APPEAL NO. 93536

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On June 1, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. Evidence was heard at the CCH concerning two separate claims brought by the appellant (herein claimant). In regard to the first claim the issues at the CCH were: 1. whether the claimant sustained an injury in the course and scope of employment on or about (date of injury), as a result of toxic exposure to lead fumes; 2. whether the claimant reported any such injury to his employer on or before the 30th day he knew or should have known the injury was related to his employment; 3. whether the claimant had any disability as a result of any such injury; 4. if there was disability, for what period of time; and 5. what temporary income benefits, if any, are due the claimant. In regard to the second claim the issues at the CCH were: 1. whether the claimant sustained a repetitive trauma injury in the course and scope of his employment on or about (date of injury); 2. whether the claimant reported any such occupational disease (carpal tunnel syndrome) to his employer on or before the 30th day after the date he knew or should have known that the disease was related to his employment; 3. whether the claimant had any disa bility as a result of the injury; 4. if there was disability, for what period of time; and 5. what temporary income benefits are due the claimant. The hearing officer held that the claimant did not sustain either of the alleged injuries in the course and scope of employment, but that he had timely reported both injuries to his employer. The hearing officer also held that since the claimant was not injured in either claim in the course and scope of employment, he did not have disability from either injury and was not entitled to temporary disability benefits.

The claimant files a request for review stating that the hearing officer did not consider a document which the claimant had submitted at the benefit review conference (BRC) and which the claimant felt was central to the decision of the benefit review officer (BRO) in recommending that the claimant did sustain a compensable repetitive trauma injury on (date of injury). The claimant attaches a copy of the document, a letter from a hand surgeon relating the claimant's carpal tunnel syndrome to his work for the employer. In a timely supplemental request for review the claimant attaches a statement from the same hand surgeon stating that the claimant should not work due to his injury until an electromyographic evaluation could be accomplished and argues that this presents evidence of disability due to claimant's injury.

The respondent (carrier herein) replies that the claimant failed to offer the letter at the CCH and should not be allowed to offer it on appeal. The carrier argues that there is no proof that either document submitted by the claimant on appeal is newly discovered evidence and that the first document clearly is not since it was used at the BRC. The carrier also contends that we should affirm the hearing officer that the claimant was not in the course and scope of employment and that the second document is irrelevant to this issue since it relates only to the issue of disability.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

The hearing officer in his decision describes the evidence in detail in the section entitled "Statement of Evidence," which we adopt for purposes of our decision. Briefly the claimant began working for (employer) on April 22, 1991. His job included working with a machine (wave machine) which applied lead solder to computer circuit boards. He also handled and inspected the circuit boards. The claimant testified that in November of 1991 he had symptoms which included insomnia, headaches, vomiting, and aches. In January 1992, the claimant went to a hospital emergency room and was diagnosed with bronchitis. In February 1992, the claimant consulted a family practitioner, (Dr. W), who referred him to (Dr. C), a rheumatologist. Dr. C found no evidence of rheumatic or connective tissue disease. Dr. W then ordered a blood lead level test which was performed in April 1992 and which showed his lead blood level range to be 5 micrograms/deciliter (mcg/dl), which was reported as being below detection levels. The claimant had stopped working for the employer on (date of injury), and has not returned to work since that date.

Dr. W referred the claimant to (Dr. P), who performed nerve conduction studies and who, on (date of injury), diagnosed bilateral carpal tunnel syndrome. Dr. P did not express an opinion as to the cause of the claimant's bilateral carpal tunnel syndrome. The claimant returned to Dr. W who said that the carpal tunnel syndrome might be job related, but that he would defer that decision to (Dr. A), an occupational medicine specialist to whom he referred the claimant. Dr. A took a series of blood samples from June through October 1992 which showed elevated blood lead levels. The results of these blood tests is as follows:

June 10, 1992	109mcg/dl.
June 29, 1992	94 mcg/dl.
July 17, 1992	62 mcg/dl.
September 16, 1992	37 mcg/dl
October 2, 1992	32 mcg/dl.

Tests of the claimant's wife and child showed no abnormal blood lead levels. Tests of the claimant's home and water well showed no source of lead. On June 26, 1992, Dr. W went to employer's place of business to inspect the claimant's work site and found no evidence of toxic fumes. Dr. A also went the work site and reviewed the claimant's working conditions and procedures. Dr. A concluded that the claimant's acute lead toxicity most likely occurred after he stopped working for the employer. Further, it was Dr. A's opinion that the ergonomics of the claimant's job with employer could not have caused the claimant's carpal tunnel syndrome; Dr. A stated he believed that the claimant's previous employment in carpentry and automobile mechanics were the likely cause. In October 1992, the claimant went to the (university medical center). The medical reports from the university

medical center did not indicate an opinion by the doctors there as to the source of either the claimant's lead exposure or carpal tunnel syndrome.

The letter which the claimant complains on appeal was not considered by the hearing officer is a letter from (Dr. Wa), a hand surgeon, to Dr. A dated February 24, 1993, which states:

> I wanted to thank you for the opportunity to evaluate your patient, [claimant] in my office today, February 24, 1993. This fascinating patient has sure been put through the ropes with the discovery of carpal tunnel syndrome in association with apparent lead intoxication. It will be fascinating to obtain tissue samples from his hand to see if there are any residual levels of lead, indicating that he obtained the intoxication while pushing down on the lead and copper circuit boards. Unfortunately, we may be so far down the line that we will not see significant lead or copper levels in the tissue, but this would have been a fascinating examination to perform a year ago.
>
> He certainly has signs and symptoms consistent with median and probably ulnar nerve compression, at the wrist level. The disturbing point is that he is also showing signs of radial and median nerve compression at the elbow level. There is no doubt in my mind that there is a causal relationship between his pushing down on the circuit boards and his development of median, radial and perhaps ulnar compression in both elbows, forearms wrists and hands.
>
> I am going to obtain an electromyographic evaluation of both elbows and wrists through (Dr. L) to see if he can pick up any evidence of electromyographic abnormalities in the elbow region which I think are there by clinical examination.
>
> Please contact me if you have additional questions or concerns. Hoping this information is helpful to you, I remain

The document which the claimant attaches to his supplemental request for review is a statement dated June 30, 1993, and signed by Dr. Wa:

> Please be informed that within reasonable and medical probability [claimant] has compression of the median and ulnar and possibly the radial nerves in his right and left elbows, which can lead to further muscle/nerve junction destruction. He needs electromyeographic (sic) evaluation by (Dr. L) at the earliest possible time.
>
> I think that it would be unwise and potentially harmful for him to be performing any

type of work activity until the results of these studies are available to me.

If you have any questions please don't hesitate to contact me.

As a general rule the Appeals Panel considers only the record developed at the contested case hearing, the request for review and the response thereto. Article 8308-6.42(a) (1989 Act); Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1992; Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Thus we have refused to consider new evidence on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92201, decided June 29, 1992; Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We have held that in determining whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Willis, 758 S.W.2d 809 (Tex App.-Dallas 1988, no writ). *See* Texas Workers' Compensation Commission Appeal No. 93463, decided July 19, 1993. *Compare* Texas Workers' Compensation Commission Appeal No. 93530, decided August 10, 1993.

Applying this rule, we cannot remand this case for consideration of Dr. Wa's letter of February 24, 1993. Clearly, the claimant had knowledge of this letter before the hearing. Claimant admits as much by stating that he relied upon the letter at the BRC which was held prior to the CCH in this case. We see no reason that with due diligence the letter could not have been introduced at the CCH. In any case the letter is cumulative in that there was evidence of the contents of the letter in the record. The hearing officer admitted as part of Hearing Officer Exhibit 1 the entire BRC report. In his BRC report AM, the BRO, quoted this letter as follows:

> In addition, the medical records from [Dr. Wa] clearly demonstrates the causal relationship between the claimant's work activities at [employer] and the diagnoses of carpal tunnel syndrome and possible compression neuropathies. [Dr. Wa] states in his 2/24/93 letter to [Dr. A] that "(t)here is no doubt in my mind that there is a causal relationship between his pushing down on the circuit boards and his development of median, radial and perhaps ulnar nerve compression in both elbows, forearms, wrists and hands."

Clearly, the claimant would have preferred that the hearing officer give more weight to this evidence than he did. However, Article 8308-6.34(e) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was

for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). We should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986). We cannot say under this standard of review that the decision of the hearing officer to give more weight to the opinion of Dr. A than to Dr. Wa constitutes reversible error.

The June 30, 1993, statement of Dr. Wa, really deals only with the issue of disability. Once the issue of injury in the course and scope of employment is decided against the claimant the issue of disability is moot. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993; Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992. In other words, applying the rule concerning whether evidence offered for the first time on appeal requires remand, this evidence obviously would not have produced a different result. *See* Appeal No. 93530, *supra*. This is because the claimant does not have disability since he was found not to be injured in the course and scope of his employment.

Therefore, the decision of the hearing officer is affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge