APPEAL NO. 92259

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992). On April 16, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He found that claimant, appellant herein, had been released to return to work after an injury and that she did not show disability after that release. He determined that temporary income benefits are not due from the time of release until such time, if any, that she can show disability. Appellant in her request for appeal appears only to attack the 1989 Act, describe her inability to get a lawyer, and assert that her doctors did not do enough. She attached 12 pages of documents to her appeal. Her appeal will be considered as contesting the sufficiency of the evidence to support the hearing officer's determination.

DECISION

Finding that the evidence sufficiently supports the decision of the hearing officer, we affirm.

Appellant testified that on (date of injury), while working at (employer) in the delicatessen, she slipped and managed to grab a table to keep from falling. She had a pain in her back but managed to work the next day. The night of the accident her leg hurt and it was worse the next day, developing numbness. The respondent stipulated that it had accepted liability for the injury. The sole issue at this hearing was whether appellant was unable to obtain and retain work at her pre-injury wage after October 22, 1991 because of her injury.

The only testimony was offered by appellant and she presented no documents to be considered by the hearing officer. She stated that she first saw her family doctor, (Dr. C), later identified as (Dr. CB) on (date). He sent her to have x-rays made. She did not say what they showed but agreed that he released her to limited duty on March 20, 1991. She asked the insurance company for another doctor's name and (Dr. H) was suggested. She said that Dr. CB spoke favorably of Dr. H. She only saw Dr. H once, except for her return for the results of an MRI. Records of Dr. H, offered by respondent, show that appellant saw him on April 3, 1991. He examined her, noted that x-rays were unremarkable, and recommended an MRI be done. His records show that on April 15th, appellant had an MRI that showed no objective abnormality. On April 16th, Dr. H explained the negative findings to appellant who took issue with them. Dr. H concluded that note by stating "[t]his lady certainly is capable of returning at least to light duty at the present time." Also introduced by respondent was the Specific Medical Report of Dr. H dated April 19, 1991, which referred to appellant's visit of April 16, 1991, the normal MRI, and appellant's return to limited duty as of April 16, 1991. Appellant did not return to work.

Appellant states she then started seeing (Dr. W), who gave her medication and heat treatments. She said she quit seeing Dr. W in November, 1991, when he said he could no longer treat her since (Dr. P), had released her to return to work. Hearing Officer Exhibit A,

the benefit review conference report, shows that on April 29, 1991 Dr. W said appellant could not work and never released her to work through November 12, 1991, when she last saw him. Nothing indicated when he thought she could return to work. Appellant saw two other doctors, Dr. P and (Dr. B). She saw Dr. P after respondent suggested that she see him and her attorney at that time, (Mr. V), agreed. She saw Dr. P in October 1991, and he released her to return to work. She does not agree with that opinion. (She also stated that she was glad her attorney, Mr. V, withdrew from the case, but did not indicate her feeling was based on his role in her decision to see Dr. P.) She saw Dr. B in March 1992 after the respondent agreed to her selection of him as her third choice of a doctor. She only saw him once before this hearing and only had a document from him relative to physical therapy. The record indicates that the document was shown to the hearing officer, but is silent thereafter concerning it and neither the decision or the record shows it was offered or accepted into evidence. Appellant stated this physical therapy is helping her but she still has pain.

Dr. P submitted a Specific Medical Report dated October 31st, in which he referred to a visit of October 22, 1991. He found no abnormality objectively and released appellant to return to normal work on a full-time basis as of October 22, 1991. A TWCC- 69 was also admitted, with Dr. P's name but unsigned, which purports to address maximum medical improvement. Since no findings as to MMI were made and the issue is not raised on appeal, no further comment is necessary about this piece of paper.

Appellant believes that she still has a job with employer. She has made regular contact with employer and has spoken with the manager of the store about light duty, but in her opinion the only light duty offered (wrapping bread) was not acceptable. She has applied at (employer) and "E C at the hospital" but was not accepted for employment. In answer to a question from the hearing officer as to why she was not accepted, she alluded to the fact that the person she contacted at (employer) knew her before the accident, but did not say she was not hired because of the injury.

The hearing officer stated at the beginning of the hearing that the burden of proof was on appellant to show eligibility for temporary income benefits, which he then restated as "means to show disability." This statement is consistent with Texas Workers' Compensation Commission Appeal No. 91045 (Docket No redacted) decided November 21, 1991, which said "[a]n unconditional medical release to return to full duty does not, in and of itself, end disability. . . . If an employee cannot obtain and retain employment because of a compensable injury, disability continues. Where the evidence sufficiently establishes an unconditional medical release to return to full duty status of the employee, the employee has the burden to show that disability is continuing."

The hearing officer found Dr. P released appellant to duty on October 22, 1991. From his decision we can imply that he also gave considerable weight to Dr. P's release and the circumstances "sufficiently established" that appellant could return to work notwithstanding evidence that she was still in pain and that her treating doctor at the time,

Dr. W, had not released her to return to work. *See* Burnett v. Motyka, 610 S.W.2d 735 (Tex. 1980). The hearing officer is the sole judge of weight and credibility of the evidence. Article 8308-6.34(e) of the 1989 Act. He is to weigh all the evidence in determining disability, including all the medical evidence and testimony of the claimant. *See* Texas Workers' Compensation Commission Appeal No. 92147 (Docket No. redacted) decided May 29, 1992. He may decide which conflicting expert opinion weighs more heavily. *See* Atkinson v. U.S. Fidelity & Guaranty Co., (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.). In addition to the opinion of Dr. P that appellant could return to work, the hearing officer's finding that appellant did not show that she could not obtain and retain employment at the preinjury wage because of the injury was not against the great weight and preponderance of the evidence. *See* Gilbert v. Canter, 500 S.W.2d 557 (Tex. Civ. App.-Houston [14th Dist] 1973, writ ref'd n.r.e.). Also, in this case Dr. P's release was not inconsistent with the releases to limited work issued by two doctors six months earlier.

Appellant attached several documents to her appeal, some of which were made a part of the hearing record and some were not. We decline to consider those documents that were not made part of the record. Article 8308-6.42(a) requires that the appeals panel base its decision on the record, the appeal, and the response.

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge