APPEAL NO. 93582

A contested case hearing was held in ___, on June 10, 1993,. The Hearing Officer determined that the (claimant), who is the respondent herein, suffered a compensable heart attack on ___, in the course and scope of his duties as an oil field worker employed by the (employer). The hearing officer awarded benefits in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act).

The carrier appeals the decision, and urges error in the conclusion that a compensable heart attack occurred and in findings of fact by the hearing officer that the heart attack occurred as a result of a specific event at work at a definite time and place and that the preponderance of the medical evidence indicated that the work, rather than the natural progression of a pre-existing heart disease, was a substantial contributing factor of the heart attack. The carrier also argues that it was reversible error for the hearing officer to admit, over objection, the Employer's First Report of Injury. The respondent argues that the hearing officer's decision should be upheld.

DECISION

We affirm the hearing officer's decision.

The claimant, a 53 year old oil field worker, had worked for the employer for ten years. He testified that he arrived at his job site about 7:00 a.m. on ___. It was a cold and windy day. About 8:00 a.m. he attempted to start a gasoline powered five horsepower motor to pump out a tank. The motor would not start. For 30 to 45 minutes he pulled on the starter rope and checked the sparkplug, and estimated that he pulled the cord between 40-50 times. Not able to start the motor he pursued other tasks. Claimant said that after the work on the motor, he felt tired and sweaty. He then climbed a ladder of undetermined height to gauge a tank. As he climbed he felt chest pain and weakness.

Completing his work on the tank, claimant struggled to get off and "crawled" to his truck. He got in to get warm and ate a sandwich. He then secured the gate at the tank site and drove off to do more work at another tank site. He stayed at this latter site because he felt he was going to faint. Claimant again sat in his truck until he felt better. He then went home in the early afternoon. He ate supper shortly after 7:00 p.m. and went to bed.

Claimant said he got up about 1:30 or 2:00 a.m. on ____, for something to eat. He then fainted. His son found him on the couch and took him to the hospital emergency room. The admitting physician at the emergency room, (Dr. SJ), diagnosed pneumonia predominantly in the left lung, acute inferior wall myocardial infarction in evolution, noninsulin-dependent diabetes mellitus (later listed in all reports as insulin-dependent), and incipient mild congestive heart failure (CHF) resolved.

On December 10, 1991, the claimant underwent elective myocardial revascularization surgery as a result of severe triple-vessel coronary atherosclerotic disease with severe left ventricle dysfunction. His EKGs revealed an old inferior and suggestion of anterior wall myocardial infarction. The claimant testified that he had never before had symptoms of heart disease. He could not recall what he might have told the emergency room doctor who treated him. The claimant testified he had quit smoking before the incident.

At the contested case hearing, medical evaluations of the claimant's condition and possible contributory factors were introduced. (Dr. F), an assistant professor in a medical school department of cardiology, based upon a review of claimant's medical records and not a personal examination, opined that:

> The patient's coronary artery disease is not directly related to his occupation. However, it is highly likely that his vigorous work on ___ was directly related to his myocardial infarction. In other words, the patient clearly already had significant obstruction to blood flow in his major arteries of his heart. This condition of atherosclerosis developed over a long period of time. Still, the acute change in (claimant's) condition at the time in question may have resulted directly from his professional activity . . . . It is difficult to predict whether the heart attack would have occurred without his intense work on the day in question. It is likely however that without that episode he would have eventually come to coronary artery bypass surgery.

Dr. F goes on to describe important risk factors for coronary artery disease and notes that the claimant has two of the factors, i.e., diabetes and tobacco use, "which are among the major culprits in this (claimant's) condition."

In a later clarification of this statement, Dr. F said his early statement was based on an impression, from a deposition by claimant not in evidence, that the claimant was working hard. Dr. F then stated that, based upon new information provided to him by the employer's production engineer that claimant was working on an electrical motor, rather than a gasoline motor, the claimant was not working as vigorously as Dr. F earlier believed, and if so, "it makes it considerably less likely that his work was directly causal in his heart attack."

(Dr. SS), a specialist in cardiovascular disease, became the claimant's treating physician. In a letter, Dr. SS stated that the claimant's coronary disease is "possibly multi-factorial. The history of insulin-dependent diabetes mellitus and smoking certainly are risk factors." Dr. SS concluded that "any exertion including pulling of rotary engine could cause angina. It is certainly possible that if exertion is very severe, especially with severe coronary artery disease, one could have myocardial infarction as a result."

In the final piece of medical evidence introduced at the hearing, Dr. SS certifies that

the claimant has coronary artery disease, but "it is quite possible that he could have prolonged angina pectoris while climbing a ladder." She concludes by saying that "any exertion on the job could have triggered chest pain." Dr. SS noted that a history of work-related exertion had not been provided by claimant when he was admitted to the emergency room.

Article 8308-4.15 provides:

Art. 8308-4.15. Compensability of heart attacks

A heart attack is a compensable injury under this Act only if:

(1) the attack can be identified as:

(A) occurring at a definite time and place; and

(B) caused by a specific event occurring in the course and scope of employment;

(2) the preponderance of the medical evidence regarding the attack indicates that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack; and

(3) the attack was not triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus.

These "new and much more demanding standards" (Texas Workers' Compensation Commission Appeal No. 92460, decided October 12, 1992), have been discussed at length in a series of Appeals Panel decisions beginning with Texas Workers' Compensation Commission appeal No. 91009, decided September 4, 1991. Briefly, these decisions stress that proof of the event required by Art. 8308-4.15(1) may be, and often is, met by lay testimony, which may be that of the claimant who alone is in a position to describe the timing and locations of symptoms later diagnosed as a heart attack.

However, lay testimony will not meet the standard set forth in Art. 8308-4.15(2) which requires medical evidence. The evidence must indicate that the effect of the work being performed by the employee was a substantial contributing factor when balanced against the natural progression of a pre-existing heart condition or disease. There can be more than one substantial contributing factor, so long as the work is a greater factor than the natural progress of any underlying heart condition or disease. Texas Workers' Compensation Commission Appeal No. 91009, decided September 9, 1991.

In this decision, the hearing officer has performed the required comparison in

determining the preponderance of the medical evidence. The question then becomes whether the medical evidence supports his determination. We agree that it does.

It is important to emphasize that the fact that a claimant comes to a job with pre-existing heart disease does not, in and of itself, preclude compensability, as the carrier argues. Texas Workers' Compensation Commission Appeal No 93121, decided April 2, 1993. Such an interpretation would cast aside the use by the legislature of the phrase "natural progression". A claimant who has a condition that could result in a heart attack from day-to-day activities, or from no activity, arguably has a disease with a "natural progression" distinguishable from the person who, as here, had risk factors and might eventually have needed a bypass, but who (according to the medical evidence) experienced one sooner as a result of an acute condition brought on because of the work-related activity. It is the carrier's doctor, Dr. F, who opined that it was "highly likely" that claimant's vigorous work directly resulted in the "acute change" that occurred on ___. This opinion was qualified only by "new information" that claimant may have been working on an electrical engine. The hearing officer evidently believed (and is sufficiently supported by the evidence) that claimant was working on a gasoline engine, rather than an electrical engine. It is clear from reading both of Dr. F's letters that his initial opinion about the effect of a vigorous exertion at work on ___ and its causal relationship to claimant's heart attack has not been altered. The carrier doctor's initial opinion, along with that of the treating doctor, sufficiently support the hearing officer's determination that the preponderance of the medical evidence indicated that the work-related activity was a substantial contributing factor of the heart attack, rather than the natural progression of claimant's pre-existing heart disease.

As to the findings concerning the work-related event leading to the heart attack, we note that Article 8308-6.34(e) provides that the hearing officer, as fact finder, is the sole judge of the weight and credibility to be given the evidence. He may believe all, part, or none of the testimony. The Appeals Panel will reverse a finding of fact of the hearing officer only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175,176 (Tex. 1986). The claimant, though an interested party in the case (*see* Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App. - Amarillo 1973, no writ)), was in the best position to know what happened to him on the morning of ___. He has plausible explanations for why he did not report his symptoms in his daily log. The fact that claimant did not, while being treated in the emergency room for a heart attack, report what he believed to be the precipitating event may have been considered a reasonable omission by claimant considering that he was at the time undergoing a medical emergency. We cannot say that the evidence was insufficient to support the finding that claimant suffered a heart attack at this work site on ___, after trying to start the gasoline motor. Thus we do not disturb the findings and related conclusions ct of the hearing officer that the claimant's heart attack met the conditions of Art. 8308-4.15. *See* Texas Workers' Compensation Appeal No. 92034, decided May 19, 1992.

While we tend to agree that a hearing officer treads dangerously close to error when he or she admits, over objection, the Employer's First Report of Injury, we note that the hearing officer did state at the end of the hearing that he would not consider it as an admission against the employer or carrier. Art. 8308-5.05 (b) prohibits the consideration (not necessarily the admission into the record) of the report where the facts set out in the report are disputed. Given that the sole issue in the case was whether a compensable heart attack occurred in the course and scope of employment, there was no purpose for which the report could have been tendered except for the statement by the employer that a heart attack occurred at work. Art. 8308-5.05(b). (Of course, such a statement could never be substituted for the required medical evidence that must be tendered in accordance with Art. 8308-4.15(2), and therefore could be tendered as an "admission" only as to the occurrence of a heart attack at work.)

The better course of action in this case would have been for the hearing officer to deny admission of that report under these circumstances. Nevertheless, we are persuaded from reviewing the evidence that claimant's testimony alone was sufficient to establish the occurrence of a heart attack at work and that the hearing officer did not consider the report as an admission or evidence against the carrier. Therefore, we overrule carrier's point of error relating to admission of the report in this case.

For reasons set forth above, the hearing officer's decision is affirmed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Lynda H. Nesenholtz
Appeals Judge

DISSENTING OPINION

I respectfully dissent. I do not find that the requirements of Article 8308-4.15(2) have been met in this case. These "new and much more demanding standards" (Texas Workers' Compensation Commission Appeal No. 92460, decided October 12, 1992), have been discussed at length in a series of Appeals Panel decisions beginning with Texas Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991. Briefly, these decisions stress that part (1) of art. 8308-4.15 may be, and often is, met by

lay testimony, quite often that of the claimant who alone is in a position to describe the timing and locations of symptoms later diagnosed as a heart attack. The part (2) finding of a preponderance of the medical evidence can be arrived at only after comparing or weighing the available medical evidence as to the effect of the work being performed by the employee against the natural progression of a preexisting heart condition or disease. The lesson of Texas Workers' Compensation Commission Appeal No. 92115, decided May 4, 1992, bears repeating:

> It is not enough, as we view the legislative language, to show by some evidence that some work-related stress was a substantial contributing factor of the attack. The preponderance of the medical evidence regarding the attack must indicate that the work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack. By its very terms. Article 8308-4.15 requires this weighing or comparison.

The burden is on the claimant to establish by reasonable medical probability that the work was a substantial contributing factor as opposed to a preexisting condition. Appeal No. 92115 quoting approvingly from 1 Montford, Barber Duncan, A Guide to Texas Workers' Comp Reform, Sec 4A, page 4-78 (1991).

Whether the hearing officer properly concluded that the preponderance of the medical evidence indicates that the claimant's work rather than the natural progression of a preexisting heart condition or disease with a substantial contributing factor of the heart attack is where I differ with the majority opinion.

The fact that the claimant had a preexisting condition or diseased arteries will not preclude compensation. Texas Workers' Compensation Commission Appeal No. 93121, decided April 2, 1993. Under these conditions, however, it is critical that the job exertion be "a substantial contributing factor of the attack." Only medical evidence can be considered in reaching this determination. Substantial has been held to mean more than "insubstantial" or "slight" but not "predominance." Appeal No. 91009, *supra*. A mere exacerbating condition does not raise to the statutory level of a substantial contributing factor. And, there can be more than one substantial contributing factor. Texas Workers' Compensation Commission Appeal No. 91009, decided on September 9, 1991.

The medical evaluations in this case are at best equivocal although it is clear the claimant had "severe" coronary artery disease. Though medical evidence need not repeat the so called "magic words" (Texas Workers' Compensation Commission Appeal No. 93121, decided April 2, 1992) of Article 8308-4.15, it must, when taken in context, go beyond the level of mere possibilities and probabilities to compare and weigh the various conditions leading to the heart attack. Texas Workers' Compensation Commission Appeal No. 92115, decided May 5, 1992. None of the doctors expressed an awareness of the degree of claimant's on the job exertions that immediately preceded the heart attack. Dr.

F, after some initial decisiveness, was confused as to the type of engine the claimant was trying to start and concluded that the harder the work, the more likely it was a causative factor. Dr. F, the carrier's expert, also offered possibly the strongest evidence of the necessary weighing when he indicated it was highly likely that the "vigorous" work was directly related to the heart attack but then states it "may have resulted" from the work and that it was difficult to predict whether the hearing attack would have occurred without the "intense" work on the day in question. However true those statements may be, it scarcely can be considered a sufficient weighing of the evidence. Similarly, Drs. SJ and SS seem unsure of what transpired at the tank field on the morning of ___. Dr. SS talks in terms of factors contributing to angina, or chest pain, symptoms and not a heart attack. Dr. SJ speaks of the claimant's extensive preexisting heart condition, of the claimant's recent history of reaction to being out in the cold and of the claimant's description of events leading up to the attack. No weighing of factors is apparent in any reasonable sustained sense. At best, Drs. SJ and SS appear to be saying that the claimant's exertion "amount to no more than saying the exertion was probably a factor of some contributing nature, and this falls short of the statutorily imposed higher standard of a substantial contributing factor. I would reverse the determinations that the claimant's work rather than the natural progression of a preexisting condition or heart disease, was a substantial contributing factor to the claimant's heart attack.

_____

Stark O. Sanders, Jr.
Chief Appeals Judge