APPEAL NO. 950136

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On December 29, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues were whether respondent (claimant), who is the claimant herein, sustained a compensable injury on (date of injury), while employed by (employer), and whether he had disability as a result of that injury.

The hearing officer determined that claimant had sustained a compensable injury and had disability on one day, August 19, 1994, and thereafter resuming on September 27, 1994, to the date of the hearing.

The carrier appeals, arguing that there was insufficient evidence to support the hearing officer's determination that claimant was injured. In essence, the carrier argues that the claim was filed out of some spite toward the employer relating to claimant's termination. The carrier further argues that a witness statement from a co-worker of claimant should have been excluded from evidence because it was not exchanged within 15 days after the benefit review conference, and that the hearing officer erred by admitting it without a finding of good cause. The carrier argues that any error in admission is not harmless because without the affidavit, there is "no" evidence to support the claimant's on-the-job injury. The claimant responds that the evidence supports the decision, and further that the affidavit was exchanged at least 17 days before the hearing such that carrier was not prejudiced at all in presentation of its case.

DECISION

Affirmed.

The claimant was a body shop worker for the employer, and had been employed about nine months when he was injured on (date of injury), a Wednesday. According to claimant, he was working on a Blazer on a frame machine, about 3-1/2 to 4 feet off the ground, removing a grill near the windshield and wipers of the car, when he fell off, landing on the pavement. He stated that no one saw the accident but the impact made noise, and a co-worker, (Mr. L), came around the car and helped him up. The owner of the body shop, (Mr. C), was claimant's supervisor. Claimant said he did not report the accident that day because Mr. C was out of the shop. Claimant worked the rest of the day but indicated he was not very productive. Claimant said that it was his understanding from an instruction from Mr. C earlier that week that he was to work on the Blazer, and that he was not aware of any instruction to the contrary.

Claimant, who said he was driven to work that morning by a friend, reported the fall to Mr. C the next morning. Claimant said that because the posted notice was blank in the portion where the carrier should be identified, he asked Mr. C about obtaining medical treatment. He said Mr. C responded he would check with the carrier and let him know

which doctor to see. Claimant said he worked until noon, when the pain became bad, and went home.

The next morning, Friday, August 19th, claimant went to the emergency room of the hospital. He said the doctor told him he could go to work but on light duty, and gave him a paper (which he did not read) to take to his employer. Claimant said he went to work to get his check, gave Mr. C the paper, and said he'd come back the following Monday.

Claimant said he went in to work Monday, and Mr. C didn't tell him any doctor's name. Claimant said he didn't work much, and just hung around. Claimant confirmed that this week he and Mr. C had a disagreement about whether a Chevrolet pickup needed a new frame, or needed the old one straightened.

According to claimant, the Wednesday of this week, Mr. C brought claimant into his office and said, "You're disabled, right?" Claimant confirmed he was. Mr. C asked him how old he was and claimant responded he was 48. Mr. C said that would be all. At the end of the day, Mr. C told him he would have to let him go.

Claimant stated that he has not been able to get medical treatment because he cannot afford a doctor and the carrier was disputing the claim. Claimant said he checked with a (Mr. B), a person whose position was not made clear in the record, who told him the employer did not have insurance. Claimant said because of this he pursued an unemployment compensation claim. He filed his worker's compensation claim two months after the claim. Claimant stated that he did not have a fight or disagreement with Mr. C on the date of his injury, because Mr. C was not at the shop.

Claimant stated that he had a prior injury relating to a robbery in 1987 during which he had been shot. He stated he had high blood pressure, and it was higher the morning of the 19th because he was in pain.

Claimant stated that Mr. C had announced to his employees that anyone who witnessed an accident would be fired. He recalled this occurred after an occasion where a customer slipped and fell at the shop.

Mr. C testified first as an adverse witness. He said that claimant first mentioned the fall to him about 10:30 on the morning of the (date); he indicated that claimant mentioned nothing on the (date), but stated that he was "in and out" of the shop. He agreed he was not there at the time the incident happened. Mr. C said the frame machine was directly in the center of his shop, which was about 50 by 100 feet. Mr. C stated that claimant did not ask for medical treatment on the (date). According to Mr. C, he investigated to see if anyone saw anything. Mr. C was asked if he talked to (Mr. M), a co-worker from whom a sworn statement was produced, about what he saw; according to Mr.C, Mr. M was in a

"group of guys" whom Mr. C approached and asked if they had seen claimant fall, and that none of the group said they witnessed anything. Mr. C identified Mr. M as claimant's son-in-law.

Mr. C stated that no one was authorized to work on the Blazer on the (date), because an insurance adjuster was coming by to see it. He agreed he had told claimant earlier in the week to work on it, but that he had left instructions with the body work manager that no one was to work on it on the (date).

Mr. C said that claimant left at noon on the (date). Mr. C attributed this to the fact that he had earlier announced that someone would be coming by to talk to the men about a lie detector test, relating to some materials that had disappeared from the shop. Mr. C stated that no lie detector test had been arranged, only that someone was going to talk to the men about it.

Mr. C stated he was contacted on Friday morning by the hospital emergency room about claimant's alleged injury, and that Mr. C told the hospital he was not paying for anything. He stated that claimant came in that morning to pick up his paycheck, and he saw the emergency room tag on claimant's wrist. Mr. C stated that he did not believe claimant's accident occurred because no one saw it, because claimant continued to work, and because claimant waited until the (date) to report it.

Mr. C stated that claimant was terminated because of previously existing problems with substandard body work, and being disrespectful. Mr. C stated, the second time through his account of how things occurred, that he and claimant had a spirited argument on the (date) about the Blazer. Mr. C admitted that he had not brought up this argument prior to the CCH.

The claimant's attorney tendered a notarized statement from a co-worker, Mr. M, which is acknowledged, but not sworn to, in which Mr. M states he witnessed claimant fall from the fame on (date of injury). Mr. M indicated that it was not until 2 or 3 weeks after claimant was fired that Mr. C asked if anyone had seen claimant fall. Mr. M told Mr. C that he had witnessed the fall. Mr. M stated that he requested time off that following Saturday and it was granted. Mr. M said he had been fired by Mr. C when he showed up the next workday, relating to a controversy about the day off.

The carrier objected to the statement, because it had been notarized on October 27th, but was not produced at the November 4th benefit review conference or within 15 days after it. According to the discussion of the parties, claimant's attorney produced it with other materials in a December 8th mailing. Claimant's attorney said this was within a day or two after his client gave it to him. The hearing officer overruled the exchange objection, pointing out that not producing documents within 15 days would not result in exclusion. He further noted that the document had been mailed to the carrier about three

weeks before the hearing, and there would have been no prejudice to claimant's case. He did not make an express finding of good cause.

Medical records from the hospital indicate a final diagnosis of right inguinal ligament strain, ankle sprain, hypertension, and borderline diabetes. It should be noted that claimant agreed he had pre-existing high blood pressure.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.- Houston [1st Dist.] 1987, no writ). Leaving aside Mr. M's statement, the hearing officer could have arrived at his decision based solely upon weighing the testimony of the claimant against that of Mr. C. For example, on the matter of credibility, he could have believed that Mr. C logically would have raised the matter of an (date of injury) argument between him and claimant at some point much earlier than the CCH, given that the theory of defense was that this was to some extent a claim motivated by spite against the employer.

There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses and the record as a whole. 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.). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Co. of Pittsburgh, Pa. v. Soto, 819 S.W.2d 619, 620 (Tex. App.- El Paso 1991, writ denied). However, in this case, we cannot agree that the decision of the hearing officer was against the great weight and preponderance of the evidence, and we affirm his decision on injury and disability.

We find no error in the admission by the hearing officer of the notarized statement by Mr. M. Tex. W.C. Comm'n Rules, 28 TEX. ADMIN. CODE § 142.13(c) provides not only for a 15 day exchange, but prompt exchange of documents that become available after that time. Claimant's attorney indicated that he received the statement a day or two before December 8th, when it was promptly sent to the carrier. There was no evidence or statement that the claimant received it before this time, or at the time of the November 4th benefit review conference (there arguably would have been no benefit to claimant to withhold this statement if he had it on that date). We note that the penalty of exclusion of evidence, set out in Section 410.161, relates to the failure to disclose information as provided by the Commission. Given the absence of any evidence that the document was in the custody or possession of claimant within 15 days after the benefit review conference, we cannot find error. As the hearing officer pointed out, the document was in fact produced well in advance of the CCH; if carrier was harmed by its introduction, such

harm was not occasioned by surprise. As we discussed above, there is sufficient evidence even leaving aside Mr. M's statement to support the hearing officer's decision.

We affirm the decision and order of the hearing officer.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Alan C. Ernst
Appeals Judge