APPEAL NO. 991635

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 June 30, 1999. With regard to the issues before her, the hearing officer determined that respondent (claimant) sustained a compensable left foot and ankle injury on _____ (all dates are 1997 unless otherwise noted), that claimant timely reported his work-related injury to his employer when he "told his leadman, [sic L] [Mr. LL] that he had injured himself at work," and that claimant had disability from December 22nd through the date of the CCH. The hearing officer's decision on the issues of injury and disability have not been appealed, have become final pursuant to Section 410.169, and will be discussed only in relation to the timely reporting issue.

Appellant (carrier) appeals on the sole basis that claimant had not timely reported his work-related injury because Mr. LL "did not hold a supervisory or management position with [the employer]." Carrier submits additional documentary evidence of Mr. LL's status with its appeal. Carrier requests that we reverse the hearing officer's decision and "remand this case" to the hearing officer for additional evidence regarding Mr. LL's status. The file does not contain a response from claimant.

DECISION

Affirmed.

We will first address the additional documentation carrier submitted with its appeal. We have frequently held that documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the party'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). In this case, the employment information regarding Mr. LL was clearly available before the CCH and tended to be cumulative to the testimony of employer's human resources manager. We find that the document attached to carrier's appeal does not meet the requirements of newly discovered evidence necessary to warrant a remand. *See* Appeal No. 93111.

On the merits, the unappealed findings established that claimant was employed as a loader/operator and that on _____ he was walking on top of a trailer when he fell, injuring his left foot and ankle. The fall was witnessed by a coworker, Mr. JH. Claimant testified that he continued working because he needed the job and was afraid he would be fired if he reported the injury.

Nonetheless, it is undisputed that Mr. LL asked claimant why he was limping and that claimant told Mr. LL about his work-related fall and injury. At issue is whether Mr. LL was such a supervisor who could receive notice on behalf of the employer. Section 409.001 requires that an employee notify the employer of an injury by the 30th day after the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. Whether, and, if so, when, notice is given is a question of fact for the hearing officer to decide. Section 409.001(b)(2) provides that notice may be to an employee of the employer who holds a supervisory or management position.

Claimant testified through a translator. We agree that initially claimant did not even know Mr. LL's last name but referred to his supervisor as "DL" and it was only later that DL was identified as Mr. LL. Claimant was asked if he had reported the injury to a supervisor and claimant identified DL. When asked if DL was his supervisor, claimant replied, "something like that, probably." Later, claimant was asked when was the first time he spoke with a supervisor and claimant replied, "Around September when [Mr. LL] asked me." At another time, claimant testified that ""[i]t was about two weeks into September when [Mr. LL] asked me." Claimant said that he had about three supervisors, naming Mr. LL, T (later identified as Mr. TT who undisputedly was the night supervisor), and another person. Mr. JH testified that he was claimant's helper, that he witnessed the accident, and that he and claimant had the same supervisors, one of whom was Mr. LL. Mr. JH described Mr. LL's job as to "see that everything was supposed to be clean and to do an adequate job." Perhaps the most definitive testimony regarding Mr. LL's status came from the employer's human resources manager, Mr. R, who identified Mr. LL and Mr. TT and who stated that Mr. LL was a welder and

> [h]e sort of was an acting lead man. He worked as well as, you know, as far as, you know, assigning what jobs need to be done.

Mr. R also testified that Mr. LL was not "actually a supervisor" but only did translations.

Based on this testimony, the hearing officer, in an appealed finding determined:

FINDING OF FACT

> 3. No later than September 14, 1997, Claimant told his leadman, [Mr. LL] that he had injured himself while at work when he slipped and fell on a trailer.

Carrier appealed that finding, contending that Mr. LL "was not a supervisor," that Mr. R testified that Mr. LL was only a translator and, pointing to claimant's testimony, that Mr. LL was a welder. We note that it was Mr. R's testimony that suggested Mr. LL was "an acting leadman" and assisted Mr. TT in "assigning what jobs need to be done." The fact that an employee also does translations and welding does not necessarily preclude him from also

having a supervisory position as a leadman. We find the hearing officer's decision to be supported by sufficient evidence. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge