APPEAL NO. 000064

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 December 14, 1999. The issues involved the proper impairment rating (IR) to be assigned to the respondent, who is the claimant. Although the appellant (carrier) sought to have the IR reduced due to what it argued were the effects of preexisting conditions, contribution had not been reported as an issue from the benefit review conference.

The hearing officer held that the claimant's IR was 20%, in accordance with the report of the designated doctor, which had not been overcome by the great weight of the contrary medical evidence.

The carrier has appealed and argues that the hearing officer either should have adopted the designated doctor's report without any IR for range of motion (ROM) deficits or adopted the report of one of the other doctors. The claimant responds that the hearing officer's decision is a correct resolution of the facts and application of the law.

DECISION

Affirmed.

It was stipulated that the claimant sustained a compensable injury to his low back on _____. He twisted his back while lifting a table at (employer), where he had been employed over two years. The claimant denied that he had any back problems prior to this injury. He said that although surgery had been recommended, he declined, fearing it would make him worse. The claimant said that in 1991, he had undergone a total hip replacement.

The claimant was examined in a required medical examination requested by the carrier. Dr. L noted that the claimant was at maximum medical improvement (MMI) "if he does not undergo surgery in the future." He noted that the claimant had spinal stenosis and instability and certified that the claimant reached MMI on April 14, 1999, with a 13% IR, with eight percent for a specific spinal condition and five percent for decreased ROM.

Dr. L specifically noted that the claimant's past history indicated no prior back problems before the date of his compensable injury. The ROM was for lateral deficits only, as the straight leg raising (SLR) test invalidated the other ROM measurements. The claimant was noted as being 5' 10" tall and 235 pounds in weight. Strength and sensory testing showed no abnormalities.

A designated doctor, Dr. J, was appointed and examined the claimant on July 15, 1999. Dr. J noted that there were "signs and symptoms consistent with a lower lumbar problem which appeared to be aggravated by a lifting injury on-the-job." Dr. J noted that

the claimant's May 1998 MRI showed multi-level stenosis throughout the lumbar area which he characterized as "severe." The claimant was noted to weigh five pounds less than at Dr. L's examination.

Dr. J certified that the claimant was at MMI on April 14, 1999, with a 20% IR. The ROM IR was entirely due to lateral restrictions, as the rest of the ROM was invalidated.

Dr. J, *sua sponte,* volunteered the following observation which has apparently given rise to the dispute here:

> Since the severe stenosis, degeneration, and spondylolisthesis pre-dated the injury, the hearing officer could reduce the rating. Without this advanced degeneration and stenosis, [ROM] would not have been as limited.

Dr. J recites no medical records that he reviewed, predating the injury, which document any back problems. The claimant was 59 years old at the time of this examination.

The carrier apparently presented the IRs for a "paper peer review" and what purports to be a report that does not identify the person or the expertise of the reviewer is in evidence. This report recommended reduction of the IR to eight percent, based upon invalidation of the ROM by the SLR test. Dr. J responded to this by pointing out that flexion and extension were invalidated, and points out that lateral ROM to support the 13% IR was present on his examination. Dr. J went on to say:

> Past medical records and my clinical examination indicate that the pre-existing condition was aggravated at least on a temporary basis by the incident on _____. However, had there been no pre-existing spinal stenosis and degenerative changes, the incident on _____ would have probably healed completely after 3 months without permanent residuals. Therefore, in this case the hearing officer would be justified in reducing the [IR] because of the significant pre-existing condition. However, by history, there was no back pain prior to the _____ incident.

It is axiomatic, in case law having to do with aggravation, that the employer accepts the employee as he is when he enters employment. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ). An incident may indeed cause injury where there is preexisting infirmity where no injury might result in a sound employee and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963). However, the compensable injury includes these enhanced effects and, unless a first condition is one for which compensation is payable under the 1989 Act, a subsequent carrier's liability is not reduced by reason of the prior condition. St. Paul Fire & Marine Insurance Company v. Murphree, 357 S.W.2d 744 (Tex. 1962). In this case, Dr. J agreed that whatever preexisting condition

was in place on the date of injury was aggravated by the lifting incident. It, therefore, became part of the compensable injury. The effects of the preexisting condition cannot be discounted. Texas Workers' Compensation Commission Appeal No. 931130, decided January 26, 1994; Texas Workers' Compensation Commission Appeal No. 94618, decided June 22, 1994. Given that the claimant has been recommended for surgery (even if declined), the hearing officer could conclude that the effects of the lifting injury were not temporary, but resulted in permanent impairment. As to whether the claimant would have been so badly injured if he did not have a preexisting condition, we note that the IR must be done on the compensable injury sustained by the injured worker as he is, not the hypothetical, fit, and younger injured worker that might have existed but for a preexisting body structure. The hearing officer certainly did not err in considering the claimant's current impairment, rather than what he might have been rated were he a different person.

Only if the prior condition is compensable may the appropriate reduction for a prior compensable injury be allowed through contribution determined in accordance with Section 408.084. We have long held that the sole manner in which allowance for the effects of a prior injury or condition can be properly done is by Texas Workers' Compensation Commission action through the 1989 Act, Section 408.084, and not through adjusting the designated doctor's IR for the recent injury. Texas Workers' Compensation Commission Appeal No. 93889, decided November 17, 1993. Texas Workers' Compensation Commission Appeal No. 92610, decided December 30, 1992.

We find that the hearing officer's decision is sufficiently supported by the evidence in the record and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge