

## APPEAL NO. 002303

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 September 13, 2000. With respect to the single issue before him, the hearing officer determined that the respondent (carrier) is entitled to reduce the appellant's (claimant) impairment income benefits (IIBs) by 64% based upon contribution from an earlier compensable injury. In his appeal, the claimant essentially argues that the hearing officer erred in determining that the carrier is entitled to contribution at a rate of 64%. In its response to the claimant's appeal, the carrier urges affirmance.

### DECISION

Reversed and a new decision rendered that the carrier did not sustain its burden of proving entitlement to contribution.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_, to his lumbar spine, which consisted of a herniation at L4-5 and disc bulges at L1-2, L2-3, and L3-4; that the claimant received a 14% impairment rating (IR) for his \_\_\_\_\_, compensable injury; that the claimant sustained a second compensable injury on \_\_\_\_\_, which consisted of herniations at L1-2, L2-3, and L3-4, and an aggravation of the herniation at L4-5; and that the claimant received an 11% IR for the \_\_\_\_\_, compensable injury. The 14% IR for the August 1994 compensable injury was assigned by Dr. H. The narrative report accompanying Dr. H's Report of Medical Evaluation (TWCC-69) states that the 14% was comprised of seven percent 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 for a specific disorder of the lumbar spine (the herniated disc at L4-5) and eight percent for loss of lumbar range of motion (ROM). The 11% rating for the August 1997 injury was assigned by the claimant's treating doctor, Dr. M. In his narrative report, Dr. M states that the 11% was comprised of seven percent under Table 49 for a specific disorder of the lumbar spine and four percent for loss of lumbar ROM.

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 the 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. The carrier need not prove an exact percentage; however, there must be sufficient evidence to determine a contribution percentage that is reasonably supportable. Texas Workers' Compensation Commission Appeal No. 961211, decided August 7, 1996. The issue of contribution then becomes a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941405, decided

December 1, 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.

The hearing officer awarded contribution in a ratio of 7/11 or at a rate of 64%. It appears that the hearing officer determined the contribution percentage by allowing for contribution for the specific disorder rating, which was seven percent for both compensable injuries. We have previously recognized that the fact that a subsequent injury receives the same rating under Table 49 as the prior compensable injury "does not mean it is the same injury and that the carrier is entitled to contribution for the full [specific disorder] impairment." Texas Workers' Compensation Commission Appeal No. 971182, decided August 7, 1997 (Unpublished). In addition, it is well-settled that "[s]imply proving the occurrence of a previous compensable injury will not sustain the carrier's burden to prove the interaction of that injury with the current one on the present impairment." Texas Workers' Compensation Commission Appeal No. 971348, decided August 28, 1997. At the hearing, the carrier did not argue for a specific percentage of contribution and it did not present medical evidence addressing the cumulative impact of the 1994 injury on the claimant's impairment for the 1997 injury. The carrier failed to establish an overlap of the impairment for the two injuries to support an award of contribution in this instance. In Texas Workers' Compensation Commission Appeal No. 961315, decided August 22, 1996, we noted that there must be "sufficient evidence for the hearing officer to determine a contribution percentage that is reasonably supportable." It is that evidence that is wholly lacking in this case. The carrier's evidence simply did not establish that the payment of the 11% IR for the 1997 compensable injury would have the effect of making the amount of benefits the carrier pays "increased by the effect of an earlier work-related injury that is part of the current impairment." Appeal No. 971348, *supra*. Rather, given the dearth of evidence presented by the carrier to establish its entitlement to contribution, the hearing officer's award of 64% contribution permits the carrier to "receive a windfall" by ordering a credit for impairment which it did not demonstrate had a cumulative impact on the impairment for the 1997 compensable injury. *Id.*

The hearing officer's determination that the carrier is entitled to contribution at a rate of 64% is not supported by sufficient evidence; thus, we reverse his decision to allow 64% contribution and render a new decision that the carrier is not entitled to contribution herein.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Judy L. Stephens  
Appeals Judge