

APPEAL NO. 000632

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 February 11, 2000. The hearing officer determined that the respondent (carrier) is entitled to a reduction of appellant-s (claimant) impairment income benefits (IIBs) and/or supplemental income benefits (SIBs) based on contribution from earlier compensable injuries, by a proportion of 17/22 or 77%. The claimant appealed, asserting that the second, or actually third, low back injury "essentially obliterated" the effects of the first injury, and that claimant had returned to his regular full work and daily activities after the first injury. Claimant contends that there should either be no contribution or that contribution should be computed backward from the most recent injury and carrier would be entitled to "6.5%/22% [sic, means 6.5/22 or 29.5%] contribution at best." Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The carrier responded with its own figures and urges affirmance.

DECISION

We reverse and render.

Claimant had been employed as a delivery driver for (employer). It is undisputed that claimant sustained a compensable low back injury on _____ (the 1991 injury) and had a lumbar laminectomy and posterior lumbar fusion at L3-4 in July 1992. Claimant testified, and the medical records support, that the fusion failed. Claimant was eventually assessed as having a 17% impairment rating (IR) (apparently 10% impairment 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); seven percent impairment for range of motion (ROM); and one percent for neurological deficits). Claimant was released to return to modified duty on December 28, 1994, and released to return to regular full-time work in January 1995. Claimant sustained a second low back injury on _____, which was diagnosed as a muscle strain. This was a no-lost-time injury and claimant testified that the lumbar strain was due to the failed L3-4 fusion. Claimant was assessed a two percent IR for the 1996 injury. Claimant sustained a third compensable low back injury on _____, and had three subsequent spinal surgeries. The hearing officer, in an unappealed finding, determined that:

On November 12, 1997, Claimant underwent spinal surgery including the following procedures: decompressive lumbar laminectomy at L3-4 and L4-5 bilaterally, excision of herniated disk at L4-5, posterior lumbar interbody fusion with instrumentation at L3-4 and L4-5, posterolateral fusion at L3-4 bilaterally, implantation of bone growth stimulator at L3-5 bilaterally, and bone graft harvesting from the right iliac crest.

Claimant subsequently underwent surgical removal of the bone growth stimulator battery on June 30, 1998. Claimant's most recent surgery was on December 8, 1999, for reexploration of the L3-5 lumbar laminectomy and bilateral refusion at L3-S1 with instrumentation. In February 1999 claimant was certified as having reached "statutory MMI [maximum medical improvement]" with a 22% IR based on 12% impairment from Table 49 of the AMA Guides, and apparently 11% impairment for loss of ROM, with zero percent for neurological deficits, combined in the Combined Values Table for a 22% IR.

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. 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.

Claimant's last surgery was being discussed in March 1999, one month after the 22% IR had been certified regarding the 1997 injury. This last surgery took place in December 1999, about two months before the CCH. There was no medical evidence of claimant's condition after the December 1999 surgery. Therefore, there was no comparison of claimant's condition after his 1991 injury, with his condition after his December 1999 injury. Without such evidence, any analysis or determination regarding cumulative impact is tenuous, at best. However, there was evidence that claimant's ROM was already restricted from the 1991 injury. We reverse the determination that carrier is entitled to contribution of 17/22 and we render a decision that carrier is entitled to contribution of 7/22 in this case.

Judy Stephens
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. Although I would agree that the hearing officer's decision of a 17/22 or 77% contribution was unusual given the cumulative effect of the three injuries and claimant's most recent surgery, it was supported by the evidence. The majority decision to only give carrier contribution for the seven percent loss of range of motion from the 1991 injury appears to me to be fact finding and substituting our opinion for that of the hearing officer, something which we consistently say we will not do. I would have affirmed the hearing officer's decision.

Thomas A. Knapp
Appeals Judge