APPEAL NO. 92477

A contested case hearing was held in (city), Texas, on July 13, 1992, (hearing officer) presiding, to determine whether appellant's right shoulder was injured at work on (date of injury). The hearing officer found that appellant did not show by credible evidence that his right shoulder was injured at work on that date, and concluded he did not sustain a compensable injury under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. Appellant challenges the sufficiency of the evidence to support the hearing officer's adverse determination, arguing that his testimony and the corroborating evidence was credible and met his burden of proof. Respondent urges our affirmance contending that the credibility of the evidence was a matter for the hearing officer as the finder of fact.

DECISION

Finding sufficient evidence to support the challenged findings and conclusion, we affirm.

At the close of the hearing both parties stated in argument that the outcome turned on the credibility of the appellant, and during the hearing appellant himself stated the matter came down to his word against that of his supervisor, (Mr. J). Appellant testified that on (date of injury), while working as an automobile mechanic for an automobile dealership (employer), he injured his right shoulder while replacing a transmission oil cooler line at work. He said he was pulling on a long extension and rachet to remove a nut when he felt something "snap" in his shoulder and experienced a sharp burning pain. Appellant said he went to the office and advised his supervisor, (Mr. J), that he had just hurt his shoulder working on a car and that he needed to see a doctor. According to the appellant, (Mr. J) suggested that perhaps appellant had simply slept on his shoulder the wrong way and said nothing more. Appellant returned to work with his shoulder hurting badly, did not seek medical attention, and continued to work until he was terminated on October 7, 1991. He said that during his customary mid-morning call to his wife on (date of injury), he told her of his shoulder injury. Appellant's wife's testimony basically corroborated appellant's testimony about the substance of his phone call to her concerning his injury. Appellant said he told (Mr. J) again the next day about his shoulder injury and the latter again suggested perhaps appellant had slept on it the wrong way. On the day after his termination, appellant said he called (Mr. J) and said he needed to see a doctor and that (Mr. J) told him he was not covered by employer's insurance.

Appellant obtained employment with another employer in early November 1991. He said he first saw a doctor (Dr. G) about his shoulder on April 22, 1992 and had not earlier sought medical attention because he had no insurance and couldn't afford it. According to (Dr. G's) report of April 27, 1992, appellant had a right shoulder rotator cuff tear for which surgery was indicated. Appellant denied any prior shoulder injuries. When asked about a "Lifetime Record Check" from the Texas Workers' Compensation Commission which reflected three prior workers' compensation claims files, including one for a shoulder injury

in June 1975, appellant stated that that injury was to his neck, not to his shoulder. When appellant was asked to explain why he answered "no" to the question on employer's employment application form as to whether he had ever had an on-the-job injury, he conceded the answer was not true and that he did not inform employer of his prior injuries. However, he said he did not deny them and explained that he just didn't think about it. Appellant called as a witness his friend, (Mr. B), who testified that appellant told him in (month year) that he had hurt his shoulder taking a transmission out of a car at work.

(Mr. J) testified that when appellant came to his office in (month) advising that his shoulder hurt, he asked appellant if it happened on the job and appellant said he didn't know or wasn't sure, and never mentioned an incident involving work on a transmission. Appellant acknowledged to (Mr. J) that he may have simply slept on his shoulder the wrong way. (Mr. J) said that appellant was terminated on October 7, 1991, for poor performance. (Mr. J) said his first knowledge that appellant was relating his sore shoulder to his work came on the day after the termination. Appellant called him on October 8th saying he needed to see a doctor and that it should be employer's responsibility. He reviewed with appellant their conversation of (date of injury) and appellant acknowledged that in that conversation he had said he didn't know or wasn't sure how his shoulder had been injured. Respondent also introduced (Mr. J's) handwritten notes of the (date of injury) conversation, dated October 9th, which recited that appellant had then said his shoulder had not been injured at work.

(Mr. B), a coworker, testified that appellant had told him he had hurt his shoulder working on a car but that he had not witnessed the occurrence. In his signed, sworn statement, fellow employee (S W) related that appellant had come to work one morning saying that his shoulder hurt when he lifted his arm up over his head. When (Mr. W) asked what had happened, appellant replied that he wasn't sure how he had hurt his shoulder. The signed, sworn statement of (Mr. T), another fellow employee, related that appellant told him at one time that his shoulder was hurt and he couldn't raise it up high; however, appellant did not indicate where he got hurt.

In her discussion of the evidence, the hearing officer stated that the credibility of the witnesses "was pivotal," and that she found the appellant's credibility wanting, particularly with regard to his not having been truthful on his job application about his prior job-related injuries. The hearing officer also discussed why she found (Mr. J's) testimony credible concerning appellant's not having reported on (date of injury) that some specific work event occurred which caused his injury that day.

Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of the weight and credibility it is to be given. Respondent had the burden to prove by a preponderance of the evidence that he sustained an injury in the course and scope of his employment. Johnson v. Employer Reinsurance Corporation, 351 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some

discrepancies. Taylor v. Lewis, 553 S.W. 2d 153 (Tex. Civ. App. - Amarillo 1977, writ ref'd n.r.e.). The hearing officer could disbelieve a portion of appellant's testimony if she saw fit to do so. Johnson *supra* at 939. As the trier of fact, it was for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W. 2d 701 (Tex. Civ. App. - Amarillo 1974, no writ.). We will not substitute our judgement for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App. - Texarkana 1989, no writ). The challenged findings and conclusion are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' 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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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge