APPEAL NO. 941627

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ? 401.001 *et seq*. On November 4, 1994, a contested case hearing (CCH) was held. The only issue was whether claimant had commuted his Impairment Income Benefits (IIBS), which would preclude any entitlement to Supplemental Income Benefits (SIBS). The hearing officer determined that the claimant "was not legally qualified" to commute his remaining IIBS, that claimant "did not knowingly and voluntarily commute his IIBS," and that claimant has not waived his entitlement to SIBS. Appellant, carrier, "contests" certain of the hearing officer's determinations and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant, did not file a response.

DECISION

The decision and order of the hearing officer are affirmed.

The circumstances surrounding claimant's original compensable injury of _____, were not developed, however, claimant apparently sustained an eye injury (apparently to the left eye "Intraoculeral laceration") on _____, and had at least two surgical procedures ("Vitrectomy/removal foreign body" and a "repeat vitrectomy") on July 24 and October 30, 1991. Claimant testified that he cannot see out of his left eye. A Report of Medical Evaluation (TWCC-69) certified maximum medical improvement (MMI) on January 21, 1992, with a 24% impairment rating (IR), and that claimant has "No light perception as of 12/27/91." This evaluation apparently was not challenged and claimant began receiving 72 weeks of IIBS (24% x 3 weeks = 72 weeks) on January 24, 1992.

In a form letter dated "1-18-93" carrier advised claimant " . . . that you may commute (lump sum) impairment income benefits. However, you must have returned to work for at least three months and earned at least 80% of your pre-injury average weekly wage [AWW]." At the bottom of the letter was a handwritten note by carrier's adjuster stating "Please contact me to discuss the possibility of commu(remainder of word cut off) (lump sum) your remai(cut off) IIB payment." Claimant testified that his wife told him what the letter said and that in response he contacted carrier's adjuster who told him that he could get his remaining IIBS in a final check by signing a form. Claimant testified that he understood that he was doing this as a convenience to the carrier and that the form was necessary to send him his last compensation check. Claimant testified that he signed a form (Claimant's Exhibit No. 5) entitled "Request to commute impairment income benefits (IIBS)," that he did not know what "commute" meant at that time, that he did not (or could not) read the form and that he was unaware of the implications of commuting IIBS. The form claimant signed was a carrier form and differed from the Texas Workers' Compensation Commission (Commission) Employee Election for Commuted (Lump Sum) Impairment Income Benefits (TWCC-51) form.

Claimant's Exhibit No. 5 is dated "3-25-94," recites that "claimant returned to work

on 7-92. PRIOR AWW: 642.93 CURRENT AWW Approx. 800.00" and that "claimant is qualified to commute IIB on 1-24-92." Claimant testified that he has worked for several employers since his injury, but usually on a part-time basis or was laid off after a particular job was completed, that he has never earned $800.00 a week while working for any employer after his injury and that he has not worked for any employer three consecutive months without being laid off.

Carrier submitted a wage statement showing claimant's earnings prior to his injury with the AWW being $642.93. In one of those biweekly periods, before his injury, claimant earned $1,795.35 which included overtime and was included in calculating the $642.93 AWW. Claimant testified that he has earned no more than $450.00 per week since returning to work in July 1992, after his injury. There is no evidence to contradict that testimony. The hearing officer in her discussion of the evidence stated, in part:

> . . . the evidence indicates that claimant's preinjury [AWW] was $642.93; eighty percent of this figure is $514.34. Since the evidence indicates that Claimant has, at no time since returning to work in approximately of [sic] July of 1992, worked for three months without interruptions, and has not earned a weekly wage even approaching $514.34 during this time frame, Claimant was not eligible to commute any portion of his [IIBS] prior to their expiration. Therefore, even though, by his own admission, Claimant did sign Claimant's Exhibit 5, any action taken in reliance on that signature was in clear contravention of the applicable portions of the Act.
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> * * * *
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> For the reasons discussed above, it is decided that Claimant did not voluntarily commute his [IIBS], despite his signature on Claimant's Exhibit 5, since he was not legally qualified to commute his [IIBS] on the date he signed the exhibit in question.

The hearing officer made the following determinations which have been challenged ("contested") by carrier:

FINDINGS OF FACT

6. Since returning to work in approximately July of 1992, Claimant has not worked for three months or more without interruption.

7. Since returning to work in approximately July of 1992, Claimant has not earned an [AWW] of $514.34, which is eighty percent of Claimant's preinjury [AWW] of 642.93.

8. On April 7, 1993, Claimant signed a request to commute his [IIBS],

which request was not contained in a TWCC-51.

9. At the time he signed the request for commutation of his [IIBS], Claimant was unaware of the effect that commutation would have on any future income benefits to which Claimant might otherwise be entitled.

CONCLUSIONS OF LAW

3. On April 7, 1993, Claimant was not legally qualified to commute his remaining [IIBS].

4. Claimant did not knowingly and voluntarily commute his remaining [IIBS].

5. Claimant has not waived his right to entitlement to [SIBS] by virtue of his having signed a request for commutation of [IIBS].

With respect to Findings of Fact No. 6 and No. 7 and Conclusion of Law No. 3, carrier merely states that " . . . the evidence and testimony establish . . . the claimant has worked for three months or more without interruption. . . . (and) has earned an (AWW) of at least $514.34 which is 80 percent of the Claimant's pre-injury (AWW) of 642.93. . . . (and was therefore) legally qualified to commute his remaining (IIBS)." The only evidence and testimony on these points was from the claimant and he specifically denied he had ever received more than $450.00 a week after his injury and that he had not worked for one employer for three months without being laid off. Carrier's argument at the CCH and statement in the appeal do not constitute evidence. Our review of the evidence does not support carrier's contention and carrier gives no specifics to support its allegations of such evidence and testimony. Carrier's contention on this point is without merit as not being supported by the testimony and evidence in the record.

With respect to Finding of Fact No. 8, carrier contends that Claimant's Exhibit No. 5 " . . . was a [sic] sufficiently similar in substance and spirit as TWCC-51." The hearing officer found otherwise and while we will not say a TWCC-51 form must be used (although Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ? 147.10 (Rule 147.10) does state that a request to commute "must: (1) be in writing on a commission-prescribed form; . . . .)" we note substantial differences, namely the emphasis and warning (in capital letters) on the TWCC-51 that SIBS may be available at the end of the impairment period if the claimant has an IR of 15% or more, and that "IF YOU TAKE A LUMP SUM PAYMENT OF YOUR [IIBS], YOU WILL NOT BE ABLE TO COLLECT [SIBS] OR ANY ADDITIONAL INCOME BENEFITS FOR THE INJURY." We agree with the hearing officer that an unemphasized sentence in the body of a paragraph which states "If the employer commutes IIB, he waives any additional temporary or supplemental income benefits which may later result

from the injury" is not nearly as conspicuous in effect or spirit as similar language in the TWCC-51.

With respect to carrier's contest of Finding of Fact No. 9 and Conclusions Law No. 4 and No. 5, carrier states, "Claimant was informed by the Carrier's adjuster of the effect that commutation would have" and that the claimant "was aware of the effect that commutation would have on any future benefits . . . ." The hearing officer noted " . . . despite Carrier's argument that the adjuster fully explained the impact of claimant's signature to claimant, the record contains absolutely no evidence of this assertion; in fact, the evidence contained in the record is to the effect that the adjuster did not fully explain the effect of claimant's signature. . . ." We fully agree with the hearing officer's interpretation of the record. Claimant certainly did not testify that the adjuster had fully explained the meaning of Claimant's Exhibit No. 5, there is no documentary evidence to support carrier's contention and the adjuster neither testified in person or by affidavit. Consequently, there is no basis for carrier's contention.

Along these lines, carrier alleges that the "evidence and testimony establish that the claimant retained an attorney . . . who advised claimant of the effect of commutation . . . . " Claimant admitted he consulted an attorney for a potential 3rd party suit against the manufacturer of the device that caused the injury, but dropped that aspect of the case when the attorney advised claimant that there was no basis for such litigation. Claimant was adamant that the attorney had not been retained for the workers' compensation claim. The attorney may have, at some time, corresponded with carrier and there is an undated, unsigned copy of a letter to the attorney from the carrier, acknowledging receipt of a letter "inquiring about commutation." However, there is no evidence of, and it would be pure speculation that the attorney discussed, much less explained, discussions of commutation, contrary to the claimant's sworn testimony.

Claimant, through his ombudsman, cites Texas Workers' Compensation Commission Appeal No. 93894, decided November 17, 1993, for the proposition that Rule 147.10 "must be followed." Both Appeal No. 93894, and Texas Workers' Compensation Commission Appeal No. 94207, decided April 6, 1994, discuss commutation, reference Section 408.128 and quote Rule 147.10. In Appeal No. 93894, the Appeals Panel considered the commutation statute and affirmed the hearing officer that claimant had commuted his IIBS. In a concurring opinion one Appeals Panel judge specifically recited how the claimant's argument that he did not understand the effect of his action was "disingenuous." In Appeal No. 94207, the hearing officer made a determination that the claimant had not made a "clear and informed choice." The Appeals Panel held:

> The hearing officer invalidated the commutation based on her finding that claimant did not make a "clear and informed choice." We agree with the carrier that the statute does not require such a finding; to the extent that the rule mandated a warning to employee seeking to commute benefits, that rule

was complied with in this case. Further, claimant testified that he stated he would accept an IR only for the CTS, and that he believed he could receive further income benefits based upon the Raynaud's syndrome. Insofar as this represents a misunderstanding of the law, it has been held that ignorance of statutory requirements does not excuse compliance. *See, e.g.,* Texas Employers Insurance Association v. Herron, 569 S.W.2d 549 (Tex. Civ. App.-1974, no writ); Allstate Insurance Company v. King 444 S.W.2d 602 (Tex. 1969).

We distinguish Appeal Nos. 93894 and 94207 from the instant case in that this case turns on whether claimant was "legally qualified" to commute his remaining IIBS, (i.e. whether he had returned to work for at least three months, earning at least 80% of his AWW in accordance with Rule 147.10(a)). The hearing officer determined claimant was not so legally qualified and that determination was supported by the evidence as discussed previously. Although the hearing officer made determinations that the claimant "did not knowingly and voluntarily commute his remaining [IIBS]," carrier's challenge to those determinations was only on a factual basis and we have affirmed that the hearing officer's determinations were factually supported by the evidence. Consequently, we need not, and we decline to, address the legal issue of whether a claimant's election to commute IIBS must be made "knowingly, . . . voluntarily," or through a "clear and informed choice."

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge