APPEAL NO. 94207

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in (city), Texas on January 6, 1994, with the record closing on January 13th. Three issues were before the hearing officer, (hearing officer):

1.Was the first certification of maximum medical improvement [MMI] and impairment rating [IR] disputed by the claimant within 90 days of its being assigned;

2.Has claimant reached [MMI], and if so, on what date; and

3.What is claimant's [IR].

The hearing officer also noted in her decision, and it was not disputed on appeal, that commutation of income impairment benefits (IIBS) was not a listed issue but essentially was discussed by the parties at the benefit review conference and the CCH as a sub-issue.

The carrier, which is the appellant in this action, raises two points of error with regard to the decision of the hearing officer: that the hearing officer erred in concluding the first assigned IR and certification of MMI was invalid, and that she erred in concluding the claimant reached MMI on October 14, 1993, with a 17% IR. The claimant filed no response.

DECISION

For reasons detailed herein, we reverse the decision and order of the hearing officer.

It was not in dispute that the claimant, who worked as an assembler for (employer) suffered a repetitive trauma injury in the course and scope of his employment. He stated that in (month year) he first saw a doctor at employer's clinic for complaints of numbness in his fingers. (Clinic notes from (date of injury), show claimant complaining about pain and swelling in his right wrist for about one week, and a tingling and burning sensation in his index and middle fingers and thumb.) In October of 1991 the clinic referred him to (Dr. C), who took him off work and started him on a course of physical therapy.

On October 21, 1991, Dr. C stated her impression as early right carpal tunnel syndrome (CTS), and on December 21st she stated an additional impression of possible vascular insufficiency. She referred claimant to (Dr. B), who performed a carpal tunnel release on January 14, 1992. On February 11, 1992, Dr. C noted that Dr. B had referred claimant to a (Dr. P), a vascular surgeon, due to "the possible vasospasm of the digital vessels to the index finger." Notes from Dr. P dated December 19, 1991, show an impression of Raynaud's phenomenon,[1] right hand, along with CTS, although he said he believed this to be "coincidental." (On February 18th, Dr. C added her impression of

[1]Dr. R, who testified for claimant, defined Raynaud's phenomenon or syndrome as a neurovascular disorder causing constriction of a blood vessel which can result in paleness, numbness, and weakness in the affected part.

"possible Raynaud's.") On subsequent visits Dr. P prescribed medication but noted continuing coolness and discoloration in claimant's fingers.

On February 13, 1992, Dr. B released claimant to work on a light duty basis, noting that he continued to have symptoms with Raynaud's syndrome. On April 24th, responding to a letter from the carrier, Dr. B indicated claimant had not reached MMI, stating claimant had not only CTS but "also the Raynaud's as a complication." On August 4th Dr. B responded to the carrier to say he did not have the American Medical Association's Guides to the Evaluation of Permanent Impairment, and he deferred MMI and IR to Dr. C.

Dr. C saw claimant on December 29th and noted his CTS and Raynaud's syndrome for which he had seen Dr. P. Dr. C attached the results of a limited electrical and conduction study done to re-evaluate claimant's CTS; she said his condition was stable, noted that Dr. B had suggested an IR, and stated her opinion that "At most, he probably can get a 5% rating to close his case." Dr. C completed a Report of Medical Evaluation (Form TWCC-69) on January 15, 1993, in which she certified MMI (with no date specified) and assigned a five percent IR for claimant's CTS. Claimant said he returned to work in March 1992 and worked at a series of jobs created by the employer until, he said, there were no funds to create another job and he was told on May 3, 1993, that he would have to "go back out" on workers' compensation. At that point he said he was told by carrier's representative that he had been "paid everything."

The record contained a January 19, 1993, letter from carrier to claimant which stated carrier's intent to pay IIBS based upon Dr. C's IR. (Claimant did not contend that the amount of IIBS attributable to Dr. C's IR was not correct). It also said, "There is a question as to whether you wanted to commute your remaining benefits," and "If you decide to lump sum the remaining portion of your benefits then you will waive any additional temporary [sic] or supplemental income benefits [SIBS] later resulting from your injury." The record also contained a Commission form entitled "Employee's Request For Commuted (Lump Sum) Impairment Income Benefits [IIBS]," dated January 22, 1993, and accepted by carrier on the same date. The claimant testified that he was told by both the carrier and Commission personnel that he had already been paid his IIBS, but that he had agreed only to payment for the impairment due to CTS and in May 1993 he was seeking benefits for the Raynaud's syndrome. Claimant said at that point he returned to Dr. C and told her he could no longer receive benefits, and asked her either to give him an "all person" IR or to refer him to a doctor who could.

On May 14, 1993, Dr. C completed a second TWCC-69 certifying MMI (again, with no date given) and a six percent IR. A handwritten note stated, "This is an addendum on 5-14-93 TWCC-69. His [IR] is specifically for R carpal tunnel synd. only--[Dr. P] continues to see him for his vascular problem." On May 5th the claimant disputed Dr. C's five percent IR.

A July 13, 1993, report from Dr. C stated that since she saw him on June 10th to rule out CTS in his left hand, he had complained of more pain from the fingers to the elbows

bilaterally. Dr. C stated her intention to refer the claimant to (Dr. W) "to get an opinion on his [IR]." Dr. W began an examination of claimant on July 29th, which was completed September 10th. Although he did not complete a TWCC-69, Dr. W prepared a report in which he assigned the claimant a 19% whole person IR, comprised of 15% vascular impairment due to Raynaud's syndrome combined with his previous five percent carpal tunnel impairment. Dr. W testified at the hearing concerning the requirement that a whole person IR be given and noted his opinion that it is "invalid to give a partial [IR]."

On October 4, 1993, the Texas Workers' Compensation Commission (Commission) appointed (Dr. RB) as designated doctor to determine IR only. Dr. RB found claimant reached MMI on October 26, 1993, with a 17% IR due to claimant's CTS and to the Raynaud's phenomenon, although he said the latter was related in part to his work-related injury and in part to claimant's long term nicotine abuse.

The hearing officer determined, among other things, that claimant's medically documented diagnoses for his injury included CTS and Raynaud's syndrome, and thus Dr. C's determination of MMI and IR were not valid since she did not consider claimant's Raynaud's syndrome. As a result, the hearing officer held that Dr. C's certification of MMI could not become final and, as a result of such invalidity, it would not preclude claimant's dispute of it. She also held that the claimant chose to commute his IIBS pursuant to Section 408.128, but based upon the preponderance of the evidence he did not make a "clear and informed choice." The hearing officer found the claimant reached statutory MMI (on October 14, 1993) and accepted the designated doctor's IR of 17%, stating that the other medical evidence was not contrary to the designated doctor's report.

In its appeal the carrier argues that the hearing officer erred in finding Dr. C's report of MMI and IR "invalid," which it says relates to the certification process itself and not to whether the claimant has reached MMI and the IR is correct. The carrier further argues that allowing the claimant to attack Dr. C's date of MMI and IR in this manner renders the applicable rule (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 130.5(e) (Rule 130.5(e)) meaningless.

Second, the carrier argues that claimant may not dispute MMI and impairment because he commuted his IIBS and is thus barred from receiving further income benefits. It argues that there is no evidence that the applicable statute (Section 408.128) and rule (Rule 147.10) on commutation of benefits were not followed, and states that the hearing officer has introduced a new element, i.e., that the carrier must prove a claimant made a "clear and informed" choice to commute.

Finally, the carrier contends the hearing officer erred in concluding that MMI was reached statutorily and claimant's IR was 17%. It notes that both Drs. W and RB (the designated doctor) included an assessment for Raynaud's syndrome, but says that Dr. RB concluded the latter condition was just as likely attributable to cigarette use. Therefore, it argues, Dr. C's original MMI and IR (which did not consider Raynaud's syndrome, and which was amended, but never rescinded, by Dr. C) should stand.

We need not address each of the arguments raised by the carrier because we find that claimant's commutation of his IIBS precludes claimant's entitlement to any further income benefits. Section 408.128, regarding commutation of IIBS, provides as follows:

(a)An employee may elect to commute the remainder of the [IIBS] 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 [IIBS] is not entitled to additional income benefits for the compensable injury.

Rule 147.10, which implements these provisions, provides in pertinent part:

(b)A request to commute must:

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

(2)state the date the employee reached [MMI]; the [IR]; 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 [IIBS]. . . .

As noted above, it was not alleged that claimant did not meet the statutory requirements for commutation nor that the provisions of the rule were not followed. (Although carrier's January 22, 1993, letter to claimant requests his signature to indicate agreement, that letter was not signed by the claimant, who instead completed the proper Commission form which contains a conspicuous warning as to the effect of commutation and informs an employee that he may seek Commission assistance with information needed to complete the form.)

The Appeals Panel has previously considered the commutation statute in Texas Workers' Compensation Commission Appeal No. 93894, decided November 17, 1993. In that case, the claimant, whose referral doctor had recommended surgery, saw carrier's doctor who assigned an eight percent IR in the event claimant did not have the surgery. Despite that fact, and the fact that his treating doctor deemed the IR "ridiculous," the claimant requested commutation of IIBS based upon the eight percent. (However, the claimant testified at the hearing that he did not understand what he was doing, and that he neither read nor understood the form.) The claimant subsequently saw a designated doctor who determined he had not reached MMI.

The hearing officer determined, and the Appeals Panel affirmed, that the claimant had not reached MMI and hence any IR was premature, but that the agreement to commute IIBS was binding upon the claimant. After reciting the statute and rule on commutation, the panel in Appeal No. 93894 cited Montford, Barber, and Duncan's "A Guide to Texas Workers' Comp. Reform," Vol.1, Sec. 4B.27, page 4-115, which states:

> 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 (SIBS).

The panel also noted in Appeal No. 93894 that at the time claimant elected to commute IIBS he knew carrier's doctor's opinion was subject to the need for surgery, that his doctor had recommended surgery, and that his treating doctor strongly disagreed with the first IR; he also completed a form which warned him of the consequences of his action. Likewise in this case, there is evidence that the claimant was aware of a separately diagnosed, and potentially related, condition (Raynaud's syndrome) well before he received Dr. C's IR and completed the form commuting his IIBS. Although we do not need to decide this question in light of our disposition of this case, we note that the evidence raises considerable doubt as to whether the Raynaud's syndrome was a compensable injury: Dr. P, the vascular surgeon, opined that it was "coincidental" to the CTS, Dr. W testified that Raynaud's had many causes and that the most common was a malignancy, and even the designated doctor indicated it was just as attributable to smoking as to repetitive motion.

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 mandates a warning to employees 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).

While the foregoing may appear to be a strict application of the statute and rules, both in this case and in Appeal No. 93894, *supra*, especially in light of developments subsequent to each claimant's election to commute benefits, the legislature plainly provided that an election to commute precludes receipt of further income benefits. Moreover, the safeguards provided by the rule have been complied with. We note that the law (and as the Commission form) specifically provides that commutation does not affect a claimant's entitlement to medical benefits.

The decision and order of the hearing officer are reversed and a new decision rendered that the claimant's commutation of IIBS bars entitlement to future income benefits.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge