

APPEAL NOS. 022052 AND 022341
FILED SEPTEMBER 24, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing (CCH) was held on July 23, 2002. In Docket No. 1 (the 1994 injury, Appeal No. 022341), the hearing officer determined that the compensable 1994 injury does not include respondent 1's (claimant herein) current psychological problems after (date of subsequent injury). In Docket No. 2 (the 1998 injury, Appeal No. 022052), the hearing officer determined that the compensable 1998 injury includes the claimant's psychological problems "and/or aggravation of his preexisting psychological problems" (from the 1994 injury); that the appellant, Lumbermens Mutual Casualty Company (Carrier 2 herein), is not entitled to a reduction of the claimant's impairment income benefits (IIBs) and supplemental income benefits (SIBs) based upon contribution from an earlier (the 1994) injury; that the claimant's average weekly wage (AWW) is \$462.31; and that Carrier 2 is not entitled to suspend the claimant's income benefits to recoup overpayment.

Carrier 2 appeals the adverse findings regarding the 1998 injury, contending that the claimant's psychological problems occurred prior to the 1998 injury; that the claimant's depression was due to personal problems rather than the 1998 injury; that Carrier 2 is entitled to contribution from the 1994 injury based on the impairment ratings (IR) of two doctors that rated that injury; that the hearing officer should have based the AWW on a same or similar employee rather than the fair, just, and reasonable standard (Section 408.041(c)); and that Carrier 2 was entitled to recoupment of overpayments based on an excessive AWW. The file does not contain a response from either the claimant or respondent 2, Travelers Indemnity Company of Connecticut (Carrier 1 herein)

DECISION

Affirmed.

The claimant sustained a compensable low back injury on (date of first injury) (the 1994 injury), had spinal surgery ("L4-5 surgical decompression with laminectomy and bilateral L4-5 discectomy") for that injury on August 1, 1995, and eventually received a 15% IR (10% impairment for the low back, 5% impairment for mental disorder) for that injury. The claimant returned to work in 1996 (and had a noncompensable 1997 injury, see Carrier 2's Exhibit No. 17). The claimant returned to work performing heavy work as a vending machine route salesman when he slipped and fell on some ice on (date of subsequent injury)/, (the 1998 injury). The claimant has had additional spinal surgery (fusion) at the L3-4 and L4-5 levels.

EXTENT OF INJURY-DEPRESSION

Carrier 2 contends that the claimant's current psychological problems are due to either problems occurring before (date of subsequent injury) (although Carrier 2 cites report's dealing with acute pain and "Major Depression associated with chronic and acute pain" in reports dated 1999 dealing with the 1998 injury), or personal problems due to his inability to provide for his family. The claimant undoubtedly had psychological problems prior to (date of subsequent injury) but based on the claimant's testimony and medical records those problems had ameliorated. In any event, the evidence was conflicting and presented the hearing officer with questions of fact, which the hearing officer resolved in the claimant's favor. The hearing officer's decision is supported by sufficient evidence.

CONTRIBUTION

Carrier 2 argues that it is entitled to contribution, criticizing the hearing officer's "finding an aggravation to Claimant's ongoing psychological problems stemming from his prior compensable lumbar injury." We note however that Carrier 2 is asking only for contribution due to the lumbar injury because the claimant's psychological condition due to the 1998 injury has not been rated. Carrier 2 states:

Carrier's Request for Contribution [TWCC 33] (for lumbar only) was done on 11/29/01 and attached to it was [Dr. S] report and [Report of Medical Evaluation] TWCC-69 and [Dr. E] TWCC-69 on Claimant's 1994 claim.

Dr. S had given the claimant a 16% IR for the 1994 injury (lumbar only) and Dr. E assessed a 15% IR. Section 408.084 provides that, at the request of an insurance carrier, the Texas Workers' Compensation Commission (Commission) may order that IIBs and SIBs may be reduced 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 from 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). Carrier 2 criticized the hearing officer for failure to analyze the cumulative impact of the earlier compensable (1994) injury in the claimant's overall impairment and that the hearing officer "simply ignored" Dr. S and Dr. E's reports. We disagree. The hearing officer, in his contribution discussion, detailed his analysis and how he arrived at his conclusion, pointing out that Carrier 2's own required medical examination (RME) doctor for the 1998 injury found the 1998 injury "so distinctive and affecting the L4 nerve root (the previous surgery was at L5) I will note this finding today as a new injury." Further, Dr. S, in a report dated October 31, 2001, rating the 1998 injury, comments that the claimant "had a herniated disc at L3-4 which is a different disc that he had been operated on previously at L4-5." Dr. S went on to rate the injury based on the surgery for the 1998 injury, using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). It is true that the designated doctor for the 1998 injury used the 4th edition of the AMA Guides assessing a 20% IR,

however Carrier 2 presented no medical evidence as to the cumulative impact of the 1994 injury on the 1998 injury. Indeed Carrier 2's RME doctor and Dr. S appear to believe the 1998 injury is new and distinctive, unrelated to the 1994 injury. Whether there is a cumulative impact, and, if so, the amount of such cumulative impact, is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94578, decided June 22, 1994. It is well-settled that "[s]imply proving the occurrence of a previous compensable injury will not sustain the carrier's burden to prove the interaction of that injury with the current one on the present impairment." Texas Workers' Compensation Commission Appeal No. 971348, decided August 28, 1997. The consideration of the cumulative impact from prior injuries requires an assessment not only of the impairment from previous injuries, but also an analysis of how the injuries work together. Texas Workers' Compensation Commission Appeal No. 021413, decided July 11, 2002. Carrier 2 had the burden of proof in showing the cumulative impact from the 1994 injury and the 1998 injury and the hearing officer's determination that Carrier 2 failed to do so is supported by the evidence.

AWW

The claimant testified that he works 50 to 60 hours a week for a base pay of \$400 a week plus commission. The claimant's testimony is supported by testimony from the employer's human resources manager, who testified that full time is "50 plus hours" a week for a base "\$400 salary per week." It is undisputed that the claimant had worked for the employer less than 13 consecutive weeks preceding the 1998 injury. Carrier 2 submitted the wage statement of a "same or similar" employee (see Section 408.041(a) and (b)) who had an AWW of \$289. Carrier 2 argues that the hearing officer erred in stating that the employer's "same or similar" employee "is not close," asking us to compare Carrier 2's "Exh. 16 with Carrier [2's] Exh. 20." We have done so and find Carrier 2's Exhibit No. 16 to be a summarization of the claimant's wage statement for the seven weeks prior to his injury and Carrier 2's Exhibit No. 20 to be the claimant's wage statement. (In essence Carrier 2 asks us to compare the claimant's summarized wage statement with his actual wage statement). The alleged same or similar employee's wage statement is found at claimant's Exhibit 6 which shows that for the 13 weeks prior to the claimant's date of injury the "same or similar" employee never worked more than 44.03 hours and some weeks worked as few as 31.74 hours (with no commission). We would note that 44 hours is 25% less than 55 hours and 31.74 hours is 45% less than 56 or 57 hours. The hearing officer did not err in finding the proffered same or similar employee was not in fact a same or similar employee based on the number of hours per week worked. The hearing officer determined the \$462.13 AWW on a fair, just, and reasonable basis by adding the claimant's wages for seven full weeks the claimant worked and then dividing by seven.

RECOUPMENT

Since the alleged overpayment is based on the incorrect \$289 AWW of the dissimilar employee and the income benefits were paid on the basis of \$311.99 AWW, we agree with the hearing officer's conclusion that Carrier 2 is not entitled to recoup

overpayments and based on the AWW of \$462.13 found by the hearing officer the claimant may be “due benefits for [Carrier 2] underpaying.”

We conclude that the hearing officer’s determinations, on all of the issues presented, are not so against the great weight and preponderance of the evidence as at clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer’s decision and order are affirmed.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge