APPEAL NO. 001929

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 August 1, 2000. The issues at the CCH were whether the appellant (claimant) had disability from January 9, 1999, through February 6, 1999, as a result of the compensable injury of _____, and whether the claimant was attempting to avoid enforcement of the benefit review conference (BRC) agreement dated September 20, 1999, by filing for an additional period of disability. The hearing officer determined that the claimant did not have disability from January 9, 1999, through February 6, 1999, and the claimant did not attempt to avoid enforcement of the BRC agreement dated September 20, 1999. The claimant appealed the determination that he did not have disability from January 9, 1999, through February 6, 1999, on the grounds of sufficiency of the evidence and contended the hearing officer erred in adding the second issue regarding the BRC agreement. The claimant requested the Appeals Panel to reverse and render a decision that he did have disability during the relevant time period. The respondent (carrier) replied that the evidence was sufficient to support the determination of the hearing officer and that he did not err in adding the issue. The carrier requested that the decision and order be affirmed.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he sustained a low back strain and returned to light duty work on November 2, 1998. He acknowledged that Dr. Os certified him to be at maximum medical improvement (MMI) on November 25, 1998, with a three percent impairment rating (IR). The claimant testified that he disputed the certification and he was examined by Dr. Ol, the designated doctor, on January 21, 1999. Dr. Ol certified that the claimant reached MMI on January 8, 1999, with a two percent IR. The claimant admitted that he worked at light duty from January 8, 1999, through January 21, 1999, but stated that his wages were only $206.00 per week for the light duty as compared to $1,245.06 per week for his regular-duty work.

The claimant testified that although he had not been released back to full-duty work by his treating doctor for the period of January 9, 1999, through February 6, 1999, he obtained a return-to-work slip from the doctor on February 11, 1999, because the carrier had requested him to undergo a functional capacity evaluation (FCE) by the "company doctor." The claimant explained that the "company doctor" would not perform the FCE unless he had been released back to work, so he obtained the release. After he obtained the release, the claimant stated, he went back to the "company doctor" but the doctor subsequently decided not to perform the FCE because "it would do more harm to me to do the FCE, therefore, he referred me back to my treating physician for additional treatment." These statements are corroborated by medical records from the treating

doctor. The claimant stated he did not return to work thereafter (between January 21, 1999, and February 6, 1999) because the employer did not offer him light duty.

The parties signed a Benefit Review Conference Agreement (TWCC-24) on September 20, 1999, in which they agreed that the claimant reached MMI on April 8, 1999, with a two percent IR and that he had disability from February 11, 1999, through April 8, 1999. Disability for the dates in controversy at the CCH from January 9, 1999, through February 6, 1999, were not addressed in the TWCC-24.

We first address the question of whether the hearing officer erred in adding the issue concerning the BRC agreement. The claimant on appeal asserts that the hearing officer erred in adding the second issue as to whether he was attempting to avoid enforcement of the BRC agreement dated September 20, 1999. He contends that it was not a question of whether he wanted to avoid the effects of the agreement, but rather the carrier attempting to avoid the effects of the agreement. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(b) and (e) (Rule 142.7(b) and (e)) provides that a hearing officer may, upon a finding of good cause, add an additional issue at the CCH. The hearing officer found that good cause existed to add the issue and we review such action on an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 991851, decided October 12, 1999. We find that the hearing officer did not err in adding the issue because it was discussed at the BRC as part of the general dispute over the dates of disability in contention and how the TWCC-24 should be interpreted.

In this instance, the hearing officer found in favor of the claimant on the BRC agreement issue and by doing so, the claimant cannot demonstrate that he sustained harm from the alleged error. Finding no reversible error, we affirm the determination by the hearing officer that the claimant is not attempting to avoid enforcement of the BRC agreement dated September 20, 1999, by filing for an additional period of disability.

We are concerned, however, with the hearing officer's discussion in his Statement of the Evidence regarding whether the claimant sustained his burden of proving disability for the dates in question. The hearing officer wrote:

> In reviewing the evidence and testimony, I conclude that Claimant did not meet the statutory test for disability during the period in question, between January 9, 1999 and February 6, 1999. His doctor had not released him to full duty, but both [Dr. Os] and [Dr. Ol] (in his first report) showed an MMI date prior to January 9, 1999. Claimant testified at the hearing that he remained disabled during the disputed period of time, but that conflicts with the evidence of those two medical reports and the TWCC-24, signed by Claimant, which showed disability for the period of February 11, 1999 through April 8, 1999.

We believe the above-quoted language demonstrates that the hearing officer may have confused the date of MMI with disability and therefore applied the wrong standard in

deciding whether the claimant had disability from January 9, 1999, through February 6, 1999. The date that an injured employee reaches MMI and whether he or she has disability are separate issues and are determined separately. Texas Workers' Compensation Commission Appeal No. 931026, decided December 22, 1993. "Disability" means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). "Maximum medical improvement" means the earlier of: (1) the earliest date after which, based on reasonable medical probability, further medical recovery from or lasting improvement to an injury can no longer reasonably be anticipated; (2) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (3) the date determined as provided in Section 408.104 (regarding spinal surgery). Section 401.011(30). An injured employee can reach MMI but still may continue to have disability. After MMI has been reached the injured worker is no longer entitled to temporary income benefits. Section 408.101(a).

We affirm the determination of the hearing officer that the claimant is not attempting to avoid enforcement of the BRC agreement dated September 20, 1999, by filing for an additional period of disability. We reverse the decision and order of the hearing officer that the claimant did not have disability for the period of January 9, 1999, through February 6, 1999, and remand the matter for the hearing officer to determine, using the proper standard and the evidence received at the CCH on August 1, 2000, whether the claimant had disability from January 9, 1999, through February 6, 1999.

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.

Kathleen C. Decker
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge