

APPEAL NO. 021311
FILED JULY 10, 2002

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 April 23, 2002. The hearing officer decided that the respondent (self-insured) was entitled to 100% contribution against the impairment income and supplemental income benefits for the effects of a prior (date 1) back injury. The appellant (claimant) has appealed, arguing that the designated doctors' use of two different sections of Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association defeats any contribution for the specific condition. He further argues that there were two different injuries to his back and essentially two different disorders were rated that cannot be offset against each other. The self-insured responds that the decision is correct.

DECISION

Reversed and rendered.

The claimant was assigned a nine percent overall whole body impairment rating (IR) after each of his back injuries that occurred in (date 1) and (date 2). According to the description given by the claimant, both injuries happened when he was postured a certain way while performing his work. The claimant was diagnosed with spondylolisthesis after his (date 1) injury. The second injury was characterized as an aggravation of the first; an MRI made in (date 2) showed extensive degenerative disc disease in the claimant's spine and a small herniation at L5-S1.

The hearing officer's allowance of a 100% contribution effectively cancels out the overall (date 2) IR entirely, by comparing the gross total to the gross total and considering one doctor's opinion that the second injury did not worsen the claimant's back.

It is "impairment" that is rated, not an injury per se. The Appeals Panel has held that a designated doctor should not attempt to take out of his IR the effects of a prior injury, and that those determinations should be left to the Texas Workers' Compensation Commission in the context of a request for contribution. Texas Workers' Compensation Commission Appeal No. 93695, decided September 22, 1993. Therefore, the proper procedure was followed in this case when the (date 2) injury was evaluated for impairment, and it does not appear that the second designated doctor inappropriately attempted to deduct from his IR because of the earlier IR, although the report showed that the designated doctor was aware of the previous IR. The hearing officer's analysis was required to sort out the extent to which the first IR contributed to the second IR.

While we do not disagree with the hearing officer's approach to contribution for the specific condition IR from Table 49, we do believe that he erred by finding that the claimant's overall condition was not worsened *at all* from the second injury. We do not agree that the entire second IR is entirely accounted for by the effects of the 1993 injury.

After the (date 1) injury, the claimant was awarded one percent for right lateral range of motion (ROM) deficits. His left ROM was then normal. After his (date 2) injury, his right lateral flexion angle was almost the same as after the (date 1) injury, but this time his left lateral flexion angle was limited enough to incur another one percent IR. Consequently, the claimant's condition was worsened somewhat after his second injury, however slight. It was therefore against the great weight and preponderance of the evidence to mandate a 100% contribution because the IRs are not "identical" as the consulting doctor for the self-insured has stated. *Compare* Texas Workers' Compensation Commission Appeal No. 952019, decided January 12, 1996.

Accordingly, we reverse the determination that the self-insured was entitled to 100% contribution, and render a decision that the contribution should be 8/9 of the impairment income benefit payment as representing the cumulative effect of the (date 1) back impairment.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**MANAGER
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge