "[ROM] of the lumbar spine was slightly decreased in flexion." Dr. O referred claimant to the (Clinic 2) for impairment and disability evaluation. The records of that evaluation indicated that claimant's lumbar ROM studies were invalidated by the straight leg raising (SLR) test.

In a TWCC-69 dated January 12, 1994, Dr. B revised claimant's IR to 15% stating he felt one-half of claimant's abnormal ROM "to be related to congenital abnormality." In his letter of January 11, 1994, to the hearing officer, Dr. B stated that in his initial calculation of claimant's IR, he had not allowed further impairment under Table 49 II E for additional spinal levels because, in his opinion, claimant "had a congenital fusion of the other level in question." He went on to explain that he had failed to carry through with that rationale, however, when determining claimant's ROM impairment to

be a total of 11%; and, that he was now reducing the 11% for ROM to six percent, which yielded an IR of 15%. Dr. B explained it thusly:

Again at this time, carrying through my original thoughts that he had a congenital sacralization of the first lumbar segment, I would have to say half of his decreased [ROM] he demonstrates now was actually a pre-existing condition. Therefore, I would still allow the 10% impairment by Table 49, but I am going to revise my impairment for his [ROM] to be 6% instead of the 11% as I had previously calculated. Again, this is based on the opinion that some of his altered [ROM] was pre-existing, and to the best of my ability, I think assuming half of it is as a result of his present injury is a fair approximation. Therefore, taking the 10% and 6%, going to the Combined Value Charts, this would calculate to be a 15% impairment of the whole person as opposed to the previously determined 21% as I had stated.

The hearing officer found, among other things, that it was incorrect for Dr. B to revise the 21% IR to 15% based on his opinion that some of claimant's altered ROM was due to a pre-existing condition, and that claimant's correct IR was the 21% first determined by Dr. B. The hearing officer also found that, notwithstanding that he was the treating doctor and surgeon, Dr. A's TWCC-69 was not properly completed in that Item 13 merely stated: "All information has previously been reported." The hearing officer further found that Dr. O's report was contradictory in assigning three percent for lumbar ROM when another part of his report stated that claimant's lumbar ROM testing was invalidated by the straight leg raise testing. In this regard, however, we note that Dr. O's TWCC-69 assigning three percent for ROM was signed later in time than the narrative report. The hearing officer concluded that claimant reached MMI as of June 30, 1992, with a 21% IR.

The hearing officer relied on two Appeals Panel decisions in finding that the designated doctor erred in reducing claimants' IR to reflect the existence of a pre-existing condition, Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993, and Texas Workers' Compensation Commission Appeal No. 93889, decided November 17, 1993. In Appeal No. 93272, *supra*, the carrier wrote the designated doctor after he had assigned the employee a 16% IR for his back injury, pointed out that the employee had had a prior compensable back injury resulting in a seven percent IR, and inquired about reducing the 16% IR to reflect the prior injury, whereupon the designated doctor reduced the IR to six and one-half percent. The hearing officer adopted the designated doctor's original IR, finding, correctly, that no disputed issue was in the case concerning the contribution to the impairment from a prior compensable injury. The Appeals Panel affirmed. *See* Section 408.084 regarding contributing injuries. *And see* Texas Workers' Compensation Commission Appeal No. 93695, decided September 22, 1993, where the designated doctor basically deducted

the contributing effects of a prior compensable injury from the IR and the Appeals Panel remanded stating 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 a claimant `has already been compensated.'" In Appeal No. 93889, *supra*, the designated doctor assigned the employee an IR of 11% for a left knee injury and stated that he recognized that the employee had a pre-existing arthritis condition which he felt the accident "probably aggravated," and said he would give him "a small percentage on this" but suggested that "a majority of that was from previous injuries . . ." In reversing and remanding, the Appeals Panel stated that "[i]f 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 [Emphasis supplied]."

The problem with the case we consider is that the evidence does not indicate whether claimant's pre-existing spinal condition at the L5-S1 level was a part of his compensable injury and, thus, entitled to be considered in the calculation of his IR. The 1989 Act defines "impairment" as "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). Section 408.122(a) provides, in part, that an IR must be based upon "objective clinical or laboratory finding." The TWCC-69 provides, pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(g) (Rule 130.1(g)), that an IR shall be based on the compensable injury alone. The Appeals Panel held in an early decision that an injury that aggravates a pre-existing bodily infirmity or condition is compensable provided that an accident arising out of employment contributed to the incapacity, and that the issue of whether the employment aggravated an internal weakness or disease producing any incapacity or compensable injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 91091, decided January 13, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 92010, decided March 5, 1992, wherein the Appeals Panel affirmed the hearing officer's decision that the employee's pre-existing spondylolisthesis was aggravated by his work-related injury. In Appeal No. 93695, *supra*, the opinion stated: "Observations that the inception of a condition is congenital or that it `related' to a prior injury do not standing alone rule out `aggravation' by way of the current and undisputed fall."

From the records in evidence, it appears that claimant's diskectomy was at the L4-5 level, that he had fusions at the L3-4 and L4-5 levels, and that he had congenital fusion at the L5-S1 level. The designated doctor determined that claimant had abnormal lumbosacral ROM which should be a component of his IR but in his revised report deducted certain of the ROM impairment as attributable to the pre-existing condition. If, however, the pre-existing condition was a part of the compensable injury, such as by having been aggravated by the work-related accident, then impairment for

such pre-existing condition would also be includable in the IR. With the evidence in this posture, we believe the appropriate action is to remand the case to the hearing officer to inquire of the designated doctor as to whether claimant's pre-existing spinal condition was aggravated by the work-related accident, affected by the spinal surgery, or otherwise affected by the work-related accident, and for the hearing officer to determine whether it was part of the compensable injury and, thus, includable in the calculation of claimant's IR. The hearing officer may, of course, develop such further evidence as is deemed necessary to make additional appropriate findings and conclusions.

The decision and order of the hearing officer are reversed and the case is remanded for such further development of the evidence and for such further consideration and findings as are appropriate and not inconsistent with this opinion. 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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge