APPEAL NO. 93650

A contested case hearing was held in (city), Texas, on April 30, 1993, with (hearing officer) presiding, and the record was closed on May 18, 1993. The hearing officer concluded that the respondent (claimant) was injured in the course and scope of his employment on (date of injury), when he suffered bilateral inguinal hernias while draining water from employer's tanks, and that claimant reported his injury to his employer in a timely manner as required by the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 409.001 (1989 Act). The appellant (carrier) challenges the sufficiency of the evidence to support the timely notice of injury conclusion and one of the findings upon which it was based. No response was filed by the claimant.

DECISION

Finding the evidence sufficient to support the challenged finding and conclusion, we affirm.

Since the carrier has not requested our review of the determination that claimant was injured in the course and scope of his employment on (date of injury), our recitation of the evidence and discussion will be limited to the issue of timely notice of injury. The hearing officer made the following two factual findings pertinent to this appeal:

FINDINGS OF FACT

5.CLAIMANT'S conversations with EMPLOYER within two days after the (date of injury), injury relating the burning pain to "going over the top" combined with his later conversation on October 7 or 8, telling EMPLOYER he had bilateral inguinal hernias after seeing the doctor on October 6, constituted notice to EMPLOYER of an on the job injury.

6.CLAIMANT gave notice of his injury to EMPLOYER within 30 days of (date of injury).

Based on these findings, the hearing officer concluded that claimant timely reported his injury to employer as required by Section 409.001(a) requiring an employee to notify the employer of an injury not later than the 30th day after the date the injury occurs. Carrier challenges the sufficiency of the evidence to support Finding of Fact No. 5 and the legal conclusion. Though the carrier did not specifically dispute Finding of Fact No. 6, it is substantially similar to the legal conclusion which is disputed. The thrust of carrier's contention on appeal is that the testimony of the claimant, provided through a Spanish language translator, was in conflict with statements provided by others, was imprecise, varied in response to questions asked by the hearing officer and upon cross-examination, and did not sufficiently relate to the employer that the burning pain which claimant mentioned to employer a few days after the injury date, as well as the diagnosed hernias which claimant mentioned to employer a few days after his October 6th visit to Dr. J, were job related.

Carrier maintained that it was not until January 1993 when employer was contacted about the method of payment for claimant's surgery that employer became aware of claimant's contention that his bilateral hernia injury was sustained on the job on (date of injury).

Claimant testified that on (date of injury), as he pulled heavy hoses up from the bottom of tank from which he was siphoning water at an oil field site, he felt a burning sensation two or three inches below his belt line on both sides. About 20 years earlier, claimant had experienced a similar burning sensation on the right side and had also felt a knot under his skin at that time. On that occasion, he saw a doctor the same day and had surgery. This time, he was not sure he had "a rupture" because he did not feel a knot. The "burning" was similar but it subsided. He said when he performed similar tank draining jobs during the next several days, the pain returned and got worse. He said he was certain he was injured on (date of injury) and that he reported his injury within two or three days to employer's co-owners, (Mr. R) and (Mr. M), and to (Mr. T), the dispatcher. According to claimant's affidavit, introduced by the carrier and consisting of interview information provided the carrier on January 25, 1993, the day before his surgery, Messrs. R and M were the co-owners of L and (employer). According to his affidavit, claimant was told by employer to "go see the doctor." He also testified he was told to "buy a belt," which he did, but that the pain continued. He became concerned and went to the doctor on October 6th. According to claimant's affidavit and testimony, he told "them" (referring to Messrs. R,M, and T), that employer should not require employees to carry the hoses up ladders and go into the tanks "over the top" to drain them, that he had done such three days earlier and had since "been feeling a burning sensation right here," that every time he "went over the top and pull them hoses out [he] felt a burning," and that when he had done those jobs the last three times, apparently including (date of injury), he had felt the pain when pulling the hoses up to the top of the tank.

Claimant said he went to (Dr. J) on October 6, 1992, complaining of the flu and while there mentioned his burning pain when picking things up. He was diagnosed with bilateral hernias, the right sided hernia being a recurrence. Claimant said he told Dr. J how his hernias happened on the job and asked Dr. J to write the information down because he wanted to report it to employer. He said he was told that Dr. J would call his "boss." A few days later however, when his "boss" (apparently referring to Mr. R) had not mentioned receiving a phone call from Dr. J, claimant said he spoke to Messrs. R, M, and T, reminded them of his earlier conversation about having the burning pain, said he had been to the doctor and had been diagnosed with two small hernias, and told them again what he had been doing and when and where. According to claimant, Mr. R responded that he would talk to Dr. J and get all the information. Claimant said Dr. J wanted to operate right away but that he decided to defer the surgery until January 1993 when he could take vacation and when his son could be present. When advised that the carrier's position at the benefit review conference was that while employer knew about the hernias, it did not know they were work related, claimant responded: "I told them what I was doing and where and when

I was doing it."

In his affidavit claimant stated that when he talked to Mr. M on January 25, 1993, he was "thinking they knew that this had happened at work," but they told him they "could not consider it as a comp case because he had not filed a report." Claimant responded that he had told both of them (Messrs. R and M) about his injury, "thought that just by telling them they would fill it out," and "felt that by letting them know, that was all that I needed to do, and that they would take care of the rest of it." However, claimant said that Mr. M replied that it was claimant's obligation to fill out the report and that to file the claim under worker's comp instead of employer's group health carrier "would cause the company a great deal of problems." According to claimant's affidavit, he had two years of schooling in the United States which approximated grades seven and eight.

Mr. R testified that he could not recall claimant making any statement in (date of injury) with reference to his having been injured on the job. He did recall claimant making a statement to him, apparently sometime in October 1992, in the presence of Mr. M and Mr. T, to the effect that he was having pain and had a previous hernia. Mr. R said it did not register with him that claimant was advising employer of a job-related injury and that employer did not become aware of such until contacted by Dr. J's office in January 1993 before the surgery concerning payment of the medical bills.

Carrier introduced an affidavit from Mr. T which stated that claimant had never mentioned an on-the-job injury to him. The affidavit of Mr. M stated that claimant did not report an accident to him on (date). However, continued Mr. M, at some point, probably in October because claimant saw a doctor on October 6th, claimant did come to the dispatch office, stated he had a hernia which caused a burning sensation when he lifted, and that he would defer surgery until January 1993 when he could take vacation. Mr. M said he advised claimant to be cautious with lifting and suggested claimant buy a hernia support at a drug store. He said he "and everyone in this place" understood claimant to be merely stating that he had a hernia condition which he was going to have repaired in 1993 and not that he was reporting the hernia condition as a job-related accident. Mr. M felt that claimant had not raised the matter of a workers' compensation claim until January 25th when he learned that under the group health plan he would have to pay a deductible amount of $200.00 together with 20% of the cost of his surgery. Mr. M also stated that he advised claimant he "did not report it to us as an accident" and that had he done so he, claimant, would have had to fill out an accident report which employer would have assisted him with. An affidavit from employer's bookkeeper essentially corroborated information in Mr. M's affidavit.

The issue challenged on appeal was one of fact for the hearing officer as the fact finder. We are satisfied the challenged finding and conclusion are sufficiently supported by the evidence. Section 410.165(a) provides that the hearing officer is the sole judge not only

of the relevance and materiality of the evidence but also of its weight and credibility. As the trier of fact the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701, (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe, all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge