

APPEAL NO. 980117

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 December 8, 1997. The hearing officer determined that: (1) appellant (claimant) did not sustain a compensable left elbow injury or rib injury on _____; (2) the claimed injury was not caused by claimant's wilful attempt to injure himself; and (3) claimant did not have disability. Claimant appealed, contending that he did sustain a compensable aggravation injury of his left elbow and that he had disability. He also complained of *ex parte* communications between the attorney for respondent (carrier) and the hearing officer. The determination regarding self-injury was not appealed. Carrier responds that sufficient evidence supports the hearing officer's decision and order and that there was no *ex parte* communication.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he did not sustain a compensable injury. He asserts that: (1) his preexisting elbow condition involved the ulnar portions of the elbow; (2) he injured the radial part of the elbow and his ribs on _____; (3) he did not have any preexisting condition with his ribs before _____; and (4) he did have disability.

Claimant testified that he slipped and fell at work on _____, injuring his ribs and left elbow. He testified that his _____, injury involved the outside of the elbow and that it was different than his prior elbow condition. Claimant said he was told x-rays showed a rib fracture. Claimant said that he had undergone elbow surgery in June 1997, that he had gone back to work two weeks after the surgery, that the surgery was a success, and that his elbow was "fine" after the surgery. Claimant indicated that his group health insurance had initially refused to pay for his June 1997 elbow surgery, but that it eventually paid for the surgery.

(Mr. GA), claimant's supervisor, said that claimant told him before the _____, fall that he was upset because carrier would not pay for his elbow surgery or painkillers and that if he did not have an answer about whether it would pay by that same week, he would sue them.

In an April 30, 1997, medical report, (Dr. BO) stated that claimant had been treated by his family physician for left elbow problems. He indicated that the treatment was for olecranon bursitis. A May 21, 1997, report states that claimant has a possible loose bone fragment in his left elbow. In a June 9, 1997, report, (Dr. BE) states that claimant has a history of arthritis and possible rheumatoid arthritis "who has been treated for some time

now with medications and injections for left elbow pain.” The diagnosis stated in the report was, “synovitis, arthritis, left elbow; failed conservative care; possible rheumatologic involvement.” In a July 1997, report, Dr. BE said “[claimant] struck his elbow “at work, at some time in the beginning of the year. The patient is somewhat vague about the time. He underwent surgery on June 9, 1997, for elbow spur excision.” A July 1997, examination report states that claimant was injured when his “elbow [was] struck by [a] falling alignment rack,” that the date of injury was “1997” and that the diagnosis is “elbow synovitis.” In an August 1, 1997, medical report, Dr. BO stated that claimant fell at work, hurting his ribs and left elbow, and said that claimant had just had elbow surgery “and he was doing well before he fell.” In an August 27, 1997, report, Dr. BE stated that x-rays showed no fracture of claimant’s ribs or elbow. In a September 10, 1997, report, Dr. BE diagnosed a contusion of claimant’s left elbow and stated that if an injection did not help, radial head excision and synovectomy of the radial capitellar joint would be considered.

In an August 4, 1997, transcribed written statement, claimant told (Ms. HY), an employee for carrier, that he cannot use his left arm and the two discussed insurance coverage regarding his left elbow. In an undated, transcribed written statement, claimant described his fall at work on _____, to Ms. HY, stated that he understood that she denied his left elbow claim that they had discussed previously, and said that he had been using his left elbow at work and that he had been having no problems with the left elbow, except a loss of strength.

A finding of a new injury or aggravation of a preexisting condition is not necessarily compelled simply because the claimant experiences pain. The mere assertion that there has been an aggravation does not carry the burden that the proponent has to prove that an injury occurred. Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994. What must be proven is not a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not completely resolved, but that there has been some enhancement, acceleration, or worsening of the underlying condition from the injury. Whether a claimant has sustained a compensable new injury as claimed by the claimant, or a compensable injury by way of aggravation of a preexisting injury or condition, are ordinarily questions of fact to be determined by the hearing officer.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Here, the hearing officer reviewed the evidence and determined that claimant did not sustain an aggravation injury to his elbow or an injury to his ribs on _____. We have

reviewed the evidence in this case and we conclude that this determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. The fact that there could have been different inferences based on the record does not mean that there is reversible error. We also affirm the hearing officer's disability determination. Because there was no compensable injury, there can be no disability.

Finally, we consider claimant's assertion that the hearing officer and the attorney for carrier may have engaged in *ex parte* communication about his case. He asserts that the two arrived together to the CCH, that they had been on the same airplane from another city, and that he suspected that they discussed his case. There is no basis in the record for claimant's assertion. Claimant did not raise this concern at the CCH. We consider allegations of *ex parte* communications a very serious matter. Texas Workers' Compensation Commission administrative law judges do receive training regarding improper communications and Section 410.167 of the 1989 Act prohibits *ex parte* communication. Because there is only a bald assertion of such improper contact before us, we find no basis for reversal.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge