APPEAL NO. 94819
FILED AUGUST 4, 1994

On May 18, 1994, a contested case hearing was held in [City], Texas, with [hearing officer] presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The parties agreed that the respondent (claimant) reached maximum medical improvement (MMI) on March 3, 1993. The issue at the hearing was the claimant's impairment rating (IR). The hearing officer decided that the claimant has a 60% IR as reported by the designated doctor selected by the Texas Workers' Compensation Commission (Commission) and that he is entitled to 180 weeks of impairment income benefits (IIBS). The appellant (carrier) disagrees with the hearing officer's decision. The claimant requests affirmance.

DECISION

Affirmed.

The claimant, who is 35 years old, was diagnosed as having polio when he was two years old which caused weakness in both legs. The claimant said that he was last treated for his polio when he was 13 years old at which time his left ankle and foot were fused together and surgery was performed on his left knee. In 1986 or 1987, the claimant was involved in a motor vehicle accident and sustained fractures of the hips, spine, and left femur. He said he was treated for one year for those injuries. He indicated that the motor vehicle accident was not work related when he said that he had never had a prior workers' compensation claim.

The claimant, who is a research biologist, began working for the employer, the [employer], in April of 1992. On [date of injury], the claimant fell while pushing a cart at work and sustained a fracture to his left femur. The next day surgery was performed consisting of an intramedullary nailing of the fracture. The claimant then went to rehabilitation for about a month. In July 1992, [Dr. H], a doctor at the rehabilitation clinic, wrote that the claimant's mobility is dependent on a wheelchair, and explained that the claimant is confined to a wheelchair for "distances and uneven terrain." Dr. H further stated that "due to his lower extremity medical problems, he will always be at risk of injuries in the future and will always need a wheelchair for long distances." The claimant testified that before he fell at work, he was able to walk short distances without the use of a cane and longer distances with the use of a cane. He did not use a wheelchair. After the fall at work, he said he uses a cane when walking short distances, but that he is basically confined to a wheelchair. He said that the prolonged sitting in the wheelchair has weakened his right leg.

In August of 1992, the claimant returned to work for one day but did not continue to work because he said that when he attempted to sit down after reaching for something he felt pressure on his left leg. For some reason, medical reports note that incident as a second fall at work. The claimant's attorney represented that the second incident was being handled as "part of the same thing." Medical reports also note another fall in November 1992.

In an undated Report of Medical Evaluation (TWCC-69), [Dr. M], who treated the claimant, reported that the claimant reached MMI on March 3, 1993, with a four percent IR. In a narrative report dated March 3, 1993, Dr. M stated that the left femur fracture had healed, that the instability in the left leg that the claimant had before the fracture was still present, that the claimant had 97% of flexion, and that he had full extension. Dr. M recommended that the claimant continue to wear a leg brace on a permanent basis, but recommended against a special wheelchair that would lift the claimant. Dr. M stated that he thought that the claimant could go from a seated to a standing position and noted that the claimant could "ambulate." Apparently, after the motor vehicle accident the claimant wore a left leg brace from his foot to his knee for about two months, and after the surgery for his work-related injury the claimant has worn a left leg brace from his pelvis to his foot.

On March 15, 1993, an occupational therapist who performed a functional capacity evaluation on the claimant reported that prior to his work-related injury the claimant stood or walked more than 70% of an eight-hour workday. However, by March 1993, the claimant was unable to stand for more than one and one-half minutes.

Dr. M referred the claimant to [Dr. T] for an impairment evaluation and in a narrative report dated March 25, 1993, Dr. T noted the claimant's history of polio, motor vehicle accident injuries, and work-related injury, and he reported that the claimant had left lower extremity impairment of 100%, which resulted in a 40% whole body impairment, and right lower extremity impairment of 42%, which resulted in a 17% whole body impairment. Dr. T concluded that the claimant has a 57% whole body IR. Dr. M stated in a letter dated June 4, 1993, that he did not agree with the IR assigned by Dr. T. Dr. M stated that Dr. T's rating was based on weakness and loss of function of the legs that pre-existed the work-related injury and that the claimant's femur fracture had healed completely. He said the femur fracture did not exacerbate or make the polio any worse. Dr. M further stated that his four percent IR was based on loss of range of motion (ROM) of the left knee.

By letter dated July 9, 1993, the Commission selected [Dr. B] as the designated doctor to determine MMI and IR. In a TWCC-69 dated July 29, 1993, Dr. B reported that the claimant reached MMI on March 3, 1993 (as reported by Dr. M), with a 60%

whole body IR. In a narrative report dated July 30, 1993, Dr. B noted the claimant's history of polio, motor vehicle accident injuries, and work-related injury, and reported that the claimant has left lower extremity impairment of 100%, which resulted in a 40% whole body impairment, and right lower extremity impairment of 50%, which resulted in a 20% whole body IR. Dr. B stated "[h]is total body impairment then would be 60 percent. To attribute the specific portion attributable to the injury sustained at work, however, would be extremely difficult based on the pre-existing nature of his condition, the exact nature of which I have no way of knowing."

Dr. B noted that after the claimant's work-related injury of [date of injury], the claimant had apparently fallen in August and November 1992, but that those falls resulted in only minimally displaced fractures for which "no additional procedures were required." Dr. B noted that after the surgery for the work-related injury, the claimant has worn a long leg brace on his left leg and that the claimant was in a wheelchair, and had been in a wheelchair, throughout the time of his treatment for his work-related injury. In addition, the claimant reported to Dr. B that he had had progressive weakness in both legs since the onset of his fracture and his "enforced immobilization." In addition to noting that the claimant had to wear a long leg brace on the left leg since his surgery of May 24, 1992, Dr. B noted that the claimant's right leg revealed "marked weakness."

In a benefit review conference agreement dated September 1, 1993, the parties agreed that they would submit questions they had for Dr. B, the designated doctor, to the Commission in order for the Commission to obtain clarification from Dr. B. In a letter dated September 14, 1993, the benefit review officer (BRO) asked Dr. B "[a]s [claimant] had disability from childhood polio and a previous motor vehicle accident, do you feel that permanent impairment for the [date of injury] injury to the femur can be assessed without including these other conditions?" In a letter dated September 20, 1993, the BRO asked Dr. B whether he could separate the claimant's impairment resulting from pre-existing conditions from impairment resulting from the work-related injury, whether he had sufficient information to make such a determination, and if the "past and present impairments cannot be separately determined, is it medically probable that [claimant's] current whole body impairment is the result of his work-related injury."

On September 30, 1993, Dr. B responded that:

> it is extremely difficult to determine a specific disability of [claimant] because of the diversity of his disabilities and it is totally impossible to determine how much is a result of his injuries as a result of his falls and contractures of his femur, because no estimate was made of his disability prior to the time of his fracture. He said he is considerably weaker since the falls. I'm sure that this is true. The degree of this increased

> weakness, however, is totally impossible to measure and unless some estimate of this total disability prior to the falls was made and is available, there would be no way to tell what the percentage of disability would be as a result of this fall.

It certainly is not the total 60 percent body disability because a good deal of this is a result of his polio and of the residual disability as a result of his polio.

As previously noted, the issue at the hearing was the claimant's IR. The hearing officer found that the 60% IR assigned by Dr. B, the designated doctor, is entitled to presumptive weight because it is not contrary to the great weight of the other medical evidence. She concluded that the claimant has a 60% IR as assigned by Dr. B and that the claimant is entitled to 180 weeks of IIBS beginning on March 4, 1993. The carrier appeals the hearing officer's conclusion of law that the claimant has a 60% IR. The carrier states that the basis of its appeal is that "the great weight of the medical evidence before this Commission failed to establish that the Claimant's [IR] is 60%." The carrier states its position thusly, "the medical evidence clearly establishes that the Claimant's [IR] from his pre-existing condition was not separated out and an inaccurate rating was rendered, therefore Conclusion of Law No. 3 is contrary to the great weight of the totality of the medical evidence on Claimant's pre-existing condition and thus the hearing officer's decision on this issue should be overruled."

"Impairment" means 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). An "IR" means the percentage of permanent impairment of the whole body resulting from a compensable injury. Section 401.011(24). When the Commission selects a doctor as a designated doctor to determine an employee's IR, the report of the designated doctor has presumptive weight and the Commission must base its determination of the IR on the report of the designated doctor, unless the great weight of the other medical evidence is to the contrary. Section 408.125(e). No other doctor's report, including that of a treating doctor, is entitled to presumptive weight. To overcome the presumptive weight accorded to the report of the designated doctor requires more than a preponderance of the evidence; it requires the "great weight" of the other medical evidence to be contrary to the report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

We first point out that this case does not involve contribution for a prior compensable injury under Section 408.084, and that a carrier is not entitled to any contribution due to a noncompensable injury. *See* Texas Workers' Compensation Commission Appeal No. 93861, decided November 15, 1993.

Next, we observe that an aggravation of a preexisting condition is an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.- Houston [14th Dist.] 1988, no writ); Texas Workers' Compensation Commission Appeal No. 93889, decided November 17, 1993. In Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ), the court stated in regard to pre-existing disease or bodily infirmity and workers' compensation law that:

> One of the fundamental precepts of this law is that the liability arising thereunder cannot be defeated by showing that the injured employee was not a well person at the time of the injury. The employer accepts the employee as he is when he enters the employment, and it is no defense to a claim for compensation that the injury would not have been as great if the employee had been in a healthy or more perfect physical condition. [Citations omitted.]
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> Not only may an injured employee recover the statutory benefits flowing from the injury itself but in the event such injury aggravates or accelerates the effect of pre-existing disease or bodily infirmity that renders him more susceptible to such an injury he may not be denied recovery for such incapacity. [Citations omitted.]

Moreover, in regard to the extent of injury, the court in Texas Employers' Insurance Association v. Thorn, 611 S.W.2d 140 (Tex. Civ. App.-Waco, 1980, no writ) stated:

> Under our workers' compensation law, the immediate effects of the original injury are not solely determinative of the nature and extent of the compensable injury. "The full consequences of the original injury, together with the effects of its treatment, upon the general health and body of the workman are to be considered." [Citation omitted.]

In the instant case, Dr. M, the treating doctor, opined to the effect that the claimant's femur fracture had healed and that the claimant's weakness and loss of function of the legs are not related to his work-related injury. However, the claimant reported to Dr. B, the designated doctor, that he has had progressive weakness in both legs since his fracture and "enforced immobilization," and Dr. B "is sure that this is true." There is compelling evidence that before the fall at work, the claimant was able to function without the use of a wheelchair, and that after his fall he has been mostly confined to a wheelchair. As the finder of fact, the hearing officer determines whether an injury has aggravated a pre-existing condition. Texas Workers' Compensation Commission Appeal No. 93246, decided May 10, 1993. The hearing officer also resolves conflicts in the expert medical evidence and determines what facts have been

established from the conflicting evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); St. Paul Fire & Marine Insurance Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). Although the hearing officer did not make an express finding that the claimant's work-related injury of [date of injury], aggravated his pre-existing condition, in view of the hearing officer's decision, and given the fact that she did not return the case to the designated doctor with instructions to limit the IR, we can imply that the hearing officer determined that the work-related injury aggravated the claimant's pre-existing condition. *See* Texas Workers' Compensation Commission Appeal No. 94392, decided May 13, 1994.

The fact that the designated doctor found it impossible to separate impairment due to the pre-existing condition from impairment due to the compensable injury does not necessarily result in an "inaccurate rating" as contended by the carrier. In Appeal No. 94392, *supra,* the claimant injured his back at work and the designated doctor found that the claimant had degenerative changes in his back due to age and deterioration, but not from trauma. The designated doctor also determined that the "trauma may represent an injury superimposed on that degenerative process that allowed it to become symptomatic," and assigned the claimant a 20% IR. In a subsequent report, the designated doctor stated "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 gave presumptive weight to the report of the designated doctor and we affirmed stating that:

> An injury that aggravates a pre-existing condition can be a compensable injury. [Citation omitted.] 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.

Although the carrier mentions in its appeal that Drs. T and B gave an IR for the right leg "that was not injured at work" or that "was not injured in this incident," the carrier does not address the evidence that the right leg was weakened by prolonged sitting in the wheelchair which, according to Dr. H, the claimant is now dependent upon for his mobility. In Maryland Causalty Company v. Sosa, 425 S.W.2d 871 (Tex. Civ.

App.-San Antonio 1968) *writ ref'd n.r.e. per curiam* 432 S.W.2d 515 (Tex. 1968), the claimant sustained a compensable injury to his left wrist which required a cast which remained on his arm for an extended period of time. The claimant subsequently complained of left shoulder pain (adhesions had developed) which was apparently caused by the lack of use of the arm resulting from the wrist injury and cast and not solely from voluntary nonuse. The court upheld the jury finding that the injury to the wrist extended to the shoulder. The decision in Sosa, *supra*, was cited in Texas Workers' Compensation Commission Appeal No. 93414, decided July 5, 1993, where we affirmed a hearing officer's decision that the claimant's compensable right knee injury caused injuries to her back and left knee because her right knee injury caused her to alter her gait, which placed additional pressures on her back and left knee.

We believe that the court's decision in Sosa, *supra*, and our decision in Appeal No. 93414, *supra* provide legal authority for including as part of the compensable injury the claimant's right leg, which, according to the claimant's testimony which the hearing officer was entitled to believe, was further weakened by prolonged sitting in the wheelchair. *Compare* Texas Workers' Compensation Commission Appeal No. 93725, decided September 28, 1993 (Judge Knapp dissenting), wherein the majority held that the claimant's right hand carpal tunnel syndrome (CTS) was not part of her compensable injury because there was no evidence of a direct causal relationship between the claimant's compensable left hand CTS which was caused by cat bites to her left hand at work and the subsequently developed right hand CTS. That is not the situation in this case where there is evidence that the increased weakness in both legs was a direct and natural result of the compensable injury to the left leg given the claimant's pre-existing condition and the need for use of a wheelchair following the injury.

Having reviewed the record in light of the points raised on appeal, we conclude that sufficient evidence supports the findings and conclusions of the hearing officer and that they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we find no basis to disturb the hearing officer's decision. We point out that the basis for the carrier's appeal that "the great weight of the medical evidence before the Commission failed to establish that the Claimant's [IR] is 60%," is not in accordance with the standard set forth in Section 408.125(e). Under that section, the Commission must base the IR on the report of the designated doctor selected by the Commission unless the great weight of the other medical evidence is to the contrary. Thus, since the carrier was challenging the report of the designated doctor, it had the burden to establish that the great weight of the medical evidence was contrary to the IR assigned by the designated doctor.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge