APPEAL NO. 92184

On April 7, 1992, a contested case hearing was held in (city), Texas with (hearing officer) presiding as the hearing officer. The hearing officer determined that respondent's injury extended to and affected his back, and that respondent was not offered a *bona fide* position of employment which he was reasonably capable of performing given his physical condition. The hearing officer decided that appellant, the employer's workers' compensation insurance carrier, is liable for payment of benefits to respondent under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 et seq. (Vernon Supp. 1992) (1989 Act), and that appellant is not entitled to an offset for any light duty work offered under Article 8308-4.23(f).

Appellant contends that the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be manifestly unjust, and requests that we reverse the decision and render a decision in its favor. Respondent, who was not represented by an attorney at the hearing, but who was assisted by (L W), a Texas Workers' Compensation Commission Ombudsman, did not file a response to the appeal.

DECISION

The decision of the hearing officer is affirmed.

It was undisputed at the hearing that respondent injured his right ankle while working for his employer, (employer), on (date of injury). The issues to be determined by the hearing officer were whether respondent's injury extended to and affected his back, and whether appellant was entitled to an offset to payment of temporary income benefits for light duty work which was offered by the employer to respondent. The hearing officer determined that respondent's injury did extend to and affect his back, and that appellant was not entitled to an offset.

The employer is in the street paving business. At the time of his injury respondent had worked for the employer as a steel tier for about two and one-half years. Respondent testified through an interpreter as follows: At about 10:00 a.m. on Thursday, (date of injury), his supervisor, Mr C, told him to check a leak in the water truck which required him to get on top of the truck. As he was climbing down from the truck, he jumped to the ground and hit his right ankle on a rock. The supervisor witnessed the incident. Respondent felt and heard a "pop" in his back when he bent down and grabbed his ankle immediately after hitting it on the rock, but he felt no pain in his back that day. He immediately told his supervisor that he had hurt his ankle, but did not mention having felt a pop in his back. He continued doing his normal work of carrying and tying metal reinforcing rods. He initially declined his supervisor's offer to have a coworker take him to the hospital, but then accepted that offer and was taken to the hospital when his ankle started to hurt worse at about 12:00 p.m. The emergency room doctor examined his right ankle, wrapped it in a bandage, and told him to use crutches. The doctor told him his ankle would heal in two or three days, and told him he could return to work the next day if

his employer had light duty work available. He didn't tell the emergency room doctor about the pop he had felt in his back. The same afternoon he returned to the job site on crutches and waited for the friend and coworker who had driven him to work to drive him home. At that time, he showed his supervisor his light duty work release and his supervisor told him the employer had light duty work for him driving the truck or doing something easier. He did not work Thursday afternoon, but did work on Friday, (date), driving the supervisor's pickup truck which has an automatic transmission. He drove the truck using his left foot because he was unable to use his right foot due to his ankle injury. At about 1:00 p.m. on Friday afternoon he began experiencing pain in his back, but did not relate this to his supervisor. He did not report to work on Monday, October 14th, because his back and right foot hurt a lot and he wasn't able to "sit or do anything." An attorney he saw on October 14th made an appointment for him with Dr. W, whom he saw on Tuesday, October 15th. Respondent said that Dr. W told him he probably injured his back when he bent down to grab his ankle, and that time and therapy would make it better. On October 17th respondent returned to the job site and

told his supervisor he had hurt his back the previous Thursday, (date of injury). Respondent said he has not had a previous back injury.

Mr. C testified that he saw respondent jump from the truck and hit his ankle or foot on a rock, and that respondent grabbed his ankle and said it hurt. Respondent was limping and obviously in pain so he had a coworker take respondent to the hospital. When respondent showed him the release for light duty work from the hospital on (date of injury), he told respondent that the employer had light duty work available for him, and that respondent could drive the truck on Friday. The witness said that the employer has had a light duty work program for about a year, and that on light duty status respondent would have had the same hours and pay, and worked in the same general locations, as he had prior to his injury. He said that respondent made no complaints while driving the truck on Friday. He also said that respondent would have been continued on light duty status on Monday, October 14th, had respondent come to work. The witness testified that respondent didn't tell him about having back problems on (date of injury) or (date). On October 17th respondent came to the job site and told him that he was very sick and had "broken nerves" in his back.

Mr. B, a vice-president in the employer's company, testified that the employer has a light duty work program, that Dr. W's office had called him the Tuesday or Wednesday after respondent's accident and requested authorization to treat respondent's back, and that on October 17th respondent told him he had hurt his back in the accident that occurred on (date of injury).

Medical records relating to respondent's treatment at the hospital emergency room on (date of injury) reveal that the emergency room doctor diagnosed a right ankle sprain, applied a splint to respondent's right ankle, and told respondent to use crutches for a

week. The doctor noted in the hospital record "[u]nable to return to work until tomorrow - light duty crutches required" and he further noted "no work if no light duty available." An x-ray showed moderate soft tissue swelling of the right ankle with no underlying fracture. An MRI of respondent's right ankle was unremarkable. There is no mention in the hospital records that respondent complained of back pain or was treated for a back problem.

Medical records from Dr. W's clinic reveal that respondent was under Dr. W's care from October 15, 1991, through at least April 3, 1992. Dr. W is a doctor of osteopathy. In a report dated October 15, 1991, Dr. W recommended that respondent be excused from work in order to avoid aggravation of his condition. He described respondent's condition as "back/ankle injury." In reports dated December 20, 1991, February 7, 1992, March 13, 1992, and April 3, 1992, Dr. W continued to recommend that respondent be excused from work in order to avoid aggravating his condition. The December 20th report noted that respondent had a lumbar strain with radiculopathy and a right ankle sprain. In the February 7, 1992, report Dr. W's diagnosis of respondent's condition was: 1. Cervical and lumbar sprain/strain with lumbar radiculopathy, and 2. Sprain right ankle.

In considering a challenge to the sufficiency of the evidence, we recognize that the function of the hearing officer, as the trier of fact, is to judge the credibility of the witnesses, assign the weight to be given the evidence, and resolve any conflicts or inconsistencies in the testimony. Article 8308-6.34(e); Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). We do not substitute our judgment for that of the hearing officer if the challenged finding is supported by some evidence of probative value and is not so against the great weight and preponderance of the evidence as to be manifestly unjust. Alcantara, *supra*; Texas Workers' Compensation Commission Appeal No. 92166 (Docket No.) decided June 8, 1992.

Respondent's testimony raised a fact issue as to whether his injury extended to and affected his back. The hearing officer was entitled to believe respondent's testimony that he felt and heard a pop in his back when he grabbed his injured ankle, and that he had back pain the next day which continued into the following week. *See* Highlands Insurance Company v. Baugh, 605 S.W.2d 314, 316 (Tex. Civ. App.-Eastland 1980, no writ). From this evidence, the hearing officer could reasonably infer that respondent's back injury, as diagnosed by Dr. W within five days of the work-related accident, resulted from the accident. We conclude that the hearing officer's determination that respondent's injury extended to and affected his back is supported by sufficient evidence, and that it is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust.

We next consider appellant's challenge to the hearing officer's determination that respondent was not offered a *bona fide* position of employment which respondent was reasonably capable of performing given respondent's physical condition. Articles 8308-4.23(c) and (d) set forth the manner in which temporary income benefits are calculated

and take into consideration weekly earnings after the injury. Article 8308-4.23(f) provides as follows:

> For purposes of Subsections (c) and (d) of this section, if the employee is offered a *bona fide* position of employment that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly earnings after the injury are equivalent to the weekly wage for the position offered to the employee.

Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE Sec. 129.5(b) (Rule 129.5(b)) provides as follows:

> A written offer of employment which was delivered to the employee during the period for which benefits are payable shall be presumed to be a *bona fide* offer, if the offer clearly states the position offered, the duties of the position, that the employer is aware of and will abide by the physical limitations under which the employee or his treating physician have authorized the employee to return to work, the maximum physical requirements of the job, the wage, and the location of employment. If the offer of employment was not made in writing, the insurance carrier shall be required to provide clear and convincing evidence that a *bona fide* offer was made.

In determining whether an offer of employment is *bona fide*, the Commission must consider, among other things, the physical requirements and accommodations of the position compared to the employee's physical capabilities. Rule 129.5(a)(4).

The evidence showed that the emergency room doctor treated respondent on only one occasion, diagnosed a sprained ankle, and advised that respondent could return to light duty work on crutches. The light duty work offered respondent was driving a truck which respondent said he had difficulty doing because of the injury to his right ankle. The hearing officer could consider respondent's testimony on the element under Rule 129.5(a)(4) of the physical requirements of the position compared to his physical capabilities. *See* Texas Workers' Compensation Commission Appeal No. 91024 (Docket No. LB-00015-91-CC-1) decided October 23. 1991. Five days after the accident, Dr. W diagnosed a back injury and an ankle injury and advised that respondent should remain off work so as not to aggravate his condition. Dr. W's recommendation that respondent remain off work continued into April 1992. Dr. W appeared to be respondent's treating doctor inasmuch as respondent was under his continuous care for his injuries from October 15, 1991, to at least April 1992. There is no evidence that either Dr. W or respondent authorized respondent to return to work on or after October 15, 1991. In light of this evidence, and our decision on the first issue relating to the back injury, we conclude that the hearing officer's determination that respondent was not offered a *bona fide*

position of employment that respondent was reasonably capable of performing given his physical condition is supported by sufficient evidence, and is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* Texas Workers' Compensation Commission Appeal No. 91023 (Docket No. HO-00017-91-CC-2) decided October 16, 1991, wherein the appeals panel stated that under Rule 129.5(b) "only two people are allowed to provide a basis for an offer of limited work--either the `employee' or `treating physician' must provide the authority for the offer." *See also* Texas Workers' Compensation Commission Appeal No. 91024 *supra*.

Although not raised as an issue on appeal, we note for the purpose of clarification that in the "Evidence Presented" portion of the hearing officer's decision, the hearing officer correctly recites that x-rays offered by respondent were withdrawn from evidence, but incorrectly identifies the withdrawn exhibit as Claimant's Exhibit 2. The x-rays were Claimant's Exhibit 1. Claimant's Exhibit 2, consisting of medical records and correspondence, was admitted into evidence and was not withdrawn from evidence. It is incorrectly identified as Claimant's Exhibit 1 in the decision. We also note that this same portion of the hearing officer's decision recites that appellant presented no exhibits, which is incorrect. Appellant introduced into evidence six exhibits, three of which were the same as documents included in Claimant's Exhibit 2. The three other exhibits were the reports of the MRI scan and x-ray and an (date of injury) report from the emergency room doctor indicating light duty work status. The MRI and x-ray results were not contrary to the hearing officer's finding that the emergency room doctor diagnosed a right ankle sprain. The work status report is not contrary to the hearing officer's finding that respondent attempted to perform light duty work on (date). We have reviewed the entire record of the contested case hearing, including all of the exhibits that were admitted into evidence and not withdrawn at the hearing, in reaching our decision on appeal.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge