APPEAL NO. 92419

On July 14, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to consider the issues of: (1) whether either of two emergency room doctors constituted the claimant's choice of doctor; (2) whether the claimant abandoned medical treatment; and (3) whether the claimant had disability before or after June 25, 1991, as a result of his injury (date of injury). It was not disputed that the claimant, (claimant), respondent herein, had suffered an injury to his back in the course and scope of his employment with (employer), on (date of injury). It was on June 25, 1991, that respondent went back to work briefly for another employer.

The hearing officer ruled that neither emergency room doctor constituted the respondent's treating doctor, that the respondent had not abandoned medical treatment without good cause, and that the respondent had disability resulting from his compensable injury, from (date of injury) to the date of the hearing.

The appellant appeals only the determinations made with respect to disability. Notwithstanding the fact that it has not controverted the compensability of the injury, appellant refers to respondent's injury in its appeal as "the alleged injury." Appellant complains of the finding of fact that respondent has had back pain throughout the period of disability. Appellant further complains of error in the conclusion of law finding disability from the date of injury to "the present." Appellant argues a matter not raised in the proceeding below: that any disability resulted from a subsequent injury that respondent incurred when he went back briefly to work following his injury. The gist of much of appellant's argument is that because respondent did work briefly, he has demonstrated that his injury is no impediment to gainful employment. Appellant further complains that the hearing officer has erred by not discussing, in the decision's Statement of Evidence, the disability issue in the context in which it was raised by the carrier, in that the hearing officer has considered that respondent testified he returned to work for economic reasons brought on by appellant's underpayment of the temporary income benefit.

Respondent counters by pointing out the evidence supportive of the decision, and asks that the decision be affirmed.

DECISION

Not able to determine that the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm.

The respondent injured his back on (date of injury), when he was moving a 50-60 lb. section of pipe on an assembly line at (employer) on behalf of his employer. The employer is a temporary employment service, for which respondent said he had first gone to work in November 1990. Respondent was driven to the emergency room by the employer that day; he consulted with (Dr. H), who diagnosed an acute lumbar strain and took the respondent

off work for three days pending a recheck on May 31st. An x-ray taken that date of respondent's spine was negative; no other tests were ordered that day. Respondent did not return to (Dr. H) but, on June 4, 1991, he went to the emergency room of another hospital and consulted with (Dr. T), who diagnosed acute lumbosacral sprain and prescribed medication. Respondent stated that he was referred by Dr. T to a specialist, (Dr. B). Although he attempted to make an appointment with Dr. B at this point, he testified that Dr. B would not be available to see him for some number of weeks. The greatest impediment to seeing Dr. B, respondent stated, was that the appellant would not give authorization to Dr. B's office for treatment.

Respondent stated that he worked for $6.00 an hour for employer, and worked up to twelve hours a day, five days a week. However, the appellant began payment of only the minimum compensation benefit, $68.00 per week. Respondent said that he did not question this because he did not know that much about workers' compensation. He stated he began to look for work because this amount was inadequate to support his family. Respondent and appellant have since agreed to an average weekly wage of $294.92.

We can surmise from the record that appellant derived the amount of benefit it paid by applying the presumption set out in Texas W.C. Comm'n, 28 TEXAS ADMIN. CODE §128.2(a) (Rule 128.2) that the last paycheck [as indicated on the Employer's First Report of Injury] was an accurate reflection of the average weekly wage for purposes of expediting the payment of benefits. It appears that appellant initially underpaid, for whatever reason, the temporary income benefits.

Respondent applied for and was hired by a landscape service operated by (Mr. V). Mr. V testified and stated that respondent was assigned to do mowing, rather than landscape, work. This involved pushing a self-propelled mower, edging lawns, and, on occasion, carrying a blower that weighed no more than ten pounds. Mr. V stated that this was "hard" work, although he avoided labelling it as "strenuous". In a recorded statement given January 17, 1992, Mr. V answered, in response to various questions about the job performed by respondent, "it's not really strenuous physical activity of any kind" . . . "There was some unloading but I mean, nothing where a person has to physically lift the entire mower" . . . "You're walking constantly, that's really the main thing." Mr. V also confirmed in his statement that very little, if any, bending or stooping was required.

According to Mr. V, respondent worked for his service from June 25, until August 13, 1991. He said that respondent resigned, saying he wanted to rejoin the military. He had no knowledge of any back injury sustained by respondent, nor did he observe respondent to appear to be in any kind of pain. Respondent was paid $4.75 per hour the first week, $5.00 per hour until July 23rd, and $5.25 per hour thereafter.

Respondent stated that his back never stopped hurting during this time, and that he quit because of the pain. He stated that on one occasion when he pulled a bush, he irritated his back, but that he did the work assigned. He stated that he told Mr. V that he was going

to reenlist, even though he didn't intend to because of his back.

Respondent began seeing (Dr. S) on September 4, 1991; by letter dated September 16, 1991, Dr. S stated that respondent was unable to work at that time. Respondent stated that his back did not improve with chiropractic treatment by Dr. S. The record indicates that such treatment was rendered three times a week. Dr. S eventually referred him for a magnetic resonance imaging (MRI) examination, conducted December 18, 1991. The results showed a herniated disc. After the January 1992 benefit review conference, respondent began consulting with Dr. B. Dr. B prescribed physical therapy. As recently as May 11, 1992, Dr. B stated in writing that respondent was unable to work because of his back.

The issue was whether respondent had disability, as defined in the 1989 Act, art. 8308-1.03(16), meaning: "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Medical and non-medical evidence may be considered by the trier of fact. In the case at hand, the wage earned after the injury was lower than the pre-injury wage. The major question for the hearing officer to resolve, therefore, was whether this occurred because of the compensable injury. This can be established by a claimant's testimony, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 91083 (Docket No. redacted) decided January 6, 1992. Article 8308-4.23(c) & (d), which direct calculation of temporary income benefits as a percentage of the difference between pre- and post-injury earnings, appear to contemplate applicability to situations where a person has returned to work, albeit not the work previously performed. Consequently, the simple fact that a worker has returned to some gainful employment does not automatically equate to an ending of disability. *See* Texas Workers' Compensation Commission Appeal No. 92299 (Docket No., redacted) decided August 10, 1992. From the record developed herein, the work performed for Mr. V did not involve lifting similar to the pre-injury employment, nor were bending and stooping required. Respondent's testimony that he eventually left this job because he could not continue to work with the pain, and the medical records indicating a herniated disc, are sufficient to support a finding of disability. Insofar as appellant now argues that the "normal" x-ray at the time of injury refutes the occurrence of an injury at that time, we would note previous decisions that cite situations where a "normal" x-ray and an "abnormal" MRI were not necessarily inconsistent, *for example, see* Texas Workers' Compensation Commission Appeal No. 92140 (Docket No. redacted) decided May 20, 1992.

The contention that the hearing officer should be bound by appellant's casting of the "context" of the issue is rejected. The appellant cites no authority in arguing that the hearing officer should be precluded from considering all evidence elicited on the inquiry into the issue of disability that was before her. Appellant came to the proceeding asking the hearing officer to infer that respondent, notwithstanding his return to work at lower wages than those earned prior to the injury, had shown thereby that his back does not prevent employment. Given this posture, the respondent clearly had the right to prove up factors, other than

recovery from the injury, that inspired respondent to return to work. The hearing officer did not err in considering testimony, not objected to when offered, that respondent's return to the work force was caused primarily by the amount of benefits being paid. We would point out that the statement of evidence is a summary of evidence presented at a hearing. While it may occasionally lend insight into a hearing officer's evaluation of evidence, the presence or absence of facts in the statement of evidence does not constitute error. *See* Texas Workers' Compensation Commission Appeal No. 92213 (Docket No. redacted) decided July 10, 1992.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, Art. 8308-6.34(e). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The fact that a claimant may hold himself out as available for work in an application for unemployment benefits is not necessarily adverse to his testimony during trial of the case that he is unable to obtain and retain employment due to his injury. *See* Aetna Casualty & Surety Co. v. Moore, 386 S.W.2d 639 (Tex. Civ. App.- Beaumont 1964, writ ref'd n.r.e.). We will not consider the defense raised for the first time on appeal, that the injury resulted from subsequent employment. *See* Art. 8308-6.31(a).

There being sufficient evidence to support the decision of the hearing officer, we affirm.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge