APPEAL NO. 92592

A contested case hearing was held in (city), Texas, on September 4, 1992, (hearing officer) presiding, to consider three disputed issues, namely, whether the parties' benefit review conference agreement (BRC agreement) may be set aside thereby relieving respondent (claimant) of its effect, whether claimant's lumbar back injury arose out of his work-related accident of (date of injury), and whether appellant (carrier) was required to controvert claimant's assertion of lumbar injury, and, if so, whether carrier did so timely. The hearing officer determined that claimant was not bound by the BRC agreement in that it was not properly executed, that claimant's lumbar back injury did arise from the (date of injury) accident, and that carrier had not waived its right to controvert claimant's assertion of a lumbar back injury. Carrier asserts error by the hearing officer in determining that the BRC agreement was not binding, and challenges the sufficiency of the evidence to support the determination that claimant's lumbar back injury arose from the (date of injury) accident. Claimant asks that we affirm the decision.

DECISION

Finding no reversible error and the evidence sufficient to support the challenged determination, we affirm the hearing officer's decision.

Claimant testified that he had worked for (employer) as a truck driver for between two and three years when, on (date of injury), the truck he was driving at about 53 miles per hour pulled to the right, went over an embankment, and turned over onto its right side. Claimant hung in the seat belt a few minutes before he was able to exit through the driver's side door. He got down off the truck and felt like he was in shock. The parties stipulated that claimant sustained an injury on (date of injury), and that carrier accepted the on-the-job accident as compensable under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The parties also agreed that employer was insured by carrier on (date of injury). We note that in the Decision and Order the hearing officer stated carrier's name as Transportation Insurance Company in both the recitation of the stipulations and in Finding of Fact No. 2, and also stated employer's name in the stipulations as (employer). In the hearing record, the parties stipulated that on (date of injury), claimant was employed by (employer) which was insured by (Insurance Company). Neither party has asserted error in this regard, however, and we will consider the stipulations as they are stated in the hearing record to have correctly identified both employer and its workers' compensation insurance carrier.

Claimant testified he first sought medical treatment on April 18, 1991 at (emergency room) where he was examined, x-rayed, and treated. His complaint was of neck and back pain since his accident and x-rays showed narrowing of the disc at the lumbosacral level. On April 24, 1991, claimant began treatment at the (Eastside) where he was seen on a regular basis by several physicians through the summer of 1992. The initial Eastside records indicate that his chief complaint was "midback pain between [his] shoulder blades," that x-rays were taken of claimant's cervical and thoracic spine, and that he was initially

diagnosed with cervical and thoracic strain/sprain. However, at claimant's follow-up visit on May 13th, the records noted claimant "still has pain from the mid-lumbar up into the neck and out to both shoulders," and on June 18th the diagnosis of lumbar spine sprain was added, with indication it had not been initially included even though claimant had pain in the upper lumbar vertebrae at the time. An Eastside letter of July 27, 1992 explained that claimant sustained painful structural damage to his spine in the accident, that both the cervical and lumbar areas were involved, but that through an oversight the first treating doctor, (Dr. G), did not list the lumbar spine in his initial report. Carrier argued that Eastside's additional diagnosis came about only after claimant slipped and fell down some stairs at home sometime in June. Claimant insisted he had complained of back pain from the lumbar area up to the cervical area from the outset, and said the incident on the stairs at home occurred when a sharp, knifelike pain from back muscle spasm hit him as he was going down the stairs. His denial that he actually fell down the stairs, however, was in conflict with his medical records. His July 23, 1991 record stated claimant had fallen again, secondary to a stabbing pain in his lumbar spine. In early September 1991 claimant's records indicated that magnetic resonance imaging (MRI) tests of his cervical and lumbar spine showed structural damage and the possibility of claimant's seeing an orthopedic surgeon was noted. In December claimant was referred to (Dr. H), an orthopedic surgeon, for evaluation, and physical therapy treatments were planned for three times a week for four weeks. (Dr. H's) diagnosis was lumbar disc injury and he obtained additional diagnostic testing in January 1992 including a myelogram which showed evidence of lumbar disorder (disc bulging) at L3-4, L4-5, and L5-S1 and disc narrowing at the lowest level.

On February 18, 1992, claimant was seen by (Dr. C) for an independent medical evaluation. (Dr. C) reviewed the various imaging tests and noted that there were at least disc bulges at L4-5 and L5-S1 which encroach upon the nerve root. In answer to the question whether it was reasonable for lumbar pain to start two months after an accident, (Dr. C) replied that the records of claimant's April 18, 1991 visit to the emergency room reflect he had lumbar spine x-rays which would indicate he was apparently complaining of low back pain at the time of the accident and "may have sustained some type of injury to the lumbar spine." In his impression, (Dr. C) stated that claimant had multiple level disc findings indicating some degenerative changes "which appear to have been aggravated by the accident in question."

Throughout the spring and summer of 1992 claimant continued to visit Eastside with complaints of pain and was prescribed medications and kept off work. One of the Eastside doctors, (Dr. S), said in his June 18, 1992 deposition that he first saw claimant on December 5, 1991, has seen claimant every three to four weeks since then, and that claimant has cervical and lumbar disc disease both from degenerative disease and from trauma. Claimant also periodically saw (Dr. H) who had been trying since January 1992 to get the carrier to authorize the discogram he felt was indicated, and who on August 24, 1992 said claimant was in that day and that he intended to inject claimant and go from there.

On May 7, 1992, a BRC was held and the benefit review officer recommended that

claimant's lower back problems were related to his (date of injury) injury. The hearing officer introduced a Texas Workers' Compensation Commission (Commission) form "interim TWCC-24 (1/91)" (BRC agreement) which stated the disputed issue as whether carrier is liable for claimant's low back injury resulting from his (date of injury) work related accident. This agreement also stated the following as the "resolution:"

carrier and claimant agree that carrier will accept liability for claimant's low back injury among other parts of the body not in dispute. Carrier agrees to pay all past and future reasonable and necessary medical treatment regarding claimant's low back injury. Claimant agrees to accept (Dr. Y) as his new treating doctor regarding this workers' comp claim. CCH to be cancelled.

The BRC agreement bore the apparent signatures of claimant and his attorney with the date "7/29/92," and carrier's attorney's signature with the date "8/2/92." Claimant introduced a letter from his attorney to the hearing officer, dated August 6, 1992, advising that on that day claimant called his attorney, instructed him to withdraw from the BRC agreement, and insisted on his right to be treated by his doctor of choice, (Dr. H).

At the outset of the hearing below, the hearing officer stated the issues as whether, under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.4 (TWCC Rule 147.4), claimant "had good and sufficient cause to set aside the [BRC] agreement signed on July 29th, 1992, and, if so, the second issue of whether the claimant's low back injury arose out of an (date of injury) on-the-job accident." A third issue added by claimant regarding whether carrier was required to specifically contest the compensability of the low back injury under Article 8308-5.21, rather than treating the matter as a medical dispute, and if so whether it timely contested the low back injury, was resolved favorably for carrier and is not an appealed issue. In identifying the issues the hearing officer iterated that as far as he was concerned the threshold issue was whether, pursuant to TWCC Rule 147.4, claimant had good cause to set aside the agreement. However, claimant at that point in the hearing contended that because the agreement was not properly executed under the 1989 Act and the TWCC Rules, it was never "finalized." Thus, argued claimant, there was never an agreement from which to withdraw and therefore no necessity existed for a good cause showing. When claimant testified, he denied that he signed the BRC agreement and disavowed the signature of his name thereupon as his. He conceded he initially agreed with his attorney about entering the agreement one day about mid-afternoon, but changed his mind that night and tried to contact his attorney the next morning. He said he had told his attorney he would probably agree to it in order to get his "lower back fixed," but then wanted to see his own doctor, called (Dr. H) afterwards, and changed his mind. Carrier argued there was a binding agreement between the parties pursuant to Article 8308-6.15(c) and TWCC Rule 147.4, that claimant failed to show fraud, newly discovered evidence, or good and sufficient cause to cancel the agreement, and that if the mere changing of a claimant's mind were to constitute good and sufficient cause to withdraw from a BRC agreement, a carrier should similarly be permitted to withdraw from such an agreement for the same reason.

After the close of the evidence, claimant argued that while "[w]e do not deny that we signed that agreement," it did not become binding because it had not been approved by the Commission's director of the division of hearings pursuant to Articles 8308-4.33 and 6.15. The applicable findings and conclusion of the hearing officer on this issue follow:

FINDINGS OF FACT

10. On July 29, 1992, the Parties to this BCCH prepared an agreement concerning the issue of the Carrier liability to the Claimant for the lumbar back injury whereby the Carrier accepted liability in exchange for the Claimant's agreement to change his choice of treating doctor from (Dr. H) to (Dr. Y).

11. The claimant did not actually sign the agreement. Instead, he gave authorization to his attorney of record to execute the document on his behalf.

CONCLUSIONS OF LAW

3. The [BRC] Agreement referenced herein was not properly executed. Therefore, the Claimant is not bound by the terms of that agreement.

In the discussion portion of his Decision and Order, the hearing officer, citing Article 8308-6.15 and TWCC Rule 147.3(b), stated that the BRC agreement was not properly executed by claimant and thus he was not bound by its terms. Carrier agrees with the above findings but asserts the hearing officer erred in the legal conclusion for the following three reasons: (1) TWCC Rule 147.3(b) was not raised by claimant as a ground for voiding the BRC agreement; (2) TWCC Rule 147.3(b) is inapplicable in the circumstances of this case because its obvious intent was to protect a claimant from being bound by an agreement which he did not authorize, or did not agree to, or did not understand, or where fraud or mistake on the part of the claimant's representative existed; and (3) claimant did not timely invoke TWCC Rule 147.3(b), thus waiving its application, and the hearing officer's post-hearing application of the rule effectively denied carrier the opportunity to address its application to this case.

Article 8308-6.15(a), which authorizes the benefit review officer (BRO) to reduce mutual agreements on disputed issues to writing, provides in part that the BRO "and each party or the designated representative of the party shall sign the agreement or settlement. (emphasis supplied)." TWCC Rules 147.3(a) and (b) provide:

(a) In addition to the parties, the employee's representative, if any, shall sign the written agreement or settlement. (Emphasis supplied.)

(b) An employee's representative shall not sign a written agreement or settlement on behalf of the employee except upon a finding of extraordinary circumstances by the director of the division of hearings.

We read TWCC Rule 147.3(a) as quite plainly requiring the signatures of both claimant and his representative on the BRC agreement. Claimant's testimony that he did not sign the agreement was unequivocal and uncontradicted, and there was no assertion that his attorney obtained a finding of extraordinary circumstances by the director of the division of hearings prior to his signing the agreement of behalf of claimant. Carrier's arguments that TWCC Rule 147.3, a rule having the force and effect of law, cannot be applied by a hearing officer unless it be first, and timely, "raised" by a party is utterly without merit. Carrier's argument that TWCC Rule 147.3(b) is inapplicable under the circumstances of this case appears to overlook TWCC Rule 147.3(a) with which it must obviously be read. Together, these rules first require that both the employee and the representative sign the agreement; but next permit the representative to sign on behalf of the employee when the director of the division of hearings has found the existence of extraordinary circumstances.

We disagree with carrier's remaining appealed issue that the evidence fails to establish that claimant sustained his burden of proving his back injury arose out of the (date of injury) accident. Our recounting above of some of the evidence demonstrates that sufficient evidence supports the hearing officer's determination of this fact issue. Carrier foots its contention largely on its estimation of claimant's lack of credibility. The hearing officer, as the trier of fact, is the sole judge not only of the relevance and materiality of the evidence, but also of the weight and credibility it is to be given. Article 8308-6.34(e). The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some discrepancies. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). We will not substitute our judgment for that of the hearing officer where, as here, the challenged conclusion is supported by sufficient evidence. The hearing officer's determination here challenged is not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge