APPEAL NO. 92595

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On September 18, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether an injury was sustained in the course and scope of employment, or as a result of horseplay, by the claimant, (claimant), who is the respondent in this appeal, and, if so, the correct impairment rating resulting from the injury. The hearing officer determined that the claimant sustained a compensable injury on (date of injury), in the course and scope of employment with (employer).

The hearing officer also determined that the various reports of the treating doctor, a consulting doctor, and the designated doctor, which assigned impairment ratings in the range of 24-26%, were nevertheless defective for various omissions of information, and she consequently found that claimant had not reached maximum medical improvement (MMI) and that no impairment rating was assigned.

The carrier has appealed this decision, asserting that the evidence establishes horseplay as the basis of injury, and further asserting that the hearing officer erred in finding that claimant had not reached MMI and that no impairment rating has been assigned.

DECISION

After reviewing the record of the case, we affirm the determination of the hearing officer that an injury occurred in the course and scope of employment. However, we reverse the determination of the hearing officer that MMI has not been reached and an impairment rating has not been assigned, and remand for further development and consideration of the evidence, specifically, clarification from the designated doctor as to whether the claimant has or has not reached MMI, and, if so, the effective date.

The claimant testified that on (date of injury), he was working as a switchman for employer, and was located at the front of a long line of moving railroad cars. He stated that (OJ) was the motorman at the back of the cars, and that the motorman typically worked near a noisy engine. The claimant stated that the switchman would signal with a whistle; he indicated that the system has since been changed because the whistle was not always heard. Claimant testified that he blew the whistle, but the train did not stop, so he started to jump off the train to avoid hitting cars in front. However, the line of cars stopped suddenly, which had the effect of throwing him straight into the stopped railroad car in front of him. He stated that he hit the car with great force and fell back on the ground on his rear end. The claimant stated that OJ came up to him and he told OJ what happened and that he was hurt; OJ indicated he did not want to be involved because a drug test was required of all employees involved in accidents. The claimant then reported the accident to his supervisor, (Mr. B). He saw the company nurse who told him he did not have to go to the doctor. However, because he was in such pain, he subsequently saw a doctor, and eventually was referred to his treating doctor, (Dr. B), an orthopedic surgeon. Dr. B also

referred him to (Dr. O), an orthopedic surgeon, for another opinion. In addition, the claimant has seen a designated doctor, (Dr. W), an orthopedic surgeon appointed as a designated doctor when the carrier disputed the degree of claimant's impairment.

Very succinctly, all doctors have noted a minimal compression fracture of the T8 level of the spine, a broken right second rib and possible fracture of the left tenth rib, soft tissue injury in the right shoulder area, pain in the right shoulder and arm, and some loss of strength and sensory level in the right arm and hand. Dr. O found in March 1991 that the claimant had not reached medical stability but estimated that he would have around a 25% permanent impairment as a result of his injuries. Dr. B determined by letters dated October 18 and November 20, 1991, that the claimant had reached MMI and had a 26% whole person impairment. Several subsequent medical reports filed thereafter by Dr. B repeat that claimant has reached MMI. Dr. W filed a narrative medical report on March 18, 1992 which assesses a 24% impairment; it is silent on the existence or non-existence of MMI. There were no TWCC-69 forms (Report of Medical Evaluation) from any of the doctors, nor does the record indicate the dispute which the designated doctor was asked to resolve. The benefit review conference report indicates that there was a disputed issue articulated as one over the correct impairment rating; no specific dispute over MMI is reported, either as a discreet issue or part of the impairment rating issue.

After the claim was apparently accepted, the employer's risk manager, (Mr. Mc), heard rumors around the work place that the claimant had not been injured as he stated, but had engaged in horseplay with OJ. Mr. Mc stated that he was not employed by the employer until after (date of injury), and he investigated the open claims as part of his duties as company risk manager. The inquiry focused on OJ. By about the third meeting with Mr. Mc, in December 1991, which also included so-called "higher ups" of the employer, OJ was given assurances that he would not be fired for engaging in horseplay. He subsequently gave a statement to the carrier saying that claimant and he were engaged in rough play and punching each other. OJ said that claimant stated the next day that he could hardly lift his arm as a result. Mr. Mc admitted that he had said around the work place that he would "nail claimant's hide to the wall." Mr. Mc said that OJ was not promised anything for giving his statement. OJ was thereafter terminated when he failed a drug test after a second accident, and Mr. Mc told him he could use him as a reference.

OJ appeared and testified that he was six feet tall and weighed 270 pounds in (month year). That month, on a date he could not remember, he and the claimant had traded horseplay punches after work, right side to right side, and that those punches, although hard, were not thrown in anger. OJ felt he and the claimant were punching each other with equal force. He stated that he did not believe he was hitting hard enough to break bones. OJ said he was sore for about 2 days after this incident. OJ stated that his blows fell around the claimant's upper right shoulder and chest, and he did not punch him on the left side. OJ said he did not work the next day, but when he came to work the following day, the claimant told him he was sore and said that OJ had sure hit him hard. OJ apologized.

OJ stated that about 3-5 days after the horseplay, the claimant was visibly hurting

and when OJ asked what happened, he told OJ that he had jumped into another railway car. OJ asked him why he didn't blow the whistle and claimant responded, "[y]ou wouldn't hear it." OJ said at this time he had no reason to doubt claimant was injured as he stated. When pressed as to whether the claimant ever told him that he intended to file his injuries as a work-related accident, OJ stated that it was his impression that this was the case. OJ agreed he had been given assurances when he gave his statement to the carrier that he would not be fired, but that he has not been promised a job by employer. Although the carrier, in its opening statement, indicated that it "had to subpoena" OJ to attend, OJ stated that he came from Louisiana to testify, and was paid his expenses at the rate of twenty-seven cents per mile, or a total of around $492. OJ was unemployed at the time of the contested case hearing.

As we review the record, we find that there is sufficient evidence to support the findings and conclusions that the claimant was injured in the course and scope of his employment on (date of injury), and that the horseplay defense was not made out. We affirm that part of the decision.

Of concern to us, however, is the failure to resolve the MMI and impairment issue given the extensive medical records in the file. The hearing officer is literally correct in noting the absence of any MMI finding in the designated doctor's report. However, we do not believe, with respect to a designated doctor who serves by appointment of the Texas Workers' Compensation Commission (Commission), and whose report is given presumptive weight under Articles 8308-4.25(b) and 4.26(g) of the 1989 Act, that this should have in and of itself negated the use of that doctor's report without further inquiry. Dr. B had treated claimant several months and the record contains not the slightest indication that the claimant quarrelled with Dr. B's MMI opinion.

The use of a designated doctor is clearly intended under the Act to assign an impartial doctor to finally <u>resolve</u> disputes over MMI and impairment rating. As we noted recently in Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992, it is important to realize that the designated doctor, unlike a treating doctor or a doctor for whom a carrier seeks a medical examination order under Article 8038-4.16, serves at the request of the Commission. We believe that it is the responsibility of the Commission, and not of either of the parties, to ensure that the designated doctor completes the TWCC-69 form or otherwise supplies the information required under Texas Workers' Compensation Commission Rules, 28 TEX. ADMIN. CODE §130.1 (Rule 130.1). If information is nevertheless missing or unclear by the time that the contested case hearing officer is asked to evaluate the designated doctor's report, it is appropriate for the hearing officer, in carrying out his or her responsibilities to fully develop the facts required, in accordance with Article 8308-6.34(b), to seek that additional information. Moreover, direct contact between the Commission and its appointed designated doctor will serve to discourage unilateral contacts from either side following the examination that could serve to undermine the perception that the designated doctor is impartial. *See* Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992.

In this case, it is possible that the designated doctor wasn't asked to evaluate MMI because Dr. B's MMI was accepted as correct. We agree that it is necessary to find a specific MMI date from which to calculate impairment income benefits. In this case, it appears such a date could have been ascertained by holding the record open for a short period of time. The hearing officer has the authority, if necessary, to direct either party to seek clarification from the doctors who serve as their expert witnesses. The alternative is prolongation, rather than resolution, of disputes, and reversal and remand of cases to develop the needed evidence. That is the situation we have here, and is especially unfortunate given the fact that three nearly identical impairment ratings were found by the treating, consulting, and designated doctor. It may be that remand of this case will not necessitate another full hearing; we will, however, leave this to the discretion of the hearing officer.

The decision of the hearing officer that the claimant sustained an injury in the course and scope of employment is affirmed. For the reasons expressed above, the hearing officer's decision regarding her findings on MMI and impairment is reversed, and the case is remanded for the expedited development of further evidence, as appropriate, and for reconsideration and such additional findings as are appropriate and not inconsistent with this opinion. Pending resolution of remand, a final decision has not been made in this case.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge