

APPEAL NO. 990512

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 9, 1999. He (hearing officer) determined that the respondent (claimant) sustained a compensable hernia injury; that the claimant timely reported the injury or, alternatively, that the claimant had good cause for not timely reporting the injury; and that the claimant had disability. The appellant (carrier) appeals these determinations, contending that they are against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant testified that on \_\_\_\_\_, while operating a jackhammer, the tip became jammed. He said he jerked on it to release it and felt a pull in his groin area. He continued working, and said he told Mr. M, the supervisor, about a week later that he hurt himself on the job, saying it felt liked someone had kicked him. According to the claimant, Mr. M told him it was probably stress. The claimant continued working with off and on pain, he said, until October 21, 1998, when he went to an emergency room (ER). At this point, he said, the swelling in his groin was getting worse. Eventually an inguinal hernia was diagnosed and repair surgery was performed on November 20, 1998.

The claimant testified that he also felt a pull in his groin area while lifting bags of cement at work about three weeks before he went to the ER. ER records of his visit on October 21, 1998, reflect that the claimant "lifts heavy objects" at work. The claimant admitted that he said this, but did not specifically mention the incident with the jackhammer or the cement. The first mention of the jackhammer incident is in a medical record of November 12, 1998. The claimant also admitted to telling his coworkers before he went to the ER that he had done some weight lifting (150 pound curls). At the CCH, he said that, even though he told his coworkers this, he had not actually had anything to do with weight lifting since 1991. The claimant's wife also testified that, to her knowledge, the claimant had not lifted weights since 1989.

Mr. M testified that he did not recall the claimant reporting an injury in their conversation about a week after \_\_\_\_\_. He thought the claimant was complaining about an upset stomach and personal problems. On October 21, 1998, he said, the claimant called from the ER seeking information about workers' compensation. He later asked the claimant how he hurt himself and the claimant mentioned lifting the bags of cement. He said the claimant denied lifting weights. According to Mr. M, he only found out about the jackhammer theory of compensability at the benefit review conference, which was held on December 29, 1998. Mr. M further said that the claimant had been working up to the time he went to the ER.

Two coworkers testified that the claimant mentioned to them that he was lifting weights on the weekend before he went to the ER.

The claimant had the burden of proof on all the issues considered in this case. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). These issues each presented questions of fact for the hearing officer to decide and depended for their resolution, primarily, on the hearing officer's evaluation of the claimant's credibility. The carrier challenges that credibility based on the delay in seeking medical attention, the story about weight lifting, the reference to lifting bags of cement, and the lack of any mention of the jackhammer incident until reflected in medical records on November 12, 1998. It suggests that, over time, the claimant "honed his story" until he came up with the jackhammer incident. Clearly, the evidence raised a challenge to the claimant's credibility. The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). He discounted the claimant's delay in seeking medical attention as well as competing theories of how the claimant may have sustained a hernia in favor of his account of the jackhammer incident. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the claimant for that of the hearing officer. Rather, we find the claimant's testimony, attributing his injury to the jackhammer incident, deemed credible by the hearing officer, sufficient evidence to support the finding of a compensable injury.

With regard to the timely reporting of an injury, the hearing officer found the claimant credible in his assertion that he told Mr. M a week after \_\_\_\_\_, that he hurt himself on the job. Mr. M did not have a clear recollection of the conversation and believed the claimant had a personal problem. The claimant's testimony was sufficient to support a finding of timely notice. We expressly disregard and do not rely on the alternate finding of good cause for lack of timely notice because there was little, if any, evidence presented to support a finding of trivialization up to October 21, 1998. See Texas Workers' Compensation Commission Appeal No. 960675, decided May 8, 1996, and cases cited therein.

Finally, the carrier appeals the determination of disability on the basis that there was no compensable injury and no timely notice of the injury. Having affirmed findings of compensability, we also affirm the finding of disability.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Susan M. Kelley  
Appeals Judge