APPEAL NO. 93268

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). On February 23, 1993, a contested case hearing was held in (city), Texas, following a change of venue, before hearing officer (hearing officer). The appellant, hereinafter carrier, asserts error in the hearing officer's findings and conclusions that the claimant injured his back in the course and scope of his employment and that he has disability as a result of that compensable injury. Carrier contends that the hearing officer primarily based his decision on the opinion of a medical examination order doctor, who the carrier maintains gave a different opinion following an *ex parte* contact with claimant's attorney. The carrier asks that this case be remanded for further consideration with untainted, unbiased medical opinions. In his response, the claimant contends the hearing officer's decision is supported by the evidence, and said the MEO doctor had only been asked to provide written clarification of his position with regard to claimant's injury.

DECISION

We affirm the decision of the hearing officer.

The claimant testified that he worked for, Texas (employer), maintaining roads. On March 19, 1992, he said he got a flat tire on his maintainer, which was a large piece of equipment used to blade roads. He tried to get a coworker, Mr W, to help him, and waited a while for assistance, but when none came he proceeded to remove the tire himself. He said that the tire weighed between 200 and 250 pounds. While he was loading it onto his pickup truck to take it to be repaired, he hurt his back. About the same time his wife and a friend, Ms Y, drove up and saw him loading the tire. The claimant took the tire to Company and Battery for repairs, and a receipt from that company, showing "1 new 1300-24 maintainer tire mounted" on "3-19-91" was made part of the record. (Claimant said the year was a typographical error, and in fact the date at the top of the ticket, which was an "open ticket" and had many entries on it, was 2-29-92.)

The claimant had had two prior back injuries, with accompanying lumbar laminectomies. (The exact dates of his surgeries was not clear from the record; one medical report refers to laminectomies in January and July of 1991, one mentions back surgery in November 1990, and a third refers to surgery in March 1991 at two levels, L4-5 and L5-S1. The December 8, 1992 benefit review conference report gives the dates of the prior back injuries, both of which were compensable, as November 20, 1990 and June 4, 1991.) After the March 1992 injury claimant said he returned to (Dr. S), the doctor who had treated him before. Dr. S's initial medical report dated April 1, 1992, said "Patient stated he feel (sic) a week or so ago getting on his maintainer and he did again yesterday and hurt his back and neck. He has had back and neck pain ever since." The claimant denied that he told Dr. S he had fallen. He said when he saw Dr. S, the doctor asked him if he had fallen and when he replied negatively, the doctor said, "[t]hey've got here that you've fallen." The claimant guessed that the doctor had gotten that from the receptionist, although he said he had not

told anyone he had fallen. Dr. S's initial medical report also said the claimant's neck and low back were stiff, and that he thought claimant had a joint problem. He prescribed medication and advised claimant to get a lumbosacral support.

On November 11, 1992, Dr. S wrote the carrier that the pain in claimant's back and neck area was an aggravation of a pre-existing condition. Dr. S wrote, "[claimant] was doing fairly well until about March 20, 1992, when he fell off his road maintainer and hurt himself again. That caused his painful back and neck condition to recur."

In a December 1992 letter to the carrier, Dr. S stated as follows: "[Claimant] related his injury personally to me. Generally, the only notes my nurse documentates (sic) in a chart is blood pressure and temperature readings and suture removal notes following surgery."

After the first benefit review conference, the claimant subsequently went to (Dr. O) as part of a required medical examination. The record does not indicate the date of the first benefit review conference, nor does it include any copy of an order for a medical examination. Dr. O's "Worker's Compensation Second Opinion Narrative Report" indicates, however, that Dr. O saw claimant on November 12, 1992, and gave his assessment as, "[s]tatus-post lumbar spine surgery, apparently two-level discectomy, now classified as a failed back syndrome with possible chronic pain syndrome." Dr. O also recommended an MRI scan to rule out recurrent disc herniation, and said that depending upon the results, the claimant could be a candidate for either beginning selective cortisone injections in an effort to identify an anatomic pain generator or, if the claimant declined further work-up, an impairment rating. Handwritten notes of Dr. O (the date of which was not completely copied, although they are from sometime in 1992) indicate the claimant had a November 18, 1992 MRI showing "dessication (sic) changes @ L4,5 & L5-S1, post op changes L5-S1." The assessment stated: "CLBP unclear etiology possible recurrent disc lesion, possible failed back syndrome. Needs selective injection to identify anatomic pain generator." The claimant said Dr. O gave him injections in his back and told him this was a new injury. On December 9, 1992 Dr. O wrote the benefit review officer as follows:

> After discussing the patient's history with him, he appears to have had lumbar spine surgery in March 1991, apparently at two levels, L4/5 and L5/S1. After recovery from the surgery, he claims to have gone back to work at his usual and customary job without any significant pain. On or about March 1992 he re-injured his back lifting a large tire, with onset of new pain. Based on this history, I feel that the injury of 3/19/92 is a new injury, however, it may involve injury to the same lumbar segments that were previously operated on.
>
> Because the patient claims to have returned to work at full-duty without difficulty, it is my opinion that the injury of 3/19/92 is a new injury.

The claimant's wife testified that on March 19th she drove to where her husband was working to see if he had gotten his paycheck. She said she observed him loading the tire into his pickup, and that she could tell he had hurt his back. The friend who was with her, Penny Young, testified essentially the same. The claimant testified, and his wife also stated, that at the time of his injury he had recovered from his last prior back surgery; that he sometimes had stiffness when he got up in the mornings, but that it went away after he moved around. A transcription of a recorded statement of his coworker ,Mr W, said that after claimant's second surgery he complained of his back "sometimes daily, sometimes not," but also said claimant would "be sore in the morning and then after he get to moving around, loosen up." Both claimant and his wife testified that since the March 1992 injury he was in constant pain and was unable to do the kind of work he was trained for nor much of anything else. Claimant said he had been laid off by his employer, but he wasn't sure of the reason. He had not worked since his injury.

The carrier essentially contends that the evidence does not support the hearing officer's decision, and specifically argues that the decision is primarily based upon Dr. O's December 9th letter which it claims was tainted because of *ex parte* contact with the claimant's attorney. The carrier cites Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993, for the proposition that contact with a Commission appointed doctor should be discouraged.

The claimant's attorney at the hearing and on appeal provided an explanation for the events that occurred with regard to Dr. O. In claimant's response to request for review, the claimant's attorney stated as follows:

First, Claimant was referred to [Dr. O] by [benefit review officer] Mr C subsequent to an initial Benefit Review Conference. [Dr. O] prepared and submitted a letter report dated November 12, 1992 (CL-EX-3). According to Claimant's testimony at the hearing, [Dr. O] at all times believed, and advised Claimant of his belief, that Claimant had incurred a new injury; and, further, that this belief was accurately set forth in his November 12, 1992 letter.

Subsequently, an additional Benefit Review Conference was convened, at which time [employer] advised that this conclusion was not clear to it from [Dr. O's] report. As a result of the position taken by [employer], Claimant's attorney requested that [Dr. O] clarify the matter in an additional letter, and expressly state his opinion on the dispositive issue. Such request was made immediately and in writing, and [Dr. O] responded with his December 9, 1992 letter . . . .

[Carrier's] allegations of any improper ex-parte contact are expressly denied. The

> only contact between Claimant's attorney and [Dr. O] was a written request for clarification of the dispositive medical issue, which was properly and appropriately provided. Despite its allegations, [carrier] has brought forward no evidence of any improper conduct, or any evidence of any tainted or biased medical testimony. To the contrary, [Dr. O] was simply asked to provide a report and did so.

Article 8308-4.16 allows the Commission, on its own motion, to require an employee to submit to a medical examination to resolve disputes concerning medical issues. While rules of the Commission, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§126.5 and 126.6 (Rules 126.5 and 126.6), contain procedures for requesting and issuing orders for medical examinations, as well as penalties for failure to comply with such orders, they do not prohibit contacts of the nature that occurred in this case. Moreover, Appeal No. 93039, *supra*, cited by carrier, cites Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992, in which the Appeals Panel remanded the case for clarification from the designated doctor as to whether the claimant had reached MMI. That decision also said, in pertinent part:

The use of a designated doctor is clearly intended under the Act to assign an impartial

> doctor to finally resolve disputes of 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 8308-4.16, 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 [Rule 130.1] . . . . Moreover, direct contact between the Commission and its appointed doctor will serve to discourage unilateral contact from either side following the examination that could serve to undermine the perception that the designated doctor is impartial . . . .

Thus, this opinion makes the hearing officer responsible for ensuring that all information necessary to resolve a dispute over MMI and impairment is adequately developed and presented. The language of this opinion also distinguishes between discouraging potential unilateral contact with a designated doctor--whose opinion is entitled to presumptive weight, Articles 8308-4.25 and 4.26, and who thus stands in a unique position in the dispute resolution process--and a doctor appointed to perform a medical examination for purposes of determining issues other than maximum medical improvement or impairment. The latter issues are dependent upon expert medical opinion, whereas issues of injury in course and scope and disability generally can be determined by lay testimony as well as medical evidence. We further note that Rule 126.6, Order for Required

Medical Examinations, states at subsection (f) that a doctor who conducts an examination solely under the authority of an order issued according to the rule shall not be considered a designated doctor under Articles 8308-4.25(b) or 4.26(g).

Based upon the information in the record before us, we cannot say that any error was committed by the hearing officer with regard to the opinion of Dr. O. We additionally find that the record contained other evidence, including Dr. S's opinion and the claimant's own testimony and that of his wife, to support the hearing officer's determination. While the latter individuals were interested parties, their testimony raised factual issues which the hearing officer as trier of fact was entitled to determine in the claimant's favor. We will not substitute our judgment for that of the hearing officer where his decision is not so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer is affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge