APPEAL NO. 92420

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held in (city), Texas, on July 15, 1992, with (hearing officer) presiding, to determine whether appellant sustained a compensable injury on (date of injury), while employed by (employer). The parties stipulated that appellant presently has a hernia condition which requires surgery. The hearing officer found that appellant did not provide any credible evidence that he sustained a hernia on (date of injury), and that he did not sustain an injury on that date while working for employer. Based on those findings, the hearing officer concluded that appellant did not sustain an injury while in the course and scope of his employment with employer. In appellant's request for review, which he failed to serve on respondent, appellant asserts he was hurt on the job and did report his injury. He also states he has discovered another witness he hadn't realized he had spoken to about the injury who will testify that appellant did tell that witness about the injury. Our review is limited to the record developed at the hearing. Article 8308-6.42(a). Appellant does not show that it was not a want of diligence which prevented him from discovering such testimony, and that such testimony would probably produce a different result. *See* Texas Workers' Compensation Commission Appeal No. 92255 (Docket No. redacted) decided July 27, 1992. Respondent accepts the hearing officer's statement of the evidence and urges our affirmance of the decision below. Having invoked "the rule" (Tex. R. Civ. P. 267), respondent complains of the exclusion of employer's representative, also a witness, from the hearing. However, since respondent did not file a request for review (Article 8308-6.41) so as to raise such as an appealed issue, we need not address the matter.

DECISION

Finding sufficient evidence to support the hearing officer's findings and conclusion, we affirm the decision below.

Appellant testified that at around 2:00 p.m. on (date of injury) (which appellant thought was a Wednesday), approximately three weeks after he was hired as a laborer by employer, he lifted a 16-foot scaffold board above his head to set it on scaffold jacks and felt a pull in his groin area. He thought he had pulled a muscle. He said that on that same day, he told (Mr. P), his supervisor, that he felt like he had pulled a muscle. However, (Mr. P) just mumbled "you'll be all right" and kept concentrating on blueprints. Appellant felt as though (Mr. P) was simply ignoring this injury report as he had done on appellant's three prior reports of injuries, such as a smashed thumb. When appellant got to his parents' home that evening, he told them he thought he had pulled a muscle and asked his mother for pain medication. He also called his sister and asked her for pain medication. His parents and sister testified to this effect. Appellant continued to work until Friday, March 8th, when he attended a preenlistment physical exam. The records of that exam and a letter from the doctor indicate that appellant didn't reveal his claimed injury. He said he did not report any injury to the examining physician because he thought he had just pulled a muscle. He was advised by the examining physician that he had a hernia. He thought the physician didn't

know what he was talking about and decided to obtain a second opinion from (Dr. B), his family doctor. He called (Mr. P) on Sunday, March 10th, to advise of the hernia diagnosis and of his intention to obtain a second opinion the next day. On Monday, March 11th, appellant saw (Dr. B) who apparently confirmed the diagnosis and referred him to (Dr. R). On March 19th, appellant saw (Dr. R) who also confirmed the diagnosis. Appellant said he saw (Dr. R) only once and has not seen a doctor since then. He has not worked in the intervening 16 months because he hasn't been "released" by (Dr. R). He said he does not have the financial resources to obtain a hernia repair.

(Mr. P) testified that appellant did not advise him of the injury on (date of injury). He keeps a log of incidents at work and would have written such a report in his log. He said that when appellant called him on Sunday about the preenlistment exam finding of a hernia, he never indicated he had injured himself or was hurting. (Mr. P) also testified that the man with whom appellant rode to work stated appellant had not mentioned an injury. He said that appellant contacted him after seeing (Dr. B) on Monday and he then filled out an Employer's First Report of Injury or Illness (TWCC-1). This document reflected the date and time of injury, and the manner of its occurrence, as "unknown."

Appellant had the burden of proving by a preponderance of the evidence that he sustained an injury within the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). An accident does not have to be witnessed to be compensable, and a claimant's testimony alone can establish the occurrence of an injury. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394, 397 (Tex. 1989). However, the hearing officer, as the trier of fact, need not accept the claimant's testimony at face value. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621, 625 (Tex. Civ. App.-Amarillo 1980, no writ). The hearing officer is the sole judge of the materiality and relevance of the evidence, as well as the weight and credibility it is to be given. Article 8308-6.34(e). It was for the hearing officer to resolve the conflicts and inconsistencies in the testimony. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The hearing officer commented in her discussion of the evidence that notwithstanding that appellant's pain on the evening of (date of injury) was such that he sought pain medication from his mother and sister, he failed to advise the examining personnel at his preenlistment physical examination on May 8th of his injury. The hearing officer noted that while such evidence may have related to appellant's desire to pass the physical, it undermined his credibility regarding the source of his hernia. We may not substitute our judgment for that of the hearing officer where, as here, the findings and conclusions are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge