APPEAL NO. 93475

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on May 12, 1993, to resolve the issue of whether the claimant sustained an injury in the course and scope of his employment on (date of injury). The appellant, hereinafter carrier, appeals hearing officer (hearing officer) decision in favor of the respondent, hereinafter claimant.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who had been a bricklayer for 22 years, testified that on December 9, 1992, he was hired by (employer), which was finishing up a construction project. On December 12th, claimant said he and two other employees, (Mr. L) and (Mr. H), were working on an L-shaped wall which was constructed of three layers of stone topped by brick. (The claimant estimated that the stones weighed around 45-50 pounds.) The claimant said that around 11:00 a.m. he had spread mud on the wall when he picked up the stone he was going to lay, swung over a cement pillar, and squatted down to lay the stone. At that time he said he heard a pop in his back and he began experiencing pain; however, he said he continued working because he did not think at the time that he was hurt.

Around 11:30 or 12:00 claimant said he, Mr. L, and Mr. H took their lunch break at a nearby convenience store. They purchased drinks and lottery tickets, and claimant said Mr. H went back into the store to buy more tickets. Claimant mentioned to Mr. L that his back was hurting, although he said he did not tell him why; he said he could not remember whether Mr. H was present during this conversation, although the statement he gave to carrier's adjuster said Mr. H was in the car at the time. Claimant went back to work after lunch and worked the rest of the afternoon.

The following day, a Sunday, claimant was off work but he returned to work on Monday, December 14th. He recalled that it rained and that he worked only part of the day. In the afternoon claimant's supervisor, (Mr. B), told claimant he was laid off because the job was nearly over. Claimant acknowledged that he worked until the end of the day on the 14th and that he did not mention an injury to Mr. B. He also said he knew when he was hired that the job would be a short-term one, but that he had not realized it would be that short.

The claimant said he looked without success for work after he was laid off, and that during that time his back pain increased. On December 24th he said he was beginning to limp and could not stand the pain any more, so he went to a chiropractor, Dr. M. After that treatment he said his pain was no better, and early on December 25th he went to the emergency room at Good Shepherd Medical Center where he was x-rayed and given pain medication. He returned to the medical center on December 27th for further tests, and to

the emergency room on December 30th where an MRI disclosed a disk herniation at L5-S1. He was then referred to Dr. G, who recommended surgery. Claimant had a laminectomy and hemilaminectomy on January 14th, which he said was paid for by the county. The claimant acknowledged that he did not inform his employer about his injury until December 27th, the second time he went to the hospital.

Mr. L testified that he has known claimant for about 15 years, and that he had told claimant about the job with employer. He recalled that claimant told him, while they were sitting in the car at lunch, that he "might have pulled something or hurt his back." While the statement he gave to carrier's adjustor stated that Mr. H was in the car when claimant complained about his back, and "he had to hear it," Mr. L said at the hearing that Mr. H might have been in the convenience store at the time. Mr. L said he remembered claimant having problems bending down that afternoon to cut out a "big bed-joint," and that he had to assist him. Mr. L, whose last day working for employer was also December 12th, said that he saw claimant on December 24th and that he was in pain and had difficulty walking.

(Mr. V), who works as a mason for employer, testified that he worked six to 10 feet from claimant on December 12th and 14th, and that claimant appeared not hurt and able to do his job. Mr. V also said he worked around the corner of the L-shaped wall part of the time, and at that time would not have been able to see claimant. Mr. H, who no longer works for employer, testified that he also did not observe claimant in any discomfort on those days. He said he worked about 15 feet from claimant, but that they would have met at the corner of the wall to raise the line every five minutes or so. He acknowledged that Mr. L would have worked in much greater proximity to claimant. He also said that claimant and Mr. L did not go into the convenience store with him each time at lunch, and that it was possible that they could have had a conversation in the car while he was gone.

Mr. B, employer's job superintendent, stated that he first became aware of claimant's injury on December 28th; he, too, had seen claimant on December 12th and 14th and had not observed that he was unable to work. He said he did notice the "extra big joint" Mr. L spoke of, and that it needed to be fixed.

The hearing officer determined that the claimant proved, by a preponderance of the evidence, that he sustained an injury in the course and scope of his employment on (date of injury). In its appeal the carrier contends that this determination was against the great weight of the credible evidence. The carrier argues that, based upon comments made by the hearing officer during the hearing, it was apparent that claimant's burden of proof shifted to the carrier and that the relevant evidence presented by the carrier was not considered. The carrier also calls to our attention inconsistencies in the evidence.

The comments referred to by the carrier concerned the hearing officer's questions to counsel regarding the probative value of the testimony of carrier's witnesses, who admittedly

had not witnessed any injury to claimant. Despite these questions, the hearing officer made it clear on the record that the burden of proving an injury was unequivocally on the claimant, and that any indication otherwise was error. The hearing officer's discussion of the evidence made clear that he considered the testimony of all witnesses. We are satisfied by our review of the record that no bias or prejudice was demonstrated, and no error committed, by the hearing officer in this regard.

With regard to conflicting evidence in the record, that is a matter for the hearing officer to resolve. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no writ). We will not substitute our judgment for that of the hearing officer where, as here, sufficient evidence supported his decision and where the decision was not so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.).

The hearing officer's decision and order are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge