APPEAL NO. 011800
FILED SEPTEMBER 12, 2001

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 April 30, 2001. Pursuant to a request from the appellant/cross-respondent (claimant), hearing officer 1 was later recused and (hearing officer 2) was designated as the hearing officer. The record was closed on July 20, 2001, without further proceedings as agreed by the parties. The hearing officer determined that (1) the claimant's compensable neck and low back injury of _____, did not extend to include bipolar mood disorder and/or major depression with anxiety; (2) the claimant's average weekly wage (AWW) is $280.00; (3) the respondent/cross-appellant (carrier) is entitled to reduce the claimant's impairment and supplemental income benefits by 65% based upon contribution from earlier compensable injuries; and (4) the claimant's impairment rating (IR) is 34%. The claimant appealed the determinations on sufficiency grounds. The carrier cross-appealed the hearing officer's AWW, IR, and contribution determinations on sufficiency grounds. The carrier also asserts that the designated doctor should have been disqualified and a new designated doctor appointed because he was repeatedly contacted by the claimant following the examination.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

EXTENT OF INJURY

The hearing officer did not err in determining that the claimant's compensable injury of _____, did not extend to include bipolar mood disorder or major depression with anxiety. The claimant had the burden to prove by expert medical evidence that his mental condition naturally resulted from the compensable injury. Section 401.011(26); Texas Workers' Compensation Commission Appeal No. 980847, decided June 10, 1998; Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). Contrary to the claimant's assertion, a designated doctor's opinion is not entitled to presumptive weight with regard to extent of injury. Texas Workers' Compensation Commission Appeal No. 950789, decided June 30, 1995. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer could reasonably infer from the medical evidence that the claimant's mental condition did not result from his compensable injury of _____. Accordingly, the hearing officer's extent-of-injury determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

AVERAGE WEEKLY WAGE

The hearing officer did not err in determining that the claimant's AWW is $280.00. The parties argue that the claimant's AWW should be based on the usual wage paid to a similar employee or for similar services in the vicinity, rather than calculated under a fair, just, and reasonable method. Section 408.041(b) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(e) (Rule 128.3(e)) provide, in pertinent part, that the AWW of an employee who has worked for the employer less than 13 consecutive weeks immediately preceding the injury equals the usual wage that the employer pays a similar employee for similar services, or, if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services provided for remuneration. When Section 408.041(a) or (b) cannot reasonably be applied, the hearing officer may determine the employee's AWW by any method considered fair, just, and reasonable to all parties. Section 408.041(c).

Pursuant to Rule 128.3(f), "similar employee" means a person with training, experience, skills and wages that are comparable to the injured employee, and "similar services" means tasks performed or services rendered that are comparable in nature to those performed by the injured employee and that are comparable in the number of hours normally worked. This is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 991423, decided August 19, 1999. The carrier presented an Employer's Wage Statement (TWCC-3) form listing 13 weeks of wages for another employee of the same employer, but offered no evidence regarding whether the employee was a similar employee who performed similar services, as those terms are defined in Rule 128.3(f). The claimant presented a document from the Texas Workforce Commission that indicated that a person with five years experience installing insulation and duct work in (city), Texas, can earn between ten and fifteen dollars per hour. However, the claimant testified that he installed wiring in new homes, not duct work or insulation, and that he earned only seven dollars per hour. Given the evidence, we find no error in the hearing officer's decision to base the claimant's AWW on a fair, just, and reasonable calculation, rather than on the usual wage paid to a similar employee or for similar services in the vicinity. Additionally, we cannot conclude that the hearing officer's methodology for calculating the claimant's AWW constituted an abuse of discretion.

IMPAIRMENT RATING

We first address the carrier's assertion that the Texas Workers' Compensation Commission (Commission)-appointed designated doctor should be disqualified from this proceeding and a new designated doctor appointed because he was tainted by repeated unilateral contacts by the claimant following the examination. The designated doctor's report indicates that it was completed on January 13, 2001, the date of the examination. The claimant testified, under cross-examination, that he contacted the designated doctor's office on numerous occasions approximately one week following his examination "to find out what the impairment rating [IR] was" so payment arrangements could be made with the carrier. The claimant stated that he never spoke directly with the designated doctor about his case. Although the Appeals Panel has consistently deplored unilateral contact between

a party and a Commission-selected designated doctor, and such contact is an administrative violation pursuant to Section 408.125(f), we cannot conclude, under the circumstances of this case, that the hearing officer erred in considering the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 93672, September 16, 1993.

The medical evidence shows that the claimant was certified by his treating doctor with a 25% IR--10% for specific lumbar disorder, 4% for specific cervical disorder, 3% for lumbar loss of range of motion (ROM), and 11% for cervical loss of ROM. The Commission-appointed designated doctor examined the claimant and certified him with a 34% IR--16% for cervical loss of ROM and 21% lumbar loss of ROM. Upon request for clarification from the hearing officer, after the CCH, the designated doctor indicated that the claimant was entitled to an additional 7% for a specific disorder of the lumbar spine–i.e. pathology at L3-4. The carrier's peer review doctor opined that the designated doctor's ROM measurements were invalid because they were not apportioned for prior compensable injuries, and the lumbar ROM measurements were not valid because they were not consistent with those of the claimant's treating doctor. Neither premise is correct.

Contrary to the carrier's assertion, the hearing officer did not err in giving presumptive weight to the designated doctor's report. First, we have held that it is the Commission, not a doctor assessing impairment, who will determine the extent to which any contributing compensable injury is one for which a claimant "has already been compensated." Texas Workers' Compensation Commission Appeal No. 93889, decided November 17, 1993. Therefore, the designated doctor's report is not invalid for failure to apportion the claimant's IR for prior injuries. Second, with regard to the lumbar ROM measurements, we view the treating doctor's report merely to represent different ROM measurements at different points in time, which in and of itself would not invalidate ROM measurements.

In the "Statement of the Evidence" portion of the decision, the hearing officer, while discussing the issue of contribution, states that the designated doctor "revised his [IR] to include . . . 7% based on 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 one level, unoperated." In Finding of Fact No. 11, however, the hearing officer determines that the designated doctor certified the claimant with a 34% IR. The hearing officer concludes that the claimant's IR is 34%. The hearing officer does not explain, either in the numbered findings of fact or conclusions of law, why the claimant's IR did not include the additional 7% impairment for a specific disorder of the lumbar spine. We believe the hearing officer erred in failing to give effect to the designated doctor's amendment of his IR and render a decision that the 7% included in the clarification letter should have been included in the claimant's IR. We therefore reverse the hearing officer's decision as to IR and render that the claimant's IR is 39% (34% combined with 7%).

CONTRIBUTION

Section 408.084(a) provides that at the request of the carrier, the Commission may order impairment income benefits and supplemental income benefits reduced "in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries." The Commission is required to consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining the reduction. Section 408.084(b). 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. 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. 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. This analysis includes considering the IRs from the prior compensable injuries, the present injury, and the components of the IRs. *See* Texas Workers' Compensation Commission Appeal No. 950735, decided June 22, 1995; Texas Workers' Compensation Commission Appeal No. 951019, decided August 4, 1995.

The medical evidence shows that the claimant sustained an injury to his lower back prior to 1987, and underwent three spinal surgeries at L4-5 and L5-S1 at that time. The evidence does not establish that this injury was a compensable injury. The evidence also shows that the claimant sustained a compensable injury to his low back and hip on June 22, 1992. The claimant was certified with a 27% IR, which was comprised of 7% for a specific disorder of the lumbar spine, 6% for weak left L4-5 enervated muscles, 8% for left total hip replacement, and 9% for loss of ROM in the left hip. On November 16, 1994, the claimant sustained another compensable injury, apparently to his neck, upper back, and low back. The claimant was certified with a 34% IR by a Commission-appointed designated doctor. The IR was comprised of 7% for the thoracic spine, including 2% for a soft tissue injury and 5.5% for loss of ROM; 8% for the cervical spine, including 4% for a specific disorder of the cervical spine and 4% for cervical loss of ROM; 23% for the lumbar spine, including 12% for a specific disorder (10% for one surgically treated disc lesion with residuals and 2% for additional operation in the lumbar area), 2% for lumbar loss of ROM, and 10% for nerve involvement. The designated doctor indicated that the claimant's lumbar IR was entirely attributable to his prior surgery. The parties entered into a settlement agreement that the claimant's IR for the 1994 injury was 23% for the 1994 injury and that the carrier agreed not seek contribution for the claimant's 1992 compensable injury. The claimant sustained his most recent compensable injury on ____. As stated above, he was certified by a Commission-appointed designated doctor with a 34% IR, comprised of 16% for cervical loss of ROM and 21% lumbar loss of ROM. After the CCH, on a request for clarification from the hearing officer, the designated doctor amended the claimant's IR to include 7% for a specific disorder of the lumbar spine–i.e. pathology at L3-4.

In the "Statement of Evidence" portion of the decision, the hearing officer states that "[the 1992 and 1994 injuries] have had a significant cumulative impact on the current condition of the claimant. Considering all of this information, I believe the Carrier is entitled to contribution in the amount of the [sic] 65%." Notwithstanding, the hearing officer made no findings assessing the extent of ongoing impairment for the prior injuries, regarding how the injuries worked together, or how the prior injuries contributed to the present impairment with regard to the affected areas, nor is there an explanation of such in the hearing officer's discussion. More importantly, the hearing officer's contribution decision was made on the assumption that the claimant's IR from the present injury was 34% rather than 39%. Accordingly, the decision of the hearing officer is remanded with regard to contribution. The hearing officer is to indicate how he arrived at any contribution percentage.

CARRIER INFORMATION

This case is also remanded for the purpose of compliance with House Bill 2600 amending Section 410.164, effective June 17, 2001. Section 410.164 was amended by the addition of subsection (c), which provides as follows:

> (c) At each [CCH], as applicable, the insurance carrier shall file with the hearing officer and shall deliver to the claimant a single document stating the true corporate name of the insurance carrier and the name and address of the insurance carrier's registered agent for service of process. The document is part of the record of the [CCH].

The procedure for implementing the statutory amendment is contained in the June 19, 2001, Commission memorandum to hearing officers entitled "Required Insurance Carrier Information." A rehearing on remand is required to obtain this information and admit it into the hearing record.

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 (amended June 17, 2001). *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge