APPEAL NO. 92398

On June 24, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. Appellant, the employer's workers' compensation insurance carrier, requests that we reverse the decision of the hearing officer that the claimant, (claimant), respondent herein, suffered a compensable back injury on (date of injury), and that he has disability from that date and is eligible for temporary income benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that: (1) on (date of injury), respondent was an employee of (the employer); (2) on (date of injury), appellant was the employer's workers' compensation insurance carrier; and (3) appellant accepted liability for respondent's (date of injury) injury.

The issue at the hearing was: did respondent have disability within the meaning of Article 8308-1.03(16) from an injury he suffered on (date of injury)? "Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). Respondent's position at the hearing was that his injury was not confined to heat stroke, but that he fell at work and injured his back and that he has disability because of his injuries. Appellant's position was that respondent suffered only heat stroke at work and that he does not have disability. Appellant contends that the evidence does not support the hearing officer's findings that respondent injured his back at work on (date of injury), and that respondent's back injury caused him to be unable to obtain and retain employment at wages equivalent to his preinjury wage.

(date of injury) was respondent's first day at work for the employer. Respondent testified that it was very hot that day and that he was working outside spreading concrete using a trowel. He said that he went to get a drink of water and that when he got back to the work area he felt dizzy and fell down on his back. In a signed statement, a coworker stated that he was working with respondent on (date of injury), that it was an extremely hot day, and that when he heard a yell he turned around and saw respondent on the ground on his back. The owner of the company said that he had been told by respondent's supervisor that respondent had only fallen to his knees. He also said that respondent had only been working for three hours. Respondent was taken by ambulance to a hospital where he remained for five days while tests where conducted. The hospital records reflected that respondent told the doctors at the hospital that while he was working he suddenly developed severe dizziness, chest pain, nausea, vomiting, and generalized myalgias. There is no mention in the hospital records of respondent having fallen to the ground or of complaints of back pain. The hospital discharge summary revealed that respondent was diagnosed as having a left cerebellar infarct which was felt to be ischemic in origin, and it was surmised that perhaps respondent became hypercoagulable when he was having his heat exhaustion

and subsequently had a small stroke.

On August 8, 1991 respondent went to (Dr. B) whose records reflected that respondent stated that he had a heat stroke and fell backwards to the ground hitting the back of his head and body generally, and that since then he has had pain in his lower back and shoulders. (Dr. B) diagnosed respondent as having heat stroke, lumbosacral strain, a knee injury, and a closed head injury, and in his initial medical report to the Commission wrote "n/a" in response to the questions concerning when respondent could return to limited type work or full-time work. In October 1991, (Dr. B) reported the same diagnoses as in his initial medical report and wrote "deferred" in response to the questions concerning when respondent could return to work. In March 1992, (Dr. B) diagnosed respondent as having degenerative disc disease and paresthesia, and again reported that the anticipated date that respondent could return to work was "deferred." In April 1992, (Dr. B) reported that respondent had not reached maximum medical improvement.

Respondent testified that since the accident he has been having continued trouble and problems with his back and that his back "hurts a lot." He said he has not been able to continue his normal activities and is limited to working in his yard or on his car for only 30 minutes to one hour at a time. An investigator hired by the employer testified that in September 1991 he observed respondent working on the brakes of a vehicle in respondent's yard for about two hours, and that in October he saw respondent lift a tire in and out of the back of a truck in his yard. Photographs of these activities were in evidence which depict respondent doing what the investigator said he observed.

Appellant introduced into evidence the reports of several doctors, including those of (Drs. K) and (L). (Dr. K) examined respondent in December 1991 and reported to appellant that he could not see how respondent's neck, shoulder, and low back pain are closely related to an episode of heat stroke where there was no fall or injury. As previously noted, respondent testified that he fell on his back, a coworker saw him on his back, (Dr. B) recited in his reports that respondent said he had fallen backwards onto the ground, and (Dr. B) diagnosed a lumbosacral strain. (Dr. K) further stated that even if there was this history, he found nothing focal or localizing to explain respondent's complaints. (Dr. B) referred respondent to (Dr. L) for evaluation and treatment of a "cerebral ischemic event." In January 1992, (Dr. L) stated his impression of respondent's condition as: 1. remote effects of PICA infarct (heat stroke); 2. cervical pain; 3. lumbosacral pain; and 4. malingering. He found no evidence of nerve or muscle impairment and cleared respondent to return to work. As previously noted, (Dr. B), who had been treating respondent since August 1991, reported through March 1992 that he had "deferred" respondent's return to work.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered, and of the weight and credibility to be given the evidence. Article 8308-6.34(e). As the fact finder, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). That different inferences might reasonably be drawn from the evidence is not a basis to set aside a fact finder's determinations. Garza, *supra*. The

decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92312 (Docket No. redacted) decided August 19, 1992. Having reviewed all the evidence of record, we conclude that the hearing officer's findings of a work-related back injury and disability are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *See* Texas Workers' Compensation Commission Appeal No. 92285 (Docket No. redacted) decided August 14, 1992.

The decision of the hearing officer is affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Lynda H. Nesenholtz
Appeals Judge