

APPEAL NO. 011972
FILED OCTOBER 9, 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 held on July 30, 2001. The hearing officer determined that the appellant (claimant) did not sustain a compensable repetitive trauma injury and that the claimant did not have disability. The claimant has appealed, stating her disagreement with Finding of Fact Nos. 3, 4, 5, and 7, and Conclusions of Law Nos. 3 and 4. The claimant also asserts that the hearing officer did not view the videotape that was placed in evidence by the respondent (carrier), as there was no comment that the hearing officer had viewed the videotape; that the videotape was not indicative of the actual work she performs; that the hearing officer did not take the time to properly view all the medical records as she was about to leave for vacation for 21 days; and that the carrier's witnesses were not listed on the decision and order. She also asks the Appeals Panel to "view how witness can be paid off for [their] testimony." The claimant attached several pages of information to her appeal, including some documents admitted at the CCH and, for the first time on appeal, a letter from Dr. V, her treating doctor, dated August 14, 2001, and a letter from the (CWA) Department of Occupational Safety and Health, dated June 11, 2001. The carrier has not submitted a response to the appeal.

DECISION

Affirmed.

The claimant's disagreements with particular Findings of Fact and Conclusions of Law amount to a difference of opinion on the weight and value to be placed on the evidence, and will be addressed below. As to the statement that the hearing officer did not view the videotape, there is no requirement that the hearing officer specifically comment that she has viewed each piece of evidence. The hearing officer is presumed to do her job properly, absent evidence to the contrary. The claimant's bare assertion is not evidence. This assertion of error is rejected. As to the claimant's position that the videotape is not indicative of the actual work she performs, that was specifically pointed out to the hearing officer when the claimant objected to admission of the videotape (transcript, p. 16), and again in the ombudsman's rebuttal argument on behalf of the claimant. In addition, the circumstances of the study done at the employer's worksite, during which the videotape was made, were fully explained on the record so that the hearing officer could give the evidence its proper weight.

As to the assertion that the hearing officer did not take the time to properly review the medical evidence because she was about to go on vacation, the hearing officer is presumed to her job properly, absent evidence to the contrary. The claimant's bare assertion is not evidence. Regarding the statement that the carrier's witnesses are not listed on the decision and order, we note that the name of the employer's representative, Mr. R, was the only name omitted from the witness list. We have the transcript of the CCH and we have reviewed his testimony. We perceive no error in the administrative oversight

of not listing Mr. R as a witness. As to the comment about a witness being “paid off for [their] testimony,” the claimant is referring to Ms. H, the expert in ergonomic studies. Ms. H was asked if she was being paid for her testimony, and she replied that she was being paid for her time. We note that experts are frequently compensated for their time and their work, and such circumstance was properly before the hearing officer to aid her in deciding how much weight to assign to the testimony of the expert. We perceive no error. Lastly, concerning the documentation presented for the first time on appeal, 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). Dr. V has been claimant's treating doctor since April. With due diligence, information from Dr. V could have and should have been developed prior to the CCH. The letter from the CWA existed some seven weeks prior to the CCH, and the claimant testified briefly as to its contents (transcript, p. 73-75). Neither of these items qualify as newly discovered evidence.

The hearing officer did not err in determining that the claimant did not sustain damage or harm in the form of a repetitive trauma injury on _____. The claimant had the burden to prove that she sustained damage or harm in the form of a repetitive trauma occupational disease, arising out of and in the course and scope of her employment. See Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. The hearing officer concluded that the claimant failed to meet her burden. The hearing officer had the benefit of seeing and hearing the witnesses as they testified, and was best able to assess their credibility. Given the evidence presented as to the nature of the work done by the claimant, the hearing officer could conclude that the work did not rise to the level of being repetitive. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate-reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The hearing officer did not err in determining that the claimant did not have disability. The 1989 Act requires the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16). Because the claimant did not sustain a

compensable injury, the hearing officer properly concluded that the claimant did not have disability.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**WILLIAM PARNELL
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231.**

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge