APPEAL NO. 94077

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing combining two dockets involving the same claimant was held on November 29, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the appellant (claimant) sustained a hernia injury in the course and scope of his employment on (date of injury); whether he had good cause for failing to timely notify his employer of the injury; and whether the claimant sustained a thigh injury in the course and scope of his employment on (date of injury). The hearing officer determined that the claimant did sustain a hernia injury on (date of injury), in the course and scope of his employment, but that without good cause he failed to timely notify his employer of the injury, and that he did not injure his thigh in the course and scope of his employment on (date of injury), as alleged. The claimant appeals only that part of the decision which found he did not suffer a thigh injury in the course and scope of employment arguing that "new evidence establishes that . . . the injury . . . was work related." The respondent (carrier) replies that the decision of the hearing officer on the appealed issue is supported by sufficient evidence and that the Appeals Panel is limited to considering the record established at the hearing and should not consider new evidence presented for the first time on appeal.

DECISION

The decision and order of the hearing officer are affirmed.

The claimant testified that he worked for (employer). His duties included inspecting panels as they came off an assembly line and stacking them in tubs. He stated that he injured his right thigh on (date of injury), by a twisting action in getting up from a chair "in a hurry." He felt a muscle pull and pain. There were no witnesses to this accident. It occurred allegedly at about 6:30 a.m. as he neared the end of his shift. At about 7:00 a.m. the same morning he reported the injury to (Dr. E), the employer's on-site doctor. According to a transcription of a telephone conversation between the claimant and an adjuster, the claimant quotes Dr.E as saying that he thought the thigh problem "maybe is a torn muscle or cramp or something." The claimant was then referred to (Dr. S) who examined him on March 12, 1993, for the purported thigh injury. No x-rays were done, but Dr. S completed a physical examination from which he concluded that the claimant's gait and posture were normal, there was full range of motion of the lumbar spine, the hip motion was pain free, straight leg raising was normal, and there was no muscle spasm. He did note a palpable mass in the rectus femoris muscle and the right thigh was "one inch larger" that the left. He concluded that the mass was one of multiple benign lipoma in the right quadriceps. In his testimony, the claimant stated that he had a history of lipoma extending over the previous five years. He described these as painless. No other evidence was introduced by the claimant to establish that the alleged thigh injury occurred in the course and scope of employment.

In his appeal of the hearing officer's decision that the thigh injury was not job related, the claimant attached two reports he described as "new evidence." One consisted of a (Dr. H) January 10, 1994, "amended report" of the results of an MRI of the right thigh done on September 24, 1993. It confirmed the original report that the rectus femoris in the right mid-thigh was larger than that of the left, but there was no evidence of tumor, muscle hemorrhage or inflammation. He concluded these findings were consistent with scarring and a retraction of the muscle of the mid-thigh and "with the [claimant's] history of abrupt pain and partial disability in the proximal right thigh upon arising from a chair, followed by swelling and discoloration consistent with an acute hemorrhage." The second document is a January 12, 1994, letter from a (Dr. N) who largely restated Dr. H's amended report and concluded that the thigh problem "is caused by trauma."

The Appeals Panel normally considers only the record developed at the contested case hearing together with the written request for appeal and the response. Section 410.203(a). We will decline to review new evidence on appeal except in very limited circumstances in which the new evidence necessitates a remand. Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993. In determining if a remand is necessary based on new evidence, we consider whether this new evidence came to light after the hearing, whether it is cumulative of other evidence already admitted, whether it was not introduced at the hearing through lack of diligence, 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 Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this case, the "new evidence" consisted essentially of interpretations of an MRI completed in September 1993, not new tests or new examinations. Even though the hearing took place on November 29, 1993, some two months after the MRI, the "new evidence" re-evaluating this MRI was not dated until January 10 and 12, 1994. There was no attempt by the claimant to explain in his appeal why such evidence was not or could not have been developed earlier and made available at the hearing.[1] In addition, although we do not believe the "new evidence" is necessarily cumulative because it is probative of the fact that the claimant's thigh injury was likely the result of trauma while the evidence presented by the claimant at the hearing did not fairly attribute the injury to anything, we nonetheless cannot conclude that had it been introduced it would probably have produced a different result. The claimant described the accident as occurring when he quickly got up from a chair. He did not describe any trauma beyond a "twisting." The "new evidence" did not address how any trauma resulting in the injury originated in his work or occurred while the claimant was "engaged in or about the furtherance of the affairs or business of the employer." Section 401.011(12). For these reasons we conclude that the "new evidence" does not compel remand in this case, and we will not consider it for the first time on appeal.

[1]The hearing itself was initially set for August 3, 1993, but the claimant asked, and was granted, continuances based on the need for more time for discovery and the need for his attorney (not the same attorney who appeared at the hearing) to properly prepare the claimant's case.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Ci App.-Texarkana 1961, no writ). An injury may be established by the testimony of the claimant if deemed credible by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. Whether an injury occurred in the course and scope of employment is one of fact. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as the finder of fact, is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). The claimant's evidence that he injured his thigh in the course and scope of his employment was sketchy at best on the details of how the injury occurred. The medical evidence at the hearing disclosed an essentially normal thigh except for some enlargement. Given this evidence, the hearing officer could have simply disbelieved the claimant's account of how he was injured, however sincere he may have been in his testimony, or concluded that the claimant did not meet his burden of proving by a preponderance of the evidence that the injury occurred as alleged. In any case, we are unable to say that the decision of the hearing officer that the claimant did not sustain a thigh injury in the course and scope of his employment on (date of injury), lacked a sufficient basis in the evidence or that it was so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust, which is our standard for review.

Finding no error in the decision below and declining to consider evidence submitted by the claimant for the first time on appeal, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge