APPEAL NO. 92416

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). On May 1, 1992, a contested case hearing was held in (city), Texas, before (hearing officer), hearing officer. The record in the case was left open until July 14th to allow additional evidence to come into the record. The single issue was whether claimant (appellant herein) suffered an injury within the course and scope of his employment. The hearing officer held that appellant did not prove by a preponderance of the evidence that he suffered an injury on (date of injury), in the course and scope of his employment, and is therefore not entitled to benefits under the 1989 Act.

Appellant basically asks this panel to review the sufficiency of the evidence supporting the hearing officer. Respondent claims the decision is supported by the evidence.

DECISION

We affirm the decision of the hearing officer.

Appellant testified that on (date of injury), while working for (employer) at the site of an oil spill, he slipped and fell from the steps of employer's truck. He said he fell backwards and landed on his back and shoulder. He said he was stunned and his back was a little sore, but he kept working and did not report the incident. Over the next few weeks, he said, his back pain got worse. On February 26th he worked all day on another oil spill, with no help. On the evening of February 26th he said his back was hurting so badly that he had difficulty getting out of a chair, and he said he was unable to sleep because of the pain. The next morning he said he told the dispatcher, Melinda Tacker, that he wished he had had a helper because his back was hurting so bad. He said he had earlier told Lloyd Glenn, a part time dispatcher, that his back was hurting from falling out of the truck.

About 8:30 a.m. on February 27th, appellant had an argument with his supervisor, (Mr. S), over a certain type of shoes appellant had purchased for use on the job. He then went out upon Mr. S's orders to buy different shoes; he did not return to work, he said, because he was angry and needed some "cooling off" time. He later talked to Mr. S on the telephone and told him he wanted to get his back checked out; that he did not want to file a workers' compensation claim, but he wanted to go to a doctor. He said Mr. S recommended appellant call his doctor, (Dr. B). Appellant said he called Dr. B's office and told them how he had been hurt, but was told he had to file an accident report and have a signed statement from the insurance company or they could not treat him. He went to employer's office to sign a copy of the accident report, but was told it already had been faxed to the insurance carrier.

Appellant was never seen by Dr. B. Medical records introduced into evidence at the

hearing show he was seen by (Dr. R) at the Care Chiropractic Clinic on April 2nd, and that Dr. R referred him for physical therapy to Health Concepts of Texas, where he was seen on April 8th. The April 2nd letter from Dr. R said x-rays were taken and abnormal findings included pre-existing spondylosis in the lumbar spinal area; lipping and spur formation on the bodies of the L2, L3, L4, and L5 vertebrae; intervertebral disc thinning at L3, L4, and L5 vertebral levels; encroachment of the intervertebral foramen at the C3, C4, C5, L3, L4, and L5 spinal levels; and a straightening of the normal cervical lordosis lending to altered spinal mechanics. Appellant said employer told him on April 2nd he was terminated for failure to return to work.

Mr. S testified that he was first aware that appellant had been injured when he talked with him on the afternoon of February 27th; he said he did not know the date appellant claimed the accident occurred until the Benefit Review Conference on April 2nd. Mr. S said he asked appellant if he had had an accident and was told by appellant, "No, my back's just been hurting me." He said that when he called Dr. B's office to check on appellant's status he was told by the receptionist that he had fallen out of his personal truck.

(Ms. A), employer's bookkeeper and Mr. S's niece, said she talked to appellant on February 27th when he came in to sign the accident report. She understood that he had slipped the previous day while working on the second oil spill. When she talked to Dr. B's office, she was told that appellant said he was injured in a fall from employer's truck, but that he did not want to cause any more trouble with Mr. S and did not want his injury treated as a workers' compensation claim. Ms. A had filled out the employer's first report of injury; she said she did not consult with appellant when completing it because of the hostility that had occurred on February 27th between appellant and Mr. S. She also said it was filled out during the time employer thought appellant had been injured in a fall from his own truck.

The claimant in a workers' compensation case has the burden of proving, through a preponderance of evidence, that an injury occurred in the course and scope of his employment. Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969). As the decision below noted, this case involved a number of miscommunications and misunderstandings. Where there is conflicting testimony, the hearing officer as trier of fact may believe one witness and disbelieve others. Ford v. Panhandle & Santa Fe Ry. Co., 252 S.W.2d 561 (Tex. 1952). The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). We will set aside the hearing officer's decision only where the evidence supporting the decision is so weak or against the overwhelming weight 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.).

We find sufficient evidence in the record to support the hearing officer's determination that appellant did not suffer an injury in the course and scope of his

employment on (date of injury). The decision and order of the hearing officer are accordingly affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge