APPEAL NO. 991554

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 30, 1999. The issues at the CCH were whether good cause exists to relieve the respondent (claimant) from the effects of the agreement signed on April 24, 1998; whether the appellant (carrier) is entitled to reimbursement of monies paid, if the agreement is found to be invalid; and whether the claimant was entitled to supplemental income benefits (SIBS) for the third compensable quarter "which began on April 1, 1999 [sic, should be 1998], and ended on June 30, 1999 [sic, should be 1998]." The hearing officer found that the agreement was not consistent with the requirements of law, that it was not binding on all parties, that the claimant was entitled to SIBS for the third compensable quarter, and that the carrier was entitled to a credit for monies paid under the agreement. The carrier appeals two of the hearing officer's determinations, urging that, as a matter of law, the hearing officer erred in finding that the agreement is not consistent with the requirements of the law, and in finding that the claimant qualified for SIBS for the third compensable quarter. The claimant responds that he agrees with the finding that the agreement was not consistent with the requirements of law and was not in his best interest, and that the evidence shows his entitlement to SIBS for the third compensable quarter.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant sustained a compensable cervical injury on _____, had surgery in December 1994, and was certified as having reached maximum medical improvement (MMI) by his treating doctor on September 17, 1996, with an 18% impairment rating (IR). The claimant was apparently paid SIBS for the first two quarters and was denied SIBS for the third quarter because of the carrier's dispute regarding the claimant's lack of making a good faith effort to seek employment commensurate with his ability to work, as shown by an independent medical evaluation (IME) dated February 19, 1998. The report indicated under diagnoses "2. Symptom magnification" and stated the claimant "could return to almost any kind of light to even moderate work activity levels." The claimant's treating doctor subsequently disagreed and stated that claimant was unable to return to work "due to pain restrictions" and that his restrictions include no lifting over 10 pounds with no awkward positioning of his neck. The claimant offered a statement in evidence showing limited medical treatment or activity in 1997 and that he wanted to forestall any surgery. He also stated that he received psychological care from February to May 1997, that he sought to enter a retraining program from June to December 1997, and that he started a program in January 1998 under the auspices of the Texas Rehabilitation Commission, which included 12 hours of class work with requirements for lab sessions and tutoring. He looked for some seven jobs late in the filing period and after getting the IME report.

At a benefit review conference (BRC) on April 10, 1998, in which the carrier was contesting the entitlement to SIBS for the third quarter, the claimant was assisted by an

ombudsman. There was bitter disagreement at the current CCH as to what transpired at the April 10, 1998, BRC. However, as a result of the BRC, an agreement was signed by the claimant, the adjuster representing the carrier and the benefit review officer (BRO) in which the parties agreed that the claimant is entitled to third quarter SIBS, with the monthly rate for the third quarter being agreed to be $201.76. The agreement was signed on April 10, 1998, by the adjuster and the claimant, and on April 24, 1998, by the BRO. At the current CCH, the claimant sought to be relieved from the agreement for good cause claiming, among other matters, that he was misled by the BRO and others, that the agreement signed by him was blank (disputed by other evidence), that he wanted to think about the agreement before it became effective, that he did not know it was binding, and that he wanted his full amount of monthly SIBS which would be $807.03 monthly. It is apparent that the hearing officer did not find the claimant's testimony persuasive on the good cause matter and he entered findings, none of which are appealed, that find:

FINDINGS OF FACT

2. The agreement executed on April 24, 1998 was not ambiguous.

3. The claimant understood the agreement, its effects, and that he would be paid at a SIBS rate of $201.76.

4. The agreement was not signed based on misrepresentations of any party.

5. The agreement was not signed based on a mutual mistake of fact.

6. The claimant had access to all the facts necessary to have a full understanding of the agreement at the time that he signed the agreement.

The hearing officer also found that there had been no bona fide offer of employment nor had the claimant earned any wages. In addition, the hearing officer found that the agreement was "NOT consistent with the requirements of law, because the SIBS rate was reduced for not [sic] reason other than to compromise the dispute regarding claimant's entitlement to SIBS at the full SIBS rate of $807.03." Because the agreement was not consistent with "the requirements of law," good cause existed. We are not informed as to what requirements of law the hearing officer determined had not been met nor are there any citations to any legal authority for the finding made.

The subchapter on SIBS in the 1989 Act initially provides that "an award of [SIBS], whether by the commission [Texas Workers' Compensation Commission] or a court, shall be made in accordance with this subchapter." Section 408.141. The remainder of the subchapter sets out the parameters for qualifying for SIBS and continuation of SIBS (15% IR, not having returned to work or earning less that 80% of average weekly wage (AWW), not electing to commute, and making a good faith effort to obtain employment), filing of

employee's statement, computation of the SIBS benefit (80 percent of AWW) less wages earned and any bona fide offer of employment, and the provisions for termination and reinstatement of SIBS. Agreements or settlements are not provided for or proscribed in the subchapter on SIBS.

Agreements are provided for in the 1989 Act and are defined as meaning "the resolution by the parties to a dispute under this subtitle of one or more issues regarding an injury, death, coverage, compensability or compensation." Section 401.011(3). A dispute may be resolved either in whole or in part at a BRC and if a resolution of some disputed issues results, the BRO reduces it to writing and the BRO and parties or representatives sign it. Section 410.029; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 141.5(d) and (e) (Rule 141.5(d) and (e). An agreement is binding on the claimant, if represented by an attorney, to the same extent as on the carrier. If a claimant is not represented by an attorney, the agreement is binding on the claimant through the conclusion of all matters relating to the claimant which the claim is pending before the Commission, unless the Commission, for good cause, relieves the claimant of the effects of the agreement. Section 410.030(b); Rule 147.4. Section 408.005 provides for certain limitations on settlements and agreements, namely, that medical benefits may not be limited or terminated, and that a settlement or agreement resolving an impairment issue may not be made before an employee reaches MMI, and must adopt an IR using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association.

TWCC Advisory 94-06 sets out examples of agreements that are not deemed to be in compliance with the 1989 Act, rules and Commission policies and are not binding on the parties. None of the eight examples set out in the advisory proscribe the agreement reached in this case.

As indicated, the 1989 Act and rules provide for agreements and set out certain limitations on agreements and settlements. None of the specified limitations set out in the Act or rules are in issue here nor are the examples of unacceptable agreements set forth in Advisory 94-06. Although Section 408.141 provides that an award of a supplemental income benefit shall be made in accordance with that subchapter, it does not proscribe or prohibit agreements as to award of or amount of SIBS. From our reading of the Act and rules, with the exception of specific prohibitions on agreements or settlements, resolution of disputes through agreement of the parties is provided for and encouraged to resolve issues at an early stage when possible and not contrary to the provisions of the Act and rules. Rule 141.5(d)(6) and (7) specifically provides that the BRO shall assist the parties to agree on specific options for resolution and to resolve disputed issues by agreement or settlement. The Appeals Panel, while not encountering the specific matter raised here, has upheld agreements relating to SIBS. In Texas Workers' Compensation Commission Appeal 980060, decided February 17, 1998, the parties entered into a BRC agreement involving two SIBS quarters in dispute and agreed that the carrier would pay SIBS for one quarter and the claimant would agree he was not entitled to the SIBS for the other quarter. Similarly, the claimant in that case and the current case on appeal urged misunderstanding,

that he was coerced into signing the agreement, and that there was good cause for invalidating the agreement. The Appeals Panel upheld the determination of no good cause shown and upheld the validity of the agreement. In Texas Workers' Compensation Commission Appeal No. 961979, decided November 20, 1996, the Appeals Panel upheld the refusal to relieve the claimant from an agreement that provided in part that the carrier would pay the disputed first quarter SIBS and could withhold 23% of future income benefits to recover overpayments. *See also* Texas Workers' Compensation Commission Appeal No. 982534, decided December 4, 1998, and Texas Workers' Compensation Commission Appeal No. 971076, decided July 23, 1997, a case upholding an agreement involving the AWW changing after a certain period of time.

From our review of the 1989 Act and rules we cannot conclude that the BRC agreement is not consistent with the requirements of the law, the sole basis on appeal for the holding by the hearing officer. Where there are specified statutory and regulatory limitations regarding agreements, as noted above, and the agreement in issue is not one of those proscribed by the Act or rules, the Appeals Panel, if it affirmed the hearing officer on the basis stated, could well be perceived as creating new or additional limitations on agreements without specific statutory or regulatory provisions. This is not looked upon favorably on judicial review. *See* Rosa Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J. 900 (July 1, 1999). Accordingly, we reverse the finding, conclusion, and decision insofar as it hold that the BRC agreement signed on April 24, 1998, is not binding on all parties because it is not consistent with the law. We render a new decision that the BRC agreement is binding on all parties.

Regarding the appealed issue asserting that the holding that the claimant is entitled to SIBS for the third quarter, we have reviewed the evidence of record and cannot conclude that the finding, conclusion, and decision by the hearing officer is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). The hearing officer could give preponderant weight to the testimony of the claimant on this issue, as well as to corroborative documentation concerning the scope and time necessary to participate in the retraining program, including classroom, lab work, and tutoring, plus the attempt to find part-time employment at the school after the evaluation showed restricted ability to work. This is generally a factual issue for the hearing officer's resolution, reversible only if there is legally insufficient evidence to support the determination made. We do not find that to be the case here and accordingly affirm this part of the decision on appeal.

The decision and order are affirmed as to the entitlement to SIBS for the third quarter and are reversed as to the determination that the BRC agreement signed on April 24, 1998, is not binding on the parties because it is not consistent with the law and a new decision rendered that the BRC agreement is binding on all parties.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge