APPEAL NO. 980094

This appeal is brought 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 December 5, 1997. She (hearing officer) determined that the appellant (claimant) was not injured in the course and scope of his employment on _____, and that the employer tendered a bona fide offer of employment to the claimant. The claimant appealed; attached a report of an MRI dated December 17, 1997, stating that there was a herniated disc at L3-4 and a letter from (Mr. E), a physician's assistant in the office of (Dr. G), the orthopedic surgeon who performed surgery on the claimant for his 1992 injury, stating that based on the claimant's symptomology and objective data from the MRI, they feel that the claimant did have a new injury to his lower back on _____; and requested a new hearing because of new evidence that did not exist at the time of the CCH. The respondent (carrier) replied; stated that the claimant did not assert how the attached report and letter were newly discovered evidence, that he did not request a continuance, that the claimant did not offer an explanation why he did not see Dr. G earlier or have the MRI performed earlier, and that the claimant did not establish that the new evidence would probably produce a different result since the MRI cannot establish when the herniation occurred.

DECISION

We affirm.

The claimant testified that he had a prior workers' compensation injury; that Dr. G performed a fusion at L4-5 in 1992; that he had another surgery in 1993 to remove metal from the first surgery; that he returned to work in about the middle of 1994; that he has had low-back pain off and on since he had the surgery; that he had another back injury in 1995; that he did not have surgery as the result of that injury; that he returned to work as a forklift operator; that on Friday morning, _____, about one and one-half hours before his shift ended, he replaced a propane tank on the forklift; that the tank weighed about 45 or 50 pounds; that he felt a pull in his back; that he finished the shift without telling anyone about the injury; and that he hoped it would not be serious. He stated that by Sunday he was hurting pretty bad, that he went to (Dr. F) on Monday, that he was given medication, and that he did not tell Dr. F that he was hurt at work. The claimant said that since he was on medication, he had his wife call the employer to say that he would not be working; that she called the employer on Monday, Tuesday, and Wednesday and did not say that he had been hurt at work; that he did not want to report a workers' compensation injury if it was only minor because he had already missed so much work; that he had been with the employer for 19 years and did not want to jeopardize his position; that he became concerned that the injury may be serious; and that on Thursday he told one of the supervisors that he had been hurt the previous Friday. He testified that he was told to complete paperwork on the injury and to go to the company doctor and he did so. He said

that he was released to return to work at light duty with restrictions, that he returned to work doing paperwork for two days in early March, that he was on medication and did not feel that he was as alert as he should have been, and that he did not go back to work. He stated that he was placed on therapy, that he went back for therapy, and that he was told that the therapy had been denied. The claimant said that he was seen by several doctors before he went back to see Dr. G, who had performed the surgery after his first injury; he denied telling (Dr. S) that he had slipped on wet grass; and testified that he was to have an MRI either the day or the week after the hearing.

(Mr. B) testified that he is a terminal manager for the employer; that prior to the injury the employer planned to terminate the claimant because of absenteeism; that a union-company grievance committee reduced it to a two-week suspension; that on February 27, 1997, the claimant reported to him that he was injured on _____; that he asked the claimant to fill out paperwork and to go to the company doctor; that the claimant did; that he gave the claimant a modified job offer; and that the claimant worked at that modified job on March 6 and 7, 1997.

A copy of notes from Dr. F are in evidence. A note dated "-27-97" and is apparently a note made on January 27, 1997, states that the claimant had back pain since last November, that there was a sudden onset of pain from coughing, that there was no injury, that the impression is lumbar back strain, and that medication was prescribed. A note on the same page and below that note is dated February 24, 1997. It states that the claimant is there for a follow up for a back strain, that he also has pain radiating into his leg, that the impression is lumbar strain, and that medication was prescribed. Reports from (Dr. C) stated that he saw the claimant on February 27, 1997; that the claimant reported that he hurt his back moving a propane bottle on _____; that he had pain in his back radiating into his right leg; that the claimant had a fusion at L4-5; that the diagnosis is lumbar strain; and that the claimant could return to modified duty with specific restrictions. A note from Dr. S dated March 24, 1997, states that the claimant said that he slipped on wet grass on March 21, 1997; that medication was prescribed; and that additional evaluation may be necessary. In a note dated September 17, 1997, Dr. S stated that he last saw the claimant on March 24, 1997, that he said he had not seen another doctor, that he asked for a letter having him off work for the last six months, that she refused to provide such a letter, and that she told him about the possibility of an orthopedic consultation.

In his appeal, the claimant requested a "rehearing because of new evidence that did not exist at the time of the CCH." The Appeals Panel considers only the record developed at the CCH. Section 410.203(a)(1) and Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992. In Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992, the Appeals Panel wrote:

> Where there is a claim of newly discovered evidence, as there is here, we evaluate the evidence to determine if there is a sound basis to cause a remand for further consideration and development of the evidence. In doing

> so, we look to the guidelines provided in Texas case authority. It is incumbent on a party who seeks a new trial on grounds of newly discovered evidence to establish: (1) the evidence has come to the knowledge of the party since the hearing; (2) it was not owing to want of due diligence that it did not come sooner; (3) the evidence is not just cumulative; and (4) the evidence is so material it would probably produce a different result if a new hearing were granted. *See* Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983); Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992.

The claimant did not offer any argument on the four criteria.

The report of the MRI and the letter from Mr. E are dated after the CCH and came to the knowledge of the claimant after the CCH. The claimant testified that he was to have the MRI the day or the week after the CCH. He did not request a continuance to obtain the results of the pending MRI nor did he request that the record be held open so that a report could be made part of the record. The claimant alleged that he was injured on _____; he was seen by Dr. F and Dr. C in February 1997; he went to Dr. S on March 24 and September 17, 1997; he went to Dr. G on December 3, 1997; the CCH was held on December 5, 1997; and the MRI was conducted on December 17, 1997. At the CCH, the claimant testified that his condition has improved since he sustained the injury and that he thought that about two or three weeks ago he could have started driving a forklift. He said that the doctor he had been seeing, presumably Dr. S, referred him to a specialist and wanted him to get an MRI and a CT scan; so he decided to go back to Dr. G, who had performed his surgery. The claimant has not shown that due diligence was used in having the MRI performed, obtaining the report and the letter, and requesting that they be considered by the hearing officer. But even assuming that the first three requirements for a remand for the hearing officer to consider the report and the letter had been met, there has not been a showing that the evidence is so material that it would probably produce a different result if it was considered by the hearing officer. Briefly, there is evidence that the claimant had back pain since November 1996; that on February 24, 1997, he did not tell Dr. F that he was injured or injured at work; and that he may have slipped on wet grass in March 1997. The MRI was conducted in December 1997. There is no showing that the December 1997 MRI report showing a disc herniation at L3-4 and Mr. E's January 1998 letter containing comments that he and Dr. G felt that the herniation was caused by an incident on _____, would probably have produced a different result on the issue of whether the claimant was injured in the course and scope of his employment on _____.

We do not reverse and remand for the hearing officer to consider the evidence submitted by the claimant with his appeal. We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge