APPEAL NO. 92596

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992). On September 4, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He held that respondent, claimant herein, injured his back in the course and scope of employment and ordered that benefits be provided. Appellant, carrier herein, asserts that claimant did not meet his burden of proof and that claimant was not injured. Respondent replied that the hearing officer should be upheld.

DECISION

Finding that the decision is sufficiently supported by the evidence, we affirm.

Claimant was a foreman for a construction company and had been with this employer for 14 years. He recently had surgery on his right shoulder and was on light duty because it was not yet healed when the injury occurred. On (date of injury), claimant was at work while a large amount of concrete was being poured. Claimant was the foreman in charge of the finishing work in regard to concrete. Normally another foreman, MH, who was on vacation, would have been in charge of the pouring part of the operation. Claimant nevertheless testified that at one point early in the morning, he instructed an employee to release the concrete over a wider area of a slab. The employee in question, LS, controlled the release of concrete from a bucket that was held from above by a crane. A handle on the bucket allowed the concrete to be released all at once or more slowly.

Claimant testified that he used his left hand only, because of the injury to his shoulder, in releasing the lever on the bucket to show LS how he wanted it done. He surmised that using only one hand could have contributed to the strain on his back, which he felt as pain, as he demonstrated to LS. He did continue work on that Saturday even though in pain, but the next morning he could not get out of bed. He saw his medical doctor, Dr. W, on Monday, (date), and called an assistant superintendent that day to tell him he would not be in and would come in Tuesday to explain the injury. (Claimant stressed that he went to a medical doctor, to distance himself from others, and said, "people get a little bit hurt, they go to chiropractor, they take six months off, they get money all the time." He also pointed out that he had been told not to report the injury to his shoulder as a workers' compensation injury.) He came to work and told his employer of the injury on Tuesday, (date). He was fired on (date) for "threats to employees."

The carrier first called JB as a witness. He testified that he was operating a crane at the worksite on (date of injury). The foreman in charge of the pouring of the concrete was MH, who JB said was there working. JB did not see claimant do any physical work or injure himself that day. LS was also called by the carrier. He disagreed with JB that MH worked, saying that he only had come by for a short time and then left. He acknowledged that while he was operating the bucket, held by the crane, claimant had talked to him. At one point he said it was hard to remember whether claimant said he was doing anything improperly.

Later, LS said claimant did come over and discuss where to release the concrete. Still later LS said that he did have a conversation with claimant about placing the bucket. Finally LS said that claimant might have said the concrete was being poured too fast. LS maintained, however, that he did not see claimant hurt and claimant did not empty concrete out of the bucket that morning. LS did acknowledge that he had some problem with the crane operator early in the morning at the time claimant said he hurt himself.

The carrier stresses the testimony of its witnesses who did not see an injury to claimant. It also says that claimant, in an admission against interest, said that LS told the truth. The record shows that claimant testified, in regard to LS having difficulty remembering, and said that he did not think LS was telling the truth. Claimant's final argument, considered as a whole, really just concluded that LS was the only carrier's witness who was truthful in part of his testimony.

Claimant in discussing his visits to his doctor said that at the first visit, the doctor took x-rays and did range of motion tests. The doctor then told him he had a "bad back" and should not work. Claimant, pro se, did not offer his doctor's medical notes, but did provide an extensive billing document and his doctor's statement that claimant was off work and then on light duty. Hearing officer Exhibit 1 included a disputed issue form from the benefit review conference that indicated that medical reports dated (date) and June 3, 1992 from Dr. W were considered there. Claimant testified that he still was bothered by his back but that it was much better.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. He could believe claimant injured himself showing another worker how to use the concrete bucket even though other witnesses testified that they did not observe an injury. *See* Highland Insurance Co. v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). He could believe claimant's own account of the extent of injury especially since claimant sought medical care for this injury without delay. In addition, there was some corroboration in the form of his doctor's statement concerning his inability to work and ability to do only limited work. While no other employee would admit that claimant hurt himself, one did relate, over an extended period of testimony, that most of claimant's assertions of events at the worksite at the time were true.

The decision and order of the hearing officer are not against the great weight and preponderance of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge