

APPEAL NO. 000761

On March 14, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issues by deciding that the compensable injury of _____, is a producing cause of respondent=s (claimant) lumbar strain, vertebral infection, and osteomyelitis, and that claimant has a 14% impairment rating (IR) as certified by the designated doctor chosen by the Texas Workers= Compensation Commission (Commission). Appellant (carrier) requests that the hearing officer=s decision be reversed and that a decision be rendered in its favor. No response was received from claimant.

DECISION

Affirmed.

Claimant testified that he had back pain when he lifted and carried a 75-pound plant at work on _____ (all dates are in 1999 unless otherwise noted). He moved several plants that day. It is undisputed that claimant sustained a compensable back injury on _____. Carrier contends that the compensable injury is limited to an injury to claimant=s thoracic spine. TY, claimant=s supervisor, testified that when claimant reported his back injury on January 21st claimant indicated the area of pain by placing his hand on his back about five inches above his belt. In a recorded statement taken on February 5th claimant stated that he had pain from about five or six inches above the waist up to where his neck starts. Claimant testified that his low back pain started about three weeks after his injury.

Hospital emergency room (ER) records of January 21st noted claimant=s complaints of mid back pain that radiates around to his chest that started when he moved plants at work the day before and he was diagnosed as having a thoracic strain and pleuritic pain. Claimant was seen by Dr. B on January 25th and Dr. B noted complaints of mid back pain and diagnosed a muscle strain of the thoracic spine. Dr. B saw claimant on February 3rd and made an assessment of upper back pain. When Dr. B saw claimant on February 10th, an assessment of mid back pain was made. Claimant went to the ER on February 10th for chest pains and Dr. B noted in the ER records that claimant had been seen at the clinic for a muscle strain of his lower back.

Dr. M examined claimant on March 4th and he gave an assessment of low thoracic to lumbar muscle aches and pain. Dr. M referred claimant to Dr. L, a neurologist, who examined claimant on March 10th and stated an impression of acute low back pain sustained after a work-related injury that is suggestive of an acute lumbosacral muscle strain. Diagnostic testing was done and Dr. L wrote on March 18th that claimant has a destructive process at T8.

Claimant had surgery done at T8-9 on April 1st and a biopsy of the vertebral body mass identified a staphylococcal organism and claimant was placed on antimicrobial therapy. Dr. L noted on May 19th that claimant has osteomyelitis at the T8 level and had undergone a decompression for the thoracic abscess. On July 22nd, Dr. L certified that claimant reached

maximum medical improvement (MMI) on that date with a nine percent IR. Dr. L's narrative report of the same date diagnosed a lumbar strain.

The Commission appointed Dr. H as the designated doctor and he examined claimant, reviewed the medical records, and certified that claimant reached MMI on September 1st with a 14% IR. Dr. H diagnosed a thoracic strain, a lumbar strain, and osteomyelitis at T8-9. Dr. H assigned impairment of seven percent for the lumbar region (five percent for a specific disorder and two percent for loss of range of motion) and seven percent for the thoracic region (five percent for a specific disorder and two percent of loss of range of motion). The parties stipulated that claimant reached MMI on September 1st. Dr. H wrote that, if claimant has a compensable injury, then both the thoracic and lumbar spine are part of the injury. Dr. H explained how an infection in one part of the body can travel to an injured part of the body through increased blood flow to the injured part of the body. Dr. H also noted that it could be considered that claimant had a preexisting infectious process involving the disc space at T8-9 with radiation of pain to the thoracic and lumbar spine and thus not be considered to be a result of the injury at work.

At the Commission's request, Dr. HA examined claimant in December regarding the issue of extent of injury and Dr. HA reported that he believed that claimant had an indolent osteomyelitis, which was likely causing a subacute destruction of the vertebral body (at T8), which then became symptomatic with lifting, at which time, the vertebral cortex fractured. Dr. HA also wrote that, within reasonable medical probability, claimant had an indolent osteomyelitis which became symptomatic as a result of a work-related event. Dr. HA also wrote that he believes that claimant had a work-related thoracic strain on _____ and that the vertebral body infection was causally related to the injury of _____. However, despite his previous statements regarding the osteomyelitis, Dr. HA wrote that the claimant's osteomyelitis is not causally related to the injury of _____. Dr. HA also correctly noted that, under workers' compensation law, the aggravation of a preexisting condition is considered a new injury, and thus he believes that claimant has a work-related injury. Dr. HA noted that impairment should be based upon the thoracic spine and not the lumbar spine.

Dr. N reviewed claimant's medical records at carrier's request and wrote that, at most, claimant sustained a sprain; that claimant's symptoms from the beginning have been due to the thoracic spine abnormality; that the vertebral osteomyelitis is an ordinary disease of life and is not due to the compensable injury of _____; that the symptoms would have occurred whether or not there had been a lifting episode; and that the finding of a herniated disc at L5-S1 is an incidental finding and has nothing to do with claimant's symptom complex.

The hearing officer found that claimant was injured at work on _____ when he moved heavy plants; that the injury of _____ extends to and includes injury to claimant's thoracic and lumbar spine; that the injury of _____ caused the dormant osteomyelitis to become active; that the osteomyelitis is causally related to the injury of _____; that Dr. H, the designated doctor, certified that claimant has a 14% IR; and that the opinions of the

designated doctor were not overcome by the great weight of other medical evidence. The hearing officer concluded that the compensable injury of _____ is a producing cause of the lumbar strain, vertebral infection, and osteomyelitis, and that claimant has an IR of 14%. Carrier contends that the lumbar spine, osteomyelitis, and vertebral infection are not part of the compensable injury and that the IR should not include impairment for the lumbar spine.

The aggravation of a preexisting condition (in the course and scope of employment) is a compensable injury for purposes of the 1989 Act. Peterson v. Continental Casualty Company, 997 S.W.2d 893 (Tex. App.-Houston [1st Dist.] 1999, no pet. h.). The report of the designated doctor chosen by the Commission has presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. Section 408.125(e). The 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 410.165(a). There is conflicting evidence in this case on both issues. As the trier of fact, the hearing officer resolves conflicts in the evidence and determines what facts have been established from the evidence presented. We conclude that the hearing officer's decision on the issues of extent of injury and IR are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge