This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On January 14, 1992, a hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. He found no injury in the course and scope of employment and decided that claimant (appellant herein) was not entitled to benefits. Appellant asserts that the decision is not supported by the evidence and that the claim is not based on spite.

DECISION

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

Appellant had been employed since December of 1990 with (car wash) when he complained of an injury occurring on (date of injury). The car wash employed a track system to pull cars through various stages of cleaning. Appellant worked at the end of the line and in so doing had to bend over, get in and out of the car, and stretch or extend himself to clean cars. While there was contradictory evidence as to whether employees had to push or pull cars the last two feet because of the position of a blower at the end of the track, it was clear that pushing or pulling cars that distance was a common practice at this car wash.

Appellant testified he pulled a "little white car" on (date of injury) between 1:00 and 2:00 p.m. and felt a catch or pinch in his low back. He states that he told a co-employee, (DD), about 10 minutes later of his injury in the context of complaining that there were too many cars coming through the wash. He worked the rest of the day doing all aspects of his job, but he felt sore. The next day it rained so there was no work. The following day, January 10, it was gloomy with intermittent rain so he called to see if the car wash would be open. (Mr. B), an owner, said they would not be open that day. Appellant later testified that in calling on the 10th, he was asking whether he could work that day, not reporting an injury that occurred on (date of injury). The next day, January 11, appellant again called Mr. B at approximately 7:30 a.m. to see if there would be work for him and was told he was fired. Appellant called back about 10:00 a.m. and reported that he was filing an injury claim. Appellant acknowledged that he had filed workmen's compensation claims before and knew an injury was supposed to be reported to a supervisor right away.

(Mrs. B) is the wife of Mr. B and a co-owner who helps in the car wash. She worked the afternoon of (date of injury), and saw appellant work without physical impairment. She stated she had pulled/pushed cars because it was not hard; she explained that one applied effort to the car as it came to the end of the line but before it stopped. She described the effort as comparable to lifting a laundry basket. She also said appellant reported no injury to her even though she was in the same area. She did say she saw appellant spend an inordinate amount of time in one car cleaning it and surmised that appellant charged the owner an extra amount and pocketed that money. She said she asked appellant about payment for such work but did not elaborate on this matter. Appellant was not recalled to explain the incident.

Mr. B testified at length about the way the track system worked in pulling cars through the wash. He also said that appellant had come to work hung-over on (date of injury), was dirty, and smelled. He referred to these points plus the fact that appellant did special work on the job for which the car wash was not paid. He said neither appellant, nor anyone else, told him of an injury prior to the time he fired appellant on Friday, January 11, 1991. He did

not say why, since he was firing appellant for his conduct on (date of injury), he did not do so when on the phone with him on Thursday, January 10.

The hearing officer correctly pointed out to appellant on the record that he had the burden of proof. No statement from DD was offered; appellant did not subpoena him to testify.

Appellant first went to a chiropractor on January 22, 1991. He reported hurting his back while pulling a car "through a tunnel." He was found to have a back strain/sprain. An MRI in March 1991 found some degeneration of two discs. As late as September 18, 1991, his chiropractor still described the prognosis as "guarded" and had not released him to work. The hearing officer is the sole judge of the weight and credibility of evidence. Article 8308-6.34(e) of the 1989 Act. As trier of fact he judges the credibility of witnesses and may make reasonable inferences. Atlantic Mutual Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). As an interested party, appellant's testimony only created fact issues for the hearing officer to resolve. Burlesmith v. Liberty Mutual Ins. Co., 568 S.W.2d 695 (Tex. App.-Amarillo 1978, no writ). In this case, the hearing officer could have found a compensable injury based on appellant's timely notice, his report of an on-the-job injury to his chiropractor, his injury, and the fact that what he was engaged in doing was within the course and scope of employment and could conceivably have caused the injury. In concluding that appellant was not injured in the course and scope of employment, apparently the hearing officer placed more weight on appellant's failure either to acknowledge the injury on the day it was said to have occurred or to tell his employer about the incident during a phone conversation prior to his firing. In addition, appellant worked the remainder of the day without noticeable change in effort or efficiency and did not see a chiropractor for two weeks. Finally, no one saw him get injured. To choose between these two possibilities is the function of the hearing officer who is in the best position to evaluate the credibility of the witnesses. We will not substitute our judgment for his when the finding upon which the decision is based is supported by some evidence of probative value and is not against the great weight and preponderance of the evidence. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied).

We affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge