

APPEAL NO. 991612

This appeal arises 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 June 16, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury on or about Injury 2, and whether the respondent (carrier) is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001. The hearing officer determined that the claimant did not sustain a compensable injury on Injury 2, and that the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001. The claimant appeals, urging she did sustain a compensable injury on Injury 2, and did timely notify her employer of the injury. The appeals file does not contain a reply from the carrier.

DECISION

Affirmed.

The claimant injured her cervical spine in a motor vehicle accident (MVA) in injury 1 and had spinal surgery in 1995. The claimant testified that she has a history of low back problems caused by her work as a registered nurse for over 20 years and in March 1997, an MRI revealed a herniated disc at L4-5. The claimant testified that on Injury 2, she aggravated her low back condition when she attempted to sit down but there was no chair, and she fell to the floor. According to the claimant, the fall caused her right leg pain to increase and move to the left leg. Prior to Injury 2, the claimant was receiving treatment from Dr. C, and after the fall she continued to receive treatment from him. Dr. C prescribed anti-inflammatory medication, physical therapy, and recommended steroid injections. The claimant was involved in another MVA on Injury 3, and was terminated from employment on August 27, 1997.

In May 1998, Dr. C performed a bone scan. The claimant testified that on May 5, 1998, after Dr. C received the bone scan report, his physician's assistant, Mr. J, called her and asked her if she had fallen because she had a fracture in her back; that as a result of the conversation she remembered the fall on Injury 2; that she told Mr. J about the fall; and that Mr. J stated that the type of fall she sustained could have caused an increase in her symptoms. According to the claimant, it was this conversation which triggered her memory, causing her to mention the Injury 2, injury for the first time to Dr. C. The claimant had a laminectomy and fusion from L4 to S1 on October 28, 1998. The claimant testified that her fusion has failed and that her only option is to have another surgery with pedicle screws.

It was the claimant's position that she timely reported the injury. The claimant testified that on Injury 2, she filled out an employee injury form and put it in an interoffice envelope addressed to Ms. S, her immediate supervisor, but did not discuss it with Ms. S. The claimant testified that after her conversation with Mr. J, she called her employer about the injury form because she could not remember the date of the fall, and was told that they

could not find a copy of the injury form. After this conversation, the claimant looked through her paperwork at home and found a copy of an injury form dated Injury 2.

While the medical records of Dr. C indicate complaints of lumbar back pain, there is no mention of an injury on Injury 2, until a letter written by Dr. C to the claimant dated April 6, 1999. In that letter, Dr. C states:

The purpose of this letter is to confirm that review of these records and chain of events suggest that the initial back problems could well be related to "cumulative trauma disorder" in the lower back with a congenital spondylolisthesis which gradually worsened over time and was acutely worsened by the fall in April 1997.

On June 8, 1999, Dr. C states that the injury of Injury 2, could have contributed to her overall back problem, though to what degree would be impossible to determine.

The claimant had the burden to prove that she injured herself as claimed on Injury 2. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). He resolved contradictions in the evidence against the claimant and concluded that the claimant did not meet her burden of proving she sustained a compensable injury on Injury 2. 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 v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not injure her lower back at work on Injury 2.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after which the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. The testimony of the claimant that she reported the injury to her employer on an injury form signed Injury 2, is in direct conflict with carrier's assertion that the claim form was never received by the employer and that the employer's first notice of the injury was on May 11, 1998. The hearing officer, after considering all of the evidence, found that the claimant did not report the alleged injury within 30 days of Injury 2. Whether, and if so, when, notice is given is a question of fact for the hearing officer to decide. We find there was sufficient evidence to support the determination of the hearing officer that the claimant failed to timely notify the

employer pursuant to Section 409.001 and the carrier is relieved of liability under Section 409.002.

Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the documents the claimant has attached to her appeal, but not in evidence, will not be considered on appeal. See Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We observe that the documents attached to the appeal which were not offered at the hearing do not meet the criteria for newly discovered evidence. Appeal No. 92400. To constitute "newly discovered evidence," the evidence would need to have come to the appellant's knowledge since the hearing; that it was not due to lack of diligence that it came no sooner; that it is not cumulative; and that it is so material it would probably produce a different result upon a new hearing. See Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge