APPEAL NO. 991547

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 25, 1999, a contested case hearing (CCH) was held. The disputed issues were:

1. Did the Claimant [appellant] commute his impairment income benefits [IIBS] pursuant to Section 408.128?

2. As a result of the decision and order does the commission [Texas Workers' Compensation Commission] have jurisdiction to determine the impairment rating [IR]?

3. Is the Claimant entitled to supplemental income benefits [SIBS] for the 1st compensable quarter, November 20, 1998 through February 18, 1999?

4. Is the Carrier [respondent] entitled to reduce income benefits to recoup the previous overpayment of $2776.80?

With regard to those issues, the hearing officer determined that claimant elected to commute, and did commute, his IIBS pursuant to Section 408.128; that the parties litigated the IR at a prior CCH (the August 1998 CCH); that claimant's 19% IR has become final; that the Commission does "not now have jurisdiction to determine the [IR]"; that claimant is not entitled to SIBS for the first compensable quarter (stipulated to and not appealed); and that carrier is not entitled to reduce income benefits to recoup an overpayment of $2,776.80 (essentially not appealed).

Claimant appeals a number of the hearing officer's findings, essentially arguing that claimant's commutation in February 1998 of an 11% IR assessed by the designated doctor was invalid because the IR was subsequently increased to 19% and that the commutation was invalid because claimant could not read and did not understand that by commuting IIBS he would not be entitled to any additional income benefits and because claimant "was not read his rights." Claimant contends that the Commission no longer has jurisdiction to hear the 19% IR and that any commutation of the 11% IR was therefore invalid. Claimant requests that we reverse the hearing officer's decision on the appealed issues and render a decision in his favor. Carrier responds, first challenging that the appeal is by an entity and an individual not a party to the proceedings and urging that the appeal should be dismissed for lack of jurisdiction. Carrier asserts that claimant's representative failed to comply with the Commission rules and was engaged in the practice of law without a license. Otherwise, carrier generally urges affirmance, citing authority for its contentions.

DECISION

Affirmed.

We will first address carrier's contention that claimant's appeal should be dismissed for want of jurisdiction pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 150.3 and 143.3 (Rules 150.3 and 143.3). The appeal is entitled "Claimant's Request for Review," and states that it is "CLAIMANT'S REQUEST FOR REVIEW" and is signed by Mr. G. The appeal itself has the signature block of (IWAC), and is signed by Mr. G. Carrier contends that neither IWAC nor Mr. G are proper parties to the proceeding, that Mr. G has not complied with Rule 150.3 (or Rule 143.3) and, therefore, the appeal should be dismissed. Rule 150.3 references the definition of a representative in Section 401.011(37) and their authority as outlined in Section 402.071. Rule 150.3(a)(3) provides that a person who is neither an adjuster or attorney (presumably such as Mr. G) is to file a power of attorney or written authorization from the claimant. Carrier contends that Mr. G failed to do so and, therefore, claimant's appeal should be dismissed. We disagree and note that Rule 150.3(b) provides that a representative who fails to comply with the 1989 Act or Commission rules "may be subject to sanctions, including suspension, as provided by the [1989] Act § 2.09(f) [since codified as Section 402.072] and § 10.07(d) [since codified as Section 415.023]. Consequently, the penalty or sanction for failing to comply with the 1989 Act or Commission rules runs against the representative rather than the claimant. Carrier is free to request sanctions against the representative for failing to comply with the statutory and/or regulatory provisions and/or illegal practice of law with the proper agencies, but such a violation does not result in dismissal of claimant's appeal for lack of jurisdiction.

Mr. G represented claimant at an earlier CCH and, at this CCH, signed in as claimant's representative. Mr. G acted as claimant's representative throughout both CCHs without complaint by carrier. Although it would have been better had the appeal either been signed by claimant or, at least, signed by Mr. G for claimant (instead of IWAC), we do not consider that failure to result in dismissal of the appeal, which fairly clearly was, and is, on claimant's behalf. Carrier cites Texas Workers' Compensation Commission Appeal No. 960861, decided June 7, 1996. In a similar situation, an injured employee was being "assisted" or represented by a nonlawyer representative, who filed an appeal which stated that "the claimant requests that an appeal be filed . . . . " In Appeal No. 960861, a copy was sent to the claimant, while in this case, that is not evident; however, we elect to follow Appeal No. 960861, which held that "under these circumstances, we are unwilling to conclude that the authority he [the representative] exercised for the claimant at the CCH did not extend to filing an appeal on the claimant's behalf." Carrier asks us to reconsider this issue. We have done so and decline to change our position, noting, as stated previously, that the carrier has other means for asking for penalties and sanctions, to include suspension, for a representative that fails to comply with the 1989 Act or Commission rules, short of penalizing the claimant by dismissing his or her claim.

Carrier cites Texas Workers' Compensation Commission Appeal No. 950940, decided July 21, 1995, a case where we found an appeal filed by the employee's girlfriend, and perhaps without his knowledge, to be untimely. We distinguish that case from the instant case for several different reasons. First, the key to that case was the appeal was untimely regardless of who filed it. Secondly, the girlfriend in Appeal No. 950940 never met the definition and had not acted as claimant's representative; whereas, in the instant case,

Mr. G clearly was claimant's unchallenged representative in two CCHs. Third, in Appeal No. 950940, the filed document implied that the claimant in that case did "not know that the friend is filing" the appeal, that the document itself says "it was a bit late to ask for an appeal," and that the document did not seek specific relief. In that case, the "appeal" was dismissed for lack of jurisdiction because it was untimely. Consequently, that case is no authority for dismissal of this case for lack of jurisdiction.

Nor do we find carrier's contention that the appeal fails to comply with the minimum requirements of Rule 143.3 (that the appeal clearly and concisely rebuts each issue that claimant wants reviewed). While we agree that some of claimant's arguments are hard to follow and tend to be repeated, they are the same arguments that claimant made at the CCH where carrier had no difficulty in countering those arguments. We do not find carrier's contention that it did not have "fair notice of what is being claimed" meritorious.

Claimant testified, and it is generally undisputed, that claimant was performing his job duties for the employer, a fast food chain, on _____, when he slipped in some liquid, fell and sustained injuries to his neck, back and shoulder. Claimant did not have any surgery and treated with several doctors, including one doctor that assessed a three percent IR. Eventually, he was sent to Dr. H, whose letterhead indicates he is a "board certified neurologist" and who, in a Report of Medical Evaluation (TWCC-69) dated October 23, 1997, and narrative, certified maximum medical improvement (MMI) (not an issue) and assessed a 19% IR. This IR was apparently disputed and Dr. L was appointed as a Commission-selected designated doctor. Documentation in evidence establishes that Dr. L certified MMI and assessed an 11% IR on December 18, 1997. Claimant testified that he disputed that IR and that he believed Dr. H's 19% IR was correct.

Claimant, at some time, had apparently returned to work and had requested, and been paid, three advances on his income benefits. Apparently, claimant requested a fourth advance, which was refused by carrier. *See* Rule 126.4, particularly Rule 126.4(f). Although not entirely clear under what circumstances commutation was sought, claimant went to the Commission and, on an Employee's Election for Commuted (Lump Sum) Impairment Income Benefits (TWCC-51), requested commutation of IIBS for the _____, injury. On the TWCC-51, the block stating "Did you or insurance company dispute the rating?" is marked "Yes." Carrier attempted to call or depose the Commission employee that had assisted claimant in completing the TWCC-51, but was denied. Claimant testified that although he had attended the 10th grade, he actually only had a fifth grade education and could not read at all. There was a good deal of testimony from both claimant and carrier's claims supervisor as to what claimant had or had not been told, what he may or may not have understood, whether the warning on the TWCC-51 had been explained and what representations may have been made. In any event, claimant signed the TWCC-51 on February 12, 1998; it was sent to carrier by facsimile transmission, was approved and claimant received a lump sum commutation based on his 11% IR. Claimant testified that in April and August 1998, he sustained additional unspecified injuries while working for the new employer.

Subsequently, Dr. L's IR was challenged and a CCH was convened on August 26, 1998, with the issues being MMI and IR. The hearing officer in that CCH determined that the great weight of other medical evidence was contrary to the designated doctor's report and adopted Dr. H's 19% IR. That decision was not appealed and has become final. Unknown to the hearing officer and the parties, Dr. L, on the date of the CCH, had revised his IR and raised it from 11% to 16%. The testimony was, and the hearing officer found, that carrier paid and claimant received "a lump sum payment of [IIBS] for an additional 8% of whole body impairment."

The hearing officer, in an unappealed finding, found that claimant's testimony that he would sign a TWCC-51 without being able to read it and without having it read to him "is not credible." In disputed findings the hearing officer found that claimant understood that if he commuted his IIBS he would not be eligible for SIBS. We have often stated that the 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Consequently, on those points on appeal dealing with what claimant knew or did not know, what was or was not explained, we defer to the hearing officer as the sole judge of the credibility of the evidence.

Section 408.128(a) provides that an employee may elect to commute the remainder of the IIBS if the employee has returned to work for at least three months (at 80% of his preinjury wage). Section 408.128(b) states that "[a]n employee who elects to commute [IIBS] is not entitled to additional income benefits for the compensable injury." We note that neither Section 408.128 nor Rule 147.10 (the implementing Commission rule) contain any exception for good cause based on misunderstanding or lack of explanation of the law. Rule 147.10(c) does prescribe that the warning to the employee that commutation terminates entitlement to additional income benefits be included on the form. We have previously addressed the contentions claimant raises in Texas Workers' Compensation Commission Appeal No. 94207, decided April 6, 1994, which reversed a hearing officer's decision that a claimant had not made an informed choice to commute IIBS. In that case, the claimant stated his belief that he had been accepting accelerated benefits only for one portion of his injury, and that he could receive further income benefits based upon another component of the injury. In reversing the hearing officer's decision that claimant's decision had not been "clear and informed," the Appeals Panel cited Texas Workers' Compensation Commission Appeal No. 93894, decided November 17, 1993, which determined that an agreement to commute IIBS was binding upon the claimant in the face of his testimony that he did not understand what he was doing and that he neither read nor understood the form. Both Appeal No. 94207, *supra*, and Appeal No. 93894, *supra*, relied upon the fact that the form for commuting IIBS warns of the consequences of the act of commutation. *And see* similar cases, Texas Workers' Compensation Commission Appeal No. 950167, decided

March 17, 1995, and Texas Workers' Compensation Commission Appeal No. 951549, decided November 1, 1995.

As noted in Appeal No. 94207, *supra*, the legislature plainly provided that an election to commute precludes entitlement for the receipt of further income benefits. In this case, the safeguards and warnings provided by Rule 147.10 have been complied with. The fact that the IR commuted was subsequently changed (raised) does not invalidate the commutation of the 11% IR. Claimant was aware and, indeed, was urging that the Commission adopt Dr. H's 19% IR at the time that he commuted the designated doctor's 11% IR. Nor does the fact that the carrier paid an additional eight percent (24 weeks) of IIBS invalidate the commutation. Claimant was not entitled to that payment and, as carrier states, that overpayment was simply "a gratuitous payment." As Appeal No. 951549, *supra*, notes, the same result would not be the case where there is fraud or where the application itself, or other information in possession of the carrier, would establish that the statutory requirements for commutation did not exist. That does not appear to be the case here, where claimant seeks to invalidate his commutation on the basis of his ability to read/ understand the TWCC-51 and/or that a subsequent higher IR somehow invalidated the commutation.

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 clearly wrong or 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:

_____
Robert W. Potts
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge