APPEAL NO. 961211

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 16, 1996, a contested case hearing (CCH) was held.

With respect to the sole issue before her the hearing officer determined that carrier was not entitled to contribution due to claimant's two earlier compensable injuries.

Appellant, carrier, cites the contribution section of the 1989 Act, and certain Appeals Panel decisions, reiterates the facts and argument presented at the CCH, and contends that "justice dictates that the carrier be allowed some percentage of contribution for the Claimant's prior compensable injuries." Carrier requests that we reverse the hearing officer's decision and render a decision that carrier be allowed a 66% contribution for the claimant's two prior compensable injuries. Respondent, claimant, did not file a response.

DECISION

Affirmed.

Although there was extensive testimony from the claimant and voluminous medical records, the essential facts are not in dispute. Claimant in the latter 1980s worked as a carpenter on construction projects. On (the 1988 injury), claimant sustained a compensable low back and neck injury when she fell from a scaffold and was caught by her safety harness. Claimant was diagnosed as having a "small focal herniation" at L5-S1 and either a disc bulge or herniation at L4-L5. Claimant was off work approximately one and a half years, was treated conservatively and eventually settled her claim for $25,000. Dr. B in a handwritten note of August 23, 1988, commented that claimant did not want surgery. Claimant's treating doctor, Dr. CM, in a report dated August 9, 1988, notes "We also discussed briefly surgery and her future." Claimant's treating doctor released claimant back to full duty without restrictions.

On (the 1990 injury) claimant sustained another compensable low back injury while bending and attempting to lift a 200 pound slab of granite. Claimant was off work about two years with this injury, which again was treated conservatively. The doctors again identified herniated disc at L5-S1 and a central disc herniation at L4-L5. Claimant settled this case for $40,000 and was again released to work without restrictions in August 1992. (In pursuing her 1990 workers' compensation claim, claimant, through her attorney, claimed to be totally permanently disabled due to the 1990 injury.)

Claimant, for whatever reason, left construction and went into sales. Claimant testified that she wore high heels and was able to work long hours standing. She testified that on (the 1994 injury), while working as a salesperson, walking across the showroom floor, she tripped, and fell. Claimant said that in an effort to hold her dress down she fell on her hip and injured her low back. Claimant continued working the rest of that day and

shortly thereafter she went to the hospital and her employment was eventually terminated. Claimant's treating doctor for this injury, Dr. KM, after an November 11, 1994 MRI of the lumbar spine showed "moderate left disc herniation at L5-S1. Mild central disc herniation at L4-5" recommended surgery. Dr. W, in a second opinion for spinal surgery, commented that "By history form . . . we knew that she had a disc herniation in her back in 1988". Dr. W indicated that he reviewed "previous films" including a 1990 MRI and stated:

> This MRI certainly shows a disc herniation at L5-S1, as well as a bulge at L4-5. The 1994 film shows the same bulge at L4-5, which is no different; however, the disc herniation at L5-S1 does appear to be worse on the transverse cuts; that is, the disc herniation now impinges on the thecal sac, where it did not in 1990.
>
> It is likely, [claimant] did have a disc herniation with nerve symptoms in 1990. It is also likely that the disc herniation worsened with time, or with her next injury in 1994. There is even a possibility that the strength in the left foot and leg were weakened somewhat by her original injury, and this may have contributed to her fall while working in (the 1994 injury). (This is just speculation.)

After several delays, surgery in the form of a "L5-S1 hemilaminectomy and microdiscectomy" was performed on April 4, 1995. In a Report of Medical Evaluation (TWCC-69) dated December 21, 1995, and narrative dated December 18, 1995, Dr. KM certified maximum medical improvement (MMI) on December 18, 1995, with a fourteen percent impairment rating (IR). Dr. KM's fourteen percent IR was based on ten percent impairment from Table 49 IIE for a surgically treated disc lesion with residual symptoms and "2% impairment of the lower extremity for sensory combined with 2% of the lower extremity for motor" to equal fourteen percent on the combined values chart.

Although there are a number of other medical reports from all three injuries (all of which verify a disc herniation as early as 1988) none of the reports attempt to indicate how much of claimant's present impairment is due to the other two injuries. Carrier's position is that there were three injuries to claimant's back and that it is entitled to 2/3 or 66 2/3% contribution for the prior two injuries. Without so stating, carrier obviously believes each injury contributed in equal parts to claimant's present impairment.

The hearing officer determined that the carrier failed to establish that the claimant's two prior compensable injuries have had a cumulative impact on the claimant's current low back condition. The hearing officer further noted that the claimant successfully reentered the work force at full duty, with no restrictions after each prior compensable injury, after conservative treatment, and that "the carrier is not entitled to a reduction of the claimant's impairment income benefits (IIBS) based on contribution from two earlier compensable injuries." Carrier's appeal goes into extensive detail on each of the three injuries, cites the

various medical reports showing the existence of a herniated disc at L5-S1, from 1988 on, emphasizes claimant's settlements for the 1988 and 1990 injuries and points out that claimant has only worked two and a half years out of the last eight years. Carrier cites Appeals Panel decisions for the propositions that there must be a "documented impairment" for contribution to apply, that a "previous percentage of impairment" for the prior old law injuries is not required and that a claimant's return to work after a prior compensable injury does not bar contribution. We agree with all carrier's factual contentions and the cited propositions of law. However, carrier has misinterpreted Appeals Panel cases which state that apportionment is up to the Commission and not the doctors, and that "a doctor's opinion is not required in determining whether contribution is appropriate" citing Texas Workers' Compensation Commission Appeal No. 941405, decided December 1, 1994. That opinion went on to state:

> that it is the Commission and not the doctor that determines the extent of any contribution, that a doctor is not entitled to exclude the effects of a prior compensable injury on a claimant's present impairment, and that it is certainly acceptable for a doctor, however, to opine as to the extent to which impairment can be allocated to a prior injury (citing Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993). ***The Appeals Panel went on to state: "It is the role of [the] Commission to establish the proportion of any contribution to be allowed after considering whether the evidence proves a documented impairment from a prior compensable injury, and the cumulative impact of prior injuries on the claimant's overall current impairment. While it is helpful if there is a doctor's opinion stating the proportion among the various compensable injuries, such an opinion is not required before the Commission may order contribution."

Section 408.084, entitled "Contributing Injury" provides in pertinent part that at the request of carrier, the Commission "may order" (emphasis added) IIBS and supplemental income benefits (SIBS) be reduced due to documented impairment from earlier compensable injuries. Further, Section 408.084(b) provides that the Commission "shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section." All of the Appeals Panel decisions, including those cited by carrier unanimously hold that:

> The carrier has the burden of proving the extent, if any, that claimant's prior compensable injury contributed to his present impairment. This issue presented the hearing officer with a question of fact and it is the hearing officer who is the sole judge of the weight and credibility of the evidence. Section 410.165(a).

Mindful of the language in Appeal No. 941405, *supra*, that a doctor's opinion regarding the proportionment of impairment among multiple injuries "is helpful" but "is not

required", Texas Workers' Compensation Commission Appeal No. 952058, decided January 17, 1996, holds that:

> The determination of contribution is for the hearing officer, the hearing officer is not bound by the opinion of any doctor, but the hearing officer's determination must be based upon medical evidence. Texas Workers' Compensation Commission Appeal No. 94578, decided June 22, 1994. The hearing officer is not necessarily required to base the determination of contribution solely on expert opinion but may take into account other factors. Texas Workers' Compensation Commission Appeal No. 941170, decided October 17, 1994. The carrier need not prove an exact percentage; however, there must be sufficient evidence for the hearing officer to determine a percentage that is reasonably supportable. Texas Workers' Compensation Commission Appeal No. 950268, decided April 10, 1995.

See also Texas Workers' Compensation Commission Appeal No. 960275, decided March 27, 1996 which stated:

> The carrier had the burden of proving an entitlement to contribution. In order to meet this burden, the carrier need not prove an exact percentage by which income benefits are to be reduced, but must submit sufficient evidence from which the hearing officer may determine a reasonably supportable percentage. Texas Workers' Compensation Commission Appeal No. 952058, decided January 17, 1996; Texas Workers' Compensation Commission Appeal No. 931130, decided January 26, 1994.

Reading these cases together, it is clear that the Appeals Panel gives great deference to the hearing officer's determination on contribution and that while a doctor's opinion on percentage of contribution may not be absolutely necessary it is certainly helpful in assisting the hearing officer determine a reasonably supportable percentage of contribution. In the instant case, there is no doctor's opinion or other medical evidence in assisting the hearing officer in determining an appropriate and reasonably supportable percentage of impairment. While it is not essential that carrier prove an exact percentage of impairment for the prior injuries, it is necessary to do more than merely recite that the injuries occurred, were to the same portion of the body and that the employee received a lump sum settlement for that injury without opining on the existence or extent of any impairment. In this case claimant returned to work without restrictions after her first two injuries and there is documented evidence that the third injury caused a worsening of the condition and required surgery. Texas Workers' Compensation Commission Appeal No. 941338, decided November 22, 1994. Carrier, which had the burden of proof, relies solely on simple arithmetic and pure speculation that because there were three injuries it logically follows that each contributes equally to claimant's present impairment. There is absolutely

no evidence to support that speculation and the hearing officer determined that carrier had failed to establish the cumulative impact of the prior 1988 and 1990 compensable back injuries on claimant's current low back condition. We find that determination imminently supportable by the evidence, or as the case may be, absence of evidence to the contrary.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge