APPEAL NO. 080469-s
FILED MAY 29, 2008

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 February 25, 2008. The issues before the hearing officer were: (1) whether the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from Dr. D on July 10, 2006, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) whether the respondent (claimant) is entitled to be relieved from the effects of the Employee's Election for Commuted (Lump Sum) Impairment Income Benefits (IIBs) (DWC-51); (3) whether the compensable injury of _____, extends to and includes post-traumatic brain injury; and (4) whether the appellant (carrier) waived the right to contest compensability of a traumatic brain injury by not timely contesting the diagnosis in accordance with Sections 409.021 and 409.022.

The hearing officer determined that: (1) the first certification of MMI and assigned IR from Dr. D on July 10, 2006, did not become final under Section 408.123 and Rule 130.12; (2) the claimant is entitled to be relieved from the effects of the DWC-51 signed on October 11, 2006; (3) the compensable injury on _____, extends to and includes post-traumatic brain injury; and (4) the carrier has not waived the right to contest compensability of traumatic brain injury by not timely contesting the diagnosis in accordance with Sections 409.021 and 409.022.

The carrier appealed the hearing officer's adverse determinations on the issues of the finality of the first certification of MMI and assigned IR, relief from the effects of the DWC-51, and extent of injury. The claimant responded, urging affirmance. The hearing officer's determination on the issue of carrier waiver was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

FACTUAL BACKGROUND

The parties stipulated that the claimant sustained a compensable injury on _____. It was undisputed that the claimant was seriously injured when a 4,800 pound, 8 x 20 foot steel shaker deck struck him, throwing him over a pipe. The claimant was careflighted to a hospital. The evidence indicates the hospital noted a head wound with possible loss of consciousness as well as a ruptured spleen and arterial kidney damage. The claimant underwent a splenectomy and removal of his left kidney. The hospital records noted that the claimant had "Possible TBI," which the hearing officer read as traumatic brain injury. The primary emergency room diagnosis was "Traumatic Brain Injury – Rule Out." A CT scan of the claimant's head done on the date of injury

noted no acute traumatic injury. At discharge, there was a diagnosis code for "unspecified open wound of head, uncomplicated." It is undisputed that the claimant returned to work at his previous job on March 20, 2006. On July 10, 2006, Dr. D, the treating doctor, certified that the claimant reached MMI on that date with an 11% IR (with 10% IR assessed due to the nephrectomy and 1% due to the lateral femoral cutaneous nerve sensory dysfunction). It is undisputed that on October 11, 2006, the date that the claimant signed the DWC-51, he had returned to work at his preinjury wage for more than three months. Furthermore, the carrier signed and approved the DWC-51 on October 13, 2006. The evidence indicates that at the time Dr. D certified MMI and assigned an IR and at the time the claimant signed the DWC-51, the claimant had not yet been diagnosed with post-traumatic brain injury. The claimant received a check for his lump sum payment from the carrier. Thereafter, in April 2007, Dr. D diagnosed the claimant with a traumatic brain injury and reported that the claimant was not at MMI. In February 2008, the designated doctor appointed to determine the extent of the compensable injury diagnosed a concussion of the brain.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury extends to and includes a post-traumatic brain injury is supported by sufficient evidence and is affirmed.

FINALITY UNDER SECTION 408.123

The hearing officer made a finding that the Report of Medical Evaluation (DWC-69) reflecting Dr. D's first certification of MMI and assigned IR on July 10, 2006, "was not shown to have been delivered to Claimant by verifiable means at any time." However, in evidence are the claimant's sworn answers to interrogatories, in which the claimant was asked when he "received [Dr. D's] certification of [MMI] and [IR]," to which the claimant answered, "to the best of my knowledge July 10[,] 2006." In Appeals Panel Decision (APD) 041985-s, decided September 28, 2004, the Appeals Panel noted that the preamble to Rule 130.12 stated that written notice is verifiable when it is provided from any source in a manner that reasonably confirms delivery to the party, and that this may include acknowledged receipt by the injured employee or insurance carrier . . . ." *See also* APD 080301-s, decided April 16, 2008, regarding acknowledged receipt by an insurance carrier. We hold that a sworn answer to an interrogatory, acknowledging receipt of the first valid certification of MMI and assigned IR, constitutes delivery by verifiable means. The hearing officer's finding that the "first certification of [MMI] and assigned [IR] on July 10, 2006, was not shown to have been delivered to Claimant by verifiable means at any time" is not supported by the evidence. However, the hearing officer's implied finding that compelling medical evidence existed of a clearly mistaken diagnosis or a previously undiagnosed medical condition (*see* Section 408.123(f)(1)(B)) and the determination that the first certification of MMI and assigned IR from Dr. D on July 10, 2006, did not become final under Section 408.123 and Rule 130.12 are supported by sufficient evidence and are affirmed.

RELIEF FROM THE EFFECTS OF THE COMMUTATION OF IIBS

An employee's election to receive a lump sum of IIBs is final and binding if it is properly made in accordance with the requirements of Section 408.128 and Rule 147.10. APD 992541, decided December 29, 1999. Section 408.128(a) provides that "[a]n 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 percent of the employee's average weekly wage [AWW]." Subsection (b) further provides that an employee who elects to commute IIBs "is not entitled to additional income benefits for the compensable injury." Rule 147.10, in addition to requiring that the employee has returned to work for at least three months, earning at least 80% of his AWW in order to elect to commute IIBs, provides:

(b) A request to commute must:

(1) be in writing on a commission-[now Texas Department of Insurance, Division of Workers' Compensation (Division)] prescribed form [DWC-51];

(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]).

It is undisputed that the claimant had been at work for over three months at his preinjury wage when he signed the DWC-51. The DWC-51 contained, in bold print, the consequences of requesting a commutation of IIBs and the warning that commutation of IIBs terminates the employee's entitlement to supplemental income benefits or any additional income benefits for the injury. The DWC-51 also noted the weekly IIBs amount, the MMI date of July 10, 2006, the IR of 11%, a notation that the IR had not been disputed by the claimant or the carrier, when the claimant had returned to work, which was more than three months before the date the claimant signed the DWC-51 and the claimant's pay rate. The claimant seeks to avoid the consequences of his election to commute IIBs by testifying that he did not really understand what he was signing or the effects of the document. However, in APD 992541, *supra*, the claimant sought to avoid the commutation of IIBs because she had not made a "knowing and voluntary election" due to a mentally fragile condition and a drug dependency problem. The claimant, in that case, also alleged there was a discrepancy on the DWC-51 as to whether or not there was a dispute of the IR. The Appeals Panel, in affirming the hearing officer's decision that the claimant was not able to avoid the election to commute IIBs, held that the Appeals Panel would not require a carrier to go behind the DWC-51 to determine whether the representations are accurate and whether the claimant has any inconsistent intentions, absent fraud by the carrier. There was no finding in that case, or in the case before us, that the claimant lacked the mental ability to sign a legal document. We have previously stated that the failure of a claimant to make a "clear and informed choice" is not a basis for invalidating a commutation of IIBs. APD 94207, decided April 6, 1994.

The claimant, in the case before us, also sought to avoid his election to commute IIBs by arguing at the CCH that the DWC-51 is null and void because it was not filed with the Division field office managing the claim as required by Rule 147.10. However, in his response, the claimant states "the form itself was not filed for at least seven months after [claimant's] signature was secured." No evidence was presented at the CCH that the completed DWC-51 had been filed with the Division field office managing the claim after the DWC-51 was approved by the carrier on October 13, 2006. In APD 970940, decided July 3, 1997, the claimant sought to avoid the effects of commutation of IIBs by contending that the filing requirements of Rule 147.10 were not met. The Appeals Panel held that there is no time period for the carrier to file the completed DWC-51 with the field office, only that the form be filed. In this case the carrier, in closing argument, commented that it believed that the DWC-51 had been filed with the Division on May 9, 2007. Our review of the Division's Dispute Resolution Information System (DRIS) indicates that a note dated June 1, 2007, states, "received faxed copy of DWC-51 in (City 1) office [the field office managing the claim] on 6-1-07—employee's election for commuted lump sum payment shows it was approved on 10-13-06." Another DRIS note dated June 4, 2007, states that "carrier states there is no time limit to file the D-51 and it was rec'd on 5/9/07 & again today at BRC." While neither party requested the hearing officer to take official notice of whether the DWC-51 had been filed with the Division field office managing the claim, we note that the Appeals Panel has "required that a hearing officer take official notice of essential [Division] records where compliance with the 1989 Act is at issue." APD 032619-s, decided November

13, 2003; APD 031441, decided July 23, 2003; and APD 031458, decided July 23, 2003. We note that at the CCH, regarding another matter, the hearing officer commented that he was "required to take official notice of our [Division] records." We hold that the hearing officer should have inquired and taken official notice of the DRIS notes which would have supported the carrier's assertions of the filing of the DWC-51 with the Division field office.

There is no allegation by the claimant of fraud, misrepresentation, or misinformation on the part of the carrier.[1] Rather, the hearing officer, in the case before us, finds that both parties were mutually mistaken as to the facts at the time of the signing of the DWC-51, to-wit: no definitive symptoms nor diagnosis of traumatic brain injury. However, a mistake of this nature has not been held to relieve a legally qualified, injured employee of the effects of a completed election for commutation of IIBs. In APD 961110, decided July 22, 1996, the claimant argued that there was good cause to set aside the commutation because at the time he signed, the doctors did not know that his injury would include a claimed extent of injury or that the accepted condition would result in a higher IR. The Appeals Panel held, in that case, that the safeguards provided by Rule 147.10 had been complied with, affording the claimant protection against commuting imprudently. *See also* APD 93894, decided November 17, 1993, in which the Appeals Panel noted that despite the injured employee's awareness of facts tending to show that he had not yet reached MMI, the claimant initiated the request for a lump sum of IIBs based on a certification of MMI and IR and the form contained the appropriate warning of the consequences of his election. The Appeals Panel in that decision held that the form the claimant filled out to request commutation of IIBs warned of the consequences of his election and that the claimant was not entitled to additional income benefits for the compensable injury. In APD 023166, decided January 30, 2003, the Appeals Panel has held there is no "good cause" exception to Section 408.128(a) and Rule 147.10(a), however, in that case the claimant was found not to be legally qualified to elect to commute IIBs because he had not returned to work for at least three months earning at least 80% of his AWW. There is no authority for the claimant's argument that the good cause exception to set aside a BRC agreement is applicable to an employee's election to commute IIBs.

Accordingly, we reverse the hearing officer's determination that the claimant is entitled to be relieved from the effects of the commutation of IIBs signed on October 11, 2006, and we render a new decision that the claimant is not entitled to be relieved from the effects of the commutation of IIBs signed on October 11, 2006.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of _____, extends to and includes post-traumatic brain injury and the determination that the first certification of MMI and assigned IR from Dr. D on July 10, 2006, did not become final under Section 408.123 and Rule 130.12. We reverse the

[1] *See* APD 042062, decided October 4, 2004, in which the Appeals Panel cautions that fraud may be a ground to avoid an election to commute IIBs.

hearing officer's determination that the claimant is entitled to be relieved from the effects of the commutation of IIBs signed on October 11, 2006, and render a new decision that the claimant is not entitled to be relieved from the effects of the commutation of IIBs signed on October 11, 2006.

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

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251-2237.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge