

APPEAL NO. 991566

This appeal after remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On September 24, 1998, the first contested case hearing (CCH) was held. The issue at that CCH was whether good cause existed to relieve the appellant (claimant), who was unrepresented at the time, from the effects of the November 3, 1997, benefit review conference (BRC) agreement, which concerned maximum medical improvement (MMI) and impairment rating (IR). In the first decision and order, the hearing officer found that claimant did not establish good cause. Claimant appealed, contending that good cause was shown in that when he signed the BRC agreement he did not know he needed surgery. Respondent (carrier) responded that there was no substantial change in claimant's condition and that the hearing officer did not abuse his discretion. In Texas Workers' Compensation Commission Appeal No. 982607, decided December 21, 1998, the Appeals Panel reversed the hearing officer's decision and remanded the case for the hearing officer to consider whether: (1) there was an accurate diagnosis before the BRC agreement was signed; and (2) claimant had all the facts at the time he signed the BRC agreement. After an April 13, 1999, hearing on remand, the hearing officer determined in a second decision and order that: (1) claimant had an accurate diagnosis before he signed the November 3, 1997, BRC agreement; (2) claimant had all the relevant facts at the time he signed the BRC agreement; and (3) claimant is not relieved of the effects of the BRC agreement. Claimant again appeals, contending that he should be relieved of the effects of the BRC agreement because he did not know and had no way of knowing that he would need spinal surgery at the time he signed the agreement. Carrier responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We reverse and render.

Claimant contends the hearing officer abused his discretion in failing to find good cause and refusing to relieve him of the effects of the November 3, 1997, BRC agreement. Claimant contends that he established good cause in that he did not know that he would need surgery until after he had already signed the BRC agreement. Claimant underwent spinal surgery in July 1998, after going through the Texas Workers' Compensation Commission (Commission) spinal surgery process.

The applicable law regarding BRC agreements, our appellate standard of review, and the evidence are set forth in our prior decision. Claimant was unrepresented at the time he signed the BRC agreement. Briefly, the BRC agreement stated that the parties agreed that claimant reached MMI on September 22, 1997, with an IR of eight percent, in accordance with the report of Dr. GU. Claimant testified that, after his _____, compensable injury, he saw several doctors and specialists who told him he had a back strain, that he would be better after some therapy, and that he did not have a surgical condition. He said it was not known that he needed surgery until after he signed the

November 3, 1997, BRC agreement. He testified that he would not have entered into the agreement if he had known he would need surgery.

The medical records dated before the BRC agreement do not suggest that claimant was considered to be or was a surgical candidate. After claimant signed the BRC agreement, in a December 7, 1997, letter, Dr. C noted that claimant had swelling at the L3-4, L4-5 levels. In a January 1998 letter, Dr. C stated that previous studies “have not demonstrated much in the way of pathology,” and considered whether claimant might benefit from fusion surgery. In an April 1998 letter, Dr. E stated that claimant would undergo a localized injection at the L5 pseudoarthrosis and that if that did not relieve his pain, he would be “referred back to [Dr. GO] for removal of this transitional vertebra.” The record contains an April 1998 Recommendation for Spinal Surgery (TWCC-63) from Dr. GO. The two second opinion doctors concurred and claimant had the surgery in July 1998.

The hearing officer determined no good cause existed to relieve claimant of the effects of the BRC agreement. In the first decision and order, the hearing officer noted that any changes to claimant’s body after the signing of the BRC agreement were “degenerative” in nature and noted that there was “no substantial change” in claimant’s diagnosis.

As stated in our prior decision, there was evidence that claimant did not have all the facts at the time he signed the BRC agreement. The hearing officer found that claimant was not credible regarding what he was told by the adjuster about being relieved of the effects of the agreement. However, the hearing officer did not determine that claimant was not credible regarding whether he knew, before signing the BRC agreement, that surgery might be contemplated or was contemplated. The hearing officer did not make any findings in that regard. Given the medical evidence, it appears that claimant could not have known that surgery was contemplated for the simple reason that it was not contemplated before the BRC agreement was signed. Claimant testified that when he found out surgery was required, he filed a Request for Benefit Review Conference (TWCC-45) in February 1998, about three months after he signed the BRC agreement, and asserted that he should be relieved of the effects of the BRC agreement.

This case is similar to Texas Workers’ Compensation Commission Appeal No. 952101, decided January 24, 1996, where the claimant signed a BRC agreement regarding MMI and IR based on the medical representations that “there was no more medical treatment that could help him.” However, shortly thereafter, the claimant’s knee condition worsened and he was required to undergo another total knee replacement surgery. The hearing officer relieved claimant of the effects of his BRC agreement, and the Appeals Panel affirmed. We would note that the claimant in Appeal No. 952101 was represented by an attorney at the time he signed his BRC agreement. Therefore, he had to show fraud, newly discovered evidence, or other “good and sufficient cause” to be relieved of his agreement. The unrepresented claimant in the case before us had to meet a less stringent standard in that he had to establish only “good cause” to be relieved of his November 3,

1997, BRC agreement. Texas Workers' Compensation Commission Appeal No. 961922, decided November 20, 1996.

In Texas Workers' Compensation Commission Appeal No. 971027, decided July 18, 1997, the Appeals Panel affirmed the decision of a hearing officer who found there was good cause to set aside the BRC agreement of an unrepresented claimant. The claimant had signed a BRC agreement regarding his average weekly wage (AWW) even though he did not have the wage statement from the employer at the time he signed the agreement. The Appeals Panel stated that, "at best the BRC agreement resulted from mutual mistake, with the claimant being unaware that his AWW should be based on higher gross wage," and permitted that employee to be relieved of the effects of his BRC agreement.

Because it was unforeseen that claimant would require surgery at the time he signed the agreement and because he sought to set aside the BRC agreement within a few months after he signed the agreement, once he learned that surgery would be needed, we conclude that the hearing officer abused his discretion in determining that claimant did not have good cause in this case. Even if claimant's diagnosis did not change after he signed the BRC agreement, the significant fact that claimant could not have known before he signed the BRC agreement was that he had a *surgical* condition, and that this was a material fact in assessment of IR and MMI.

Carrier implies that the surgery was performed to correct only an ordinary disease of life. However, if the surgery was approved after completion of the Commission's spinal surgery process, then the surgery was to treat the compensable injury. There was medical evidence that claimant did have a congenital condition, but that the compensable injury caused it to become symptomatic.

We do recognize that the issue of good cause is a question of fact for the hearing officer. However, in the decision and order on remand, the hearing officer did not discuss or appear to consider the effect of the evidence regarding claimant's lack of knowledge that he had a surgical condition. The hearing officer focused on whether claimant knew his diagnosis and whether he was credible in stating that he thought he could get out of the BRC agreement if there was newly discovered evidence. The hearing officer did not state that he disbelieved claimant's testimony that he did not know, until after he signed the agreement, that he would require surgery.

We reverse the hearing officer's decision and order and render a determination that claimant is relieved of the effects of the BRC agreement signed on November 3, 1997.

Judy Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge