

APPEAL NO. 992048

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 was held on August 25, 1999. It is undisputed that the respondent (claimant) sustained an injury to a rib and his liver on _____. The hearing officer determined that on that day the claimant also sustained a compensable injury to his neck. The appellant (carrier) requested review, attached to its appeal a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated September 9, 1999, and a report from a private investigator dated September 10, 1999; contended that the determination that the claimant's compensable injury includes a neck injury is contrary to the great weight of the credible evidence; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant's compensable injury does not include his neck. In the alternative, the carrier requested that the Appeals Panel reverse the decision and remand for the hearing officer to consider the report from the private investigator. The claimant responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

We first address the documents attached to the carrier's appeal. The Appeals Panel addressed newly discover evidence in Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992, and wrote:

We only consider the record developed at the hearing. Article 8308-6.42(a)(1). [Now Section 410.203(a)(1).] Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992. 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 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 TWCC-21 indicates that the claimant began working for another employer on May 11, 1999, and did not report that information to the carrier. The private investigator's report

indicates some activities of the claimant on August 31 and September 1 and 2, 1999. The carrier contends that this information reveals the lack of the claimant's credibility and is critical. The carrier indicated that it received the information from an anonymous caller and did not address why it did not obtain the information about the claimant sooner. We will not consider the information attached to the carrier's appeal and do not reverse and remand for the hearing officer to consider the information.

The Decision and Order of the hearing officer contains a statement of the evidence. Briefly, the claimant was struck in the chest by a heavy chain that broke. His seventh rib on the right side was broken and his liver was damaged. The claimant testified that he had severe pain where the chain struck his chest area, that he had difficulty breathing, that he had some neck pain, that he concentrated on the areas of severe pain and his difficulty breathing, and that he did not tell the people in the emergency room about his neck pain. He said that as the chest pain subsided, he noticed the neck pain more. He stated that he was not pleased his neck injury was not being treated and went to Dr. VB, a chiropractor. Dr. VB testified that he diagnosed the claimant as having cervical disc displacement, sprain/strain, and brachial radiculopathy; that from the claimant's description of what happened and the medical records showing the injury to the rib and the liver, he thinks the claimant sustained a whiplash-type injury when the chain struck him; that he referred the claimant to Dr. R, a neurosurgeon; and that a CAT scan showed a disc herniation at C5-6. The carrier introduced a report from a chiropractor stating there was no causal relation of the claimant's right cervical brachial complaints and right arm numbness with the work injury that resulted in a broken rib.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would support a different result. 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's determination that the claimant sustained a compensable injury to his neck on _____, is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge