APPEAL NO. 021853
FILED SEPTEMBER 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 (CCH) was held on July 5, 2002. The hearing officer determined that no contribution was allowable for the effects of an earlier 1995 injury and impairment rating (IR) because that earlier condition had "resolved."

DECISION

Affirmed.

The respondent (claimant) sustained a lumbar sprain injury in 1995, for which she received a 7% IR. This was derived from a 5% specific condition rating, and a 2% range of motion (ROM) deficit, all relating to right lateral flexion.

On _____, the claimant sustained multiple compensable injuries. One component of her injuries was a lumbar strain. She was certified to have a 23 % IR. Only 4% of this IR was for her lumbar injury, and it was all for ROM deficits. She was not assigned any "specific condition" IR for her 2001 lumbar injury. Her MRI following this injury was essentially normal with mild degenerative conditions noted. The claimant testified that her 1995 lumbar condition had essentially resolved and did not cause problems or pain prior to her 2001 injury.

Section 408.084 states (in pertinent part):

> (a) At the request of the insurance carrier, the [Texas Workers' Compensation] commission may order that impairment income benefits and supplemental income benefits be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.
>
> (b) The commission shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section.

We cannot agree that the hearing officer erred by finding no cumulative effect from the prior 1995 IR to the current IR. First of all, we cannot agree with the appellant's (carrier) purely arithmetical request for a 7/23 reduction for the effects of contribution from the prior injury. Because the lumbar impairment only comprised 4% whole body impairment for the 2001 injury, the maximum that could be allowed even with full "arithmetic" contribution would be 4/23, with no carryover of the remaining 3% to other regions of the body not previously injured.

Second, the area of "overlap" where the potential area of contribution exists with the two injuries relates only to ROM; there was no IR for a specific condition relating to the second injury. Within the second ROM IR, only 1% was for right lateral flexion, actually a better IR than previously awarded after the 1995 injury. Given this comparison, the hearing officer could conclude that the second injury to the lumbar spine was entirely superimposed over any effects of the old injury so that there was no "cumulative impact" from the first injury to the second IR.

However, we must comment on the reliance of the claimant and the hearing officer on their opinion that the 1995 injury "had resolved." This is not a term of art found in the 1989 Act relating to IRs or contribution. An IR should be assigned when an anatomic or functional loss or abnormality is "reasonably presumed to be permanent." Section 401.011(23). The claimant's assisting ombudsman argued at the CCH that "when you have a sprain/strain six years ago, you're not going to have ongoing problems." The irony of this argument is that if there were a general recognition in the medical community that there can never be "ongoing effects" from lumbar strains, then an IR for a lumbar strain could never be assigned given the definition of impairment in the 1989 Act.

We hasten to add that we do not suggest that this is the way lumbar strains should be approached; rather, we make this point to emphasize that the question of whether an earlier injury has "resolved" from a pain or functional standpoint does not necessarily address or foreclose the cumulative impact of an earlier IR reflecting anatomical abnormality or loss on a subsequent IR. The assignment of an IR is not a judgment that there will be no ability to work or function in the future, but an assessment of the permanent residue of the injury that will likely remain after maximum medical improvement is achieved. Thus, the resolution of pain or "problems" does not necessarily equate to restoration of loss or abnormality. Consequently, the focus of contribution should always be on the "cumulative impact" of the earlier impairment on the subsequent impairment whether or not there has been subjective resolution of pain.

We will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995. In this case, the determination that there was no "cumulative impact" to the current IR from the one after the 1995 injury is supported by the record, and we therefore affirm the decision and order.

The true corporate name of the insurance carrier is **ROYAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATE SERVICE COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

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Margaret L. Turner
Appeals Judge