APPEAL NO. 991582

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 June 30, 1999. The issues at the CCH involved whether the appellant, who is the claimant, was injured in the course and scope of his employment on _____, and whether he had disability as the result of his injury. An issue over average weekly wage was resolved prior to the CCH.

The hearing officer found that the claimant did not sustain injury in the course and scope of employment. A primary finding of fact in arriving at this conclusion was that the claimant knew he was going to have surgery before the day he saw the doctor. This was based upon the adjuster's testimony at the CCH. The adjuster was called to testify about a conversation she had with Mr. R, whose unsworn but signed statement is in evidence, and her testimony called the credibility of that statement into question.

The claimant has appealed. He attaches an affidavit from Mr. R, who recites an opposite view of the conversation than what was reflected in the adjuster's testimony. Claimant asks that the decision be reversed, as the evidence otherwise supports the fact that an injury occurred. The respondent (carrier) responds by arguing that new evidence that was not presented earlier cannot be considered, and that the claimant could have developed this evidence earlier with the exercise of diligence.

DECISION

Reversed and remanded.

The claimant testified that for most of 35 years, he had worked as an independent contractor in construction work. He said that such work produced fluctuations in income to the point where he decided, after a "rough winter," to seek regular employment. He had worked for (employer) for four days at the time he said he sustained an injury, which was ultimately diagnosed as a hernia. The claimant and another witness, Mr. J, both agreed that the claimant was in training, building a storage shed with Mr. J, on _____. According to the claimant, he was in the front yard, lifting a piece of large plywood (approximately 4 feet by 8 feet and 3/4-inch thick) and carrying it to the shed area, when a gust of wind caught the plywood. He said he twisted and fell. He immediately felt a pain in his genital area, but said that in this business, it was not unusual to pull muscles, and he assumed it would go away. Claimant said that he told Mr. J later that afternoon he was hurt, and declined to work on the decking. Claimant did not go to work the next day (although not entirely clear, he apparently could not get transportation), and, over the weekend, he developed a bulge, which caused him to go to the doctor on March 9, 1999, where he was diagnosed with a hernia.

Essentially, it was the carrier's theory of defense that claimant had gone to work for the employer for its benefits, including workers' compensation insurance, knowing he had a

preexisting condition. Claimant testified that he had not been to a doctor in years and denied this. He presented statements from two persons for whom he had done private contracting work. Mr. R stated that he saw claimant work on a project for him through February with no noticeable discomfort. He said that the claimant had been unable to install vinyl siding "because of an injury received during his first week of employment." Another statement from Ms. D is more general and says that claimant completed two remodeling projects for her over the past six months with no inability to perform his duties, including lifting. The statement is dated April 6, 1999.

Mr. J testified that during the four days he worked with claimant, the claimant indicated a disinclination to get up on a roof, or to do heavy work, saying he had to get back in shape. He did see claimant lift some plywood, and he said that although he did not see the incident claimed, he would not have been able to see it if he were in the backyard and claimant in the front yard when it happened. Mr. J said he did not notice claimant limping or acting hurt as he completed his workday, and claimant did not report an injury.

The adjuster, Ms. H, was called as a witness by the carrier. She was asked only to testify about a conversation she said she had with Mr. R, for which there was no written statement or notes. Ms. H said that she asked Mr. R when he knew about claimant's injury, and that Mr. R said he would look at a calendar, and then identified Friday, March 5th, as the day that the claimant told him he would be having surgery from a workers' compensation injury. The claimant's attorney, during cross-examination, stated that this was the first claimant had heard of the substance of Ms. H's testimony.

The medical records in evidence, which are sparse, reflect that the claimant went to a minor emergency clinic and was seen by Dr. W on March 9th, and was diagnosed with a hernia on that day. He returned the claimant to light-duty work (sitting only) on that day, with no twisting, squatting, or lifting more than five pounds. He was referred to a surgeon, Dr. WT, who confirmed the existence of the hernia. Dr. WT took claimant entirely off work.

On appeal, the claimant has presented a sworn statement (bearing a signature that looks substantially similar to that on the signed, unsworn statement) from Mr. R, who asserts that the testimony that he understands was given by Ms. H is not what he told her. Mr. R said that when he saw claimant's truck in his driveway early on March 5th, a Friday, he went over and asked if claimant could work on his project. Mr. R said that claimant responded he had been hurt at work the day before, and would not work over the weekend but would go to the doctor on the following Monday if he was not better. Mr. R stated that the claimant told him the evening of March 9th that he had a hernia and would need surgery.

Mr. R said that Ms. H contacted him in May and that he told Ms. H that claimant was not hurt while working on his home. He said that when asked by Ms. H when he first learned of claimant's injury, he set forth the sequence of events as related above. He said that he had since been told that Ms. H testified that Mr. R said claimant contended he needed surgery on March 5th. Mr. R states in his affidavit:

> I want to make it very clear that [Ms. H's] testimony is not true and I made every effort to detail the sequence of events to her during our telephone conversation. I am certain that I left no room for any misunderstanding. Again, I did not learn of [claimant's] need for surgery until the evening of March 9, 1999.

The hearing officer found, as fact, that claimant knew he was going to have surgery on March 5, 1999, and that his testimony was not "creditable." He found no compensable injury, and although he found that claimant had the inability to obtain and retain work due to his claimed injury, he did not have disability because there was no injury in the course and scope of employment.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). In this case, we agree that the hearing officer could choose to disbelieve the claimant. What is especially troubling in this case, however, is that it appears that the testimony of Ms. H was a direct factor in the hearing officer's assessment of claimant's lack of credibility. The truthfulness or accuracy of that testimony, which was, in essence, hearsay, has been directly assailed. Given this, it is somewhat surprising that the only response of the carrier is not to deny the facts set out in Mr. R's affidavit, but to assert that the claimant could have obtained this evidence for the CCH.

We cannot agree, in this case, that the claimant failed, in diligent preparation of the case, to anticipate that the carrier would offer hearsay testimony that would be disputed as untruthful or inaccurate by the other party to the conversation. As we have noted in Texas Workers' Compensation Commission Appeal No. 93407, decided July 5, 1993, and Texas Workers' Compensation Commission Appeal No. 970311, decided April 11, 1997, the Appeals Panel will not turn a blind eye on those rare occasions where evidence is presented that can so materially impact the representations made by a party or a witness in a CCH, the omission of which could result in a material misrepresentation to the hearing officer of the facts of the case. We will not draw conclusions as to the reason for the discrepancy, nor do we intend our observations to dictate an ultimate outcome, but remand so that it may be cleared up, and the hearing officer, as finder of fact, will have the chance to consider the full range of evidence on this matter.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge