APPEAL NOS. 002002
AND 002003

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 31, 2000, a contested case hearing (CCH) was held. The CCH pertained to two alleged injuries to the appellant (claimant).

One CCH was conducted for both claims, but a separate decision was written in each case. The issues were:

For Docket No. 077512 (Appeal No. 002002, involving a _____ injury)

1, Does good cause exist to relieve the Claimant from the effects of the Agreement signed on July 8, 1997;

2. What is the date of Maximum Medical Improvement (MMI); and

3, What is the impairment rating (IR)?

For Docket No. 122477 (Appeal No. 002003, involving a 1997 incident)

1. Does good cause exist to relieve the Claimant from the effects of the Agreement signed on July 8, 1997?

With regard to those issues, the hearing officer determined that the agreement the claimant entered into on July 8, 1997, relative to the issues in both Appeal No. 002002 and Appeal No. 002003, was binding on the claimant and that no good cause exists to relieve him of the effects of that agreement. The hearing officer further determined with regard to the other issues in Appeal No. 002002 that the claimant reached MMI on August 25, 1995, with a nine percent IR pursuant to the designated doctor's first report.

The claimant appeals, contending, as he had at the CCH, that he had been "coerced into signing" the agreement and that his IR should be 22% as found by the designated doctor in a second report. The claimant asserts the facts from his perspective and requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (self-insured) responds, citing portions of the testimony and evidence that support its position, and urges affirmance.

DECISION

Affirmed.

The claimant was a police officer for the self-insured city and the parties stipulated that the claimant sustained a compensable (low back) injury on _____ (chasing a suspect). The claimant received conservative treatment and returned to his regular duties

in November or December 1994. The claimant's treating doctor for this injury was Dr. D, who eventually certified the claimant had reached MMI on May 4, 1995, with a 12% IR. The claimant apparently disputed that assessment and Dr. H was appointed as the Texas Workers' Compensation Commission (Commission)-selected designated doctor. Dr. H, in a report dated August 25, 1995, certified MMI on that date with a 9% IR, based on loss of range of motion (ROM). The claimant testified that between 1995 and March 1997 he continued to experience occasional back pain and numbness and tingling in his legs due to the _____ injury. The claimant also continued to receive treatment from Dr. D and Dr. C, although it is not clear whether Dr. C was, in fact, a doctor. The claimant refers to seeing him "for pain management."

The claimant testified, and it is largely undisputed, that on _____, the claimant was again chasing a suspect in a field when he stepped in a hole, which led to increased symptoms and problems with his low back and legs. The claimant asserted a new workers' compensation injury which was controverted by the self-insured. (In evidence is a statement from the claimant where the claimant attributes his _____, fall to "the injury that I occurred [sic] on _____ because . . . [m]y legs give [sic] out from under me." The claimant testified that the self-insured denied him medical care (Dr. D had apparently retired) and that he was desperate for treatment. At some point, apparently March 19, 1997, on his wife's recommendation, the claimant saw Dr. S. The claimant testified that Dr. S performed or ordered an MRI and CAT scan and wanted to do a discogram, which the self-insured refused to authorize.

On July 8, 1997, at a benefit review conference (BRC), the claimant, who was represented by an attorney at the time, and the self-insured entered into two BRC agreements. Regarding the _____ injury:

> 1. Parties agree that the compensable injury of _____ is a producing cause of the Claimant's low back problems. The [self-insured] agrees to authorize a discogram at the direction of the treating doctor, [Dr. S.].

Regarding the 1997 event:

> 1. Parties agree that the Claimant did not sustain a compensable new injury on _____.

The claimant testified that his attorney and the benefit review officer (BRO) explained the agreements to him but that he did not understand them. The agreements were signed by the claimant, his attorney, the self-insured's representative and the BRO, who accepted the agreements. The claimant testified at the CCH that he was motivated to enter into the agreements because he thought doing so would enable him to obtain further medical treatment.

The details of what happened next are not clearly evident. The claimant had three spinal surgeries by Dr. S, currently has a cage or hardware in his back and currently has constant pain. The surgeries were performed in September 1997, April 1998 and June 1999. The claimant was reexamined by Dr. H, the designated doctor, who, in a report dated August 18, 1999, found the claimant at MMI on October 31, 1996 (apparently by operation of law in Section 401.011(30)(B) and referred to as statutory MMI) with a 22% IR, based on a 15% impairment from Table 49, Section II E, II F and II G, of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association; 13% impairment for loss of ROM; and 3% impairment for loss of sensation, which combined to result in a 22% whole person IR. The claimant testified that the self-insured has paid him the difference between the 9% IR he received for his _____ injury and the 22% IR that Dr. H has assessed for his current condition. The claimant testified that Dr. S told him that he should be drawing supplemental income benefits (SIBs) for his injury. The claimant testified that he retired from the self-insured's police force on April 20, 1999, apparently when his sick leave and vacation time were exhausted, and that he has moved to a small town, where he is currently employed as a county corrections officer doing paperwork, at approximately one-third of his preinjury pay. The claimant makes it absolutely clear that he believes that he is entitled to SIBs and that he was coerced into the BRC agreement by the self-insured's denial of medical care.

The hearing officer made a finding that there was no evidence of fraud or newly discovered information that taints or calls into question the propriety or validity of the two BRC agreements entered into on July 8, 1997. Section 410.030 provides, in part, that a written BRC agreement is binding on a represented claimant "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 case," relieves the carrier (or in this case the claimant) of the effect of the agreement. The claimant asserts good cause in that he was coerced into signing the agreement because the self-insured had denied him medical benefits and he was desperate for medical treatment. The hearing officer could judge the credibility of that testimony in that the claimant, by his own testimony, was receiving treatment from Dr. S and the self-insured had only refused to authorize a discogram. Further, the claimant made no attempt to return to his original treating doctor or request a change of treating doctors due to Dr. D's retirement. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. (Section 410.165(a).) The hearing officer could believe all, part or none of the claimant's testimony and could give the weight she felt was due to the claimant's protestations that he was forced into signing the agreement or that he did not understand the explanations of his attorney and the BRO. The hearing officer's decision on this issue is supported by the evidence.

On the issues of MMI and IR, the hearing officer is to be commended for keeping the focus of the CCH on track and not being misled into a Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 1305.(e)) issue or confusing a BRC agreement with the rules involving a settlement. As previously indicated, the claimant has received impairment income benefits based on a 22% IR and what is really at issue is whether the claimant can

get to the threshold 15% IR to qualify for SIBs. While we have held that a designated doctor may amend his report for a proper reason within a reasonable time (Texas Workers' Compensation Commission Appeal No. 000138, decided March 8, 2000), the burden of proof is on the party who advocates that the amendment was made for a proper reason within a reasonable time, and that depends on the circumstances of the individual case. Subsequent surgery alone may not be a sufficient basis for a designated doctor to amend a report. Whether surgery was "under active consideration" at the time of statutory MMI or was performed prior to statutory MMI is essential to the consideration of whether the designated doctor amended the report within a reasonable time and for a proper purpose. In this case, statutory MMI was on or about October 31, 1996, at a time the claimant had been assessed at having been at MMI for over a year, and where the claimant had returned to his regular preinjury work. Certainly, surgery was not being contemplated at that time. The claimant reinjured his back on _____, some four months after statutory MMI, and surgery was not performed until September 1997, 10 months after statutory MMI. The hearing officer does not discuss whether Dr. H's second report was within a reasonable time or for a proper purpose, but in her Statement of Evidence, comments:

> The evidence tends to show, however, that while the Claimant had symptoms into 1997 relative to the _____ injury, his surgeries appear to be due to the _____ accident. Unfortunately, the Claimant opted to agree that this accident did not cause a compensable injury. It, therefore, is determined that [Dr. H's] first report has presumptive weight and should be adopted.

There is evidence to support the hearing officer's determinations and we affirm the hearing officer's decision that the claimant reached MMI on August 25, 1995, with a nine percent IR.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge