APPEAL NO. 92683

A contested case hearing was held, pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq* (Vernon Supp. 1993) (1989 Act), on November 20, 1992, at (city), Texas, (hearing officer) presiding as hearing officer. He determined the respondent (claimant) had disability as a result of a compensable injury and was due temporary income benefits (TIBS) from February 26, 1992 until March 17, 1992 and from June 24, 1992 until maximum medical improvement (MMI) is reached or disability ends. Appellant (carrier) appeals, finding fault with several of the hearing officer's findings of fact and a conclusion of law, and asks that the decision be reversed and a new one rendered, or in the alternative, reversed and remanded. Respondent initially complains of inappropriate statements made in the request for review and urges that the evidence is sufficient to support the decision of the hearing officer and request that it be affirmed.

DECISION

The determinations of the hearing officer not being so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, the decision is affirmed, with a modification to one of his findings of fact.

Initially, we note that the request for review does contain several somewhat caustic remarks concerning this claim and the claimant. As a basic proposition of appellate advocacy, such comments are not helpful, are never appropriate and should be carefully avoided.

The credibility of the two key witnesses in this case, the claimant and the employer's plant manager, was critical to the findings and conclusions in this case. And, it is apparent that the hearing officer necessarily drew inferences from the circumstantial evidence presented, in making some of his finding and arriving at his conclusions. The hearing officer, as the fact finder, is the sole judge of the weight and credibility to be given the testimony of the witness and, regarding the evidence offered at the hearing, the determiner of the relevancy and materiality of the evidence offered. Article 8308-6.34(e). Circumstantial evidence is not inferior evidence and, if it has probative force, may wholly prove any ultimate fact. *See generally* Buchanan v. American National Insurance Co., 446 S.W.2d 384 (Tex. Civ. App.-El Paso 1969, writ ref'd n.r.e.); H.E. Butt Grocery Co. v. Pena, 592 S.W.2d 956 (Tex. Civ. App.-Austin 1980, no writ). Fact finders are the exclusive judges of whether a fact has been established by circumstantial evidence, and generally, any conclusion may be based upon circumstantial evidence, and the fact that evidence is circumstantial does not render it incompetent or destroy its probative force. Duke v. Houston Oil Co. of Texas, 128 S.W.2d 480 (Tex. Civ. App.-Beaumont 1939, dism. judgm. cor.). To establish a fact by circumstantial evidence, circumstances relied on must have probative force sufficient to constitute the basis of legal inference and it is not enough that they raise a mere surmise or suspicion of existence of fact or permit a purely speculative conclusion. Smith v. Tennessee Life Insurance Co., 618 S.W.2d 829 (Tex. App.-Houston [1st Dist.] 1981, no writ).

Here, the issue was whether the claimant had disability and, if so, for what period. The evidence concerning disability came largely from the claimant, from medical records and from the circumstances surrounding her employment with the employer. The claimant testified through an interpreter that she started working for the employer in December 1991, that she was hired as an inspector but did other production type work such as operating a snap setting machine, that she never had any problems with her hand or wrist until she hit it hard on a machine on (date of injury), that she immediately noted a small bump and that her hand became swollen, that she did not report the matter to anyone at the time, that her productivity went down as a result of the injury to her hand and she was subsequently put in another job which made her injury worse, that she continued work although her hand pained her, that she made an appointment to see a doctor sometime in late February, that she informed her supervisor about the injury and he informed her that she was going to be laid off around February 26th, that she subsequently saw a (Dr. V) one time and he referred her to a specialist, (Dr. G), that she was diagnosed as having a ganglion cyst and was treated by Dr. G., and that he released her to return to work on March 17, 1992. The cyst was aspirated on April 1, 1992. The claimant subsequently saw a (Dr. M) who found that flexation of the wrist to be painful to the claimant and he put her on light to medium duties. At the hearing the claimant was wearing a brace on her wrist and said that she has worn it daily since May or June and that she still can not work. She testified it was her belief that the layoff had to do with her injured hand. The claimant acknowledged that very shortly following her layoff she applied for unemployment benefits, that she received such benefits, and looked for other employment but was not able to find any jobs available.

The plant manager testified that he first knew of the claimant's injury on (date), and that before that time he did not know she was having difficulty doing her job. He testified that although the claimant was hired as an inspector, that there was not enough work in inspecting and she was used in other jobs. He testified that she was laid off because the employer's production was down (the transcript erroneously indicates that the plant manager stated "her" rather than "our" production was down) and that others were laid off during that time frame although he did not recall how many or when the layoffs occurred. The plant now employs more people than it did in the (month)/(month) (year) time frame. He denied that the claimant was laid off because of her injury or because of her low production and hedged somewhat on the question of whether he would hire the claimant at this time because he did not know if they had something suitable for her.

There is no medical report from Dr. V in evidence. A medical report from Dr. G dated February 18, 1992, indicates a ganglion cyst on the dorsum of the wrist and describes claimant as asymptomatic, noting that "these cysts tend to increase and decrease with activity etc." A March 17, 1992 notation indicated the claimant "wanted her forms filled out because she is going to do some other type of employment" and notes that she states she had pain with any type of grip. This report indicates a return to duty. A subsequent notation indicates she had an aspiration done on April 1, 1992. Medical reports from Dr. M generally indicate pain and some motion deviation in the claimant's wrist and state that the

claimant elected not to have surgery on her wrist. A work release dated June 24, 1992 from Dr. M indicates the claimant is released "to light to medium duties as of this date."

The carrier complains of the following findings of fact and conclusion of law:

**FINDINGS OF FACT**

4.The Claimant's employment was terminated on February 26, 1992 because she could not maintain her production because of her hand injury.

5.The Claimant was returned to a full, regular work status on March 17, 1992.

6.The Claimant was restricted to light to medium duty on June 24, 1992, and that status has not changed.

7.The Claimant has not been able to work because of her injury.

**CONCLUSION OF LAW**

2.The Claimant has and has had the inability to obtain and retain employment at wages equivalent to her preinjury wages because of her compensable injury.

As we noted above, the transcript of the proceedings indicated that the plant manager testified the reason the claimant was laid off was because "her" production had gone down. As pointed out in the carrier's request for review, the tape recording of the proceedings clearly reflect that in it the plant manager said "our" production had gone down. This is reinforced by the testimony immediately following the testimony in question. Without this erroneously transcribed testimony, the only evidence of the reason for the layoff was from circumstances surrounding the layoff (apparently no one else was laid off during the immediate time frame, the fact that no offer of reemployment was subsequently made to the claimant although the number of employees increased sometime following the layoff period), and the belief of the claimant that her layoff was related to her hand injury. Although this circumstantial evidence appears to be tenuous and somewhat speculative to support the first part of the finding regarding the reason for termination, we do not believe this is pivotal to the ultimate determination that TIBS are payable for the periods specified. So much of Finding of Fact No. 4 that states the claimant "could not maintain her production because of her hand injury" does find sufficient support in the evidence. She herself so testified and could certainly be believed by the hearing officer. *See* Texas Employers Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. App.-Houston 1981, no writ). We likewise find there is sufficient circumstantial evidence, together with direct evidence of the doctor's release to work statements, to uphold Findings of Fact No. 5 and 6. The claimant's testimony, together with the medical reports, provides probative evidence that is sufficient to support the hearing officer's finding that she has not been able to work because of her

injury. The evidence to the contrary does not rise to the level of the great weight and preponderance of evidence so as to defeat the finding of the hearing officer in his Finding of Fact No. 7. As stated, it was for the hearing officer to weigh and assess the credibility of the evidence. He could reasonably give greater weight to the testimony of the claimant and give less to the testimony of the plant manager. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastlant 1980, no writ).

Because we cannot conclude from all the evidence before him that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm the decision and modify Finding of Fact No. 4 to read that "The claimant could not maintain her production because of her hand injury."

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge