

APPEAL NO. 020396
FILED APRIL 3, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on January 25, 2002, the hearing officer resolved the disputed issues by concluding that the appellant (carrier) is not entitled to a reduction of the respondent's (claimant) impairment income benefits (IIBs) based upon the claimed contribution from an earlier compensable injury and that the carrier is not entitled to reduce the claimant's income benefits to recoup the claimed prior overpayment. The carrier has requested our review of these determinations on evidentiary sufficiency grounds and also asserts error by the hearing officer in refusing to bifurcate the contribution issue. The file does not contain a response from the claimant.

DECISION

Affirmed.

We first address the asserted error related to bifurcating the contribution issue. The contribution issue framed in the benefit review conference (BRC) report is as follows:

Is the Carrier entitled to a reduction of the claimant's [IIBs] based on contribution from an earlier compensable injury, if so, by what proportion, and when does contribution begin?

The carrier filed a prehearing "Request To Include Additional Dispute" (Hearing Officer Exhibit No. 2) asking that this issue be recast into two issues, namely, (1) an issue concerning whether the carrier is entitled to a reduction of the claimant's IIBs based on contribution and, if so, by what proportion, and (2) an issue concerning when the contribution, if awarded, begins. The carrier urged this request on the basis that both entitlement to contribution and the effective date of the reduction of income benefits based on contribution, if awarded, were at issue. No other documents relating to this request were made a part of the hearing record. When the carrier raised its request at the outset of the hearing, it was apparent there had been some discussion of the matter prior to the convening of the hearing, although such discussion is not on the record. The hearing officer summarily denied the motion, referring to the prior discussion and stating that the requested bifurcation was unnecessary. It appeared that the carrier was urging that the effective date of any contribution awarded should be the date the claimant reached maximum medical improvement, not the date the carrier filed its Request for Reduction of Income Benefits Due to Contribution (TWCC-33). The carrier apparently recognized that there is Appeals Panel authority for effectuating contribution as of the date the TWCC-33 is filed, Texas Workers' Compensation Commission Appeal No. 002211-S, decided November 6, 2000, and wanted that issue bifurcated so that separate findings could be made for possible judicial review. While the carrier contends that the decision in Appeal No. 002211-S is wrong as a matter of law and fails to follow the precedent of many prior Appeals Panel decisions, the carrier cites no authority in support of this asserted error.

With the record in this state, we find no abuse of discretion in the hearing officer's ruling on the request. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Since we are affirming the hearing officer's determination that the carrier is not entitled to contribution, an issue as to the effective date of the contribution does not arise.

With regard to the disputed issue on contribution, the carrier's TWCC-33 reflects that the carrier requested a Texas Workers' Compensation Commission (Commission) order reducing the claimant's IIBs by 100% based on contribution from the claimant's _____, injury (sprain/strain to cervical and lumbar spine regions) to her impairment from her _____, injury (sprain/strain to cervical and lumbar spine regions); that the Commission ordered a 20% reduction; that the carrier then requested a BRC on its request for 100% reduction, and on its right to recoup overpayment of IIBs; and that the benefit review officer recommended against any reduction in IIBs and issued an Interlocutory Order for the payment of IIBs. At the hearing, the carrier, apparently abandoning the request for 100%, asked the hearing officer to award a 50% reduction in IIBs or, at the very least, the 20% previously awarded by the Commission. This is also the relief sought on appeal.

It is undisputed that the claimant's 1990 neck and low back strain/sprain injury, sustained when she fell at work, was not assigned an impairment rating (IR); that she did not undergo surgical treatment following that injury; that her 1999 neck and low back strain/sprain injury, sustained while attempting to lift a very heavy patient, resulted in the assignment of a 9% IR by a designated doctor (4% for the cervical spine and 5% for the lumbar spine, pursuant to Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association); and that she did not undergo surgical treatment for the latter injury.

The carrier contended that the 1990 injury did result in impairment, which would have been 9% had it been rated since the 1990 and 1999 injuries were essentially the same, and which contributed to the claimant's impairment from the 1999 injury. The carrier asserted that such impairment is evidenced by the claimant's having been off work for approximately three years after the 1990 injury; by the claimant's having entered into a Compromise Settlement Agreement for the 1990 injury, accepting \$10,500.00 for what the carrier characterized, without a scintilla of evidence to support that characterization, as payment for "impairment"; by the claimant's abnormally low cervical and lumbar spine range of motion (ROM) measurements following both injuries, albeit she received no IR for ROM; and by the claimant's having degenerative disc disease at an unusually young age, 28. In contrast, the claimant testified that after being released by her treating doctor to return to work approximately three years after her 1990 injury, her symptoms had completely resolved; that she had no subsequent medical treatment for that injury; and that she became employed as a nursing aide and performed strenuous work with patients with no spinal problems whatsoever until she fell while attempting to lift the patient on _____.

Section 408.084 provides that the Commission may order a reduction in IIBs and

supplemental income benefits “in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.” In determining the reduction in benefits because of contribution of a prior compensable injury, the Commission is to consider the “cumulative impact from the compensable injuries on the employee’s overall impairment. . . .” Section 408.084(b).

The hearing officer found, among other things, that the 1990 injury did not result in any permanent impairment; that the 1990 injury resolved and the claimant returned to full duty active employment in 1993; that the 1990 injury had no lasting effect on the claimant’s physical condition and did not contribute to the permanent impairment rated by the designated doctor after the 1999 injury; and that the 9% IR determined by the designated doctor resulted from the 1999 injury alone and there is no cumulative impact on the claimant’s body resulting from the 1990 and 1999 injuries. Further finding that the carrier has not overpaid income benefits, the hearing officer concluded that the carrier is not entitled to reduce income benefits in order to recoup the claimed overpayment. The carrier had the burden of proof on both disputed issues by a preponderance of the evidence.

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 (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). Having reviewed the record, we are satisfied that the challenged determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King’s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TEXAS HOSPITAL INSURANCE EXCHANGE** and the name and address of its registered agent for service of process is

**ROBERT DION, CEO
6300 LA CALMA SUITE 550
AUSTIN, TEXAS 78761.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Edward Vilano
Appeals Judge