

APPEAL NO. 002109

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 August 15, 2000. The hearing officer determined that the respondent (carrier) is entitled to reduce the impairment income benefits (IIBs) and/or supplemental income benefits (SIBs) of the appellant (claimant) based on contribution from earlier compensable injuries, at a rate of 67%. Claimant appealed this determination, contending that the hearing officer should have denied carrier's request for contribution. Carrier responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm in part and reverse and render in part.

Claimant contends the hearing officer erred in determining that carrier is entitled to contribution at a rate of 67%. Claimant asserts that: (1) the hearing officer failed to consider the cumulative impact of the injuries; (2) the hearing officer did not consider the specifics regarding the impairment for the injuries and did not award the proper percentage; (3) carrier is not entitled to contribution at all because claimant had returned to work full duty after his earlier injuries; and (4) carrier was not entitled to contribution regarding the cervical and shoulder injuries because there was no overlap regarding the kind of impairment involved.

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.

Claimant, a truck driver, testified that he was off work for 11 months after his _____ compensable shoulder, back and neck injury. He said he returned to work and thereafter sustained a compensable shoulder and neck injury in _____, after which he underwent shoulder surgery. Claimant testified that he worked every day, that

he passed employment physicals, and that he did not see a doctor for over three years after he received the 20% impairment rating (IR) for the _____ injury. He said he was not taking any medications and was not undergoing any therapy or other treatment after his _____ injury. Claimant testified that he had not completely recovered from his _____ injury at the time the 20% IR was certified for that injury, but that his problems with his neck and shoulder disappeared about four or five months after the 20% IR was certified for the _____ injury. Claimant said he bid on jobs that did not require heavy lifting after his _____ injury, but that he was not always successful in limiting the lifting he did at work. Medical records indicate that claimant sustained the current _____, injury to his ankle, neck, shoulder, and back when he fell after he stepped in a hole.

Dr. M, the designated doctor for the _____, injury (current injury), awarded a 30% IR for the 1998 injury. This 30% IR included seven percent impairment for loss of range of motion (ROM) in claimant's shoulder; six percent for loss of cervical ROM; four percent for specific disorders of the cervical spine; and impairment for the lumbar spine and ankle. In this case, no contribution was awarded regarding impairment for the lumbar spine and ankle, and carrier did not appeal in that regard.¹ The hearing officer considered the cumulative impact of the compensable injuries as they concerned the cervical spine and shoulder.

The _____ injury was an "old law" injury and involved claimant's back, neck, and shoulder.² The _____ injury was an injury to claimant's shoulder and neck. Dr. SA, the designated doctor regarding the _____ injury, determined that claimant's IR was 20%. This included zero percent impairment for loss of cervical ROM; six percent impairment for specific disorders of the cervical spine; and 15% impairment related to the upper extremity, which included shoulder impairment. Dr. SA stated that the shoulder impairment he found was for loss of ROM.

In a report for carrier, Dr. O stated that the IR for the _____ injury "should have included the impairment for the _____ injury." Dr. O noted that a 20% IR was certified for the _____ injury. Dr. O then stated that, in the case before us, contribution should be awarded at the rate of 20/30. Dr. O discussed in detail only the impairment from the _____ injury and the current injury in making his determination regarding contribution, although he clearly considered all three injuries.

The hearing officer did state that she considered the contribution issue with regard to claimant's _____ "old law" injury, for which no IR was officially assigned pursuant to the Guides to the Evaluation of Permanent Impairment, third edition, second printing,

¹The report from Dr. O to carrier regarding contribution suggested contribution regarding the cervical spine and shoulder only.

²The hearing officer stated that no contribution had been previously awarded regarding the _____ injury for the _____ injury.

dated February 1989, published by the American Medical Association (AMA Guides). The hearing officer was charged with considering the medical evidence and coming up with an amount by which the _____ and _____ injuries contributed to the 30% IR for the current injury. The hearing officer indicated that she considered the evidence regarding claimant's two prior injuries and the impairment from these injuries. In the decision and order, the hearing officer noted that she must consider the cumulative impact of the injuries.

The hearing officer determined that the IR from the _____ injury was "inclusive" in the 20% IR for the _____ injury. The hearing officer stated that she found Dr. O's analysis "persuasive" regarding contribution and the 1998 injury. In this regard, the hearing officer apparently believed that carrier is entitled to contribution regarding all impairment for the cervical spine and shoulder. The hearing officer stated that 17% of the 30% IR is due to the current injury. It appears that she arrived at the 17% by using the combined values chart to combine the 11% lumbar ROM impairment, the five percent lumbar specific disorders impairment, and the two percent ankle impairment. From this statement, we can conclude that the hearing officer determined that *all* of the cervical and shoulder impairment found by Dr. M for the current injury is attributable to the prior _____ and _____ injuries and that carrier should be awarded contribution because claimant has already been compensated for the shoulder and cervical impairment found by Dr. M. We now review this general determination regarding contribution. We note, however, that the hearing officer determined that carrier was entitled to contribution in the amount of 67%. She said she arrived at 67% by dividing the 20% IR for the _____ injury by the 30% IR for the current injury. We will also review the percentage of contribution found by the hearing officer.

The 20% IR for the _____ injury included 12% impairment for loss of ROM of the shoulder.³ The decision and order indicates that the hearing officer found that claimant's loss of shoulder ROM measured after his current shoulder injury was already present after his prior _____ compensable injury. After reviewing the record, Dr O's report, and the decision and order, we conclude that the record supports a determination that all of the seven percent impairment for loss of ROM found by Dr. M for the current injury is attributable to the prior _____ injury. Therefore, carrier is entitled to contribution in that regard.

Regarding the four percent impairment for specific disorders of the cervical spine that was included in the 30% IR, the decision and order indicates that the hearing officer found that this was also attributable to the prior _____ injury. As indicated previously, Dr. SA had included six percent impairment for specific disorders of the cervical spine in the 20% IR certified for the prior _____ injury. Even though different levels of the cervical spine were discussed by the designated doctors for the _____ and

³The 12% impairment for loss of ROM was combined with other impairments to arrive at an upper extremity impairment and then a percentage of whole person impairment.

1998 injuries, we conclude that the hearing officer's general determination that carrier is entitled to contribution in this regard is supported by the evidence. We note that claimant did not undergo cervical surgery. Also, we note that spinal regions, not levels, are rated under Table 49 of the AMA Guides. See Texas Workers' Compensation Commission Appeal No. 001121, decided June 26, 2000. Accordingly, we perceive no error in the determination that carrier is entitled to contribution regarding impairment for specific disorders of the cervical spine included in the 30% IR.

The decision and order indicates that the hearing officer found that there was also overlap in the impairment for loss of cervical ROM between the 20% IR for the _____ injury and the 30% IR for the current injury.⁴ In comparing the _____ and 1998 IR reports, we note that Dr. SA found that claimant's impairment from the _____ injury for loss of cervical ROM was zero percent. Therefore, claimant was not compensated for loss of cervical ROM after the _____ injury. Further, we note that Dr. SA had said that claimant's right and left cervical flexion was normal after the _____ injury. Regarding the _____ injury, Dr. SO stated alternately that claimant's cervical ROM was "good" or that it was limited only in the "extremes." By way of contrast, claimant's cervical ROM was limited after the current injury and Dr. M also found valid impairment in this regard. Therefore, the evidence does not support a determination that carrier is entitled to contribution regarding the impairment for loss of cervical ROM. We reverse the implied determination that carrier is entitled to contribution regarding loss of cervical ROM and render a determination that carrier is not entitled to contribution in this regard.

In sum, we conclude that carrier is to be awarded contribution regarding all of the impairment included in the 30% IR for specific disorders of the cervical spine and for the shoulder injury. We render a determination that carrier is entitled to contribution regarding the seven percent impairment for loss of shoulder ROM and four percent impairment for specific disorders of the cervical spine. We reverse the determination that carrier is entitled to contribution regarding impairment for loss of cervical ROM and render a determination that carrier is not entitled to contribution in this regard. We render a determination that carrier is awarded contribution and is entitled to reduce claimant's IIBs and/or SIBs, if any, by 36% or 11/30.

Claimant contends that the hearing officer should not have awarded any contribution because he had recovered from his prior _____ and _____ injuries and had returned to work before his current injury. However, the ability of a claimant to work after an earlier injury is a factor to consider, but is not the dispositive factor in determining whether there is a "cumulative" effect. Texas Workers' Compensation Commission Appeal No. 980598, decided May 11, 1998; Texas Workers' Compensation Commission Appeal No. 972104, decided November 24, 1997. The hearing officer could still find from the evidence that carrier is entitled to contribution in this case.

⁴Both the hearing officer and Dr. O indicated that the 20% IR for the prior _____ injury also covered or reflected impairment for the prior _____ injury.

We affirm that part of the hearing officer's decision and order that determines that carrier is entitled to contribution regarding prior compensable injuries for specific disorders of the cervical spine and for shoulder impairment. We reverse that part of the decision and order that awards contribution at a rate of 67%. We render a determination that carrier is awarded contribution and is entitled to reduce claimant's IIBs and/or SIBs, if any, by 36% or 11/30.

Judy L. Stephens
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Philip F. O'Neill
Appeals Judge