APPEAL NO. 011598
FILED AUGUST 14, 2001

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 begun on April 5, 2001, and continued to and concluded on June 5, 2001. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease diagnosed as Methicillin Resistant *Staphylococcus Aureus* (MRSA), with a date of injury of _____. The claimant has appealed the determination on sufficiency of the evidence grounds. The respondent (self-insured) urges that the decision and order of the hearing officer be affirmed.

DECISION

Affirmed.

The claimant worked as a dialysis nurse at a correctional facility from May 1, 2000, until September 2, 2000. She maintained that she was infected with MRSA in the course and scope of her employment through exposure to infected inmates. An occupational disease is "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. . . . The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." Section 401.011(34). An employee must prove, by a preponderance of the evidence, the compensability of an occupational disease. Texas Workers' Compensation Commission Appeal No. 960582, decided May 2, 1996, citing Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980).

There was evidence from which the hearing officer could determine that the claimant failed to meet her burden of establishing that she was infected in the workplace. The evidence indicated that MRSA may be more prevalent in health care facilities than in the community. Such evidence, however, does not establish that the claimant was actually infected in the workplace, as opposed to in the community. The Statement of the Evidence discusses the claimant's belief that she was exposed to individuals infected with MRSA in the course of her duties as a dialysis nurse. The hearing officer ordered the self-insured to determine whether there were individuals with MRSA treated in the correctional facility during the time that the claimant worked there. The self-insured's health information management manager had a query done which revealed that there were no offenders provided treatment during the relevant time frames "who either have or have had MRSA." *See* Self-Insured's Exhibit No. 8. The claimant presented medical evidence in the form of opinions from three of the doctors who have been treating her. The hearing officer found that their opinions that the workplace is the most likely source of the claimant's infection do not equate to an opinion that within reasonable medical probability the claimant became infected with MRSA at the workplace. The hearing officer is the sole judge of the relevance and materiality of the evidence and of

its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, 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 only raises 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). 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 manifestly unjust, and we do not find it to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The claimant submitted a lengthy appeal, which includes voluminous attachments, and we are compelled to comment on some aspects of her submission. The claimant asks that all the documentation attached to her appeal be reviewed and we have done so, giving careful consideration to her arguments. She presents ten pages of explanation and amplification of the documentation which was presented at the CCH and presents duplicate copies of much of the documentation. We note that she also included what were marked as Claimant's Exhibit Nos. 19 and 31, documents that were not admitted by the hearing officer, and she also included a page from what was marked as Claimant's Exhibit No. 40, another document that was not admitted. We decline to consider these documents now, as we perceive no abuse of discretion by the hearing officer in excluding the items during the CCH, and we are limited to reviewing the record developed at the CCH. Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the additional information that the claimant has attached to her appeal, but which was 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 or admitted 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 her 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).

As to specific points raised in the appeal, first, the claimant states her disagreement with Finding of Fact No. 2 because she presented an article that "proved" MRSA was in her patient population. This same item of evidence was before the hearing officer and he had the task of assigning weight and credibility to each piece of evidence; we will not second-guess his factual determination.

Second, the claimant disagrees with Finding of Fact No. 3 because her "physician said that he is 99.8% sure that I contracted MRSA in my work environment and he is willing to say

so." The short answer to that contention is that the evidence that the claimant presented at the CCH was that her doctor said her workplace was the "most likely source" of her infection. The claimant is not permitted to supplement the record at this point, unless the evidence meets the criteria of Black, *supra*, and we hold that this restatement of an opinion would not constitute "newly discovered evidence."

Third, in her disagreement with Finding of Fact No. 4, the claimant refers to check stubs. The check stubs were originally marked as Claimant's Exhibit No. 36, and were briefly discussed at the CCH, but not offered or admitted into evidence. The check stubs may not be considered at this time. We note that the claimant indicated that the check stubs were intended to show the hours that she worked, and she agreed that she had placed the same information on Claimant's Exhibit No. 1. The information from the check stubs was available to the hearing officer, and we perceive no error in excluding a redundant exhibit from the record. Also, in her statement of disagreement with Finding of Fact No. 4, the claimant refers to information about MRSA-infected persons who are patients of her physicians, what occupations they have, and where they acquired their infections. That information was not before the hearing officer, it does not appear to be newly discovered, and it also has little relevance to determining the source of this claimant's infection; this information will not be considered for the first time on appeal.

Fourth, the claimant disagreed with Finding of Fact No. 5 because the hearing officer did not issue subpoenas she had requested. The hearing officer ruled that he would not issue the subpoenas because there was no good cause shown by the claimant for issuance of the subpoenas for medical records of several inmates. Given the very high probability that such records are confidential, we do not find any abuse of discretion on the part of the hearing officer in determining no good cause was shown for issuance of the subpoenas. In addition, we note that the hearing officer did order the self-insured to determine whether there were individuals with MRSA treated in the correctional facility during the time that the claimant worked there, thus securing information with less risk of invading the privacy of another's medical records.

Fifth, the claimant questions the hearing officer's stipulation on venue. We note that claimant resides outside of Texas and the CCH was held at the field office which is located closest to the out-of-state home of the claimant. We note also that the hearing officer carefully explained what a stipulation is, and the claimant agreed on the record that venue was proper in the _____ field office. We perceive no error.

The claimant closes her appeal with a request that the Appeals Panel not make a decision until the (state agency) and (company) complete a formal investigation at the correctional facility. She also asks at the end of her ten-spage letter that the case be remanded back to the hearing officer after the investigation is done. She states that it will be 180 days before that investigation is completed. Those requests are denied. This case does

not meet the criteria for remand to the hearing officer, and we are required to issue our decision within the time limits set forth in Section 410.204(a).

After a complete and careful review of the evidence properly admitted and of the matters raised in the appeal, we affirm the factual determinations and the decision and order of the hearing officer.

Michael B. McShane
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge