

APPEAL NO. 990837

On March 29, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether respondent (claimant) sustained a compensable injury on \_\_\_\_\_; (2) whether the compensable injury extends to claimant's back; and (3) whether claimant had disability from December 2, 1998, to the present as a result of the compensable injury. The appellant (carrier) requests reversal of the hearing officer's decision that claimant sustained a compensable right inguinal hernia on \_\_\_\_\_, and that claimant had disability from December 2, 1998, until March 29, 1999, and is entitled to temporary income benefits. The claimant requests affirmance of the hearing officer's decision. There is no appeal of the hearing officer's decision that claimant's compensable injury of \_\_\_\_\_, does not extend to claimant's back.

DECISION

Affirmed.

Claimant's testimony was translated by a Spanish-speaking interpreter. There was some confusion as to the interpretation of certain words. Claimant testified that about 15 years ago he had a right inguinal hernia that had been surgically repaired and that in 1990 he had a left inguinal hernia. Claimant said that on Monday, \_\_\_\_\_, he had been working for employer, a construction company, for about three weeks. It is undisputed that claimant was working at the employer's construction site on \_\_\_\_\_. Claimant said that on that day he and a coworker, GR, were lifting a machine that weighed about 100 pounds onto a tractor when he felt pain. The machine that he was lifting is variously referred to in the record as a tamper, a jackhammer, and a jumping jack. Claimant said that he told GR that he was not feeling well and that he told his supervisor, JD, who he said was on the tractor, that he had felt pain. Claimant said that the morning of December 2nd he told the foreman, YR, that he was not feeling well and that he wanted to be sent to a doctor and that YR told him that he would be sent to a doctor but that he was being terminated. Claimant said that his present injury is a right inguinal hernia and back pain, that his doctor is recommending surgery for his right inguinal hernia, and that he has not been working.

JD testified that on \_\_\_\_\_ claimant and GR were working in the same area, that he does not remember claimant lifting a tamper because he was busy elsewhere, that neither claimant nor GR told him on \_\_\_\_\_ that claimant was hurt, and that about a week later, his boss, YR, told him that claimant reported that he was injured.

YR testified that on \_\_\_\_\_ claimant did not tell him he was injured, that claimant worked on December 1st, that on December 2nd he laid off claimant because of claimant's slow work performance over the two or three weeks that claimant worked for employer and gave claimant claimant's paycheck, that when he laid claimant off claimant

told him that he was injured picking up the jumping jack on Monday and claimant pointed to his groin area, that claimant did not mention his back, that claimant said that YH was a witness, that he spoke to YH and JD and they did not know anything about the incident, that he talked to GR and GR said he did not have any knowledge of claimant's injury, and that he sent claimant to a doctor on December 2nd.

LZ, the employer's project manager, testified that YR told him that after YR had laid off claimant, claimant told YR that he had been injured; that claimant was laid off because of his work performance and not because of an injury; and that YR had claimant's paycheck ready on December 2nd, which was not the normal payday, because YR had already determined that claimant was to be laid off.

YH stated in a recorded statement that he does not remember working with claimant on \_\_\_\_\_, that he does not remember whether claimant lifted a jumping jack on that day, and that he did not know that claimant had injured himself on the job. GR stated in a recorded statement that he was working next to claimant when claimant was injured, that claimant was trying to lift a jumping jack onto the tractor when he heard claimant make a sound that he was hurt, and that he told claimant that he would help him put it on there.

Claimant was seen by Dr. S on December 2, 1998, and Dr. S noted that claimant told him that on \_\_\_\_\_ while trying to place a machine on a trailer at work he hurt his groin area. Dr. S diagnosed claimant as having a right inguinal hernia, wrote that claimant should have a surgical referral, and noted that claimant could return to work that day with restrictions of no repetitive lifting over 10 pounds, no pushing and/or pulling over 25 pounds of force, and no squatting and/or kneeling. Claimant was seen by Dr. B on December 22, 1998, and Dr. B noted that claimant had injured his lower back and right inguinal area at work operating a jackhammer on \_\_\_\_\_, and that claimant had had a surgical repair of a right inguinal hernia in 1982. Dr. B diagnosed claimant as having thoracolumbar radiculitis and a right inguinal hernia. Dr. B's plan was for a surgical referral. Dr. B noted that claimant was totally incapacitated and was to be off work. Dr. B noted on March 26, 1999, that he had been unable to treat claimant because of carrier's dispute of claimant's claim, that claimant needs to be seen by a surgeon for repair of his right inguinal hernia and needs treatment for his low back pain, and that in all medical probability his right inguinal hernia and his back pain are due to the injury of \_\_\_\_\_.

There is no appeal of the hearing officer's decision that claimant's compensable injury of \_\_\_\_\_, does not extend to his back. Carrier appeals the hearing officer's findings that claimant suffered a right side inguinal hernia on \_\_\_\_\_, while lifting a soil tamper at work and that claimant's right inguinal hernia has prevented claimant from working at wages he earned before \_\_\_\_\_, from December 2, 1998, until March 29, 1999. Carrier also appeals the hearing officer's conclusions that claimant suffered a right inguinal hernia on \_\_\_\_\_, in the course and scope of his employment and that claimant had disability from December 2, 1998, until March 29, 1999, the date of the CCH.

Carrier contends that the hearing officer committed reversible error in admitting the transcribed recorded statement of GR over its objection. GR's statement was taken on March 26, 1999, and was exchanged with the carrier on that date. The hearing officer ruled that claimant had good cause for the late exchange based on claimant's testimony that he did not learn what GR's name was until after the benefit review conference, that he went to the employer to see GR, that GR had stopped working for the employer, that he then obtained from the employer GR's telephone number, and that it was after that that he was able to contact GR. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) sets forth the requirements and time frames for the exchange of evidence. We cannot conclude that the hearing officer abused his discretion in finding good cause and for admitting GR's statement into evidence.

In addition, in order to show reversible error in the admission of evidence, it must be shown that the admission of the evidence was error and that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). While the hearing officer sets out the testimony and statements of other witnesses in his Statement of the Evidence, he does not refer to GR's statement, except to list it as an exhibit. Generally, in workers' compensation cases the issues of injury and disability may be established by the testimony of the claimant alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). Claimant's testimony and the medical reports support the appealed findings and conclusions. Thus, if the hearing officer erred in the admission of GR's statement, we cannot conclude that carrier has shown reversible error.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Dorian E. Ramirez  
Appeals Judge