APPEAL NO. 950268
FILED APRIL 10, 1995

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 (CCH) was held on September 2, 1994, with the record held open until (month) 20, 1994. With respect to the only issue before him, the hearing officer determined that the appellant (carrier) is not entitled to a reduction of the claimant's impairment income benefits (IIBS) and supplemental income benefits (SIBS) based on contribution from an earlier compensable injury. The carrier requested review urging that the determination of the hearing officer is so against the great weight and preponderance of the evidence that it is clearly wrong and manifestly unjust. A response from the respondent (claimant) has not been received.

DECISION

We reverse and render.

Many of the facts in this case are not disputed. The claimant sustained a compensable injury _____. On June 26, 1991, Dr. L performed laminectomies at L4-5 and L5-S1 with excision of herniated discs and nerve root decompressions. On April 27, 1992, the claimant and the carrier responsible for the injury incurred on _____, entered into a compromise settlement agreement (CSA) that was approved by the Texas Workers' Compensation Commission (Commission) on May 14, 1992. The CSA indicates that the claimant had been paid $40,164.00 in income benefits, would be paid an additional $40,000.00, and that the carrier would pay for all reasonable and necessary future hospital and medical expenses resulting from the injury until April 23, 1995. On (month) 8, 1992, Dr. F performed another laminectomy at the L5-S1 level to correct problems resulting from the _____, injury and the June 26, 1991, surgery. Dr. F released the claimant to return to work on January 11, 1993. After that he was self-employed for about three months and worked several different places. In May he sought employment with employer and was referred to Therapy 1 for a pre-employment examination.

The claimant passed the examination, but what occurred during the examination is in dispute. The examination was conducted by Ms. BF; however, she did not testify nor was a statement made by her offered as evidence. Mr. G testified that he has been a physical therapist for eight years; that he is a partner in Therapy 1; and that he is the custodian of records at Therapy 1. He said that he and his partner, Mr. LF, developed a program that has been franchised to other physical therapy clinics including Therapy 2. He said that two of the purposes of the program are to determine if a person is capable of performing the tasks of a job and to establish a baseline to be used if an employee is later injured. He testified that he has done about two hundred impairment ratings (IR) for doctors and that the testing for an IR and for a pre-employment examination are the same. Mr. G said that he was one of the persons who trained Ms. BF, that he has observed Ms.

BF perform pre-employment examinations, and that she always uses dual inclinometers when testing range of motion (ROM). He explained how two inclinometers are used. A copy of the record of the pre-employment examination given to the claimant was introduced. It contains the following entries under inclinometer:

FLEXION TOTAL	90	MINUS PELVIS	40	EQUALS LUMBAR	50	
EXTENSION TOTAL	35	MINUS PELVIS	10	EQUALS LUMBAR	25	
SBR TOTAL	20E	MINUS PELVIS		EQUALS LUMBAR	20E	
SBL TOTAL	25E	MINUS PELVIS		EQUALS LUMBAR	25	

[sic]

Mr. G testified that this shows that dual inclinometers were used. The claimant testified that Mr. S, a physical therapist at Therapy 2, used inclinometers on him and that he knows what inclinometers are. He was emphatic in stating that Ms. BF did not use an inclinometer on him during the pre-employment physical.

Mr. G testified that he reviewed the report from the pre-employment physical, that he originally assigned eight percent for surgically treated disc lesion with no residuals and five percent for loss of ROM for a whole body IR of 13%. He said that upon learning of the second surgery and residuals, he added two percent for the second surgery, two percent for the residuals, increased the IR for the specific injury to 12%, and used the combined values chart of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) to increase the IR for the 1989 injury to 16%. Mr. G said that in his opinion the injury in (month) 1989 contributed to the claimant's IR and that 16% of the total IR is from the (month) 1989 injury.

Mr. S testified that he has been a physical therapist for five years and has been in private practice at Therapy 2 for four years. He said that Therapy 2 uses the program, that he is aware of the program's protocol, that dual inclinometers are used for ROM, and that each physical therapist that conducts a pre-employment examination completes the standard forms. Mr. S testified that Dr. F has asked him to do IRs on numerous times and that Dr. F has always adopted his IRs. He said that Dr. F referred the claimant to him for an IR, that he assigned a 30% IR, and that Dr. F adopted that 30% IR. Mr. S testified that based on the additional surgery that he did not know about previously and the residuals he increased the claimant's IR to 33%, that he agreed with the 16% IR determined from reviewing the report of the pre-employment examination, that if the 16% IR is subtracted from the 33% IR the claimant still has a 17% IR for his lumbar spine, and that the claimant has an additional 10% IR for his wrist which results in a 25% IR. He said that he offered to assign an IR for the claimant's wrist, but that Dr. W treated the claimant's wrist injury and indicated that he would assign an IR for the wrist injury. On cross-examination Mr. S said that it is possible that the reports could have been completed without the use of an inclinometer. On redirect-examination he said that he has not estimated a ROM without using inclinometers and that the program's protocols requires the use of dual inclinometers. Mr. S said that during pre-employment examinations only one measurement of ROM would be taken because persons being tested are anxious to pass

the test to obtain employment. He said that he has never seen anyone not pass the pre-employment examination. Mr. S testified that using the combined values chart a 33% IR for the back and a 10% IR for the wrist would result in a 40% IR. He went on to explain that to determine the percent of contribution, the 16% from the 1989 injury is divided by the 40% which is the total IR, resulting in a 40% contribution from the 1989 injury.

The carrier introduced a letter dated August 16, 1994, from Mr. S to Dr. F in which Mr. S reported that the claimant's IR for his lumbar spine is 33% and that the IR derived from reviewing the pre-employment examination is 16%. Below the signature of Mr. S appears "8/25/94 I accept the Whole Body Impairment Ratings as above." (Emphasis added) followed by the signature of Dr. F. A letter from Mr. S to Dr. F dated June 6, 1994, that contains only one IR for the lumbar spine contains the following after the signature of Mr. S "Date 6/6/94 I accept the Whole Body Impairment Rating with my changes indicated and initialed." (Emphasis added.) The body of the letter contains no changes or initials.

The carrier questioned the credibility of the claimant. The claimant said that he did not include his injury in 1989 when he completed the application for employment with the employer in 1993 because a lot of places will not hire you and that he told them about it afterwards. He said that he did not lie about it, that he just did not put it down, and that he needed the work. The records of the pre-employment examination reveal that the claimant stated that Dr. F performed lumbar surgery on December 8, 1992, and that the claimant had no problems now. He did not mention the back surgery performed by Dr. L. On the urinalysis consent form signed on May 3, 1993, the claimant indicated that in the past seven days he had taken "Doracet." The claimant testified that he told them that he had been taking medication in the past, that he was not taking any at the time, and that he passed the drug test.

The parties entered into the following written agreement that was approved by the hearing officer on December 20, 1994:

> CLAIMANT's correct IR for his _____ injuries to his lumbar spine and right wrist is 40% which is derived from combining Dr. [F's] 08/25/94 corrected 33% IR for CLAIMANT's back injury and Dr. [W's] 10% IR for CLAIMANT's right wrist injury.

The hearing officer made 23 findings of fact and three conclusions of law. The carrier urges that the following findings of fact and conclusions of law are so against the great weight and preponderance of the evidence to be clearly wrong and manifestly unjust and are contrary to the 1989 Act:

FINDINGS OF FACT

> 15. Preparatory to an BRC [benefit review conference], CARRIER requested that physical therapist [Mr. G] compare testing data from 05/04/93 pre-employment physical to the requirements of the correct version of the AMA Guides. The physical therapist determined that CLAIMANT would have had a 13% whole body IR for the lumbar

spine injury (5% for loss of lumbar [ROM] and 8% for a specific disorder of the spine under Table 49 II (e) had an IR been given for his original 12/08/89 injury. After the BRC on 07/12/94 in preparation of the CCH, CARRIER had physical therapist [Mr. S] review his earlier reported contribution figures from the prior compensable injury and that contribution figure was revised to 16% to reflect a 5% loss of [ROM] and a 12% IR for a specific disorder of the lumbar spine pursuant to Table 49 (II) (e). He indicated that 10% should be allocated for the 06/26/93 [sic] surgery and 2% for the 12/08/92 surgery.

* * * *

17. Although the physical therapist testified to the contrary, CLAIMANT states and the hearing officer finds that physical therapist [Ms. BF] did not use a dual inclinometer in her [ROM] tests of CLAIMANT's lumbar spine in the pre-employment testing.

18. The pre-employment physical [ROM] tests were not similar to the lumbar [ROM] tests performed by the [Therapy 1] therapists to determine CLAIMANT's IR for the _____ injury.

* * * *

21. CLAIMANT's prior compensable injury resulted in no residual permanent anatomic or functional abnormality or impairment.

22. CLAIMANT had no documented residual impairment from his _____ compensable injury.

23. CLAIMANT's IR is 40% and is not impacted by his _____ injury. That rating is attributable entirely to CLAIMANT's _____ injury.

CONCLUSIONS OF LAW

2. CARRIER did not meet its burden of proving by preponderance of the evidence that CLAIMANT's prior compensable injury resulted in a documented permanent residual impairment that entitled them [sic] to contribution for that injury.

3. CARRIER is not entitled to a reduction of CLAIMANT's IIBS and SIBS based on contribution from an earlier compensable injury.

The hearing officer made findings of fact concerning the pre-employment examination conducted on May 4, 1993. He found that the claimant disclosed the 1989

injury and the surgery on December 8, 1992; that the claimant lifted 145.5 pounds; that Ms. BF determined the claimant's ROM as indicated earlier in this decision; that the claimant passed the pre-employment examination; that the pre-employment examination and tests were not performed by a doctor; and that the claimant worked as a floor hand on a drilling rig after the pre-employment examination without incident at that extremely physically demanding job until he was injured on _____. The records of the employer indicate that the claimant worked 17 days between May 9, 1994, and June 13, 1994.

In Texas Workers' Compensation Commission Appeal No. 92160, decided June 8, 1992, we held that the burden of proving that contribution should be ordered is on the carrier. The applicable provision of the 1989 Act by which the Commission may order a reduction of IIBS and SIBS is Section 408.084. It provides in part as follows:

> (a) At the request of the insurance carrier, the commission may order that [IIBS] and [SIBS] 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 Texas Workers' Compensation Commission Appeal No. 92549, decided November 24, 1992, the Appeals Panel quoted 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM (1991), VOL. 1, §4b.30, P 4-132, as follows:

> The requirement that the contributing injury must have resulted in "documented impairment" seems to require that the impairment from the contributing injury be recorded in medical records. This does not require a prior [IR], but it does require some indication that there was at least ". . . anatomic or functional abnormality or loss . . . reasonably presumed to be permanent." Therefore, the Commission will be required to examine the medical evidence from the earlier injury and make a determination of the extent of the previous impairment. It may be necessary to obtain a doctor's opinion to establish the extent of residual impairment resulting from the prior injury and the cumulative impact of the previous and present injuries on the employee's overall impairment (citations omitted).

In Texas Workers' Compensation Commission Appeal No. 931098, decided January 18, 1994, concerning a 1984 back injury, the chief judge wrote "[i]t does need to be recorded in medical records but does not require a prior [IR], only that there is some indication that there was at least anatomic or functional abnormality or loss reasonable presumed to be permanent." It is not essential for the carrier to prove an exact percentage, but there must be sufficient facts in the record for the hearing officer to find a percentage that is reasonably supportable. Texas Workers' Compensation Commission Appeal No. 941074,

decided September 23, 1994. The Appeals Panel has noted that it believes that consideration of the "cumulative impact" requires not only some assessment of extent of impairment for previous injuries but an analysis of how the injuries work together, i.e. the extent to which prior injuries "contribute" to the present impairment. Appeal No. 941074, *supra*. A carrier should not have the amount it pays increased by the effect of an earlier work-related injury that is part of the current impairment; likewise, a carrier should not receive a windfall by obtaining credit for an earlier impairment that does not effect the current impairment for which it is liable. Texas Workers' Compensation Commission Appeal No. 941338, decided November 22, 1994.

In the case before us, the hearing officer seemed to place weight on his determinations that Ms. BF did not use dual inclinometers in performing ROM testing and that the pre-employment examination was not conducted by a doctor. Dr. F signed a note that is on the fourth page of a letter to him from Mr. S dated August 16, 1994. The letter contains the 33% IR for the 1993 injury and the 16% IR for the 1989 injury, and the note, in a different type from that used in the letter, is dated August 25, 1994, and states "I accept the Whole Body Impairment Ratings as above." Also the record reflects that Dr. F increased the IR for the claimant's lumbar spine from 30% to 33% because of the two prior surgeries. The hearing officer's decision and order directs the carrier to pay this IIBS and SIBS including the additional three percent. The hearing officer's determination that the carrier is not entitled to a reduction of the claimant's IIBS and SIBS based on contribution from an earlier compensable injury is so contrary to 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.).

Accordingly, we reverse and render a decision that orders the IIBS and SIBS to which claimant may be entitled to be reduced by 40%.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge