APPEAL NO. 941170

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 6, 1994. The issue at the CCH was whether the appellant (carrier herein) was entitled to contribution, and if so, by what proportion. The hearing officer ruled that the carrier failed to establish that contribution should be allowed or what amount of contribution should be allowed. The carrier appeals arguing that it proved that the respondent's (claimant herein) two prior compensable injury contributed to his present impairment and that the as result of his prior surgery the claimant had a 15% to 25% disability entitling carrier to contribution in that amount. The carrier did not file a response to the carrier's request for review.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The only witness to testify at the CCH was the claimant who was called by the carrier as a witness. Claimant admitted that prior to his injury in the present case, which took place on _____, he had suffered two prior compensable injuries. He testified that each of these prior injuries required spinal surgery--the first in 1973, the second in 1987. The claimant testified that after each of these surgeries he was able to return to work in the oilfield. The carrier put into evidence medical record concerning the claimant's previous as well as his present injuries.

According to medical reports, the claimant suffered his present injury when he slipped on the wet stairs of drilling platform and fell down the stairs some 15 to 16 feet. The medical records concerning the present injury include a Report of Medical Evaluation (TWCC-69) from Dr. R, M. D., who appears to be one of the claimant's treating doctors, certifying that the claimant attained maximum medical improvement (MMI) on May 24, 1993, with 25% whole body impairment rating (IR). The carrier, through a request for medical examination order (MEO), obtained an examination by Dr. W, M. D., who certified the claimant attained MMI on June 8, 1993, with a seven percent IR. Dr. Wa, M .D., a designated doctor selected by the Texas Workers' Compensation Commission (Commission), certified that the claimant attained MMI on December 9, 1993, with an 18% IR. The parties at some point entered into an agreement at a benefit review conference that the claimant attained MMI on May 24, 1993, with an 18% IR.

The medical evidence indicated that the claimant's 1973 surgery was a multi-level laminectomy and that the 1987 surgery was primarily to remove scar tissue. The 1987

surgery, which resulted from an accident in which the claimant was struck in the chest by a set of tongs, breaking several ribs and injuring his back, was performed by Dr. M, M. D., who stated in a September 28, 1987, as follows:

> As far as permanent disability, I think we are thinking in this individual as more in the 15-25% range than the usual lower figure because of the kind of work he was doing at the time of his injury.

There was also medical evidence that in addition to his problems from his injuries, the claimant suffers from diabetes, hypertension, spinal stenosis and ankylosing spondylitis.

In attempting to sort out the effects of the claimant's various problems on his impairment, Dr. W, the designated doctor stated as follows in her narrative report of December 9, 1993:

> At this point there may be some difficulty with apportionment with regards to this patient's impairment. I stated previously that the ankylosing spondylitis has likely been progressive for many years; however, it was present at the time that the patient was hired by the company. Loss of range of motion in this patient's spine has likely not progressed as a result of his injury; therefore, it is difficult to wholly ascribe it to the patient's compensable injury. The two level degenerative disk disease with foraminal encroachment is likely contributed significantly by the patient's prior surgeries as well as the cumulative wear and tear the patient has put on the spine with his many years of working in the oil field. At this point, I cannot apportion how much of the degenerative changes are secondary to the patient's current employment. What is important to note is that the patient had been functioning without significant weakness at the time of his fall and it wasn't until the trauma was superimposed on all the patient's prior problems that he began having progressive weakness. I therefore feel it is important to apportion the patient's weakness to his compensable injury.

Dr. W, the carrier's MEO doctor, expressed a somewhat different view stating in a narrative report attached to his TWCC-69 as follows:

> I would feel that this patient has to be evaluated in light of the fact that he already had ankylosis spondylitis which is very severe and he has diabetes prior to this injury occurring. Any disability percentage on the basis of motion would not be applicable because the patient was stiff prior to this occurring and of course the ankylosis spondylitis is the primary reason for the stiffness.

Unless some finding is noted on tests that I have not seen, he does not have a lesion from the injury which would be considered as a cause of decreased motion. Therefore, I would feel that his disability would have to be based simply on an unoperated condition being aggravated by the injury. According to the AMA Guide, this would give a 7% whole person impairment for the lumbar area.

I would feel the patient is going to have to be considered on the basis of his pre-existing conditions and the fact that these pre-existing conditions prevent him from returning to heavy labor type activities he was doing.

Section 408.084 provides in relevant part:

(a)At the request of the insurance carrier, the commission may order that impairment income benefits and supplemental income benefits be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.

(b)The commission shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section.

In the present case the carrier argues that the hearing officer erred by overly relying on the fact that the designated doctor failed to apportion the claimant's impairment between the prior and present injuries and failed to give sufficient weight to Dr. M's report stating the claimant had a 15% to 25% disability because he spoke in terms of disability rather than impairment. The carrier is certainly correct that we have held that in regard to the issue of contribution, the hearing officer is not required to give presumptive weight to the opinion the designated doctor. Texas Workers' Compensation Commission Appeal No. 94637, decided July 1, 1994; Texas Workers' Compensation Commission Appeal No. 94451, decided May 23, 1994. We also recognize that we have held that a carrier can obtain contribution for pre-1989 injuries. Texas Workers' Compensation Commission Appeal No. 94607, decided June 24, 1994. We have also allowed such contribution when the impairment from the prior injury was expressed in terms of "disability" or "disability rating." Appeal No. 94607, *supra*. As the carrier points out, in Appeal No. 94607, *supra*, we have even reversed a hearing officer and rendered a decision ordering contribution when such evidence was uncontroverted.

We part company with the carrier's logic when it argues that the application of these doctrines requires reversal of the hearing officer in the present case. First, we would point out that whenever the term "disability" is used rather than "impairment," caution should be exercised to make sure that apples and oranges are not mixed. The terms "disability" and

"disability rating" have long been used interchangeably with the terms "impairment" or "impairment rating" by many medical professionals for a great number of years. A physician may consider these terms clinically equivalent and be unaware of their legal meaning. "Impairment" is defined in Section 401.011(23) as any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." In terms of the 1989 Act "impairment rating" has a very specific legal meaning. Any IR under the 1989 must be pursuant to Section 408.124(b) be determined using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (the Guides). "Disability" and "disability rating," may have similar meanings[1], but not necessarily. These terms, which were used more commonly prior to the 1989 Act, can also imply some other than just physical impairment and often included a component how the injury affected a person's ability to obtain and retain employment. Thus it has been stated that the same amount of impairment may result in greater disability based upon one's age, education, training and previous employment. [Cite]

Where it can be determined from context that a physician is using the terms equivalently "disability" to mean "impairment" there is not harm in treating the terms as equivalent. *See* . However, when a physician means the term "disability" to include inability to work rather than physical impairment, the terms should not and cannot be considered equivalent. This is what distinguishes the present case from those cited by the carrier. In Appeal No. 94607, *supra*, we affirmed a hearing officer who reduced the claimant's benefits by 29% due to contribution. In that case the claimant had a prior injury under pre-1989 law for which his doctor at the time had assigned a 15% disability rating. The designated doctor in the subsequent 1989 Act injury stated that this 15% rating could not be directly extrapolated into an IR under the Guides, but stated that reviewing the medical records of the early injury led him to the conclusion that 29% of the claimant's present impairment was from the prior injury. Thus, in Appeal 94607 there was medical evidence translating the pre-1989 disability rating into an IR. Similarly in Appeal No. 94637, *supra*, the case which the carrier is argues most like and controls the present case, the carrier presented testimony from an expert who reviewed the medical records of the claimant's prior compensable injury and translated the claimant's prior incapacity into 1989 Act impairment, (even though the doctor used the term disability, we recognized that in context he clearly meant impairment). In the present case we do not have an expert translating Dr. M's disability rating into 1989 impairment terms. Further, it is obvious from the context of Dr. M's own rating when he is speaking of IR, he is speaking of more than physical impairment but including a component for loss of ability to do a particular type of

[1]Obviously no impairment or disability rating could have been calculated literally using the Guides prior to February 1989, but the third edition of these Guides was not the first and prior to 1989 prior editions of the AMA Guides to the Evaluation of Permanent Impairment were sometimes, but certainly not always, used to calculate impairment and sometimes disability.

work when he says his assigning a higher rating to the claimant "because of the kind of work he was doing at the time of his injury."

Another distinction between the Appeal 94637 and the present case is that in Appeal 94637, the evidence of the carrier's expert as to amount of impairment from the prior accident was uncontroverted. Even were one to accept the opinion of Dr. M or Dr. W as evidence that the carrier was entitled to some amount of contribution, the designated doctor states that it is impossible to apportion impairment from the claimant's prior conditions and injuries from the present injury. In many cases this may indeed may be the case and in such cases it may not be possible to grant the carrier contribution. As the hearing officer stated in his discussion, "Any contribution assigned by the hearing officer would be a guess. I choose not to guess in this case."

While the opinion of the designated doctor is not entitled to presumptive weight on the issue of contribution, it is certainly medical evidence on which the hearing officer can choose to rely. As we said in Appeal 94607:

> As we indicated in Texas Workers' Compensation Commission Appeal No. 94578, decided June 22, 1994, assessment of contribution depends on medical evidence. The matter of contribution is normally a question of fact. Claridy v. Texas Employers' Insurance Association, 795 S.W.2d 228 (Tex. App.-Waco 1900, writ denied). The fact finding hearing officer resolves conflicts in expert medical evidence jus as he or she resolves conflicts and inconsistencies in the other evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Highlands Underwriter's Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex Civ. App.-Corpus Christi 1973, no writ): Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We have reviewed all the medical evidence of record and can not conclude that the hearing officer's determinations on contribution were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

We affirm the decision and order of the hearing officer.

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Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge

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