APPEAL NO. 93068

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 December 22, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent's (claimant herein) hernia developed when he lifted a television set in the course of his employment as a salesman and that he timely notified his employer. Appellant, carrier herein, asserts that the great weight of the evidence shows that claimant was not injured and did not provide sufficient notice; it adds that the hearing officer erred in finding good cause for the failure of claimant to timely exchange an affidavit.

DECISION

Finding that the decision and order are sufficiently supported by the evidence, we affirm.

Claimant was hired by (employer) in July 1991. On (date of injury), while working as a TV salesman, he moved a TV set off a shelf to show to a customer and then returned it. He testified that he felt a strong pain in his left groin area as he re-shelved the set. He added that he took his leave from the customer and went to the lounge. He also stated that upon his return, he saw the store manager, (Mr. T) who commented that he looked bad. Claimant testified he then told Mr. T that he thought he hurt himself lifting a TV, adding that he was in pain. He said that Mr. T told him to take it easy.

Claimant had hernia surgery in October 1991 and had obtained health insurance forms from the employer to cover that expense. He testified that he did not want to cause problems and just wanted the matter taken care of. He also stated that he scheduled the surgery not to interfere with the busy holiday season at the store and with a bike race he wanted to take before the surgery. When the medical bills were not taken care of promptly and his inquiries at work did not appear to resolve the matter, he then filed a workers' compensation claim in May 1992.

Mr. T testified that he knew of claimant's hernia and the surgery but did not know it was caused by the job. He said that (Mr. R) was claimant's direct supervisor. He did not recall claimant telling him he hurt himself lifting a TV, but agreed that it was "conceivable" in the rush of activity at the store to have been told claimant hurt himself and to have replied thereto: take care of it. Mr. R gave a statement in a letter dated August 26, 1992, which directed most of its attention at the internal procedures, or lack of them, at the store subsequent to claimant's injury; he was generally supportive of claimant as being an honest employee.

The carrier pointed out that Mr. R was terminated in June 1992 and that claimant had a prior workers' compensation claim in another state. It introduced a statement of the employer's business manager who said that she did not know of any injury to claimant in August 1991, but that claimant would have been briefed on "benefits" just prior to that time. The carrier also provided the statement of (Ms. A) dated November 10, 1992, which said

that she was a claims specialist for employer and that in that capacity she talked to Mr. R in June 1992. She indicated that Mr. R said he was not aware of an on the job accident of claimant and that claimant had kept Mr. T appraised, not him. Claimant then obtained another statement from Mr. R, dated December 18, 1992, which the hearing officer admitted upon finding good cause not to exchange earlier.

The carrier asserts error in the acceptance of the December 18th statement of Mr. R into evidence. It argued that claimant should have obtained it sooner. Claimant replied that after receiving a copy of the November 10th statement of Ms. A he had tried to get Mr. R to agree to come to testify, but was able only to get him to sign the statement at the time he did. The hearing officer noted that December 18th was a Friday and the day of hearing was the following Tuesday. He found good cause for not providing the statement earlier, but offered to grant a continuance to order a subpoena of Mr. R. No motion for such relief was made. Mr. R in his subsequent statement took issue with the generalizations in Ms. A's affidavit and said that Mr. T told him of the accident either the day it occurred or the day after because of its impact on him as a supervisor. He added that while Mr. T indicated claimant had been injured lifting a TV, Mr. R was left to surmise that claimant had injured his back and did not know immediately that it was a hernia.

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. While he did not have to accept claimant's testimony, as an interested witness, in regard to the injury (*see* Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ)), he could also consider that the injury was established by the testimony of claimant, alone. *See* Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The hearing officer, as trier of fact, also resolves conflicts in the evidence (*see* Perry v. Perry Brothers Inc., 753 S.W.2d 773 (Tex. App.-Dallas 1988, no writ)), and, in doing so, could choose to believe claimant when he said he told Mr. T the day of the accident, rather than Mr. T who said he did not know the injury was tied to the job. Some corroboration of both the injury issue and the notice question was also provided by the statement of Mr. R, who said that Mr. T told him claimant injured himself lifting a TV for a customer. While the medical records do not indicate that claimant reported a job injury, they do show that claimant had a hernia at the time in question and that it was repaired surgically. The hearing officer did not abuse his discretion in finding good cause to admit a document received the Friday before a Tuesday hearing, especially upon giving the complaining party opportunity for a continuance. *See* Texas Workers' Compensation Commission Appeal No. 91009, dated September 4, 1991.

We will not reverse the decision of the hearing officer, based on the issues before him in this hearing, unless the great weight and preponderance of the evidence is to the contrary. *See* TEIA v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge