

APPEAL NO. 042062
FILED OCTOBER 4, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 3, 2004. The hearing officer determined that the appellant's (claimant) impairment rating (IR) was 6% and that the respondent (self-insured) was relieved of liability for income benefits pursuant to Section 408.128 of the 1989 Act. The claimant appealed the determinations on the grounds that the IR did not properly rate his injury because his right wrist had not required treatment until after his impairment income benefits (IIBs) had been commuted. He also argues that he did not understand the consequences of commuting his IIBs. There is no response from the self-insured in the file.

DECISION

Affirmed.

The claimant, a worker for the (employer), testified that he sustained a repetitive trauma injury to his left wrist on _____, as a consequence of working with equipment such as sledge hammers over some period of time. An EMG dated November 19, 2002, found bilateral carpal tunnel syndrome, with worse symptoms on his left hand. The claimant testified that he is right-handed. On February 26, 2003, the claimant had surgery in the form of a modified endoscopic left carpal tunnel release. The claimant's treating doctor found him at maximum medical improvement on July 28, 2003, and rated his IR at 6% whole body in light of his left carpal tunnel surgery. On August 21, 2003, the claimant signed an Employee's Election for Commuted (Lump Sum) [IIBs] (TWCC-51), electing to commute his impairment benefits. On October 20, 2003, the claimant presented to his treating doctor with increasing problems to his right upper extremity. On December 24, 2003, the claimant had surgery in the form of modified endoscopic right carpal tunnel release. In March, 2004, the claimant requested that his IR be modified in light of his right hand surgery. His request was denied on the grounds that he was ineligible for further impairment benefits pursuant to Section 408.128 because he commuted his benefits. The claimant argues that he was not made aware of the full implications of his election. The hearing officer concluded that there was no provision in the 1989 Act or the Texas Workers' Compensation Commission rules that would allow rescission of his election.

Section 408.128 of the 1989 Act provides that an employee who elects to commute IIBs is not entitled to additional income benefits for the compensable injury. In the instant case, the claimant testified that the right carpal tunnel symptoms were accepted by the employer as part of the original injury. There was no testimony that he was pressured into commuting his benefits or prevented from filing a separate claim for his right carpal tunnel syndrome. Indeed, mild symptoms had been diagnosed as part of the original injury. We have previously held in Texas Workers' Compensation

Commission Appeal No. 970102, decided March 4, 1997, that the claimant had the burden to prove that he was not bound by his TWCC-51 agreement with the carrier and this issue, as well as the issue of his correct IR, was one of fact for the hearing officer who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and who as the trier of fact is to resolve the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). In Texas Workers' Compensation Commission Appeal No. 951549, decided November 1, 1995, the Appeals Panel affirmed the hearing officer's determination that the employee was not entitled to supplemental income benefits because he had commuted his IIBs. In that decision, the Appeals Panel stated as follows:

it would constitute a burden not otherwise required by statute or rule to hold that a carrier is not entitled to rely upon the plain and unambiguous representations of a claimant who has been fully warned in the signed form, but instead must go behind the document to determine whether the representations contained therein were indeed correct. We caution that that 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

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**EXECUTIVE DIRECTOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Thomas A. Knapp
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge