

APPEAL NO. 030864-s
FILED JUNE 5, 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 February 28, 2003. The hearing officer resolved the disputed issue by deciding that the appellant (carrier) is not entitled to a reduction of the respondent'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 claimant responded, urging affirmance.

DECISION

Reversed and remanded.

The carrier contends that the hearing officer erred in her determination that the carrier is not entitled to a reduction of the claimant's income benefits based on contribution from an earlier compensable injury to the claimant's low back in 1998. 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 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 of a prior compensable injury, the Commission is to consider the "cumulative impact of the compensable injuries on the employee's overall impairment" Section 408.084(b). 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.

The carrier argues that the law does not require that the carrier must establish that the prior work-related injury was given an impairment rating (IR), nor does the law require the carrier to convert the former IR assigned 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 a rating 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) so that presumably a mathematical comparison can be made in order to determine the percentage of contribution.

The hearing officer noted in her Statement of the Evidence that neither of the medical experts provided a conversion of the 1998 injury using the AMA Guides 4th edition in their cumulative impact analysis. The hearing officer then stated "[t]herefore, the Carrier has failed to provide a valid request in that all the information was not

included as such the Carrier is entitled to 0% contribution.” The hearing officer specifically found that the cumulative impact analysis from the medical experts “did not contain all the required information” and that the medical experts did not provide a conversion of the 1998 injury using the AMA Guides 4th edition.

We agree with the carrier’s assertion that prior decisions have held that carriers may be entitled to a reduction in benefits based upon an out-of-state work-related injury, which may not have been rated under the AMA Guides. See Texas Workers’ Compensation Commission Appeal No. 951002, decided August 7, 1995. We also note that the workers’ compensation law in effect prior to the effective date of the 1989 Act does not preclude a finding of contribution from an old law injury where the medical evidence demonstrates a documented impairment that resulted from an earlier compensable injury sustained under the provisions of the old law. See Texas Workers’ Compensation Commission Appeal No. 92549, decided November 24, 1992; and Texas Workers’ Compensation Commission Appeal No. 960273, decided March 28, 1996. There is no requirement either in the statute, Commission rules, or prior Appeals Panel decisions that an IR that is determined under the AMA Guides 3rd edition must be converted to an IR under the AMA Guides 4th edition to be entitled to contribution. However, we recognize that there are vast differences between the AMA Guides 3rd and 4th editions, and that it may be difficult to have a meaningful comparison if such a conversion is not offered into evidence. Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE §130.1(c)(2)(B) (Rule 130.1(c)(2)(B)) establishes what version of the AMA Guides should be used to determine the claimant’s IR and requires use of the AMA Guides 4th edition for all certifying examinations after October 15, 2001. However, the rule creates an exception if there is a certification of maximum medical improvement which was made prior to October 15, 2001, and which has not previously been withdrawn through agreement of the parties or by final decision. The preamble to Rule 130.1 notes that this ensures that all ratings in a given dispute will be made according to the same edition and are thus, comparable. The preamble additionally discusses some of the various differences between the 3rd and 4th editions of the AMA Guides. This is an acknowledgement of the problems inherent in trying to make a meaningful comparison if the ratings are from different editions of the AMA Guides.

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; and Texas Workers’ Compensation Commission Appeal No. 950268, decided April 10, 1995. However, this analysis includes consideration of 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; and Texas Workers’ Compensation Commission Appeal No. 951019, decided August 4, 1995. The carrier correctly asserts that there is no requirement that an IR of

a prior injury be converted to an IR of the AMA Guides 4th edition. However, without a conversion of an IR to the same AMA Guides edition, it may be next to impossible for the hearing officer to make a meaningful comparison of the IRs and to award contribution.

The carrier has the burden of proving the extent, if any, that the claimant's prior compensable injury contributed to her present impairment. Texas Workers' Compensation Commission Appeal No. 022666, decided November 27, 2002; Texas Workers' Compensation Commission Appeal No. 021985, decided September 18, 2002; and Texas Workers' Compensation Commission Appeal No. 021820, decided August 28, 2002. 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, and Texas Workers' Compensation Commission Appeal No. 002303, decided November 14, 2000.

We remand because the hearing officer appears to have denied the carrier's 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. The hearing officer did not specifically address whether the carrier met its burden of proof on the contribution issue. We, therefore, reverse and remand 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.

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 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. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

**C T 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