APPEAL NO. 94578

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 18, 1994. The single remaining issue at the hearing was whether the respondent (carrier) was entitled to reduce the appellant's (claimant) impairment income benefits (IIBs) based on contribution from a prior compensable injury. The parties agreed that the claimant reached maximum medical improvement on June 15, 1993, and has a 12% whole body impairment rating as determined by Dr. O, a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The hearing officer concluded that the carrier was entitled to reduce IIBs by 100% due to contribution from a previous compensable injury. The claimant appeals this decision. The carrier did not submit a response.

DECISION

We affirm the decision and order of the hearing officer.

It was not disputed that the claimant suffered a compensable injury in a motor vehicle accident on (date of injury), in which the truck he was driving ran off the road and crashed into a tree and for which benefits, including a lump sum settlement, were paid. The terms of the settlement were not introduced into evidence. It is also undisputed that the claimant suffered another compensable injury arising out of a second motor vehicle accident on (date of injury), in which he was rear-ended by a truck. The carrier contended at the hearing that the injuries claimed as a result of the second accident were "virtually the same" as those claimed for the first accident and that all of the claimant's present medical problems are attributable to the prior injury.

The claimant was first seen as a result of his first accident by Dr. K, who referred him to Dr. S.[1] Records of Dr. S cover the period from September 26, (year), to June 27, 1991. Dr. S reports the claimant on his visit of September 26, (year), complained of pain "in his left shoulder, left side of his neck and both hips, also in the lower part of the ribs on the right side." The claimant denied numbness or tingling in the hands or feet. Dr. S diagnosed a fracture of the left humerus, cervical strain, contusions of the hips and right side of the rib cage, with no evidence of fracture. X-rays taken on (date of injury) and October 24, (year), were negative for fractures of the right ribs, cervical spine, left shoulder and pelvis though mild degenerative changes of the mid-thoracic spine were noted. Over the following weeks, the claimant showed signs of improvement until in November (year), his back began to start hurting again and he complained of numbness and pain in the right hip and thigh region. An MRI of the lumbar spine taken on December 14, (year), revealed a degenerated disc at L5-S1 with a mild bulge, but no herniation, and suspected spondylolysis. At his last visit with Dr. S, the claimant reported that the work hardening

[1]No medical records of Dr. K were introduced into evidence.

program was not too successful and that he had increased pain in his neck and back. Dr. S then referred the claimant to Dr. SA, a neurosurgeon.

According to Dr. SA's treatment records, the claimant presented himself for a neurological evaluation on June 21, 1991, with chief complaints of neck pains, headaches in back of head, low to middle back pain and left shoulder pain. On August 27, 1991, Dr. SA reported that the claimant was suffering a hyperextension injury of the neck, lumbar strain and a linear fracture of the left humerus. He believed the claimant would have residual pain and limitation of movement in the left shoulder from the fracture and "is also liable to suffer from pains in his neck and lower back . . . for an indefinite period of time." The claimant also reported on again/off again complaints of cervical and lumbar radiculopathy. Dr. SA released the claimant to return to work on January 14, 1992. The claimant's last recorded visit with Dr. SA was on (date of injury), some four days before his second vehicular accident. He complained of pain in his neck and the joints of his hands, wrists and elbows, knees and ankles and lower back.

In a undated Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) received by the Commission on December 14, 1992, the claimant described his second injury as extending to his head, neck, back, shoulder and legs. After this second accident, the claimant was seen by Dr. KH, a neurologist, on November 4, 1992, with complaints of headache, pack and neck pain. Dr. KH diagnosed cervical strain, low back derangement and right hip pain. An MRI of the cervical spine on November 10, 1992, showed "diffuse cervical radicular irritation and degenerative changes," but was otherwise unremarkable. Subsequent evaluations disclosed lessening of the neck pain, but persistent low back pain. MRIs of the lumbar spine in April 1993 showed spondylolysis and L5-S1 radiculopathy. At his last visit on August 17, 1993, he still had low back pain and pain in both hips.

On June 21, 1993, Dr. O completed an examination of the claimant. He recited a history of the second accident only and found MMI to have been reached on June 15, 1993, with a 12% IR. The 12% consisted of four percent for a specific disorder of the cervical spine and eight percent for a specific disorder of the lumbar spine. Range of motion testing was considered invalid and no neurological impairment was noted. In a letter of June 25, 1993, the carrier advised Dr. O about the claimant's first accident and provided his treatment records from Dr. SA which showed treatment as late as October 7, 1992. In its letter, the carrier stated:

> Of course you understand that we would be able to get contribution for any permanent impairment as a result of that prior injury which could conceivably reduce our rating . . . Please review this material and advise us what part of the twelve percent rating you might attribute to the previous accident.

As a consequence, on August 5, 1993, Dr. O issued a revised Report of Medical Evaluation (TWCC-69) which reflected the same June 15, 1993, date of MMI, but

assigned a zero percent IR. Dr. O, in a letter attached to his revised TWCC-69 wrote that the claimant "stated he had a previous injury which involved his shoulder and not the areas in question." Dr. O then gave a rating for a "small change in the neck, as well as a change in the back" which he concluded occurred prior to the second accident. His "minimum rating" was based on symptoms of pain after the second accident based on an aggravation of his cervical and lumbar spine condition. Dr. O continued:

> With the data we now have, showing he was getting treatment up to one week before the accident, all of the present findings would have to be apportioned out due to the first trauma and not the one involved here. If I had all this data available to me when I made the rating, I would have given him 0% for the last trauma and assigned all the impairment due to the traumatic injury from (year).

In a December 21, 1993, letter, a Commission benefit review officer cautioned Dr. O about unilateral contact with carrier representatives and advised him that in arriving at an IR, a designated doctor "must not exclude the effect of the prior compensable injury on the claimant's present impairment." He requested that Dr. O reexamine the claimant and answer a series of four questions. The first question asked if Dr. O was provided all previous medical records at the time of his first examination. Dr. O replied that he did not have "some of the necessary information for a proper and complete evaluation." The second question asked if Dr. O was still of the opinion that the claimant reached MMI. Dr. O confirmed that he still believed the claimant reached MMI on June 15, 1993. The third question asked what was the correct IR in light of the previous clarification that he must not exclude the effect of a prior compensable injury. Dr. O, in a lengthy response to this question, reaffirmed his original 12% rating based essentially on the date of the onset of symptomatology and the x-ray evidence. In brief, it was his opinion that given the evidence of arthritic condition or spondylosis and the claimant's symptoms before the second accident, the second trauma would not correlate with the symptomatology. He therefor assigned an IR of 12% for "all the impairment." He added, "[t]hen the benefit review officer can determine contribution." The fourth question asked for copies of his work sheets and any charts or tables used in his evaluation.

The claimant testified that when he went back to work in January 1992, he was fully recovered from his first accident and had only normal aches and pains. He insisted that he told Dr. O about his first accident when he was first examined by him in June 1993, even though he admitted not telling him about all his pain or his most recent visit with Dr. SA. He does not agree that he saw Dr. SA on October 7, 1992, and insists that he had back and neck pain after the first and second accidents, but denies he had headaches from the first accident. He also denied injuring his ribs in the first accident.

In her discussion of the evidence, the hearing officer observed that Dr. K describes the claimant as suffering from radiculopathy only after the second accident and that after his return to work the claimant was lifting heavy objects. This suggested to her that the

second injury aggravated the claimant's condition from the first injury and "that Claimant's recovery from his 1992 accident has not brought Claimant to the same level of improvement that Claimant reached following his (year) accident, shortly before the accident of 1992." She nonetheless concluded that the matter of contribution "must be determined with reference to expert medical evidence." Since the only expert evidence was the opinion of Dr. O, the hearing officer determined that all of the claimant's current 12% IR was attributable to the first accident and ordered a 100% reduction in IIBs.

Section 408.084 provides in pertinent part:

CONTRIBUTING INJURY.

(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 form 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.

The Appeals Panel has previously held that in order for a carrier to receive contribution, it has the burden of establishing both a prior compensable injury, which is the contributing injury, and the documented impairment which resulted from that injury. *See* Texas Workers' Compensation Commission Appeal No. 94451, decided May 23, 1994, and Texas Workers' Compensation Commission Appeal No. 92549, decided November 24, 1992. Whether these conditions exist is a question of fact. For old law, or pre-1989 Act injuries, there must at least be some medical evidence of " . . . anatomic or functional abnormality or loss . . . reasonably presumed to be permanent." Section 401.011(23). In the case under appeal, the parties agreed that the claimant did suffer a compensable injury in (year), and this is reflected in the medical records of both Dr. S and SA. In prior cases, treating doctors and designated doctors have provided opinions on the extent of contribution from earlier compensable injuries. *See* Texas Workers' Compensation Commission Appeal No. 92549, decided November 24, 1992.

The hearing officer stated in her decision and order that contribution can only be decided from expert medical evidence. Although, to our knowledge, the Appeals Panel has never expressly stated such a requirement, we agree with the hearing officer and hold that the amount of that contribution must be established by expert medical evidence. We are compelled to this conclusion because, first, entitlement to contribution is premised on the assignment of an IR, both for the later and prior contributing injury, and only a doctor can assign an IR based on the Guides to the Evaluation of Permanent Impairment, 3d Edition, 2d printing, February 1989 (Guides). *See* Section 408.122 and 408.124. Secondly, the Appeals Panel when confronted with this issue in the past has always relied

on the medical evidence in finding contribution. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 931098, decided January 18, 1994. Third, the degree of impairment and source of that impairment are inherently complex medical issues and are not readily ascertainable by non-experts. Although holding that contribution must be based on expert evidence, we also observe that the "determination of contribution is for the hearing officer who is not bound by the opinion of any doctor, including the designated doctor." Texas Workers' Compensation Commission Appeal No. 94256, decided April 20, 1994. *See also*, Texas Workers' Compensation Commission Appeal No. 93889, decided November 17, 1993. The hearing officer as fact finder is the sole judge of the relevance and materiality of the medical evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In the case under appeal, Dr. O presented the opinion, with extensive supporting rationale, that the entire 12% IR he assigned the claimant was attributable to his first injury. In the absence of other medical evidence on this point, the hearing officer could find Dr. O credible and persuasive and base her findings of fact and conclusions of law on this evidence.

An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, a standard not met in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

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

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Alan C. Ernst
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Tommy W. Lueders
Appeals Judge