APPEAL NO. 980211
FILED MARCH 20, 1998

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 July 17, 1997, with hearing officer. The single issue was whether the appellant (carrier) was entitled to contribution from earlier compensable injuries and the proportion. The hearing officer determined that the carrier was not entitled to contribution and the case was appealed. In Texas Workers' Compensation Commission Appeal No. 971592, decided September 25, 1997, the Appeals Panel reversed that decision and remanded the case, concluding that the determination of no contribution was against the great weight and preponderance of the evidence, requiring reversal and remand for further consideration and reassessment of the percentage of contribution "not inconsistent with the opinion." In a Decision and Order dated January 6, 1998, the hearing officer indicated there was no need for a hearing on remand, expressed her disagreement with the Appeals Panel evaluation of the case, indicated that the carrier failed to meet its burden of proof, and stated that since she has been mandated to award some amount of contribution, she would only award the bare minimum, which, in her opinion, is one percent. The carrier appeals, urging that the hearing officer has again failed to award a reasonable percentage of contribution based upon the evidence in the records. The respondent (claimant) urges that the decision be affirmed based upon the overwhelming weight of the evidence.

DECISION

Finding legal error, the decision is reversed and a new decision rendered.

The facts of this case are well set forth in the prior decision of the Appeals Panel and will not be repeated here. Appeal No. 971592, *supra*. The claimant sustained a compensable injury to his neck (diagnosed as trapezius strain) on (injury date 4). Clearly, there were several documented prior injuries involving the claimant's neck, including a work-related injury in 1989 resulting in cervical fusion surgery in 1990 and subsequently settled under the prior workers' compensation law. Although in a note on June 11, 1991, claimant's treating doctor indicated that "today there is full range of motion [ROM] on the cervical spine," notes from a subsequent visits on September 22, 1992, shows only "fair [ROM]." The claimant sustained another work-related neck injury in 1994, from unloading luggage, and notes from his treating doctor indicate his ROM was "about 2 normal" and that the claimant had on-and-off episodes of neck and shoulder pain. The claimant was diagnosed with "sprain of neck," with work restrictions of avoiding neck movement. The claimant sustained yet another work-related injury to his neck on (injury date 3), resulting in a series of injections to his neck which continued well after the (injury date 4) at issue here. According to the claimant, he had received somewhere between 60 to 80 injections prior to the (injury 4) and has had about 338 total. Although his pain was being treated before the current injury, the claimant indicated that his neck pain was somewhat more severe after the (injury 4) incident. The claimant acknowledged that he had been issued a permanent 10-pound lifting restriction by his treating doctor in 1994, and that it was still in effect.

As was noted in our previous decision, there were two impairment ratings (IR) rendered in this case, one of 19% rendered by a physical therapist and concurred in by the claimant's treating doctor, and a 15% IR by a designated doctor (the final IR in the case). Both of the IRS included ROM deficits, the first for the total 19%, and the latter for 11% (the remaining four percent for a Table 49 specific disorder from the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association). The designated doctor noted in his report regarding ROM of the cervical area (the only injury in issue here) that the cervical spine was severely limited because of pain and scoliosis and previous surgery. Also noted in the previous decision was a Carrier's Request for Reduction of Income Benefits Due to Contribution (TWCC-33) which was granted by the Texas Workers' Compensation Commission on December 5, 1996, in the amount of 73%, and a benefit review conference recommendation that a reduction of 67% be allowed. These are not binding on the hearing officer.

The carrier had the claimant's medical records reviewed by a (Dr. C), who, in a report dated October 15, 1996, stated regarding the portion of the IR that was related to the prior neck injuries: "All of it." The report goes on to cite the prior neck injuries, one of which required surgery, and observes that the impairment based on ROM can vary greatly from examiner to examiner and day to day, and notes the treatment being received for neck problems right up to the current injury.

Aside from expressing disagreement with the Appeals Panel resolution of the issue in the decision on remand, the hearing officer also states that the carrier "failed to prove a specific amount of impairment attributable to the previous injuries." This is an incorrect application of the law as reflected by prior Appeal Panel decisions. We have clearly held that in seeking contribution for prior injuries, it is not essential for a carrier to prove an exact percentage; rather there must be sufficient facts in the record to find a percentage that is reasonably supportable. Texas Workers' Compensation Commission Appeal No. 94637, decided July 1, 1994. In that case we cited 1 Monford, Barber, and Duncan, A GUIDE TO TEXAS WORKERS' COMP REFORM Sec. 4.30(a) p. 4-132 (1991) for the proposition that an IR for prior injuries was not necessary and that what is required is medical evidence showing some anatomic or functional abnormality reasonably presumed to be permanent. *In Accord*, Texas Workers' Compensation Commission Appeal No. 971368, decided September 2, 1997, Texas Workers' Compensation Commission Appeal No. 950130, decided March 13, 1995. *Compare* Texas Workers' Compensation Commission Appeal No. 941338, decided November 22, 1994. Where there is, as we have determined here, sufficient medical evidence for a determination of a percentage of contribution that is reasonably supportable, contribution should be awarded. Texas Workers' Compensation Commission Appeal No. 961315, decided August 22, 1996; Appeal No. 971368, *supra*.

Because he only reviewed medical records and did not personally examine the claimant, the hearing officer gave "very little weight" to the opinion of Dr. C, who indicated that all of claimant's impairment was attributable to the prior injuries. While we question the blanket basis of giving "very little weight" to a medical opinion based upon review of medical records in a case, it is generally recognized that it is within the hearing officer's duties and responsibilities to weigh and resolve expert medical opinion. Texas Employers

Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Texas Workers' Compensation Commission Appeal No. 972527, decided January 20, 1998. The hearing officer thus effectively rejected the notion that contribution was 100% as would result from the opinion of Dr. C, and we do not find this to be reversible error. However, that does not end our concern, as was set out and held in our previous decision in this case, where we found the hearing officer's decision to be so against the great weight and preponderance of the evidence as to necessitate reversal and remand. Since we are precluded from more than one remand (Section 410.203(c)), and we conclude the hearing officer failed to comply with the remand in awarding a "bare minimum" of one percent (in her words, "despite the fact that the carrier has not produced sufficient medical evidence to determine a percentage"), we reverse and render a new decision. We conclude that the hearing officer incorrectly applied the law to the evidence in this case and that her award of one percent contribution was arbitrary and unreasonable. Accordingly we reverse and render a new decision.

While there is no exact figure stated in the medical reports, other than the opinion of Dr. C, as we have held, there is sufficient evidence to award contribution because of impairment from the prior injuries. Evidence of this consists of the medical records of the prior injuries, the surgery, the ongoing treatment, the pain experienced both before and after the current injury, the evidence of less than full ROM (except for the June 11, 1991, note) in medical notes in 1992 and 1994, the fact that the claimant was already undergoing injections (some 60 to 80) prior to the current injury, the claimant's own testimony that he continued to have pain before and after the current injury, although the pain was somewhat more severe, and the continuing 10-pound lifting restriction that had been imposed in 1994. Of significance, both of the IRs included deficits for ROM, and in the designated doctor's report he made clear that the cervical spine ROM was severely limited by pain, scoliosis, and the prior surgery. Of course, the surgery only related to a prior injury and a degree of pain was present resulting from a prior injury, the severity of which is shown by the ongoing injections. Under these circumstances, it is reasonable to conclude that contribution applies to the ROM impairments. Accordingly, we hold that no contribution applies to the four percent awarded for the Specific Disorder for the current injury but that a b contribution is appropriate, based on all the evidence, for the 11% ROM impairment. Rounding the numbers, we hold that the carrier is entitled to seven percent contribution of the 11% for ROM deficits as reasonably supportable by the evidence.

Accordingly, the rate of contribution is 47% ($^{7}/_{15}$) as applied to any impairment and/or supplemental income benefits payable as a result of the injury of ___.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge