APPEAL NO. 162431
FILED JANUARY 20, 2017

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 January 13, 2016, with the record closing on November 1, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent's (claimant) commutation of impairment income benefits (IIBs) on August 5, 2011, is not valid or final; (2) the claimant had disability from July 9, 2011, through January 13, 2016, the date of the CCH; (3) the claimant reached maximum medical improvement (MMI) on June 13, 2013; and (4) the claimant's impairment rating (IR) is 10%.

The appellant (carrier) appealed, contending that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be manifestly unjust, and that the hearing officer failed to properly apply the law to the facts of the case. The claimant responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed in part; reversed and rendered in part; and reversed and remanded in part.

The parties stipulated in part to the following at the CCH: the claimant sustained a compensable injury on (date of injury), to include at least a lumbar strain/sprain, thoracic sprain/strain, disc bulge at T11-12, and Schmorl's Node at T11; (Dr. G), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) examined the claimant on June 30, 2011, and certified that the claimant reached MMI on June 30, 2011, with a 5% IR for a lumbar sprain/strain and a thoracic sprain/strain; the claimant requested commutation of his IIBs and the request was in writing on an Employee's Election for Commuted (Lump Sum) [IIBs] (DWC-51); the claimant's pre-injury average weekly wage (AWW) is $486.92; and the claimant's eighth day of partial disability was June 8, 2011.

The claimant testified he was injured when he lifted a heavy claw-foot bathtub at work on (date of injury). As noted above, Dr. G, the designated doctor, examined the claimant on June 30, 2011, and certified that the claimant reached MMI on that date with a 5% IR based on lumbar and thoracic sprains/strains. The claimant signed the DWC-51 on August 1, 2011, requesting commutation of his IIBs, and the carrier approved the claimant's DWC-51 on August 5, 2011. In evidence is an Agreed Judgment signed by the parties on March 13, 2015, in which the parties agreed that the

claimant's (date of injury), compensable injury extends to disc bulge at T11-12 and Schmorl's node at T11.

COMMUTATION OF IIBs

Section 408.128 provides the following:

(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% of the employee's [AWW].

(b) An employee who elects to commute [IIBs] is not entitled to additional income benefits for the compensable injury.

28 TEX. ADMIN. CODE § 147.10 (Rule 147.10) provides the following:

(a) An employee may elect to commute [IIBs] when the employee has returned to work for at least three months, earning at least 80% of the employee's [AWW].

(b) A request to commute must:

(1) be in writing on a [Division]-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 [Division] field office managing the claim.

(c) The [Division]-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 [Division] 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]. A notice of denial shall include the carrier's reasons for denial. A copy of the notice shall be filed with the [Division] field office managing the claim.

(f) If the carrier denies the request, the employee may request the [Division] to schedule a benefit review conference (BRC) to resolve the issue, as provided by §141.1 of this title (relating to Requesting and Setting a [BRC]).

We hold that in this case the DWC-51 on its face was sufficient to meet the statutory requirements to commute IIBs under Section 408.128. Therefore, the hearing officer's determination that the claimant's commutation of IIBs on August 5, 2011, is not valid or final is legal error. Accordingly, we reverse the hearing officer's determination that the claimant's commutation of IIBs on August 5, 2011, is not valid or final, and we render a new decision that the claimant's commutation of IIBs on August 5, 2011, is valid and final.

The claimant's DWC-51 in evidence shows that the claimant filled out the blanks for the MMI date (although as noted by the hearing officer this date is difficult to read), the IR, the rating doctor's name, that neither he nor the carrier disputed the IR, and the weekly IIBs amount as being $340.84. The claimant also stated that he had "no lost time" in the date returned to work blank, and checked the box stating that he had returned to work for at least three months. However, the claimant left the "present rate of pay" blank.

The hearing officer noted in her Discussion that the claimant testified he initially returned to work at his regular pay rate of $15.00 per hour, and that his hourly wage rate was reduced by $3.00 beginning on June 6, 2011. The hearing officer stated that "[a]ssuming that [the] [c]laimant continued to work as many hours post injury as he did pre-injury, then he would still be earning 80% of his AWW," and that his post-injury earnings were well above the 80% threshold to be eligible for commutation of IIBs. The hearing officer also noted that the claimant testified he earned no wages after his job was terminated, and that "[a]ssuming [the] [c]laimant returned to work on March 16, 2011, after his (date of injury), injury, he worked earning at least 80% of his AWW, until July 8, 2011[1], a period greater than three months," and that he had not been working for approximately 23 days before filing the DWC-51.

The hearing officer noted that while Rule 147.10 does not specifically require the date of return to work and the present rate of pay be included on the DWC-51, Rule 147.10 does require that an injured worker must have returned to work for at least three months earning at least 80% of his or her AWW, and that if the information requested by the DWC-51 is not included, a determination cannot be made whether or not an injured worker is eligible to commute IIBs. The hearing officer also noted that the Appeals Panel has instructed that a carrier does not need to go behind the document to determine whether the representations made by the claimant are accurate or whether

[1] We note the hearing officer inadvertently stated a date of 2016 rather than the correct date of 2011.

the claimant had any inconsistent intentions; however, the hearing officer stated that "on the face of the DWC-51, [the] [c]arrier did not have enough information to determine whether [the] [c]laimant was legally qualified to commute IIBs." The hearing officer cited Appeals Panel Decision (APD) 991241, decided July 23, 1999, in support of her determination that the claimant's commutation of IIBs on August 5, 2011, is not valid or final.

In APD 991241, *supra*, the claimant testified that she wanted to sell Avon and had obtained a sales bag, but had earned no money since her injury. The claimant also testified she told her attorney she had not returned to work and that her attorney told her she did not have to return to work to receive a lump sum payment. The claimant obtained a DWC-51 and signed only her name to the blank form and returned it to her attorney. The claimant's attorney completed the DWC-51, and the carrier approved it. The DWC-51 did not contain an MMI date, did not indicate whether the IR was disputed, did not indicate the present rate of pay, but underneath the blank for rate of pay stated that "% varies by sales." The hearing officer determined that the claimant's commutation of IIBs was not valid and final. The Appeals Panel affirmed, noting that the key elements of the DWC-51 are the IR and whether the claimant has returned to work for at least three months earning at least 80% of the pre-injury AWW because those are the statutory criteria for commutation of IIBs. The Appeals Panel noted that while the DWC-51 indicated that the claimant returned to work for at least three months, the "present rate of pay" was blank, the form stated "% varies by sales" and the box "weekly" was checked. The Appeals Panel stated that in that case the information contained on the DWC-51 was insufficient to convey that the claimant was making at least 80% of her pre-injury AWW.

The hearing officer in the case on appeal stated in her Discussion that:

> In the case at bar, as in APD 991241, without the present rate of pay, [the] [c]arrier did not have sufficient information on the DWC-51[2] to determine whether [the] [c]laimant was making 80% of his pre-injury [AWW]. It is determined that [the] [c]laimant's election to receive a lump sum of IIBs was not made in accordance with the requirements of Section 408.128 and Rule 147.10, and is not valid or final.

Unlike the facts in APD 991241, *supra*, the evidence in the case on appeal established that the claimant had returned to work for at least three months earning at least 80% of the AWW. The claimant testified that he had returned to work on March 16, 2011, the day after his injury, and worked the same hours (40 per week) with the same rate of pay ($15.00 per hour) as he did before the injury. The evidence

[2] We note that the hearing officer inadvertently identified the form as a DWC-52.

established that the employer offered the claimant a modified duty position on June 3, 2011, in which he worked the same number of hours at $12.00 per hour. The claimant testified that he no longer worked for the employer after July 8, 2011, due to his injury.

We have held that in this case, the DWC-51 on its face was sufficient to meet the statutory requirements to commute IIBs under Section 408.128. For the above-discussed reasons, the case on appeal is distinguishable from APD 991241, *supra*.

MMI/IR

The hearing officer determined that the claimant reached MMI on June 13, 2013, with a 10% IR as certified by (Dr. M), the subsequently-appointed designated doctor.

Dr. M examined the claimant on April 25, 2016, in response to a Presiding Officer Directive from the hearing officer on the issues of MMI and IR. Dr. M certified that the claimant reached MMI statutorily on June 5, 2013, with a 10% IR based on the accepted conditions of lumbar and thoracic sprains/strains, disc bulge at T11-12, and Schmorl's node at T11.

After some discussion the parties at the CCH stipulated that the statutory date of MMI is June 5, 2013. However, in evidence are emails from the hearing officer to the parties in which the hearing officer noted that the parties stipulated the date of statutory MMI is June 13, 2013, and that the correct statutory MMI date based on the dates of disability should be June 5, 2013. The hearing officer requested the parties to stipulate that the statutory date of MMI is June 5, 2013; however, the carrier declined to so stipulate. The hearing officer sent Dr. M a letter of clarification notifying him that the statutory date of MMI is June 13, 2013. Dr. M amended his MMI/IR certification to state that the claimant reached MMI statutorily on June 13, 2013, with a 10% IR. The hearing officer stated in the decision and order that the parties stipulated the statutory date of MMI is June 13, 2013, and determined that the claimant reached MMI on June 13, 2013, with a 10% IR as certified by Dr. M.

The hearing officer incorrectly stated the parties stipulated that the statutory date of MMI is June 13, 2013, and the hearing officer did not make any findings of fact regarding the statutory date of MMI. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on June 13, 2013, with a 10% IR, and we remand this case to the hearing officer to clarify the parties' stipulation regarding the statutory date of MMI or to make a finding of fact on the correct statutory date of MMI.

DISABILITY

We affirm the hearing officer's determination that the claimant had disability from July 9, 2011, through January 13, 2016, the date of the CCH. However, given that we have reversed the hearing officer's determination that the claimant's commutation of IIBs on August 5, 2011, is not valid or final and have rendered a new decision that the claimant's commutation of IIBs on August 5, 2011, is valid and final, the claimant is not entitled to additional income benefits for the compensable injury. *See* Section 408.128(b).

SUMMARY

We affirm the hearing officer's determination that the claimant had disability from July 9, 2011, through January 13, 2016, the date of the CCH.

We reverse the hearing officer's determination that the claimant's commutation of IIBs on August 5, 2011, is not valid or final, and we render a new decision that the claimant's commutation of IIBs on August 5, 2011, is valid and final.

We reverse the hearing officer's determination that the claimant reached MMI on June 13, 2013, and we remand the issue of MMI to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is 10%, and we remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. M is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed.

The hearing officer is to ask the parties to stipulate to the statutory date of MMI or make a finding regarding the statutory date of MMI. If the stipulated or found statutory date of MMI differs from the dates in evidence, the hearing officer is to notify the designated doctor of the date of statutory MMI. The hearing officer is to inform the designated doctor that the compensable injury extends to lumbar and thoracic sprains/strains, disc bulge at T11-12, and Schmorl's node at T11. The hearing officer is to request the designated doctor give an opinion on the claimant's MMI, which can be no later than the statutory date of MMI (Section 401.011(30)), and IR by rating the entire compensable injury as of the date of MMI in accordance with the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing,

including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's MMI/IR certification, if any. The hearing officer is to make a determination on MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

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

RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

____
Carisa Space-Beam
Appeals Judge

CONCUR:

____
K. Eugene Kraft
Appeals Judge

____
Margaret L. Turner
Appeals Judge