APPEAL NO. 92541

On August 5, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that the respondent (claimant) did not receive a *bona fide* offer of employment that he was physically capable of performing in (month) (year) and that claimant continued to have disability resulting from his (date of injury) compensable injury. (carrier) appealed alleging a *bona fide* offer of employment had been offered to claimant in (month) (year). Carrier also alleges that claimant was ready and able to return to work at the time of the hearing. Carrier requests we reverse the hearing officer's decision. No response was filed to the carrier's request for review. This case is appealed under provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act).

DECISION

After reviewing the record, we affirm the decision of the hearing officer.

Claimant was employed by (employer) on (date of injury), when he sustained a compensable injury to his back lifting cable out of a hole. Claimant sought treatment for his back injury on or about (date of injury) but was dissatisfied with that doctor. The uncontroverted evidence is that claimant asked (Mrs. T), employer's secretary/treasurer, for recommendation of another doctor. Mrs. T recommended (Dr. Mc). Claimant saw Dr. Mc for the first time on or about March 10, 1992. Claimant testified that he returned for a second visit with Dr. Mc on or about March 17, 1992 and asked to be taken off work because he did not feel he could do the work, but Dr. Mc refused claimant's request. The hearing officer, in her discussion, noted that after claimant's March 24, 1992 appointment with Dr. Mc, carrier's adjustor ". . . telephoned [claimant] and told [claimant] that (Dr. Mc) had released him to return to light-duty work." After asking Mrs. T what kind of work he would be doing, claimant worked at his light duty assignment of clerical work for two days in (month) (year). The hearing officer's discussion states: "After two days, claimant informed employer that he was not physically capable of performing his assigned work." Carrier, in its appeal, disputes this evidentiary discussion by the hearing officer, stating: "Further, the uncontroverted testimony indicates that [claimant] never complained to his employer that he was unable to perform his job. [Claimant] simply failed to show for work one day and gave no communication to his supervisors to explain his absence." It is undisputed that claimant subsequently saw (Dr. DeL) who took claimant off work and has not yet released him. On June 23, 1992, claimant was examined by (Dr. L) for a required medical examination. Dr. L found no objective findings and opined claimant could return to work. The undisputed evidence is that a week or so prior to the contested case hearing (CCH) claimant called (Mr. T), employer's president, requesting assistance in getting out of jail and agreeing to return to work in return for assistance in getting out of jail. At the CCH on August 5, 1992, the hearing officer recessed the hearing, over carrier's objection, for nine days in order for Dr. DeL to perform additional tests at Back in Action. The hearing officer made it clear that for the tests to be considered the report must be submitted by close of business on August 14, 1992. No reference is made to this report and the hearing officer wrote her decision on

August 17, 1992.

The hearing officer found in part:

FINDINGS OF FACT

4.Employer received [Dr. Mc]'s approval for light-duty work consisting of (1) assisting and answering the telephone; (2) running errands to pick up supplies, but no lifting; and (3) handing small tools to carpenters.

5.Employer offered claimant light-duty work that consisted of sitting for eight hours to do clerical work.

6.Claimant attempted to perform the work offered by employer and was not physically capable of performing the light-duty work offered by employer in (month), (year).

7.Employer did not make a written offer of light-duty work to claimant in (month), (year).

CONCLUSIONS OF LAW

3.Carrier has not established by clear and convincing evidence that claimant was offered a bona fide offer of employment in (month) (year), that claimant was physically capable for performing pursuant to Article 8308-4.23(f) of the Texas Workers' Compensation Act and TWCC Rule 129.5.

The hearing officer's findings of fact might appear to be slightly contradictory. Finding of Fact No. 5 says employer offered claimant light duty work, Finding of Fact No. 7 says employer did not make a written offer of light duty work, and Conclusion of Law No. 3 states, in effect, claimant was not offered a *bona fide* offer of employment that claimant was physically capable of performing. It is acknowledged that there was no written offer of light duty work. Carrier argues that an offer was obviously made and communicated by virtue that the claimant performed, or attempted to perform, the work offered. Some consistency of the hearing officer's findings is achieved if one reads them as saying a verbal offer of light duty was made to claimant, but it does not rise to a *bona fide* offer of employment because the claimant was not physically capable of performing the offered duties.

Article 8308-4.23(f) states:

(f) 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.

TWCC Rule 129.5 states:

Rule 129.5: Bona Fide Offers of Employment

(a)In determining whether an offer of employment is bona fide, the commission shall consider the following:

(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.

(b)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.

Carrier concedes no written offer was made but argues that there was compliance with Rule 129.5(b) cited above, in that the carrier had provided clear and convincing evidence that a *bona fide* offer was made. If there is a written offer it may be presumed to be *bona fide*, otherwise no presumption applies and the evidence must be clear and convincing to conclude it was *bona fide*. *See* Texas Workers' Compensation Commission Appeal No. 91127, decided February 12, 1991. The element which appears most in controversy in this case is Rule 129.5 section (a)(4). Carrier argues that the employer was flexible to accommodate the needs of the claimant and that claimant never complained that he was unable to perform the light work given him. Carrier further argues that the employer was never given an opportunity to further adapt the light duty in a way that would be satisfactory to the parties. Rule 129.5(a)(4) has two parts. One is the physical requirements and accommodations of the position. In an analogous case, Texas Workers'

Compensation Commission Appeal No. 92004, decided February 20, 1992, we noted that the record in that case did not describe the position offered. In the instant case the job described was either answering the telephone or was not described at all. The rule requires definition of the position. Had the offer been written there would have been a presumption of a *bona fide* offer assuming other required elements of Rule 129.5(b) were present. As the offer was not written it becomes a matter of interpretation of the evidence as to the duties and parameters of the work offered. The hearing officer obviously failed to find clear and convincing evidence that claimant was offered a *bona fide* offer of employment. The other prong of the test in Rule 129.5(a)(4) is the employee's physical capabilities. These capabilities can be determined by the treating doctor, other doctors who evaluated the claimant and the claimant's own opinion of his capability. The hearing officer apparently placed great reliance on the claimant's testimony regarding his capabilities, or lack thereof. *See* Appeal No. 92004, *supra*. The hearing officer, as the sole judge of the weight and credibility of the evidence as provided in Article 8308-6.34(e) was entitled to accept the testimony of claimant, corroborated by Dr. DeL, that the job tasks assigned to him were not within the claimant's physical capabilities. *See also* Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992.

Carrier's second point is that of the claimant's continued disability. Carrier, in its appeal, concedes the hearing officer has great latitude to judge the weight and credibility of the evidence and testimony. Carrier, indeed, states that if the case were presented on the medical evidence alone ". . . there could be no argument with her [the hearing officer's] decision as the interpretation of those [medical] records are fully within her discretion." Carrier goes on to argue that claimant's call for assistance in getting out of jail proved that claimant was no longer disabled and was available to return to work. Carrier cites as fact Mr. T's testimony that claimant ". . . unequivocally stated that he [claimant] would return to work at full duty and drop his worker's compensation lawsuit." That statement is disputed by claimant who specifically denies offering to drop his workers' compensation claim. Claimant further testified that he only generally agreed he would return to work for assistance in getting out of jail. That statement could mean he would return to light duty, would attempt to work in spite of pain, or would return to duty when his back healed, which is what claimant said he meant. Again, the hearing officer is authorized to believe whichever version she felt had the greatest credibility and we will not substitute our judgment for that of the hearing officer.

There is more than ample authority for the propositions that the hearing officer is sole judge of the weight and credibility of the evidence, Article 8308-6.34(e), the hearing officer as trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony, McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986), Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758, 760 (Tex. Civ. App.-Amarillo 1973, no writ). The corollary is that the hearing officer's decision 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). In this case there was substantial evidence, by both medical and lay testimony, to support the carrier's case. Had we been the triers of fact it is possible that we would not have found as did the hearing officer. The court in Commercial Union Assurance Company v. Foster, 379 S.W.2d 320, 322 (Tex. 1964) held "[i]t is an elemental proposition of law that where there is some evidence of a substantial and probative character to support the trial court's (hearing officer in this case) findings of fact, they are controlling upon this court (or appeals panel) and will not be disturbed, even though this court might have reached a different conclusion therefrom." In reviewing a point on insufficiency of the evidence, "if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence." Texas Workers' Compensation Commission Appeal No. 92447, decided October 5, 1992, citing Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242, 247 (Tex. App.-Beaumont 1991, writ denied). The court in Highlands held, "[w]e are empowered to set aside the [hearing officer's findings and decision] if, but only if, the same are clearly wrong and manifestly unjust." Highlands Insurance Company, *supra*, at 447. We cannot so find.

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

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge