APPEAL NO. 92318

A contested case hearing was held May 28, 1992, in (city) Texas, (hearing officer) presiding. Two issues were before the hearing officer, the second of which was added by agreement of the parties. The issues were as follows: (1) was claimant (appellant herein) injured in the course and scope of her employment; (2) if so, does she have disability, as defined by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act), as a result of that injury. The hearing officer held that appellant failed to prove she had been injured in the course and scope of her employment, and that she has not sustained a compensable injury nor does she have disability.

Appellant argues that the great weight and preponderance of the evidence demonstrates that appellant was injured in the course and scope of her employment, that one doctor put her off work for a period of time beginning with the date of her injury, and that another doctor, on April 27, 1992, stated she could never return to full work status. Respondent argues that the hearing officer's decision and order is supported by substantial evidence.

DECISION

We affirm the hearing officer's decision and order.

Appellant was employed as a UPC clerk for (employer). Her job required her to work at a computer terminal, checking and entering price changes. On (date of injury) she testified that she lifted a box of magazines and felt a pain in her back. She went to see (Ms. P), the assistant manager, to see if she could go home because of her back pain. That day appellant, who was two months pregnant, went to see (Dr. S), her obstetrician. He said he could do nothing about her pain, but told her to rest for a few days. A week later she returned to work doing the same job, where she remained until she was terminated September 5, 1991. She testified that she was terminated because she had been leaving work early to get to a computer class, but was including the hours she left early on her time card. She said the computer class was five hours a day (5 p.m. to 10 p.m.), four days a week, and involved doing work at a computer keyboard. She finished the program in January 1992; however, she has not worked since she was terminated by employer.

Ms. P, who was the assistant manager and appellant's supervisor, testified that appellant came to her on (date of injury) and said she wanted to go home because her back hurt from lifting a box. Ms. P said she asked appellant if she wanted to fill out a report of injury, and whether appellant felt the injury was job related or related to her pregnancy. She said appellant said she was not sure, but that she just wanted to go to the doctor. When appellant came back to work a few days later, Ms. P said she asked appellant if she was all right, and that appellant replied in the affirmative. She said appellant continued to do the same job, with no added restrictions, and that she continued to work until she was fired on September 5th. During the period of time that appellant came back to work and the date

she was terminated, she did not tell Ms. P she was having problems with her back or having trouble doing her job.

(Mr. C), the store manager, testified that he was first aware of appellant's problem with her back in the fall of 1991, but that Ms. P during the summer had mentioned in casual conversation that appellant was off work with an injury.

Appellant previously suffered from polio and wore a long leg brace on her left leg, which was shorter than the right leg. Ms. P said appellant at an earlier time had had to be moved to the UPC job from a job in the fitting room because standing was hard for her. On cross-examination she said she was not sure whether appellant and another coworker were working as UPC clerks because both were pregnant and that was considered light duty work.

Medical records made a part of the record include a (date of injury) notation from Dr. S, "[b]ack injury at work today . . . heating pad to back." Appellant later began seeing (Dr. R) as her obstetrician. In a November 4th letter of referral to another physician, Dr. R said "[p]atient complains of lower back pain after picking up a box of books at work. The back pain increases at the end of the day and with exercise." Appellant was also seen by (Dr. N), who on December 17th noted appellant's report of the (date of injury) injury and who diagnosed lumbosacral sprain. Dr. N prescribed continued therapy and medication. On April 27, 1992 Dr. N projected a return to limited work and maximum medical improvement on May 30th, but projected no return to full work. His physical examination noted tenderness in the lumbar region, with negative straight leg raise on the right and shortening and weakness consistent with history of polio on the left.

Upon review of the record, we find sufficient evidence to support the decision below on the issue of injury. The claimant in a workers' compensation case has the burden of proof to establish that an injury occurred within the course and scope of employment. Parker v. Employers Mutual Liability Insurance Co. of Wisconsin, 440 S.W.2d 43 (Tex. 1969). Where, as here, the hearing officer has found that appellant was not injured in the course and scope of her employment and did not incur a compensable injury, we will not set that decision aside merely because the record contains evidence of or gives support to inconsistent inferences. Garza v. Commercial Insurance Co., of Newark N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). To the extent that the facts of a particular case pit one witness's credibility against another, it is the function of the fact finder to judge the credibility of witnesses and the weight to be given their testimony. Genzer v. City of Mission, 666 S.W.2d 116 (Tex. Civ. App.-Corpus Christi 1983, writ ref'd n.r.e.); Article 8308-6.34(e). We will set aside the decision of the hearing officer only if it is so against the great weight and preponderance of the evidence as to be manifestly unjust or unfair. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The hearing officer also held that the appellant did not have disability, defined in the 1989 Act as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Disability thus presupposes the

existence of a compensable injury, which the hearing officer found had not been proved in this case. Independent of that, we find that there was sufficient evidence to uphold this conclusion. As with the issue of injury, the claimant has the burden of proof to establish disability. *See* Texas Workers' Compensation Appeal No. 91122 (Docket No. redacted), decided February 6, 1992. The evidence showed appellant continued working at her preinjury job for three months until she was terminated. From that time forward there was little evidence that her lack of employment was due to a compensable injury rather than to another reason. Appellant did not testify whether she sought other employment during that time. Following her termination, she continued to attend her class and work at a computer terminal for five hours a day, four days a week. April 27th was the first time a doctor gave an opinion on appellant's ability to work. We recognize prior opinions of this panel have acknowledged that disability is not necessarily a continuing status only, and that a claimant may have disability recur after a period of no disability. Texas Workers' Compensation Commission Appeal No. 91053 (Docket No. redacted), decided December 5, 1991. However, based on the evidence of record in this case, we believe there is sufficient support for the hearing officer's conclusion that appellant did not meet her burden of proof regarding disability.

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge