

APPEAL NO. 032375
FILED OCTOBER 9, 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 August 13, 2003. The hearing officer determined that the appellant (carrier) is not entitled to a reduction of the respondent's (claimant) impairment income benefits (IIBs) based on contribution from an earlier compensable injury, and that the carrier is not entitled to suspend payment of income benefits and recoup the previous payment of \$6,375.00. The carrier appeals on sufficiency of the evidence grounds. The claimant responds, urging affirmance, and also suggesting that the two impairment ratings (IR) he has received should be added together "for a total of 21[%] to compensate for the pain, rejection & suffering I've encountered throughout this ordeal." (Emphasis in original.)

DECISION

Affirmed.

We reject the claimant's suggestion that we add his two IRs together; there is no statutory or rule provision that authorizes such a result.

The claimant sustained a compensable lower back injury on _____, for which he received an IR of 11% from the Texas Workers' Compensation Commission (Commission)-selected designated doctor, under the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides third edition). The 11% IR included 6% for range of motion (ROM) and 5% for a specific disorder under Table 49, (II)(B), AMA Guides third edition (unoperated with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm or rigidity associated with none-to-minimal degenerative changes on structural tests). The claimant sustained a second compensable lower back injury on (subsequent date of injury), for which he received an IR of 10% from a Commission-selected designated doctor, under the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides fourth edition). The 10% IR was based on Diagnosis Related Estimate (DRE) Category III, Table 72, AMA Guides fourth edition.

The carrier presented testimony from its peer review doctor, Dr. H, who opined that the AMA Guides third edition IR for the 1998 lower back injury, excluding any rating for ROM, would be 5% for DRE Category II when converted to an AMA Guides fourth edition IR, and that the 2002 injury was exactly the same injury. Dr. H disagreed with the designated doctor's conclusion that the 2002 injury included radiculopathy warranting a 10% IR under DRE Category III. Based upon the peer review doctor's

conclusions, the carrier requested contribution, pursuant to Section 408.084, of 100%, asserting that the 1998 injury was a strain and the 2002 injury was also a strain.

The hearing officer correctly noted that he did not have an issue before him concerning the correctness of the IR for the 2002 injury. The issue he had to resolve involved the possible reduction of IIBs based upon an earlier contributing injury. He also noted that Section 408.084(b) provides for consideration of "the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section." In his analysis of the evidence, the hearing officer stated that the 1998 injury did not show radiculopathy, and that the L5-S1 disc was bulging, consistent with the aging process, while after the 2002 injury, the claimant's L5-S1 disc was found to be herniated, and that a herniation could very likely cause radiculopathy. He consequently viewed the 2002 injury as a completely different injury that included a herniation and radiculopathy. He found no cumulative impact of the first injury on the second one, and declined to award any contribution.

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. 950268, decided April 10, 1995. This analysis includes considering the IRs from the prior compensable injuries and the present injury, and the 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 carrier had the burden of proof on the contribution issue. 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 regarding the contribution issue 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). Accordingly, the hearing officer's determination that the carrier is not entitled to a reduction of the claimant's income benefits based on contribution from an earlier compensable injury is affirmed.

In view of the determination that the carrier is not entitled to contribution, it follows that the carrier will not be entitled to recoupment of income benefits pursuant to Section 410.209. We can affirm the hearing officer's decision on any reasonable basis

supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied). His determination of this issue was correct, and need not be discussed further.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS STREET, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

Chris Cowan
Appeals Judge

Edward Vilano
Appeals Judge