APPEAL NO. 94244

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 January 26, 1994. The issues at the CCH were: 1. whether the agreement of the parties regarding average weekly wage (AWW) was binding; 2. if not, what was the correct amount of the appellant's (claimant herein) average weekly wage; and 3. whether the claimant was a part-time or full-time employee for the purpose of calculating his income benefits. The hearing officer ruled that the agreement was binding on the parties and if it were not the claimant's proper AWW would be $150.42. The hearing officer also found that the claimant was a full-time employee. The claimant appeals challenging a number of the findings of the hearing officer. The respondent (carrier herein) argues that the hearing officer's determination that the agreement of the parties was binding, was correct, and requests that we affirm the decision of the hearing officer.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm.

The hearing officer summarizes the evidence in detail in the section of her decision and order entitled "Statement of Evidence" and we adopt her rendition of the evidence. Briefly, the claimant testified that after having been unemployed for two years, during which time he received workers' compensation benefits due to a prior injury and then unemployment benefits, he began working for (MP), as a temporary laborer, in May 1993. MP placed the claimant on a couple of temporary jobs prior to placing him as a mechanic's helper and general laborer with (RW) on or about June 20, 1993. The claimant testified that while his previous placements through MP did not afford the claimant the opportunity to work 40 hours per week, his job with RW was a forty hour per week job and he was paid $5.00 per hour. The claimant testified that there were at least two other employees at RW who were similar employees to him. However, the claimant testified that these employees worked more as warehouse employees than as mechanic helpers. The claimant testified that these two employees made at least $5.00 per hour, working at least 40 hours per week.

Claimant and the carrier disagreed concerning the claimant's AWW. The issue was taken to a benefit review conference (BRC) on October 28, 1993, where the claimant took the position that his AWW was $200.00 per week, because this is what he was actually earning at the time he was injured and because the two other workers mentioned earlier earned at least $200.00. The carrier took the position that the claimant was entitled to $158.77, based on an Employer's Wage Statement (TWCC-3) from MP showing that the claimant earned $1429.00 working nine weeks beginning on May 21, 1993, and ending on July 25, 1993.

At the original BRC on October 28, 1993, the claimant and carrier entered into an agreement concerning AWW which read in relevant parts as follows:

> Parties agree to a [AWW] of $179.39. Parties agree all past and future income benefits will be calculated based on the [AWW] of $179.39. Carrier will include interest at a rate of 3.27% on the accrued temporary income benefits [TIBS]. The total in accrued benefits including the interest due [claimant] is $207.55.

The claimant, the carrier's representative and the Benefit Review Officer (BRO) signed this agreement. The claimant called the Texas Workers' Compensation Commission (Commission), wishing to rescind this agreement and a second BRC was held by telephone on November 2, 1993, in which the issues determined at the CCH under review were developed.

The claimant specifically disputes the following findings of fact by the hearing officer:

FINDINGS OF FACT

> 5. Claimant was not induced to sign the agreement in question by any misrepresentation of any participant in the Benefit Review Conference.
>
> 7. Claimant has not demonstrated good cause to avoid the effect of the agreement in question.
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> 9. There is no employee similar to Claimant who worked for [MP] for thirteen weeks prior to(date of injury).
>
> 10. There is no employee similar to Claimant who worked in (County 1) area for thirteen weeks prior to (date of injury).
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> 12. It would be just, fair, and reasonable, for a mechanic's helper in (County 1) area to earn an average of $150.42 per week.
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> 13. During the approximately nine and one-half weeks Claimant worked for [MP] prior to his injury of (date of injury, Claimant worked an average of approximately thirty-four hours per week.
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> 14. Claimant worked full-time for [MP] during the approximately nine and one-half weeks which Claimant worked for [MP] prior to Claimant's injury of (date of injury.

In reviewing the claimant's challenge to these findings of fact, we must apply the appropriate standard of appellate review. Section 410.165(a) provides that the CCH officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence.

Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In regard to Finding of Fact No. 5, quoted verbatim above, the claimant alleges that he was misled by representations of the BRO, when the representative of the carrier was out of the room, that the method used by the carrier in calculating his AWW at $158.77 (dividing the number of weeks worked by the total amount earned) was the correct method under Appeals Panel decisions in computing AWW for an employee who had worked for the employer for less than 13 weeks. The claimant alleges he was told that the compromise agreement under discussion would raise his AWW above this amount. The claimant contends that he has since discovered other Appeals Panel rulings that would apply in his case (and apparently result in another outcome). The claimant does not specify at this point to which decisions he refers and in fact in his request for review the only Appeals Panel decision he references (and this is much later) is Texas Workers' Compensation Commission Appeal No. 92426, decided October 1, 1992, which deals primarily with the standard of review the Appeals Panel will apply (abuse of discretion) when reviewing a hearing officer's determination as to whether there was good cause to set aside a BRC agreement.

The first problem in reviewing the claimant's first point of error is that there is no evidence in the record of the alleged statement of the benefit review officer (BRO) which the claimant recounts on appeal. The claimant testified at the CCH that the BRO worded the BRC agreement and told him to read and reread it which the claimant testified that he did. Most of the claimant's testimony concerning the BRC and the BRC agreement at the CCH revolved around this contention that at the BRC only TIBS were discussed and his belief that in signing the BRC agreement he was only agreeing to an AWW for purposes of computing TIBS, not for purposes of computing either impairment income benefits (IIBS) or supplemental income benefits (SIBS). Thus the claimant's contention that the BRO told him that the carrier was correctly computing AWW is new evidence raised for the first time on appeal.

We note that we will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission

Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal may require that case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Willis, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The evidence of the claimant on appeal fails to meet the first and third prongs of this test since the circumstances of the first BRC were obviously known to the claimant before the CCH and there is no showing why the claimant could not have presented this evidence at the CCH.

The claimant's challenge to the hearing officer's Finding of Fact No. 7 is predicated on his having good cause to abrogate the BRC agreement. The claimant argues that he should be allowed to avoid the agreement since he called the Commission within two or three hours to rescind his agreement and that he was not aware at the time he signed it that it would apply to IIBS and SIBS, but thought it would only apply to TIBS. Both he and his wife testified that the only type of income benefits discussed at the original BRC was TIBS. As to the claimant's first argument, the BRC report substantiates that the claimant called the Commission the day of the first BRC to attempt to rescind the BRC agreement. The claimant argues that the rapidity with which he sought rescission was in itself good cause to allow him to rescind. While this may certainly be a factor for the hearing officer to consider in good cause, it is not absolutely controlling.

Subsections (a) and (b) of Section 410.029 provides 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 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 thought 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:
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> (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, *supra*, 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, 298 (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.

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). In this case the claimant testified that he read and reread the BRC agreement. He testified that he was aware at the time of entering the agreement that there were different types of income benefits. The agreement itself clearly states that it applies to "past and future" benefits. Under these circumstances we cannot find that the hearing officer's finding that the claimant did not have good cause to avoid the effect of the agreement is an abuse of discretion.

In his attacks on the hearing officer's Finding of Fact No.9, No. 10, No. 12, No.13, and No. 14 the claimant is essentially contending that the hearing officer miscalculated his AWW in the event that the BRC agreement was not binding. He contends this is because (1) she improperly uses a week during which he did not work (the week ending June 20) in making her calculations, that (2) she finds he was a full-time worker when he was in fact a part-time worker, and (3) she finds that there was a no same or similar employee working for MP or in (County 1) when he believes there must one. The claimant had the burden of proof in regard to these contentions. In regard to the claimant's first point, the TWCC-3 has no entry for the week ending June 20th, perhaps, though it is not clear from the evidence at the hearing, because the claimant did not work during that week. A week during which the claimant did not work at all should not be used in computing AWW. We do not necessarily approve or disapprove under these circumstances, the method used by the hearing officer in determining whether the claimant was a full or part-time employee (adding up the hours worked by the claimant each week--24, 40, 65, 17 1/2, 40, 45, 32, 40, 39--and dividing by the number of weeks to determine whether the result is equal to or greater than 30). As to the issue of same or similar employee, there was evidence before the hearing officer that there was no same or similar employee working for MP in that MP does not list one on its TWCC-3, when the TWCC-3 instructs it to do so if one exists. In regard to there being no same or similar employee in (County 1), there is really no evidence on this point one way or the other, the hearing officer obviously believing that the two other workers at RW did not qualify as they had different job duties than the claimant. Again, if the claimant wished the hearing officer to use the wages of a same or similar employee in the vicinity, he had the burden of presenting evidence concerning such employee.

However, error, if any, by the hearing officer in regard to these matters would not be reversible error. In other words, any such error would not have led to the rendition of an improper decision. The decision and order of the hearing officer are sufficiently supported by her finding that the BRC agreement is binding. That decision alone determines the

AWW at $179.39, as stated in the BRC agreement. The hearing officer's other findings only could affect the outcome of the case if the BRC agreement were invalidated. Having decided to affirm her decision in regard to that issue, any error regarding the other challenged findings would not affect the ultimate question in this case--the claimant's proper AWW--and therefore would be harmless.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur in the result reached in the decision of Judge Kilgore. In my opinion, the hearing officer's finding that there is no good cause to set aside the benefit review conference (BRC) agreement is dispositive of all matters that were before the hearing officer in that the BRC agreement establishes the claimant's average weekly wage (AWW) regardless of whether the claimant is a full-time or part-time employee, and regardless of what the claimant's AWW would have been determined to be in the absence of the agreement. It should be noted that the claimant's AWW under the BRC agreement is higher than what it would have been under the fair, just and reasonable method employed by the hearing officer.

Robert W. Potts
Appeals Judge