APPEAL NO. 012231
FILED NOVEMBER 1, 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 August 13, 2001. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and that he did not have disability. The claimant appeals the adverse determinations on sufficiency of the evidence grounds. The respondent (carrier) replies, urging that the determinations of the hearing officer be affirmed.

DECISION

Affirmed.

The claimant attached numerous medical records and off-work slips to his appeal which were not timely exchanged after the benefit review conference (BRC) in this case. From the dates of the documents, it is apparent that most of these documents are records of medical treatment received after the March 27, 2001, BRC. The carrier has objected to consideration of these new matters. We will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine 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 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). We conclude that this additional documentation does not meet the above criteria, as it has not been shown to be so material that it would probably produce a different result had it been in evidence at the CCH. We decline to consider the additional matters.

The claimant alleged that he sustained a low back injury as a result of a slip and fall while attempting to climb out of the muddy hole he was digging to verify that drain pipes had been placed as required in the construction of a custom home. The claimant was a supervisor of the construction, and claimed that the pipes had been properly placed. The homeowner was concerned that the pipes were not placed under the foundation, and the employer directed that the claimant dig and locate the pipes. There was conflicting evidence presented as to whether the claimant's job was in jeopardy over this situation. There was a dispute over the size of the hole dug by the claimant, and a contention by the employer that this was a spite claim. The claimant did not seek medical treatment for approximately two weeks after the alleged injury.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility

that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust, and we do not find it to be so in this case. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

Given our affirmance of the hearing officer's determination that the claimant did not sustain a compensable injury, we likewise affirm his determination that the claimant did not have disability. By definition, the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

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

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Michael B. McShane
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge