

APPEAL NO. 93277

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 May 13, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding--the record was closed on March 15, 1993. The hearing officer determined that appellant (claimant) did not sustain a hernia or an aggravation of a hernia on (date of injury), while in the course of employment. Claimant asserts that the decision is against the great weight and preponderance of the evidence. Respondent (carrier) replies by saying that the decision is supported by sufficient evidence.

DECISION

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

Claimant testified that he was employed by (employer) on (date of injury), and was pushing a rack of anodes (a large device on small wheels which weighs over one ton) when a wheel stuck. He felt a burning in his stomach area and told (WW) "I ripped my guts open." He said that (SS) told him to see the company nurse. Claimant offered that he was to have a physical examination on December 31, 1991, and would see a doctor then. He testified that before December 26, he had a non-painful, umbilical hernia that was about one inch in size located on the right lower side of the navel. He also had had gall bladder surgery with a nine inch scar from his appendix area up his side. Claimant stated that the umbilical hernia on (date of injury) caused him pain and enlarged to a five inch knot making his navel convex rather than concave. He also had burning in the area of the incision. He continued working, but at some point "Joe" told him not to work any more until he saw a doctor. Claimant testified that he saw the company nurse, (BP), told him of his pain, and told him the hernia was bigger. He also agreed that he described the area of his injury on some accident reports that were completed. He added that the physical with the company doctor, (Dr. C), was delayed and actually took place on January 21, 1992, although he had some blood work done beginning on January 2, 1992. Claimant went to (Dr. Ch) on February 10, 1992, and was referred to (Dr. R), who surgically repaired his hernias on February 27, 1992. He returned to work on April 16, 1992. He testified, in answer to the question of whether a doctor restricted his work in January 1992, "I told him that Joe told me not to pull no racks."

WW testified that claimant told him on (date of injury) that he hurt his stomach; he described the rack of anodes, its size and weight; claimant did work after (date of injury) and before the surgery, and he saw claimant helping to push racks between (date of injury) and the surgery.

Claimant identified and answered questions in regard to medical documents and accident reports in evidence. The medical reports primarily were in the form of employer physical examinations which were said to be given every six months. Claimant's physical exam report of July 1, 1990 showed that he had an "incarcerated umbilical hernia." On April 16, 1991, the form again showed "incarcerated umbilical hernia" and also noted the

presence of scars. The physical exam of January 1992 (claimant had testified it began with blood work on January 2nd and the doctor saw him on January 21st) showed "epigastric and umbilical hernia(s)." The doctor on that form found no medical condition that put claimant at risk, but did state that claimant should see his own doctor about his cholesterol and something referred to as "BS 130." Claimant testified that the first time he heard that he had an epigastric hernia was during the physical of January 1992. On cross examination, claimant also acknowledged that he marked "no" to a question on the history portion of the January 1992 physical examination that asked whether he had "stomach bloating or pain" since his last examination.

Several reports of injury were in evidence which claimant had signed. A TWCC form 41 dated February 24, 1992, indicated that claimant's injury was to the "lower groin area" a "hernia" from "pulling anode rack." A statement of injury, dated February 12, 1992, showed the injury to be "groin injury." A form not signed by claimant, but signed by BP and Dr. C, dated January 21, 1992, indicates that BP reported claimant had alleged an injury on (date of injury), which BP describes as "pulled muscle in groin area". Dr. C then notes that he saw the claimant for an epigastric hernia which claimant said was job-related. Dr. C returned claimant to his regular work at that time. In statements made in June 1992, both BP and Dr. C denied any knowledge of claimant's hernia increasing to five inch size. BP said in that statement that claimant talked to him on January 7, 1992 about the (date of injury) allegation; the injury was said to be in the lower groin area and claimant said he had no swelling. BP said that Dr. C in January did refer claimant to another doctor to repair his hernia, but did not say why Dr. C referred him then, except that Dr. C had found the umbilical hernia to be larger. Dr. C, in June 1992, stated that he did do a physical exam on claimant in January 1992; there was no five inch umbilical hernia; if there had been, he would have noted it, called for immediate treatment, and taken claimant off work. Dr. C also said that claimant did not report that his hernia had swelled to five inch size.

Claimant saw Dr. Ch on February 10th and reported pain while moving the anode rack. The pain was in the upper right abdomen, around the umbilicus, and right groin area. Dr. Ch referred claimant to Dr. R. Dr. R relates a history of a tearing sensation at work. His impression was a "ventral vs incisional hernia," an "umbilical hernia" a "mild right inguinal strain" and pulmonary problems. The umbilical and epigastric hernias were repaired on February 27, 1992, and claimant said that he returned to work on April 16, 1992. Dr. R in a letter to claimant's attorney dated May 27, 1992, said, "while he was at his place of employment that he began having difficulties with both an umbilical hernia and a medial epigastric incisional hernia. Both lesions were aggravated by his employment and were compromising his job effectiveness."

Claimant's appeal points out that the hearing officer chose to believe claimant's medical records showed no change in the condition of the existing umbilical hernia after the date pain was felt; it suggests that the hearing officer would then be consistent to observe that

the medical records first noted any epigastric hernia in January 1992, a short time after the asserted date of injury of (date of injury). The carrier just as logically points out the questions of credibility and inconsistency raised by claimant's testimony as opposed to the documentary evidence; as part of its argument, carrier states that just because a doctor found an epigastric hernia on January 21, 1992, not seen on a physical examination in April 1991, does not mean that such hernia occurred on the job in December 1991.

The decision of the hearing officer, in both the Statement of the Evidence and Discussion of Evidence, emphasized claimant's testimony that his one inch hernia increased to five inch size on (date of injury). BP and Dr. C, in written statements, both stated that claimant said nothing of such increase and, while Dr. C apparently found the hernia to be somewhat larger, he stated he heard or saw nothing amounting to five inch size. This disparity coupled with claimant's earlier complaints of a "groin" injury and his failure to note any stomach problems on the history he gave in January 1992, could raise a credibility question in the mind of the fact finder. (We note that even had there been medical testimony that an aggravation of a hernia could initially cause significant swelling which could then largely subside prior to examination twenty six days later, that evidence would still not address why claimant would not have reported such swelling or why he would state that he had no stomach problems since the last physical.)

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 could have found the injury compensable had he given more weight to claimant's story that he injured himself at work (notwithstanding that claimant was not immediately examined by any employee, nurse, or doctor), the hearing officer could also question claimant's testimony as an interested party. See Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). Because claimant chose to tell the hearing officer of the great increase in size in the existing hernia and did not, according to the nurse or doctor involved, tell either of such a significant fact, the hearing officer could question his credibility. See Ashcraft v. United Supermarkets Inc., 758 S.W.2d 375 (Tex. App.- Amarillo 1988, writ denied). While Dr. R's opinion was that the job aggravated claimant's hernias, the hearing officer did not have to adopt that conclusion just because it was made by a doctor. See Gregory v. TEIA, 530 S.W.2d 105 (Tex. 1975), in which the court said,

While the expert witness' testimony must be taken as true insofar as it establishes facts, the opinions of the expert as to deductions from those facts is never binding on the trier of facts, even though not contradicted by an opposing expert.

The Appeals Panel will not reverse a decision based on factual findings unless the decision is against the great weight and preponderance of the evidence. In this case, reasonable minds could differ as to injury, but the decision is not against the great weight of the evidence, and it is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge