APPEAL NO. 960589

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 February 14, 1996. The issue at the CCH was the extent to which any impairment from a compensable 1986 lumbar injury contributed to the _____, lumbar injury of the appellant, (DP), who is the claimant, and whether a reduction should be allowed to any future impairment income benefits (IIBS) and supplemental income benefits (SIBS). Claimant's injury and 24% impairment rating (IR) were not disputed.

The hearing officer held that the carrier was entitled to contribution at the rate of 50% of the weekly benefits amount.

The claimant has appealed, arguing that this extent of contribution is not supported by the evidence, which proved that claimant had no problems following his first surgery, and that the hearing officer's method of simply calculating what IR claimant would have had after his first surgery does not account for the cumulative effect of the injuries on the overall impairment. The claimant further argues that a report from the designated doctor considering the issue of contribution is based upon medical records which do not exist or precede claimant's first surgery. The claimant argues that there should be no contribution. The carrier responds that the hearing officer's decision should not be disturbed because medical evidence indicated a severe earlier injury.

DECISION

We reverse and render that the contribution from claimant's 1986 back injury is 3/8 (9/24).

Claimant was a truck driver for several years for (employer), who is self-insured. He injured his lumbar spine in a compensable injury that occurred (the 1986 injury), when he fell. Claimant had one surgical procedure in (City 1) on January 29, 1987, involving two levels of his lumbar spine, during which a laminectomy, discectomy, and fusion were performed. Claimant returned to work on July 17, 1987, and said he wore a brace for three months. Medical reports indicate that he had been advised against driving a truck, although he resumed this occupation. Claimant said that he did not have any lower back problems or leg pain, although in 1990 he did sustain a neck and shoulder injury.

On _____, claimant again injured his lower back, apparently through repetitive trauma from a faulty seat. He had another back surgery, a laminectomy and hemilaminectomy at L4-5, on September 23, 1993, performed by Dr. S. Loose fragments were removed and nerve compression was relieved in this surgery. A designated doctor, Dr. W, in an October 1994 report, assessed a 24% IR for claimant's lower back, which included a 12% rating for his specific spinal condition from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), added to range of motion

(ROM) deficits, and nerve root impairment. She noted that he had only some relief from his surgery, and continued to have severe back pain and radiating leg pain thereafter.

Dr. W stated that it was her impression that claimant had no problems and was pain-free after his 1987 surgery, but that there would still be a contributing effect to his current IR because of his previous injury that would amount to less than 25%.

Dr. W was asked to review additional medical records and she reconsidered her opinion as to the effect of the prior injury on the current impairment. In a July 1995 letter, Dr. W recited some medical reports which preceded claimant's 1987 surgery as indicating spondylolisthesis and S1 radiculopathy. Dr. W commented that a note from an unidentified doctor, dated June 11, 1990, stated that claimant complained about back and leg pain. However, Dr. W recited that she saw indications in medical records of the existence of stenosis at the time of the 1986 injury, and that fact, coupled with two operative levels from the 1987 surgery, would cause at least 50% of claimant's current ROM and nerve root problems. Dr. W noted that, so far as Table 49 specific conditions were concerned, claimant would merit 10% IR from his 1993 injury even if he had not had previous surgery. She therefore determined that the only contributing effect on the specific Table 49, injury impairment would be three percent. Dr. W concluded by stating that claimant's current injury would merit an overall 15% if the previous injury had not occurred, indicating that the extent of the contributing effect from the prior impairment on the current IR would be 9/24. The carrier's theory of contribution, first articulated in closing argument, was that Dr. W's assessment would be a fair contribution and should support a reduction of 9/24.

We note also that a report from a doctor whose role was not clarified, Dr. A, reported on April 20, 1994, that claimant had 13% IR from his _____, injury, derived solely from Table 49. However, he opined that claimant had also not reached MMI by that date, but would reach it by July 1994. Claimant's treating doctor also assigned a 16% IR due to the 1993 injury.

As claimant argues, the underlying reports referred to by Dr. W, the June 11, 1990 note and a report from Dr. W of "1998," do not independently exist in this record. The records of claimant's cervical injury do not comment, one way or the other, on claimant's lumbar condition. Nevertheless, it appears that Dr. W's second report was not necessarily premised solely on whether claimant subjectively had or did not have pain following his first surgery. Whether claimant did or did not have pain after his first injury does not rule out the existence of "impairment" which may be assessed under the AMA Guides.

We note that one objective condition leading to each surgery was a herniated disc at L4/5. Nerve compression was another similar condition. There was consequently an "overlap" in the injuries that occurred in 1986 and 1993.

Section 408.084 provides for adjusting the IIBS and SIBS to allow for the effects of impairment from a previous compensable injury. This section states (in pertinent part):

> (a)At the request of the insurance carrier, the commission may order that impairment income benefits and supplemental income benefits be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.
>
> (b)The commission shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section.

Our concern about the method followed by the hearing officer, to simply reconstruct what IR claimant might have been assigned after his 1987 surgery and use this to credit a contribution, is the same concern the Appeals Panel had in Texas Workers' Compensation Commission Appeal No. 941338, decided November 22, 1994, in that it makes no analysis of "cumulative impact" of both injuries on the current impairment. We stated, in that case, that:

> [T]he prior law made the carrier for a current injury liable only for benefits for which it would be liable had not an earlier compensable injury taken place. *See* TEX. REV. CIV. STATE. ANN. Art. 8306. § 12c (repealed). This, it seems to us, summarizes the essence of the current statutory direction to consider the `cumulative impact' of the injuries on the current disability. Thus, we believe that consideration of the `cumulative impact' requires not only some assessment of extent of impairment for previous injuries but an analysis of how the injuries work together. . . . . An earlier injury could well have a rating that does not parallel its impact on a subsequent injury.

It appears to us that the logical, appropriate way to assess "cumulative effect" is to start with the recent impairment and look back, not, as the hearing officer did, with the earliest impairment looking forward to events that have not yet occurred. The decision in Appeal No. 941338, *supra*, was reversed and remanded to develop evidence on cumulative impact which was lacking. In the instant case, however, medical evidence which analyzes the interplay of both injuries was furnished by Dr. W in her July 1995 letter. While the hearing officer is not necessarily bound to follow a doctor's opinion, the method chosen by the hearing officer as an alternative should be soundly based in the evidence. This is especially true when the hearing officer finds an amount of contribution which exceeds that requested by the carrier, who has the burden of proof on this issue.

We find no such sound basis for the method chosen by the hearing officer that would override the medical evidence and Dr. W's comparison of the medical effects of two injuries. The testimony and medical reports in evidence do not support the hearing officer's

discussion that the effects from 1986 continued through the second surgery utterly unaffected. Dr. W's 1995 letter, by assessing what claimant would merit had the first surgery not taken place, indicates that the second injury and surgery effectively obliterated some of the residual effects of the first injury and surgery such that the remaining effect would only be the enhancement under the AMA Guides for the number of procedures and surgeries.

In considering all the evidence in the record, we agree that the finding of the hearing officer that the contribution percentage should be 50% of the benefit, is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (Tex. 1951). The great weight and preponderance of evidence that considers not only impairment after two injuries but the cumulative effect on the overall impairment is 1995 letter of Dr. W, and we reverse the decision of the hearing officer and render a decision that contribution should be allowed in accordance with Dr. W's opinion, or a reduction of benefits by 3/8 (9/24).

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge