APPEAL NO. 92630

A contested case hearing was held in (city), Texas, on October 1, 1992, (hearing officer) presiding, to consider the sole disputed issue unresolved at the benefit review conference (BRC), namely, whether respondent (claimant) has disability under the Texas Workers' Compensation Act, TEX. REV. STAT. ANN. art. 8308-1.03(16) (Vernon Supp. 1992) (1989 Act). The hearing officer determined the issue in claimant's favor and appellant (carrier) challenges the sufficiency of the evidence to support such determination. Claimant did not file a response to carrier's request for review.

DECISION

There being sufficient evidence to support the challenged factual findings and legal conclusions, we affirm the hearing officer's decision.

Claimant testified through a translator, and with the assistance of an ombudsman from the Texas Workers' Compensation Commission, that he had a third grade education, had worked as a road construction laborer for approximately two and one-half years for (employer) tieing steel bars, shoveling dirt beneath forms, and so forth, and that on (date of injury), he injured his back and, apparently, his ankle. He said he had a swollen, slipped disc and that his treating doctor, (Dr. W), recommended surgery but claimant elected to undergo physical therapy first which he indicated Dr. W presented as an alternative. Claimant said that since October 15, 1991, he has been and remains under Dr. W's care, receives pain medication, and that Dr. W advised him not to work so as to avoid aggravating his injury. Dr. W's report of October 1, 1992 reflects that claimant was seen on September 29, 1992, was awaiting an MRI, elected not to have surgery at that time, and was scheduled for a work hardening program.

Dr. W's report also recommended against claimant's working so as to avoid aggravation of his condition. Claimant, however, testified his doctor said he could work subject to a 25 pound lifting restriction and that he is willing to perform light duty if such work can be found. He said he recently took the doctor's letter to employer but was told employer had no "easy work" for him. He doesn't think he can earn his former wages because he "is sick." According to the evidence, claimant began to work again in May 1992, apparently on a piecemeal basis, doing painting, and lawn and gardening work at various residences for (Mr. M). He was paid $5.00 per hour, in contrast to the $6.05 hourly wage he was paid by employer, and said he only earned $35.00 per week for the first few weeks. Claimant said he did such work, which he described as light duty, for a few hours a day but worked full days on Fridays when (Mr. M) had to cut the grass at six houses. He said his back still hurt but that he did such work because he had a family and was desperate. There was evidence claimant did such work through July 1992. He said he stopped that work because he "got caught working" and it caused him "problems" with the carrier, apparently referring to his being required to report such earnings to the carrier and to the carrier's cessation of his benefits under the 1989 Act. He also said the carrier stopped paying for his doctor visits and he could not get treatment or medicine until his doctor persuaded the carrier to resume

payments.

Carrier introduced an investigator's report, accompanied by photographs and a videotape, all to the effect that claimant was seen lifting a gallon of paint from (Mr. M's) truck and shaking it; lifting, with (Mr. M), two power lawn mowers off a trailer; pulling a power mower engine starter rope several times; and pushing a mower. Claimant testified the mower was self-propelled and said he considered his work for (Mr. M) to be light duty.

Carrier asserts that the following factual findings and legal conclusions are so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust:

FINDINGS OF FACT

5.Claimant performed lawn and garden work on a part time basis from May 1992 through July 1992, and was paid at a rate of $5.00 per hour.

6.Claimant was not employed in August and September 1992.

7.Claimant's back injury prohibited him from working as road construction laborer on a full time basis.

CONCLUSIONS OF LAW

2.Claimant was not able to obtain or retain employment at wages equivalent to the pre-injury wage because of a compensable injury.

3.Claimant has disability.

Carrier fails to enlighten us in its request for review as to how it is that factual findings 5 and 6 are unsupported by evidence. Not only was there evidence to support those findings, including evidence adduced by the carrier, but there was no countervailing evidence whatsoever as to those particular findings. Respecting finding 7 and the challenged conclusions, we are persuaded there is sufficient evidence of record to support them. The hearing officer is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility (Article 8308-6.34(e)), and we will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W. 2d 865, 868 (Tex. App. - Texarkana 1989, no writ).

Article 8308-1.03(16) defines disability as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." The evidence showed that claimant did not work after the injury date of (date of injury) until early May 1992, and he said he had been told not to work by his doctor. While he could and did, from early May through July 1992, perform some work which he termed light duty,

namely the painting and landscaping work he did for (Mr. M), for $5.00 per hour, and attempted to obtain light duty from his employer, he could not perform the type of work he did for employer for $6.05 per hour. As recently as September 29, 1992, claimant's doctor recommended he not work to avoid aggravation of his injury and scheduled claimant for an MRI and a work hardening program. The issue was whether claimant had disability as a result of his compensable injury, and all medical and non-medical evidence bearing on that issue could be considered by the trier of fact. *See* Texas Workers' Compensation Commission Appeal No. 92299, decided August 10, 1992. We have previously observed that the determination of the end of disability within the meaning of the 1989 Act can be a difficult and imprecise matter, and that while such determination is less problematical where the employee remains in the employ of the preinjury employer, it becomes more convoluted where the employee is precluded, for whatever cause, from working for the preinjury employer. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

It was for the hearing officer to determine whether claimant's inability to work at his preinjury wages during all or part of the period after his injury date was because of his compensable injury. The hearing officer had not only the report from claimant's doctor and claimant's testimony, but also the countervailing evidence of carrier's videotape, photographs, and investigative report which portrayed both the physical requirements of the work claimant performed for (Mr. M) and his ability to perform them. *Compare* Texas Workers' Compensation Commission Appeal No. 92146, decided May 27, 1992, a case which also involved a videotape of the claimant's physical activities, where the hearing officer had sufficient evidence to find that disability had ceased. Claimant testified he still had pain and we have said that can be a consideration. Texas Workers' Compensation Commission Apeal No. 91024, decided October 23, 1991. The hearing officer also had the testimony of claimant to the effect that he stopped working for (Mr. M) because it was causing "problems" with payment of his benefits. Claimant was apparently referencing the requirement that he is responsible for providing information to the carrier about the existence or amount of any earnings, or any offers of employment. Tex. W. C. Comm'n, 28 TEX ADMIN CODE § 129.4(d) (Rule 129.4(d)). The credibility of claimant, the sole witness, was for the hearing officer to judge.

In Texas Workers' Compensation Appeal No. 91045, *supra*, we made the following observation which seems applicable here:

> We do not perceive the intent and purpose of the 1989 Act to impose on an injured employee the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his physical condition and generally within the parameters of his training, experience and qualifications. On the other hand, we do not believe the 1989 Act is intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of his injury, he is capable of employment but chooses

not to avail himself of reasonable opportunities, or where necessary, a bona fide offer.

Also, while there is no requirement that post-injury employment be precisely the same as that held prior to the injury, an employee who returns to light duty at less than the preinjury wages can still be considered to have disability under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92270, decided August 6, 1992. We view the evidence as sufficient to support the challenged findings and conclusions.

Carrier also asserts that claimant is contending he has disability from a back injury whereas this case involved only an ankle injury. Not only was that position not advanced by carrier below, but the extent or scope of claimant's injury was not a disputed issue at that hearing. The BRC report indicated claimant's position was that he was still having trouble with both his foot and back. This assertion is plainly without merit.

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

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Thomas A. Knapp
Appeals Judge