APPEAL NO. 032825
FILED DECEMBER 16, 2003

This appeal after remand 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 February 28, 2003. The hearing officer determined that the respondent (carrier) was not entitled to a reduction of the appellant's (claimant) impairment income benefits (IIBs) and/or supplemental income benefits (SIBs) based on contribution from an earlier compensable injury. The carrier appealed, arguing that the hearing officer inappropriately placed additional requirements upon the carrier. The Appeals Panel reversed the hearing officer's decision and remanded the case because the hearing officer appeared to have denied the carrier's request for contribution solely because the carrier did not provide a conversion of the impairment rating (IR) for the 1998 compensable injury under the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides 3rd edition) to an IR 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 4th edition) and did not specifically address whether the carrier met its burden of proof on the contribution issue. Texas Workers' Compensation Commission Appeal No. 030864-s, decided June 5, 2003. A hearing on remand was held on September 24, 2003. In his decision after remand, the hearing officer considered new evidence offered and determined that the carrier is entitled to a reduction of the claimant's IIBs and/or SIBs based on contribution from an earlier compensable injury in the amount of 80%. The claimant appealed, arguing that the carrier did not provide medical evidence to support its position at the CCH and disputed the remanding of the case for rehearing. The claimant additionally objected to the hearing officer's consideration of evidence presented at the remand that was not offered during the original hearing and alleges that the hearing officer lacked impartiality. In its response, the carrier urges affirmance, asserting that the determination that 80% of the claimant's current impairment is attributable to the prior work-related injury is supported by legally and factually sufficient evidence.

DECISION

Affirmed.

The claimant contends on appeal that the hearing officer erred in admitting Carrier's Exhibit No. 14, a chart review which was not offered into evidence at the initial CCH. We agree that it was error for the exhibit to be admitted. At the CCH on remand, the hearing officer overruled the claimant's objection to the admission of Carrier's Exhibit No. 14, that the prior Appeals Panel decision "basically establishes new rules of the game." We disagree. The case was remanded to the hearing officer for "further consideration of the record for the hearing officer to determine if the carrier met its burden of proof on the issue of contribution and if so, to determine the award of

contribution." Further, we note that the case was remanded because the hearing officer in the prior CCH appeared to have denied the request for contribution solely because the carrier did not provide a conversion of the IR for the 1998 compensable injury under the AMA Guides 3rd edition to an IR under the AMA Guides 4th edition. While there was language in the decision which acknowledged the difficulty in arriving at an amount of contribution without a conversion of an IR to the same AMA Guides edition, the decision noted that the carrier correctly asserted that there is no requirement that an IR of a prior injury must be converted to an IR of the AMA Guides 4th edition. We have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.) While the hearing officer does refer to statements contained in Carrier's Exhibit No. 14, it is clear that his decision was not based solely on the information contained in this exhibit. To the contrary, much of the information contained in this exhibit is also contained in previous medical records which were admitted at the prior CCH. The hearing officer did not accept the conversion of the IR from the AMA Guides 3rd edition to the AMA Guides 4th edition provided in this exhibit. Therefore, the evidentiary error does not amount to reversible error in this instance.

It is undisputed that on _____, the claimant sustained a compensable injury to the low back and was assessed a 15% IR with a June 12, 2000, maximum medical improvement (MMI) date pursuant to the Texas Workers' Compensation Commission (Commission)-selected designated doctor, and that on _____, the claimant sustained a compensable injury to the low back and was assessed a 25% IR with a June 19, 2002, MMI date pursuant to the Commission-selected designated doctor. 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.

In the instant case, the hearing officer on remand examined the components of the IR assigned to the first injury under the AMA Guides 3rd edition. The hearing officer noted that the fusion performed on December 13, 1999, for the first injury would have continuing impact; that the operative report for the second injury reflected that there were bursitic changes over the hardware from the prior surgery with fibrous tissues removed from the hardware site; and that the claimant was not placed at MMI for her first injury until seven months before her second injury to her low back. The hearing officer noted that "under no conceivable theory is a zero percent contribution appropriate" under the facts of this case.

The carrier had the burden of proof on the contribution issue. The carrier need not prove an exact percentage; however, there must be sufficient evidence to determine a contribution percentage that is reasonably supportable. Texas Workers' Compensation Commission Appeal No. 961211, decided August 7, 1996. The issue of contribution then becomes a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941405, decided December 1, 1994. A determination of contribution must be based on medical evidence, but the existence of medical evidence supporting contribution does not require an award of contribution. Texas Workers' Compensation Commission Appeal No. 941170, decided October 17, 1994. 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).

The claimant contends that the hearing officer changed the actual start time of the hearing to benefit the carrier's attorney's billing and that this was evidence that he was not impartial. Although the record contains a discussion about the length of time to be used to calculate the length of the hearing, the record does not support the claimant's assertions that the hearing officer was impartial. In her appeal, the claimant explains that there was a delay in the start of the hearing because of a problem with traffic.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **NORTH AMERICAN SPECIALTY INSURANCE COMPANY** 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.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge