APPEAL NO. 971604

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 2, 1997. With respect to the issues before her, the hearing officer determined that no good cause exists to relieve the appellant/cross-respondent (claimant) of the effects of the benefit review conference (BRC) agreement dated June 7, 1993; that the claimant's impairment rating (IR) is eight percent; and that the respondent/cross-appellant (carrier) waived its right to contest subsequent compensable quarters of supplemental income benefits (SIBS) on the basis of no 15% or greater IR because it did not contest the Texas Workers' Compensation Commission's (Commission) initial determination of SIBS entitlement in a timely manner. In his appeal, the claimant challenges the determination that no good and sufficient cause exists to relieve him of the effects of the June 7, 1993, BRC agreement that his IR is eight percent. We note that the claimant also asserts error in the hearing officer's determination that he reached maximum medical improvement (MMI) on February 27, 1993; however, no MMI issue was before the hearing officer and in fact, the parties stipulated to that date of MMI, which appears to coincide with the date that the claimant reached MMI by operation of law under Section 401.011(30)(B). In response, to the claimant's appeal, the carrier urges affirmance of the determination that good and sufficient cause does not exist for relieving the claimant of the effects of the BRC agreement. In its appeal, the carrier argues that the hearing officer erred in determining that it was precluded from contesting subsequent compensable quarters of SIBS on the basis of the requirement that the claimant have a 15% or greater IR by its failure to timely contest the Commission's determination that the claimant was entitled to the first compensable quarter of SIBS. It maintains that the claimant was never entitled to SIBS in this instance because he executed an agreement that his IR was eight percent and, as a result, he never satisfied the threshold requirement of having a 15% or greater IR. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____. In a Report of Medical Evaluation (TWCC-69) dated October 23, 1992, Dr. S, the claimant's treating doctor, certified that the claimant reached MMI on October 20, 1992, with an IR of eight percent. On the face of the TWCC-69, Dr. S noted "this impairment rating is without patient having surgery, with surgery impairment rating is subject to change." Apparently, the claimant disputed that certification and Dr. W was selected by the Commission to serve as the designated doctor. Dr. W completed a TWCC-69, certifying that the claimant reached MMI on March 9, 1993, with an IR of eight percent. Directly above the blanks for MMI date and IR, Dr. W made a handwritten notation "[i]f pt doesn't have surgery."

On May 17, 1993, Mr. D, an attorney representing the claimant, filed a Request for Setting Benefit Review Conference (TWCC-45), stating that there were disputed issues concerning MMI, IR and reinstatement of temporary income benefits (TIBS). On May 21,

1993, the claimant underwent a laminotomy, discectomy and foraminotomy at L5-S1, which was followed by a fusion from L4-S1. On June 7, 1993, a BRC was held and the parties signed an agreement which stated that the average weekly wage is $352.00, that the claimant reached MMI on February 27, 1993, and that the claimant's IR is eight percent. The agreement was signed by the claimant, his attorney, the carrier's representative and the benefit review officer (BRO). On the basis of that agreement, the claimant was apparently paid TIBS through the date of MMI and was paid 24 weeks of impairment income benefits (IIBS).

In a TWCC-69 dated June 14, 1994, Dr. S certified that the claimant reached MMI on June 9, 1994, with an IR of 19%. In his accompanying narrative report, Dr. S explained that he was amending his earlier certification to take into account the effects on the claimant's IR of the spinal surgery he had on May 21, 1993. Although it is not entirely clear from the record, it appears that the carrier reinstituted the payment of IIBS to the claimant based upon the treating doctor's increased IR. On January 25, 1995, the claimant filed a Statement of Employment Status (TWCC-52) seeking first quarter SIBS. On February 7, 1995, the Commission determined that the claimant was entitled to those benefits. The carrier paid first quarter SIBS to the claimant. The claimant testified, and the BRC report states, that the carrier also paid SIBS in the second compensable quarter. On June 21, 1995, an adjuster for the carrier requested a BRC, apparently in response to the claimant's request for third quarter SIBS. That request states:

> We are requesting a BRC with the disputed issue being that [claimant] is not entitled to SIBS due to a previous BRC agreement. Please see the attached copy of the BRC agreement.

On September 12, 1995, a BRO sent a letter to Dr. W stating that the claimant was being returned for a repeat examination to determine if the claimant's IR "changed as a result of him having spinal surgery 2 months subsequent to your last examination and statutory maximum medical improvement." In a TWCC-69 dated September 13, 1995, Dr. W increased the claimant's IR to 16% to reflect the changes in the claimant's IR following spinal surgery.

Initially, we will consider the issue of whether good and sufficient cause exists to relieve the claimant of the effects of the June 7, 1993, BRC agreement. The hearing officer may set aside a BRC agreement for a represented claimant "on a finding of fraud, newly discovered evidence, or other good and sufficient cause. . . ." Sections 410.030(a) and (b). We review the hearing officer's determination of whether or not to relieve a represented claimant of the effects of an agreement under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995.

Under Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986), in determining whether there was an abuse of discretion, we must inquire whether the hearing officer looked to appropriate guiding principles or standards in making her determination. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994. Rule 147.9(b) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.9(b)] states:

> (b) An agreement resolving a dispute about impairment rating, or a settlement:

(1) may not be made until the employee has reached maximum medical improvement; and

(2) must adopt an impairment rating established by a doctor pursuant to the Act, sec. 4.26.

In this instance, the claimant, who was represented by an attorney at the BRC, and the carrier signed an agreement on June 7, 1993, some 17 days after the claimant had undergone spinal surgery. The parties agreed that the claimant had an IR of eight percent. Both Dr. S and Dr. W had certified that the claimant's IR was eight percent; however, each doctor conditioned his rating upon the claimant's not having had surgery. That is, both Dr. S and Dr. W indicated that their ratings were conditional and that they were subject to change in the event of surgery. We have previously determined that such a conditional rating is not valid in the context of cases concerning Rule 130.5(e). Texas Workers' Compensation Commission Appeal No. 950627, decided June 5, 1995; Texas Workers' Compensation Commission Appeal No. 950448, decided May 9, 1995; Texas Workers' Compensation Commission Appeal No. 941247, decided October 27, 1994. At the BRC, it is undisputed that the claimant had undergone spinal surgery. Therefore, a necessary prerequisite to the continuing viability of the ratings of Dr. S and Dr. W, the fact that the claimant had not had surgery, was no longer satisfied and, as such, there was not an eight percent IR established by a doctor that the parties could agree to at the BRC. Thus, the purported agreement of June 7, 1993, was not in compliance with Rule 147.9(b)(2). As a result, the hearing officer abused her discretion in not relieving the claimant of the effects of the agreement because reference to Rule 147.9 dictates that the agreement in this case should be set aside in that it was entered in violation of that Rule. The hearing officer's determination that good and sufficient cause does not exist to relieve the claimant from the effects of the purported June 7, 1993, agreement is reversed and a new decision rendered that the claimant is relieved from the effects thereof. We note in addition, that in this instance it appears as if the parties acted as if there were no agreement. The claimant was apparently paid IIBS based upon the treating doctor's 19% and he was paid two quarters of SIBS, also as if he had at least a 15% IR. Given our determination that the claimant should be relieved from the effects of the purported June 7, 1993, BRC agreement, we reverse the hearing officer's determination that the claimant's IR is eight percent and remand the case for a determination of the claimant's IR.

Finally, we consider the issue of whether the carrier has waived its right to contest future quarters of SIBS on the basis of no 15% or greater IR by not timely disputing the Commission's initial determination of SIBS entitlement. In the absence of a dispute relating to entitlement to a quarter of SIBS, this issue appears to request an advisory opinion, which we do not have the authority to issue. Texas Workers' Compensation Commission Appeal No. 941523, decided December 22, 1994; Texas Workers' Compensation Commission Appeal No. 92169, decided June 17, 1992. After the IR issue is resolved in this case, an issue may arise concerning entitlement to a future quarter of SIBS. At that time, the claimant may wish to make this argument again if it is applicable and necessary. However, at this time, no basis exists for us to consider the argument on appeal.

The hearing officer's determination that good and sufficient cause does not exist for

relieving the claimant from the effects of the alleged June 7, 1993, BRC agreement is reversed and a new decision rendered that the claimant is relieved from that alleged agreement. The hearing officer's determination that the claimant's IR is eight percent is reversed and the case is remanded for a determination of the claimant's IR in a manner consistent with this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Gary L. Kilgore
Appeals Judge