APPEAL NO. 93703

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 12, 1993, a contested case hearing (CCH) was held in (city), Texas with (hearing officer) presiding. The record was left open and was subsequently closed on July 20, 1993. The issue left unresolved from the benefit review conference (BRC) and announced at the CCH was, "Whether the claimant's lower back was injured on (date of injury), or was his injury limited to the chin, head, and neck." The hearing officer determined that the appellant (claimant) herein, did not meet his burden of showing that he sustained injury to his back as the result of a compensable injury on the job.

Claimant failed to appear at the CCH and both telephonically and through his attorney indicated he "did not wish to proceed" with his workers' compensation claim. On appeal claimant submits medical reports and a narrative letter regarding the merits of his case. Respondent, atauga, a self-insured governmental entity, Town herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

The record reflects that this matter was set for a CCH on July 12, 1993, and that both claimant and his attorney of record had notice of the setting. The record reflects that when the claimant did not appear, the hearing officer called both claimant's attorney and claimant inquiring about their failure to appear. Claimant's attorney, on the record, told the hearing officer that claimant had advised the attorney that he did not wish to proceed with his workers' compensation case. Claimant subsequently verified this by stating it was not worth his while to proceed. The hearing officer, on the record, advised claimant that by failing to pursue his claim, he may be forfeiting and/or prejudicing his rights. The claimant stated he understood. The Town was represented and was present at the proceeding and elected not to present any evidence relying on the fact claimant had the burden of proof. The hearing officer, as she had advised claimant she would do, sent claimant and his attorney a letter dated July 12, 1993, advising that "failure without good cause to comply with the directives of the Commission could affect your entitlement to workers' compensation benefits. This officer will postpone the taking of any action in connection with this hearing until ten (10) days from the date of this letter." Claimant responded by letter dated July 14, 1993, stating: "I feel at this time the Workers' Compensation Commission would only be wasting their time as well as mine to continue this case." Claimant's attorney did not respond. The hearing officer proceeded to close the record on July 20, 1993, and prepared her decision.

The claimant filed a timely request for review, attaching copies of the Employees Notice of Injury and copies of two medical reports dated May 17, 1993, and March 3, 1993. The claimant in his letter presented information regarding his accident and the injuries he allegedly sustained. The request for review gives no reason why this information was not presented to the hearing officer at the CCH or gives any explanation for his apparent change of mind.

We have, on a number of occasions, held that as a general rule the Appeals Panel considers only the record developed below at the CCH, the request for review and the response thereto. Section 410.203(a) (1989 Act); Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1993; Texas Workers' Compensation Commission Appeal No. 92417, 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. Obviously, claimant's testimony regarding the circumstances of the accident and injury were known to claimant at the time of the hearing and does not constitute new evidence. Both medical reports were dated several months before the hearing and there is no indication or allegation that the information was not available for submission at the CCH. Nothing claimant now offers would qualify as new evidence.

In short, claimant should have made his case to the hearing officer, as the finder of fact. After being advised verbally and by letter that failure to pursue his claim could prejudice his rights, claimant made a conscious decision that to proceed would be a waste of his time. Claimant is now precluded from submitting information to us for the first time on appeal where that evidence was readily available at the time of the CCH and claimant simply chose not to submit it.

The hearing officer's decision was not against the great weight and the preponderance of the evidence. Pool v. Ford Motor Co., 715 S.W.2d 629, 634 (Tex. 1986). The decision is affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge