APPEAL NO. 002936

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 5, 2000, a hearing was held. The hearing officer decided that the appellant (claimant) had not sustained a compensable injury in the course and scope of his employment on _____, and did not have disability resulting from the claimed injury. The claimant appealed, asserting that the hearing officer considered evidence not properly before him and that the hearing officer's decision was against the great weight of the evidence. Included with the claimant's appeal are two statements, one by the claimant and one by claimant's counsel, which assert matters which were not presented at the contested case hearing (CCH) and which the claimant asserts constitute newly discovered evidence. The respondent (carrier) responded that the hearing officer's decision is not against the great weight of the evidence, that the statements offered on appeal by the claimant and his counsel do not constitute newly discovered evidence which could or should be considered by the Appeals Panel, and that the hearing officer's decision and order should be affirmed.

DECISION

The hearing officer's decision and order are affirmed.

With his appeal, the claimant submitted a statement wherein he sets out a conversation he allegedly had with one of the individuals whose written statements were offered by the carrier and admitted without objection. The claimant also submitted a statement from his attorney which essentially constitutes argument regarding the claimant's statement. Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. 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. Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. 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). Although counsel for the claimant asserts that "[i]t was impossible for Claimant and me to address such conflicts in the written testimony of [Mr. P] because he was not available to us in our preparation for the CCH," the only reason given by counsel for not contacting Mr. P or the night manager of the motel referred to in Mr. P's written statement was that "[a] workers' compensation case does not pay enough to justify having lengthy discovery as a personal injury case would." There is no allegation, nor was there at the hearing, that the carrier failed to provide the claimant with Mr. P's statement in a timely manner. The claimant, through the exercise of due diligence, could have contacted Mr. P and, had the need arisen, either obtained a controverting statement from Mr. P or compelled his attendance at the CCH. We also note that although the hearing officer considered Mr. P's statement, had Mr. P testified the hearing officer could have either accepted or rejected his later testimony. We

also note that the hearing officer's decision reflects that Mr. P's statement was only one of a number of reasons that the hearing officer found that the claimant's testimony was not credible and that the claimant did not sustain his injury in the course and scope of his employment. The evidence reflected in the claimant's post-hearing statement is not 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. Consequently, the documents that the claimant has attached to his appeal, but which were not in evidence, will not be considered on appeal. *See* Appeal No. 92400.

Conflicting evidence, including internally contradictory testimony by the claimant, was adduced during the hearing. The testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's 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. The hearing officer did not find the claimant to be a credible witness and determined that the claimant's injury was not sustained in the course and scope of his employment. Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge