APPEAL NO. 001121

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 April 22, 2000. The hearing officer determined that the appellant (self-insured) is not entitled to reduce the amount of the respondent's (claimant) impairment or supplemental income benefits for contribution from an earlier compensable injury. He held that there was no cumulative effect from the previous impairment on the present impairment. The self-insured appeals and argues that the hearing officer applied the wrong standard, one of cumulative financial impact, to the decision he made. The self-insured argued that the peer review doctor's percentage of contribution should be adopted. The claimant responds that there is no contribution since impairment resulted from two different spinal injuries.

DECISION

Affirmed on the record.

The carrier sought contribution for the effects of claimant's prior back injury and surgery, which occurred a little over a year before the current _____, injury. He was employed at the time of both injuries by the self-insured.

The claimant was injured on June 12, 1996. An MRI revealed a large herniation at L5-S1, and a smaller one with degenerative disease at L4-5. The claimant had severe radicular pain following his injury. His doctor was Dr. G, who recommended emergency surgery on June 19, 1996. Dr. G wrote on that date that he did not believe that the mild degenerative changes at L4-5 were the cause of the claimant's problem, and that while he might have some symptoms in future years from that level, only surgery to L5-S1 was needed. The claimant had surgery on June 21, 1996, and, afterwards, Dr. G assigned a 12% impairment rating (IR), for the specific spinal condition on Table 49 from the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) and two percent for range of motion (ROM) loss. The claimant said he was pretty much normal after this surgery.

The claimant sustained a new injury on _____, and had a second surgery on July 29, 1998, after conservative treatment. His surgeon was Dr. GB. The surgery was primarily directed at the L4-5 level, where an extruded fragment was present in addition to a large herniation. The laminectomy also involved L3-4, and not only removal of hardware at L5-S1 but an exploration of that level to assess possible nerve compression. The claimant testified that he continued to have residual effects on a daily basis from this injury. The claimant's IR after this procedure was 20%, according to a designated doctor, Dr. H.

Significantly, Dr. H awarded 10% from Table 49 of the AMA Guides for specific condition. In so doing, he expressly stated that he omitted the increment for additional (and earlier) surgery, "because this was from a previous injury." The claimant had only

invalidated ROM deficits, so was awarded a zero percent IR. Finally, Dr. H awarded an additional one percent IR for loss of sensation, and 10% IR for loss of strength. He did so, however, because of impairment at the L5 nerve root.

The self-insured presented a letter from a peer review doctor stating that he believed that the carrier's proposed 35% contribution was reasonable, although he did not explain how this figure was derived (and neither did the carrier's request letter to him). This letter stated that spinal surgery can often cause a stress in adjacent levels. The peer review doctor did not examine the claimant. The claimant presented a letter from Dr. GB that the second injury was a separate one from the first and that the L5-S1 level was a separate issue. However, he apparently was not asked if the impairment from the previous injury contributed in any way to the impairment after the second surgery.

We must first note that we cannot credit the hearing officer's theory that there needs to be a financial connection between two injuries in order for contribution to be allowed. More often than not, a previous documented impairment from a prior injury may have occurred before the effective date of the 1989 Act, involving a different carrier, where no financial connection may exist, but contribution is in order where a present impairment includes the cumulative impact of prior injuries regardless of whether the first documented impairment was "paid for." Nor can the occurrence of impairment for different spinal levels in the cumulated injuries provide a basis for disallowance of contribution entirely. *See* Texas Workers' Compensation Commission Appeal No. 950898, decided July 17, 1995; Texas Workers' Compensation Commission Appeal No. 980297, decided March 30, 1998; and Texas Workers' Compensation Commission Appeal No. 990165, decided March 9, 1999 (Unpublished). In this regard, we note that the AMA Guides call for rating spinal regional impairments, not individual discs. While the hearing officer may consider that injuries largely impacted different levels, he must still consider the cumulative impact of both injuries on the second impairment.

While there is no overlap or apparent contribution to ROM or for Table 49, part of the IR was for L5 nerve root problems. The peer review doctor raised the cogent point that one surgery can set up a stress on adjacent levels. That statement, the fact that claimant had a small herniation at L4-5 from his first injury, and the fact that claimant now has impairment at the nerve root level that lies between his two surgical sites, point toward a cumulative impact of both injuries on the current IR not accounted for by considering each injury in isolation.

However, the primary problem in this case, and the reason for our affirmance, is that the carrier has the burden of proving the extent and existence of contribution through medical evidence. No clue is afforded as to how the 35% figure proposed by the carrier was derived in the evidence or even in the argument at the CCH. The Texas Workers' Compensation Commission cannot simply select a contribution percentage without a sound medical basis for it.

We will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995. Consequently, we affirm the disallowance of contribution because of the lack of evidence to support a percentage of contribution.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge