APPEAL NO. 92168

A contested case hearing was held in (city), Texas, on January 10 and March 6, 1992, (hearing officer) presiding as hearing officer. He determined (claimant) sustained "an injury to his back during the course and scope of his employment with (employer), an employer within the meaning of Article 8308-1.03(19), on (date of injury), and that the appellant was liable for benefits under Article 8308-3.01." TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq*. (Vernon Supp 1992) (1989 Act). He also reversed a November 14, 1991, interlocutory order of the benefit review officer which stopped the payment of temporary income benefits. The appellant faults one of the hearing officer's findings of fact and conclusions of law and urges that the hearing officer had no jurisdiction to make any ruling concerning the interlocutory order. There was no appeal or response filed by (claimant).

DECISION

Finding sufficient evidence of probative value in support of the hearing officer's decision and determining his findings, conclusions, and decision not to be so against the great weight and preponderance of the evidence as to be manifestly wrong or clearly unjust, we affirm.

There is nothing ordinary about this case. And, it presents several unique problems. First, the respondent, for want of a more accurate description, has not and still does not seek benefits under the 1989 Act. Rather, he steadfastly maintains he was injured on the job on (date) (the 1989 Act applies only to injuries occurring on or after January 1, 1991); that no new injury or aggravation of an injury occurred on (date of injury) and, that he went to a new doctor in (date of injury) because the pain from his (date) injury kept getting worse and he was not being helped by the company or insurance doctor. To make matters even more complicated, the attorney retained and representing the respondent absolutely refused to attend the contested case hearing stating he represented the respondent for "a claim for compensation for (date) injury" which they had filed. (According to the evidence, the respondent did not miss any work as a result of the (date) back injury and any doctor visits associated with that injury had been paid for, apparently by the insurance carrier.) The respondent's attorney acknowledged that "we" appeared at the benefit review conference but only to explain they had filed for the (month) injury. This does not seem consistent with the benefit review officer's report as he indicated the issue raised but not resolved after the benefit review conference was "[w]hether (respondent) sustained an aggravation of a prior condition, and thus a new injury, on (date of injury) or if his problems are due solely to his prior injury of (date)." At the end of the conference, the benefit review officer issued an interlocutory order suspending the payment of temporary income benefits.

In any event, the respondent was unrepresented at the contested case hearing and testified through an interpreter that he sustained a back injury on (date), but had not missed any work. He stated that he went to a company doctor on several occasions after work between September 18, 1990 (his initial visit) and (date of injury), but that he did not get better and the doctor told him nothing was wrong. He said he experienced pain at work

and that it kept getting worse and that on (date of injury), although he did not have an injury on that date, he told his supervisor he wanted to change to another or a private doctor. He denied that he reported any injury on (date of injury); however, a medical report admitted at the hearing shows the respondent saw the "company" doctor on (date of injury). This brief medical report indicates "Date of Accident (date)" and under how injured reflects "[p]atient states while working on (date of injury) he was lifting heavy pipes and experienced pain in lower back. Complains has been sore entire time but pain increased." The respondent did not introduce any medical records at the hearing except for a brief medical report concerning the (date) injury which shows a treatment date of "9-18-90," lists a diagnosis of "Lumbosacral strain" and provides a return to work date of "9-18-90."

A sworn statement of the original adjuster on the case indicates that when the report of injury of (date of injury) was received, she called the employer and was advised the respondent was continuing to see the doctor about his back but was not losing time from work. She states that she contacted the doctor for the employer who advised that the respondent had been seen on (date of injury) and on January 31 when he was told to see an orthopedic doctor. She states that approval was given for the orthopedic doctor, (Dr. P). She states she was later advised that the respondent was seen on February 14 and was advised not to work. She then initiated temporary income benefits. She states that she later talked with the respondent's attorney about the date of the injury and was advised the date of injury was "(date)" and that the incident of "(date of injury)" was only an aggravation of that injury.

A vice president of the employer testified that the respondent reported an injury on (date), and that it had been reported and the respondent sent to a clinic used by the employer. He states their records do not reflect that the respondent saw the doctor after September 18, 1990 until the visit on (date of injury) and that the respondent worked full time at his job during that time. He states that on (date of injury), the employer filled out a new report of injury on the respondent for an injury on or about that date and sent him to the doctor.

A telephonically recorded statement of the respondent's immediate supervisor was accepted into evidence and reflects that (date) was the first time that the respondent ever had a problem with his back and felt that he needed to see a doctor. He stated although the respondent complained periodically about his back being sore that there was not much complaining "from the original one up till the recent one" and that he did not miss work. He stated they tried to "lighten" the respondent's load which involved lifting and working with steel pipes but it did not seem to help. The following question and answer segment took place during the interview:

Q.Did he seem to be doing OK.
A.He seemed to be doing all right.

Q.OK, then he had the recent one and it seemed to make is (sic) problem a little worse?

A.Correct.

Q.OK, and it was basically the same story with the recent problem. It wasn't any kind of an accident or anything. It was just one day he, he may have mentioned to you that whatever he did that day kinda made his back sore again, was that-----

A.That's it, he just, you know, nothing happened to cause any injury. He just, you know said he was getting soreness in his back, at night, you know, after he gets home, his legs getting to hurt and----.

In the "9/9/91" request for a benefit review conference in this case the appellant set forth:

Carrier requests permission to suspend payment of temporary income benefits based on the attached independent medical examination report which indicated the claimant is at maximum medical improvement.

As indicated, the benefit review officer did enter an order suspending the payment of temporary income benefits and indicated in the recommendations and comments section of his report that "[i]t appears there was no injury in (date of injury) but rather (respondent's) condition deteriorated from the injury of (date) to the point that he was unable to continue working in January."

Appellant faults the hearing officer's Finding of Fact No. 11 and his Conclusion of Law No. 4 which are as follows:

11.On 14 November 1991 the Commission entered an interlocutory order suspending the payment of temporary income benefits to (respondent), because (respondent) did not suffer a 1991 injury.

4.The 14 November 1991 interlocutory order is reversed by this decision and order. *See* Article 8308-6.15(e).

In essence, the appellant seems to argue that since the benefit review conference was requested citing the respondent's having reached maximum medical improvement, that the interlocutory order was necessarily based upon the benefit review officer footing his order on the respondent's having reached maximum medical improvement. Hence, posits appellant, the hearing officer had no basis to find the order was based upon the absence of a 1991 injury. Further, with regard to Conclusion of Law No. 4, appellant urges that the hearing officer had no jurisdiction or authority to make any ruling or decision concerning the interlocutory order because the conference was requested on a maximum medical improvement issue whereas the only issue cited as unresolved and referred to a contested case hearing (and stated at the beginning of the hearing) was concerned with whether there

was an injury or aggravation of an injury in 1991. Consequently, the argument goes, there was no issue concerning maximum medical improvement for the hearing officer to decide at the contested case hearing, since that issue had either been resolved or waived. (The hearing officer made a finding of fact that "[t]here is insufficient evidence before the hearing officer to determine if (respondent) reached maximum medical improvement.)

We find little merit in these positions. While it may well be that the request for the conference stated the reason as being the reaching of maximum medical improvement, it is obvious from the conference report that a more fundamental issue became the focal matter before and unresolved at the benefit review conference. From his comments, it is patent that the benefit review officer did not believe there was any injury or aggravation of an injury in 1991, which resulted in nothing upon which to base certification of maximum medical improvement or payment of temporary income benefits (both of which are provisions of the new law and apply to injuries occurring on and after January 1, 1991). (1989 Act, Sec. 17.18). Consequently, we find a sufficient basis for the inference reached by the hearing officer in his Finding of Fact No. 11.

With regard to the appellant's position that an issue of maximum medical improvement was either resolved or waived, we can only conclude, under the circumstances and state of this case, that a third alternative is the correct one: it was never reached. While we find it peculiar that the matter of when the injury or injuries were incurred was not mentioned or apparently contested until the continued payment of temporary income benefits was called into question, it is clear to us that this matter became the main focal point and only indicated issue at both the conference and the hearing. Since the hearing officer determined that respondent sustained a compensable injury on (date of injury), and found insufficient evidence before him to warrant the stoppage of temporary income benefits, he was well within his authority to reverse or set aside the interlocutory order which had suspended the payment of temporary income benefits. Article 8308-6.34(g), 1989 Act. In this regard, Article 8308-4.23, 1989 Act, provides that an employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits which continue until he has reached maximum medical improvement (with a 104 week maximum).

The evidence concerning maximum medical improvement introduced (although not within the issue stated at the beginning of the hearing) consisted of an abbreviated and unsigned TWCC Form 69 stating that the date respondent reached MMI could not be determined, and referencing an attachment which we assume to be an August 19, 1991 letter from one (Dr. F). The record is silent as to whether the appropriate steps were ever taken with regard to resolving a dispute involving maximum medical improvement. Article 8308-4.16, 1989 Act; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.3 (Rule 130.3); Texas Workers' Compensation Commission Appeal No. 92176 (Docket No. DA91-093174-01-CC-DA41) decided June 10, 1992; Texas Workers' Compensation Commission Appeal No. 92077 (Docket No. HO-00122-91-CC-1) decided April 13, 1992; Texas Workers' Compensation Commission Appeal No. 92027 (Docket No. BU/91086969/01-CC-BU31) decided March 27, 1992. In any event, the hearing officer did not determine the matter of

maximum medical improvement and the record doesn't show the issue was addressed at the benefit review conference. When and if that issue becomes ripe, another benefit review conference, if desired by either party, would appear to be the appropriate forum.

Although not raised as an issue on appeal, we have reviewed the complete record in this case and conclude there is sufficient evidence to support the hearing officer's decision on the issue before him as stated at the beginning of the contested case hearing. Clearly, there was conflicting evidence before him. However, he is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Article 8308-6.34(e), 1989 Act. It is his responsibility and well within his authority as the fact finder to resolve any conflicts and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92106 (Docket No. AU/92-001308-01/CC-AU41) decided April 27, 1992; Texas Workers' Compensation Commission Appeal No. 92096 (Docket No. AU-92-058850-01-CC-AU41) decided April 27, 1992. An aggravation of a preexisting condition or injury or a reinjury can be the basis for a entitlement to benefits under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 91094 (Docket No. SG-A123649-01-CC-AB31) decided January 17, 1992; Texas Workers' Compensation Commission Appeal No. 92069 (Docket No. DA-A-137287-01-CC-DA41) decided April 1, 1992.

The decision and order of the hearing officer are affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge