

APPEAL NO. 012091
FILED OCTOBER 17, 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 August 9, 2001. The hearing officer resolved the disputed issues by determining that the appellant (carrier) was not entitled to any contribution against the respondent's (claimant) impairment income benefits (IIBs) and supplemental income benefits (SIBs) from a prior impairment awarded for a 1993 injury, because that injury had no "cumulative" impact on the current impairment rating (IR). He further made findings that a report by the designated doctor on maximum medical improvement (MMI) and IR had been misread as 28%, when in fact that doctor assigned a 45% IR to the claimant.

The carrier has appealed, arguing that it is entitled to contribution. The carrier also argues that the hearing officer was bound by stipulation that the claimant's IR for his current injury was 28%. The claimant responds that the decision is correct and that his _____ injury was not a factor in his recent injury.

DECISION

Affirmed in part reversed and remanded in part.

FACTS

The claimant hurt his low back, as well as other regions of his body, on _____. He had a fusion laminectomy. The CCH concerned a dispute raised by the claimant over a decision by an employee of the Texas Workers' Compensation Commission to allow a 25% contribution against the claimant's IIBs and SIBs for the effects of a compensable _____ lumbar injury. The claimant was not represented by counsel but was assisted at the CCH by an ombudsman.

No testimony was taken at the CCH. At the beginning of the CCH, the hearing officer read into evidence several stipulated facts, which he said the parties had discussed before the CCH. At the end of his recitation, he asked the parties if they agreed. The attorney for the carrier indicated agreement and the ombudsman did as well. However, there was no agreement indicated by the claimant on the record. One of the stipulations was as follows:

4. The claimant reached [MMI] for this injury on January 22, 2001, with a 28% impairment rating. The claimant is currently receiving impairment income benefits in the amount of \$287.90 per week, before contribution is taken out.

Documents were received into evidence without objection from either party. Included were a report from the claimant's treating doctor, Dr. T, certifying that the claimant

reached MMI on January 23, 2001, with a 28% IR. There is also a report from the designated doctor, Dr. K, and, as the hearing officer observed, although the Report of Medical Evaluation (TWCC-69) signed by Dr. K assigned a 28% IR, with an MMI date of January 22, 2001, (not the 23rd as found by the treating doctor), the narrative report attached to this TWCC-69 differs substantively from the certification. The narrative makes clear that the designated doctor found that the claimant had a 45% IR; the calculation of the various elements of this are set out and the designated doctor further comments about the divergence between his IR and that of the treating doctor. Eleven percent of Dr. K's IR was awarded for specific conditions of the spine, which is the number for lumbar surgery at multiple levels, but those levels are not specifically identified. There is no operative report in evidence. However, Dr. T's IR indicates that the claimant had a large herniated at L3-4 and a smaller one at L5-S1.

Previously, in May 1993, the claimant had injured his lower back in a work-related incident and received a 7% IR, also stipulated to at the beginning of the CCH. The 7% was awarded for an unoperated herniated lumbar disc and six months of pain. The lumbar disc involved is not identified. The certifying doctor commented in this report that the examination was unremarkable, and range of motion was not limited. However, the IR report indicated that surgery had been recommended to the claimant by two of his doctors.

There was argument, but no testimony, that the claimant sustained a 1995 back injury that was not compensable. This alleged occurrence is not referenced or described in the medical records in evidence.

CONTRIBUTION

The hearing officer erred by determining that the carrier was not entitled to any contribution. An IR is based upon an impairment, defined in Section 401.011(23) as:

[A]ny anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent.

The fact that the claimant's 1993 doctor observed that his examination for the 7% IR was "unremarkable" did not lessen the presumption of permanency of the lumbar condition. Nor can the fact that the claimant could return to work after his _____ injury mean that the condition leading to an IR had "resolved" for purposes of analyzing the cumulative impact on the present impairment rating. There is no evidence that the herniation had gone away at the time of the _____ injury. Finally, in the absence of any evidence as to what the alleged 1995 injury was, we are not willing to simply conclude that this injury "broke" any correlation between the 1993 and 1999 IRs, as stated by the hearing officer in his discussion.

Given the medical evidence and the reliance of the hearing officer on factors that do not appear to analyze the impact of the _____ injury IR on the current IR, it is

hard to understand how no contribution would be found. We consequently reverse and remand for a reconsideration of contribution which fairly recognizes the cumulative effect of the IR for the _____ injury on the present IR.

EFFECT OF IR STIPULATION

Hearing officers may take stipulations from the parties to expedite the proceedings. Rule 142.8(a)(5). An oral stipulation or agreement of the parties that is filed in the record or an oral stipulation or agreement of the parties that is preserved in the record is final and binding. Section 410.166. A stipulation is an agreement, a concession made by parties respecting some matter incident to a judicial proceeding. National Union Fire Insurance Co. v. Martinez, 800 S.W.2d 331 (Tex. App.-El Paso 1990, no writ). They are generally received as judicial admissions in the absence of allegations and proof of fraud, mistake, or lack of authority. Thompson v. Graham, 318 S.W.2d 102 (Tex. Civ. App.-Eastland 1958, writ ref'd n.r.e.). Parties cannot stipulate to legal conclusions to be drawn from the facts of a case; such stipulations are without effect and bind neither the parties nor the courts. City of Houston v. Deshotel, 585 S.W.2d 846 (Tex. Civ. App.-Houston [1st Dist.] 1979, no writ). However, parties may agree on truth of specific facts by stipulation and by this method limit the issue to be tried. Geo-Western Petroleum Development Inc. v. Mitchell, 717 S.W.2d 734 (Tex. App.-Waco 1986, no writ). Such stipulations are binding on the parties, on the trial court, and the appeals court. *Id.*

Evidence conflicting with an agreed stipulation is generally not admissible until the contrary stipulation is nullified by consent or order of the court. Allen v. Allen, 704 S.W.2d 600, 605 (Tex. App.-Fort Worth 1986, no writ); Wilson v. West, 149 S.W.2d 1026 (Tex. Civ. App.-San Antonio 1941, writ dism'd judgm't. corr.). However, in order to rely on stipulations, objections must be made to the admission of evidence contrary to the stipulations or the right to rely on them may be waived. State Bar of Texas v. Grossenbacher, 781 S.W.2d 736, 738 (Tex. App.-San Antonio 1989, no writ). The Appeals Panel has held that matters of mixed fact and law cannot result in binding stipulations; consequently, parties cannot stipulate that a subsequent IR is a "first" IR for purposes of Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 981875, decided September 23, 1998.

In this case, the stipulation concerning the "28% IR" plainly was intended to refer to Dr. K's report, whose MMI date is used. However, a designated doctor's report includes not just the TWCC-69 but attached narratives. In a case involving contribution, identification of the actual assigned IR against which contribution is sought is part of an issue on contribution. While the issue would not authorize the hearing officer or parties to determine the substantive correctness of the IR, the hearing officer must make findings on what the IR was in order to calculate the permitted amount of contribution. In this regard, we hold that the parties may not agree that, for purposes of contribution, the IR is anything

other than what it actually is.¹ In this case, it was clear that the designated doctor's TWCC-69 contains what amounts to a clerical error, and the hearing officer was correct in using the actual IR, as proven by a document not objected to and admitted into evidence, rather than the "stipulated" IR of 28%. As this case is being remanded, the stipulation may be removed from the decision and order and a fact finding made that the claimant's IR was certified by a designated doctor to be 45%.

As stated above, we reverse the determination that the carrier was not entitled to any contribution for the cumulative effect of the 1993 impairment on the IR for the _____ injury, which was 45%, and remand for determination of the appropriate amount of contribution (prospective from the date the initial request for contribution was made).

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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

¹ We would also observe that an ombudsman does not represent the claimant as would an attorney, and cannot make binding agreements for the claimant in his/her stead.

The true corporate name of the insurance carrier is **SENTRY INSURANCE, A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

**CLAY WHITE
SAMMONS & PARKER, P.C.
218 N. COLLEGE
TYLER, TEXAS 75702**

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge