

APPEAL NO. 000180

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 14, 1999, a hearing was held. The hearing officer determined that respondent's (claimant) impairment rating (IR) from an _____, compensable injury is 15%, as assigned by the designated doctor, Dr. A, and that appellant (carrier) is not entitled to any reduction based on contribution. Carrier asserts that it is entitled to contribution and cites Texas Workers' Compensation Commission Appeal No. 952019, decided January 12, 1996, as authority based on a range of motion (ROM) deficit from a _____ injury. While carrier's appeal listed a conclusion of law that addresses the IR of 15%, it did not appeal findings of fact relative to presumptive weight given the designated doctor's opinion that the IR was 15% and did not provide any reason for overturning the 15% IR. There was no response from the claimant in the appeals file.

DECISION

We affirm.

Claimant testified that he was injured on _____, when a roll of plastic struck him in the chest causing him to strike a pole. Carrier's appeal did not take issue with a finding of fact which said that claimant injured his neck and low back when he struck that pole on _____. The hearing officer also found that Dr. A first assigned an IR of five percent in May 1999 but that it was based only on the lumbar injury; Dr. A thereafter assigned a 15% IR in August 1999 based on both the lumbar and cervical injury, with five percent for a (none to minimal) lumbar specific disorder, four percent for a (none to minimal) cervical specific disorder, and six percent for cervical ROM (no lumbar ROM). The hearing officer also found that Dr. A's amended report in August 1999 is not contrary to the great weight of other medical evidence. None of these findings of fact was disputed on appeal. Having considered these unappealed findings of fact, the absence of any evidence that Dr. A's examination or report in August 1999 was inadequate, and noting that the record contains only one other IR for the _____ injury in the amount of 16% as assigned by claimant's treating doctor, Dr. H, the determination that claimant has an IR of 15% is not against the great weight and preponderance of the evidence.

Carrier did appeal two findings of fact that said carrier offered no evidence as to what claimant's IR would have been after the _____ injury had there been no prior injuries, and carrier "failed to establish the cumulative impact that the prior injuries had on the present IR and is not entitled to contribution."

While carrier does attack a conclusion of law that says claimant's IR is 15%, that conclusion of law is sufficiently supported by the unappealed findings of fact discussed above and the absence of any other evidence either establishing another IR or in some manner invalidating Dr. A's IR.

Carrier provided four exhibits and no testimony. The most recent document offered was produced by Dr. HA; it is dated January 8, 1996, over 18 months before the injury in question. This document constitutes the basis of carrier's appeal but presents several anomalies. It provides an IR of 28% in response to a _____ injury for which there was no surgery. It provided an IR for ROM limitations for the cervical spine of 10%; similarly, it provided 10% for ROM for the lumbar spine; it considered claimant's spinal studies to be normal, but still assigned a specific disorder IR to both the cervical and lumbar spine (some thoracic IR was also added). At the conclusion of his report dated January 8, 1996, Dr. HA then stated that he had previously examined claimant (implying for a prior compensable injury, which Dr. HA later mentioned) and said he had obtained "similar findings," with only lumbar extension now being three percent greater than before. Dr. HA said, "I believe that the 25% of the 28% whole body medical impairment this patient has at this time is apportioned to his injury of _____." This conclusion by Dr. HA may have been reasonably interpreted by the hearing officer as saying that claimant did not have cervical and lumbar ROM, or any specific disorder, IR from the _____ injury except in regard to three percent for lumbar ROM. Not so clear is why Dr. HA believed a 25% IR was attributable to a _____ injury in which the only IR in the record is in the amount of only 15% (given by Dr. R in 1992) and which gives no breakdown concerning cervical and lumbar specific disorder, and no amount relative to ROM of either, although both cervical and lumbar injuries are listed. (Obviously, not even the 10% ROM IR for lumbar and 10% ROM IR for cervical could fit in a total of only 15% IR.) Nevertheless, Dr. HA's January 1996 report is the only medical evidence addressing a _____ injury in this record, but, as stated, he attributed the IR found to the _____ injury.

Apparently Dr. HA's assertion that the IR he saw in 1996 was actually from a _____ injury, not a _____ injury (except for three percent), was accepted by the parties, because on April 1, 1996, claimant and carrier signed a benefit dispute agreement in which both parties accepted that carrier could reduce claimant's impairment income benefits and supplemental income benefits by 100% because of "prior compensable injuries," which included the _____ injury.

It is true that Dr. HA's 1996 report on IR was provided in reference to a _____ injury and he does assign an IR of 28%. However, Texas Workers' Compensation Commission Appeal No. 992161, decided November 15, 1999, stressed that a doctor's testimony concerning potential recovery from ROM deficits up to 95% of normal motion was not directed at the injury in question and should not have been accepted by the hearing officer; that the doctor actually said that the specific ROM deficit from a _____ injury lasted through the compensable injury at issue in that case. While Appeal No. 992161 reversed the hearing officer, the hearing officer in the case under review gives no indication by his decision that he accepted Dr. HA's IR of 28% as attributable to the _____ injury, which would be contrary to Dr. HA's clear assertion that 25 of the 28% was attributable to the _____ injury.

In addition to the reports of Dr. HA and Dr. R, carrier provided two reports from Dr. B dated in 1988 and 1989, both of which referred to claimant's "overall disability." See Texas

Workers' Compensation Commission Appeal No. 971368, decided September 2, 1997, which cited Texas Workers' Compensation Commission Appeal No. 941170, decided October 17, 1994, as affirming no contribution, in part because medical evidence addressed disability, not impairment.

Dr. A's 15% IR provided no IR for lumbar ROM so that part of the 28% IR which Dr. H said was attributable to the _____ injury (lumbar ROM) is not a factor in the current IR of 15%. It is also true that Dr. A at one point in his report "highly recommended" apportionment based on "previous cervical injury," but he provided no further detail and he also said in the same report that "based on the medical records, it cannot be determined whether these conditions were present before or after the date of injury" (we presume that a condition rated was present after the injury); the hearing officer showed that he considered this comment significant because he incorporated it into a finding of fact. In addition, Dr. HA in 1996 specifically referred to cervical studies as "essentially normal," although Dr. R in 1992 said that claimant had a herniated disc at C3-4 and a bulging disc at C4-5, but as stated, did not say what, if any, IR was attributed to cervical as compared to lumbar injuries, much less what, if any, was assigned to a specific disorder of the cervical spine. Thereafter, an MRI in September 1997 said:

Canal stenosis accentuated at C3-4 through C5-6 levels related to disc bulges, right paracentral protrusion at C3-4 and mild annulus fibrosis bulges at C4-5 and C5-6 levels. Minimal cord compression at C3-4 level related to disc protrusion. No cord edema.

The best that can be said of the medical evidence from the point of view of the carrier is that medical opinion as to claimant's cervical injury prior to 1997 was conflicting and there is no evidence that any physician compared _____ studies, after the current compensable injury, to studies that Dr. HA referred to as normal in 1996 or to studies that Dr. R referred to as herniated/bulging discs, in 1992. Appeal No. 952019's, *supra*, side-by-side comparison of ROM numbers from different IRs and conclusions it drew therefrom are not available in the case under review since Dr. HA in 1996 attributed his list of ROM numbers to a _____ injury, not the intervening _____ injury, and there is no breakout of numbers for the _____ injury as discussed above. With Dr. A appearing to have contradicted himself as to apportionment, the hearing officer stressed Dr. A's inability to say what part of the injury was present before the current injury. With conflicting medical evidence as to claimant's cervical injury before 1997 and contradictory evidence as to apportionment, the determination as to contribution was a factual matter for the hearing officer to make. The record contains sufficient evidence to support the determination that carrier did not meet its burden of proof and did not show that contribution was due.

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:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge