APPEAL NO. 991241

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 13, 1999. With respect to the sole issue before him, the hearing officer determined that the respondent's (claimant) commutation of impairment income benefits (IIBS) on October 31, 1997, was not valid and final. The appellant (carrier) appeals, urging that the hearing officer erred in determining that failure to include all of the information on the form relieves the claimant from the effects of signing the form. The claimant replies that the hearing officer's decision is correct and should be affirmed.

DECISION

Affirmed, as reformed.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that she fell from a 12-foot ladder and injured her head, shoulder, hand, and leg, and the injury resulted in psychiatric problems such as memory loss. On October 14, 1996, the claimant was certified by Dr. P at maximum medical improvement (MMI) on July 1, 1996, with a 34% impairment rating (IR). The claimant was represented by Mr. R in 1995 and 1996, and Ms. G beginning January 1997. The claimant said she asked Mr. R if she could get a lump sum payment of IIBS and Mr. R told her that she could, but he advised against it and told her that she first had to return to work.

The claimant later called the Texas Workers' Compensation Commission (Commission), spoke to an unknown person, asked if she could get a lump sum of money, and was told that she could not unless she was working for at least three months and earning less than 80% of her average weekly wage (AWW). The claimant said that she wanted to sell Avon and had obtained a sales bag, but had not earned any money since her injury. Sometime after speaking with the Commission, the claimant called Ms. G and asked if she could get a lump sum payment. The claimant told Ms. G that she had not returned to work and Ms. G said she did not have to return to work. Ms. G told the claimant that she would send her a blank form and instructed her to sign it.

The claimant received the form, an Employee's Election for Commuted (Lump Sum) Impairment Income Benefits (TWCC-51), signed only her name to the blank form, and returned it to Ms. G. The claimant testified that she read the TWCC-51, but did not understand what it really meant and that Ms. G did not tell her that if she signed the form she would not be entitled to any further income benefits. The TWCC-51 was completed by Ms. G and approved by the carrier on October 31, 1997. The TWCC-51 approved by the carrier did not contain an MMI date, did not indicate whether the IR was disputed, did not indicate the present rate of pay, and states "% varies by sales." The TWCC-51 indicates that the carrier paid $3,732.49 to the claimant for the period from November 1, 1997, through June 15, 1998.

At the CCH, the claimant asserted that she was misled and misguided and, as a result, the commutation should be set aside as not being valid. The hearing officer concluded that the claimant's commutation of IIBS was not valid and final and, in support of, made the following findings of fact:

> 2. The TWCC-51 signed by the Claimant on or about September 30, 1997, did not include all of the required information, including the date of [MMI]; the [IR]; the Employee weekly [IIBS] amount; or the date the Claimant returned to work.
>
> 3. On the date the Claimant signed the blank TWCC-51, the Claimant had not returned to work for a[t] least three months earning 80% of her [AWW].

The hearing officer indicates in his Statement of the Evidence, that he relied, in part, on Texas Workers' Compensation Commission Appeal No. 970509, decided May 5, 1997 (Unpublished), in which the Appeals Panel affirmed the decision of the hearing officer that the claimant was not entitled to commute his IIBS. In Appeal No. 970509, the claimant, unrepresented, contacted the carrier's adjuster requesting a lump sum payment. The TWCC-51 was filled out with the exception of the MMI date, and no box was checked next to the question "did you or [the] insurance company dispute the [impairment] rating?" The claimant then disputed his IR after receiving his lump sum IIBS check. The Appeals Panel cited Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.10 (Rule 147.10) and stated:

> The fact that the form was not completed indicates that claimant did not know all of the information the form required or that he did not understand it. In our view, this should have prompted carrier to at least work with claimant regarding the completion of the required TWCC-51 before writing the check for lump sum IIBS. We have acknowledged that the statute does not expressly require that a claimant make a "clear and informed choice" regarding whether to commute IIBS. Appeal No. 94207 [Texas Workers' Compensation Commission Appeal No. 94207, decided April 6, 1994]. However, we have also contemplated that the rule appears to "mandate a warning" to employees seeking to commute benefits. The TWCC-51 signed by claimant did contain a warning regarding the effects of commutation of IIBS. However, Rule 147.10 was not complied with in that the TWCC-51 was not properly and fully completed.

We have previously stated that the failure of a claimant to make a "clear and informed choice" is not a basis for invalidating a commutation of IIBS. *See* Texas Workers' Compensation Commission Appeal No. 941627, decided January 18, 1995. In this case, the claimant was represented by an attorney. The claimant's attorney acted as her agent and the attorney's actions or inactions in the course and scope of her employment were attributable to the claimant and the claimant is bound by them. Texas Workers' Compensation Commission Appeal No. 93664, decided September 15, 1993. Regardless

of who completed what portions of the TWCC-51, the TWCC-51 submitted to the carrier is entirely attributed to the claimant. We disagree with the hearing officer's Finding of Fact No. 2 because the TWCC-51 submitted and approved by the carrier on October 31, 1998, did contain the IR, did contain the weekly IIBS amount, and did contain the date the claimant returned to work. It is of no consequence that the claimant herself did not complete these portions of the form. We reform Finding of Fact No. 2 as follows:

> 2. The TWCC-51 signed by the Claimant on or about September 30, 1997, did not include the [MMI] date, did not indicate whether the [IR] was disputed, did not indicate the present rate of pay, and states "% varies by sales."

The carrier asserts that to relieve the claimant of her request to commute IIBS based on her failure to complete one blank on the form, the MMI date, would be promoting form over substance. We agree. In this case, however, the TWCC-51 is not just missing the MMI date. We believe that the key elements of the TWCC-51 are the IR and whether the claimant has returned to work for at least three months, earning at least 80% of preinjury AWW, because they are the statutory criteria for commutation of IIBS. Section 408.128. While the carrier argues that the claimant has indicated that she returned to work for three months and was making at least 80% of her preinjury AWW, we do not believe this to be the case. The TWCC-51 indicates the claimant returned to work for at least three months; however, "present rate of pay" is blank, below it appears "% varies by sales," and the box "weekly" is checked. In Texas Workers' Compensation Commission Appeal No. 951549, decided November 1, 1995, we noted that a carrier is permitted to rely upon the claimant's "plain and unambiguous" representation that he has returned to work for at least three months prior to his request to commute IIBS, earning 80% of his preinjury AWW, and that it need not "go behind the document to determine whether the representations contained therein were correct." However, in this case, we find the information contained on the TWCC-51 insufficient to convey that the claimant was making at least 80% of her preinjury AWW.

We are satisfied that the hearing officer's decision is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The hearing officer's decision and order are affirmed, as reformed.

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Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge