APPEAL NO. 031504
FILED JULY 17, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 13, 2003. The hearing officer determined that the appellant's (claimant) compensable injury of _____, does not include an injury to the lumbar spine. The claimant appeals on sufficiency of the evidence grounds, attaches a document not previously admitted in evidence, asserts that the respondent (carrier) misrepresented the contents of Carrier's Exhibit No. 2, complains about the admission of Carrier's Exhibit No. 2, and complains of the assistance received from the ombudsman. The carrier responds, urging affirmance.

DECISION

Affirmed.

The claimant attached one page of medical records from Dr. B to his appeal. Documents submitted for the first time on appeal are generally not considered, unless they constitute newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993. To constitute "newly discovered evidence," the evidence must have come to the appellant's knowledge since the hearing; it must not have been due to a lack of diligence that it came to the appellant's knowledge no sooner; it must not be cumulative; and it must be so material that 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). After reviewing the document attached to the appeal that was not in evidence, we cannot agree that it meets the requirements for newly discovered evidence and, as such, it will not be considered.

The claimant asserts that the carrier misrepresented the contents of Carrier's Exhibit No. 2, by characterizing the records as more than 20 visits to Dr. B during which the claimant did not make complaints of lumbar or leg pain. The first page of that exhibit is a record from Dr. B, but the following six pages of the exhibit are clearly marked as "Physical Therapy Record," and do reflect 20 visits to the physical therapist without any mention of lumbar or leg pain during the December 19, 2000, through March 2, 2001, timeframe. We perceive no error, even if the carrier incorrectly identified the actual source of the records. The hearing officer noted that "Even though all of the evidence presented was not discussed, it was considered." We can presume that the hearing officer correctly noted that these were records from a physical therapist, rather than from Dr. B. In any event, the obvious reason for offering the records was to demonstrate that there were numerous visits to medical care providers over the course of several months that did not document lower extremity complaints. Clearly, these records are part of the evidence upon which the hearing officer based his Finding of Fact No. 7 that: "The claimant had no documented lower extremity complaints between May 22, 2000, and August 8, 2001."

We next address the complaint about the admission of Carrier's Exhibit No. 2 into evidence. The claimant did not object to the admission of the exhibit at the hearing. Any error in the admission of the document was, therefore, waived and will not be addressed for the first time on appeal.

Claimant next complains of the assistance of the ombudsman in that he did not object to admission of Carrier's Exhibit No. 2. As we have noted in the past, an ombudsman is available to assist a claimant, not to be the claimant's legal representative. A claimant is still responsible for the presentation of his or her case and for insuring that the evidence considered appropriate and persuasive is presented to the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 931006, decided December 17, 1993. We perceive no error.

Extent of injury is a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer reviewed the record and the extensive conflicting medical evidence, and was not persuaded that the compensable injury of _____, extended to or included an injury to the claimant's lumbar spine, or that the claimant's lumbar spine condition was causally related to the compensable injury of _____. We conclude that the hearing officer's determination is sufficiently supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

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

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge