APPEAL NO. 93683

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 25, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues presented and agreed upon at the CCH were:

a.are additional accrued temporary income benefits [TIBS] owed due to an alleged deficit of listed benefits on filed wage statement; and,

b.has the Claimant reached maximum medical improvement [MMI].

The hearing officer determined that certain adjustments were to be made in computing claimant's average weekly wage (AWW), that health insurance premiums were to be recalculated and an employer's matching five percent retirement contribution could not be used in computing AWW and that it was necessary to sever the issue of MMI.

Appellant, claimant herein, contends the hearing officer erred in not including employer paid health insurance premiums and the employer's matching five percent retirement contribution in calculating the AWW. Claimant also contends the hearing officer erred "in severing the issue of [MMI] . . . because [MMI] has been determined by the statute. Article 8308 § 1.03(32)(B) [now Section 401.011(30)]." Claimant requests we reverse the hearing officer's decision on the cited points and ". . . order payment to Claimant of 104 weeks of [TIBS], minus those weeks already paid, and additionally, payment for the weeks for which payment is due based upon the undisputed 10% impairment rating." Respondent, Maverick County Water Control and Improvement District, a self-insured governmental entity, employer herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed in part and reversed and rendered in part.

Initially, we note that (hearing officer) was the hearing officer who heard this case. An Order Keeping The Record Open for purposes of appointing a designated doctor to assess MMI was entered on April 8, 1993. Subsequently, because that hearing officer left the employment of the Texas Workers' Compensation Commission (Commission), a successor hearing officer was appointed. That hearing officer reviewed the evidence, listened to the tapes and prepared the decision and order. In that these procedures have not been challenged on appeal we will not comment further on them.

There was no testimony regarding the circumstances of claimant's injury; however, the medical reports record that claimant sustained a low back injury on or about (date of injury). The hearing officer notes that claimant "had disability from March 1, 1991, and the Carrier (employer) began to pay [TIBS]." (Dr. J) was claimant's treating doctor and on a

Report of Medical Evaluation (TWCC-69) certified MMI on "12/3/91." A (Dr. H), apparently the employer's doctor, by TWCC-69, certified MMI on October 9, 1991. Dr. J, by letter dated January 15, 1992, stated, in effect, agreement with Dr. H's assessment. Eventually claimant was seen by (Dr. S) who was the Commission designated doctor appointed to determine MMI in accordance with the hearing officer's Order Keeping The Record Open. Although Dr. S's TWCC-69 and report dated May 5, 1993, have not been marked and admitted in the record, the hearing officer notes Dr. S certified MMI on September 19, 1991.

First of all claimant requests we order payment "based upon the undisputed 10% impairment rating." Impairment was not an issue at the benefit review conference (BRC) or the CCH. Section 410.151(b) (formerly Article 8308-6.31) provides that issues not raised at the BRC may not be considered except by consent of the parties or unless the Commission determines that good cause existed for not raising the issue earlier. Impairment was never an agreed issue and consequently will not be considered by us. Parenthetically, we note that the 10% impairment rating was not "undisputed," as claimant alleges, in that Dr. H found an eight percent impairment.

Claimant contests the hearing officer's Findings of Fact Nos. 7 and 9 which state:

> 7.The Employer's initial wage statement properly did not include payments for health insurance for the Claimant because the Employer continued to pay the Claimant's health insurance premiums through May 31, 1991, three months after the Claimant's disability began on March 1, 1991.
>
> 9.The Employer should have, but did not, submitted (sic) a revised wage statement to recalculate the [AWW] to reflect the loss of this health insurance premium fringe benefit valued at $25.56 in gross pay per week.

It is undisputed that the employer paid $25.56 a week for claimant's health insurance during the 13 week period prior to the accident of (date of injury). In considering this point, we look to the applicable statute and rule. Section 401.011(43) (formerly Article 8308-1.03(47)) provides:

> "Wages" includes every form of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and other advantage that can be estimated in money which the employee receives from the employer as part of the employee's remuneration.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1. (Rules 128.1(b) and (c)) provide:

(b)An employee's wage, for the purpose of calculating the [AWW] shall include every

> form of remuneration paid for the period of computation of [AWW] to the employee for personal services. An employee's wage includes, but is not limited to:
>
> (1)amounts paid to the employee by the employer for time off such as holidays, vacation, and sick leave;
>
> (2)the market value of any other advantage provided by an employer as remuneration for the employee's services that the employer does not continue to provide, including but not limited to meals, lodging, clothing, laundry, and fuel; and
>
> (3) health care premiums paid by the employer.
>
> (c)An employee's wage, for the purpose of calculating the [AWW], shall not include:
>
> (1)payments made by an employer to reimburse the employee for the use of the employee's equipment or for paying helpers; or
>
> (2)the market value of any non-pecuniary advantage that the employer continues to provide after the date of injury.

We believe that health insurance premiums paid by the employer clearly are a form of remuneration which have a precise dollar value and which are specifically addressed by Rule 128.1(b)(3). The hearing officer apparently treated the health insurance premiums paid by the employer as being an "other advantage" provided by the employer as remuneration under Rule 128.1(b)(2) or nonpecuniary wages as discussed below. This, in our opinion, ignores the plain meaning of Rule 128.1(b)(3). In Texas Register (16 Tex. Reg. 119) comments on whether health care premiums paid by the employer are to be included as wages, the Commission is quoted as ". . . believing that health care premiums are a benefit within the statutory definition of wage." The hearing officer makes a distinction that the health insurance premiums continued to be paid after claimant's disability began on March 1, 1991, and that the employer's initial wage statement "properly" did not include payments for the health insurance it was continuing to pay and that claimant was entitled to have the carrier recalculate the AWW after the employer discontinued health insurance premiums. Perhaps the hearing officer was considering the health insurance premiums paid by the employer as "nonpecuniary wages" within the meaning of Section 408.045 (formerly Article 8308-4.10(i)). We disagree with that interpretation. We believe that Section 408-041(a) (formerly Article 8308-4.10(a)) contemplates a one-time calculation of the AWW based on dividing the sum of the wages paid in the 13 consecutive weeks immediately preceding the date of the injury by 13. We look to Rule 128.1 in determining what constitutes the sum of the wages. A plain reading of Rule 128.1(b)(3) indicates an

employee's wage includes "(3) health care premiums." If health care premiums or other elements of an employee's wage continue to be paid after the injury, TIBS are adjusted rather than recalculating the AWW. Recalculation of AWW is specifically provided for in the case of seasonal employees and minors, apprentices, trainees or students. *See* Sections 408.043 and 408.044, *see also* Rules 128.1(a); 128.3(b) and (c); 128.5 and 128.6. The key point here is whether the health insurance premiums, continued to be paid by the employer, constitute a "nonpecuniary wage" within the meaning of Section 408.045. We believe the Commission by implementing Rule 128.1(b) has specifically distinguished the nonpecuniary wage items listed in Rule 128.1(b)(2) from health insurance premiums paid by the employer as listed in (b)(3). Consequently, we do not consider health insurance premiums continued to be paid by the employer within the purview of Section 408.045. On this point we reverse the hearing officer and render a decision that health insurance premiums paid by the employer are to be included in calculating the AWW. TIBS will be calculated to reflect the employer's continued payment of health insurance premiums. Subsequently, when the employer discontinues payment of health insurance premiums, TIBS may be readjusted.

Claimant also contends the hearing officer erred in Finding of Fact No. 12 which states:

12.The Employer's contribution to the retirement fund is not remuneration payable for a given period to the Claimant for personal services.

It is undisputed that claimant contributed five percent of his gross pay into the employer's Texas District and County Employees Retirement Fund (retirement fund) and that the employer matched claimant's contribution by payment of an equal amount into the retirement fund. Claimant argues that the money paid by the employer should be considered wages in calculating the AWW. Specifically, claimant argues that: "Within the clear meaning of the English language and by correct statutory construction this money paid by the employer must be considered as wages and must be added to the amount of gross wages for the thirteen weeks preceding the date of injury, (date of injury), in arriving at the correct figure upon which to base [AWW]." However, employer's general manager testified to the circumstances surrounding the employer's payment into the retirement fund. It was clear from the witness' testimony that the employer's portion of the contribution does not become vested until the employee actually retires. The testimony was that should the employee leave the employer's employment at any time, the employee is entitled to return of his contribution plus interest but not to the employer's matching contribution. Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991, comprehensively reviewed cases involving fringe benefits. Although none of the cases involved matching contributions to a retirement fund, Larson, Workers' Compensation Law, Vol. 2 § 60.12(b) (Matthew Bender, N.Y. 1989) appears to make "the inclusion of such benefits depend on whether they are vested." Both Larson and Appeal No. 91059, *supra*, cite Munroe Regional Medical Center v. Richer, 489 So.2d 785 (Fla. App. 1986), as holding

that the value of social security taxes are not included in the calculation of AWW. Consequently, both the points that the employer's contribution has not vested and the analogy to social security contributions support the hearing officer's determination that the employer's matching contribution should not be considered as "wages" for purposes of calculating the AWW.

Appeal No. 91059, *supra*, summarizes:

> It is our opinion that payments made by an employer for the employer's portion of the F.I.C.A. (social security) tax, payments made by an employer for workers' compensation insurance coverage, and payments made by an employer for unemployment compensation are not included within the definition of "wages" in Section 401.011(43). It appears to us that the weight of legal authority supports our position, and that to hold otherwise would undermine the goal of promptness of payment of workers' compensation benefits because the wage calculation process would become a source of constant controversy. We also note that in promulgating Rule 128.1, the Commission included health care premiums paid by the employer in the calculation of wages . . .

The hearing officer's finding that the employer's contribution to the retirement fund is not remuneration for purposes of calculating the AWW is correct.

Claimant argues that the hearing officer's Finding of Fact No. 15, which states:

> 15.There are no facts in the record that would allow a determination of the issue of [MMI].

is in error because it overlooks the statutory definition of MMI. Section 401.011(30) (formerly Article 8308-1.03(32)). That definition states:

> (30)"Maximum medical improvement" means the earlier of:
>
> (a)the earliest date after which, based on reasonable medical probability, further material recover from or lasting improvement to an injury can no longer reasonably be anticipated; or
>
> (B)the expiration of 104 weeks from the date on which income benefits begin to accrue.

Claimant only cites the (B) portion of the definition while ignoring the (a) provision. We would note that although statutory MMI occurs 104 weeks from the date on which income benefits began to accrue, and that date has indeed passed, this does not preclude a finding

of MMI at an earlier date. In fact, we note all the doctors that have certified MMI have certified MMI was reached in latter 1991 (sometime between September and December); consequently, contrary to claimant's allegations, MMI is still very much in issue.

A more difficult question arises in determining whether the hearing officer, in the circumstances of this case, abused his discretion in severing the issue of MMI from the hearing and on his own motion canceling the issue. The hearing officer in the discussion portion of the decision states "[i]t would be futile to reopen the record and receive into the record the documents regarding the designated doctor and the comments of the parties. The appointment of the designated doctor was invalid. . . ." (Emphasis added.) Perhaps "invalid" is not entirely correct but certainly the appointment was procedurally flawed. The hearing officer explained:

> Moreover, the Claimant objected that the Carrier and the Claimant had not been afforded the opportunity to agree to a designated doctor, as required by section 4.25(b) [Section 408.122(b)] of the Act. The Appeals Panel has said on several occasions that the failure to follow the elementary procedures of the Act invalidates the designation of the doctor by the Commission and renders void any findings by the designated doctor as to the date of [MMI] and an impairment rating.

As reflected in the hearing officer's decision, claimant had complained to the Commission that the Commission's Rules had been violated in that the parties were not given the opportunity to select a designated doctor by mutual agreement as required by the 1989 Act and Rules. Claimant, having first objected that the Commission rules were not followed, cannot now, on appeal, argue that to cancel and sever the issue of MMI is "meaningless." To determine whether there was an abuse of discretion we look to see if the hearing officer "acted without reference to any guiding rules and principles." Morrow v. H.E.B. Inc., 714 S.W.2d 297 (Tex. 1986). We cannot, under these circumstances, where claimant objected to the appointment of a designated doctor, where the designated doctor used the incorrect standards, and where the record is incomplete regarding the request or need for a designated doctor, hold that the hearing officer abused his discretion in severing the issue of MMI from the hearing on his own motion. The hearing officer points out that the issue of MMI may again be raised through the normal dispute resolution process.

Finding no reversible error and finding that the decision was not against the great weight and preponderance of the evidence (Pool v. Ford Motor Co., 715 S.W.2d 629, 634 (Tex. 1986)), we affirm the decision that the employer's matching contributions to the retirement fund not be used in determining the AWW and that the hearing officer did not abuse his discretion in severing the issue of MMI on his own motion. We reverse and render that health insurance premiums paid by the employer are to be included in calculating the AWW in accordance with Rule 128.1(b)(3). TIBS may be calculated to reflect the

employer's continued payment of health insurance premiums after the injury. When the employer discontinues payment of the health care premiums, TIBS will be recalculated.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge