APPEAL NO. 990631

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 8, 1999, a contested case hearing was held. With respect to the issues before her, the hearing officer determined that the appellant (carrier) was entitled to zero percent contribution from an earlier injury. The carrier appeals this determination, arguing it was contrary to the evidence and was a misapplication of the law. There is no response from the respondent (claimant) to the carrier's appeal in the appeals file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that on _____, the claimant sustained a compensable injury to his right knee; that claimant was assessed at maximum medical improvement (MMI) on June 26, 1998, and assigned a nine percent impairment rating (IR); that on (prior date of injury), the claimant had sustained a compensable injury to his right knee; that Dr. S was the claimant's treating doctor and had treated him for both the 1992 and 1998 injuries; and that claimant was certified at MMI on July 13, 1994, with an IR of 11% for the 1992 injury.

The claimant testified as to the mechanism of injury as to both the 1992 and 1998 injuries. Both involved slips that injured his right knee. The claimant testified that both injuries resulted in surgery to his right knee. The claimant testified that after his 1992 injury he returned to work in 1994 and had not sought medical treatment after his return to work. The claimant testified that he had recovered from his 1992 injury at the time of his 1998 injury.

There was medical evidence from Dr. S that these were two separate injuries and that the site of the injuries was not in the same location of the femoral condyle. There was also medical evidence from Dr. B, who performed a required medical examination. Dr. B stated as follows in a report dated June 26, 1998:

> [The claimant] has a known previous right knee injury that required surgical intervention approximately five to six years ago. As [Dr. S] notes indicate, and [the claimant] confirms he was not having problems with his right knee, was working full-duty and had a new chondral tear of the medial femoral condyle. This was confirmed by [Dr. S's] arthroscopic surgery and, therefore, I do not feel this portion of his [IR] was affected by his previous injury. The lateral meniscal tear was also a new injury. The only other question would be whether, prior to this injury, his right knee range of motion was already reduced from his previous injury. Without documentation from his previous injury and subsequent range of motion measurements, I cannot make this

> determination. However, given the extent of his most recent surgery, I would not think it unusual for him to have some loss of range of motion, and would most likely consider the mild restriction in his range of motion contributed to his most recent surgery. Therefore, I would not be inclined to apportion out any of his current [IR] because of his prior injury.

Also in evidence was a report from Dr. P, who, at the carrier's request, conducted a peer review of the claimant's case based upon his review of the medical records. Dr. P stated as follows in a report dated December 8, 1998:

> I have been asked to comment on contribution of the previous injury to the [IR] for the _____ injury. In my opinion, as a result of the _____ injury, the patient has an additional impairment of the right lower extremity which converts to a 2% whole person [IR]. The remaining 7% should be considered contribution for the previous injury of (prior date of injury).

Section 408.084 provides as follows in relevant part:

> (a) At the request of the insurance carrier, the commission [Texas Workers' Compensation 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.

The carrier argues that a hearing officer must award some contribution when there is evidence of a prior compensable injury to the same body part, citing our decision in Texas Workers' Compensation Commission Appeal No. 971592, decided September 25, 1997. This overstates the holding of Appeal No. 971592 wherein the Appeals Panel remanded the case to the hearing officer based upon its finding that the overwhelming evidence in that case was contrary to the hearing officer's finding of no contribution. Clearly, this decision was based upon the Appeals Panel review of the evidence in that specific case and does not stand for the proposition that contribution must be awarded in every case or in particular sets of cases. In fact, the language of Section 408.084(a) which provides that the Commission *may,* rather than *shall,* assess contribution would clearly indicate that contribution is not mandatory as matter of law in any particular circumstance. We have held that the existence of medical evidence supporting contribution does not require an award of contribution. Texas Workers' Compensation Commission Appeal No. 941170, decided October 17, 1994. It is also well-established that the burden is on a carrier to

establish entitlement to contribution. Texas Workers' Compensation Commission Appeal No. 961499, decided September 11, 1996.

In any case, the hearing officer's decision in the present case turns on her view that considering the cumulative impact the carrier is not entitled to contribution in the present case. Whether there is a cumulative impact, and if so the amount of such cumulative impact, is a question of fact for the hearing officer to decide. Appeal No. 941170, *supra*. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case, there was clearly conflicting medical evidence on the issue of contribution, including the cumulative impact of the claimant's injuries. The carrier essentially argues that the hearing officer should find that the report of Dr. P, its peer review doctor, established that it was entitled to contribution. The hearing officer clearly chooses not to rely on Dr. P's opinion, but to instead give greater weight to the opinion of Dr. B. In fact, she states as follows in her decision:

> The medical evidence pertinent to the issue of contribution in this case consisted of a peer review report prepared by [Dr. P]. According to [Dr. P], the Claimant was given 15% impairment of the right lower extremity due to chondromalacia from the first injury and given a 15% [IR] of the right lower extremity due to chondromalacia after the second injury. Therefore, this should all be considered contribution. What [Dr. P] does not take into consideration is that the Claimant sustained a new injury, albeit to the same body part as the previous injury. [Dr. B], the required medical examiner selected by the Carrier, found that since the Claimant was not having problems with his right knee, was working full-duty and had a new chondral tear of the medial femoral condyle, he did not feel this portion of his [IR] was

affected by his previous injury. This Hearing Officer agrees with [Dr. B's] reasoning, therefore, the Carrier is not entitled to any contribution for this portion of the [IR].

With regard to the range of motion, [Dr. P], determined that the Claimant was assigned 14% [IR] of the right lower extremity due to range of motion loss following the (prior date of injury) injury and was assigned 4% [IR] for range of motion loss for the _____ injury. Therefore, there is no additional impairment from the _____ injury. [Dr. B] on the other hand reasoned given the extent of his most recent surgery, he did not think it unusual for the Claimant to have some loss of range of motion, and would most likely consider the mild restriction in his range of motion is contributed to his most recent surgery. This Hearing Officer agrees and is therefore not inclined to apportion out any of Claimant's current [IR] because of his prior injury.

It was the province of the hearing officer to weigh the evidence including the medical evidence. We do not find that the overwhelming evidence is contrary to her resolution of the issue of contribution.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge