APPEAL NO. 93064

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993). On December 8, 1992, a contested case hearing was held in (city) s, Texas, with (hearing officer) presiding, to determine only the issue of whether the claimant, JF, who is the respondent in this appeal, sustained a back injury "on or about" (date of injury), 1992, in the course and scope of his employment with (employer). (There was an included issue as to whether the alleged injury occurred on (date of injury) or (date of injury) The hearing officer found that the claimant suffered a compensable back injury on date.

The carrier appeals this determination, arguing that the preponderance of credible evidence should have led to a decision that an injury did not occur in the course and scope of employment. The carrier notes that there was sufficient evidence of non-work related occurrences that would have resulted in a back strain. No response was filed.

DECISION

After reviewing the record of the case, we affirm the decision of the hearing officer.

The claimant, who was 24 years old, said he was working for the employer in the "pre-load" section, where boxes were loaded onto employer's trucks, when he injured himself at about 5:45 a.m. on date. He stated that he lifted a 60 pound box to an eye-level high area, and felt a catch in his back. He later described the catch as a sharp pain. The claimant said he was 5 feet 11 inches tall. About fifteen minutes later, his immediate supervisor, (Mr. P), came by in the course of his routine check. Claimant reported to him that he had hurt his back. Mr. P told the more senior supervisor, (Mr. H), who came over and asked claimant if he could continue working. The claimant said that he could, because he felt that it would go away. The claimant said that he did not repeat to Mr. H that he was injured at work but did not do so because he had already told Mr. P, who had in turn told Mr. H he was hurt. In any case, claimant stated that he needed to continue working for the money, and because he had already arranged to leave early on June 12th, a day when he was attending major league baseball tryouts. The claimant also attended College, where he played on the college baseball team.

The claimant got off work around 8:30-9:00 a.m., and went to class at college. He showed up for work the next day and again reported he was hurt. He said that he completed a written and signed report of injury, which was later alleged by claimant to have been misplaced. (He completed another written report of injury around date.)

The claimant stated that he attended the tryout on date he tried out for second baseman. This consisted of three throws from second base to home plate, which were timed. The claimant acknowledged that one would throw with "all that you have," in order to impress the scouts. He stated that his immediate preparation for this was light tossing of the ball by way of a warmup. The claimant did not, however, engage in training,

calisthenics, or other exercising in the weeks leading up to the tryout because he felt confidence in his abilities. He stated that he had attended a previous tryout on May 29, 1992. He stated that he did not hurt himself during either tryout.

On Monday, June 15th, claimant went back to work, at around 4:00 a.m., the start of his shift, and complained of pain to Mr. H. He did not see the doctor until that afternoon. He said that Mr. H told him he would have to claim it on private insurance, and he passed this information on to the doctor even though he told the doctor he was hurt at work. He said that he told Mr. H on Monday that he was not hurt at the tryout.

Mr. H stated that he was not informed that claimant contended he was hurt at work until being contacted by the safety director around June 29th about filing an accident report. He agreed that Mr. P reported to him the morning of (date of injury) that the claimant had hurt his back; he asked claimant if he knew what caused it and claimant said he didn't know. Although Mr. H testified that a work-related injury would cause immediate removal from the line and examination by the company doctor, he stated that for a non-work related injury this would not necessarily occur. Mr. H pointed out that claimant elected to continue work.

Mr. H said that claimant complained on June 15th of pain and that Mr. H told him he could not work until he saw a doctor. Mr. H said that he asked him if it were work related and claimant said he did not know. He said that claimant, when asked if he could have "hurt it more" at the tryout, answered, "I think so." He stated that he talked with a coworker, Mark Miller (Mr. M), who told him that the claimant said he had been hurt during the tryout. Mr. H, on cross-examination, said that he had this conversation with Mr. M the week before June 15, 1992. Then, on redirect, he stated that he talked with Mr. M only two days before the hearing.

Claimant went to the Baylor University Medical Center, on June 15th, where an impression of lumbar back strain was reported, based upon a history of injury on the job "Thursday." On June 23, 1992, (Dr. W) reported a lumbosacral strain syndrome secondary to an on-the-job injury. Dr. W's notes omit any reference to the baseball tryout, although the box lifting incident is recorded. On July 8, 1992, a lumbar MRI evaluation was normal. In August and September 1992, the claimant received facet joint injections from Dr. L. Physical therapy initial evaluation notes recite the history of the condition but do not note that claimant was involved on June 12th in baseball tryouts.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination 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.). The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Article 8308-6.34(e). The decision should not be set

aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The burden is on the claimant to prove, by a preponderance of the evidence, that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses and the record as a whole. While it must be frankly stated that the evidence here could lead a trier of fact to conclude that the back strain to this young and athletic man occurred off the job during an extraordinary physical effort, there is also sufficient support in the record for the hearing officer's decision, in that there was uncontroverted testimony that claimant complained of back pain at work, on date, which was before the major league baseball tryout that came immediately before he sought medical treatment.

The decision of the hearing officer is therefore affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge