APPEAL NO. 950167

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on January 5, 1995, (hearing officer) presiding as hearing officer. He determined that the claimant has not reached maximum medical improvement (MMI), any impairment rating (IR) is premature and in violation of the Act and Rules, and that the appellant (claimant) is not entitled to additional income benefits since she commuted her impairment income benefits (IIBS). The claimant appeals asking that the appeals panel review the case and, in essence, urges that she was mislead in requesting her IIBS be paid in a lump sum and that she should not be bound by it. The respondent (carrier) urges that the evidence and law supports the hearing officer's determination that the claimant was not entitled to further income benefits.

DECISION

The decision is affirmed.

We address only the issue that this is appealed, that is, whether the claimant commuted her IIBS and is not entitled to additional income benefits. The claimant sustained a compensable back injury on (date of injury), lifting some cans from a conveyor belt. She underwent a course of conservative treatment desiring to avoid surgery. She testified that she was off work from (date of injury) to (date). She further testified that she returned to work until August 19, 1993 and then was off until January 3, 1994, when she was released to work. She continued to work until September 6, 1994, when her back was worse and she asserts she was not able to work. In any event, her treating doctor, (Dr. G) certified that she had reached MMI on December 14, 1993, and assessed an IR of 22%. There was no evidence that either party disputed the MMI; however, the carrier disputed the IR. A designated doctor, (Dr. L), was ultimately selected by the Commission to render an IR on the claimant. Dr. L examined the claimant on February 22, 1994, and in a report dated March 11, 1994, certified that the claimant's IR was 13%. The carrier apparently began to pay weekly IIBS after the claimant returned to work and the claimant called the carrier to inquire why she was getting checks after she had gone back to work. According to the claimant, the insurance adjuster explained that she would get three weeks of IIBS for each percentage point of the IR, and that it could be paid in a lump sum but that the claimant would have to go through the Commission for a form. The claimant stated that she told the adjuster she might have to have surgery in the future and that she, the claimant, misunderstood the adjuster or was mislead by the adjuster and believed that signing for a lump sum would not affect any future benefits, including income benefits. In any event, the claimant contacted the Commission and requested a form for a lump sum payment. The claimant filled out the form, Employee's Election for Commuted (Lump Sum) Impairment Income Benefits (TWCC-51), dated and signed on April 6, 1994, and was subsequently approved for a lump sum payment of $6,380.00. The Form 51 explains the effect of a lump sum payment, contains a specific warning section, and in bold, all capital letter type sets out:

IF YOU TAKE A LUMP SUM PAYMENT OF YOUR IMPAIRMENT INCOME BENEFITS, YOU WILL NOT BE ABLE TO COLLECT SUPPLEMENTAL INCOME BENEFITS OR ANY ADDITIONAL INCOME BENEFITS FOR THE INJURY. Medical benefits related to this injury will not be affected if you receive a lump sum.

As stated, the claimant continued to work until September 6, 1994, when she states her back was worse to the point of not being able to work. She stated she saw her doctor intermittently during the period from January to September 1994. In December, 1994 Dr. G recommended surgery and a second opinion doctor concurred on December 20, 1994. Dr. G, in a note dated "12-5-94" apparently amending his earlier December 1993 certification of MMI, stated:

I have been asked to dictate a statement concerning this patient. MMI has not been reached due to pending surgery. As a result of surgery, her impairment rating will change, The degree is undetermined at this time.

Although the thrust of the claimant's position seems to be that she was mislead by the carrier's adjuster and told that her income benefits would not be affected by a lump sum payment, it is apparent that the hearing officer was not so persuaded, particularly in view of the fact the claimant initiated the request for a lump sum, contacted the Commission to obtain the necessary form, and the form contained clear, highlighted, and unambiguous language and a warning section. We cannot find his determination that the claimant commuted her IIBS and is not entitled to additional income benefits to be so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). To the contrary, there is sufficient evidence to support his decision. Further, we find this case to be markedly analogous to our decision in Texas Workers' Compensation Commission Appeal No. 93894, decided November 17, 1993.

In Appeal No. 93894, the claimant sustained a back injury, was under conservative treatment although the distinct possibility of surgery in the future was known, he was certified as having reached MMI with an IR, he initiated and elected to obtain a lump sum for IIBS and similarly signed a form as in this case, subsequently did have surgery, and claimed he did not understand what the results would be from signing for a lump sum payment for IIBS. The hearing officer in that case similarly determined that MMI had not been reached and that an IR was premature (up to the time of the hearing) but that he was bound by the lump sum payment request and not entitled to any additional income benefits for the compensable injury. In that case we stated:

Section 408.128(b) specifically provides that an employee who elects to commute IIBS is not entitled to additional income benefits for the compensable injury. Consequently, despite the fact that the designated doctor subsequently found that the claimant had not reached MMI, the claimant, by electing to

> commute IIBS based on the impairment rating assigned by Dr. M, waived any entitlement to additional income benefits under the particular facts of this case. The evidence demonstrates that at the time the claimant elected to commute IIBS he knew that Dr. M's certification of MMI and eight percent impairment rating were subject to the need for surgery. . . . Despite his awareness of facts tending to show that he had not reached MMI, the claimant nevertheless contacted the carrier and requested lump sum payment of IIBS based on Dr. M's certification of MMI and eight percent impairment rating thereby indicating that he did not dispute Dr. M's report and in essence giving every appearance of having agreed that he was entitled to IIBS based on the finding of Dr. M. The form the claimant filled out to request IIBS warned him of the consequences of his election. We decline to hold, under the particular circumstances presented, that there is no basis for entitlement to IIBS at the time the claimant elected to commute IIBS.

Concluding that Appeal 93894, *supra*, is dispositive of the case before us now, we affirm the decision and order of the hearing officer.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge