APPEAL NO. 931051

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On October 6, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) had not reached maximum medical improvement because the settlement agreement the parties had signed, and which was approved by the Texas Workers' Compensation Commission's (Commission) Director of Hearings, should be set aside. Appellant (carrier) asserts that the 1989 Act does not provide for setting aside a settlement agreement after approval and adds that the settlement met the criteria of the 1989 Act. Claimant responded that the hearing officer acted properly. (Claimant also filed a large number of documents within the period for appeal with a cover letter asking that the carrier's appeal be dismissed and that he be paid pending the appeal; he again referred to communication to stop the settlement--as a result, claimant will be treated as cross-appealing the finding that he did not timely notify the Commission that he did not want the settlement approved.)

DECISION

We reverse and render.

As stated in the Statement of Evidence by the hearing officer, claimant injured his knee on (date of injury). He saw a number of doctors. One of the doctors who treated claimant, (Dr. S), stated on December 16, 1991, that claimant had a "lateral meniscectomy" three weeks ago. He also referred to surgery on the same knee two years previous to this. Dr. S gave claimant a 21% impairment rating at that time in 1991. Thereafter, on February 17, 1992, Dr. S stated in a narrative that maximum medical improvement (MMI) had been reached. He gave claimant a 14% rating and said he was not a candidate for more surgery.

On February 16, 1992, a Benefit Review Conference Agreement, not signed by claimant, but signed by a (Mr. F) as claimant's representative, called for (Dr. H) to be "designated and treating doctor." (Claimant at the hearing indicated displeasure with Mr. F--this document is not referred to as indicating whether Mr. F had power to sign or not, but merely to show the inception of Dr. H.) Dr. H on February 25, 1992, saw the claimant. Dr. H referred to the past surgeries of claimant and noted "minimal arthritic changes." He did refer to a partial tear in the anterior cruciate ligament, but could see no evidence of it. Dr. H stated that claimant did not need surgery; he did refer to the possibility of a 16-20% rating in reference to Dr. S, which he did not rule out in the narrative. On the TWCC form 69, however, Dr. H states that MMI was reached on February 25, 1992, with 14% impairment.

Thereafter on June 11, 1992, another benefit review conference (BRC) took place. A Benefit Dispute Settlement (Interim TWCC form 25) is dated June 11, 1992, with claimant, Mr. F, carrier, and the BRC officer signing. That settlement agreed to MMI on February 25, 1992; to 14% impairment; to Dr. H as the treating doctor; to the amount of average weekly wage; to payment of impairment income benefits (IIBS) through a certain date with a final payment amount thereafter. Above the signatures of all signees (and below the terms set

forth above) is the statement:

> A settlement shall include a statement to be signed by parties, stating that a final resolution has been reached on all issues in the claim, and shall include a written waiver by all parties of their rights to any additional commission proceeding or review, other than proceedings necessary to resolve medical benefit disputes or to enforce compliance with the terms of the written settlement. The employee's right to medical benefits . . . shall not be limited. . . .

The issues before the hearing were whether the settlement should be set aside, whether the Commission has the authority to set aside the settlement, and whether MMI has been reached.

A significant period of time was spent in the hearing by the claimant asserting, and offering evidence, of his attempt to retract the settlement prior to the Director of Hearings approving it; the carrier spent a significant period of time introducing medical documents and pointing to possible defects in claimant's assertion that an attempt was made to stop the settlement prior to approval. At no time did the claimant offer any argument or any evidence that there were in existence any prior oral or written agreements not included in the settlement signed on June 11, 1992.

The Director of Hearings signed his approval of the Interim TWCC form 25 on June 23, 1992. The hearing officer in his decision at Finding of Fact No. 11 determined that the claimant did not attempt to withdraw his acceptance of the settlement until after July 30, 1992. (Emphasis added). The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He could question whether claimant's letter contesting MMI dated June 14, 1992, which referred to a test done on July 12, 1992, was what it purported to be. He could compare the letter of June 14, 1992, to an identical one dated July 24, 1992, which also referred to the test on July 12, 1992. (Both were in evidence.) He could consider that another BRC was held on July 30, 1992, in which the only issue was whether or not physical therapy should be paid. (Carrier's Exhibit 4). The hearing officer had sufficient evidence upon which to base his Finding of Fact No. 11 that claimant did not timely attempt to withdraw his acceptance of a settlement.

The hearing officer did make Finding of Fact No. 10 which said that the agreement did not incorporate all prior oral and written agreements and did not state that a final resolution has been reached on all issues or that the parties waive their rights to subsequent proceedings other than to resolve medical disputes or enforce the settlement. As stated, the claimant never referred to any prior oral or written agreements. In addition, the carrier did not either. The settlement itself contains language as to final resolution and waiver of future acts. While such statement is poorly worded and would accomplish its purpose much better if written as an affirmance by the parties, it is sufficient to indicate the effect of signing a settlement.

Section 408.005 addresses Settlements. It provides for approval of a Settlement by

the Director of Hearings when that person is satisfied that: agreement is reflected by the parties; that it adheres to the law and policy; and is in the best interest of the claimant. A party is specifically allowed to withdraw from the settlement before it is effective. The settlement is effective when the Director of Hearings approves it. There is no provision for appeal of the action of the Director of Hearings. Section 410.029 and 410.030 mention settlement, but do not conflict with the more specific provisions of Section 408.005. The later sections also deal with agreements and provide the extent to which an agreement is binding on the carrier and claimant. While the later sections do not specify settlements in the discussion of how an agreement is binding, we note that even in an agreement, good cause must be found to relieve the claimant of the terms of the agreement.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.9(c) (Rule 147.9(c)) provides that a settlement must provide certain points, including (1) liability, (2) compensability, (3) entitlement to benefits, (4) incorporate all prior written and oral agreements between the parties, and (5) must state the final resolution and waiver provisions. The hearing officer in Finding of Fact No. 9 "inferentially" found the first three points set forth in Rule 147.9(c).

The hearing officer then went on to make Conclusion of Law No. 4 which said that the settlement should be set aside because it did not comply with Rule 147.9(c)(4) and (5). Without stating that the Appeals Panel finds authority to set aside a Settlement approval by the Director of Hearings, in this case the basis set forth by the hearing officer does not state a basis for set aside. As stated, one part of the rule cited by the hearing officer for set aside is set forth in the TWCC form 25 signed by the parties--the reference to final resolution and waiver on the form itself is not framed in the best manner but does sufficiently convey the message of the rule. The other basis for set aside is the failure to incorporate prior agreements when no prior agreements have been asserted to even exist, much less to have caused some problem or conflict with the settlement. Finding of Fact No. 10 is against the great weight and preponderance of the evidence as to its reference to final resolution and waiver. It is not against the great weight as to its reference to a lack of reference to past agreements; there is, however, no finding that there was any past agreement. As a result, Conclusion of Law No. 4 is not sufficiently supported by the findings of fact.

As stated in Texas Workers' Compensation Commission Appeal No. 93902, decided November 19, 1993, in reference to an agreement between the parties, not a settlement, "the hearing officer is not required to give presumptive weight to a designated doctor's opinion when the parties have chosen to enter into an agreement as to how MMI and impairment rating will be determined." Conclusion of Law No. 5 that says the issue of MMI is not ripe is moot since the parties have addressed MMI and impairment in the settlement.

The decision and order are reversed and a new decision rendered that the settlement as approved by the Director of Hearings is in force and governs the rights of the parties.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge