APPEAL NO. 93989

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S, Article 8308-1.01 *et seq.*). On September 14, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues announced at the beginning of the CCH were:

1.Is the Claimant, BH, eligible for supplemental income benefits?
2.Whether the agreement entered into by both parties on February 25, 1993, is binding on both parties?
3.Whether these two cases should have been commingled by the Commission (91-135150 and 91-133311)?
4.Did the Commission err in not fully explaining the Benefit Review Conference Agreement of February 25, 1993, in particular "significant factors if not equal," thereby invalidating the agreement?

Based on the evidence presented at the CCH, the hearing officer, with agreement of the parties reformed the first issue to be: "Does Claimant's 19% impairment rating meet the impairment rating requirement for supplemental income benefit eligibility?" The hearing officer determined that claimant sustained an injury to his left shoulder on (date of injury) and a separate injury to his back on (date), that the parties "read, understood and voluntarily agreed" to various agreements at benefit review conferences (BRC) on January 14, 1993, February 23, 1993, and April 8, 1993, that the parties agreed to set aside one designated doctor's report and agreed to "have the Texas Workers' Compensation Commission (Commission) appoint (Dr. A) designated doctor to assess claimant's whole body impairment ratings for both injuries," that both injuries "were combined and inseparable," that claimant reached maximum medical improvement (MMI) on February 23, 1993, with a 19% whole body impairment rating (IR), and that the 19% IR meets IR requirement for supplemental income benefit eligibility.

Appellant, carrier herein, appeals only the finding of fact that claimant and carrier understood the "BRC agreement dated February 25, 1993, to be that the 19% IR for both injuries were combined and inseparable" and the conclusion of law that claimant's 19% IR meets the IR requirement for supplemental income benefits (SIBS) eligibility. Respondent, claimant herein, filed a timely response reiterating many of the contentions he asserted at the CCH. Claimant's response will be considered as a response but was not timely filed to be considered as an appeal.

DECISION

The decision of the hearing officer is affirmed, as reformed herein.

By way of background, claimant was employed as a maintenance technician by H Apartments, employer herein. It is undisputed claimant injured his right shoulder cleaning a carpet on (date of injury). Subsequently on (date), claimant suffered a back and neck

injury when a hot water heater fell on him. Claimant testified he first saw (Dr. C) after his second injury. Dr. C, according to claimant, took claimant off work on or about July 21, 1991. Claimant states that he was also "terminated about that time." Claimant then saw (Dr. W) who became the first treating doctor for both injuries. Claimant attributes a severe complicating infection to an injection given by Dr. W in doing a discogram and changed treating doctors to Dr. M. Claimant was also seen by Dr. B who refused to treat claimant after being sent a video of claimant by the carrier. On January 13, 1992, carrier requested that claimant be seen by (Dr. R), a carrier Medical Examination Order (MEO) doctor. In a Report of Medical Evaluation (TWCC-69) and narrative report dated February 4, 1992, Dr. R certified MMI on 2-4-92 with a 14% IR based on a "protruding disk at the L3 level."

Dr. R's rating was disputed and the Commission appointed (Dr. S) as a Commission-selected designated doctor to evaluate claimant. By TWCC-69 and report dated November 4, 1992, Dr. S certified MMI on "11-10-92" with an 18% IR based on a herniated nucleus pulposus at L3-L4 and "L4-5, L5-S1 discitis." (Parenthetically we would note that Dr. S apparently certified a prospective MMI date.) Carrier by letter dated November 24, 1992, sought "clarification" asking Dr. S to reconsider his report in light of the fact that there were two distinct injuries on separate dates, and that there was videotaped activity of the claimant performing activities inconsistent with the limitations Dr. S had observed. Dr. S by notation of 12-7-92 stated: "We do <u>not</u> wish to reconsider our evaluation." Carrier made this information known to the Commission benefit review officer (BRO) by letter dated December 17, 1992.

At a BRC on January 14, 1993, the parties agreed to set aside Dr. S's IR and "[b]oth parties agree to TWCC designated Dr. A to correctly assess impairment ratings on the (date of injury) and the (date) injuries." (No mention is made that (Dr. A) may have been "a designated doctor chosen by mutual agreement of the parties" in accordance with Section 408.125). Dr. A in a TWCC-69 dated 2-23-92 certified MMI on 2-23-92 with a 19% IR. Dr. A broke down his impairment rating as follows:

Lumbar Spine - limited flexion		3%	
	limited extension		5%
	limited bending		1%
Shoulder limitations	3%		
Degenerated L3,4 Disc - unoperated		7%	

Nonetheless the ombudsman called Dr. A and requested that he separate the ratings by injury. Accordingly, by TWCC-69s dated 8-31-93, Dr. A certified MMI on 2-23-93 with a 16% IR for the (date) back injury and certified MMI on 2-23-93 with a 3% IR for the (date of injury) shoulder injury.

Before Dr. A's August 1993 breakdown, another BRC was held on February 25, 1993. At that time a BRC agreement was entered into, albeit apparently against the advice of the ombudsman, according to claimant's testimony. That agreement stated:

[1]Both parties accept the designated doctor, [Dr. A's] rating of impairment of 19% whole body. Both parties agree that both claims Docket No. and Docket No. were significant factors (if not equal) in establishing the 19% impairment rating. This whole body impairment

of 19% is the total for both claims. Two designated doctors were unable to assess whole body contributions separately-therefore the 19% for both.-MMI/ 11-10-92

Carrier apparently interpreted the phrase "significant factors (if not equal)" to mean 9½% IR for the shoulder and 9½% IR for the back. Claimant disputed this interpretation.

On April 8, 1993, yet another BRC was convened with a disputed issue of "the correct date of [MMI]." A BRC agreement stated: "[1] Both parties accept the designated doctor, [Dr. A's], assessment of MMI as 2.23.93." We would note that no mention in the documentary evidence has been made up to this point of supplementary income benefits (SIBS).

Another BRC was convened on July 29, 1993, where the issues were raised whether claimant was eligible for SIBS, whether the February 25, 1993, agreement was binding, whether the interpretation of the phrase "significant factors (if not equal)" was explained to claimant, and whether further by agreeing to accept Dr. A's later date of MMI, claimant agreed to give up any claim to SIBS.

As noted previously, the hearing officer found as Finding of Fact No. 9 that:

Finding 9.Claimant and Carrier read, understood, and voluntarily agreed by a Benefit Review Conference agreement dated February 25, 1993, that the 19% whole body impairment rating for both injuries of (date of injury) and (date) were combined and inseparable.

and concluded that:

Conclusion 7:Claimant's 19% impairment rating meets the impairment rating requirement for supplemental income benefit eligibility.

Carrier objects to the language in the hearing officer's finding that the two injuries "were combined and inseparable." In the alternative carrier requests language to the effect that only impairment benefits based on 19% IR of 57 weeks of impairment income benefits (IIBS) be ordered and that carrier is not responsible for "concurrent impairment benefits based on 19% for each injury." Additionally carrier requests, in the alternative, that if claimant is entitled to SIBS that carrier not be held liable for concurrent SIBS "for each injury, since that would amount to a double recovery by [claimant]."

Addressing carrier's first point that there is "absolutely no evidence . . . that the injuries were combined and inseparable and those words were not used . . ." we would agree. It is absolutely clear and undisputed that there were two separate injuries, the shoulder injury of (date) and the back injury of (date). Although Dr. S, the first designated doctor, appeared reluctant to separate the whole body IR, it was clear from his report that he was giving a 15% IR for the back and a "3% whole person impairment from the left shoulder" with a combined rating of 18%. Nonetheless Dr. A was appointed and he certified a combined whole body IR of 19% and then obligingly broke that down into two separate and distinct ratings of 16% for the (date) back injury and 3% for the (date) shoulder injury. Nor did the BRC agreement of February 25, 1993, state that the injuries were combined and inseparable. Consequently, we reform the hearing officer's language in Finding of Fact No. 9 to read: ". . . that the 19% whole body impairment rating was for both the injuries of (date of injury) in the amount of 3% and (date) in the amount of 16%."

Having so reformed the language, we do not agree with the carrier that the language in the February 25th BRC agreement that "both claims . . . were significant factors (if not equal)" could reasonably mean that 9½% impairment is assigned to each injury. As recited above the designated doctors were in substantial agreement that the shoulder had a 3% IR and the back a 16% IR. Nowhere is there any suggestion or basis that the agreement was intended to be rated 9½% for each injury. If that was carrier's position, carrier should have been clear and unambiguous in stating that in return for accepting the MMI date of February 23, 1993, carrier was proposing the injuries be divided equally at 9½% for each injury. Using the "significant factor, if not equal" language, left the agreement open to interpretation as to the rating for each injury. Where the parties propose an agreement its terms must be clear and unambiguous. Carrier's contention as to the interpretation of significant, if not equal, is not reasonable in light of the medical evidence.

Carrier, in the alternative, requests an interpretation of the hearing officer's decision to preclude carrier from being required to pay concurrent impairment benefits based on 19% for each injury. Again, it is clear that there were two injuries and it is equally clear from both designated doctors' reports that claimant had a 3% IR for the shoulder and 16% IR for the back, for a total of 19% impairment rating which translates to a total of 57 weeks of IIBS. It should be clear, especially as the language in Finding of Fact No. 9 has been reformed, that carrier is responsible for only a total of 57 weeks (19% $\times$ 3 weeks = 57 weeks) IIBS.

Turning to the issue of the payment of SIBS, an employee may be entitled to SIBS under Section 408.142 if the employee:

(1)has an impairment rating of 15 percent or more as determined by this subtitle from the compensable injury;
(2)has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
(3)has not elected to commute a portion of the impairment income benefit under Section 408.128; and

(4)has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Although we have not previously addressed this exact issue, Texas Workers' Compensation Commission Appeal No. 93794, decided October 20, 1993 addressed an analogous situation where a carrier contended that it was not liable to pay temporary income benefits (TIBS) twice for two different injuries for the same period of time. We affirm that proposition. That case quoted Section 4.23 of Montford, A Guide to Workers' Compensation Reform, to say: "TIBS are designed to assist the employee with respect to a 'shortfall,' so to speak, in the employee's wages due to a compensable injury (i.e., to replace those lost wages) during rehabilitation or until the employee reaches (MMI)." Similarly, the purpose of SIBS under the 1989 Act is to assist an employee who has suffered loss of wages due to a compensable injury, under certain circumstances, after IIBS have been paid. Analogizing the payment of SIBS in the instant case to the payment of TIBS in Appeal No. 93794, SIBS would be payable under the above conditions to compensate an employee's decrease in earnings as a direct result of the employee's impairment from a compensable injury. We do not view the situation as a case where an employee could draw double SIBS for multiple injuries. In the present case, claimant's IR for his back is more than 15% and therefore he may, assuming other conditions are met, be eligible for SIBS for his back injury alone or his back and shoulder injuries to the extent they have been combined for purposes of an IR, but he would not be eligible for more than one SIBS payment at a time. We do not view the SIBS provisions as allowing for double payments to the same individual at the same time even if there were two or more injuries or accumulation of injuries. Just as we held in Appeal No. 93794, where the carrier was not liable to pay TIBS twice for two different injuries for the same time period, this carrier is not liable to pay SIBS twice, even if the two injuries were to each reach the 15% IR threshold. We find the hearing officer's Conclusion of Law No. 7 to be supported by the evidence.

Finding no reversible error and reforming the hearing officer's Finding of Fact No. 9 to reflect two injuries with separate IRs, we hereby affirm.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge