APPEAL NO. 92426

A contested case hearing was convened on June 11, 1992, in (city), Texas, before (hearing officer). The hearing was continued until July 17, 1992, because the insurance carrier (appellant herein) had not received notice of the earlier hearing date.

A benefit review conference (BRC) had been held on March 16, 1992, on which date the parties executed an agreement, signed by the benefit review officer (BRO), resolving two disputed issues. Subsequently, but on the same date, the claimant (respondent herein) asked to withdraw from the agreement, stating that the amount the parties had agreed to as the average weekly wage was incorrect. A second BRC on April 20, 1992, did not resolve the parties' dispute. At the contested case hearing the appellant claimed that the issue contained in the BRO's report, "[s]hould the claimant's average weekly wage be higher than the $240.00 agreed upon at a prior benefit review conference," did not reflect the correct issues. The hearing officer's decision reflects that she restated the issues as follows: (1) should the agreement of the parties executed on March 16, 1992, which establishes the claimant's average weekly wage to be $240.00, be set aside; and (2) should the claimant's average weekly wage be greater than $240.00.

The hearing officer held that the preponderance of the evidence establishes that the average weekly wage established in the benefit review conference agreement ($240.00) was incorrect, and the correct wage should be $282.40. The hearing officer also held that the respondent had good cause to request the rescission of the agreement. The hearing officer accordingly ordered the agreement below reformed to reflect the higher average weekly wage, and ordered that the appellant pay accrued income benefits to the respondent in accordance with the decision and order and the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

In its request for review, the appellant contends that the issue was not reframed into two issues at the hearing, and that no issue was raised as to whether or not the respondent's average weekly wage was greater than $240.00. For that reason, appellant contends that the issue of average weekly wage was not properly before the hearing officer, and thus disputes certain of the findings of fact and conclusions of law relative to this issue. Appellant also disputes certain findings of fact as being based upon evidence that was before the BRO and all the parties, and was used by those persons in coming up with the March 16, 1992, agreement. It contends that respondent failed to establish, by preponderance of the credible evidence, that good cause exists for the revocation of the agreement, and it asks this panel to consider the doctrine of equitable estoppel. No response was filed to the request for review.

DECISION

We affirm the decision and order of the hearing officer.

Respondent had worked for (employer) for 3½ to 4 days when he was injured on

(date of injury). A BRC held on March 16, 1992 addressed two issues: whether respondent was due temporary income benefits (TIBs) from the date of the injury, and whether appellant was entitled to a second opinion on spinal surgery. Present at that conference were respondent and his mother; (Ms. P), who worked for appellant; appellant's counsel; and the BRO. Documents under consideration at this conference included the Employer's First Report of Injury ("first report"), the Employer's Wage Statement ("wage statement"), and a document from a company (not employer) showing dates and amounts of checks allegedly paid to respondent.

The March 16, 1992 BRC resulted in an agreement resolving the two issues, which was signed by respondent, his mother, Ms. P on behalf of appellant, and the BRO (respondent testified that he had given his mother power of attorney during a 30-day period prior to the conference when he had been in jail; however, he said the power of attorney had since been revoked and his mother was merely present as a witness). The agreement stated that respondent would be paid TIBs at $180.00 (which represents 75% of AWW) for 12 weeks for the period 10/21/91 - 11/10/91 and 1/13/92 - 3/16/92 and continuing. It was further agreed that respondent's average weekly wage (AWW) was $240.00 and that as of the date of the agreement respondent would receive a lump sum amount of $2160.00, which represented the total amount of TIBs for the 12-week period. In addition, the appellant agreed to waive its right to a second opinion on spinal surgery.

Respondent testified that one hour after the benefit review conference, he wanted to rescind the agreement because he reevaluated the figures and determined "they had beat me out of" a higher amount. He stated that AWW should be higher, as he was paid $7.06 per hour for a 40-hour work week, which equaled $282.40, rather than the $240.00 shown on the first report and contained in the agreement. He said he did not know what information was used in coming up with the $240.00 AWW; he was told the employer had a report showing that amount as AWW but that he did not see it. He said he felt coerced into signing the agreement because he had gotten no income benefits since his doctor took him off work on October 21, 1991; that he was told if he did not sign the agreement, the case would go to a hearing in April, and there would be more delay in receiving the money, as the carrier had refused to start payment. He also said he was told he "could not contest the comp rate" in the agreement, and that he could not appeal. He said he contacted the Commission when he changed his mind, but that he cashed the $2160.00 check because he was told the agreement was effective immediately. He also had the spinal surgery. A second BRC was held on April 20, 1992; the failure to resolve the disputed issue at that conference resulted in the contested case hearing which is the subject of this appeal.

The first report, which was made a part of the record, reflects that respondent's hourly wage was $7.06; that the job was 8 hours per day, 5 days a week; that wages per day were $58.00; and that respondent's average weekly earnings were $240.00. Respondent testified that the correct weekly amount, based on the calculation hourly rate $\times$ hours per day $\times$ days per week, should have been $282.40. The wage statement prepared by the

employer listed only one week, May 1 to May 8, 1991, a period which included the day on which respondent was injured (date of injury). It also showed respondent working 24 hours over a four day period, for a gross pay of $169.44. It characterized respondent's status as part time. It also indicated there was no similar employee performing similar services to those of respondent, who had not worked for employer for 13 continuous weeks prior to the date of the injury.

Ms. P, who was present at the March 16th BRC, said all persons present reviewed and discussed the first report and the wage statement, although she said appellant saw the latter for the first time that day because it had been sent by the employer directly to the Commission. (She said the third document concerning payments to respondent was only used insofar as it addressed periods of respondent's disability, and that it was not used in computing AWW). She stated that everyone present was aware of and discussed the discrepancies between the two documents. In addition, Ms. P said the BRO noticed a discrepancy within the numbers on the first report, and that she said that a correct calculation of those numbers would have resulted in a weekly amount of $282.00. She said they finally agreed to give respondent the benefit of the doubt and go with the $240 contained in the first report rather than the amount ($169.44) contained in the wage statement. She said respondent agreed, and signed the agreement, stating he wanted to "get it over with." She said the atmosphere at the conference had been congenial and there was no coercion or intimidation of respondent; indeed, the BRO twice told respondent that he did not have to sign the agreement.

At the outset we will consider appellant's contention that the portion of the hearing officer's statement of facts which states that the hearing officer reframed the issue into two issues is not correct, and that no issue was raised as to whether or not respondent's AWW was greater than $240.00. The tape recording of the proceeding below contains much argument over the issue, which was stated by the BRO at the April 20, 1992 BRC as follows: should the claimant's average weekly wage be higher than the $240.00 agreed upon at a prior BRC. The 1989 Act provides that issues not raised at the BRC may not be considered at a contested case hearing except by consent of the parties or unless the Commission determines that good cause existed for not raising the issue at the earlier proceeding. Article 8308-6.31(a). The record below discloses that the appellant disagreed with the hearing officer's characterization of the issue from the BRC. Appellant stated that the issue should be whether or not good cause has been established for the revocation of the prior agreement; its position was that the issue of AWW should not be raised because of the agreement. After further discussion, the hearing officer proposed that the issue be restated into two issues: whether the March 16th agreement, which establishes AWW of $240.00, should be set aside, and whether the respondent's AWW should be greater than $240.00. The respondent refused to agree to this statement of the issues, and as a result nothing further was added to the disputed issue as stated by the BRO. This being the case, the disputed issue remained as it came from the BRC, and the issue of AWW was properly before the hearing officer. We agree that the issue as phrased by the BRO necessarily and implicitly included the issue of whether good cause existed to set aside the agreement that

established $240.00 as the AWW.

The 1989 Act clearly contemplates the early resolution of disputes at a BRC. Article 8308-6.15 says a dispute may be resolved either in whole or in part at the BRC, and that if the conference results in the resolution of issues by mutual agreement or in a settlement, the BRO shall reduce the agreement or settlement to writing. (We note that these two terms are distinct; the Act defines "agreement" as the resolution by the parties to a dispute of one or more issues regarding an injury, death, coverage, compensability, or compensation. The term "settlement" means a final resolution of all the issues in a workers' compensation claim that are permitted to be resolved under the terms of the Act. Article 8308-1.03(3), (43).) The BRO and each party or designated representative are required to sign the agreement or settlement.

The Act contains different provisions regarding the binding effect of an agreement on the different parties. An agreement signed pursuant to the Act shall be binding upon the insurance carrier through the final conclusion of all matters relating to the claim, unless the Commission or a court on a finding of fraud, newly discovered evidence, or "other good and sufficient cause," relieves the carrier of the effect of the agreement. An agreement shall be binding upon a claimant, if represented by an attorney, to the same extent as on the insurance carrier. However, if the claimant is not represented by an attorney, the Act provides that such agreement shall remain binding upon the claimant unless the Commission "for good cause shall relieve the claimant of the effect of such agreement." An agreement executed by a pro se (unrepresented) claimant also is only binding on him while the claim is pending before the Commission. Article 8308-6.15(b), (c). Clearly, the Legislature intended that a less stringent standard apply to pro se claimants who seek relief from an agreement.

We have previously held that the appropriate test for the existence of good cause is that of ordinary prudence; that is, that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances. *See* Texas Workers' Compensation Appeal No. 91009 (Docket No. redacted), decided September 4, 1991; Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948). The determination of good cause is a decision best left to the discretion of the hearing officer at the contested case hearing, and will only be set aside if that discretion has been abused. Appeal No. 91009, *supra*.

In this case, the hearing officer found that the respondent did not fully understand that the correct AWW was greater than the AWW to which he had agreed in the BRC agreement; accordingly, she concluded that the preponderance of the evidence adduced establishes that the respondent had good cause to request recision of the agreement concerning the amount of AWW. Appellant disputes this finding of fact and conclusion of law, stating that at the BRC the respondent had full knowledge of the issue of AWW, and that the greater weight of the credible evidence indicates he understood the agreement at the time of execution. Upon review of the record, we find the evidence somewhat

conflicting. Ms. P testified that all persons present reviewed and discussed the wage statement and the first report, as well as the discrepancies in the numbers within and between the documents. Respondent testified that at the BRC he discussed his wage rate and his hours, but he claimed he did not know upon what the $240.00 amount was based. While Ms. P said there was no coercion of respondent, he appears to have believed he could not contest his rate of compensation. He also stated that any disagreement on his part would cause further delay in benefits, and that he was in debt and needed the money. He testified several times that he wanted out of the agreement an hour later, and that he notified the Commission of this fact and took the necessary steps to get a hearing on the matter. Under these circumstances, we believe there is sufficient evidence to support the hearing officer's finding and conclusion, and that she has not abused her discretion.

Appellant also disagrees with Finding of Fact No. 5, which states as follows:

> The [respondent's] job with the employer required that he work eight (8) hours per day and provided him with an income of $7.06 per hour; although the [respondent] was injured before completing an entire week, had he done so he would have worked a total of five (5) days and would have earned a gross salary of $282.40 rather than $240.00, as incorrectly computed on the Employer's First Report of Injury.

Appellant claims that what the respondent would have earned was considered by the parties to the agreement, and that the evidence submitted was the same information present before the BRO and which was the basis of the March 16th agreement. Appellant also disputes Conclusion of Law Nos. 3, 4, and 5--which determine an AWW of $282.40--because it contends the issue of AWW was not properly before the Commission. Appellant also contends, without waiving its prior argument, that a finding of AWW of $282.40 is against the greater weight of the credible evidence. We have already established that the issue of AWW was properly before the hearing officer. We further find that there is sufficient evidence in the record to support the hearing officer's finding of fact and conclusions of law on this point. We will set aside a hearing officer's decision only where the evidence supporting the decision is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That clearly is not the case where, as here, the amount of AWW established by the hearing officer was the result of the correct computation of the numbers on the first report.

Appellant contends that Finding of Fact No. 7, which states that appellant never requested the employer to provide a wage statement for an employee whose status was the same or similar to the status of the respondent, is not relevant to the issue of whether respondent had good cause to revoke the prior agreement. While this finding appears superfluous, it is not inconsistent with the challenged legal conclusion in this case.

Finally, appellant argues that, as the result of the agreement, it waived its right to a

second opinion on spinal surgery, and it asks that we consider the doctrine of equitable estoppel. The agreement itself was in the record, as well as the fact of respondent's spinal surgery, and there is nothing that indicates the hearing officer did not take these circumstances into consideration when she concluded that respondent had shown good cause for rescinding the agreement.

The decision and order of the hearing officer are accordingly affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge