APPEAL NO. 961151

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 2, 1996, a hearing was held.. He (hearing officer) determined that appellant (claimant) did not show a basis for setting aside an agreement she signed on May 9, 1995, and was not relieved of the terms of that agreement. Claimant disagrees with findings of fact that state the carrier accepted liability for a shoulder injury, that she had surgery in 1992 and was evaluated by (Dr. D) as a designated doctor, and was thereafter evaluated by (Dr. De) as another designated doctor with a finding of maximum medical improvement on May 12, 1994, and an impairment rating (IR) of six percent; she adds that Dr. De did not examine her cervical condition, and she disagrees with a finding that there was no indication her attorney misrepresented facts or committed fraud in inducing her to sign an agreement, pointing out that the hearing officer was not present; she also adds that she was not informed of Texas Workers' Compensation Commission processes and disagrees with the finding that there is not good cause to set aside the agreement. She also asserts that the hearing officer was biased, asks that her medical records from (Dr. W) and (Dr. H) be read, and cites several sections of the 1989 Act. Respondent (carrier) replies that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____, when medical records in evidence indicate that she felt pain when moving furniture. The only issue at this hearing was whether there was fraud, newly discovered evidence, or other good and sufficient cause to relieve the claimant from the effects of an agreement she signed on May 9, 1995.

Prior to the time of the agreement, claimant had been examined by Dr. D as the designated doctor. He examined claimant in October 1993 and considered her neck and left shoulder. He found that she reached maximum medical improvement (MMI) on May 21, 1993, with a 0% IR. A hearing officer, replaced Dr. D as the designated doctor on the basis of a letter from the carrier transmitting medical records to Dr. D which contained the following sentence:

> When reviewing the enclosed records, please be sure to note the rationale behind [Dr. H's] decision to certify MMI and subsequent impairment rating.

Another designated doctor, Dr. De, was appointed and in September 1994 he evaluated claimant, certifying MMI on May 12, 1994, with six percent IR. Dr. De stated that claimant complained of neck and left shoulder pain. He found no significant pathology in

the cervical area and assigned six percent for the upper extremity.

Claimant was noted in Dr. D's report to have left shoulder surgery by Dr. H in September 1992 and to be receiving treatment from Dr. W.

On May 5, 1995, there was a benefit review conference to consider the questions of MMI and IR. From that conference a TWCC-24 was written which states under "Disputed Issue", "1. date of maximum medical improvement and impairment rating", and under "Resolution", "1. Parties agree that the date of maximum medical improvement is 5-12-94 with six percent impairment for the compensable injury per the report of Dr. De". It was signed on May 5 by the carrier and on May 9 by (Mr. M), attorney for claimant, and by claimant. A benefit review officer also signed it on May 9, 1995.

Claimant testified that she no longer employs Mr. M. He did not testify and provided no statement. She said that the agreement was signed on the hood of a car when her attorney told her to sign it after they had visited Dr. W's office. Dr. W's note of May 9, 1995, states in part, "her lawyer came in today with her and he tells me that they will be going to a benefits review conference." Dr. W also notes, "surgery will be scheduled, the attorney says this has been recognized as compensable. They are willing to recognize the shoulder, but not the neck. That issue will be dealt with at the hearing." Dr. W's May 9 note also stated that MMI had been reached statutorily but not medically.

Claimant testified that she did thereafter have surgery and Dr. W's note of September 14, 1995, says that claimant had surgery "for the left shoulder" on September 8, 1995. He added, "she had severe adhesions." (As stated, claimant had had surgery to the same shoulder in 1992.)

Dr. W testified by phone. He said that his conversation with claimant's lawyer that day was as reflected in his note. "Basically, that's all there was." He did not overhear any other conversation between claimant and her lawyer. He also indicated that he and claimant did not discuss the agreement that she signed that day.

Claimant many times in the hearing noted that the agreement had not been typed and stated that the wording was not clear. She also stressed that the agreement did "not mention that it's legally binding as far as any future treatment." She also used words, such as "had I been aware that it was that binding..." She also described the agreement as "not plain enough . . ." She said that she did not understand the agreement but in some testimony did indicate that she had discussed it with her lawyer, saying, "even if my attorney had not explained it to me, had it been written or typed in a more clear detail..."

Claimant acknowledged that she did not dispute the agreement until January 1996. She provided a report of a physical therapist dated February 21, 1996, which showed that

she had physical therapy after her September 1995 shoulder surgery, and a CT scan of January 17, 1996, was said by Dr. W on January 30, 1996, to show spondylosis and many levels of spurs in the cervical spine; he ordered the physical therapy previously referred to. These procedures and treatments were performed notwithstanding a letter of carrier dated June 2, 1995, which said that there had not been "formal recognition" of the left shoulder injury. Claimant's argument included that there was "new information" in medical records after the time of the BRC and agreement, mentioning the surgery that was accomplished in September. Claimant also added that she had not reached MMI.

The hearing officer is sole judge of the weight and credibility of the evidence. *See* Section 410.165. While claimant said that medical records after the time of the agreement contained new information, the medical records she introduced contained references to the September 1995 surgery, a January CT scan, physical therapy, and Dr. W's notes as described in the prior paragraph.

Section 410.030 provides that an agreement is binding on a claimant who is represented by an attorney unless there is a finding of fraud, newly discovered evidence, or other good and sufficient cause. The hearing officer found none of these things were shown. Texas Workers' Compensation Commission Appeal No. 941685, decided January 30, 1995, said that an allegation that the decision to sign the agreement was not an informed one and that the claimant's lawyer made it for him did not constitute "other good and sufficient cause". Texas Workers' Compensation Commission Appeal No. 941109, decided September 28, 1994, discussed "newly discovered evidence", one of the three criteria for rejecting an agreement in which claimant had a lawyer, in terms of whether "due diligence" had been shown, citing cases. As pointed out by Dr. W in his note of May 9, 1995, surgery of the shoulder was planned, and he indicated that carrier had not agreed to consider the neck as compensable. The medical evidence admitted that was subsequent to the agreement, along with Dr. W's note at the time of the agreement, together with the definition of newly discovered evidence to include "due diligence" provide sufficient support for the hearing officer's determination, implicit in the conclusion of law that there was no basis to set aside the agreement, that "newly discovered evidence" did not warrant negating the agreement.

There was no testimony or other indication of what claimant's attorney told her about the agreement; the focus of testimony was the place where it was signed, its lack of typing, and its clarity. The evidence sufficiently supported the finding of fact that misrepresentation or fraud were not shown to have been perpetrated by the lawyer.

Claimant's assertions on appeal included that a finding of fact, saying that carrier accepted liability for the shoulder, was error; the evidence of Dr. W and the carrier's willingness to so stipulate at the hearing provide sufficient evidence to support that finding. Next, claimant disagrees with the finding that she had surgery in 1992 and Dr. D was the

designated doctor who found MMI in 1993; the medical records indicate that these events occurred-the evidence sufficiently supports this finding of fact. Claimant then states that Dr. De did not examine her neck. While this does not directly conflict with finding of fact nine which said that claimant disagreed with Dr. De, that the commission wrote to him and that he responded, Dr. De does indicate that he considered claimant's neck along with her shoulder. Claimant only asks that the audio tape be listened to in regard to finding of fact 10, which said that she signed the May 9, 1995, agreement along with her lawyer. Claimant then points out in regard to finding 11 that the carrier had signed the agreement on May 5 and she did not sign until May 9, saying that the agreement was made between carrier and her attorney. As stated previously, finding of fact 11, which says there is no indication of fraud or misrepresentation by claimant's attorney, is sufficiently supported by the evidence. Claimant then states that she was not informed of commission processes, in regard to finding of fact 12 which said that she was "sufficiently informed of commission processes", pointing out that claimant had been part of the process that succeeded in having one designated doctor's report discarded. Then in regard to finding of fact 13, which said there was no good cause to set aside the agreement, claimant asked that the audio tape be reviewed.

Claimant also said that the hearing officer was not interested in her case and was biased. Our review of the record, including the audio tape, does not reveal any evidence of bias. We do note that the hearing officer asked several questions of the claimant which he repeated when claimant did not appear to answer the question asked. We also note that testimony was offered about matters such as MMI, which were not in issue at this hearing. In regard to claimant's request to review her medical records including those of Dr. W and Dr. H-the records of Dr. W in the record were reviewed, but there were no records of Dr. H in the record to review. All pertinent sections of the 1989 Act were considered in reviewing the record, the appeal, and the response. We note that claimant included some medical records with her appeal, including some of Dr. H, which were not offered at the hearing. They were not shown to have been unavailable at the time of the hearing or to have met the other requirements set forth in Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992, in order to remand a case so that the fact finder could consider the evidence not previously provided.

Finding that the decision and order, found at the conclusion of the hearing officer's opinion that claimant is not relieved of her agreement and that carrier is to pay benefits in accordance with the 1989 Act, are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge