APPEAL NO. 000847

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 17, 2000. The hearing officer determined that on _____, the respondent (claimant) injured his low back in the course and scope of his employment, and that he had disability beginning on November 23, 1999, and continuing through the date of the CCH. The appellant (carrier) requested review; commented on evidence favorable to its position; submitted a transcript of an interview of a person conducted on April 11, 2000; contended that the transcript is newly discovered evidence; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor. In the alternative, the carrier requested that the Appeals Panel reverse the decision of the hearing officer and remand for further development of the evidence. The claimant responded, urged that the evidence is sufficient to support the decision of the hearing officer, contended that the transcript does not meet the requirements of newly discovered evidence that would result in the case being reversed and remanded to the hearing officer, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

We first address the carrier's contention that the transcript of the interview is newly discovered evidence. In its appeal, the carrier wrote:

> Finally, carrier has been apprized most recently of a witness to events preceding the alleged date of injury. As a result of this newly discovered evidence, attached hereto as Exhibit A, the carrier is requesting that this matter be reopened for purposes of further developing the evidence in this dispute.

The party seeking a new hearing on the grounds of newly discovered evidence must show that the evidence came to the knowledge of the party since the CCH, it was not owing to a want of due diligence that it did not come sooner, the evidence is not just cumulative, and the evidence is so material that it would probably produce a different result if a new hearing was granted. Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992. The carrier did not present information on how it learned of the witness or on due diligence to obtain the information. We do not reverse the decision of the hearing officer and remand for further development of the evidence.

The claimant testified that on _____, at about 11:45 a.m., he and Mr. K were hanging four-feet-by-eight-feet sheets of plywood that weighed 60 or 70 pounds; that Mr. K dropped the end of the plywood he was holding; that he, the claimant, held on to his end;

that he was jerked down; that he hurt his back; that after the lunch break he was no longer able to work; that he told Mr. W, his supervisor, what had happened and that he could no longer work; that Mr. W got mad because he would not stay and work; that he went immediately to Dr. P, a chiropractor; and that Dr. P took him off work. Mr. K signed a statement as to what occurred at work that is consistent with the testimony of the claimant. The claimant said that Dr. P sent him to Dr. L, that an MRI was performed, that he was told he had ruptured discs, that Dr. L recommended surgery, that he does not want to have surgery, that a doctor has not released him to return to work, and that he could not return to work because of the pain.

An Initial Medical Report (TWCC-61) from Dr. P dated November 23, 1999, indicates that the claimant's statement to Dr. P about what happened is consistent with the claimant's testimony; that the treatment plan included therapy; and that Dr. P requested an MRI and referred the claimant to Dr. L. The report of the MRI dated December 2, 1999, indicates a 5mm disc protrusion with impingement on a nerve root at L3-4; a 7mm disc protrusion with impingement on a nerve root at L4-5 and a 4mm disc protrusion with narrowing of the spinal canal at that level; and an 8mm disc protrusion with impingement on a nerve root and another 5mm disc protrusion with impingement on another nerve root at L5-S1. A report from Dr. L dated December 2, 1999, states that the claimant has severe radiculopathy on the right side, that he is in tremendous pain that is very real and disabling, that he gave the claimant pain medication and muscle relaxing medication, that he recommended that conservative care be continued, and that epidural steroid injections should be considered. Records indicate that Dr. P continued to treat the claimant.

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). The determinations of the hearing officer are 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:

Susan M. Kelley
Appeals Judge

Dorian E. Ramirez
Appeals Judge