APPEAL NO. 001045

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 April 11, 2000. With regard to the issues before him, the hearing officer determined that the respondent (claimant) is relieved of the agreement entered into on June 8, 1999, and that a wage rate cannot be determined until the employer files a valid wage statement. The appellant (self-insured) appealed, contending that the hearing officer failed to properly apportion the burden of proof, that the Texas Workers' Compensation Commission (Commission) no longer had jurisdiction over the case, that claimant's average weekly wage (AWW) has become final and cannot be collaterally attacked, that claimant had accepted temporary income benefits (TIBs) and impairment income benefits (IIBs) based on the agreed upon AWW, and that claimant failed to show good cause to be relieved of the benefit review conference (BRC) agreement where the parties agreed on a $380.39 AWW. The self-insured requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant responded, urging affirmance.

DECISION

Affirmed.

Claimant was a state employee working as a custodian in one of the self-insured's facilities and sustained a compensable injury on _____. The claimant was apparently off work some period of time in 1993 and 1994. Claimant's status between then and 1999 is unclear. At a BRC conducted on June 8, 1999, a BRC agreement resolved disputed issues of the AWW and date of maximum medical improvement (MMI) by agreeing that the AWW was $380.39 and that statutory MMI was reached on January 19, 1995. Claimant was assisted by an ombudsman; the benefit review officer (BRO) was present and signed the BRC agreement, as was claimant, and an attorney representing the self-insured. Claimant appealed that case to the Appeals Panel which resulted in Texas Workers' Compensation Commission Appeal No. 992311, decided December 3, 1999 (Unpublished). The claimant's request for review included:

> The Hearing Officer found that Claimant's [AWW] was $380.39, based upon a Benefit Dispute Agreement dated June 8, 1999 (Claimant's Ex. 3).
>
> Claimant is in the process of challenging the Benefit Dispute Agreement in regard to the [AWW] provision, if an agreement with the State cannot be reached.
>
> Claimant files this Request For Review in order to avoid any finality concerning the [AWW] finding and requests that the Finding of Fact be amended to state that the [AWW] was determined to be $380.39, by the execution and approval of a Benefit Dispute Agreement, and that said

> [AWW] is applicable to this claim, unless another [AWW] is established in the future.

There was no response from the self-insured regarding claimant's appeal. The Appeals Panel affirmed the hearing officer's decision (as reformed) noting that:

> Section 410.030 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.4(d) (Rule 147.4(d)) address the binding effect of agreements. Rule 147.7 is entitled Effect on Previously-Entered Decisions and Orders and in subsection (a) provides:
>
> > A written agreement on one or more disputed issues addressed in a presiding officer's decision or order, including an interlocutory order, sets aside the decision or order, as it relates to the agreement, on the date the agreement is approved by the presiding officer.
>
> The Appeals Panel reformed the hearing officer's decision stating:
>
> > Although not necessary, but to preclude any misunderstanding; we reform Finding of Fact No. 6 to state:
> >
> > > The claimant's [AWW] is $380.39 as agreed to in the Benefit Dispute Agreement dated June 8, 1999, unless the parties enter into an agreement of a different AWW and the hearing officer approves the agreement or the claimant is otherwise relieved of the AWW provisions of the agreement dated June 8, 1999. [Emphasis added.]

The dispute about the AWW centers around the fact that it appears that the AWW was computed on claimant's gross pay and did not include that the self-insured provided health insurance benefits. It appears that neither the ombudsman, BRO or self-insured's attorney (all state (self-insured) employees) had thought to include that the self-insured provided health insurance benefits when calculating the AWW. Everyone now appears to agree that the health insurance benefits should have been included in calculating the AWW at the time. Claimant testified that the ombudsman had acknowledged her "error" and apologized for the mistake of not including the health insurance benefits. The parties were apparently unable to agree on a different or correct AWW and claimant requested another BRC to resolve the issues of "Does good cause exist to relieve the claimant from the effects of the agreement of June 8, 1999" and "What is the [AWW]?"

The hearing officer, in this case, made the following determinations:

FINDINGS OF FACT

2. Claimant entered into an agreement on [AWW] and date of [MMI] on June 8, 1999 at a [BRC].

3. Claimant was not represented by an attorney.

4. Records from his employer relating to wages were not available at the [BRC].

5. Claimant was not informed that health care premiums may be includable under certain circumstances in calculating the [AWW] for a claim.

6. The self-insured has been unable to produce documents showing what Claimant made at the time of his injury and what health care premiums, if any, were paid by Employer.

7. A wage statement was not available at the [CCH].

8. The agreement entered into on June 8, 1999 was not based on proper evidence of Claimant's true earnings.

9. Good cause exists to relieve Claimant of the effects of the agreement signed on June 8, 1999 as to [AWW].

CONCLUSIONS OF LAW

3. Claimant is relieved of the effects of the agreement entered into on June 8, 1999 as to [AWW].

4. Claimant's wage rate cannot be determined until a valid wage statement is received from Claimant's employer.

The self-insured appeals the decision stating that the hearing officer failed "to properly apportion the burden of proof among the parties." We disagree. The hearing officer clearly stated that the claimant had the burden to prove his AWW and in his decision found that the self-insured, as the employer, had failed to produce a wage statement.

Section 410.030(b) and Rule 147.4(d)(2), dealing with the binding effect of a BRC agreement, both provide that:

> If the claimant is not represented by an attorney, the agreement is binding on the claimant through the conclusion of all matters relating to the claim while the claim is pending before the commission, unless the commission for good cause relieves the claimant of the effect of the agreement. [Emphasis added.]

The self-insured argues that this case is no longer "pending before the commission" because at the conclusion of the appeal in Appeal No. 992311, *supra*, the claimant had two remedies being "[o]btain a new agreement with the Carrier regarding AWW . . . per [Rule] 147.7(a)" or seek judicial review in district court. Rule 147.7(a) provides:

> (a) A written agreement on one or more disputed issues addressed in a presiding officer's decision or order, including an interlocutory order, sets aside the decision or order, as it relates to the agreement, on the date the agreement is approved by the presiding officer.

We disagree with carrier's assertion. In Appeal No. 992311, the Appeals Panel reformed the decision to state that the AWW was $380.39 "unless the parties enter into an agreement of a different AWW" (which the self-insured apparently was and is unwilling to do) "or the claimant is otherwise relieved of the AWW provisions of the agreement dated June 8, 1999." The latter provision leaves the door open for the claimant to be "otherwise relieved" of the agreement. Both Section 410.030 and Rule 147.4(d)(2) contain a provision for good cause relieving a nonrepresented claimant from the effects of a BRC agreement.

Whether the mutual mistake by claimant, the self-insured, the ombudsman and the BRO amounts to good cause has been previously addressed in a very similar situation in Texas Workers' Compensation Commission Appeal No. 971027, decided July 18, 1997. In Appeal No. 971027, 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 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. That decision was cited with approval in Texas Workers' Compensation Commission Appeal No. 991566, decided September 7, 1999.

At the CCH, claimant argued that there was no consideration for the agreement of the $380.39 AWW, to which the self-insured countered pointing out that claimant had received a substantial amount of TIBs and IIBs based on the AWW and that claimant's challenge to the agreement is untimely. In that we are resolving this case based on a mutual mistake and the precedent of Appeal No. 971027, *supra*, we decline to address whether there was, or was not, consideration flowing to claimant in this agreement. In any case, relief from the agreement is based on statute and not on the law of contracts.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge