APPEAL NO. 000519

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq*. (1989 Act). On February 7, 2000, a hearing was held. The hearing officer determined that the Texas Workers' Compensation Commission (Commission) determined appellant's (claimant) impairment rating (IR) in Texas Workers' Compensation Commission Appeal No. 950903, decided July 13, 1995 (Unpublished), and that the Commission lost jurisdiction in regard to claimant's IR when Appeal No. 950903 became final. Claimant asserts that he has had a substantial change of condition and should have a higher IR. Respondent (carrier), citing Lumbermens Mutual Casualty Company v. Manasco, 971 S.W.2d 60 (Tex. 1998), replied that the decision should be affirmed.

DECISION

We affirm.

Claimant did not testify. Medical records contained in the record of hearing indicate that claimant reported "slipping on some onion juice at the canning factory" on _____; in _____ his complaints included his neck, back, and left shoulder.

On April 18, 1995, a hearing was held to consider two issues: one was whether claimant's injury of _____, extended to his "cervical spine and shoulders" and the other was, "what is the claimant's [IR]?" The hearing officer determined that Dr. A was the designated doctor and examined claimant on August 1, 1994. The hearing officer also found that Dr. A assigned an IR of 10% based on impairment of the lumbar spine; another finding of fact said that Dr. A found no objective evidence of cervical or left shoulder impairment. The hearing officer determined that claimant's injury did extend to the cervical spine and left shoulder but that the IR was 10% as found by Dr. A.

Appeal No. 950903 reviewed the record of the April 18, 1995, hearing; it affirmed the determination that the IR was 10%, noting, "Dr. A's report also addressed claimant's left shoulder, but to a lesser degree, and found no impairment to his upper extremity." (The extent of injury determination was not appealed to the Appeals Panel; as stated, only the left shoulder, and cervical spine, in the stated issue were determined to be part of the compensable injury.)

The parties stipulated, "[t]he decision of the appeals panel was allowed to become final since not appealed."

At the February 7, 2000, hearing, claimant submitted medical documents including an MRI of the left shoulder dated December 30, 1998, which shows, "degenerative changes in the acromioclavicular joint. Otherwise negative scan." Surgery to the left shoulder was then performed on May 28, 1999, which addressed an "impingement syndrome of the left shoulder." An MRI of the right shoulder and subsequent surgery of the right shoulder was also

performed in the same 1998-1999 time frame according to reports in evidence. There was no finding of a compensable injury to the right shoulder by the hearing officer in 1995; the absence of a finding of compensable injury to the right shoulder was not appealed to the Appeals Panel in 1995. At the recent hearing on February 7, 2000, now under review, the hearing officer made no finding of fact that claimant has had a substantial change of condition at any time. The appeal before us does not assert what the substantial change of condition is or even what body part it addresses. As stated, medical records are in evidence concerning both the left and right shoulders.

The 1989 Act, at Sections 410.205, 410.252, and 410.301, provides some guidance in this matter. Section 410.205 says that the decision of the Appeals Panel regarding benefits is final in the absence of a timely appeal for judicial review. A decision regarding the amount of the IR does address benefits because impairment income benefits are provided at a rate of three weeks pay for each percentage point of impairment. *See* Section 408.121. Section 410.252 provides that to obtain judicial review, suit must be filed not later than 40 days "after the date on which the decision of the appeals panel was filed with the division." The parties stipulated that the decision of the Appeals Panel in 1995 became final. Section 410.301 is the first section under "SUBCHAPTER G. JUDICIAL REVIEW . . ."; it provides, in part, that judicial review "of a final decision of a commission appeals panel . . . shall be conducted as provided by this subchapter." Part of "this subchapter" is Section 410.307 which addresses evidence of the extent of impairment when there has been a substantial change of condition. Section 410.307 addresses evidence considered during judicial review; it does not say that such evidence may be considered by the Commission to decide to reopen a previously adjudicated administrative decision.

The Manasco decision, *supra*, appears to have considered the question of whether an IR may be considered after the Commission has rendered a decision made final by operation of law. The supreme court said that Section 410.307 may not be used to reopen an IR after the time for an appeal has lapsed. In that case, Manasco did not appeal the hearing officer's decision to the Appeals Panel and the decision of the hearing officer became final. Thereafter, Manasco had surgery, and another hearing officer then ruled that the prior determination of IR had become final. The trial court found against Manasco but a court of appeals reversed that decision. In rendering against Manasco, the supreme court said, "based on wording and placement of Section 410.307," it is a rule of evidence applying to "properly appealed" issues. The court made two other comments about IR in this case:

> A claimant's [IR] is not final, and remains subject to revision, until the claimant reaches maximum medical improvement.

* * * *

> If the legislature had wanted to provide an open-ended means to challenge an [IR], it could have done so; instead the legislature provided a narrow exception to allow a claimant to present evidence of substantial change of condition . . . .

The February 2000 determinations of the hearing officer that claimant's IR was determined by Appeal No. 950903, *supra*, that the Commission lost jurisdiction of claimant's IR when Appeal No. 050903 became final, and that claimant's IR is 10% as determined in 1995, are sufficiently supported by the evidence and are consistent with applicable law. The decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge