APPEAL NO. 990717

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 5, 1999, a hearing was held. The hearing officer determined that certain income benefits be reduced by 50% to appellant (claimant) based on contribution from an earlier compensable injury. Claimant asserts that there should be no contribution or, in the alternative, that the reduction should be only 37.5%. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on (date of injury for 1997), the date of the injury. Claimant felt pain to her neck and shoulder while moving an empty pallet. She had sustained a prior compensable neck injury while working for this employer on (date of injury for 1993). After the 1993 injury she was found to have an impairment rating (IR) of 11%, which was made up of four percent for a specific disorder of the cervical spine based on Table 49, Section IIB, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), and seven percent for cervical range of motion (ROM) deficiencies. After the 1997 injury she was found to have an IR of 16%, based on four percent for a shoulder injury, six percent for a specific disorder of the cervical spine based on Table 49, Section IIC of the AMA Guides, and six percent for cervical ROM deficiencies.

The Texas Workers' Compensation Commission (Commission) wrote to the designated doctor, Dr. F, who provided the 16% IR for the 1997 injury, and asked him for an opinion as to contribution that should be allowed relative to the 1993 injury; he replied that the 11% IR of the 1993 injury should be considered as contribution in regard to the 16% IR of the 1997 injury; Dr. F's opinion would result in a 68% contribution and reduce claimant's current income benefits to less than one-third.

Claimant's IR from the 1997 injury included four percent for a shoulder, which was not part of the IR for the 1993 injury. Claimant did testify that the 1993 injury was serious and that it included her shoulder, stating that she could not move her arm for a period of time; she was off work for more than six months but less than one year. She initially came back to work on restricted duty but testified that she was performing regular work for over a year at the time of the 1997 injury. She had continued to see her chiropractor irregularly after returning to work from the 1993 injury until the time of the 1997 injury. Claimant stated that the 1997 injury was "more severe" and added that she has not obtained the relief from medical care after this injury that she did after the 1993 injury.

The designated doctor for the 1993 injury, Dr. S, commented that a CT scan showed "mild disc bulges" at C4-5 and C5-6, but not herniated discs. As stated, he provided four percent IR from Table 49, Section IIB for the cervical spine associated with minimal

degenerative changes. After the 1997 injury, Dr. F stated in his report that an MRI showed "broad spondylitic disc herniation at C4-5 and similar findings at C5-6." In addition, he mentioned that claimant had hypertrophy at C3-4, and C6-7 showed foraminal narrowing "due to degenerative changes." He added that a discogram showed pain reproduction at "at least two of the three discs in question with the third one being reported as abnormal." His six percent IR for a specific cervical disorder was from Table 49, Section IIC, which refers to "moderate to severe degenerative changes."

Dr. F, in later providing his opinion as to contribution, upon the request of the Commission, said that the 11% IR from the 1993 injury "would be reflected in the next IR that I provided" which provided 12% IR for the cervical area. He then concluded that "11% of the 12% assigned for cervical would be on a permanent basis from a prior injury." Very little of Dr. F's opinion relative to contribution has been omitted; the hearing officer could conclude that Dr. F provided little detail or rationale in regard to his opinion. There was evidence that Dr. F did not have the medical records that were considered by Dr. S in providing his IR of 11% for the 1993 injury.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The 1989 Act provides no presumptive weight to a designated doctor's opinion as to contribution, unlike that provided to that doctor's opinion as to maximum medical improvement and IR. The hearing officer's Statement of Evidence shows that he considered the cumulative impact of the compensable injuries on claimant's overall impairment in deciding what reduction, if any, to order. *See* Section 408.084. The hearing officer appears to have considered that the 1997 injury reflected a total IR of six percent for a specific disorder that was based in part on the 1993 injury (four percent of the six percent); he then states that claimant in 1997 also had a reduced ROM in regard to cervical flexion and cervical right rotation. This observation is correct, the claimant was given no IR for cervical flexion after the 1993 injury but was assigned one percent after the 1997 injury; similarly she had no IR for cervical right rotation which was found to be one percent after the 1997 injury. The hearing officer's explanation in his Statement of Evidence shows that he considered the 1993 injury to have provided two-thirds of ROM limitations (four percent of the six percent); this results in a total of eight percent of the 16% IR provided after the 1997 injury as the amount of reduction attributable to the 1993 injury. The hearing officer did not offset the reduced ROM in the areas specified by claimant's improvement in ROM pertaining to cervical extension and lateral flexion; carrier commented on this but did not appeal this point.

With the evidence provided in this case, the determination of the hearing officer is sufficiently supported by the evidence. Dr. F indicated that apportionment should have been greater, but as Dr. F stated, this decision is for the Commission to make. The IRs provided by the two designated doctors after the 1993 and 1997 injuries showed that each assigned IR for degenerated conditions in the cervical spine and for cervical ROM. The only area not considered by the two was the shoulder IR provided after the 1997 injury of four percent, which was not considered in reaching the amount of reduction to apply to claimant's income benefits.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge