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 10, 1992, (hearing officer) presided over a hearing in this matter in (city), Texas. He found claimant, respondent herein, was injured in the course and scope of employment on (date of injury) and is entitled to benefits as authorized by law. Appellant asserts that the decision is against the great weight and preponderance of the evidence, and in doing so, specifically addresses Finding of Fact 3 and Conclusion of Law 2.

DECISION

Finding that the evidence sufficiently supports the decision and order, we affirm.

The only issue in this case is whether the injury occurred in the course and scope of employment. Adequate medical testing and evaluation resulted in agreement by all physicians, including appellant's, that an injury took place and that surgery is a reasonable treatment method.

Respondent had worked for (employer) for about six months when he moved a number of 50-pound containers of compound by hand onto pallets on (date of injury). He had been engaged in this particular project in the warehouse with at least two other workers when the others left when "we run out of material on the line." This was about break time - 9:30 or 10:00. At approximately 10:00 to 10:15 as respondent was stacking 50-pound containers on a customer's pallets, he felt a sharp, burning, hot-poker sensation in the back of the neck. He stopped. After a while, he started again. There is no question that on May 6, the following Monday he told other employees, including supervisors that he had been injured on the job. Adequacy of notice within the requirement of Article 8308-5.01 of the 1989 Act is not a question.

The parties at the hearing concerned themselves with two sub issues: to what extent, if any, was respondent's credibility compromised by his testimony of what he reported to others between (date of injury) and May 6 when compared to what they testified he had said; and was respondent injured other than at work?

Respondent told no one immediately after the injury. He said he told two employees, (Mr. E) and (Mr. H), after lunch as they smoked cigarettes that he had done something to his shoulder "back there." Mr. E, in answer to the question, "Back in (date) or early May 1991, did (respondent) ever tell you that he had hurt himself at work?", said "No." No testimony or statement of Mr. H was offered. Respondent worked that day, a Tuesday, as he did Wednesday, Thursday, and Friday. His wife rubbed respondent's back with "Ben-Gay" that night. At work on Wednesday, respondent got some pain medication that employer keeps on hand. He says he "just mentioned" his injury that day, but at this point in his testimony refers to "the day before" having "mentioned it to Milton, he said he would take care of it." (Respondent's immediate supervisor was (MS) - MS testified that he thought the first he heard from respondent was on "the 1st, a Thursday." He referred to respondent saying that it happened "yesterday," but answered, "No" when asked if respondent said it happened while working.) Wednesday night respondent and his wife spent the night with friends so his wife could get her hair fixed. Upon arrival after work on Wednesday, respondent found his host working on a deck so he joined him and nailed a few boards with a hammer until it started raining. Respondent said he did no heavy work, and his host, (J. Bob), by sworn statement, said respondent did nothing more "than use a hammer to nail the boards." The next morning respondent awoke in pain and said he could not move for a

period. His wife got pain relievers from their host, and respondent went to work that morning, Thursday. (While medical opinions are not in dispute, we note here that a board certified neurosurgeon, to whom respondent was referred, after describing "a very large disk herniation" characterized him as "stoic.") At work respondent again sought pain relievers from employer's stock when employer's personnel manager, (JB), spoke with him. Respondent recalled saying that he got hurt on Tuesday after being asked what was the problem. He testified she next asked what he had done the night before and he said he nailed some boards and slept on a hard bed. JB allowed that respondent said his shoulder was sore so he was getting aspirin. She states she then asked what was wrong with the shoulder and respondent said he was not sure, but he spent the night at a friend's house on a hard bed after working on a deck. She added that he did not refer to being injured on the job.

A transcribed, unsigned statement of (JL), a co-worker at the same location, said that respondent did not work by himself and did not complain of an injury at work on April 30. JL added that respondent mentioned, "he noticed a sharp pain after he had went home and started doing something and was helping somebody and the next morning he was real, kind of stiff." Carrier offered a transcribed, unsigned statement of (RL), a foreman for employer. He first heard of the injury on Monday, May 6. Respondent was said to have told him that he hurt himself stacking compound on a customer's pallets on the prior Wednesday. RL pointed out that such compound was stacked on customer's pallets on Tuesday, not Wednesday.

Respondent went to (Dr. AA) on May 6, 1991 and told him he had injured himself lifting at work. He tried muscle relaxers and then ordered an MRI which showed "large disc herniation to the right at C5-6." The referral neurosurgeon, mentioned previously, (Dr. K) on June 13, 1991, agreed with the evaluation of tests as showing damage. He attempted conservative treatment but on September 3, 1991, called for surgery.

The hearing officer is the sole judge of the weight and credibility of evidence. He could judge that respondent's credibility was only slightly jeopardized by the type of contradictions set forth in the evidence. He certainly could resolve conflicts and believe a large part of what respondent said and less than all of what some co-workers said. Bullard v. Universal Underwriters Ins. Co., 609 S.W.2d 621 (Tex. App.-Amarillo 1980, no writ). As the hearing officer pointed out, there was no medical evidence indicating that nailing boards or sleeping on a hard bed could herniate a disc such as that found in respondent. The hearing officer could believe respondent was injured on the job even if other workers were in the same area and had seen no injury. Highlands Ins. Co. v. Baugh, 605 S.W.2d 314 (Tex. App.-Eastland 1980, no writ). Finding of Fact 3 is sufficiently supported by respondent's testimony and the medical evidence. Similarly, Conclusion of Law 2 is sufficiently supported by the findings of fact and evidence. Upon consideration of all the evidence, we do not find that the decision and order are against the great weight of the preponderance of the evidence as to be manifestly unjust and wrong. Twin City Fire Ins. Co. v. Grimes, 724 S.W.2d 956 (Tex. App.-Tyler 1987, writ ref'd n.r.e.).

Affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Robert W. Potts
Appeals Judge