APPEAL NO. 93292

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. 1993). On February 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) injured his back when he picked up a box of chicken on (date of injury), that actual notice was made, and that disability resulted therefrom. Appellant (school) asserts that the great weight of the evidence shows that claimant was not injured on the job.

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence, the decision is affirmed.

Claimant began working for the school in September 1990. He had an umbilical hernia from a prior job for which he recovered workers' compensation. He drove a small van for the school making deliveries of chicken and other food products to cafeterias. School officials did not have any personnel actions pending against him at the time he states that he injured himself.

Claimant's attorney stated in closing argument, "when a patient sees a doctor, that's, you know, when they're most honest. . . ." While no citation is provided for that conclusion, we note that the first doctor claimant saw after his injury, reported as being on (date of injury), was (Dr. M). Dr. M's record shows that he saw claimant on (date of injury), and immediately before that entry, also saw claimant on April 10, 1991, at which time the following was recorded:

> Pt comes in requesting checkup regarding his hernia repair, which is alright. He basically wants to know about back pain. Observation of the back reveals a scoliosis to the right and it is felt that this would better be served by the orthopedic surgeons Hoerster or Romancik.

Then on (date of injury), the day of the alleged injury, Dr. M's report shows:

> Wt 230 1/2
> Hurt at work 2 wks ago - info attached
> Tender on L _ spine -
> (illegible)

> Patient is seen in the office and he gives a history of working at school where he was lifting boxes of chicken weighing 45 pounds and he noticed a <u>pull in his abdomen</u> and some pain in his back. The pain in the abdomen was in the area of a previously repaired umbilical hernia. The pain and discomfort lasted for about 18 hours. He reported this to his supervisor. (emphasis added)

He comes now for an examination to rule out recurrence of a hernia in the umbilicus.

. . .

Physical examination reveals no evidence of hernia in the umbilicus and the patient most likely sustained pulling of the tissues in the healed hernia repair. The main problem seems to be in his back and he has pain on moving around and lifting motion. Examination reveals some scoliosis on the right with tenderness at the lumbosacral junction.

The claimant was advised to see (Dr. H), who he saw on October 23, 1991. Dr. H's records provide the following notes as to claimant just prior to the October 23rd entry:

4-17-91 cancelled and rescheduled
4/29/91 cancelled
10-3-91 no show

On October 23, 1991, the records show:

Low back pain (illegible) yr ago (illegible)

History: (claimant) is a twenty-one year old male referred by (Dr. M) with chronic low back pain. He relates it to his job working in a school cafeteria about a year ago but not any specific injury or trauma. (emphasis added)

. . .

A lumbar spine series was taken today and really I can see no evidence of acute trauma or injury. There are no degenerative changes. On one oblique there is a possibility of a nondisplaced spondylolysis at L4-5.

Dr. H adds that an MRI will be done. It was done on November 13, 1991 and showed a small central disc herniation at L5-S1 and a mild degenerated bulging disc at L4-5.

Claimant testified that two days prior to (date of injury), he was lifting boxes of chicken when "my back popped." Claimant said, about his September 1991 visit to Dr. M, that he "went to him because of my back." He also said his supervisor, (Ms. S) was standing nearby and observed the injury. He later saw Ms. S's boss, (Mr. B) and told him he had hurt his back; to which (claimant said) Mr. B replied that he had not. Claimant testified that he then said he did not argue but simply agreed with Mr. B. Claimant said that he told other employees of his back injury and provided two affidavits indicating he complained of back

pain in September 1991. Claimant added that he has not worked since Dr. H told him not to (about three weeks after (date of injury)) and he is not working now. His back still hurts. He was fired in January 1992, when he could not work.

Ms. S testified that she did not observe claimant injure himself, but she did tell him he should see a doctor when he complained about his stomach. She said that he came back from seeing a doctor and said the doctor told him the stomach was alright, but his back was a problem. Ms. S said she asked if he hurt himself at work, to which he replied, "no" and added that he did not know where it happened.

Mr. B testified that claimant reported back pain to him on October 3, 1991. Mr. B said that he asked if it resulted from work and claimant replied in the negative. Mr. B said he advised claimant that he would need a doctor's statement clearing him in order for him to go back to work. Mr. B denied saying to claimant "you did not" before claimant indicated there was no work connection. Mr. B said that he recommended that claimant be fired in January 1992 when claimant did not return to work and the school needed someone in his position to do the work.

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 on the job notwithstanding the conflicts between claimant's testimony and that of Ms. S and Mr. B. *See* Bullard v. Universal Underwriting Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). He could believe claimant's testimony that he felt a "pop" in his back, rather than a pull in the abdomen as he told one doctor, or no specific injury, as another doctor recorded. The hearing officer also resolves such inconsistencies. *See* Bullard, *supra*. Similarly, there was some evidence that the incident occurred on September 27th, as opposed to two days before, or two weeks before, or about a year before with no specific injury. The testimony of claimant also supported the finding that

the school had actual notice through claimant's supervisor. We cannot say there was not sufficient evidence to support the hearing officer's factual determinations. The case will not be reversed on a factual determination unless the decision is against the great weight and preponderance of the evidence. *See* Gilbert v. Canter, 500 S.W.2d 557 (Tex. Civ. App.-Houston [14th Dist] 1973, writ ref'd n.r.e.). Affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge