APPEAL NO. 93894

On August 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq*.). The issues at the hearing were: 1) disability; 2) maximum medical improvement (MMI); 3) impairment rating; and 4) whether an agreement to commute impairment income benefits (IIBS) is binding on the appellant (claimant). The hearing officer determined that: 1) the claimant had disability from (date of injury) to March 2, 1992; 2) the claimant had not reached MMI as of the date of the hearing; 3) any impairment rating was premature since the claimant had not reached MMI; and 4) the agreement to commute IIBS is binding on the claimant. The hearing officer decided that temporary income benefits (TIBS) accrued but not paid are to be paid in a lump sum with interest, but that IIBS had been paid in a lump sum as requested by the claimant and that the claimant is not entitled to any additional income benefits for the compensable injury. The claimant agrees with the hearing officer's determinations that he has not reached MMI and that any impairment rating is premature. The claimant disagrees with the determination that his disability ceased on March 2, 1992, and with the determination that the agreement to commute IIBS is binding. The respondent (carrier) responds that the hearing officer's decision is supported by the evidence and requests that it be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The claimant has worked as a billing clerk for (the school) for about 12 years. On some unspecified date prior to (date of injury), he took a part-time evening job at (the employer), as a telemarketing worker. The claimant was injured on (date of injury), when he fell off of a chair and a file cabinet or box fell on him while he was working at his part-time job for the employer. According to (Ms. F), the carrier's claims representative, the claimant was initially treated by (Dr. Mc), who, Ms. F said, released the claimant to return to full-time work in October 1991. The claimant said that when Dr. Mc returned him to work he began treating with (Dr. E), who, he said, told him that he could not work two jobs. Dr. E referred the claimant to (Dr. O). At the request of the carrier, the claimant was examined by (Dr. M). The designated doctor selected by the Texas Workers' Compensation Commission (Commission) in this case is (Dr. S). The claimant said he is currently seeing Drs. E and O.

According to the claimant, after his injury he never returned to his job at the employer although he admitted that the employer offered him his position doing telemarketing work which he agreed was light duty work. The claimant said he did not return to work for the employer because he did not have a good car to get him to the employer's location and because he was having problems "sitting up" at his regular job at the school. He further indicated that he did not go back to work for the employer because telemarketing is stressful work. The claimant said he returned to part-time work at the school doing his billing job around October 31, 1991, and returned to full time work at the school the beginning of March

1992, when, he said, a doctor (he didn't indicate who) said he could work full time. The claimant said he was still employed on a full-time basis at the school at the time of the hearing. The telemarketing job at the employer's required the claimant to make telephone calls. The claimant's job at the school requires typing and telephoning. The claimant said that he can "barely function" at his school job.

Medical records concerning the claimant's initial diagnoses and course of treatment were not made a part of the record. No records from Dr. Mc were in evidence nor were initial medical reports of Dr. E. The claimant said that he injured his back, neck, and ribs in the accident of (date of injury), and has had numbness in his right shoulder, arm, and hand. He said that he underwent physical therapy for several months at the request of Dr. E.

Dr. O said in a letter to Dr. E dated July 22, 1992, that he wanted to perform a brachial plexus exploration and omohyoid flap reconstruction (the brachial plexus originates from the ventral branches of the last four cervical spinal nerves and most of the ventral branch of the first thoracic spinal nerves). Dr. O also said that he anticipated that the claimant would need decompression of his peripheral nerves in the future. A copy of the letter is shown as having been sent to the carrier's claims representative.

At the request of the carrier, the claimant was examined by Dr. M on July 24, 1992. In a Report of Medical Evaluation (TWCC-69) Dr. M certified that the claimant reached MMI on July 24, 1992, with an eight percent whole body impairment rating. In an attached narrative report, Dr. M assessed an arthritic cervicothoracic strain and said that the claimant had some findings of ulnar nerve compression at the right olecran groove. Dr. M noted that the claimant advised him that Dr. O planned surgery. Dr. M stated that he was uncertain as to what surgery was planned and did not have available information to make an assessment regarding surgery. Dr. M said that if surgery is planned, the claimant has not reached MMI, but that if no surgery is planned, then the claimant has reached MMI with an eight percent impairment rating. In addition, Dr. M stated that the claimant appeared to be capable of working at his job at the school without restriction and that if the claimant's job with the employer was a clerical type job he could work there as well.

The claimant said that after he was examined by Dr. M he went back to Dr. E and Dr. E told him that Dr. M's report was "ridiculous" and that he "wasn't ready for a rating." Notwithstanding the fact that the claimant knew that Dr. O wanted to perform surgery on him and the fact that Dr. E told him that Dr. M's report was "ridiculous" and that he wasn't ready for an impairment rating, the claimant nevertheless contacted Ms. F a few weeks after getting Dr. M's impairment rating and asked her if he could have his IIBS paid in a lump sum instead of weekly. The fact that the claimant contacted the carrier requesting lump sum payment of IIBS was confirmed by both the claimant and Ms. F. The claimant and Ms. F also said that the reason the claimant wanted lump sum payment was because he was having financial difficulty due to his children's college expenses. Ms. F and the claimant also testified that Ms. F told the claimant that he would have to get a form from the Commission for lump sum payment of IIBS. The claimant and Ms. F testified that the claimant went to a Commission office and got the form, filled it out, and sent it to Ms. F. In

evidence was a Commission form entitled "Employee's Request For Commuted (Lump Sum) Impairment Income Benefits" which contains the claimant's name and, in the section marked "Employee Use Only," the date of request (August 12, 1992), MMI date of July 24, 1992, impairment rating of eight percent, and Dr. M's name. The bottom of the form indicates that the carrier accepted the claimant's request for lump sum payment of IIBS on August 14, 1992, and paid the claimant $1,584.00. The claimant testified that he was paid IIBS in a lump sum pursuant to his request. The form contains the following language:

> WARNING: If you take a lump sum payment of your Impairment Income Benefits you will not be able to collect Supplemental Income Benefits or any other income benefits. Supplemental Income Benefits may be available to you if you have an Impairment rating at 15% or more and are earning less that (sic) 80% of your pre-injury wage. Medical benefits related to this injury will not be effected (sic) by this election for a lump sum.

The claimant testified that he did not understand what he was doing when he requested lump sum payment of IIBS, that he did not read the request form (he also said that he did not understand the form), that he did not ask anyone at the Commission about the effect of lump sum payment of IIBS, and that he was not "counseled" regarding lump sum payment of IIBS. The claimant also testified that he did not know "that I could go any further" in regard to MMI and impairment rating after seeing Dr. M because he said Ms. F told him that he could not see any more doctors after seeing Dr. M; however, the claimant also testified that after seeing Dr. M he continued to see Dr. E and Dr. O and that his medical bills were paid by the carrier. The claimant said he had "no choice" in requesting lump sum IIBS because he was "railroaded" into requesting lump sum payment. Ms. F denied ever telling the claimant he could not see other doctors after seeing Dr. M and said that she did not suggest lump sum payment of IIBS and did not coerce or pressure the claimant into requesting lump sum payment.

In an undated TWCC-69 which is shown as being received by the Commission on August 28, 1992, Dr. E reported that the claimant had not reached MMI and estimated that the claimant would reach MMI on November 1, 1992 "if (sic) has successful surgery soon." In an attached report Dr. E indicated that he had last examined the claimant on August 24, 1992. Dr. E further stated, apparently in reference to Dr. M's report, that:

> Regarding I.M.E. report, how could a M.M.I. date be reached with [Dr. M] agreeing there's evidence of ulnar nerve compression (ongoing problem not stable) & saying that "if a procedure is actually planned for his right upper extremity, he has not reached a point of maximal medical improvement." ? Why didn't he check what the surgery was? Surgery cannot guarantee a cure, but the patient needs it. Therefore, his 8% impairment rating is absurd! [Claimant] may need ulnar nerve translocation later & about 50% of brachial plexus injury patients develop a carpel tunnel syndrome requiring further surgery.

The claimant was asked why he went to Dr. S, whom he said was the designated

doctor selected by the Commission. Without indicating who told him or when he was told, the claimant responded that "they just told me I need to go see a doctor if I wasn't satisfied with the rating . . . ." In the statement of the evidence portion of the decision, the hearing officer states that the claimant disputed Dr. M's impairment rating and the Commission selected Dr. S as the designated doctor. In a TWCC-69 dated February 9, 1993, Dr. S reported that the claimant had not reached MMI and estimated that the claimant would reach MMI on August 9, 1993. After examination and review of medical reports and x-rays, Dr. S stated his impression as: 1) acute post-traumatic brachial plexitis; 2) acute sprained right shoulder; 3) acute dorsal sprain; 4) possible fracture of the right anterolateral and lower rib cage; and 5) acute cervical sprain with spondylolysis. Dr. S said he did not recommend surgery and suggested that the claimant continue conservative treatment. He recommended an EMG and nerve conduction studies of the neck and right arm and shoulder, and an MRI of the right shoulder.

In a letter to the Commission dated February 23, 1993, Dr. O said that the claimant would "do well from surgery with debridement of the brachial plexus of the scar and reconstruction with muscle flap." Dr. O said he disagreed with the treatment recommended by Dr. S. An operative report dated March 18, 1993, revealed that Dr. O performed right brachial plexus surgery on the claimant on that date and that the claimant was discharged from the hospital on March 19, 1993. The claimant said he was off of work from his job at the school for a week due to the surgery. In a letter to the carrier dated July 14, 1993, Dr. O stated that the claimant has not reached MMI and that the claimant still requires "anterior sub muscular transposition of his right ulnar nerve." He further stated that the claimant would improve following the ulnar nerve transposition. Dr. E indicated his agreement at the bottom of the letter.

DISABILITY

An employee is entitled to TIBS if the employee has a disability and has not attained MMI. Section 408.101(a). "Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). The hearing officer found that the claimant has not returned to his second job with the employer, but has been physically able to do so since March 2, 1992. The hearing officer further found that the claimant had the ability to obtain and retain employment at his preinjury wage beginning on March 2, 1992, and continuing through the date of the hearing. The hearing officer concluded that the "claimant has disability which began on (date of injury), and ended on March 2, 1992." Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's determination on disability and that it is not against the great weight and preponderance of the evidence. The hearing officer judges the weight and credibility of the evidence. Section 410.165(a). And, the hearing officer resolves conflicts and inconsistencies in the evidence and testimony. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App. - Amarillo 1974, no writ). While the claimant testified that Dr. E told him he could not work two jobs and that he had problems sitting at his school job, he also testified that in March 1992 he was released for full-time work, worked his school job full time, and that the reasons he did not return to his part-time work at the employer was because the job was stressful and because

of the lack of adequate transportation. We think the evidence, although conflicting, supports the hearing officer's findings and conclusion on disability. Although the evidence was undisputed that the claimant was off work for one week during March 1993 as a result of his surgery on March 18, 1993, we do not find any entitlement to TIBS for that week because of our affirmance of the hearing officer's conclusion that the claimant is not entitled to any additional income benefits due to his commutation of IIBS on August 14, 1992, which is discussed in the latter portion of this decision.

Although no issue was raised at the hearing or on appeal concerning the calculation of the claimant's TIBS in this concurrent employment situation at the time of injury, we refer the parties to Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991, where we held that wages earned in a concurrent employment held on the date of injury are disregarded for purposes of computing average weekly wage (AWW), and to Texas Workers' Compensation Commission Appeal No. 93343, decided June 14, 1993, where we concluded that if concurrent wages earned from an employment held on the date of injury are not used to compute AWW, then it would be inconsistent to allow such concurrent wages to be deducted as weekly earnings after an injury under Article 8308-4.23(c) or (d) (now Section 408.103(1) and (2)).

MMI AND IMPAIRMENT

The hearing officer found that Dr. S is the designated doctor selected by the Commission, that he determined that the claimant has not reached MMI, and that the great weight of the medical evidence is not contrary to Dr. S's "medical evaluation." The hearing officer concluded that the claimant has not reached MMI and that "any impairment rating is premature." Since neither party has stated any disagreement with the hearing officer's findings and conclusion on MMI and impairment rating we will not elaborate on them at this point other than to observe that under Section 408.122(b), Dr. S's report has presumptive weight and the Commission is required to base its determination of MMI on that report unless the great weight of the medical evidence is to the contrary, and that under Section 401.011(23) "impairment" means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. We also observe that MMI means the earlier of (a) the earliest date after which, based on reasonable medical probability, further material recovery 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. While the claimant was not at statutory MMI (the 104 week provision) at the date of the hearing, it appears that he should have reached statutory MMI not long after the hearing date.

AGREEMENT TO COMMUTE IIBS

The parties agreed at the hearing that one of the disputed issues to be resolved was "is the agreement to commute IIBS binding on the claimant?" While it was obvious that the claimant did not want the agreement to be binding on him and that the carrier wanted the hearing officer to find that the agreement was binding, neither party gave much indication of

what they thought would result from a finding in their favor. The claimant simply asked for a decision in his favor and the carrier said "we request that the commutation of benefits be upheld and that this case be closed." Section 408.128 (formerly Article 8308-4.27) provides as follows:

Commutation of Impairment Income Benefits. (a) An employee may elect to commute the remainder of the impairment income benefits to which the employee is entitled if the employee has returned to work for at least three months, earning at least 80 percent of the employee's average weekly wage.

(b) An employee who elects to commute impairment income benefits is not entitled to additional income benefits for the compensable injury.

Under Section 401.011(9) "commute" means to pay in a lump sum. Section 401.011(25) defines "income benefit" as a payment made to an employee for a compensable injury, but the term does not include a medical benefit, death benefit, or burial benefit. Under Section 408.142(a) an employee is entitled to supplemental income benefits (SIBS) if the employee meets certain requirements, one of which is that he "has not elected to commute a portion of the impairment income benefit under Section 408.128." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Sec. 147.10 (Rule 147.10), effective December 16, 1991, provides as follows:

Commutation of Impairment Income Benefits:

(a)An employee may elect to commute [IIBS] when the employee has returned to work for at least three months, earning at least 80% of the employee's [AWW]. [No issue was raised at the hearing or on appeal regarding these requirements.]

(b)A request to commute must:

(1)be in writing on a commission-prescribed form;

(2)state the date the employee reached [MMI]; the impairment rating; and the employee's weekly [IIBS];

(3)be sent to the carrier; and

(4)be filed with the commission field office managing the claim.

(c)The commission-prescribed form shall include a warning to the employee that commutation terminates the employee's entitlement to additional income benefits for the injury.

(d)The employee may contact the commission field office managing the claim to

obtain or verify the information required to be included in the request.

(e)The carrier shall send a notice of approval or denial of the request to the employee no later than 14 days after receipt of the request. A notice of approval shall include payment of the commuted impairment income benefits. A notice of denial shall include the carrier's reason for denial. A copy of the notice shall be filed with the commission field office managing the claim.

(f)If the carrier denies the request, the employee may request the commission to schedule a benefit review conference to resolve the

issue, as provided by Sec. 141.1, of this title (relating to Requesting and Setting a Benefit Review Conference).

Pertinent findings of fact and conclusions of law are as follows:

FINDINGS OF FACT

6.[Dr. M], the carrier-requested doctor, concluded that claimant reached MMI on July 24, 1992, with an impairment rating of 8%.

9.On August 12, 1992, claimant requested that his IIBS be paid in a lump sum.

10.Carrier approved claimant's request to commute benefits on August 14, 1992, and paid claimant his IIBS in a lump sum.

11.Claimant knew that he would not be able to collect SIBS or any other income benefits if he accepted lump sum payment of his IIBS.

CONCLUSION OF LAW

5.The August 14, 1992, agreement to commute IIBS is binding and the claimant is not entitled to any additional income benefits for his compensable injury.

In Montford, Barber, and Duncan's "A Guide to Texas Workers' Comp Reform," Vol. 1, Sec. 4B.27, page 4-115, the authors note the following:

Preclusive effect of commuting IIBS. If an employee elects to commute IIBS, any entitlement to additional income benefits for that injury is waived. This includes eligibility for additional income benefits based on a change of condition and supplemental income benefits (SIBS).

Section 408.128(b) specifically provides that an employee who elects to commute

IIBS is not entitled to additional income benefits for the compensable injury. Consequently, despite the fact that the designated doctor subsequently found that the claimant had not reached MMI, the claimant, by electing to commute IIBS based on the impairment rating assigned by Dr. M, waived any entitlement to additional income benefits under the particular facts of this case. The evidence demonstrates that at the time the claimant elected to commute IIBS he knew that Dr. M's certification of MMI and eight percent impairment rating were subject to the need for surgery. He knew that Dr. O had recommended surgery. He also knew that his treating doctor, Dr. E, disagreed with Dr. M's certification of MMI and assigned impairment rating. Despite his awareness of facts tending to show that he had not reached MMI, the claimant nevertheless contacted the carrier and requested lump sum payment of IIBS based on Dr. M's certification of MMI and eight percent impairment rating thereby indicating that he did not dispute Dr. M's report and in essence giving every appearance of having agreed that he was entitled to IIBS based on the findings of Dr. M. The form the claimant filled out to request IIBS warned him of the consequences of his election. We decline to hold, under the particular circumstances presented, that there is no basis for entitlement to IIBS at the time the claimant elected to commute IIBS. However, as determined by the hearing officer, TIBS accrued but not paid for the period of disability from (date of injury) to March 2, 1992, which period is prior to commutation of IIBs, are to be paid to the claimant.

The decision of the hearing officer is affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Lynda H. Nesenholtz
Appeals Judge

CONCURRING OPINION

I concur with the well-reasoned main opinion, and only write separately to emphasize my belief that, since this case involves an election to commute benefits, the key to this case is that the claimant knowingly made this election. He was informed of his need for future surgery by his treating doctor before electing to commute benefits. He was informed of the effect of making this election by the warning on the form requesting commutation--a warning that an English speaking clerical worker could certainly understand. The claimant, not the insurance carrier, initiated the commutation procedure, and there is no evidence that the

carrier ever made any misrepresentation as to the effects of the commutation to the claimant. Based on this evidence the hearing officer made a finding (Finding of Fact No. 11) that the claimant knew that he would not be able to collect any other income benefits if he accepted lump sum payment of IIBS. This finding was clearly supported by the evidence. For the claimant to now take the position that he did not understand the effect of his actions or that he was "railroaded" into commutation appears to me to be disingenuous.

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Gary L. Kilgore
Appeals Judge