APPEAL NO. 92062

On December 9, 1991, and January 10, 1992, a contested case hearing was held at (city), Texas, (hearing officer) presiding as hearing officer. He determined the respondent sustained a compensable injury in the course and scope of his employment and was entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The appellant urges error in three of the hearing officer's findings of fact and one of his conclusions because they are against the great weight and preponderance of the evidence. Appellant also claims the hearing officer applied the wrong burden of proof in the case.

DECISION

Finding the decision of the hearing officer not to be so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, we affirm. We note that although a reviewing body may have drawn inferences and conclusions different from those the fact finder deemed most reasonable and that the record contains evidence of, or gives equal support to, inconsistent inferences, that is not a sufficient basis for reversal. *See* Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

The respondent asserts that on (date), he suffered an injury to his inguinal hernia in lifting a heavy bag of dog food at (employer). Appellant is the employer's workers' compensation carrier. The appellant states he told his supervisor about the incident and was advised to go to (clinic) of (city), an emergency clinic, for treatment.

A report of (Dr. B) who the respondent saw at the clinic, indicates that the respondent noted acute pain in the right groin while lifting a bag of dog food and that there was no prior injury. Dr. B's report noted the right groin was tender and detected the right "inguinal canal with small direct hernia" stated as "not significant." The treatment plan was "rest, no heavy lifting for 2 weeks, Motrin/ice."

The appellant also testified that on (date), he tackled a would-be shoplifter and further injured his hernia. On July 26, 1991, he was operated on for hernia repair by n (Dr. H). In an August 8, 1991, "To Whom It May Concern" statement, Dr. H states:

"(K. E.) was referred to me by (Dr. BR) for inguinal hernia repair, in which the surgery was done on July 26, 1991.

In my professional opinion, his hernia injury resulted from the lifting of a large bag of dog food and from tackling a shop-lifter (sic) at his place of employment. This injury was, in my opinion, not a pre-existing (sic) condition."

Also in evidence were medical reports from (Dr. BR) which indicate that on May 16, 1991, he performed a physical examination on respondent and, *inter alia*, detected a right

inguinal hernia. An entry by Dr. BR originally dated (date of injury), indicates he received a call from respondent stating that he wanted hernia surgery. The date of this entry was subsequently changed to (date), in a "To Whom It May Concern" letter from Dr. BR dated November 14, 1991 (approximately a month after the benefit review conference held on October 15, 1991). In a letter dated August 6, 1991, Dr. BR stated that physical examination on May 16th discloses the respondent had a "asymptomatic inguinal hernia." He further stated the respondent's "injury to the hernia most certainly resulted from lifting a large bag of dog food and from tackling a thief; this injury caused a tear to occur in this area causing pain that was not present before." He also stated the injury to the hernia was not a preexisting condition.

After the hearing officer expressed confusion concerning the state of the medical evidence at the December 9th hearing, a recess was granted and the respondent obtained another letter from Dr. BR wherein he states:

"In reference to an office progress note on May 16, 1991, I would like to state that during a routine office physical for Mr. E a hernia was discovered. The hernia was not discussed with the patient as he had no symptoms and it did not warrant any further treatment. This type is (sic) hernia is referred to as a `Silent Hernia'."

During the ensuing continuance, a lengthy deposition of Dr. BR was taken. With regard to his changing the dates in his notes from (date of injury), to (date), he states that in making the change he relied on the respondent's presentation to him that he, the respondent, had called on (date) as opposed to (date of injury). He further recollected in making the change that the respondent, in the telephone call, had already injured himself by lifting a large bag of dog food. He agreed his recollection of the entry would be better during May 1991 than it was in November 1991. Dr. BR also indicated he doesn't directly recall his discussions with respondent on May 16th and that it is possible he discussed the hernia with him on May 16th. He stated that the hernia noted on May 16th, by itself, didn't need surgery but after the subsequent injury which caused pain, it did need repair. Regarding his statement that the injury to the hernia was not a preexisting condition he stated, "Well, I'm going to surmise that preexisting conditions obviously aren't considered covered for insurance purposes and that it needed to be in there to clarify that this was not a preexisting condition, therefore, would be covered, in quotes, by insurance." He acknowledged that the only reason that statement was in his letter was not for any treatment purposes, but is an attempt to describe his feelings about whether this was a compensable hernia or not. He also acknowledged that its important a "lot of times" to make legal decisions about the compensability of a claim as its important to get bills paid. Dr. BR also thought it possible that he asked Dr. H to prepare a letter and the reason to do so on a patient that he ceased treating was "probably to aid in helping getting insurance coverage." Regarding his November 14th letter, he indicated the respondent was having difficulty with the insurance company and needed some clarification on the records. He didn't know if November 14th was the date he changed the dates in his previous records from (date of

injury) to (date).

The appellant elected not to offer any medical evidence other than the reports from the respondent's doctors although a continuance was granted, at least partially, for that purpose. The appellant did call several employees of the employer who offered very limited evidence directly on point. (Mr. DR) testified that on (date), the respondent put one bag of dog food on the shelf and that it weighed 20 pounds. This was unusual as he had never seen the respondent do stocking of dog food before. (Ms. JB) testified concerning some generalized personnel problem with the respondent involving scheduling. The respondent told her when she came in around 11:00 on (date) that he had hurt himself. She had heard about the respondent stopping a shoplifter. (Mr. RE) stated he had supervision over the respondent when the manager was gone and that there had been some conversations with the respondent about job performance. (Ms. DE), the respondent's supervisor, testified that she had discussed the respondent's job performance with him, some of which could have been job threatening. She was also present when the respondent tackled a shoplifter and fell on him. She stated the respondent did not report any injury to her following the incident.

In his discussion of the evidence, the hearing officer stated that he must rely on medical evidence to resolve the disputed issue. He then stated that the medical evidence with the respondent's testimony "suggest that it is more likely that the claimant did sustain a compensable right inguinal hernia on (date), while in the course and scope of his employment."

Pertinent findings of the hearing officer are:

FINDING NO. 3:The Claimant sustained a hernia on (date), while lifting a bag of dog food, or in the alternative, injury or aggravated a hernia that was asymptomatic prior to (date).

FINDING NO. 4:The preponderance of medical evidence supports Finding No. 3 (Claimant's Ex. 2, 4, & 9). The medical reports admitted with the benefit review conference report as hearing officer exhibit one also support finding number three.

FINDING NO. 5:The Carrier did not offer any medical evidence to rebut Finding No. 3.

The appellant urges, in addition to the insufficiency of evidence to support the above findings of fact, that the hearing officer has applied an incorrect standard as to the burden of proof which the respondent was required to meet and has also switched the burden of proof to the appellant. While we agree the hearing officer may have used ill advised and imprecise language in summarizing the evidence and evaluating it, we are satisfied that in the final analysis he did not misapply the law or erroneously shift the burden in this case.

In stating that he must rely on medical evidence in resolving the issue in the case, it is clear the hearing officer was not stating that he relied only on medical evidence. His next statement makes it clear that this evidence, coupled with the testimony of the respondent, formed the basis of his opinion. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given it. Article 8308-6.34(e). And he could weigh the reports the respondent made to the doctors. Texas Workers' Compensation Commission Appeal No. 92063 (Docket No. F-00020-91-CC-1) decided April 1, 1992. The part of a doctor's record consisting of the history given by the patient may not be considered as proof of the truth of the matters stated therein but may be considered to show factors underlying the doctor's opinion. *See* Texas Employers' Insurance Association, 483 S.W.2d 530, 534 (Tex. Civ. App.-Houston [14 Dist] 1977, writ ref'd n.r.e.). And, a doctor's diagnosis of an injury may corroborate a claimant's statement that he was injured at work and also the evidence of the occurrence of the event. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.).

The statement by the hearing officer that the medical reports and respondent's testimony "suggest that it is more likely" the respondent sustained the compensable injury is unfortunate. While this language casts some question on what he means, his Findings of Fact 3 and 4 support the conclusion that he is applying a preponderance of the evidence standard. "More likely than not, or more probable than not," we believe, encompass the concept of preponderance. *See* Black's Law Dictionary, Sixth Edition, West, 1990. He clearly finds as fact that the respondent sustained, injured or aggravated a hernia on (date) while lifting a bag of dog food. In what purports to be a finding of fact in Finding Number 4, he indicates the preponderance of medical evidence supports his Finding Number 3. We are satisfied that, regardless of the imprecise framing of his findings and conclusions, he applied a correct standard in arriving at the essential findings and conclusions.

With regard to Finding Number 5, we believe that was an unnecessary and inappropriate statement of a finding of fact, but do not conclude it was an indication that the appellant had a burden to go forward with evidence. The hearing officer had previously stated that he determined a preponderance of medical evidence supports the fact that the respondent sustained the injury in issue. Had the appellant offered any medical evidence, the hearing officer quite apparently would have considered it, but there was, nonetheless, a preponderance of medical evidence to support the (date) injury.

Clearly, there was medical evidence from which one could find sufficient support for the determination that the injury was sustained on the (date). While different inferences could well be drawn concerning Dr. BR's rendition of his May 16th finding of a hernia, his explanation of the change in dates from (date of injury) to (date), and his expert opinion concerning a hernia and an injury to a hernia, his medical evidence along with that of the other doctors was a matter for the hearing officer to weigh. This evidence, together with the testimony of the respondent, which the hearing officer obviously found credible, was some probative evidence to support his necessary determinations. His findings,

conclusions and decision were not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Pool v. Ford Motor Co., 715 AS.W.2d 629 (Tex 1986).

The decision of the hearing officer is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Susan M. Kelley
Appeals Judge