APPEAL NO. 023166
FILED JANUARY 30, 2003

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 November 15, 2002. With regard to the four disputed issues before him the hearing officer determined that "[g]ood cause does exist to relieve the [appellant/cross-respondent] Claimant from the effects of his commutation of impairment income benefits [IIBs]"; that the date of maximum medical improvement (MMI) is June 9, 1998; that the claimant's impairment rating (IR) is 15%; and that the claimant had disability from May 15 through May 17, 1998, but did not have disability from December 19, 1997, through January 10, 1998, or from May 18 through June 9, 1998.

The claimant appeals the determinations of MMI, IR, and disability as well as disputing certain factual findings. The respondent/cross-appellant (carrier) appeals the hearing officer's determination that the claimant is relieved from the effects of his commutation of IIBs, contending that there "is nothing in either the Labor Code or the [Texas Workers' Compensation Commission] Commission rules that voids an election that is approved by the Carrier." Both parties responded to the other party's appeal, urging affirmance of determinations on which they prevailed.

DECISION

Affirmed on all appealed issues.

The CCH involved lengthy and disputed factual circumstances. The hearing officer's Statement of the Evidence contains a commendable summary and discussion of the evidence. We will repeat only portions necessary for this decision, noting that many of the hearing officer's factual determinations are disputed. However, we conclude that the hearing officer's factual determinations are supported by the evidence and we accept them as established fact.

The parties stipulated that the claimant sustained a compensable (low back) injury on _____. The claimant had lumbar spinal surgery at the L5-S1 level on March 5, 1998. The claimant's treating doctor, Dr. M, released the claimant to full-duty work on May 12, 1998, and the hearing officer found that the claimant "did apparently return to work for the Employer on or about May 18, ..." Dr. M saw the claimant again on June 9, 1998, and, in a report of that date, commented that "[claimant] is doing exceptionally well." In a Report of Medical Evaluation (TWCC-69) and narrative dated June 9, 1998, Dr. M certified that the claimant was at MMI on that date with a 15% IR based on 10% impairment from Table 49 (of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association), and from various flexion and extension loss of range of motion (ROM), combined to result in the 15% IR.

After the claimant commuted his IIBs (discussed later in this decision) the claimant again began experiencing low back pain in April 2001. Although disputed by the claimant, the hearing officer found that the first quarter of supplemental income benefits (SIBs) ended on July 20, 1999, and that the claimant did not dispute the date of MMI and the IR assigned by Dr. M until June 14, 2001. The claimant had a second spinal surgery on August 23, 2001. At the claimant's request, Dr. M prepared a second TWCC-69 and narrative both dated June 17, 2002. Although expressing reservations whether the report "is legal" or would "be accepted by the TWCC or be considered valid," Dr. M certified "Statutory" MMI with a 19% IR (12% impairment from Table 49 with 8% for loss of ROM).

MMI AND IR

The claimant challenges the hearing officer's determination of MMI and IR on several grounds, including that the MMI date should be "statutory MMI," which the claimant contends is January 11, 2000; that the carrier should have requested a designated doctor; and that Dr. M's initial rating was invalid because it was based on only a follow-up exam. Section 401.011(30) defines MMI as 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;
>
> (B) the expiration of 104 weeks from the date on which income benefits to accrue; or
>
> (C) the date determined as provided by Section 408.104

The hearing officer found MMI to be June 9, 1998, with a 15% IR as defined in Section 401.011(30)(A) pursuant to Dr. M's initial certification. Although the claimant asserts that he disputed that rating, neither the Dispute Resolution Information System notes nor any other documentation supports the claimant's contention that he disputed the MMI date and IR prior to June 2001. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g)) related to SIBs also provides:

> If there is no pending dispute regarding the date of [MMI] or the [IR] prior to the expiration of the first quarter, the date of [MMI] and [IR] shall be final and binding.

We conclude that the hearing officer's determinations on MMI and the IR are supported by the evidence.

RELIEF FROM THE EFFECTS OF THE COMMUTATION OF IIBS

The testimony and evidence surrounding the claimant's request to commute IIBs, and whether he in fact had signed the Employee's Election for Commuted (Lump Sum)

[IIBs] (TWCC-51), were hotly disputed. The hearing officer commented that the claimant's testimony regarding why he requested the TWCC-51 "completely lack any credibility" but noted that there was a "strictly legal qualification" to be considered. The hearing officer, in the Statement of the Evidence, discusses how he found that the claimant returned to work, after his first surgery, on May 18, 1998. The hearing officer further found that the claimant's TWCC-51 "was signed and approved by the carrier on August 14, 1998." Section 408.128(a) and Rule 147.10(a) (which closely tracks the language of Section 408.128(a)) provide;

> (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. (Emphasis added).

The hearing officer, citing Texas Workers' Compensation Commission Appeal No. 941627, decided January 18, 1995, commented that the "date of the Claimant's election is clearly, on the face of the document, less than three months after the Claimant returned to work." We agree. *See also* Texas Workers' Compensation Commission Appeal No. 991241, decided July 23, 1999.

The carrier on this point argues that there is no "good cause" exception to Section 408.128(a) and Rule 147.10(a). We agree. However poorly worded the issue was, the hearing officer correctly interpreted the statute and rule. The carrier further argues that there is nothing in either the Labor Code or Commission rules "that voids an election that is approved by the Carrier." However, we would note, as did the hearing officer, that based on the facts as found by the hearing officer, the claimant was not legally qualified to commute IIBs because he had not returned to work "for at least 3 months." The carrier further argues that the claimant's testimony was that he worked 92 or 96 days before notification of approval by the Carrier was sent. That, however, was a factual determination for the hearing officer to resolve.

DISABILITY

The hearing officer's determinations that the claimant was either working or had been paid his preinjury wage or had been paid temporary income benefits for the disputed periods of time is sufficiently supported by the evidence.

After review of the record before us and the complained-of determinations, we have concluded that there is sufficient legal and factual support for the hearing officer's decision and that the decision is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Accordingly the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **UNITED STATES FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

PAUL DAVID EDGE
6404 INTERNATIONAL PARKWAY, SUITE 1000
PLANO, TEXAS 75093.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Chris Cowan
Appeals Judge