APPEAL NO. 92491

On August 4, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that the claimant, (claimant), is entitled to temporary income benefits, with interest on accrued benefits in accordance with Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-4.13 (Vernon Supp.) (1989 Act), from June 2, 1992 until claimant obtains maximum medical improvement or no longer has disability from her injury, whichever occurs first. Appellant, hereinafter carrier, appeals alleging the hearing officer's decision is contrary to the great weight and preponderance of the evidence, that a claimant terminated for cause does not revive the carrier's liability for temporary benefits and that the worker did not have a disability as defined by the 1989 Act so is not entitled to temporary income benefits. Claimant filed a timely response.

DECISION

The hearing officer's decision is affirmed.

Claimant is a 30 year old female, pro se litigant. The record does not give much of the historical background leading up to her problems. The date of injury is listed as on or about (date of injury) and the record contains a physician's report from (Dr. MN), M.D., dated June 27, 1991 with a statement of cause of injury as "[right] wrist started hurting about 3 weeks ago." The claimant became aware she had carpal tunnel syndrome sometime in (year), but continued to work until January 1992 when the employment record shows she missed some time because of flu or other reasons. It was during early 1992 that claimant accrued the majority of 48 discipline points for absenteeism and tardiness. From mid-1991 until April 1992 claimant alternated working ". . . on repairs for a day and then on the (assembly) line the next day."

Claimant was seen by Dr. MN on April 27, 1992 for evaluation of wrist pain. Some degenerative osteoarthritis was found and she was referred to Dr. PZ, an orthopedic specialist. On May 22, 1992, Dr. PZ released claimant for light duty stating, "[l]ight work may consist of washing gloves in warm water and sorting them." It was thought this type of activity might be beneficial for claimant's carpal tunnel syndrome. The employer offered claimant a position which consisted of taking cotton (and some vinyl) gloves out of bins, placing them in washing machines, taking them out of the washing machine, placing them in dryers and then sorting, matching and bundling the gloves. Claimant attempted to do this work from May 26 to May 31, 1992. On June 1, 1992, claimant went to Dr. KF for a second opinion. Dr. KF released claimant for "light duty only--must be in splint" effective June 2, 1992. Claimant reported for work on June 2, 1992, but advised the employer's personnel manager that she felt she could not work because of pain and swelling in her wrist.

The employer used a personnel point system with points assessed for absenteeism and tardiness. Claimant had accrued 48 points prior to June 2, 1992. If an employee

receives 50 points dismissal is warranted. When claimant refused to work the assigned light duty she was assessed additional points and terminated. Subsequently, on June 11, 1992 Dr. KF submitted a more detailed report on specifically what duties the doctor thought claimant could perform. That report defined restrictions that claimant ". . . should not do any heavy lifting with the right hand or wrist, she should not do any strong grasping or pinching with the right hand, and she should not do any type of activity, which required repetitive flexion and extension of the wrists." The issue presented is whether the duty offered was within the restrictions set by claimant's doctor and whether refusal to perform such duty constituted good cause for termination.

Carrier cites Texas Workers' Compensation Commission Appeal Nos. 91027, decided October 24, 1991, and 91098, decided January 15, 1992, for the proposition ". . . that termination for good cause does not revive the carrier's liability for temporary income benefits." Both of those cases can readily be distinguished on fact and law issues and do not answer the question of whether there was good cause to terminate the employment. In this case, the employer offered claimant a light duty job within the physician's restrictions, based on what the doctors thought she could do. Claimant worked at the light duty job for a little over a week and testified she had pain without a splint and work with a splint caused her fingers to swell and also caused her severe pain. Under the employer's point system, absences due to industrial accidents are not counted toward termination. The issue then is whether the refusal to perform the offered light duty on June 2, 1992 was good cause for termination in light of the doctor's report. The employer had made a *bona fide* offer of employment as defined by Article 8308-4.23(f) which states ". . . 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 . . ." In determining whether an offer of employment is *bona fide*, the following are considered pursuant to Texas W. C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5).

(1)the expected duration of the offered position;

(2)the length of time the offer was kept open;

(3)the manner in which the offer was communicated to the employee;

(4)the physical requirements and accommodations of the position compared to the employee's physical capabilities; and

(5)the distance of the position from the employee's residence.

The hearing officer found there was a *bona fide* offer of employment to claimant but that the employer withdrew the offer by terminating the claimant on June 2, 1992. Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, and cited in the carriers appeal, states: "[i]t is our opinion that a broadly stated rule forever denying worker's compensation benefits to an employee returned to light duty and

subsequently discharged for cause . . . has the potential to undermine a very basic purpose of worker's compensation programs: to compensate injured workers for loss of earnings attributable to a work-related injury. . . . virtually all case authority holds that the reason for the termination must be justified or for just cause . . ." The hearing officer found that the offer of *bona fide* employment was withdrawn when the claimant was terminated, and by inference found that the termination was not for good cause. Although there was initially a *bona fide* offer as defined by Rule 129.5, that *bona fide* offer was effectively withdrawn by the claimant's inability to perform the light work duties. The claimants' allegations of inability to work was subsequently supported by Dr. KF June 11, 1992 clarification. The question is whether the hearing officer believed claimant could not perform light duty on June 2, 1992. He obviously did not.

Director State Employees Workers' Compensation Division v. Wade, 788 S.W.2d 131 (Tex. App.-Beaumont 1990, writ dismissed) held that incapacity and disability can be determined by a finder of fact based on lay testimony even if contradicted by medical experts. Also in an older case, Houston General Insurance Company V. Pegues, 514 S.W.2d 492 (Tex. App.-Texarkana 1974, writ ref's n.r.e.) a workers' compensation case, it was held that opinion evidence of expert medical witnesses is only evidentiary and the issues of injury and disability may be established by testimony of the claimant alone, even though such lay testimony is contradicted by the unanimous opinion of medical experts. The trier of fact may accept or reject such testimony in whole or in part, and may accept lay testimony over that of medical experts. *Also see* Texas Workers' Compensation Commission Appeal Nos. 91023, decided October 16, 1991, and 91024, decided October 23, 1991. The hearing officer evidently found that the claimant was unable to perform the light duty which was offered on June 2, 1992 based on claimant's testimony. We will not substitute our judgement for the hearing officer, as the trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence. The hearing officer had the opportunity to judge the credibility of the witnesses and was able to view the bins and containers that claimant was required to handle. As such the hearing officer was in a better position to determine whether claimant was physically capable of performing the light duty offered given the doctor's restrictions. The findings should be upheld unless it is determined that the evidence was so weak or the findings so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find.

If claimant was unable to work because of her industrial injury on June 2, 1992 then no additional points should have been assigned against the claimant and consequently there would have been insufficient points to justify claimant's termination. Consequently we affirm the hearing officer's finding that claimant was not terminated for good cause unrelated to her injury.

Claimant clearly indicated she felt she was unable to work the proffered light duty on June 2, 1992. The hearing officer found that this inability to perform was work related and no points should have been assessed against the claimant. We find no error or abuse of

discretion in the hearing officer's findings on this point.

The decision of the hearing officer is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge