APPEAL NO. 950130

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 29, 1994, _____ conducted a contested case hearing concerning only contribution. He determined that appellant (carrier) was entitled to no contribution from an 18% impairment rating (IR), ostensibly provided for a _____, compensable injury to L4-5 and L5-S1 in his back. Carrier asserts that the percentage of impairment assigned by the designated doctor for surgery to a prior compensable injury should constitute the amount of contribution it is due. Claimant did not reply to the appeal.

DECISION

Reversed and rendered.

Claimant testified that he had a compensable injury to his back on _____, for which he had surgery on October 2, 1991. Since the injury in ___ was under prior law, he was given no IR, per se, for that injury, but did reach a settlement. He returned to work, in another job, in February 1993 and on _____, slipped and fell, hurting his back at the same L4-5, L5-S1 area. The medical records relative to the injury in question (___injury) are very scant, but Hearing Officer Exhibits Nos. 5 and 7, letters of Dr. D (Dr. D) refer to the current condition as "pseudoarthritis."

A designated doctor, Dr. F (Dr. F) was appointed. He determined that claimant reached maximum medical improvement (MMI) on September 7, 1994, with 18% IR. Dr. F wrote in his narrative dated September 7, 1994, that claimant had slipped and fallen on _____, "re-injuring" the low back area. A diagnosis of "low back pain with facet arthrosis at L4-5" was made. Dr. F states that claimant received lumbar facet injections "and epidurals," with medication and other conservative care. Dr. F also stated, "No surgical procedure has been recommended." Dr. F notes that a grade I spondylolisthesis was increased since an examination in 1992 (this indicates that the spondylolisthesis was worse after the ____ fall than it had been after surgery performed relative to the ____ injury). Dr. F also found a "minimal annular bulge at L3-4 is unchanged." Dr. F provided no rating for either the bulge or the spondylolisthesis.

Dr. F did assign eight percent IR for range of motion (ROM) limitations. He also referred to claimant's surgery in 1991 for the prior injury as including fusions at L4-5 and L5-S1. He then assigned a 10% IR for a "surgically treated disc lesion" and one percent IR for "multiple operative levels" referring to Sections II E and F of Table 49, page 73, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), as he would have done had claimant undergone two level surgery for the 1993 compensable injury in question. Dr. F did apply the combined values chart correctly for 11% and eight percent to arrive at 18% whole body impairment. It is from this IR, to which both parties

stipulated and is therefore not part of the appeal, that the issue of contribution stemmed. Since IR itself was not an issue, it will not be considered in this review.

The hearing officer in denying contribution from the above described IR of the designated doctor, referred to Texas Workers' Compensation Commission Appeal No. 941338, decided November 22, 1994. That case discussed cumulative impact as found in Section 408.084. The claimant in Appeal No. 941338 had had lower back surgery in 1967 as a result of a work injury. That claimant then was compensably injured in 1991, for which he later had surgery for the compensable injury. That hearing officer looked upon contribution as an "entitlement" and with no medical opinion carved out of Table 49 of the AMA Guides an amount for the 1967 surgery to determine the proportion of the 27% IR contributed by the 1967 surgery. Appeal No. 941338 reversed the decision of the hearing officer, correctly noting that consideration must be given to the "extent prior injuries contribute to the present impairment." (Emphasis added.) The decision in Appeal No. 941338 then went on to observe that the claimant would have been entitled to a substantial IR for the surgery from the compensable injury even if there had been no earlier surgery. (Appeal No. 941338 did not indicate that an amount (from Table 49 of the AMA Guides) for the 1967 surgery had been added into the IR to get the 27% IR, and Appeal No. 941338 did not infer that an IR, given for a past injury, must be added to the present injury to get the current IR - as compared to the case before us on review in which the designated doctor recorded a Table 49 amount for prior surgery as if it occurred as a result, at least in part, of the compensable injury and made it part of the current IR.) Appeal No. 941338 also stated that "it is not essential for the carrier to prove an exact percentage, there must be sufficient facts in the record for the trier of fact to find a percentage that is reasonably supportable."

Texas Workers' Compensation Commission Appeal No. 92394, decided September 17, 1992, stated that the IR is based upon the physical condition of the claimant "resulting from the compensable injury at the point . . . reaches MMI." (Emphasis added.) Texas Workers' Compensation Commission Appeal No. 931130, decided January 26, 1994, stated that "the effects of a prior injury should not be discounted in the assessment of an impairment rating for the current compensable injury." (Emphasis added.) Appeal No. 931130 upheld a hearing officer's decision accepting the first IR of a designated doctor given prior to another opinion in which the amount of IR for the current injury was reduced. In considering the effect of a prior injury on the current IR, Texas Workers' Compensation Commission Appeal No. 941074, decided September 23, 1994, accepted a finding of fact that a prior injury had "resolved," so that no contribution was warranted. (We note in the case under review that the IR for ROM was assigned at eight percent; with claimant having had fusion surgery at two levels, some limitation on ROM may stem from the ____ compensable injury addressed by the 1991 surgery; regardless of the amount attributable to either injury, this rating was correct because it addressed the effect of the current impairment; the carrier could have then chosen to present evidence as to the extent the

prior injury contributed to the present impairment reflected in the ROM but did not do so. *See* Appeal 941338, *supra*.)

Texas Workers' Compensation Commission Appeal No. 94637, decided June 1, 1994, reversed and rendered a decision that had allowed no contribution. In that case a compensable injury in 1991 resulted in surgical fusion of two segments of the lumbar spine in 1992. A designated doctor assigned a 17% IR. The issue of contribution in that case came from evidence of a compensable 1989 lower back injury which also resulted in surgery. A medical opinion stated that the injury of ____ contributed 8-10% of the current IR. (Appeal No. 94637 does not indicate that the designated doctor added an amount from Table 49 of the AMA Guides for the ____ surgery in arriving at the total of 17% IR assigned for the current injury, which included surgery of its own.) Appeal No. 94637 pointed out that there was no medical evidence in conflict with the opinion as to contribution. Appeal No. 94637 cited Texas Workers' Compensation Commission Appeal No. 94451, decided May 23, 1994, which in reversing a decision of no contribution also had said, "there was also a doctor's opinion attributing a portion of the impairment to the prior injury."

In the case presently under review, the designated doctor did not merely "attribute a portion" of the rating to the prior injury, he constructed an IR, in a specific amount, in part out of the rating he gave to the prior injury - 11% for surgery at two levels in 1991 for a ____ compensable injury. While not addressing contribution, *see* Texas Workers' Compensation Commission Appeal No. 95084, decided February 28, 1995, which affirmed a hearing officer who subtracted an amount of IR in a designated doctor's opinion that was assigned for an injury not found to be compensable.

Finding that the IR of claimant for the ____ injury was specifically identified by the designated doctor as including 11% IR assigned to another prior injury, no further declaration is required as to the extent that the prior injury contributed to the present impairment.

The decision and order of the hearing officer are reversed and a decision is rendered that contribution is allowed carrier in the amount of 10% of the 18% IR.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge