APPEAL NO. 92322

A contested case hearing was held in (city), Texas, on June 15, 1992, (hearing officer) presiding as hearing officer. He determined that the appellant failed to prove by a preponderance of the evidence that she had any disability as a result of an injury sustained (date of injury). Accordingly, he denied benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant urges that the appellant did establish by a preponderance of the evidence that her injury did result in disability and such disability was proximately caused by the injury. Respondent asks that the hearing officer's decision be affirmed and argues that the decision is supported by ample evidence.

DECISION

Determining the evidence to be sufficient to support the findings, conclusions and decision of the hearing officer, we affirm.

There was no dispute that the appellant slipped on some grease at her place of employment, (Hospital), on (date of injury), and sustained injury to her right arm and lower back. She subsequently saw her personal physician, (Dr. MB) on (date). He determined from his examination that she had pain in her right elbow, although no swelling, and that she had "about a 2 cm nodularity over the right S-1 joint which is tender and I feel this is a bruised lipoma" and found her back "is

otherwise nontender." His records of that date also reflect the entry "continued work without restriction. No disability at this time." A subsequent entry dated "8/14/91" reflects an entry "[c]ontinue work without restriction. No disability. No impairment."

The appellant did not miss any work and continued performing her job from (date of injury) until late September 1991 when she left the employ of the hospital. There is a dispute as to why she left: the appellant claiming she was terminated in an apparent dispute over her working hours or shift and her supervisor stating the appellant quit because she did not want to work as many hours because she had paid off some debts. In any event, she ceased working in the hospital in late September.

During the time she worked in the hospital following her fall on (date of injury), she claims she experienced pain that became more pronounced as time went on. According to two witnesses, one a coworker and the other a supervisor, the appellant never said anything about her back bothering or hurting her during the time from (date of injury) to late September, that she did her job during that period and that she did not lose any time from work during the period.

On October 2, 1991, while at home washing dishes, the appellant states she felt and heard a "pop" in her back. Because the pain was severe she went to her doctor

immediately and to the emergency room of a hospital. She said her legs were paralyzed after this October 2 incident. Subsequent medical records indicate she was diagnosed with a herniated disc at the L4-5 location. Although several forms with (Dr. TG) name on them (the specialist to whom the appellant was subsequently referred) indicate "No" in the block asking if the condition was related to patient's employment, a statement from Dr. TG dated April 23, 1992, indicates:

"This herniated disc was in all probability the result of her fall at work on (date of injury), but her pain was not of a severe enough nature that she felt it warranted her seeing a doctor. Nonetheless, she continued to experience pain that became marked on October 2, 1991. At that time, she sought medical attention and the herniated disc was found. With this history, I believe her injury should be considered an on-the-job injury and she should be entitled to workers' compensation benefits for treatment of such as she will require surgery to correct herniated disc."

Dr. MB, in a notation dated "4-15-92," states "I don't know if it relates to work."

There was also evidence that the appellant worked at another, higher paying job with the food service department of a high school district from December 2, 1991 through January 1992. She testified she left this position because of problems with her back.

Disability is 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." Article 8308-1.03(16). The hearing officer determined that disability had not been proven by a preponderance of the evidence in this case. We believe the state of the evidence in this case is sufficient to support his determination.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). Where there is conflict or inconsistency in the evidence, it is his function to weight all the evidence and resolve these matters and make findings of fact. Gonzales v. Texas Employer's Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no writ); Article 8308-6.34(g); Texas Workers' Compensation Commission Appeal No. 92232 (Docket No. redacted) decided July 20, 1992 and cases cited therein. The burden was on the appellant to establish any entitlement to benefits under the 1989 Act. *See* Reed v. Casualty and Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The hearing officer concluded that the claimant had not met that burden here. We can not say his determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986); In re Kings Estate, 224 S.W.2d 660 (Tex. 1951). That different inferences might reasonably be drawn from the evidence is not a basis to set aside a fact finder's determinations. *See* Garza v. Commercial Insurance Company of Newark, New Jersey,

508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

There is sufficient probative evidence here to uphold the hearing officer and the decision and order are, accordingly, affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge