APPEAL NO. 010641

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 February 26, 2001. The hearing officer resolved the disputed issues by deciding that good cause exists to relieve the unrepresented respondent (claimant) of the effects of the Benefit Dispute Agreement (BDA);that the claimant sustained a compensable injury; that the date of injury was _____; that the compensable injury extends to include a left rotator cuff tear; that the claimant timely notified the employer of the injury; and that the claimant did not make an informed choice to elect to receive group insurance benefits as opposed to workers' compensation benefits. The appellant (carrier) appealed the hearing officer's decision on the issues of good cause to relieve the claimant of the effects of the BDA; compensable injury; extent of injury; and timely notice, and the claimant responded. There is no appeal regarding the issue of election of remedies.

DECISION

The hearing officer's decision is affirmed.

The claimant testified that he injured his left shoulder at work on _____, while pushing and pulling on a manually operated engine lathe and that on the same day, he notified his supervisor that he had sustained a work-related injury. The supervisor indicated in a written statement that the claimant did not report the injury to him and a safety manager testified that the supervisor did not report that the claimant had reported an injury.

The claimant began treating with Dr. T on April 16, 1999, and Dr. T diagnosed the claimant as having a left shoulder sprain/strain. Dr. T noted that the claimant reported to him that he had been pushing and pulling on a machine at work when his left shoulder became sore. Dr. T referred the claimant to Dr. S, who saw the claimant on January 19, 2000, and diagnosed a probable left rotator cuff tear, but recommended an arthrogram. Dr. S wrote that the claimant had sustained an on-the-job injury. The report of the arthrogram performed on February 2, 2000, stated an impression of degenerative osteoarthritis with no evidence of a rotator cuff tear. The Texas Workers' Compensation Commission (Commission) sent the claimant to Dr. M for an examination and Dr. M reported on April 18, 2000, that the claimant sustained a rotator cuff strain and that the rotator cuff was not torn.

On July 26, 2000, the claimant, who was unrepresented, and the carrier entered into a BDA that was signed by the parties and the benefit review officer (BRO). The parties agreed in the BDA that the claimant sustained a compensable injury to the left shoulder, resulting in a rotator cuff strain, on or about _____, and that the claimant had suffered no disability. The claimant testified that he did not know that he had a rotator cuff tear at the time he signed the BDA. He said he signed it because, when the carrier's representative told the BRO that the carrier would pay for a shoulder strain, the BRO told

the carrier's representative "No, whatever he needs," and he, the claimant, thought that that would include surgery, if necessary.

On August 29, 2000, the claimant went to Dr. B, who wrote that, although the arthrogram was negative for a left rotator cuff tear, it appeared that the claimant has significant impingement syndrome with a possible partial rotator cuff tear and recommended an MRI to further evaluate the claimant. Dr. W reported that the MRI of the left shoulder done on September 8, 2000, had findings suspicious for a partial tear. Dr. B wrote on September 14, 2000, that he reviewed the MRI and that it revealed at least a partial-thickness tear of the left rotator cuff and that he recommended shoulder surgery. The claimant said that the surgery was scheduled but was then canceled because of the carrier's denial of the surgery request.

The hearing officer did not err in determining that good cause exists to relieve the unrepresented claimant of the effects of the BDA. Section 410.030(b) provides, in part, that 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. The hearing officer found that at the benefit review conference held on July 26, 2000, the unrepresented claimant did not understand that the carrier was only accepting a left shoulder strain based on the BRO's statement to the carrier's representative that the carrier would be liable for whatever the claimant needed regarding his injury, and that, at the time the parties entered the BDA, the claimant did not know the full extent of his injury because he had not yet been diagnosed as having a left rotator cuff tear.

We note that, while Dr. S had diagnosed a "probable" rotator cuff tear in January 2000, the arthrogram that the claimant underwent in February 2000 at Dr. S's recommendation was reported to have shown no evidence of a rotator cuff tear, and that Dr. M diagnosed the claimant as having only a rotator cuff strain in April 2000. It was not until after the BDA that the claimant had an MRI and Dr. B diagnosed a partial rotator cuff tear based on the MRI and recommended surgery of the left shoulder on September 14, 2000, which was less than two months from the date of the BDA. In Texas Workers' Compensation Commission Appeal No. 991566, decided September 7, 1999, the Appeals Panel held that an unrepresented claimant had good cause to be relieved from the effects of an agreement regarding maximum medical improvement (MMI) and impairment rating (IR) where the claimant did not know that he would need spinal surgery until after signing the agreement. *See also* Texas Workers' Compensation Commission Appeal No. 952101, decided January 24, 1996, where the Appeals Panel affirmed a hearing officer's decision that a claimant, who was represented by an attorney at the time an agreement was signed regarding MMI and IR, had good and sufficient cause to be relieved of the effects of the agreement where the claimant needed to have a second total knee replacement after the agreement was signed.

We conclude that the hearing officer did not abuse her discretion in determining the BDA issue in favor of the claimant. We are satisfied that the hearing officer's decision, in the case under review, that good cause exists to relieve the unrepresented claimant of the effects of the BDA is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer did not err in determining that the claimant sustained a compensable injury on _____; that the compensable injury extends to include a left rotator cuff tear; and that the claimant timely notified the employer of the injury (Section 409.001(a) provides for notice of injury to the employer within 30 days of the injury). There is conflicting evidence in this case. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer determines what facts have been established from the evidence presented. We conclude that the hearing officer's determinations are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

To obtain reversal of a decision based upon alleged error in the admission or exclusion of evidence, it must first be shown that the evidentiary ruling was in error, and second that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio, 1981, no writ). The carrier has not shown reversible error in the hearing officer's ruling admitting the written statement of (GC) into evidence over the carrier's objection as to untimely exchange of that statement, which statement was exchanged with the carrier by the claimant on January 9, 2001, more than one and one-half months before the CCH. The hearing officer found that the claimant had good cause for not exchanging the statement until January 9, 2001, and we do not find an abuse of discretion in that ruling.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge