

APPEAL NO. 230067
FILED MARCH 3, 2023

This appeal 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 December 6, 2022, with the record closing on December 15, 2022, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to a right subacute incomplete scaphoid wrist fracture; (2) the compensable injury of (date of injury), does not extend to the following right hand conditions: 8 mm osseous fragment along the ulnar side of hamate with corresponding bone marrow edema, with additional subacute fracture with still visible fracture line; tiny longitudinal split tear of the extensor carpi ulnaris tendon at the level of ulnar styloid; or tiny degenerative subchondral cystic changes of the lunate, triquetrum, or possibly capitate; (3) the appellant (claimant) reached maximum medical improvement (MMI) on April 25, 2022; (4) the claimant's impairment rating (IR) is 4%; and (5) the respondent (carrier) is entitled to a reduction of the claimant's impairment income benefits (IIBs) based on contribution from an earlier compensable injury by 50%.

The claimant appealed the ALJ's determination that the carrier is entitled to a reduction of his IIBs based on contribution from an earlier compensable injury by 50%. The carrier responded, urging affirmance of the appealed determination.

The ALJ's determinations that the compensable injury of (date of injury), extends to a right subacute incomplete scaphoid wrist fracture; the compensable injury of (date of injury), does not extend to the following right hand conditions: 8 mm osseous fragment along the ulnar side of hamate with corresponding bone marrow edema, with additional subacute fracture with still visible fracture line; tiny longitudinal split tear of the extensor carpi ulnaris tendon at the level of ulnar styloid; or tiny degenerative subchondral cystic changes of the lunate, triquetrum, or possibly capitate; the claimant reached MMI on April 25, 2022; and the claimant's IR is 4% were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury that extends to at least a right hand sprain and strain; on September 30, 2020, the claimant sustained a prior compensable injury of a left wrist strain and right wrist strain, resulting in an IR of 2%; for the compensable injury of (date of injury), the date of MMI is April 25, 2022, and the IR is 4% as certified by (Dr. M), treating doctor

referral. The claimant testified he was injured on (date of injury), while attempting to break up a fight between two incarcerated youths.

Section 408.084 provides as follows in relevant part:

(a) At the request of the insurance carrier, the commissioner may order that [IIBs] and supplemental income benefits (SIBs) be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.

(b) The commissioner shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section.

It is well settled that an insurance carrier seeking contribution due to a prior compensable injury has the burden to prove entitlement to, and the amount of, contribution. The insurance carrier need not prove an exact percentage; however, there must be sufficient evidence to determine a contribution percentage that is reasonably supportable. See Appeals Panel Decision (APD) 042339, decided November 12, 2004, and APD 961211, decided August 7, 1996. The insurance carrier must provide an analysis showing the cumulative impact of the prior compensable injury and the latest compensable injury, how the injuries work together, and the extent to which the prior compensable injury contributes to the current impairment. APD 941338, decided November 22, 1994. An insurance carrier that does not provide an adequate cumulative impact analysis fails to meet its burden of proof and is not entitled to contribution. APD 042339, *supra*.

In the Discussion portion of the decision and order the ALJ noted the assigned IR for the injury at issue in this case is 4% for the right hand, and that the claimant was assigned a 2% IR for the earlier compensable injury of September 30, 2020, which was for the right wrist. The ALJ further noted that the assigned IR for the (date of injury), compensable injury was based on similar clinical testing of the right wrist and hand. The ALJ further stated the following:

[b]ased on these two [IRs], the [Texas Department of Insurance, Division of Workers' Compensation (Division)] approved a request to reduce income benefits by 50% on June 8, 2022. The claimant did not present persuasive evidence to overturn the approval of a reduction in income benefits or to change the proportion from 50%.

The claimant argues that because the carrier failed to present a cumulative impact analysis as required for a finding of contribution, the carrier did not meet its burden to

prove entitlement to reduce his IIBs based on contribution from an earlier compensable injury by 50%. The carrier contends that it already met its burden of proof on contribution when the Division approved its application for contribution in an order dated June 8, 2022, and as such the claimant bore the burden of proof on the contribution issue at the CCH and the carrier “was not required to produce any evidence whatsoever” on that issue. We disagree. We see the instant case as being analogous to the situation in which the Division determines an injured employee is entitled to first quarter SIBs in the initial determination of SIBs. If an insurance carrier timely appeals the initial determination of an injured employee’s entitlement to first quarter SIBs, the injured employee still has the burden of proof at the CCH to establish entitlement to SIBs regardless of the Division’s initial determination. See *generally* APD 030285, decided March 11, 2003. Additionally, the carrier presented no authority to support its contention that the claimant bore the burden of proof and as such it was not required to produce evidence on the contribution issue.

The claimant sought dispute resolution regarding the Division’s June 8, 2022, order that the carrier is entitled to reduce his IIBs based on contribution from an earlier compensable injury by 50%. The carrier in this case had the burden to prove entitlement to, and the amount of contribution, and to provide an adequate cumulative impact analysis. The carrier failed to present a cumulative impact analysis. Accordingly, we reverse the ALJ’s determination that the carrier is entitled to a reduction of the claimant’s IIBs based on contribution from an earlier compensable injury by 50%. We render a new decision that the carrier is not entitled to a reduction of the claimant’s IIBs based on contribution from an earlier compensable injury by 50%.

The true corporate name of the insurance carrier is **(COUNTY)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), (STATE) (ZIP CODE).

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge