APPEAL NO. 992030

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 18, 1999. With respect to the issue before her, the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 20% as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In its appeal, the appellant (carrier) argues that the hearing officer erred in placing a sole cause burden on it, contending that the claimant was required to prove that his compensable injury "produced the impairment that [the designated doctor] rated." The carrier also argues that the claimant's evidence is insufficient to sustain his burden of proof. In his response, the claimant urges affirmance.

DECISION

Reversed and remanded.

Dr. O was selected by the Commission to serve as the designated doctor. Dr. O certified that the claimant had a 20% IR for respiratory impairment. The carrier does not take issue with the accuracy of the 20% rating; rather, it contends that the claimant's impairment is the result of preexisting chronic obstructive pulmonary disease (COPD) and/or emphysema, which are secondary to his history of cigarette smoking and not his compensable exposure to sulfur dioxide at work. At the hearing, the hearing officer noted that because the carrier was disputing the designated doctor's IR, it had the burden to demonstrate that the great weight of the other medical evidence was contrary to the designated doctor's report. In her decision, the hearing officer further explained that the carrier had the burden to prove that the "sole cause" of the claimant's impairment was his preexisting disease process caused by his prior use of tobacco products. The carrier argues that the hearing officer erred in placing a sole cause burden on it. It maintains that the claimant had the burden to prove a causal connection between his compensable injury and his impairment. We believe that the carrier's point is well-taken. The party disputing the designated doctor's rating generally is required to show that the great weight of the other medical evidence is contrary thereto and, thus, that it is not entitled to presumptive weight. However, in this instance, the carrier's challenge to the rating concerns the question of whether the impairment resulted from the compensable injury. That question is in the nature of a threshold issue that must be resolved before the question of whether the rating is entitled to presumptive weight is reached. Section 401.011(23) defines "impairment" as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." The phrase "impairment rating" is defined as "the percentage of permanent impairment of the whole body resulting from a compensable injury." Section 401.011(24). By definition, an IR can only be assigned for impairment that results from the compensable injury. In order to resolve the impairment issue in this case, the hearing

officer must first determine the nature and extent of the claimant's compensable injury. More particularly, she must determine whether the claimant's compensable injury aggravated his preexisting pulmonary condition(s). The resolution of the IR issue will flow from the hearing officer's resolution of the extent/aggravation issue. The claimant has the burden of proof on extent and aggravation issues. *See* Texas Workers' Compensation Commission Appeal No. 960733, decided May 24, 1996, and Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, respectively. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 20% and remand for the hearing officer to reconsider that issue by first resolving the underlying extent-of-injury/aggravation issue.

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 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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Elaine M. Chaney
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Dorian E. Ramirez
Appeals Judge