

APPEAL NO. 990730

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 March 9, 1999. The issues at the CCH were: (1) whether the appellant/cross-respondent (carrier) is entitled to contribution; and (2) whether the carrier waived its right to recoup impairment income benefits (IIBS) and supplemental income benefits (SIBS) over payments that were not reduced based on contribution and, if so, for what period. The hearing officer determined that the carrier is entitled to contribution at 11.5%, and that the carrier did not waive its right to recoup IIBS and SIBS overpayments that were not reduced based on contribution. The decision states that the carrier's recoupment is limited to 25% of the new weekly IIBS rate and 25% of the new monthly SIBS rate until the overpayment is recouped. The carrier appeals, urging that the decision of the hearing officer should be reformed to delete any references to the manner in which recoupment can be accomplished by the carrier, and that the decision should be reversed to entitle the carrier to no less than 46% contribution. The respondent/cross-appellant (claimant) responds that the Texas Workers' Compensation Commission (Commission) has the authority to determine the recoupment rate and the hearing officer's finding concerning the percentage of recoupment is correct. In his cross-appeal, claimant urges the hearing officer's decision should be reversed insofar as it allows recoupment against future SIBS. The carrier responded to the claimant's cross-appeal, reurging its position on the recoupment issue and stating that there is sufficient legal precedent allowing recoupment against SIBS based on contribution.

DECISION

Affirmed, as reformed.

The parties stipulated at the CCH that on (claimant's alleged date of injury), the claimant sustained a compensable lumbar spinal injury to the L3-4 and L4-5 discs. The claimant testified that he sustained the injury of (claimant's alleged date of injury), while working as a heavy equipment operator. As a result of the injury, the claimant had spinal surgery on March 27, 1997: a hemilaminectomy with discectomy and decompression of the L3-4 and L4-5 lumbar discs with removal of several free-floating disc fragments. The claimant testified he has a right foot drop, he cannot walk without the aid of a device, and he has numbness in his right leg. The designated doctor, Dr. S assigned the claimant a 26% impairment rating (IR) on September 29, 1998, which was not disputed by the parties.

The claimant testified that he sustained several prior compensable injuries. Two of the injuries were to the claimant's lumbar spine and occurred in 1975 and 1979. Both injuries resulted in laminectomies at the L4-5 level. The claimant testified that he returned to work as a laborer a couple of months after the surgery in 1975 and successfully recovered. Due to the 1979 injury, the claimant was off work for approximately two years. The claimant received social security disability from approximately 1985 through 1995 and testified that in 1985 he developed Bell's Palsy and had prostate problems which both

required surgery. The claimant testified that he returned to work in late 1994, and in January 1997 began work for employer as a heavy laborer.

The hearing officer determined that considering the cumulative impact of the current compensable injury in relation to the prior compensable injuries, the prior injuries produced an impairment of 3% which is based on the 3% awarded under 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) for additional surgeries. The hearing officer considered Dr. CR analysis persuasive. Dr. CR analyzed the cumulative impact by starting with the most recent impairment and looking backward to analyze the interplay of the injuries. He indicated that the claimant would have received 10% for specific diagnosis for the current injury, range of motion and neurological deficits are due to the current injury, and only 3% can be attributed to the prior compensable injuries. The carrier contends the hearing officer erred in determining that the carrier is entitled to contribution in the amount of 11.5% (3% divided by 26%), and asserts that it should be allowed contribution in an amount of no less than 46% (12% divided by 26%). The carrier bases its position on the opinion of Dr. P who states:

[The claimant's] IR prior to the _____ injury would be 12% of the whole person. As Dr. [S] has appropriately calculated from the AMA Guidelines for the first surgical procedure done on the lumbar spine in 1975 the patient would have a 10% whole person [IR]. The second surgery done in 1979 would yield an additional 2%. Therefore, the [claimant] would have a 12% whole person [IR] as it relates to prior injuries. [Emphasis in original.]

While the carrier argued at the CCH that contribution should be allowed in the amount of 77% based on the report of Dr. CA, his report is dated August 7, 1980, and refers to a "disability rating" of 20%.

Section 408.084(a) provides that at the request of the carrier, the 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.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer considered the cumulative impact of the two prior spinal surgeries and was permitted to draw inferences from the medical evidence. The hearing officer made findings that the claimant substantially recovered and returned to work in late 1994 operating heavy equipment and that due to the current compensable injury, he now has foot drop, must wear a brace, has pain in the lumbosacral region and is unable to perform activities other than the most menial tasks. These findings are sufficiently supported by the evidence. The hearing officer's determination that the carrier is entitled to contribution at 11.5% is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the appealed findings of fact of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The carrier appeals the portion of the decision of the hearing officer which states, "[t]o avoid undue hardship, carrier recoupment of over paid IIBS is limited to 25% of the new weekly IIBS rate and 25% of the new monthly SIBS rate until the overpayment is recouped." The carrier asserts that there was no issue before the hearing officer regarding the method by which the carrier would be entitled to recoup its overpayment. The claimant appeals the decision insofar as it allows recoupment against future SIBS. The issue before the hearing officer was whether the carrier had waived its right to recoup IIBS and SIBS overpayments that were not reduced based on contribution, and if so, for what period. Neither party appeals the determination that the carrier did not waive its right to recoup. However, the method or amount of recoupment was not an issue before the hearing officer and it was not litigated. As such, we reform the hearing officer's decision to delete any references to the manner of recoupment. The Decision section is reformed to state:

DECISION

Carrier is entitled to contribution at 11.5% (3% divided by 26%). Carrier did not waive its right to recoup IIBS and SIBS overpayment that were not reduced based on contribution.

The decision and order of the hearing officer are affirmed, as reformed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge