APPEAL NO. 011681
FILED SEPTEMBER 6, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing (CCH) held on June 26, 2001, the hearing officer determined that the respondent (claimant) had disability from June 22, 2000, through the date of the hearing. The appellant (carrier) has appealed, requesting that the Appeals Panel reverse and remand the case for the hearing officer to consider certain medical records obtained by the carrier after the hearing officer had signed the Decision and Order. The file does not contain a response from the claimant.

DECISION

Affirmed.

The Appeals Panel considers the record developed at the hearing, the request for review, and the response thereto, if any. Section 410.203(a). The Appeals Panel has stated that in determining whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through a lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). *See also* Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993.

The carrier asserts in its request for review that on June 16, 2001, the hearing officer signed an Order on Request for Subpoena Duces Tecum requiring Dr. G, the surgeon who performed the surgical repair of the claimant's compensable hernia injury on _____, to produce an entire copy of the claimant's records; that the carrier received these records on June 29, 2001, a Friday; and that the carrier submitted the records to the hearing officer on July 2, 2001, and requested that the hearing record be reopened so that these records could be considered by the hearing officer. However, the hearing officer's Decision and Order was signed on June 27, 2001, and, as the carrier states, the hearing officer did not rule on the request to reopen the record. The carrier has attached to its appeal its July 2, 2001, letter to the hearing officer, which forwards the records of Dr. G and requests that these records be admitted into evidence. This letter further states that the carrier is sending a copy of the correspondence to the claimant and requests that the claimant be contacted to determine if he objects to the admission of the records into evidence. The carrier contends on appeal that the records show that, contrary to the claimant's testimony, Dr. G did not issue an "off-work slip" on November 2, 2000, because such slip is not in Dr. G's records and, therefore, the claimant's disability should be ended on November 6, 2000, the date specified by Dr. G on November 1, 2000, as the date the claimant could return to full duty. We note that both parties offered into evidence certain records of Dr. G, which were admitted without objection.

The carrier maintains that Dr. G's records are "newly discovered" evidence; that they are not cumulative of evidence already in the record; and that their admission and consideration by the hearing officer would likely result in a different decision on the duration of the claimant's disability. The carrier further asserts that it exercised due diligence in obtaining the records in that the hearing officer signed the subpoena order on June 16, 2001; the records were not available when the CCH was held on June 26, 2001; and the records were received by the carrier on June 29, 2001, and forwarded to the hearing officer on July 2, 2001. Neither the request for the subpoena nor the order itself have been made a part of the record. Further, there was no mention of the outstanding subpoena at the hearing nor was there a request to keep the record open.

We cannot agree that the carrier exercised diligence in this matter. The benefit review conference was held on April 30, 2001, and the order for the subpoena was not signed until June 16, 2001. The carrier's appeal does not state when the request for the subpoena was made nor does it even mention, let alone attempt to explain, this delay.

Insofar as the request for review also constitutes an evidentiary challenge to the hearing officer's determination of the disputed issue, we find the evidence, recapitulated in the hearing officer's decision, to be sufficient. The challenged determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CT CORP. SYSTEMS
350 N. ST. PAUL
DALLAS, TEXAS 75201.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge