APPEAL NO. 991331

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 May 6, 1999. The sole issue at the CCH was whether the appellant (carrier) is entitled to a reduction of the respondent's (claimant) impairment income benefits (IIBS) and supplemental income benefits (SIBS) based on contribution from an earlier compensable injury and, if so, by what proportion. The hearing officer determined that because "no evidence" was offered in support of contribution based upon the claimant's impairment rating (IR) of 20%, the carrier is not entitled to a reduction of IIBS and SIBS based on contribution from an earlier compensable injury. The carrier appeals, urging that the decision is contrary to the evidence offered at the CCH, against the great weight and preponderance of the evidence, and manifestly unjust. The claimant replies that the decision is correct and that no new evidence should be submitted in his case.

DECISION

Reversed and remanded.

The parties stipulated that the claimant's IR for the compensable injury which occurred on _____, is 20%. The claimant, a truck driver, testified that he sustained three previous compensable lumbar injuries, which occurred on (alleged date of injury No. 1), (alleged date of injury No. 2), and (alleged date of injury No. 3). On (alleged date of injury No. 3), the claimant was injured pulling skids and the injury resulted in a fusion at L4-5 and L5-S1 on January 10, 1990. A compromise settlement agreement was reached in April 1991 in the amount of $36,000.00. On (alleged date of injury No. 2), the claimant twisted his back and suffered an acute lumbosacral sprain. After both the (alleged date of injury No. 3), injury and the (alleged date of injury No. 2), injury, the claimant returned to work.

On (alleged date of injury No. 1), the claimant was climbing out of a truck and injured his back. He was diagnosed with a herniated disc at L3-4 and had microdiskectomy surgery. The claimant testified that he was off work for four months and after the surgery he had no problems. The claimant testified that he returned to work without restrictions, worked approximately 14 hours per day, doubled his salary in 1994 and 1995, and did not follow up with his doctor because he had no pain. The parties stipulated that the claimant's IR for the (alleged date of injury No. 1), injury is 11%.

On _____, the claimant slipped and fell off of the fuel tank of a truck. The claimant testified that in December 1996 he had surgery at L3-4 to trim off the ruptured part of the disc, and a repeat fusion from L3-4 through L5-S1. According to the claimant, he continued to suffer pain and another surgery was performed in January 1998. The claimant testified that the surgery involved removing the discs completely and a 360E fusion with cages. The claimant testified that he has been in constant pain since the January 1998 surgery. According to the claimant, his doctor has told him he has a failed surgery and his only option is a morphine pump. The claimant testified that he has been unable to work

since the injury, is on narcotic medication, and sees a pain management doctor every 30 days.

The claimant asserted that the carrier is not entitled to any contribution because he was able to return to work after the 1993 injury, was able to earn more money, had no problems with his back after the 1993 surgery and was able to increase his work abilities. The claimant asserted that if it were found that the carrier was entitled to contribution, the carrier should be entitled to contribution at a rate of 55% (11/20).

The carrier relies upon the medical opinion of Dr. C to support its request for contribution. Dr. C calculated the claimant's IR for the _____, injury to be 23% based on the medical records. Dr. C states that the first surgery for the injury on (alleged date of injury No. 3), results in 13% per Table 49; that there are no range of motion measurements from the prior injuries, but using Table 50 for a three-level lumbar fusion results in six percent; and that combined 13% and six percent results in an 18% IR for the claimant's prior injuries. Based on the current 23% IR and a prior 18% IR, Dr. C opined that the carrier was entitled to a 78% contribution (18/23). The carrier asserted it is entitled to contribution in the amount of 78% or, in the alternative, 55%.

At the CCH, the hearing officer asked Dr. C to assume that the claimant had a 20% IR and state his opinion as to the amount of contribution. Dr. C responded that without including the prior surgeries and correcting the current IR to 23%, he could not give an accurate amount of contribution. The hearing officer made the following Finding of Fact and Conclusion of Law:

**FINDING OF FACT**

2. No evidence was offered in support of contribution based upon Claimant's [IR] of 20%.

**CONCLUSION OF LAW**

3. Because no evidence was offered in support of contribution based upon Claimant's [IR] of 20%, Carrier is not entitled to a reduction of Claimant's [IIBS] and [SIBS] based on contribution from an earlier compensable injury.

The hearing officer, in the Statement of the Evidence and Discussion, states:

> [Dr. C] refused to calculate contribution based upon the correct [IR.] No evidence was offered for contribution based upon a correct [IR] for the 1996 injury. Because Carrier did not present evidence of contribution based upon the correct [IR], Carrier is not entitled to contribution.

In its appeal, the carrier asserts that it offered significant evidence showing its right to contribution as well as the appropriate amount of contribution owed to the carrier, which was not contradicted by the claimant.

Section 408.084(a) provides that at the request of the carrier, the Texas Workers' Compensation Commission (Commission) may order IIBS and SIBS reduced "in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries." The carrier has the burden of proving an entitlement to contribution. Texas Workers' Compensation Commission Appeal No. 961499, decided September 11, 1996. The requirement that the contributing injury must have resulted in "documented impairment" does not mean that the impairment from the contributing injury must be recorded in medical records, but it does require some indication that there was at least an anatomic or functional abnormality or loss reasonably presumed to be permanent. Texas Workers' Compensation Commission Appeal No. 931098, decided January 18, 1994. It is not essential for a carrier to prove an exact percentage, but there must be sufficient facts in the record for the trier of fact to find a percentage that is reasonably supportable. Texas Workers' Compensation Commission Appeal Panel No. 980598, decided May 11, 1998.

In determining the reduction, the Commission "shall consider the cumulative impact of the compensable injuries on the employee's overall impairment . . . ." A determination of contribution must be based on medical evidence, but 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 the Commission, not a doctor assessing impairment, who is to determine the extent to which any contributing injury is one for which a claimant has already been compensated. *See* Texas Workers' Compensation Commission Appeal No. 94618, decided June 22, 1994. The Commission must examine medical evidence from the earlier injury to determine the extent of the previous injury and it may be necessary to obtain a doctor's opinion to establish the extent of residual impairment resulting from the prior injury and the cumulative impact of the previous and present injuries on the employee's overall impairment. Appeal No. 931098, *supra*. 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).

Evidence was offered in support of contribution by Dr. C and agreed to by Dr. D, the claimant's doctor. We agree with the hearing officer's finding that there was no evidence offered in support of contribution calculated in the claimant's 20% IR; however, this is not the criterion for determining contribution. The criterion for determining contribution is whether documented impairment existed that contributed to the present impairment. This determination does not require merely a mathematical calculation, but an analysis of the cumulative impact of the prior compensable injuries and the latest compensable injury by analyzing how the injuries work together and the extent to which the prior injuries contribute

to the present impairment. The hearing officer's decision does not indicate whether documented impairment existed that contribute to the claimant's present impairment, or that a cumulative impact analysis was made. We reverse Conclusion of Law No. 3 and the decision as being against the great weight and preponderance of the evidence. We remand for the hearing officer to make findings of fact and a conclusion of law to resolve the disputed issue of whether the carrier is entitled to reduce IIBS and SIBS based on contribution from cumulative impact from earlier compensable injuries and, if so, by what percentage, based on the record.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge