APPEAL NO. 041438
FILED JULY 29, 2004

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 14, 2004. The hearing officer resolved the disputed issues by determining that the appellant's (claimant) _____, compensable injury does not include hypertension, inflammation of the sternum, sleep apnea, fibromyalgia/connective tissue disorder, post-traumatic stress disorder, and headaches, and that the claimant has not exhausted the advance from the third party action requiring the respondent (carrier) to resume payment of benefits pursuant to Section 417.002(c). The claimant appeals these determinations and attaches numerous documents to her appeal, some of which were not offered into evidence at the hearing. The carrier responds, urging that the new evidence should not be considered on appeal and that the hearing officer's decision should be affirmed.

DECISION

Affirmed.

The claimant attached new evidence to her appeal, some of which was not offered into evidence at the hearing. 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; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Upon our review, the evidence offered is not so material that it would probably produce a different result. The evidence, therefore, does not meet the requirements for newly discovered evidence and will not be considered on appeal.

With regard to Dr. W report specifically, the claimant offered this evidence at the hearing, but the hearing officer excluded it on the basis that it had not been timely exchanged with the carrier and the claimant did not have good cause for failing to timely exchange it. We perceive no error in the hearing officer's application of the exchange rules. We decline to consider Dr. W's report on appeal.

The claimant expresses disagreement with the hearing officer's rendition of the facts of the case contained in the Background Information section of the decision and the fact that the hearing officer did not discuss all of the evidence in the case in this section. Section 410.168 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(a) (Rule 142.16(a)) require only that the hearing officer make findings of fact, conclusions of law, determine whether benefits are due, and award benefits. A statement of evidence as presented in the Background Information, needs only to reasonably reflect the record. Each area that the hearing officer addressed in the Background Information section is supported in the record. Accordingly, we cannot agree that the hearing officer's decision was not based on the evidence or that the decision is improper.

Extent of injury is a factual question for the hearing officer to resolve. 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 of the weight and credibility that is to be given to the evidence. It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Nothing in our review of the record indicates that the hearing officer's extent-of-injury determination is 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).

Section 417.001(a) provides, in part, that an employee may seek damages from a third party, who is or becomes liable to pay damages for a compensable injury, and may also pursue a claim for workers' compensation benefits. Section 417.001(b) provides for the subrogation rights of the insurance carrier. Section 417.002(a) provides that the net amount recovered by the claimant in a third-party action shall be used to reimburse the insurance carrier for benefits, including medical benefits, that have been paid for the compensable injury. Section 417.002(b) provides that any amount recovered that exceeds the amount of the reimbursement required under Subsection (a) shall be treated as an advance against future benefits, including medical benefits, that the claimant is entitled to receive under this subtitle. Section 417.002(c) provides that if the advance under Subsection (b) is adequate to cover all future benefits, the insurance carrier is not required to resume the payment of benefits, but if the advance is insufficient, the insurance carrier shall resume the payment of benefits when the advance is exhausted. The hearing officer noted that the claimant "presented no credible evidence that she received a third party settlement much less that she has exhausted the amount received in the settlement." We perceive no reversible error in the hearing officer's resolution of this issue.

The decision and order of the hearing officer are affirmed.

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

CINDY GHALIBAF
7610 STEMMONS FREEWAY, SUITE 350
AUSTIN, TEXAS 78758.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Edward Vilano
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge