APPEAL NO. 002152

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 28, 2000. The issues were does the compensable injury of _____, extend to the coccyx; does good cause exist to relieve the appellant (claimant) from the effects of the agreement signed on January 11, 1999; what is the date of maximum medical improvement (MMI); and what is the impairment rating (IR). The hearing officer determined that the compensable injury extends to the coccyx; that good cause does not exist to relieve the claimant of the effects of the agreement; and that the claimant reached MMI on July 22, 1998, with a 13% IR. The claimant appealed; stated that he was impeded and intimidated by the rapid fire questioning strategy by the attorney representing the respondent (carrier); contended that there is good cause to relieve him of the agreement; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is relieved of the effects of the agreement and that he reached MMI on September 18, 1999, the date of statutory MMI, with a 29% IR assigned by his treating doctor. The carrier responded, contended that no error occurred in examination of the claimant, that the appealed determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust, and requested that the decision of the hearing officer be affirmed. The determination that the compensable injury extends to the coccyx has not been appealed and has become final under the provisions of Section 410.169.

DECISION

We reverse and render in part and reverse and remand in part.

We first address the claimant's contention that the rapid fire questioning by the attorney representing the carrier impeded and intimidated him, causing him to give incorrect answers. The audiotape indicates that the attorney representing the carrier cross-examined the claimant, but not that there was rapid fire questioning by the attorney. After the cross-examination by the attorney, the ombudsman asked questions on redirect examination, including a question if the claimant had anything further to offer. The claimant was permitted to talk for approximately 10 minutes. During cross-examination, the attorney representing the carrier did argue with the claimant. The hearing officer stated that the claimant had answered the questions and requested that the attorney move on. That did not adversely impact on the claimant. We perceive no reversible error resulting from the questioning of the attorney representing the carrier.

We next address the determination that the claimant is not relieved of the effects of the agreement signed by the carrier's representative on December 31, 1998, and by the claimant on January 11, 1999, that the claimant reached MMI on July 22, 1998, and certified by the Texas Workers' Compensation Commission (Commission)-selected designated doctor with a 13% IR as assigned by the doctor who examined the claimant at the request of the carrier. Section 410.029 provides that if a benefit review conference

(BRC) results in the resolution of some of the disputed issues by agreement the benefit review officer (BRO) shall reduce the agreement to writing and the BRO and each party or the designated representative of a party shall sign the agreement. Section 410.030 provides:

> BINDING EFFECT OF AGREEMENT. (a) An agreement signed in accordance with Section 410.029 is binding on the insurance carrier through the conclusion of all matters relating to the claim, unless the commission or a court, on a finding of fraud, newly discovered evidence, or other good and sufficient cause, relieves the insurance carrier of the effect of the agreement.
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> (b) The agreement is binding on the claimant, if represented by an attorney, to the same extent as on the insurance carrier. 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.

These sections are discussed at pages 6-89 through 6-93 of 1 JOHN T. MONTFORD, *ET AL*., A GUIDE TO TEXAS WORKERS' COMP REFORM (1991). The authors state that "good and sufficient cause" is more than mere "good cause" and that "other good and sufficient cause" should involve an especially extenuating situation that would offend the Commission's or a court's general sense of fairness of equity to hold a represented party bound by a BRC agreement. The standard for relief from an agreement by an unrepresented claimant is less than that on a carrier or a represented claimant. There is no indication that a finding of fraud or newly discovered evidence are not reasons for relief from an agreement by an unrepresented claimant. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.4 (Rule 147.4) essentially repeats the provisions of Section 410.029 and Section 410.030. In Texas Workers' Compensation Commission Appeal No. 951057, decided August 10, 1995, the hearing officer determined that there was no good cause to relieve a claimant of the effects of an agreement. The Appeals Panel stated that a new medical report concerning complications was newly discovered evidence, reversed the decision of the hearing officer, and rendered a decision that the claimant was relieved of the effects of the agreement.

The hearing officer made findings of fact that there was no fraud involved in procuring the agreement and that there was not a substantial misdiagnosis of the claimant's condition on January 11, 1999. He did not make a finding of fact concerning newly discovered evidence. The claimant testified that he was taking pain medication at the time he signed the agreement; that at the end of January 1999 and the first part of February 1999, he began weaning off the pain medication; that as he did so he noticed severe pain in the coccyx area; that he complained to his treating doctor about the pain; and that in August 1999, x-rays revealed that he had a fractured coccyx. A radiographic report dated August 25, 1999, states that the findings are consistent with an anterior

subluxation of the coccyx. In a letter to the Commission dated October 20, 1999, Dr. S, the claimant's treating doctor, states that additional studies found that the claimant has a coccyx fracture; that it has a major impact on the claimant's overall prognosis and MMI determination; and that he, Dr. S, rescinded his prior certification of MMI. In a report dated November 8, 1999, Dr. S stated that he added 5% impairment for the coccyx and changed the claimant's IR from 25% to 29%. In a letter dated April 24, 2000, Dr. W, who examined the claimant at the request of the carrier, said that he was unable to state within certainty that there was a fracture or nonunion of the coccyx, that he favored the assumption that the claimant injured his coccyx, that that was not known when he examined the claimant in June 1998, but that it would not cause him to change the IR he assigned in June 1998. The designated doctor examined the claimant on November 20, 1998, and has not examined the claimant since that day.

At the time the claimant signed the agreement, there had not been a diagnosis of a fractured coccyx. Clearly there is newly discovered medical evidence that indicates a fracture that was not considered at the time the claimant signed the agreement. Injury to an additional part of the body is the type of newly discovered evidence that would be sufficient to relieve the claimant of the effects of the agreement under the provisions of Section 410.130. A misdiagnosis is not required to relieve a claimant of the effects of an agreement.

The determination that the compensable injury extends to the coccyx has not been appealed and has become final. We reverse the decision of the hearing officer that the claimant is not relieved of the agreement; that the claimant reached MMI on July 22, 1998; and that his IR is 13%. We render a decision that the claimant is relieved of the effects of the agreement that he signed on January 11, 1999. We remand for the hearing officer to determine the date the claimant reached MMI and his IR. Since the designated doctor did not consider the fracture of the coccyx when he certified that the claimant reached MMI and assigned an IR, the designated doctor should again evaluate the claimant and consider all of the claimant's compensable injury.

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 Commission's Division of Hearings, pursuant to Section 410.202. *See*

Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge