APPEAL NO. 93984

On October 1, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). The issue at the hearing was whether good cause existed to set aside an agreement the parties signed at a benefit review conference (BRC) on March 15, 1993. The appellant (claimant) asserted that good cause existed and the respondent (carrier) asserted it did not exist. The hearing officer found that there is no good cause to set aside the agreement and decided that it is valid and binding upon the parties. The claimant disagrees with the decision and requests that we set aside the agreement. The carrier responds that the decision is supported by the evidence and requests that it be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The claimant injured her shoulder pulling wood at work on (date of injury). She has been treated by (Dr. T) who diagnosed shoulder bursitis and brachial neuritis. Dr. T released the claimant to limited duty (no lifting) on July 31, 1992. The claimant testified that while she was being treated by Dr. T for her shoulder injury, she was also seeing (LG) for counseling concerning her fear of heights. In a letter dated December 10, 1992, LG stated that she was unsuccessful in addressing the claimant's phobia of heights and that any job "requiring heights would not be safe for her." It is unknown whether the claimant's job required her to be in high places. The claimant did not return to work and the reason for her not returning to work is unclear. The claimant testified that she applied for and received unemployment benefits from the Texas Employment Commission (TEC). She testified she told the TEC about her counseling for her fear of heights and that she received 26 weeks of unemployment benefits. The claimant also said that she has applied for work but has been unsuccessful in obtaining work because of Dr. T's no lifting work restriction.

A BRC was held on January 4, 1993. The purpose of the BRC is unknown. However, at the BRC the Commission ordered the claimant to be examined by (Dr. G) to determine if the claimant had reached maximum medical improvement (MMI) and, if so, to determine the claimant's impairment rating. Dr. G's status is unclear. The request for the medical examination order (MEO) is shown as having been made by the Commission and the order references Article 8308-4.16 (now Section 408.004). The order does not refer to Dr. G as a designated doctor. However, the claimant said Dr. G was a designated doctor. A designated doctor appointed by the Commission to resolve an issue of impairment or MMI is accorded presumptive weight whereas an MEO doctor is not. Notwithstanding that the order shows that the Commission requested the MEO, the claimant testified that at the January BRC, she and the carrier agreed that she would be examined by Dr. G for the purpose of determining MMI and impairment rating. No issue was raised at the hearing or on appeal as to the status of Dr. G as an MEO doctor or as a designated doctor. In any event, we have previously held that parties can reach agreement on MMI and impairment

rating whether or not a designated doctor has been involved in the case. Texas Workers' Compensation Commission Appeal No. 93706, decided September 27, 1993.

Dr. G examined the claimant on January 20, 1993. In a narrative report addressed to the claimant and dated January 20th, Dr. G diagnosed bicipital tendinitis and impingement syndrome of the right shoulder; said the claimant had good range of motion, strength and stability; reported that x-rays of the shoulder taken on January 20th were normal; and anticipated that the claimant would return to light work with the following restrictions: no lifting, pushing, pulling, carrying more than 20 pounds, and no prolonged work at or above the shoulder level. Dr. G recommended an MRI scan of the right shoulder to rule out rotator cuff tear and biceps tendinitis. Dr. G stated: "[i]f no significant damage is found then I think you will recover completely and will have reached maximum medical impairment (sic) at this date. If the MRI does not show any significant abnormality the permanent partial impairment of the right shoulder is 0%." Dr. G further stated "[i]f the MRI shows definite abnormalities then a revision of the MMI and impairment rating will of course have to be made." An MRI scan of the claimant's right shoulder was done on February 2, 1993, and it revealed "[r]ight shoulder within normal limits by MRI. In particular, there is no apparent rotator cuff tear."

A second BRC was held on March 15, 1993. In a written BRC agreement dated March 15, 1993, which is signed by the claimant (there is no indication that the claimant was represented by an attorney at the BRC but she said she had the assistance of an ombudsman at the BRC), the carrier's representative, and the benefit review officer (BRO), the disputed issues are shown as whether the claimant has reached MMI and, if so, with what impairment rating. The agreement states that the parties resolved those issues by accepting that the claimant reached MMI and by accepting Dr. G's impairment rating of zero percent. The parties further agreed that the claimant had disability for a period of four weeks and the carrier agreed to pay the claimant temporary income benefits (TIBS) in the total amount of $1752 for that four week period. The claimant said she received and cashed the carrier's check in payment of TIBS. Although a Report of Medical Evaluation (TWCC-69) was not in evidence, the claimant testified that she had in hand at the BRC Dr. G's TWCC-69 which was filled out and which assigned a zero percent impairment rating. The claimant testified that at the March 15, 1993, BRC she had the opportunity to ask questions of the BRO and the ombudsman and that the BRO and the ombudsman had the opportunity to explain the "import" of the agreement to her. There was no testimony as to what exactly was asked and what was explained. However, the claimant testified that neither the BRO nor the ombudsman told her anything "inaccurate" about the agreement. At the hearing, the claimant said she was under stress at the March BRC because her daughter had just been diagnosed with cancer, that because of the stress she was not capable of thinking, and that she "didn't understand it (the BRC agreement)."

The claimant said that Dr. T referred her to (Dr. M) sometime after the March BRC and that she saw Dr. M in August 1993. Dr. M reported that the claimant could perform light duty work lifting 20 pounds maximum. Dr. M's initial diagnosis was "bursitis shoulder and/or rotator syndrome." He recommended an arthrogram of the claimant's right shoulder

which was done on August 19, 1993, and was reported as a "normal shoulder arthrogram." On September 13th, Dr. M released the claimant to "heavy work" with no overhead or above-the-shoulder work with the right shoulder. In a letter dated September 29, 1993, which is addressed to the claimant and the carrier, Dr. M said he had performed a test on the claimant to determine the strength in her injured right shoulder as compared to her left shoulder. He said the test revealed that the right shoulder is only 11 percent as strong as the left in external rotation, 25 percent as strong in internal rotation, 38 percent as strong in abduction, and 33 percent as strong in adduction. However, he further stated that the test showed a lack of maximum effort on the part of the claimant. He further stated that it did not appear that the claimant had any pain or discomfort during the test and that she did not complain of pain after the test. Dr. M said that it was not likely that the claimant had a rotator cuff tear, but that it is still possible that she has weakness of her shoulder. Dr. M concluded his letter by stating:

> The findings of this strength test, combined with a normal shoulder MRI and arthrogram, indicate to me that she does not seem to have a significant problem with her shoulder. I think that a strengthening program would help her if she would be willing to give full effort and that is why orthorehabilitation was ordered.

The claimant testified that she still has a lot of shoulder pain, but also testified that the pain is the same as she was having on March 15, 1993, the date of the BRC agreement. A third BRC was held on August 4, 1993, to resolve the disputed issue of whether there is good cause to set aside the BRC agreement. The BRO recommended that good cause had not been shown.

The hearing officer found that at a BRC held on March 15, 1993, the claimant and the carrier entered into an agreement, which was signed by the claimant, the carrier's representative, and the BRO. She further found that there is no good cause to set aside the BRC agreement. The hearing officer concluded that the BRC agreement of March 15, 1993, is valid and is binding upon all parties in the manner indicated by the 1989 Act. After deciding that the BRC agreement is valid and binding, the hearing officer stated that nothing in her decision shall be construed to adversely affect the reasonable and necessary medical benefits to which the claimant is entitled pursuant to the 1989 Act.

Section 410.030 provides, in part, that a BRC agreement is binding on an unrepresented 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. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.4(d)(2).

On appeal, the claimant contends that the hearing officer should have relieved her of the effect of the BRC agreement because she has shown good cause to be relieved of the effect of the BRC agreement in that she was under stress when she entered the agreement and she was not aware of the limited use of her right shoulder until five months after she

entered the agreement. The claimant did not assert at the hearing, nor does she assert on appeal, that Dr. G had not certified MMI and assigned her a zero percent impairment rating.

The determination of whether a claimant has demonstrated good cause for setting aside a BRC agreement is a fact question to be decided by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 93745, decided October 5, 1993; and Texas Workers' Compensation Commission Appeal No. 93583, decided August 25, 1993. The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). Considering the claimant's testimony that her shoulder pain at the time the agreement was reached was the same five months later, together with Dr. M's findings that the claimant did not use maximum effort in her test and that it was only "possible" that she had weakness in her right shoulder, the hearing officer was not compelled to find that the claimant was unaware of her shoulder condition at the time of the agreement nor that her condition had changed after signing the agreement. The fact that the claimant was released to only limited duty at the time she signed the BRC agreement also mitigates against a finding that she was unaware of the limited use of her right shoulder at that time. The matter of whether the claimant was in such stress at the BRC as to be incapable of understanding the agreement or of being able to think was for the hearing officer to determine after hearing the testimony, considering the evidence and observing the witness. *See* Appeal No. 93583, *supra*. Having reviewed the record, we conclude that the hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). *See also* Appeal No. 93583, *supra*, and Appeal No. 93745, *supra*. No issue was presented at the hearing or on appeal as to whether the BRC agreement was, in effect, a settlement under Section 408.005, and thus we do not address such matter on appeal.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge