APPEAL NO. 990237

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 6, 1999, a contested case hearing was held. With regard to the issues before her, the hearing officer determined that respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first compensable quarter and that the appellant (carrier) is not entitled to contribution of claimant's SIBS due to an earlier injury. The hearing officer's findings and decision regarding SIBS have specifically not been appealed and have become final. Section 410.169.

Carrier appeals the findings on the contribution issue, taking exception with the hearing officer's use of the word "obliterate" and generally contends that it is entitled to contribution for a 1993 injury, and that the hearing officer's decision is against the great weight of the credible evidence. Carrier requests that we reverse the hearing officer's decision and render a decision that it is entitled to 7/16 contribution. Claimant responds, pointing out that claimant returned to his regular heavy work after his 1993 injury, that the 1993 injury "was not a compensable injury under the Worker's [sic] Compensation Act . . . of Texas" and that carrier is not entitled to contribution. Claimant urges affirmance.

DECISION

Affirmed.

Claimant was employed by the employer drilling company as a "roustabout" and "roughneck/motorman." In (prior date of injury) on an off-shore (State 1) rig, claimant slipped on some gel, fell and injured his low back. Claimant was treated in (City 1) and eventually transported back to (City 2) for treatment. Claimant's treating doctor was Dr. M. An MRI taken in (State 1) showed a herniated disc at L4-5. Claimant was treated conservatively by Dr. M, who did not think surgery was warranted. Claimant was examined by Dr. F, who in a report dated August 12, 1993, wrote that "if symptomatic enough" claimant should have a "diskectomy and spinal fusion." Claimant discussed his condition with Dr. M, who, in a report dated September 15, 1993, wrote:

> [Dr. F] did a discogram and CT scan. We know that he has the far lateral left sided ruptured disc at L4-5 and it shows on the discogram also. He also had a degenerated disc with a small tear at L5-S1, slightly to the right, but I think that that is asymptomatic. At this point I strongly discouraged any surgery. He is essentially recovered from the disc problem, and has minimal problems with his left leg. He has no back pain. I think it would be ridiculous to do an operation at this point on [claimant]. He should return to work and have surgery only if significant symptoms recur.

No impairment rating (IR) was ever assessed. Claimant returned to his preinjury work pursuant to a full-duty release from Dr. M and proceeded to work on drilling rigs in the United States and overseas.

It is unclear why the 1993 case was not pursued as a workers' compensation case but instead was filed under the Jones Act. The Jones Act is described as a tort-based federal maritime statute that provides for damages if a seaman cannot go back to sea. Claimant testified that he only received some "maintenance and cure" benefits which apparently included some medical benefits. No benefits were paid for anything which could be considered permanent impairment.

Claimant continued working his heavy labor roughneck duties until _____, when he slipped on a dirty rig floor (in (Country)) and fell on his left hip. Claimant testified that he immediately "felt a burning sensation" and reported the injury. Upon completion of his "hitch," claimant returned to Dr. M in (City 2). Claimant again initially underwent conservative treatment but subsequently had spinal surgery on July 30, 1996, and due to persistent symptoms had a second spinal surgery on December 16, 1997, for a ruptured lumbar disc at L4-5. Claimant was certified as having reached maximum medical improvement on October 1, 1997 (apparently pursuant to Section 401.011(30)(B)) with a 16% IR. The designated doctor in assigning the IR made no reference to the 1993 injury. Claimant is unable to return to his preinjury employment and carrier has requested contribution for the 1993 work injury, which is the same area of the body.

Dr. M, in a letter report dated June 20, 1996, wrote carrier that he has "absolutely no way of telling whether or not [claimant] would have required surgery if he had not had the further injury in _____." Dr. M goes on to say that "the injury of _____ . . . is simply an aggravation of the same [1993] pre-existing injury." Dr. H did a record review on behalf of the carrier. In a report dated November 2, 1998, Dr. H recited the history of claimant's 1993 injury but seemed to indicate the 1995 complaints came on gradually and does not recount the fall on a drilling rig in (Country) on _____. Dr. H noted the documented 1993 herniated disc and assigned a seven percent impairment from "(Table 49 2c)" of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) for that injury (with no loss of range of motion) and concluded that seven percent of "the present 16% IR was due to the 1993 injury."

Section 408.084(a) provides that the Texas Workers' Compensation Commission (Commission) may order impairment income benefits and SIBS benefits be reduced in a proportion equal to the proportion of the documented impairment from the earlier injury or injuries. Section 408.084(b) states 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." We have stated that this will not in every case equate to simple arithmetic. Texas Workers' Compensation Commission Appeal No. 950735, decided June 22, 1995; Texas Workers' Compensation Commission Appeal No. 971348, decided August 28, 1997. The hearing officer cites that proposition and comments that the cumulative impact analysis "must be made by taking the current condition and then

'working back'; not by taking the person at his previously injured state and working forward." The hearing officer goes on to state:

> In reviewing the medical records, it is clear that there was a prior injury which noted a herniated disc at L4-5. Even [Dr. M] noted that the herniation was caused by the fall in 1993. It is also clear that there was no real loss of motion noted during examination and that Claimant's problems from the 1993 injury generally resolved. There was no radiculopathy or much pain when Claimant was released to return to work. There was also sufficient evidence that Claimant returned to work, full duty, performing heavy duty labor for two years. It was not until Claimant fell in 1995 that the herniation was noted to have increased and required surgery to correct. In essence, the effect of the second injury obliterated the effects of the first injury. Therefore, the appropriate percentage of contribution, under the facts of this case, is zero percent.

Carrier contends that there was "no medical evidence" of a "sudden aggravation of an injury on a date certain" and indeed there is one report of Dr. M that fails to mention the 1995 fall, but other reports, such as the designated doctor's March 24, 1998, report certainly support claimant's testimony of a 1995 slip and fall to the ground. Carrier's contention of "no medical evidence" is not supported in the record. Similarly, carrier complains that the hearing officer said that the second injury "obliterated" the effects of the first injury, using a Webster's Collegiate Dictionary definition of "obliterate." While that word may not have been technically accurate, the hearing officer made amply clear that the first (1993) injury had no cumulative impact on the claimant's overall impairment. The preponderance of the evidence would support the hearing officer's findings that claimant returned to work with no restrictions, performing heavy labor following the 1993 injury and that claimant continued to work with minimal problems (claimant said that occasionally he would have a "tingling" in his body, particularly in the 40 degree to 60 degree below zero (State 1) weather) until his 1995 injury. Carrier also speculates that the 1993 injury "contributed to the claimant's need for surgery after the 1995 injury"; however, that conjecture is specifically rejected by Dr. M, who said "there was absolutely no way of telling" whether that was so.

As noted in Texas Workers' Compensation Commission Appeal No. 961770, decided October 18, 1996 (Unpublished), citing Texas Workers' Compensation Commission Appeal No. 94787, decided July 28, 1994, the Appeals Panel has written that a consideration of the cumulative impact of prior and current injuries under Section 408.084(b) "could yield a contribution proportion which is not a strict arithmetical percentage that the prior impairments bear to the overall percentage" and that there "could be instances where the trier of fact agrees that the whole is greater than the sum of its parts." The opinion went on to discuss the discretion afforded the hearing officer by the use of the word "may" in Section 408.084(b) "to weigh such considerations in determining the

proportion that will fairly reflect the 'cumulative' impact. [Citations omitted.]" Similarly, a hearing officer could conclude that the prior injury had resolved with no residual effects and that, for this reason, no contribution was warranted. Texas Workers' Compensation Commission Appeal No. 941074, decided September 24, 1994. Ultimately, the cumulative impact of multiple compensable injuries for purposes of awarding or denying contribution is a question of fact for the hearing officer to decide, Texas Workers' Compensation Commission Appeal No. 941405, decided December 1, 1994, and is subject to reversal only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company 715 S.W.2d 629, 635 (Tex. 1986).

In this case, although claimant clearly sustained a herniated disc at L4-5 due to a work-related injury in 1993, the claimant had returned to his preinjury heavy labor "with minimal problems" and continued to work "generally pain free" until the 1995 fall. Not every person who has a herniated lumbar disc automatically has a seven percent impairment. Indeed, Dr. H's assessment of a seven percent impairment is based on Table 49, the specific disorders of the spine table, Section II C, which provides a seven percent impairment for an unoperated disc "with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasms, or rigidity associated with moderate to severe degenerative changes on structural tests including unoperated herniated nucleus pulposus, with or without radiculopathy." (Emphasis added.) We note the absence of evidence of six months of medically documented pain after the 1993 injury and that claimant was released to return to work. Even Dr. F, who did not recommend a return to heavy labor, in the report dated August 12, 1993, a month after the 1993 injury, noted that claimant did not appear in distress. Dr. M in his September 15, 1993, note states "[h]e has no back pain." We also disagree with carrier that the hearing officer gave inappropriate weight to the fact that claimant returned to work. As we have stated many times the hearing officer is the sole judge of the weight and credibility that is to be given to the evidence, including medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-(City 2) [14th Dist.] 1984, no writ).

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 clearly wrong or 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:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge