APPEAL NO. 92245

This contested case hearing was held on April 29, 1992, in (city), Texas, (hearing officer) presiding. The case was adjudicated under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The sole issue in dispute was whether the appellant (claimant below) sustained an injury in the course and scope of his employment on (date of injury), while lifting a box of tiles. The hearing officer concluded that the appellant did not show by a preponderance of the credible evidence that on (date of injury), he sustained a compensable injury. On appeal, appellant claims the hearing officer erred in finding that appellant failed to prove by a preponderance of the evidence that he injured his back in the course and scope of his employment on (date of injury).

DECISION

Finding no reversible error, we affirm the decision and order of the hearing officer.

Appellant, who only speaks a little English, testified through an interpreter that on (date of injury), he was employed by (employer) as a helper. On that day, a Saturday, he said he was carrying boxes of tiles from a truck to a scaffold where his supervisor, (Mr. S), was working. Each box weighed 40 pounds or more. Appellant had to lift four to five boxes of tiles onto the scaffold, which he said was so high he could barely reach it. No other persons were working with appellant and Mr. S. When appellant lifted the last box, it started to fall back down on him and he held it so it wouldn't fall; it was then that he felt a pain in his back.

Appellant said he worked to the completion of that day's work, which was about another hour, although the rest of the time was spent in cleaning up, with no lifting. He did not tell Mr. S about his injury, he said, because he "didn't think he was hurt that bad." He also did not go to a doctor that day, even though he said he experienced pain. He said he did not go out the next day, which was a Sunday. He said Mr. S had told him on Saturday he was not sure there would be further work on Monday, (date), but if something came up he (Mr. S) would call him. On Monday morning, he said Mr. S called and spoke to appellant's girlfriend, (Ms. L), who told Mr. S that appellant couldn't work because he had injured his back on Saturday. Mr. S replied that the Monday job would be light work. Appellant accordingly showed up for work on Monday, and told Mr. S again about his back injury. He said Mr. S ignored him, saying that he also suffered from back problems but that he takes pills and that appellant should do the same. Appellant worked Monday and Tuesday to finish the job he was working on the previous Saturday, although he said the only thing he lifted was one "bundle" of cement into a wheelbarrow. Appellant said he was laid off by Mr. S at the end of Tuesday because the job was complete and there was no more work. He subsequently accepted a job with a (Mr. So), doing basically the same type of work, but said he had to quit after 2 1/2 days because of back pain.

After he was laid off on October 8th, appellant had contact with Mr. S, either directly

or indirectly through appellant's girlfriend, several times. On October 12th he went to Mr. S's house to pick up his paycheck, but he said he did not mention his injury at that time. Appellant said he saw Mr. S when the latter paid him a visit at his home, he thought on a Saturday. He said he discussed his back problems with Mr. S at that time, and told him he (appellant) could not drink any of the beer Mr. S had brought over because of the pills he was taking for his back. He also said Mr. S called his house on October 23rd to see if he could come back to work. Ms. L talked to Mr. S and told him that appellant was unavailable because of the job he had taken with Mr. So.

Appellant testified that he first sought medical treatment on October 28th, when he tried to go to a clinic. He said the clinic gave him a form to be filled out, including his place of employment and insurance information. That same day, appellant took the form to Mr. S's house for him to fill out, but while Mr. S filled some of it out he did not give any information regarding insurance. Appellant said he was first seen by a doctor, (Dr. S), on October 30th and has been seeing him since that time. He said he has not worked at all since he left the job with Mr. So. He also said he had never had back problems before his injury on (date of injury).

On cross-examination appellant said that the cleanup work he did on (date of injury) also involved putting the scaffold in the truck, which he said was bigger than a pickup, with a bed a little over waist high. He said he leaned against the truck and slid it onto the bed, and that this was done after his injury. He said the cleanup work the following Monday and Tuesday caused him to have to reach up high and bend down, but it was "mostly on the higher part." He said the job with Mr. So involved washing brick on both low and high areas with a broom and a mop for 8 or 9 hours, on his feet the whole time.

Ms. L, appellant's girlfriend with whom he lived, said he had never complained to her about back pain before (date of injury). She said on that evening he told her he got hurt at work, lifting a box of tiles onto a scaffold. She said she rubbed his back with alcohol and medicated cream, and that they purchased pills for the back pain. The next day, Sunday, she said he was in pain and couldn't do anything. On Monday, Mr. S called around 6:00 or 6:30 a.m. and asked if appellant could go to work that day. Ms. L said she told him she didn't know if appellant would be able to make it because he had gotten hurt on Saturday. She said Mr. S told her to ask him anyway because they were only going to do light work that day. After work on Monday, she said, appellant was still in pain and had to take more medicine. She said she talked to Mr. S again after their conversation on (date), when he called to ask if appellant could go back to work and she told him appellant had taken the job with Mr. So. She also saw Mr. S when he came to their house. She said on that occasion Mr. S asked how appellant's back was. She said she and appellant also saw Mr. S on October 25th when they went to his house to get him to sign the clinic form after they had gone to the clinic. On that visit, she said it was indicated to Mr. S that appellant had been injured on the job. She said Mr. S said appellant should have told him earlier so he could have filled out an injury report.

Mr. S, who is the owner of the company that employed appellant, testified that on (date of injury) he and appellant were laying glass blocks, which came in 60-pound boxes. He said appellant carried the boxes from the truck and lifted them up on the scaffold where Mr. S was working. He said appellant also made mortar that day, which involved unloading mortar in a 90-pound bag from the truck and into a wheelbarrow. At the end of the day, he said, appellant loaded the wheelbarrow into the truck, although Mr. S did not observe this. Mr. S said he told appellant that afternoon that they would have to come back on Monday to "point up," and that he did not call appellant on Sunday to tell him to come in. Mr. S said appellant, who rode with him from the job site, did not complain of an injury that Saturday.

The following Monday, Mr. S said appellant again made mortar in a mixer and put it in a wheelbarrow which he wheeled around for purposes of "pointing up." He said this job required lifting the cement and also lifting the mixer off the truck, which the two of them did together. Tuesday he said they did basically the same thing, and at the end of the day appellant loaded up the truck and carried three bags of cement from a pallet to the bed of the truck. He said appellant did not complain of an injury either day. He also said that he did not see anything in this three-day work period (Saturday through Tuesday) that indicated appellant was injured.

The next time he saw appellant, Mr. S said, was the following Friday when he came to Mr. S's house to pick up his pay check, during which time Mr. S said he appeared "very happy, very active" and did not complain about back pain or ask to see a doctor. The next contact Mr. S had was when he tried to contact appellant about coming back to work. Mr. S said he spoke on the telephone with Ms. L, who said appellant had gone to work for someone else. Ms. L did not mention a back injury. Following that conversation, Mr. S went to appellant's house on a Saturday to pay a social call. At that time, he said, appellant mentioned that he was taking medicine but did not say for what reason. Mr. S said appellant said nothing about injuring himself on the job.

The following evening, October 27th, Mr. S said appellant called him to say Mr. S needed to take him (appellant) to the doctor. He said the call came from appellant and not Ms. L, and that this was the first he had heard that appellant was hurt on the job. The next day, a Monday, Mr. S said he got a call from a doctor asking if his workers' compensation insurance was going to cover appellant. Thereafter, he said, appellant and Ms. L came to Mr. S's house with a form appellant wanted Mr. S to help him fill out so he could get a "Gold Card" for free medical treatment. Mr. S said that "I told [appellant] I didn't know whether he had gotten hurt with me or someone else." On October 31st, Mr. S filled out a first report of injury and sent it to his insurance carrier because the carrier had told him to.

Admitted into evidence as an exhibit of respondent (carrier below) was an October 31, 1991, letter Mr. S had sent to his insurance carrier. Mr. S testified on cross-examination that his wife had actually drafted the letter, but that everything in the letter was information she had gotten from her husband, and was accurate. The letter stated in part that "[o]n Saturday, 10-26 [Mr. S] paid a social call on [appellant]. He told [Mr. S] that his back was

bothering him but said nothing about it happening when he worked for [employer]." On cross-examination, Mr. S agreed that he had testified earlier that the first time he had heard appellant had hurt his back was when appellant called to say Mr. S had to take him to a doctor. He said he did not remember whether the statement in the letter was true. However, he said he was "almost positive" that appellant did not say anything about his back on that occasion because he had been "out in the parking lot working on his car" when Mr. S was there. He also said he was "not real certain" whether appellant mentioned a back injury that day.

The same October 31st letter contained the statement that "[w]hen asked on Monday 10-29 why he did not report his injury to his present employer [appellant] replied that his present employer did not carry workman's compensation insurance." However, no testimony was adduced regarding this statement.

Also admitted into evidence over respondent's objection was a November 11th recorded statement summary which purported to contain a statement Mr. S had given to (Company) concerning appellant's claim. That document contained the following statement: "Insured was unaware claimant had injury until claimant's girlfriend called him." In response to a question on cross-examination Mr. S said he didn't remember what he had told Crawford; that he may have said appellant's girlfriend had told him about the injury.

(Mr. S's) wife (Mrs. S), said she was present on October 12th when appellant picked up his paycheck, and that he did not mention an injury. She said her husband was fishing that day and was not present. She said the first she heard about appellant being injured was Sunday evening, October 27th. She said she was present when appellant brought over the clinic form to be filled out, but that that happened a day or two after appellant first told Mr. and Mrs. S he was hurt. On cross-examination, Mrs. S said she was informed of appellant's injury when Ms. L called to say appellant needed a doctor. Mrs. S said she asked why, and Ms. L said because appellant "hurt his back on your job." Mrs. S said she didn't know when he could have because appellant had not worked for their company for three weeks, and that Ms. L would have to talk to Mr. S. She said at that point she handed the call over to her husband. She said she didn't know whether appellant talked to Mr. S at that time or not.

Admitted into evidence were appellant's medical reports. The first report, dated October 30, 1991, stated the doctor's impression of acute lumbosacral sprain and lumbar radiculopathy. It also stated that "[p]atient is not a candidate for gainful employment." Follow-up reports noted a bulging disc at L4-L5 and said appellant was a candidate for lumbar myelogram.

The 1989 Act defines "compensable injury" as an injury that arises out of the course and scope of employment for which compensation is payable under the Act. Article 8308-1.03(10). "Course and scope of employment" is defined in pertinent part as "an activity of any kind or character that has to do with and originates in the work, business, trade, or

profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." Article 8303-1.03(12). The claimant has the burden of proof to show by a preponderance of the evidence that his or her injury was sustained in the course and scope of employment, Reed v. Casualty & Surety Company, 535 S.W.2d 377 (Tex. App.-Beaumont 1976, write ref'd n.r.e.). It is not incumbent on respondent, as appellant suggests, to prove that an injury did not occur as alleged. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. App.-Texarkana 1961, no writ).

In the instant case, the evidence appears uncontroverted that appellant suffered a back injury. However, whether that injury occurred while on the job was a contested issue of fact. Key to the decision below appears to be evidence regarding when the injury was first reported to employer. Appellant does not dispute that the injury was not reported the day it allegedly occurred, but both he and Ms. L claim that Mr. S was told of the injury the very next day (Sunday), as well as on Monday when appellant went back to work with Mr. S and on other occasions. Appellant testified, however, that he did not attempt to see a doctor for some 22 days following the injury. Mr. and Mrs. S maintain that the first time they were aware that appellant had been injured on the job was on October 27th. Some discrepancies existed in the testimony of Mr. S, as hereinabove noted. It was uncontroverted that appellant had worked at another job following the alleged injury, albeit for a very brief time.

The 1989 Act provides that the hearing officer as trier of fact is required to judge the credibility of witnesses, assign the weight to be given testimony, and resolve conflicts and inconsistencies in the testimony. Article 8308-6.34(e). Because of the conflicting testimony, the hearing officer could choose to believe the testimony of respondent's witnesses over that of appellant and appellant's witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1987). We do not substitute our judgment for that of the hearing officer if the challenged finding is supported by some evidence of probative value and is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). This is true even where the evidence would support a different result. National Union Fire Insurance Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, no writ).

Upon review of the record in this case, we conclude that there is sufficient evidence to support the hearing officer's findings and conclusions.

The decision of the hearing officer is accordingly affirmed.

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Lynda H. Nesenholtz

Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Susan M. Kelley
Appeals Judge