

APPEAL NO. 990288

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 October 21, 1998. The record closed on January 5, 1999. The issues were: (1) what is the date of maximum medical improvement (MMI) and the impairment rating (IR) for the \_\_\_\_\_, injury; and (2) whether respondent (carrier) is entitled to contribution due to the prior compensable injuries of the claimant. The hearing officer determined that: (1) appellant's (claimant) IR is 21%; (2) the date of MMI for the \_\_\_\_\_, injury is June 17, 1997; and (3) carrier is entitled to reduce claimant's impairment income benefits (IIBS) and supplemental income benefits (SIBS) based on contribution for prior compensable injuries by 15/21, or 71%. On appeal, appellant (claimant) contends the hearing officer erred in allowing contribution at a percentage higher than "seven percent." Claimant did not appeal the determinations regarding MMI or the 21% IR and they have become final. Carrier responds that sufficient evidence supports the hearing officer's contribution determination and requests affirmance.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that carrier is entitled to contribution at a rate of 15/21, or 71%. Claimant asserts that "carrier should be entitled to a seven percent (7%) contribution." Claimant apparently contends that only seven percent is applicable because there should be no contribution regarding the loss of range of motion (ROM) because such was not considered under the "old law."

Claimant did not testify at the CCH. In a June 1, 1995, report, Dr. GH stated that the 21% IR for the \_\_\_\_\_, injury included impairment for: (1) specific disorders of the lumbar spine, seven percent; (2) loss of cervical ROM, five percent; (3) loss of thoracic ROM, two percent; (4) loss of lumbar ROM, six percent; and (5) loss of right wrist ROM, two percent. Regarding contribution, Dr. GH indicated that claimant had prior injuries in 1984 and 1989, and that these injuries "contribute to her current impairment," but that he had difficulty calculating the appropriate percentage of contribution because the prior injuries were "old law" injuries. The diagnoses for the \_\_\_\_\_, injury included carpal tunnel syndrome, thoracic sprain/strain, cervical strain, and low back pain.

Carrier sought contribution for two prior compensable injuries: one with a date of injury of (date of 1984 injury), and one with a date of injury of (date of 1989 injury).<sup>1</sup> Medical records from the 1984 injury indicate that: (1) claimant was treated by Dr. CA; (2) the diagnosis was "acute lumbosacral strain"; (3) claimant was returned to work in November 1984; and (4) claimant still complained of pain in November 1984 and said she

---

<sup>1</sup>The date of injury for the 1989 injury is also stated as "(incorrect date of 1989 injury)," but the medical records indicate that this is the same injury.

felt she should remain off work. Medical records from the 1989 injury indicate that: (1) claimant was treated primarily by Dr. WA; (2) claimant's diagnoses included multiple contusions, thoracolumbar strain, de Quervain's tenosynovitis of the right wrist, lumbosacral strain, cervical strain, and mild fibromyalgia of the upper back; (3) in 1990, claimant complained of stiffness in her neck and right wrist; (4) in 1990, claimant had intense pain to her low back region, radiating into her buttock; (5) in 1990, claimant's cervical ROM was moderately to severely limited in all planes; (6) in 1990, there was a mild degree of limited ROM regarding right and left lateral bending; (7) in 1990, claimant was unable to tolerate prolonged sitting or standing; (8) in 1990, an MRI revealed evidence of a bulging disc at L4-5; (9) claimant had symptoms of discogenic syndrome or a possible disc herniation at L4-5; (10) in 1990, claimant had persistent mild manifestations of de Quervain's tenosynovitis of the right wrist; and (11) claimant said in 1990 that she did not feel she could return to any kind of work "on account of her painful spinal and wrist symptoms."

In a September 15, 1997, report, Dr. W stated:

It was my opinion that [claimant] had degenerative changes in [the spine] which are part of the aging process and not related to an injury. Her loss of [ROM in the spine] is secondary to preexisting factors. I would apportion possibly 75% of her loss of [ROM] to preexisting factors.

In a September 2, 1998, report, Dr. SP stated:

It is my opinion that all of the diagnosis specific disorder impairments are due to preexisting injuries of the [spine] and fully 50% of the loss of [ROM] is also due to preexisting injury. For injury to her right wrist, it is not possible for me to say that the [ROM] deficits are not due to more recent findings . . . .

It was undisputed that, regarding the \_\_\_\_\_, injury, claimant reached MMI on June 17, 1997, with an IR of 21%. The hearing officer determined that: (1) claimant had various work-related injuries that had a "cumulative impact to her injury of \_\_\_\_\_"; (2) claimant had previous work-related injuries to the cervical spine and lumbar spine which had a "cumulative impact to the injury of \_\_\_\_\_"; (3) contribution is permitted in this case (including two percent for cervical ROM, seven percent for specific disorders for the herniated lumbar disc, and six percent for lumbar ROM); and (4) 15/21 contribution will be permitted, which is a contribution rate of 71%.

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." In determining that reduction, the Commission "shall consider the cumulative impact of the compensable injuries on the employee's overall impairment . . . ." The carrier has the burden of proving an entitlement to contribution. Texas Workers' Compensation Commission Appeal No. 961499, decided September 11, 1996. Whether there is a cumulative impact, and, if so, the amount of such cumulative impact, is a

question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94578, decided June 22, 1994. 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.

1 JOHN T. MONTFORD, *ET AL.*, A GUIDE TO TEXAS WORKERS' COMP REFORM § 4.30(a), page 4-132 (1991), states as follows:

The requirement that the contributing injury must have resulted in "documented impairment" seems to require that the impairment from the contributing injury be recorded in medical records. This does not require a prior [IR], but it does require some indication that there was at least ". . . anatomic or functional abnormality or loss . . . reasonably presumed to be permanent." Therefore, the Commission will be required to examine the medical evidence from the earlier injury and make a determination of the extent of the previous impairment. 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.

Drs. SP and W attempted to grapple with the contribution issue and considered "old law" injuries for which no IR was officially assigned. The hearing officer was charged with considering the medical evidence and coming up with an amount by which the prior injuries contributed to the 21% IR. Having determined that claimant's IR was 21%, the hearing officer sorted through the medical evidence and determined that the contribution rate was 71%. We find that this was sufficiently supported by the record. The hearing officer indicated that he considered the evidence regarding claimant's two prior injuries and the impairment therefrom. In the decision and order, the hearing officer noted that he must consider the cumulative impact of the injuries. We conclude that the hearing officer did not err in determining that the portion of the 21% IR that is attributable to prior compensable injuries is 15%.

Claimant contends that ROM studies did not apply under the old law, so there should be no contribution in that regard. However, we perceive no error in the consideration of whether claimant had preexisting ROM losses due to prior compensable injuries, when considering the amount of contribution. Claimant asserts that the hearing officer erred in determining that claimant sustained two injuries on one day: (date of 1989 injury). However, it appears that there is a typographical error in the decision and order in this case. The hearing officer noted that there were two prior compensable injuries, one treated by Dr. CA and one treated by Dr. WA. It appears that the hearing officer did consider both the 1984 and 1989 prior compensable injuries in determining the contribution issue in this case. Claimant contends the hearing officer erred in failing to ask the designated doctor for

a “minimum” amount of contribution that is appropriate. We note that the designated doctor does not have presumptive weight regarding the amount of contribution. There was medical evidence in the record that the hearing officer could consider regarding the contribution issue. Claimant asserts that the hearing officer cannot properly consider the disability percentages assigned under the old law in calculating contribution. However, it does not appear that the hearing officer considered those percentages in making his calculations. We perceive no error in that regard.

We affirm the hearing officer's decision and order.

---

Judy Stephens  
Appeals Judge

CONCUR:

---

Robert W. Potts  
Appeals Judge

---

Gary L. Kilgore  
Appeals Judge