APPEAL NO. 94146

On December 21, 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). The issue at the hearing was whether good cause existed to relieve the respondent (claimant) and/or the appellant (carrier) from the effects of the agreement approved on July 29, 1993. The hearing officer determined that the claimant established good cause to be released from the terms of the agreement because the claimant and the carrier did not have a mutual understanding of the terms of the agreement. The hearing officer ordered that the claimant be released from the effects of the agreement reached on July 29, 1993, and ordered the carrier to pay workers' compensation benefits to the claimant in accordance with his decision and the provisions of the 1989 Act. The carrier disagrees with the hearing officer's decision and requests that we reverse it and render a decision in its favor or reverse the decision and remand the case to the hearing officer for further proceedings.

DECISION

The hearing officer's decision and order are affirmed.

The claimant has a General Equivalency Diploma and one year of college education. According to a medical report, the claimant sustained a right knee injury in (year)and had right knee surgery for a meniscus tear. The claimant testified that on (date of injury), he sustained a work-related injury when he slipped in a puddle at work and fell on his knees. An MRI scan of the left knee revealed a torn meniscus and arthroscopic surgery was performed on the left knee on three occasions, July 1991, February 1992, and October 1992. (Dr. L), who is the claimant's current treating doctor, performed the right knee surgery in 1981 and the last two, left knee surgeries. The claimant has undergone extensive physical therapy treatments. The claimant testified that he started having problems with his right knee in December 1991 but was not treated for his right knee pain because Dr. L wanted to concentrate medical attention on the left knee. According to several medical reports, the claimant stopped working in February 1992 and has not returned to work.

In a report dated February 17, 1993, Dr. L diagnosed the claimant's condition as status post-arthroscopy left knee and recurrent right knee strain. In a letter to the carrier dated February 23, 1993, Dr. L stated that the claimant's left knee was doing better but that the claimant had right knee symptoms which he thought may be a "recurrent internal derangement" of the right knee, and Dr. L advised the carrier that he had asked the claimant to check with the carrier "on the compensation status of this injury." The claimant testified that he contacted the carrier about his right knee and the carrier said "no" so he requested a benefit review conference (BRC).

In a letter dated March 12, 1993, the claimant stated that he was requesting a BRC because the carrier had denied "relating injury to my right knee resulting from an accident to my left knee on (date of injury)." The claimant said a BRC was held in March or April

1993; however, the BRC report was not in evidence. As a result of the BRC, the Texas Workers' Compensation Commission (Commission) selected (Dr. H) as the designated doctor. In a letter from the Commission to the claimant dated April 19, 1993, the Commission advised the claimant that he was to attend a medical examination by Dr. H on May 4, 1993, for the purpose of determining whether maximum medical improvement (MMI) had been reached and, if so, on what date, and to determine the percentage of impairment, if any. In addition, the letter advised the claimant that another purpose of the examination was to determine "whether right knee injury is causally related to the original left knee injury."

In a narrative report dated May 4, 1993, Dr. H reported that he examined both of the claimant's knees and recorded the following impressions:

1.Left knee minuscule tear status post arthroscopy times three related to work-related injury (date of injury), with residual degenerative changes but without ligamentous laxity or neurological impairment.

2.Right knee degenerative joint disease with pre-existing injury status post arthroscopy in 1981, stable since that time until reexacerbation with increased weight-bearing secondary to left knee injury (date of injury).

Dr. H then provided the following discussion:

[Claimant] has a pre-existing right knee injury which appears to have been exacerbated by his work-related injury involving primarily his left knee. Because it appears that there have been no recurrent problems involving his right knee, it would appear that the right knee exacerbation is caused by compensation and overuse during the rehabilitation of his left knee injury. He has had an appropriate course of physical therapy to manage his pain and to maintain his strength. It is unlikely that further therapy, pharmacological interventions or surgical interventions are likely to result in further improvement in his pain within reasonable medical probability over the next year. It would appear that he plateaued in his recovery in March of 1993 after completion of his most recent physical therapy treatment, which ended in late February, and I would place his date of maximum medical improvement at March 1, 1993.

His impairment rating is attached. Based on full range of motion of the right knee without documented minuscule or ligamentous damage, the impairment rating on his right knee is 0 percent. The impairment rating for his left knee and associated whole person impairment is attached.

Attached to Dr. H's narrative report is a Report of Medical Evaluation (TWCC-69) in which Dr. H reported that the claimant reached MMI on March 1, 1993, with a 12 percent whole body impairment rating. Objective laboratory or clinical findings were stated to be a torn meniscus of the left knee, arthritis "from any etiology" left knee, and a right knee strain.

Impairment was shown for left leg range of motion and for specific disorders of the left leg which resulted in a "total left lower extremity 31% LE = 12% whole person."

At the hearing the claimant said that as a result of the March or April BRC a contested case hearing had been set for sometime in May 1993. The claimant said that on some unspecified date he was contacted by the office of the Commission ombudsman and was told that the carrier had agreed that the "right knee was causally connected to the left knee injury of (date of injury)" and that (Mr. S), who was the attorney representing the carrier at that time, had "called off" the hearing. The claimant said the CCH scheduled for May 1993 was cancelled. The claimant then said that "at that point in time, I proceeded to be reevaluated by [Dr. L] and he concurred with [Dr. H] and he sought approval by the carrier to perform the surgery in June of 93 on the right knee." The claimant said that he had right knee surgery performed by Dr. L on June 16, 1993. The claimant further testified that to his "recollection" Dr. L did not have a medical report "out" on his right knee surgery before he, the claimant, signed the agreement of July 29, 1993, but that he had read Dr. H's TWCC-69 and narrative report before he signed that agreement. The operation report for the June 1993 right knee surgery was not in evidence.

In evidence was a document entitled "Post-Benefit Review Conference Agreement" (the agreement) which indicated that the date of the BRC was April 15, 1993; that the date of injury was (date of injury); and that the following were the disputed issues and the resolutions of the issues:

Disputed Issue: "1. Has maximum medical improvement been reached?"

Resolution: "1. Yes, parties agree that M.M.I. has been reached on 3/1/93."

Disputed Issue: "2. What is the impairment rating?"

Resolution: "2. Parties agree that the impairment rating is 12%."

Disputed Issue: "3. Is current "internal derangement" of the right knee causally related to original injury?"

Resolution: "3. Yes, parties agree that "internal derangement" of the right knee is related to original injury."

The agreement was signed by Mr. S, the attorney representing the carrier at that time, on July 6, 1993, by the claimant on July 29, 1993, and by a benefit review officer (BRO) on July 29, 1993. The claimant testified that in March 1993 he first talked to the ombudsman who assisted him at the hearing and that before signing the agreement he had had "some conversations" over the telephone with the ombudsman about the agreement. The claimant further testified that the ombudsman told him that the parties were agreeing that his "impairment rating would be 12 percent" and that the ombudsman also spoke to him about "MMI" and about the "causally related issue." The claimant did not state what advice,

if any, the ombudsman gave him in regard to the agreement nor did he state whether the ombudsman related any particular interpretation of the agreement to him. The claimant testified that the agreement was prepared by the ombudsman and sent to Mr. S for signature and that Mr. S then left the agreement at the Commission field office for the claimant to sign. The claimant said he came to the Commission field office on July 29, 1993, and signed the agreement in front of the receptionist. He said no one else was present when he signed the agreement and that he never talked to Mr. S or the BRO about the agreement. He did not know who presented the agreement to the BRO for signature. The claimant testified that when he signed the agreement he was having problems with his right knee. He further testified that he did not contact Dr. L before he signed the agreement. It was stipulated at the hearing that medical and income benefits have been paid to the claimant in accordance with the agreement.

Although we will discuss the claimant's position in more depth later in this decision, suffice it to say at this point that the claimant testified that when he signed the agreement he believed the date of MMI and impairment rating of 12 percent applied to his left knee only and that MMI and impairment rating for his right knee would be determined at some future time.

The claimant further testified that sometime in August 1993, Dr. L was "reevaluating the knee" and Dr. L told him that "there might be a probability of disability to that right knee." The claimant said that he then contacted the carrier and the carrier told him that it had agreed to treat the right knee, but that the "only impairment would be the 12 percent that had been allotted by [Dr. H]. The claimant said that he then requested another BRC. At this point in the hearing, the claimant introduced into evidence an undated letter which was date stamped August 25, 1993 (it is unclear by whom it was date stamped), and in which the claimant requested a BRC on the impairment rating given by the designated doctor because the claimant felt the rating was incorrect. The claimant said a BRC was held on some unspecified date and that the issue at the BRC was his impairment rating. The claimant said that as a result of the BRC the BRO "designated a doctor - [Dr. S] for the reason that [Dr. H] was not going to be in the region for an examination at that point in time." No report for this BRC was in evidence. Also, no Commission order or letter from the Commission regarding the status of Dr. S or the purpose of his examination was in evidence.

In a TWCC-69 dated October 4, 1993, Dr. S reported that the claimant had not reached MMI and estimated that the claimant would reach MMI in six weeks after further physical therapy. In a narrative report dated September 29, 1993, which was attached to the TWCC-69, Dr. S indicated that the Commission had referred the claimant to him, but he does not state the status in which he examined the claimant nor the purpose of the examination. Dr. S stated his impression as: (1) right knee pain, status post arthroscopy for torn meniscus, with persistent pain; (2) history of left knee pain, status post arthroscopy for torn meniscus; and (3) chronic pain and probable degenerative arthritis involving both knees. Dr. S reported that he did not think the claimant had reached MMI and that according to his review of the records it appeared that the claimant had not reached statutory MMI (the claimant testified and medical records indicated that the claimant began losing

time from his injury of (date of injury), in February 1992, although it is unclear whether that is actually the case because of the surgery in July 1991). Dr. S recommended physical therapy for six to eight weeks and a home exercise program. He also recommended a trial of non-steroidal medication unless that had been done in the recent past. In the narrative report he stated that he thought the claimant would reach MMI within six to eight weeks.

Also in evidence was a letter from Dr. L to the carrier dated September 20, 1993, in which Dr. L stated that he had reevaluated the claimant on September 8, 1993; that he recommended that the claimant continue with his rehabilitation program; and that "we feel that based on additional problems that have arisen from this re-injury and subsequent surgery that his impairment rating in all probability will increase reference his right knee."

The claimant said that yet another BRC was held. A report for a BRC held on November 9, 1993, was in evidence. It reflected that the issue raised but not resolved after the BRC was "Does good cause exist to relieve [claimant]/[carrier] from the effects of the agreement approved on 07/29/93?" The BRO (who was the BRO who signed the agreement) recommended that the agreement "should stand as written with a conclusion of an impairment rating of 12 percent as final for the injury occurring on [date of injury]."

In an affidavit dated December 20, 1993, Mr. S, the attorney who signed the agreement on behalf of the carrier stated that: (1) he negotiated the agreement with the claimant and the ombudsman who assisted the claimant; (2) that he personally represented to the ombudsman that the carrier would agree that the "internal derangement" of the right knee was related to the original injury in exchange for the claimant accepting a 12 percent impairment rating and that the 12 percent was to be a total impairment rating and would encompass both knees; (3) that neither the ombudsman nor the claimant took the position at the BRC (doesn't say which one) that the 12 percent impairment should apply to the left knee only; and that (4) the claimant accepted "this stipulation" and signed the agreement on July 29, 1993, and that he, Mr. S, signed the agreement on July 26, 1993, (the agreement shows a date of signing by Mr. S of 7/6/93).

Now, as to the claimant's assertion of good cause for being relieved of the effects of the agreement, the claimant testified that before he signed the agreement he had read Dr. H's report and had talked to the ombudsman about Dr. H's report and that he knew that the March 1, 1993, date of MMI, the 12 percent impairment rating, and the "right knee causally related" set forth in the agreement came from Dr. H's report. He testified that he also knew that Dr. H "gave zero percent for the right knee." He further testified that Dr. H had examined both knees and had performed range of motion testing on both knees and that Dr. H had Dr. L's reports that had been generated up to the time of Dr. H's examination of May 4, 1993, which was before his right knee surgery of June 1993. The claimant also testified that he understood when he signed the agreement that the carrier was accepting responsibility for medical treatment for his right knee.

However, the claimant also said that his interpretation of Dr. H's report was that the date of MMI and the whole body impairment rating was for his left knee only "because there

had been no medical intervention on the right knee whatsoever to document any damage to it." In explaining the basis for his interpretation of Dr. H's report, the claimant pointed to the sentence in Dr. H's narrative report which reads "[b]ased on full range of motion of the right knee without documented minuscule or ligamentous damage, the impairment rating on his right knee is 0 percent." (Underlining added.) The claimant testified that he interpreted the underlined portion of the quoted sentence to mean that with the medical evidence Dr. H had available at the time of the examination, Dr. H could not assess an impairment rating for the right knee, but that with more medical evidence an impairment rating for the right knee could be assessed. Put another way, the claimant said he read the quoted sentence to mean that "there was a lack of evidence to assign any type of disability [for the right knee]." The claimant reiterated that he had had no "medical intervention" on his right knee at the time of Dr. H's examination so that medical evidence to support an impairment rating for the right knee was not available at that time.

The claimant further explained that he had interpreted Dr. H's report to give an impairment rating only for his left knee because, after Dr. H stated in the narrative report that the right knee had a zero percent impairment rating, Dr. H stated that "[t]he impairment rating for his left knee and associated whole person impairment is attached." And, attached to Dr. H's narrative report is the TWCC-69 in which Dr. H assigned a 12 percent whole body impairment rating due to impairment of the left leg only.

Thus, although the claimant knew that the MMI date and impairment rating set forth in the agreement came from Dr. H's report, he testified that he had interpreted Dr. H's report to address MMI and impairment for his left knee only and that the right knee would be addressed at a later date, so when he signed the agreement it was his understanding that the MMI date and impairment rating applied to his left knee only, and that "the right knee would be addressed at a later date to see if there was any impairment." The claimant said that he understood that the third part of the agreement (right knee is related to the original injury) meant that the carrier would pay for medical treatment for his right knee and that he "understood it to mean that as soon as a doctor said I had reached MMI the impairment rating as to that, if any at all, would be assessed."

The claimant further testified that he believed he had "newly discovered evidence" in the form of Dr. L's statement of September 20, 1993, that "his impairment rating in all probability will increase reference his right knee," and in the form of Dr. S's report of October 4, 1993, that he had not reached MMI. The claimant stated that he felt that signing the agreement "hindered any possibility of future benefits being allotted to me." He also said that if someone had told him that by signing the agreement his weekly income benefits would stop after he was paid the income benefits for the 12 percent impairment rating, he would not have signed the agreement.

The hearing officer made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

15.Claimant's understanding of the terms of the agreement is not the same as the carrier's understanding of the terms of the agreement.

16.Claimant's understanding of the agreement and Carrier's understanding of the agreement are equally valid because the agreement is ambiguous.

CONCLUSIONS OF LAW

2.Claimant has established good cause to be released from the terms of the agreement.

3.Claimant and carrier did not have a mutual understanding of the terms of the agreement.

The hearing officer ordered that the claimant be released from the effects of the agreement and ordered the carrier to pay medical and income benefits in accordance with his decision and the provisions of the 1989 Act and rules of the Commission. On appeal, the carrier states that it disagrees with Finding of Fact No. 15 and Conclusions of Law Nos. 2 and 3. The carrier does not state any disagreement with Finding of Fact No. 16 that the agreement is ambiguous. It has been held that material fact findings that are not challenged on appeal are binding on the reviewing court and stand as the proven facts of the case. *See* Lovejoy v. Lillie, 569 S.W.2d 501 (Tex. Civ. App.-Tyler 1978, writ ref'd n.r.e.); 5 TEX. JUR. 3d *Appellate Review* § 651 (1980). In appealing Finding of Fact No. 15 and Conclusions of Law Nos. 2 and 3, the carrier contends that the evidence establishes that the claimant knew that the agreement applied to both knees and that the hearing officer abused his discretion in finding good cause to relieve the claimant of the effects of the agreement because the evidence does not support the determination of good cause. In the alternative, the carrier asserts that it is unfair to allow the claimant to be released from the agreement while it remains bound by the agreement. The carrier contends that it should be relieved of the effects of the agreement when the claimant is relieved of the effects of the agreement.

Subsections (a) and (b) of Section 410.029 provide as follows:

(a)A dispute may be resolved either in whole or in part at a [BRC].

(b)If the conference results in the resolution of some disputed issues by agreement or in a settlement, the [BRO] shall reduce the agreement or the settlement to writing. The [BRO] and each party or the designated representative of the party shall sign the agreement or settlement.

Section 410.030 provides as follows:

(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.

(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.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.4(b) (Rule 147.4(b)) provides that:

(b)A written agreement reached after a benefit review proceeding has been scheduled, whether before, during, or after the proceeding has been held, shall be sent or presented to the presiding officer. The presiding officer will review the agreement to ascertain that it complies with the Act and these rules; if so, sign it, and furnish copies to the parties. A written agreement is effective and binding on the date signed by the presiding officer.

Rule 147.4(d) provides in pertinent part that:

(d)A signed written agreement, or one made orally, as provided by subsection (c) of this section, is binding on:

(2)a claimant not represented by an attorney through the final conclusion of all matters relating to the claim while the claim is pending before the commission, unless set aside by the commission for good cause.

In Texas Workers' Compensation Commission Appeal No. 92426, decided October 1, 1992, which involved the issue of good cause to set aside a BRC agreement, we applied an abuse of discretion standard in our review of a hearing officer's determination that there was good cause to set aside a BRC agreement. We stated that the determination of good cause is a decision best left to the discretion of the hearing officer, and that the hearing officer's determination will only be set aside if that discretion has been abused. In Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986), the Supreme Court of Texas stated that "to determine if there is an abuse of discretion, we must look to see if the court acted without reference to any guiding rules and principles." Also in Appeal No. 92426, *supra*, we stated that "[w]e have previously held that the appropriate test for the existence of good cause is that of ordinary prudence; that is, that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances." We also stated that the 1989 Act clearly contemplates the early resolution of disputes at a BRC. We note that we have also held that parties can reach agreement on MMI and impairment rating. Texas

Workers' Compensation Commission Appeal No. 94072, decided March 3, 1994. In Texas Workers' Compensation Commission Appeal No. 93706, decided September 27, 1993, we affirmed a hearing officer's decision that good cause existed to set aside a BRC agreement and pointed out that good cause existed based upon "testimony of what claimant knew and understood the agreement to mean . . . ." We further stated that "the claimant did not understand the agreement she entered into on March 17, 1993, and therefore had good cause to be relieved of the agreement." In Appeal No. 93706, the parties had agreed to the MMI date found by the claimant's treating doctor and to the impairment rating found by the designated doctor selected by the Commission.

"MMI" means the earlier of: (a) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; or (b) the expiration of 104 weeks from the date on which income benefits begin to accrue. Section 401.011(30). "Impairment" means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Section 401.011(23). An "impairment rating" means the percentage of permanent impairment of the whole body resulting from a compensable injury. Section 401.011(24).

In 14 TEX. JUR. 3d *Contracts* § 101 (1981), it is stated that:

> [o]ne is presumed to have known the purpose of an agreement executed by him, the consideration therefor, and also the meaning and legal effect of the terms used therein. Therefore, if a person signs a written contract with full opportunity to inform himself of its provisions, he will not thereafter be permitted to avoid the agreement on the ground that he was mistaken as to, or ignorant of, its contents. In short, he may not thereafter successfully claim that he believed that the provisions of the contract were different from those plainly set out in the agreement, or that he did not understand the meaning of the language used in the agreement. This principle is especially applicable where a party to a contract has read the instrument or has undertaken to examine it for himself.

The claimant in this case had the burden of showing good cause to be relieved of the effects of the agreement. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts and contradictions in the evidence, it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). When presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1987). Having reviewed the record, we conclude that Finding of Fact No. 15 that the claimant's understanding of the terms of the agreement is not the same as the carrier's understanding of the terms of the agreement is sufficiently supported by the evidence. We are not presented here with the question of whether that finding alone would

be sufficient to establish good cause to relieve a claimant of the effects of an agreement where the agreement is unambiguous, because the hearing officer in this case further found that the agreement in question is ambiguous. The finding that the agreement is ambiguous together with the finding that each party had a different understanding of the agreement supports the conclusion that the parties did not have a mutual understanding of the terms of the agreement and the ultimate conclusion that the claimant established good cause to be relieved of the effects of the agreement. The finding that the agreement is ambiguous is a material finding and it stands as proven because it has not been challenged on appeal. Our affirmance of the hearing officer's decision should not be taken to mean that we in any way agree with the notion that MMI and impairment rating are to be determined piecemeal where a compensable injury is composed of more than one body part or system.

In our opinion, the hearing officer's decision that the claimant is released from the effects of the agreement also relieves the carrier of the effects of the agreement. This is so because Rule 147.4(d)(2) which implements Section 410.030(b) provides that the agreement is binding on the claimant unless set aside by the Commission for good cause. According to Black's Law Dictionary, Sixth Edition (1990), "set aside" means "to reverse, vacate, cancel, annul, or revoke a judgment, order, etc." In addition, to relieve one party of the effects of an agreement and not the other would generally not comport with traditional concepts of justice and fairness.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge