APPEAL NO. 950390

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 16, 1995, a hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant's (claimant) impairment rating (IR) is 14% but that 93% of that rating is subject to contribution for a prior compensable injury. Claimant asserts that no impairment was assessed for the prior injury and the entire 14% IR is based on the compensable injury. Respondent (carrier) replies that the decision should be upheld.

DECISION

We affirm.

Claimant injured his back on (date of injury), in a fall while working for (employer). In 1984 he had injured his back, compensably, for which surgery fused his spine at the L4-5 and L5-S1 levels. (Dr. S) had performed surgery in 1984 and treated his 1993 injury too. He was concerned about the past surgery, but a myelogram and CT showed that the fusion had held. He treated claimant conservatively, with no recommendation for surgery following the 1993 accident. Dr. S certified that claimant reached maximum medical improvement (MMI) on February 21, 1994, with a five percent IR. Dr. S's narrative used the phrase found in Section II B., Table 49, Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, "medically documented injury" of six month's duration to assign five percent IR.

A designated doctor, (Dr. F), in September 1994, examined claimant and certified MMI on February 21, 1994, with 14% IR. Dr. F's narrative made it clear that he was assigning 13% for prior surgery, not for current impairment based on objective tests. Dr. F stated that claimant's "pre-existing lumbar surgery" placed him under the "segmental instability section for multiple levels operated with residual symptoms which grants him 13% impairment. . . ." (Emphasis added.) At the time of Dr. F's IR, the medical records of claimant showed that the 1984 fusion was "solid." No record shows any instability since the 1993 compensable injury. The medical records showed no surgery for segmental instability, or any other reason, since the 1993 injury. Dr. F also found a one percent IR due to loss of nerve sensation, but did not assign five percent for six months of pain as was reported by the treating doctor.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Section 408.125(e) also provides for presumptive weight to be given the designated doctor when determining the amount of IR unless the great weight of other medical evidence is to the contrary. Section 408.125 gives no presumptive weight in regard to the extent of injury or contribution. While the IR, as provided by the designated doctor, was in dispute at the hearing and the designated doctor's construction of that IR was questionable, the hearing officer gave it presumptive weight, and the appeal does not attack

it. Therefore, resolution of the appeal regarding contribution cannot be effected by either clarification of the IR or consideration of whether it was entitled to presumptive weight. Nevertheless, we emphasize that Section 408.125(e) gives no presumptive weight to the designated doctor's determination of the extent of injury. In this case the treating doctor found the old fusion intact and tests supported him. Nevertheless, the designated doctor stated that the injury aggravated the fusion but did not further describe how a fusion that is "solid" was aggravated.

While we question whether a rating should be assigned for surgery (as opposed to the effect of an injury) occurring prior to the compensable injury in question and then made a part of the whole body IR, the IR itself, as stated, was not attacked on appeal. (*See* Section 401.011(24) which defines IR as the percentage of whole body impairment resulting from a compensable injury.) *Also see* Texas Workers' Compensation Commission Appeal No. 950130, decided March 13, 1995, which quoted from Texas Workers' Compensation Commission Appeal No. 931130, decided January 26, 1994, that "the effects of a prior injury should not be discounted in the assessment of an [IR] for the current compensable injury." (Emphasis added.)

Appeal No. 950130, *supra*, also cited Texas Workers' Compensation Commission Appeal No. 941338, decided November 22, 1994, which said that for contribution an exact percentage need not be proven as long as there is sufficient evidence for the hearing officer to determine a percentage "that is reasonably supportable." Appeal No. 950130 then stated that since a percentage of IR assigned for a surgical procedure for a prior injury was included in IR for the current compensable injury, that same figure could be used in determining contribution. Appeal No. 950130 does not call for apportionment of current impairment in arriving at an IR. For example, if an evaluation for current impairment shows a present herniated disc (or ankylosis after a fusion), it may be a part of the IR without the designated doctor attempting to apportion based on whether it was present before the compensable injury. Similarly, if segmental instability is objectively found at that evaluation, it may warrant a percentage of IR. Appeal No. 950130 said, in effect, that if past surgery were simply added to the current impairment notwithstanding the absence of objective findings of impairment present since the current compensable injury and/or at the time of the IR evaluation, then that amount added, without justification, may be considered along with other evidence by the hearing officer in determining contribution.

Finding that the decision and order of the hearing officer 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

Alan C. Ernst
Appeals Judge