APPEAL NO. 980297
FILED MARCH 30, 1998

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 January 16, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were the respondent's (claimant) impairment rating (IR) and the entitlement of appellant (carrier) to contribution from an earlier compensable injury. The hearing officer accepted the initial IR of 23% rendered by a second Texas Workers' Compensation Commission (Commission)-selected designated doctor (the first designated doctor having become disqualified as he treated the claimant) determining that the great weight of the other medical evidence was not contrary thereto, and determined that the carrier was only entitled to four percent of the 23% as contribution for the earlier compensable injury. The carrier urges error in the hearing officer's acceptance of the 23% IR of the designated doctor rather than his later report (described by the carrier as an amended report) which indicated that 10% of the IR related to the prior injury, and thus the IR for the current injury would be 13%. The carrier also appeals the amount of contribution, arguing that it should be 10%.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant sustained a back injury on (1993 injury), subsequently underwent laminectomy/discectomy surgery at the L4-5 level, and was determined to be at maximum medical improvement (MMI) on November 11, 1993, with an eight percent IR for impairment due to a specific disorder of the spine from Table 49, II D of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). No rating was given for any range of motion (ROM) deficits. The claimant was released to work and, according to his testimony, he went back to the heavy labor he had previously performed without problems. While the claimant denies any back problems up to (1994 injury), medical records and a letter from his treating doctor and surgeon for the (1993 injury), injury, Dr. D, indicated that he complained of pain and numbness across the lower back and left leg for several months prior to that date. The claimant disputes those entries and denies he received any medical treatment from October 7, 1993, to (1994 injury). In any event, the claimant sustained another compensable back injury on (1994 injury), when he tripped carrying a heavy object and subsequently underwent a 360 degree fusion at the L5-S1 level on December 19, 1995, and a later surgery for hardware removal. Dr. H was his surgeon. The claimant states that he now has constant pain which he did not have after the surgery for the (1993 injury), injury, that his activity level is limited and he has not returned to work, tried to find work because he only has a high school education and "there's not much in the town where I live that isn't heavy manual labor," and that he has been going to college and is in his last semester

of the paralegal program. He acknowledged that he has undergone a functional capacity evaluation and was assessed "medium work or something like that."

There are a number of IR assessments in the case file. As indicated, the claimant was assessed and paid for an eight percent IR for a specific disorder after his first injury and surgery. Following the second injury and surgery, a dispute arose as to the claimant's IR and the parties stipulated that a Dr. F was selected as the designated doctor and rendered an IR of 21%. This was subsequently rejected as he had been one of the doctors assisting in the claimant's treatment. A second designated doctor, Dr. M, examined the claimant and rendered a report of a 23% IR on August 17, 1997. In response to an inquiry from the Commission, Dr. M in a December 17, 1997, letter states he reviewed the additional information and would agree that "the first back surgery could be apportioned as being a 10% impairment as a result of Table 49 . . . due to the old injury and the subsequent surgery." Dr. M indicated the IR for the second injury would thus be 14%.

A report from a Dr. Fu dated November 5, 1996, assesses an IR of 22%. His report notes two surgeries at two operative levels. There is also a May 7, 1997, letter from the treating doctor for his first surgery, Dr. D, which indicated he reviewed the records and a report from Dr. T and "would certainly have no qualms" as to his apportionment. A report from Dr. T for the carrier dated March 17, 1997, indicates his opinion that the claimant's IR was 20% with 15% being attributed to the first injury and surgery. Another report dated September 15, 1995, from a Dr. C, responds to carrier's request for his opinion on the 23% IR from Dr. M. Dr. C indicates that the prior surgery would account for 10% of the 14% rendered for specific disorders under Table 49, plus the 11% for the ROM deficits for the 1994 injury.

The hearing officer accepted the initial report of Dr. M and concluded that it was not contrary to the great weight of the other medical evidence. While he does, upon specific inquiry, state that a portion of the rating is related to the earlier injury, this is not an amendment to his initial report, and, while it certainly can and should be considered, is not entitled to presumptive weight. Texas Workers' Compensation Commission Appeal No. 950562, decided May 23, 1995. On the matter of the IR, the designated doctor's opinion was entitled to presumptive weight unless it was contrary to the great weight of the other medical evidence. The hearing officer found this not to be the case and, from our review of the evidence, we do not find error in the hearing officer's determination.

The hearing officer also determined that the carrier was only entitled to a four percent reduction and that the reduction reflects the "cumulative impact" of both injuries. It is not clear just how the hearing officer arrived at the four percent contribution rate given the evidence and particular facts in this case. Section 408.084(b) provides, and we have previously indicated, that cumulative impact of the compensable injuries shall be considered in determining the amount of contribution in a given case. Texas Workers' Compensation Commission Appeal No. 941338, decided November 22,

1994. Section 408.084(a) also provides that income benefits may be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries. We have also noted that, even where there is no specific IR assessment in evidence for a prior injury, this is no reason to deny contribution and that, while expert medical evidence is needed to establish contribution, a hearing officer can consider other factors. Texas Workers' Compensation Commission Appeal No. 951086, decided August 24, 1995. What is troubling in this case, and unexplained, is that, although the claimant's testimony indicates that his second injury did not resolve as did his first injury, there is a specific IR rendered for the first injury and surgery at the L4-5 level and it is limited to the impairment for a specific disorder under Table 49. IR is defined as the percentage of permanent impairment of the whole body resulting from a compensable injury Section 401.011(24). This IR was apparently final and benefits were apparently paid by the carrier. The second injury, according to all the medical records and reports, involved an injury and surgery to a different level (L5-S1) and resulted in ratings for both the operative level involved and ROM deficits. It is apparent that the designated doctor, although finding a current whole body IR of 23% which rated the specific disorder for the second surgery together with impairment due to loss of ROM, was of the opinion that 10% was attributable to the first injury and surgery. Contribution from the first injury was contained in the opinions of Dr. D, who performed the first surgery, and Dr. T and Dr. C. In this case, there is a specific IR rendered for an earlier compensable injury which is final, and there is a second injury involving a different level with surgery for that level, followed by an IR which considered both surgeries. The IR rendered considered the different levels and resulted in ratings for specific disorders for the two surgeries with the additional loss of ROM ratings following the second injury. Further, there is compelling medical opinion supportive of contribution of at least the prior IR for the prior impairment. Under the circumstances, the evidence overwhelmingly supports contribution at the level of the prior finalized IR. *See* Texas Workers' Compensation Commission Appeal No. 960589, decided May 3, 1996; Texas Workers' Compensation Commission Appeal No. 952019, decided January 12, 1996; Texas Workers' Compensation Commission Appeal No. 951086, decided August 24, 1995; Section 408.084. When an IR for a prior injury was specifically identified by the designated doctor, we held that no further declaration was required as to the extent that the prior injury contributed to the present IR. Texas Workers' Compensation Commission Appeal No. 950130, decided March 13, 1995. We find the reasoning in Appeal No. 950130 persuasive under the particular facts of this case.

Accordingly, we reverse that part of the decision of the hearing officer which holds that the carrier is only entitled to four percent of the 23% (4/23rds) IR for contribution and render a new decision that the carrier is entitled to eight percent (8/23rds) contribution (based upon the specific and finalized IR for the prior L4-5 injury).

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Christopher L. Rhodes
Appeals Judge

DISSENTING OPINION:

I concur with the majority's affirming the hearing officer's IR determination. In regard to the contribution issue I agree with the majority that the hearing officer's decision should be reversed, but I would remand the issue back to the hearing officer for an explanation as to how he arrived at the amount of contribution he found. I believe that rendering a decision in this matter does not give sufficient deference to the fact finding responsibility of the hearing officer or to the legislative mandate that the cumulative impact be considered in making a determination of contribution.

Section 408.084 provides as follows 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.

Clearly, consideration of the cumulative impact makes the determination of the amount of any contribution granted often more than a mere mechanical mathematical computation using a ratio of the impairment ratings from the prior and present compensable injuries. Also we have held that the hearing officer may consider factors

other than the impairment ratings from the current and prior compensable injuries in making a determination of contribution. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 94787, decided July 28, 1994. Thus, factual considerations based on the circumstances of the individual case must be considered. We have recognized the importance of these factual considerations in holding that the question of cumulative impact as well as the amount of contribution, if any, are questions of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 972048, decided November 17, 1997. We have repeatedly stated that we will only overturn such factual determinations if they are contrary to the overwhelming evidence, citing cases such as the decision of the Texas Supreme Court in Cain v. Bain , 709 S.W.2d 175, 176 (Tex. 1986).

To me the real problem in the present case is that the hearing officer invokes the cumulative impact to support a finding of an amount of contribution less than would be computed by using a ratio between the impairment ratings from the prior injury and the present injury without explaining how he applied cumulative impact to arrive at the result he reached. Nor is the basis for his doing so readily apparent from the evidence in the case. In such cases we have in the past remanded for an explanation from the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 961984, decided November 18, 1996; Texas Workers' Compensation Commission Appeal No. 961499, decided September 11, 1996. This is what I would do in the present case.

Gary L. Kilgore
Appeals Judge