

APPEAL NO. 991343

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 1, 1999. The hearing officer determined that the appellant (carrier) was entitled to reduce the respondent's (claimant) impairment income benefits (IIBS) by 26% as contribution from a prior compensable injury. The carrier appeals this determination, contending that contribution at this percentage is contrary to the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

We reverse and remand.

The claimant, a long-haul truck driver, sustained a compensable injury on (date of injury for 1997), when the truck in which he was riding as a co-driver was rear ended. On December 16, 1998, Dr. N, the designated doctor, completed an amended Report of Medical Evaluation (TWCC-69) in which he certified maximum medical improvement on August 31, 1998, and assigned a 23% impairment rating (IR). For purposes of this case and this appeal, the IR consisted of a four percent whole person IR for loss of range of motion (ROM) in both knees and 17% IR for the cervical spine (eight percent for a specific disorder, including a second level of surgery, and 10% loss of cervical ROM).

The claimant testified to three prior work-related injuries. The first, sometime in the early 1980s, involved a torn meniscus of the left knee. No records regarding this injury were introduced, but apparently arthroscopic surgery was done in 1983. The second injury, apparently on (date of injury for 1988), involved the low back and fusion surgery, but is not pertinent to the contribution issue in this case. The third injury occurred in 1990 and involved the neck and a torn meniscus bilaterally. A CT scan of the cervical spine on January 3, 1991, disclosed herniation at C5-6 and spur formation at C4-5. Dr. R, the treating doctor, also performed ROM measurements of the cervical spine which showed flexion of 40E, extension of 30E, and rotation of 60E to the left and right. On January 1, 1991, Dr. G, reported with regard to the knees that the claimant had severe left knee pain, less in the right, to the extent that he cannot go up and down steps or squat. The 1990 injury was settled for \$64,000.00. According to the claimant, he was off work for the third injury for almost two years. He said that Dr. R had recommended neck surgery, but that conservative therapy had healed him "100%." He said that after this third injury he returned to his prior job and passed two federal physical examinations required to be a truck driver. He insisted that he had no problems doing his job until his current injury.

In a report of February 3, 1998, addressing the claimant's current injury, Dr. R wrote that the claimant had recurrent neck pain since his fusion surgery on August 6, 1991, for the third injury. The claimant disagrees with these comments by Dr. R. A cervical MRI on June 20, 1997, showed C5-6 disc degeneration and C4-5 herniation. Right and left knee MRIs on August 13, 1997, showed torn medial menisci. On January 19, 1998, a

bilateral meniscectomy was performed. On February 8, 1998, Dr. R performed a discectomy and fusion at C4-5 and C5-6.

Section 408.084(a) provides that at the request of the carrier, the Texas Workers' Compensation Commission (Commission) may order IIBS and supplemental income benefits 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. We have further noted that the "correct approach" to determining contribution is to start with the most recent injury, assign a whole body IR to that injury, and then determine the proportion that prior injuries contributed to the current whole body IR. Texas Workers' Compensation Commission Appeal No. 980598, decided May 11, 1998. In order to arrive at an amount of contribution, it is not necessary that there be a prior whole body IR calculated in accordance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Rather there needs to be medical evidence showing an "anatomic or functional abnormality or loss reasonably presumed to be permanent" on which a figure for contribution can be reasonably based. Texas Workers' Compensation Commission Appeal No. 941514, decided December 21, 1994. The consideration of the cumulative impact from prior injuries requires an assessment not only of the impairment from previous injuries, but also an analysis of how the injuries work together. Texas Workers' Compensation Commission Appeal No. 950268, decided April 10, 1995. Where there is "clearly an overlap" of restrictions of cervical ROM from successive injuries, contribution may well be in order. Texas Workers' Compensation Commission Appeal No. 950735, decided June 22, 1995, and Texas Workers' Compensation Commission Appeal No. 952019, decided January 12, 1996.

In this case, the carrier sought to meet its burden of proving an entitlement to contribution through the report and testimony of Dr. P. Dr. P examined the claimant and, in a report of November 7 1998, wrote that his complaints of neck and bilateral knee pain in 1990 were "virtually identical to his present complaints" With regard to the cervical spine, she wrote that the herniation was preexisting and that six percent of the IR was attributable to the preexisting injury. The hearing officer agreed and awarded contribution

in this percentage, which the claimant has not appealed and the carrier has not challenged. As to the knees, she wrote that there would have been a 10% specific disorder IR. However, Dr. N assigned no diagnosis-based IR for the knees. Although Dr. N assigned a four percent IR for loss of ROM for each knee, Dr. P concluded the loss was "actually due to soft tissue, rather than related to any specific knee problems" and any such loss was "related to a pre-existing degenerative condition of the knee related to the pre-existing meniscal injuries." Dr. P also testified with regard to the specific issue of contribution for ROM that the third injury had the greatest impact on the claimant. Relying on Dr. R's report of cervical ROM limitations, as discussed above, she concluded that seven percent of the 10% assigned by Dr. N for loss of cervical ROM was caused by the third injury. Dr. P also testified that she believed Dr. G's comments about the knees, discussed above, showed that loss of ROM at the time was essentially the same as that found by Dr. N in his examination.

The claimant testified that contrary to Dr. G's reports or any other medical information, he did not have ROM problems with his knees or cervical spine after the third injury.

The hearing officer made the following findings of fact and conclusion of law which have been appealed by the carrier:

FINDINGS OF FACT

5. The cumulative effects of the 1997 injury will prevent claimant from returning to work as a truck driver.
6. Claimant's knees had recovered from the 1990 accident and no contribution will be given for prior knee injuries.
7. Claimant's [ROM] from the 1990 accident was not measured in accordance with current guidelines, and a definitive "[IR]" cannot be computed accurately based on the measurements provided.
8. Contribution is appropriate for the cervical spine lesion, but not for cervical [ROM] and not for the bilateral knees.

CONCLUSION OF LAW

3. An appropriate reduction of the claimant's [IIBS] based on contribution from earlier compensable injuries is 26%, based on a ratio of 6/23.

We believe it important to state that the claimant does not dispute that some contribution is in order. The hearing officer based contribution solely on a specific disorder

of the cervical spine, but not on loss of ROM of the cervical spine and both knees. In Appeal No. 980598, *supra*, the hearing officer found no contribution based essentially on a finding that the claimant was able to return to work after the earlier injury, but not after the later injury. The Appeals Panel reversed and rendered a decision in favor of contribution noting that the ability to return to work, which seemed to be the controlling fact in the opinion of the hearing officer, is not dispositive of the question of cumulative impact. In the case we now consider, it is unclear whether the hearing officer gave controlling weight to the inability to return to work as a result of cervical ROM limitations. In addition, the hearing officer commented that contribution was not an "exact science," he then found as a basis for denying cervical ROM contribution the failure of the claimant to have had his cervical ROM measured in accordance with the current AMA Guides with the result that no "definitive" IR could be "accurately" computed for the 1990 cervical ROM loss. We have held that the failure to have a documented IR under the AMA Guides currently in use is not fatal to a request for contribution "as long as there is sufficient evidence for the hearing officer to determine a percentage of ROM loss 'that is reasonably supportable.'" Texas Workers' Compensation Commission Appeal No. 950130, decided March 13, 1995. Given the emphasis placed on the lack of an IR for the 1990 injury under the AMA Guides and on the inability to return to work, we cannot conclude that the correct legal standard was applied to the issue of contribution for loss of cervical ROM. For this reason, we reverse the determination of the hearing officer denying contribution for loss of cervical ROM and remand for further consideration consistent with this opinion. On remand, the hearing officer should make findings of fact whether, based on the medical evidence, there is any clearly overlapping of loss of ROM from the current and prior cervical injury such that there is or is not a cumulative effect of the prior injuries on the cervical ROM limitations for the compensable injury.

The carrier appeals Finding of Fact No. 6, which finds no contribution for a knee injury. The basis of the appeal is that the latest injury (torn meniscuses) was identical to a prior injury. We agree that the evidence establishes the same injury. However, Dr. N did not assign an IR based on a specific disorder of the knee, but only for bilateral loss of ROM. There was some medical evidence that the claimant had knee problems in the nature of loss of ROM prior to the latest injury. The claimant denied the accuracy of these reports. There was no evidence of knee ROM measurements for the prior injury akin to the cervical ROM measurements available for the 1990 injury. Under these circumstances, the hearing officer did not find persuasive the carrier's assertion of a cumulative impact or the existence of medical records to reasonably support the award of some contribution. Given the limited medical evidence on loss of bilateral knee ROM prior to the current injury, we cannot conclude that this portion of the decision and order which denies contribution for knee ROM loss is not supported by sufficient evidence.

For the foregoing reasons, we reverse the determination of the percent of contribution and remand for further consideration of whether the carrier was entitled to additional contribution for loss of cervical ROM. The determination of the six percent

contribution for a specific disorder of the cervical spine and no contribution for bilateral loss of knee ROM are undisturbed.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge