APPEAL NO. 990981
AND 990982

On April 6, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were: (1) whether appellant (claimant ) has had disability as a result of the injury sustained on (date of injury of 1997); (2) whether claimant sustained an injury in the course and scope of her employment on (date of injury of 1998); and (3) whether claimant has had disability as a result of the injury sustained on (date of injury of 1998). Claimant requests reversal of the hearing officer's decisions that: (1) claimant has not had disability as a result of her injury of (date of injury of 1997); (2) claimant did not sustain an injury in the course and scope of her employment on (date of injury of 1998); and (3) because claimant did not sustain a compensable injury on (date of injury of 1998), she has not had disability as a result of that claimed injury. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

Claimant testified that on (date of injury of 1997), she was working as an unarmed security guard for the employer when the heel of her shoe got caught while on stairs and she fell. The parties stipulated that claimant sustained a compensable injury to her right ankle, right foot, and right knee on (date of injury of 1997). Claimant said that she went to Dr. B and that he referred her to Dr. H. Medical reports reflect that claimant was seen by Dr. R on December 9, 1997, and January 5, 1998, and he noted that a right ankle x-ray was negative. Dr. R prescribed an ace wrap and pain medication and recommended light duty. Claimant was seen by Dr. H on January 15, 1998, and he diagnosed a right ankle sprain, prescribed an air cast, and recommended light duty. Claimant said the air cast was from her ankle to her knee. Claimant indicated that she did not miss time from work except for doctors' appointments, that she continued to work in (date of injury of 1997) as a security guard, and that in January 1998 the employer gave her light-duty work filing papers. She did not indicate that she made less than her preinjury wage when working light duty.

Claimant testified that on (date of injury of 1998), she was filing papers at work with two drawers open when the filing cabinet tilted over on her, hitting her neck, back, and shoulder, and that files that were on top of the cabinet fell on her. Claimant said that she felt fine after that incident and finished her shift, but that that evening she felt pain in her back and neck. Claimant said that she went to Dr. B and was told to come back the next day and that when she went back the next day she was told by Dr. B's office that "the company" would not pay for "it." Claimant said she did not have the money to see Dr. B for her injury of (date of injury of 1998). Claimant said that she did not work after (date of injury of 1998); that she did leave a message at work about not coming in; and that she

was fired on January 27, 1998. She said she was told that the reason she was fired was for not calling in when she had not reported for work.

Claimant said that her supervisor and other employees saw the accident of (date of injury of 1998). Claimant's supervisor stated in a recorded statement that on (date of injury of 1998), the cabinet tilted toward claimant, that claimant pushed it back against the wall with her left upper arm, that the cabinet did not fall, that there was nothing on top of the cabinet that fell, and that claimant said she was fine when asked at that time if she was okay. Two coworkers stated in recorded statements that with two drawers open the cabinet leaned forward, that claimant pushed the cabinet back into place with her shoulder, and that claimant said she was okay. Another coworker stated in a recorded statement that the cabinet came into contact with claimant but that claimant then closed the top drawer and the cabinet went back against the wall. An accident report dated January 26, 1998, reflects that claimant reported a left shoulder and neck strain.

Dr. H's records reflect that he saw claimant on January 30, 1998, and at that time continued to diagnose a right ankle sprain. He noted that claimant told him that a file cabinet had fallen on her. Dr. H also noted that claimant could continue light work and continue wearing her air cast. Dr. H's records reflect that when he saw claimant on February 27, 1998, claimant's ankle was doing better but that she had been fired from her job and that he released claimant to return to normal work activities as of March 2, 1998.

Claimant said that she next saw a doctor for her injuries in September 1998. The Texas Workers' Compensation Commission approved claimant's request to change treating doctors for her injury of (date of injury of 1997), from Dr. B to Dr. RI, on September 3, 1998. Claimant said that between February and September 1998 she took over-the-counter pain medications.

On September 8, 1998, claimant was seen by Dr. O and Dr. O noted a date of accident of (date of injury of 1998); complaints of neck and back pain; a history of a filing cabinet having fallen on claimant's neck and back; and complaints of right leg pain from an old injury, apparently the (date of injury of 1997) injury. Dr. O diagnosed claimant as having intervertebral disc disorder of the cervical and lumbar spine, a thoracic strain, and muscle spasm. He noted that claimant would be treated conservatively and that claimant was unable to work.

Claimant was seen by Dr. RI on September 9, 1998, and Dr. RI noted a date of injury of (date of injury of 1997), and wrote that claimant told him that while she was working on that date she was going downstairs when her heel caught on a step and she fell down, landing on her right knee and also hurting her right ankle and foot. Dr. RI diagnosed claimant as having a sprain/strain of her foot, ankle, and knee, a contusion of her ankle and foot, myalgia, and chondromalacia of the patella. Dr. RI noted that claimant would be unable to work until further notice and that an MRI was being deferred pending claimant's response to treatment.

Claimant was examined by Dr. N at carrier's request on December 15, 1998, and Dr. N gave a date of accident of (date of injury of 1998), and wrote that claimant told him that her injury occurred on that date when a file cabinet fell on her. Dr. N diagnosed a resolved cervical strain and wrote that claimant could return to regular work duties without restrictions.

Claimant was again seen by Dr. RI on January 27, 1999, and at that time Dr. RI added to his diagnoses an internal derangement of the knee, noted that an MRI was being deferred pending response to treatment, and wrote that claimant was totally precluded from regular work duties from September 9, 1998 (when he initially saw her), through February 27, 1999.

Claimant was again seen by Dr. O on March 26, 1999, and Dr. O wrote that nerve conduction velocity studies had shown C6 radiculopathy and S1 radiculopathy and that MRIs of the cervical and lumbar spine were pending. Dr. O noted that claimant is unable to work. Claimant said that she spends most of her time at home in bed because of pain and that she has pain in her ankle, knee, back, and shoulders.

"Disability" means "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). While it is undisputed that claimant sustained a compensable injury on (date of injury of 1997), claimant had the burden to prove that she had disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. Claimant also had the burden to prove that she was injured in the course and scope of her employment on (date of injury of 1998). Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ).

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. The hearing officer determined that claimant did not have disability as a result of her compensable injury of (date of injury of 1997); that claimant did not sustain a compensable injury on (date of injury of 1998); and that because claimant did not sustain a compensable injury on (date of injury of 1998), she did not have disability from that claimed injury. There is evidence that claimant worked after her compensable injury of (date of injury of 1997), until the incident of (date of injury of 1998), and there is no indication that she worked for less than her preinjury wage although she was on light duty. There is also evidence of release to normal work activities as of March 2, 1998. It is clear from the hearing officer's decision regarding the claim of a (date of injury of 1998), injury that she found that the cabinet did tilt toward

claimant, that claimant pushed the cabinet with her shoulder, that no files hit the claimant, and that claimant did not sustain an injury at that time. Claimant requests that we reverse the hearing officer's decisions on all issues and render decisions on all issues in her favor. We conclude that the hearing officer's decisions are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Carrier put into evidence without objection a medical note from Dr. O's office dated October 20, 1998, which references a patient by the name of LW and states that LW is a security guard who twisted her back when she shot a shotgun. Carrier referred to that exhibit in closing argument and claimant's attorney argued that Dr. O must be referring to some patient other than claimant. The hearing officer notes in her Statement of the Evidence that carrier's contention with regard to the claimed injury of (date of injury of 1998), was that claimant had not sought medical treatment for several months and then gave another history of injury. However, it does not appear that the hearing officer relied on the October 20, 1998, note from Dr. O in reaching her decision. Claimant attaches to her request for review of the hearing officer's decision on the claimed (date of injury of 1998), injury a letter from Dr. O dated April 8, 1999 (two days after the CCH), that explains that the October 20, 1998, note about injury from shooting a shotgun is not in any way connected with claimant. Claimant contends that Dr. O's letter of April 8th is new evidence and requests a remand.

Claimant attached to her request for review of the hearing officer's decision on the issue of disability from the (date of injury of 1997), compensable injury a copy of an MRI report dated April 8, 1999, in which a doctor records an impression of a minimal Grade III tear of the medial meniscus of claimant's right knee. Claimant contends that the MRI report is new evidence and requests a remand.

Section 410.203(a) provides that an Appeals Panel shall consider the record developed at the CCH, the written request for appeal, and the response. It has been held that it is incumbent upon a party who seeks a new trial on the ground of newly discovered evidence to show that: (1) the evidence has come to his knowledge since the trial; (2) it was not owing to the want of due diligence that it did not come sooner; (3) it is not cumulative; and (4) it is so material that it would probably produce a different result if a new trial were granted. Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983). Claimant has not shown that she could not with due diligence have obtained an explanation from Dr. O about the October 20th medical note prior to the CCH. Claimant has not shown the MRI report to be noncumulative of other evidence as Dr. RI had diagnosed an internal derangement of the claimant's right knee in January 1999. Claimant has also not shown that the information attached to her requests for appeal is so material that it would probably produce a different result on remand.

The hearing officer's decisions and orders are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge