APPEAL NO. 990222

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 17, 1998, a contested case hearing was held. With regard to the issues before him, the hearing officer determined that appellant (claimant) had not sustained a compensable right inguinal hernia and/or back injury on _____ (all dates are 1998), and that claimant did not, by definition, have disability.

Claimant appealed, contending that the hearing officer erred by not allowing claimant's wife and mother to testify (the hearing officer had excluded their testimony because they had not been identified as witnesses in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c))), that the hearing officer erred in finding that claimant's hernia was not work related and that claimant had no disability. Claimant requests that we reverse the hearing officer's decision and remand the case to allow claimant's wife and mother to testify or render a decision in claimant's favor. Respondent (carrier) responds, generally urging affirmance.

DECISION

Affirmed.

Claimant began employment with a concrete pipe construction company (employer) as a laborer on August 24th. Claimant described in some detail how he worked some 15 feet or so at the top of a form using a parachute-type harness. Claimant testified that he and a coworker were preparing to clean up and were picking up tools when he "felt a sharp pain" in his right groin and right leg at about 3:00 p.m. on _____. Claimant said that it felt like a bite or burn and he thought he might have pulled a muscle getting out of his harness. Claimant said that he finished his shift that day, and the next day, August 27th, he noticed a little red lump about two inches below his belt line on the right side. Claimant testified that he thought it was an insect bite (spider bite) and that he told his foreman, M (later identified as (MM)) about the bump and mentioned pushing a nightstand (which claimant also said was called a dresser), which was on rollers. Later on the evening of August 27th, claimant went to a hospital (H hospital) emergency room (ER).

The H hospital ER report of August 27th indicates complaints of abdominal pain "2 days ago." Tests were run, medication prescribed and claimant was released. In a past history block was the entry "® inguinal hernia" and that claimant had similar symptoms "3 months ago."

Claimant testified that he tried to call JW, employer's production supervisor, at 3:00 a.m. on August 28th, but he only got the answering machine. Claimant also said that he spoke with JW on August 29th and JW had asked him if he had injured himself moving a dresser and that claimant had replied "no, I did not." JW testified that a telephone answering message from claimant said that claimant would not be at work because he had gotten a hernia moving some furniture at home.

Claimant went to another hospital (J hospital) ER on August 28th. The "Outpatient Encounter Record" of that date states that "[p]t complains of hernia X 3-4 wks–pt states went to [H hospital] last pm then was told to go to private physician this am. Couldn't afford surg." Claimant was diagnosed with a right inguinal hernia and was referred to the surgery clinic. Claimant was again seen in the J hospital outpatient clinic on September 2nd, with "c/o ® ing hernia X 4 wks while trying to have BM." The clinic record again references the visit to H hospital. Claimant was diagnosed with a right inguinal hernia and referred to surgery. Claimant was again seen at J hospital on September 15th complaining of increased pain from his right inguinal hernia "[about] 15 days ago while working." Claimant was diagnosed with a right inguinal hernia and chest pain. Diagnostic studies performed on September 25th were normal, other than the right inguinal hernia. Claimant was seen in the J hospital outpatient clinic again on November 2nd, with complaints of "® inguinal hernia X 12 weeks. Was bulging during BM's and was reducible until [about] 3 days ago. Now bulging all the time."

JW, MM, an office clerk for the employer and FP, employer's production superintendent, all testified that, at one time or another, claimant had said that he had hurt himself at home moving furniture (MM said it was a piano, all the others said it was a dresser).

Claimant's attorney referred claimant to Dr. B, D.C., for evaluation of back complaints. In a report dated September 23rd, Dr. B noted muscle spasms and recommended chiropractic adjustments, "electric muscle stimulation" and ultrasound. Claimant contends that he has had disability from August 27th to the present.

The hearing officer found that claimant had not sustained a compensable injury on _____ and, therefore, did not have disability. Claimant's appeal first alleges error in that the hearing officer had sustained carrier's objection excluding claimant's wife and mother from testifying. Although claimant's wife and mother were mentioned in some statements in response to the specific inquiry in an interrogatory to list all persons having knowledge of relevant facts and "each individual from whom you plan to submit testimony," claimant answered "(a) See statement, persons identified in exchange, TWCC [Texas Workers' Compensation Commission] personnel, adjuster, any & all health care provider." An exchange document, Hearing Officer's Exhibit No. 4, prepared by claimant's attorney, states that claimant "will rely on the testimony of [claimant], his wife and mother." Neither the wife nor mother were identified by name or address. While one could reasonably infer that the wife is living with her husband, the same is not necessarily true of the mother. The hearing officer ruled that merely referring to a statement and mentioning his wife and mother by status (rather than name and address) does not meet the requirements of Rule 142.13(c)(1)(D), which requires the identity and location of any witness to be exchanged. We review the admission or exclusion of evidence, or the ruling on admissibility of testimony, on an abuse of discretion standard. To obtain reversal of a decision based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was, in fact, an abuse of discretion, and then show that the error was reasonably calculated to cause, and probably

did cause, the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In this case, there is no indication as to what the wife and mother would testify to or that the exclusion of that testimony was reasonably calculated to cause or probably did cause the rendition of an improper decision. The error, if any, in excluding this testimony does not amount to reversible error requiring a remand. *Compare* Texas Workers' Compensation Commission Appeal No. 94331, decided May 2, 1994, where a witness was listed in one part of the interrogatory and not another, and where there was a "proffer of what this witness would say as stated on the record," the Appeals Panel held that we could not conclude that "there is no reasonable probability that the absence of this testimony caused the hearing officer to reach an improper decision."

Claimant also contends that the harness equipment that he used, together with his duties "and the timing of the symptoms support the finding of a compensable injury." The Appeals Panel has many times stated that the claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A claimant may meet his or her burden to establish an injury through his or her own testimony alone, if the hearing officer finds the testimony credible. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In this case, the medical records support that on several occasions claimant gave a history of having sustained a hernia some weeks before his employment with the employer, either by moving furniture at home or while having a bowel movement. While the mechanics of claimant's job might support a finding of a hernia injury, the testimony of the other witnesses and the medical records support a different conclusion. In any event, the hearing officer is the sole judge of the evidence (Section 410.165(a)) and this is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We find the hearing officer's decision to be supported by sufficient evidence and not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Accordingly, the hearing officer's decision and order are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Judy L. Stephens
Appeals Judge