

APPEAL NO. 031606
FILED JULY 30, 2003

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 May 23, 2003. The hearing officer determined that (1) the respondent (carrier) is entitled a 70% reduction in impairment income benefits (IIBs) and supplemental income benefits (SIBs) for the compensable injury of _____, based on contribution from the prior compensable injury of (prior date of injury); (2) the carrier may apply contribution to income benefit payments which accrue beginning December 19, 2002; and (3) the carrier may recoup any overpayment of IIBs and SIBs which accrued beginning December 19, 2002, at a rate of 50%. The appellant (claimant) appealed these determinations on sufficiency of the evidence grounds. The carrier urges affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

CONTRIBUTION

The parties stipulated that the claimant sustained a prior compensable injury on (prior date of injury). The claimant was assigned a 24% impairment rating (IR) under the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). A report from the designated doctor, Dr. H, indicates that the claimant received a 13% whole person impairment of the cervical spine, comprised of 4% whole person under Table 49 Section (II)(B) of the AMA Guides and the remainder (9% whole person) for loss of cervical range of motion (ROM) in lateral flexion/extension and rotation; 5% whole person impairment for thoracic loss of ROM; 0% for the lumbar spine; 5% whole person impairment for right shoulder loss of ROM; and 4% whole person impairment for left shoulder loss of ROM.

The parties stipulated that the claimant sustained another compensable injury on _____, which includes the cervical spine, thoracic spine, lumbar spine, bilateral knees, bilateral carpal tunnel syndrome, and bilateral shoulders. The claimant was certified by the designated doctor, Dr. V, with a 27% IR under the third edition of the AMA Guides. According to the designated doctor's report, the claimant's IR is comprised of 10% whole person impairment for cervical loss of ROM, including flexion/extension, lateral flexion/extension, and rotation; 5% whole person impairment for thoracic loss of ROM, including flexion, extension, and rotation; 4% whole person impairment for lumbar loss of ROM; 7% whole person impairment for loss of range of motion in both knees; 5% whole person impairment for loss of ROM in both wrists, and 0% for the bilateral shoulders.

The claimant testified that she continued to experience pain from her compensable injury of 1992 at the time of her compensable injury of 1999. The carrier submitted a cumulative impact report, dated December 18, 2002, in which it argued for a 69% reduction in IIBs and SIBs for the compensable injury of _____, based on contribution from the prior compensable injury of (prior date of injury). The report compares the ratings given for each date of injury and provides:

In regard to the [_____] injury, [Dr. V] gave the claimant a 10% impairment in regard to cervical range of motion. However, the claimant already had a 13% impairment from the prior injury. Therefore, all of the impairments for the cervical spine pertaining to the [_____] injury would be from the prior injury. One hundred percent of the cervical impairment assigned for the [_____] injury would be due to the prior injury.

In regard to the thoracic spine, [Dr. V] assigned a 5% impairment of whole person. However, the claimant was given a 2% impairment for the thoracic spine in regard to the prior injury of [(prior date of injury)]. Therefore, there would be a 40% contribution due to the cumulative impact of the prior injury pertaining to the thoracic spine.

In regard to the lumbar spine, the claimant was given no impairment for the prior injury of [(prior date of injury)]. Pertaining to the [_____] injury, the physician gave the claimant a 4% impairment of whole person. Therefore, there was no contribution from the prior injury in regard to the lumbar spine.

[Dr. V] assigned a 1% for the left upper extremity and a 5% impairment for the right upper extremity. This would be a 6% impairment for the upper extremities pertaining to the [_____] injury. The claimant had a 4% impairment for the upper extremities pertaining to the prior injury of [(prior date of injury)]. Therefore, there would be a 67% impairment of contribution due to the prior injury in regard to the upper extremities.

The claimant therefore would have 100% contribution for the cervical spine, 40% contribution for the thoracic spine, and 67% contribution for the upper extremity. The 100% is added to the 40% and the 67%. An average is 69%. Therefore, 69% of the [_____] impairment rating of 27% would be from the 1992 injury....

The report also recites the clinical findings contained in the designated doctor's report for the 1999 injury and states, "Expect for the left wrist, all of the other injured areas were soft tissue injuries which should have healed without any significant residual impairment." In view of the claimant's testimony and the carrier's cumulative impact report, the hearing officer determined that the carrier is entitled a 70% reduction in IIBs

and SIBs for the compensable injury of _____, based on contribution from the prior compensable injury of (prior date of injury).

Section 408.084(a) 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. Section 408.084(b) requires that the Commission "consider the cumulative impact of the compensable injuries on the employee's overall impairment" in determining a reduction in benefits. 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. 950268, decided April 10, 1995. This includes considering the various components of the IRs. See Texas Workers' Compensation Commission Appeal No. 950735, decided June 22, 1995; Texas Workers' Compensation Commission Appeal No. 951019 decided August 4, 1995.

The cumulative impact report, relied upon by the hearing officer in this case, fails to analyze the different components of the 1992 and 1999 impairments in arriving at the conclusion that the carrier is entitled to 69% contribution. Specifically, the report allows contribution for a 1992 cervical impairment under Table 49 of the AMA Guides, when no such corresponding impairment exists for the 1999 injury. The report also allows contribution for a 1992 bilateral shoulder injury against a 1999 bilateral wrist injury, without any analysis of how the prior shoulder impairment contributes to the present bilateral wrist impairment. In our review of the evidence, the claimant's cervical and thoracic loss of ROM impairments from the 1992 injury are the only ratings which overlap the impairment for the 1999 injury and warrant contribution. Additionally, we know of no authority which permits an overall rate of contribution, in this case 69%, based upon an averaging of the various component rates of contribution, e.g., cervical spine, thoracic spine, and upper extremities. Therefore, the hearing officer's determination that the carrier is entitled to a 70% reduction in IIBs and SIBs, based upon the carrier's report, is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we reverse and remand the hearing officer's decision for further consideration of the rate of contribution, in accordance with the guidance provided in Appeal No. 950735, and Texas Workers' Compensation Commission Appeal No. 011926, decided September 13, 2002.

DATE OF CONTRIBUTION

The hearing officer did not err in determining that the carrier may apply contribution to income benefit payments which accrue beginning December 19, 2002. We have held that contribution does not apply to income benefit payments which accrue prior to the filing of a request for contribution. Texas Workers' Compensation Commission Appeal No. 002211-s, decided November 6, 2000. The evidence shows that that the carrier filed its request for contribution on December 19, 2002.

Accordingly, the hearing officer's determination that the carrier could apply contribution as of December 19, 2002, is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

RECOUPMENT

The hearing officer erred in determining that the carrier may recoup any overpayment of IIBs and SIBs, which accrued on or after December 19, 2002, at a rate of 50%. We have said that a carrier may recoup overpayments of IIBs and SIBs which accrue on or after the date the carrier files a request for contribution, from subsequent income benefits. See Appeal No. 002211-s. In determining the amount to be withheld from the subsequent income benefits, the hearing officer shall determine a reasonable rate at which such benefits are to be withheld to recoup the overpayment. Id. A reasonable rate of recoupment has been determined, in prior cases, by considering the amount overpaid, the claimant's monthly IIBs and SIBs rate after contribution, and the claimant's financial recourses. See Id. No such evidence was presented in this case. Accordingly, we reverse and remand the hearing officer's determination for development of the evidence with regard to this issue.

The decision and order of the hearing officer are affirmed with regard to date the carrier may apply contribution to income benefit payments. We reverse and remand the hearing officer's decision with regard to the rate of contribution and recoupment, consistent with our decision above.

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 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

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

**BOB MORRISON
820 GESSNER, SUITE 1000
HOUSTON, TEXAS 77024.**

Edward Vilano
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge