APPEAL NO. 990165

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 December 9, 1998. The issue was the appropriate reduction of the respondent's (claimant) impairment income benefits (IIBS) and supplemental income benefits (SIBS) based on contribution from an earlier compensable injury. The appellant (carrier) and the claimant stipulated that the claimant sustained a compensable injury on (prior date of injury); that as a result of that injury, he reached maximum medical improvement (MMI) on March 6, 1995, with a 10% impairment rating (IR); that the claimant sustained a compensable injury on _____; that Dr. B was the Texas Workers' Compensation Commission-selected designated doctor for the 1996 compensable injury; and that as a result of that compensable injury, the claimant reached MMI on March 6, 1998, with a 15% IR. The hearing officer made 11 findings of fact that are contained on over three pages in her Decision and Order. The findings of fact include:

FINDINGS OF FACT

10. Although claimant returned to his regular work duties by May 23, 1995 and worked through _____, both the 1993 and 1996 compensable injuries contribute to and cumulatively impact on claimant's overall impairment even though the two compensable injuries involved different levels of the lumbar spine.

11. Claimant's [IR] for the 1993 injury was 10% for specific disorders of the spine (surgically treated lesion with residual symptomatology) - lumbar. Claimant's [IR] for the 1996 injury was 15%, the raw data confirmed Claimant received 6% for loss of range of motion [ROM] and 11% for specific disorders of the spine but of that 11% only 1% was allotted for the additional surgery. *The raw data values of 6% and 1% combined is attributable to the 1996 injury, or 7/15ths.* [Emphasis added.]

The hearing officer concluded that the appropriate reduction for contribution from the earlier compensable injury is 7/15, the fraction by which to reduce future income benefits. The carrier appealed six of the 36 sentences in the findings of fact, including the sentence in italics in Finding of Fact No. 11 set forth earlier in this decision and the conclusion of law based on that sentence in Finding of Fact No. 11. One of the other appealed sentences states that the claimant has not returned to work; the others state things in medical records and inferences drawn from those records. The carrier also stated that the hearing officer made an error, and that the decision should be corrected to show that it is entitled to contribution of 8/15. The claimant filed a response that was timely to be a response, but not timely to be an appeal. The claimant urged that the carrier failed to prove that it is

entitled to reduce IIBS and SIBS based on contribution from a prior compensable injury and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the carrier is not entitled to reduce IIBS and SIBS. In the alternative, the claimant stated that the hearing officer determined that 7/15 of the IR is attributable to the 1996 injury; asked that the decision of the hearing officer be corrected to show that the carrier is entitled to 8/15 contribution; and requested that the decision of the hearing officer, as corrected, be affirmed. The carrier filed a response to the response filed by the claimant; stating that the claimant's response was filed as a timely response, that it was not filed as a timely appeal, and that it should be considered only as a response.

DECISION

We reform the conclusion of law and decision of the hearing officer to state that the carrier is entitled to reduce the claimant's IIBS and SIBS, if any, by 8/15 based on contribution from the earlier compensable injury. We affirm the Decision and Order of the hearing officer as reformed.

There was no testimony at the hearing. Both parties had medical reports and records admitted into evidence. In addition to the lengthy findings of fact, the Decision and Order of the hearing officer contains a four-page statement of the evidence. Only a brief summary of the evidence will be included in this decision. The claimant injured his low back at work in (prior date of injury); in June 1994 he had surgery at L5-S1 because of a herniated disc; in March 1995 his treating doctor certified that he reached MMI with a 10% IR; the 10% may be based on a specific disorder under Table 40 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), but the record does not indicate what the 10% IR is based on; there is no other report in the record assigning an IR for the 1993 injury; and the claimant was released to return to work at light duty in March 1995 and returned to his regular duty in May 1995.

The claimant sustained another compensable low back injury in _____; he had surgery for a herniated disc at L4-5 in December 1996; apparently he has not returned to work; the designated doctor certified that he reached MMI in March 1998 with a 15% IR consisting of 11% for specific disorders under Table 49 of the AMA Guides and six percent for loss of lumbar ROM; there was an apparent mistake in using the combined values chart of the AMA Guides, and the IR should have been 16%; and in October 1998 the designated doctor stated that the claimant received 10% for specific disorders of the lumbar spine for the 1993 injury and one percent for additional surgery in 1996 and opined that 60% of the loss of ROM was from the 1993 injury and 40% of it was from the 1996 injury.

The claimant's response to the carrier's appeal contains considerable review of and comment on the evidence and references to numerous Appeals Panel decisions. Since it was not timely filed to be considered an appeal, we need not consider the points raised in it that are in the nature of an appeal.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). In Texas Workers' Compensation Commission Appeal No. 950562, decided May 23, 1995, the Appeals Panel stated that the percentage of contribution from an earlier injury is a question of fact for the hearing officer and that a hearing officer is not bound by the opinion of any doctor, including the designated doctor, on the issue of contribution from an earlier injury. The hearing officer was permitted to draw inferences from the medical evidence. The six appealed sentences in the findings of fact of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the appealed findings of fact of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

It appears that the hearing officer made a clerical error in the conclusion of law and the decision by stating that the carrier is entitled to reduce IIBS and SIBS by 7/15, rather than 8/15, based on contribution from the earlier compensable injury. We reform the conclusion of law and the decision to state that the carrier is entitled to reduce IIBS and SIBS, if any, by 8/15 based on contribution from the earlier compensable injury. We affirm the decision and order of the hearing officer as reformed.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Elaine M. Chaney
Appeals Judge