APPEAL NO. 002211-S

Following a contested case hearing held in _____, Texas, on July 24, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the appellant (carrier) is entitled to reduce the respondent's (claimant) impairment income benefits (IIBs) and/or supplemental income benefits (SIBs) by 50% (9/18ths) based on contribution from an earlier compensable injury, that the carrier may not totally suspend benefits, and that the claimant's average weekly wage is $445.81. The carrier appealed the hearing officer's determination of the amount of contribution, asserting that it is entitled to reduce the claimant's IIBs and SIBs by 14/18ths, and the hearing officer's decision that it may not totally suspend benefits to recoup an overpayment of income benefits due to the contribution awarded. There is no reply in the file from the claimant.

DECISION

Affirmed as reformed.

The claimant sustained a low back injury in 1988 and underwent multiple surgeries at L4-5 and L5-S1. In 1992, he was assigned a 20% disability rating for the 1988 injury.[1] In the disability report for the 1988 injury, Dr. D stated:

> Back pain fairly constant but he is able to get around quite well. Prolonged sitting, bending, walking, stooping, and squatting bother him. He has limited movement of back to 40E-50E, muscle spasm is noted as he bends forward. He is grossly neurologically intact. I believe he has disability of 100% to his back - or 20% total body disability.

The claimant testified that he had been able to go back to work and had not needed additional medical treatment for his low back after the third and final surgery, for the removal of hardware, in 1992. On June 23, 1995, the claimant was given a full-duty release by a Dr. V. After receiving the full-duty release, the claimant returned to work as a truck driver.

On June 9, 1998, while standing on top of a load of pipes, the claimant pulled on a strap to secure the load, slipped and fell and injured his low back again. After a course of treatment, the claimant was referred to Dr. S at the carrier's request. On March 24, 1999, Dr. S certified that the claimant had reached maximum medical improvement (MMI) on February 17, 1999, with a 5% IR. The claimant disputed the IR assigned by Dr. S, and Dr.

[1]The disability rating was not an impairment rating (IR) and was not determined in accordance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association.

M was appointed to serve as a Texas Workers' Compensation Commission (Commission)-selected designated doctor.

On August 16, 1999, Dr. M examined the claimant, certified that he had reached MMI on March 24, 1999, and assigned an 18% IR. In his report, Dr. M notes that the claimant's greatest lumbar range of motion (ROM) measurements were 26E for lumbar flexion and 9E for lumbar extension. Dr. M assigned a 5% IR for specific disorders of the lumbar spine and 14% for lumbar ROM, resulting in the total IR of 18%.

The hearing officer determined that 50% of Dr. M's IR was a result of the 1988 injury, specifically referencing the preexisting loss of ROM. The carrier argues that the hearing officer erred by determining that only 9% of the 14% IR for loss of ROM was attributable to the previous injury. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of the evidence presented, including medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The carrier had the burden of proving contribution. Texas Workers' Compensation Commission Appeal No. 92610, decided December 30, 1992. Whether there has been a cumulative effect from a prior injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94578, decided June 22, 1994. Although Dr. M stated that he believed that most of the ROM limitations were a residual effect of the 1988 injury, the hearing officer stated that after considering all of the medical evidence and the cumulative impact of the 1988 and 1998 injuries, he determined that the carrier was entitled to a 9/18ths, or 50%, reduction in benefit payments because of the impact of the 1988 injury. The hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only were we to conclude, which we do not in this case, that the hearing officer's determinations regarding the cumulative effects of the two injuries were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The hearing officer was presented with the issue of whether the carrier was entitled to suspend income benefits to recoup an overpayment due to the contribution. However,

the issue as litigated by the parties was what percentage of the claimant's future income benefits would the carrier be allowed to withhold until the overpayment was recouped. At the benefit review conference, the claimant asserted that the carrier should be allowed to withhold no more than 25% of future benefits and the carrier asserted that it should be allowed to withhold 100% of future benefits.

The hearing officer made the following conclusion of law:

2. The Carrier may not totally suspend benefits.

In his decision, the hearing officer expanded on the above conclusion of law by stating:

> The Carrier may not totally suspend benefits; however, the Carrier is entitled to reduce the Claimant's income benefits by fifty percent in order to recoup an overpayment based on contribution from the earlier compensable injury.

The carrier appeals the foregoing, asserting that it appears that the hearing officer is allowing them only the reduction in benefits for contribution allowed under Section 408.084 of the 1989 Act. The foregoing language is somewhat ambiguous, especially since both the issues contribution and recoupment of overpayment were before the hearing officer. It appears to us that the hearing officer intended that the carrier be allowed an offset of 50% of the payable income benefits after contribution in order to allow the carrier to recoup the overpayment due to the late resolution of the contribution issue. That construction of the hearing officer's intent is consistent with the hearing officer's finding of fact that if the carrier were allowed a full offset against accruing income benefits (totally suspend payment of benefits), the claimant would be significantly undercompensated. To the extent that the hearing officer allowed the carrier only a 50% offset against future benefits, we find that such an action is supported by the evidence adduced at the hearing.

In this case of first impression, we hold that in circumstances such as presented in this case, where a carrier has requested a reduction of IIBs and/or SIBs, a hearing officer may order that the overpayment of benefits after a request for contribution is filed be repaid from subsequent income benefits. In determining the amount to be withheld from the subsequent income benefits, the hearing officer shall determine a reasonable rate at which such benefits are to be withheld to recoup the overpayment.

In this case, the carrier advised the hearing officer that it believed that it had overpaid benefits by approximately $14,000.00. The parties represented to the hearing officer that the claimant's monthly SIBs, after the deduction of 10% of those benefits pursuant to a Commission order on January 14, 2000, was approximately $1,000.00. The record reflects that the claimant had limited financial resources at the time of the hearing. Based upon the information before him, the hearing officer determined that recoupment at the rate of 50% of the income benefits payable to the claimant after future income benefits were reduced due to contribution was a reasonable rate. We affirm that determination.

We note that the carrier averred that it had made overpayments to the claimant in the amount of approximately $14,000.00. It appears from the record that the figure put forward by the carrier included a request for recoupment of an overpayment of income benefits beginning on the date IIBs began to accrue.

A carrier is not entitled to reduce income benefit payments to a claimant as a matter of right. Section 408.084 of the 1989 Act provides as follows in relevant part:

> (a) At the request of the insurance carrier, the 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.

The foregoing language clearly makes the approval of a reduction in benefits based upon contribution from an earlier compensable injury a matter which is within the Commission's discretion. We note that carrier delays in requesting contribution result in overpayment of IIBs and SIBs at no fault of the claimant. Further, recoupment of these overpayments can cause financial hardship for the claimant.

While we note that there is a line of cases which provide that all IIBs and SIBs are subject to reduction after the determination of contribution, regardless of the date on which a request for reduction of income benefits due to contribution is filed with the Commission, we decline to follow that line of cases. We hold that contribution does not apply to any income benefit payments which accrue prior to the filing of a request for contribution. The carrier may only recoup overpayments on IIBs and SIBs that accrue on or after the date the carrier files a request for contribution with the Commission.

To avoid possible confusion, we reform the hearing officer's decision to read as follows:

> The claimant worked for the employer and sustained a compensable injury on June 8, 1998. The claimant suffered an earlier compensable injury on July 14, 1988. The carrier is entitled to reduce the claimant's IIBs and/or SIBs, beginning on January 12, 2000, based on contribution from the earlier compensable injury, by 50% or 9/18ths. The carrier is entitled to suspend 50% of the claimant's future SIBs, if any, to recoup an overpayment of IIBs and/or SIBs paid to the claimant on or after January 12, 2000. The claimant's average weekly wage is $445.81

We affirm the hearing officer's determination that the carrier is entitled to reduce the claimant's IIBs and SIBs by 50% based on contribution from an earlier compensable injury. We reform the hearing officer's decision to state that the carrier is entitled to reduce future SIBs which may accrue by 50% to recoup the overpayment of benefits which may have been made after the carrier's submission of a request for contribution.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge