

## APPEAL NO. 92475

A contested case hearing was convened on June 24, 1992, and reconvened on August 6, 1992, in (city), Texas, (hearing officer) presiding as hearing officer. He determined the respondent had sustained a compensable hernia injury, but not a back injury, in the course and scope of his employment, and awarded medical benefits and income benefits from the date of injury to the date of the hearing "and to future income benefits from the date of this hearing." Appellant urges error in the hearing officer's award of income benefits through the date of the hearing and complains that the hearing officer exceeded his authority in determining issues not before him. Respondent asks that the decision be affirmed; however, he also states that he feels he should receive the income benefits ordered by the hearing officer (which covered only a hernia injury) because he "received a back injury at the same time I received the hernia."

### DECISION

Finding error in the hearing officer's decision and order, but finding the evidence sufficient to support his determination on the compensability of a back injury, we affirm in part and reverse and remand in part.

There was considerable confusion surrounding the hearing of this case. At the initial session, it was finally agreed that the issue was whether the respondent acquired a hernia and a back injury while in the course and scope of his employment with employer on (date of injury). At the second session, the appellant stated it was not contesting the hernia injury but was contesting that any back injury occurred. Appellant stated it had paid or would pay all medical and temporary income benefits (TIBS) associated with the hernia injury. The issue left unresolved at the benefit review conference was there framed as whether or not the respondent suffered an injury in the course and scope of employment, without defining what injury was in dispute. (There is a notation in the claimant's position portion of the benefit review conference report, which indicates that the "[c]laimant is now complaining of back pain.") The benefit review officer issued an interlocutory order for TIBS from the date of the injury to May 27, 1992, and notes that the treating doctor indicates the maximum medical improvement (MMI) date is "5/27/92." From this report and the evidence in this case, it appears that the interlocutory order was only concerned with the hernia injury.

As stated, the only issue remaining to be resolved at the contested case hearing, according to what is stated on the record and what appears to be agreed to by the parties, is whether the respondent sustained a back injury at the same time he sustained the compensable hernia injury on (date of injury). The hearing officer's decision on the back injury is not under appeal. Although the respondent's response refers to his having sustained a back injury along with the hernia, he has not appealed this matter and specifically states in his response "I do not think the hearing officer has misinterpreted the law in any way, nor do I think the hearing officer over-reached his authority by ruling on these issues. Therefore, based on the information above, I respectively (sic) request the appeals tribunal uphold its decision." In addition, the response was not filed within the time

limitations for it to be considered as an appeal. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art 8308-6.41(a) (Vernon Supp. 1992) (1989 Act). Nevertheless, we have reviewed the evidence of record and conclude there is evidence sufficient to support the hearing officer's determination in this matter. Briefly, the respondent testified that he was walking in mud carrying a large piece of tin when the wind caused him to twist resulting in the hernia for which he was operated on some eight days later. He stated he did not notice any back injury at the time and acknowledged he had long standing back problems including "spurs or something." He stated that sometime after his hernia operation he had back and leg pain. A statement from the doctor who treated his hernia states that the respondent was referred to another doctor on May 7, 1992 for "evaluation of back and leg pain." An MRI of the lumbar spine on "7-17-92" indicated some mild disc bulging and degenerative disease and some prominent anterior spondylosis. The medical report does not mention whether or not the respondent's job or the incident of (date of injury) played any part in the back condition although the respondent stated that the doctor told him over the phone that it was related. Although respondent stated he had had a bad back, he believed the (date of injury), incident aggravated it. He stated he tried to go back to work for the employer but they wouldn't take him. He also stated he got another job some three weeks before the hearing which paid about \$4.50 per hour less than his former job.

It is not clear what employment the hearing officer was referring to, however, he inquired of the respondent if he was presently unable to work because of his injury. The appellant interposed the question as to what injury the hearing officer was referring to and the hearing officer indicated "any injury." The respondent's answer, that he was unable to work at the same job (presumably the job on which he was injured), was quite apparently related to his claimed back injury and not the hernia injury. This became more clear when the respondent, when asked if he had been released to return to work, stated he had not been released by the doctor who he saw for his back. Appellant objected to the hearing officer's questions concerning the respondent's ability to work at equivalent wages on the grounds that issues regarding "lost wages, lost earning capacity, average weekly wage" had not been raised and were not before the hearing officer.

The appellant took the position at the hearing that an exhibit before the hearing officer, an unsigned Texas Workers' Compensation Commission Form 61, Initial Medical Report, from the doctor who treated the respondent for his hernia, established the respondent's return to work date and MMI. The form only indicated that the anticipated dates for return to limited type work were "5.25.92" and for MMI "5.27.92." The anticipated date for return to full-time work was not filled in.

In the appeal, appellant asserts the hearing officer overstepped his bounds in his decision requiring appellant to pay TIBS through the date of the hearing. The hearing officer, determining there was no evidence of MMI nor any evidence the respondent had been released to full duty, apparently was fulfilling his responsibilities under Article 8308-6.34(g) to make a determination on whether benefits are due, and to make an award of benefits due, by deciding that income benefits were still applicable up to the time of the hearing. Appellant cites the Form 61 and the benefit review officer's interlocutory order as a determination that MMI has been reached on May 27, 1992 and that no additional TIBS

are due.

First, we would state that the hearing officer was correct in his determination that there has been no certification of MMI. It is clear, and we have held, that specific procedures are necessary for certifying the very important status of reaching MMI. See Texas Workers' Compensation Commission Appeal No. 92027 (Docket No. redacted) decided March 27, 1992; Texas Workers' Compensation Commission Appeal No. 92363 (Docket No. redacted) decided September 9, 1992; and Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted) decided November 21, 1991. Equally clear is the fact that MMI is not established by a report, statement or form that merely sets forth some future date when it is anticipated that MMI may be reached. Whether or not it was an issue before him, it is equally apparent to us that there is no medical evidence that the respondent has been released from the limitations placed upon him as a result of his hernia. Again, the Form 61 mentioned by appellant does not have any anticipated, let alone established, date for return to full-time work. That the benefit review officer's interlocutory order only covered the period up to May 27, 1992 did not effect a determination of either MMI or return to full-time work. The benefit review officer simply does not have this type of authority--to make such final determinations, at least absent agreement by the parties. Rather, the benefit review officer mediates disputes and is empowered to issue interlocutory orders regarding benefits. Article 8308-6.13(1) and 6.15(e). And, an interlocutory order is just that, an interim matter that is temporary and not final. See Texas Workers' Compensation Commission Appeal No. 92168 (Docket No. redacted) decided June 12, 1992. See *generally* Blacks Law Dictionary, Sixth Edition, West 1990.

From the state of the record before him it appears that the hearing officer was not engaged in determining an issue that was not in dispute or an issue that had been agreed to by the parties; rather, he was attempting to make a determination concerning benefits, as he is required to do. The issue was never reached. Appeal No. 92168, *supra*. However, because his decision, as worded, has the effect of determining an issue concerning disability and the continuation of TIBS, an issue that was not before him and upon which the parties were not on notice and may not have had an opportunity to fully develop, corrective action is necessary. The issue of disability potentially involves possible set off because of wages earned (Texas Workers' Compensation Commission Appeal No. 92193 (Docket No. redacted) decided July 2, 1992) or the reaching of MMI or a return to full-time work. Article 8308-4.23(a); Appeal No. 91045, *supra*. See *also* Texas Workers' Compensation Commission Appeal No. 91014 (Docket No. redacted) decided September 20, 1991, and Texas Workers' Compensation Commission Appeal No. 92299 (Docket No. redacted) decided August 10, 1992. Such matters can precipitate the initiation of a new dispute resolution procedure. However, in the context of this case, and from the indication that there has been no agreement reached on the issue or that it otherwise has been adequately developed for a resolution of the dispute, we believe it more appropriate to remand the case to the hearing officer to give the parties and the hearing officer the opportunity for further consideration and development of evidence, as deemed appropriate by the parties and the hearing officer, on this issue. Article 8308-6.42(a)(3). As indicated earlier, there was a great deal of confusion in this case from the outset. However, the only issue that now remains in question involves disability for the hernia injury and any TIBS flowing therefrom.

The case is affirmed on the issue that the respondent did not suffer a back injury in the course and scope of his employment on (date of injury), and reversed and remanded on the issue involving disability and TIBS. An expedited hearing should be held. A final decision in this case is not rendered pending the resolution of the matter on remand.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge