

APPEAL NO. 011926  
FILED SEPTEMBER 13, 2001

Following a contested case hearing held on July 17, 2001, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The hearing officer found that there was no cumulative impact from the respondent's (claimant) prior injury on her subsequent injury, and that there was no medical analysis which indicated how these injuries worked together. Based on these findings, the hearing officer concluded that the appellant (self-insured) is entitled to a zero percent reduction in the claimant's impairment income benefits (IIBs) and supplemental income benefits (SIBs) based on contribution from the earlier compensable injury. The self-insured requests our review, contending that the hearing officer erred in requiring expert medical evidence on the matter of the "cumulative impact" of the prior subsequent injury, and that since both the prior injury and the subsequent injury resulted in impairment from loss of range of motion (ROM) in the cervical and lumbar spinal regions and in the right shoulder, the hearing officer should have found some percentage of contribution from the prior injury to the claimant's impairment from the subsequent injury. The claimant filed a response, urging the sufficiency of the evidence to support an affirmance.

DECISION

Reversed and a new decision rendered that the amount of contribution is 14% for the effects of the previous injury. Accordingly, the amount of the claimant's benefits should be reduced by 9/34.

Section 408.084(a) provides that, at the request of an insurance carrier, the Texas Workers' Compensation Commission (Commission) may order that IIBs and SIBs be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries. The parties stipulated that the claimant sustained a compensable injury to her cervical and lumbar spinal regions and right upper extremity on \_\_\_\_\_, that she received an impairment rating (IR) of 21% for these injuries, and that on \_\_\_\_\_, she sustained a compensable injury to her cervical and lumbar spinal regions, right upper extremity, left and right wrists, and left knee, and was certified with a 34% IR for these injuries.

The claimant, a school bus driver for the self-insured, testified that her 1995 back and right shoulder injuries, which she characterized as essentially "sprains," resulted from a chain link gate falling on her when it came off its hinges; that she had no surgical treatment for these injuries; that she returned to work after nine months of treatment; and that she had no further problems with these injuries before \_\_\_\_\_, when she was more severely injured falling off the steps of a school bus. She said this subsequent injury resulted in torn right shoulder and knee ligaments and that she underwent knee surgery.

The 21% IR for the claimant's \_\_\_\_\_, compensable injury, assigned in the January 25, 1996, report of Dr. A, a designated doctor, included 5% for loss of cervical

ROM, 5% for loss of lumbar ROM, 7% for loss of right upper extremity ROM, which converted to a whole person rating of 4%, and 4% and 5%, respectively, for the diagnosis-based impairments of the cervical and lumbar spinal regions 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 (AMA Guides). The 34% IR for the claimant's January 28, 1999, compensable injury, assigned in the February 2, 2001, report of Dr. V, a designated doctor, included 12% for loss of cervical ROM, no rating under Table 49 for the cervical spine, 2% for loss of lumbar spine ROM, 7% under Table 49 for the diagnosis-based impairment of the lumbar spine, 9% for loss of right upper extremity ROM, 4% for loss of left wrist ROM, and 6% for loss of left knee ROM. Dr. V also stated that "[t]here may be concerns about contribution regarding a previous injury which [claimant] states she sustained in 1995 and was awarded a 21% Whole Person Impairment for neck and right shoulder deficits, however no old records concerning this injury were made available to me at the time of the Designated Doctor exam." None of the medical records in evidence stated an opinion on the amount of impairment the prior injury contributed to impairment from the subsequent injury.

The self-insured, who had the burden of proof on the disputed issue, asked the hearing officer to compare the components of the 34% IR and the 21% IR, including the impairments for loss of ROM in the cervical and lumbar spinal regions and the right shoulder, and determine a percentage of contribution from the 1995 injury, suggesting the "62%" determined by a disability determination officer and "not less than" the 47% recommended by the benefit review officer (BRO). The self-insured introduced a Carrier's Request for Reduction of Income Benefits Due to Contribution (TWCC-33) reflecting that the self-insured requested a 35% reduction in IIBs and SIBs and that a disability determination officer approved a 61% reduction. The benefit review conference report reflects that the BRO recommended a 61% reduction. The claimant urged below that it is not enough to simply compare the components of the 21% and 34% ratings but that, pursuant to Section 408.084(b), the self-insured must show the "cumulative impact" of the compensable injuries on the claimant's overall impairment and that the self-insured has failed to do so.

The self-insured contends that the hearing officer's finding that "[t]here was no medical analysis which indicated how the injuries worked together" indicates that she was requiring the self-insured to meet its burden of proof with expert medical evidence. While this finding may be read to state no more than it literally says, it is not unreasonable to read into it an impression by the hearing officer that expert medical evidence is required on this issue. This impression is buttressed by the hearing officer's comments in her discussion of the evidence. The Appeals Panel has stated that while the extent of contribution, if any, is for the Commission, not a doctor, to decide, it is "certainly acceptable" for a doctor to opine as to the extent to which impairment can be allocated to a prior injury (Texas Workers' Compensation Commission Appeal No. 941122, decided October 3, 1994), and that while "it is helpful" if there is a doctor's opinion stating the proportion among the various compensable injuries, such an opinion is not required before the Commission may order contribution (Texas Workers' Compensation Commission Appeal No. 941074,

decided September 23, 1994). We cited in Texas Workers' Compensation Commission Appeal No. 941338, decided November 22, 1994, the following from JOHN T. MONTFORD, *ET AL.*, A GUIDE TO TEXAS WORKERS' COMP REFORM § 4.30(a), pages 4-132 (1991):

Therefore, the Commission will be required to examine the medical evidence from the earlier injury and make a determination of the extent of the previous injury. It may be necessary to obtain a doctor's opinion to establish the extent of residual impairment resulting from the prior injury and the cumulative impact of the previous and present injuries on the employee's overall impairment.

Our decision in Texas Workers' Compensation Commission Appeal No. 952019, decided January 12, 1996, stated that "[t]he Appeals Panel is firmly and unequivocally on record in its decisions as stating that it is not the role of the designated doctor to account for contribution by lowering the IR assigned to the compensable injury, but it is up to the carrier to seek, and the ultimate decision of the Commission to conclude, whether there has been an earlier injury that has contributed to the currently assessed impairment. [Citations omitted.]"

In the case we consider, no doctor's opinion was introduced as to the extent that impairment from the 1995 injury contributed to the claimant's impairment from the 1999 injury. However desirable such an opinion may have been in resolving the issue in this case, such an opinion was not required of the self-insured in order to meet its burden of proof. Such opinion is not to be confused, however, with the requirement for medical evidence of impairment. Appeal No. 941338, *supra*. And see Appeal No. 941074, *supra*.

Concerning the remaining appealed finding, that "[t]here was no cumulative impact of the prior injury to the subsequent injury," we are at a loss to understand how the impairments for loss of cervical spine, lumbar spine, and right shoulder ROM resulting from the 1995 injury, which are presumably permanent (see Sections 401.011(23) and (24)), can have no cumulative impact on the ROM impairment of these same body parts from the 1999 injury. Citing Texas Workers' Compensation Commission Appeal No. 92610, decided December 30, 1992, we stated as follows in Appeal No. 941338, *supra*:

[T]he prior law made the carrier for a current injury liable only for benefits for which it would be liable had not an earlier compensable injury taken place. See TEX. REV. CIV. STAT. Art 8306, §12(c) (repealed). This, it seems to us, summarizes the essence of the current statutory direction to consider the "cumulative impact" of the injuries on the current disability. Thus, we believe that consideration of the "cumulative impact" requires not only some assessment of extent of impairment for previous injuries but an analysis of how the injuries work together, i.e. the extent to which prior injuries "contribute" to the present impairment.

We regard as dispositive of the case we consider our decisions in Texas Workers' Compensation Commission Appeal No. 950735, decided June 22, 1995, and in Appeal No. 952019, *supra*. We found the determinations in those cases that the carriers were not entitled to contribution to be against the great weight and preponderance of the evidence. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Those cases also involved ROM impairments, albeit for the cervical region only, from designated doctors following earlier and subsequent compensable injuries. We reversed and rendered new decisions that the carriers in those cases were allowed to reduce IIBs and SIBs payments by 5/16 and 8/17, respectively, based on the cervical ROM impairments from the earlier injuries which "overlapped" with the cervical ROM impairment from the subsequent injuries. The Appeals Panel was able to calculate the amount of the contributions in those cases since the ROM ratings for the earlier and subsequent injuries were set out in the doctors' reports for both injuries and in the hearing officers' findings.

The reports of Dr. A and Dr. V contain the discrete elements of ROM measurements, as well as the Table 49 ratings, and the following charts show the comparisons between the ratings for the two injuries:

	<u>1995</u>	<u>1999</u>	<u>Difference</u>
<b>Cervical spine:</b>			
Cerv. Flexion	2%	2%	0
Cerv. Extension	3%	4%	+1
Rt. Lateral Flexion	0%	1%	+1
Lt. Lateral Flexion	0%	1%	+1
Rt. Cerv. Rotation	0%	2%	+2
Lt. Cerv. Rotation	0%	2%	+2
Table 49	4%	0%	
<b>Lumbar Spine:</b>			
Flexion	4%	Invalid	
Extension	1%	Invalid	
Rt. Lateral Flexion	0%	1%	+1
Lt. Lateral Flexion	0%	1%	+1
Table 49	5%	7%	+2

**Rt. Upper Extremity (shoulder)**

Flexion	3%	5%	+2	
Extension	0%	0%	0	
Abduction	3%	4%	+1	
Adduction	0%	0%	0	
Ext. Rotation		0%		0
Int. Rotation	1%	1%	0	
Conversion to whole body rating from Table 3	4%	6%	+2	

As can be seen from the above chart, 5% of the cervical ROM impairment from the 1995 injury overlapped with the 12% cervical ROM impairment from the 1999 injury and there was no impairment from Table 49 assigned for the 1999 injury; there was less lumbar spine ROM impairment from the 1999 injury and thus no overlap; and, 4% of the right shoulder ROM impairment from the 1995 injury overlapped with the 6% rating for the 1999 injury, these percentages being converted pursuant to Table 3 of the AMA Guides. These comparisons result in contributions from the 34% IR of 5/12 and 4/6 for a total contribution of 9/34 for ROM impairment contribution. We do not disturb the hearing officer's finding of no cumulative impact as regards Table 49 impairment.

Accordingly, we reverse the hearing officer's decision that no contribution is due and render a decision that the self-insured may have contribution from the prior compensable injury in the ratio of 9/34, applied to each weekly benefit.

The true corporate name of the insurance carrier is **INDEPENDENT SCHOOL DISTRICT** and the name and address of its registered agent for service of process is

**SUPERINTENDENT  
ADDRESS  
CITY, ZIP.**

---

Philip F. O'Neill  
Appeals Judge

CONCUR:

---

Judy L. S. Barnes  
Appeals Judge

---

Robert W. Potts  
Appeals Judge