APPEAL NO. 000711

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 March 9, 2000. The issue at the CCH was whether the appellant=s (claimant) _____, compensable injury was a producing cause of the claimant=s right and left carpal tunnel syndrome (CTS) and hypertension. The hearing officer determined that the _____, compensable injury was not a producing cause of claimant=s right and left CTS and hypertension. The claimant appeals, urging that his CTS was a direct result of his compensable injury; that the respondent (self-insured) failed to timely dispute CTS; and that he is not obese. The claimant asks the Appeals Panel to consider medical documentation attached to his appeal but not in evidence. The self-insured replies that the medical records attached to the claimant=s appeal should not be considered; that the issue of whether the self-insured timely disputed the CTS was not addressed at the CCH and is not properly before the Appeals Panel; and that the evidence is sufficient to support the hearing officer=s decision and it should be affirmed. The determination that the claimant=s _____, compensable injury is not a producing cause of the claimant=s hypertension has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the medical records that the claimant has attached to his appeal, but which were 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 appellant's knowledge since the hearing; it must not have been due to lack of diligence that it came to his knowledge no sooner; it must not be cumulative; and it must be 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 claimant asserts that the self-insured failed to timely dispute CTS, therefore, it is compensable. A benefit review conference (BRC) was held on December 14, 1999, and the claimant was assisted by an ombudsman. The BRC report does not reflect an issue of whether the self-insured failed to timely dispute CTS. On December 29, 1999, the claimant=s ombudsman requested that an additional issue be added, whether the self-insured timely contested the claimant=s condition of hypertension, and this was opposed by the self-insured. The claimant subsequently obtained an attorney who on February 18, 2000, reiterated the claimant=s request for the issue of whether the self-insured timely contested the claimant=s

condition of hypertension and also requested the issue of whether the self-insured timely contested the claimant=s condition of CTS. At the hearing, the claimant=s attorney argued that the additional issues should be added because the claimant may have had inadequate assistance at the BRC and the issue should have been raised at the BRC by the ombudsman or the benefit review officer. The hearing officer denied the claimant=s request for additional issues, stating that the claimant was responsible for his claim and that no good cause was shown.

Section 410.151(b) provides, in part, that an issue that was not raised at a BRC may not be considered unless the parties consent or, if the issue was not raised, the Texas Workers= Compensation Commission determines that good cause exists for not requesting the issue at the BRC. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 142.7 provides that additional issues may be added by a party responding to the BRC report no later than 20 days after receiving it, by unanimous consent in writing no later than 10 days before the CCH, and on the request of a party if the hearing officer finds good cause. The issue of whether the self-insured timely disputed the claimant=s CTS was not raised at the BRC and was not requested within 20 days after receiving the BRC report. The hearing officer did not abuse his discretion in refusing to add the additional issue. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Although the hearing officer advised the claimant that he could pursue the issue of waiver at a future BRC, the Appeals Panel has held that the issue of timely contest by the carrier is so closely linked to the issue of compensability that waiver may not be revived at a later proceeding once compensability is adjudicated. Texas Workers' Compensation Commission Appeal No. 950140, decided March 8, 1995.

The claimant sustained a compensable lumbar and cervical injury on _____, when he was climbing into the cab of a truck, slipped, and broke his fall by clinging to the handrails of the truck. The claimant testified that immediately following the injury, he had pain and numbness in his right hand and fingers and then developed the same symptoms in his left hand and fingers. The claimant had a lumbar laminectomy in May 1998 and a three-level cervical fusion in April 1999. Following the claimant=s cervical fusion, he continued to have complaints of bilateral numbness in both hands. On August 17, 1999, the claimant had an EMG at the request of his treating doctor, Dr. RB, which revealed left CTS. The claimant testified that he was previously diagnosed with mild right CTS by Dr. S in November 1998. According to the claimant, he is an insulin-dependent diabetic, is 6'3" or 6'4", and weighs 236 pounds.

Dr. RB opines that the claimant=s CTS is causally related to the compensable injury. In a letter dated February 16, 2000, Dr. RB states:

> In [the claimant=s] case, I think the reason he has not gotten better and has gotten worse, is that he has had three-level disc surgery which is a big surgery. He has not had any significant physical therapy following the surgery to his neck

> and he still has significant restricted ROM [range of motion] of his neck which one would expect from having had surgery and not having any significant formal therapy for the neck.
>
> Therefore, with the fluid backing up from restrictions in the neck from the cervical disc disease problems, as well as the surgery following those problems, he can then develop a secondary [CTS] because [of] the primary problem in the neck.
>
> It is my opinion, based on reasonable medical probability, that this is the mechanism in which he developed [CTS] and, therefore, it is directly related to his original injury to his neck and to his back. He had no other chronic problems to his hands and he had previous studies which did not reveal [CTS], indicating this was not present at all but developed later and, in my opinion, is the direct result of the neck injury and subsequent treatment.
>
> Diabetes Mellitus by itself is not a cause of [CTS].

Attached to Dr. RB=s letter is an article addressing Adouble crush@ injuries. The article states that precipitating factors for CTS include increasing obesity and diabetes mellitus.

The self-insured presented the testimony and reports of Dr. MB to support its position that the claimant=s CTS is not related to the _____, compensable injury. Dr. MB testified that the claimant complained of numbness in the fourth and fifth fingers in his left hand, which is not associated with CTS; that the claimant=s CTS is an ordinary disease of life; and that the claimant has predisposing factors for CTS which include obesity and diabetes mellitus.

The claimant had the burden to prove the extent of his compensable injury. The 1989 Act defines Ainjury,@ in pertinent part, as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). It has been held that the immediate effects of an injury are not solely determinative of the nature and extent of that injury and that the "full consequences of the original injury . . . upon the general health and body of the workman are to be considered." Texas Employers' Insurance Association v. Thorn, 611 S.W.2d 140 (Tex. Civ. App.-Waco 1980, no writ), quoted in Texas Workers' Compensation Commission Appeal No. 94232, decided April 11, 1994. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

The hearing officer found the evidence insufficient to causally link the claimant's CTS to his _____, compensable injury. The medical evidence concerning the cause of the claimant's CTS was conflicting. The hearing officer resolved the issue by relying on the opinion of Dr. MB. The claimant appeals the hearing officer=s finding that he is obese; however, the finding is supported by the testimony of Dr. MB that the claimant weighed 258 pounds at the time of his examination on September 28, 1998, and that the term is medically defined. When reviewing a hearing officer's decision for factual sufficiency of the evidence, we will reverse such decision only if it is so contrary to the great weight and preponderance 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 Co., 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's _____, compensable injury is not a producing cause of the claimant=s right and left CTS.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge