APPEAL NO. 990374

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 January 20, 1999. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a new compensable injury to his left elbow on _____, and that the respondent (carrier) did not waive its right to contest the compensability of the alleged new left elbow injury because it raised its contest within 60 days of the date it received written notice of the alleged new injury. In his appeal, the claimant argues that the hearing officer's determination that he did not sustain a new left elbow injury on _____, is against the great weight of the evidence. In its response, the carrier urges affirmance. The claimant did not appeal the hearing officer's determination that the carrier timely contested compensability of the claimed new left elbow injury.

DECISION

Affirmed.

It is undisputed that the claimant sustained a fracture of the radial head of his left elbow on _____, while he was working for (employer), which was a non-subscriber to workers' compensation at that time. On (subsequent date of injury), the claimant sustained a refracture of the radial head while he was moving a bed at work for the employer, who was still a non-subscriber at the time of the second injury. Dr. M treated the claimant for his second injury. Dr. M diagnosed the claimant's problem as a left elbow contracture. Dr. M scheduled the claimant for an excision of the radial head and a capsulectomy. When the claimant was under anesthesia, Dr. M was able to obtain full flexion and extension of the elbow, thus, Dr. M did not proceed with the surgery. In a letter of November 10, 1997, Dr. M stated that "[m]y current thinking in [claimant's] diagnosis would be conversion reaction," noting that there were no abnormalities of the claimant's left elbow and that "[t]here is no reason why he cannot bend his elbow." On December 8, 1997, Dr. M released the claimant to full duty without restrictions.

The claimant testified that on _____, he was working as a maintenance worker for the employer and he was lifting a trash can and dumping its contents into the dumpster, when he felt a sharp pain in his left elbow. He stated that he reported his injury to his supervisor and then he went to the emergency room. The employer had become a subscriber to workers' compensation in the interim. The claimant testified that his left elbow was x-rayed and the x-rays revealed that the radial head had not been refractured. He maintained that the doctor at the emergency room diagnosed a sprain/strain, put his arm in a sling, and gave him pain medication. The claimant began treating with Dr. C, a chiropractor. Dr. C diagnosed a left elbow "strain/sprain injury complicated by previous re-fracture and capsulectomy." It should be noted that although the capsulectomy was scheduled by Dr. M, it was not performed, contrary to Dr. C's apparent understanding. Eventually, Dr. C referred the claimant to Dr. L, an orthopedic surgeon. In a letter of January 26, 1998, Dr. L noted the claimant's history, including the alleged reinjury lifting

incident of _____, and opined that the claimant "has had previous injuries to the left elbow and now has a residual flexion contracture." In a "To Whom it May Concern" letter of May 12, 1998, Dr. G, another orthopedic surgeon who examined the claimant, stated that the claimant was seen for examination and treatment of injuries sustained on _____. Dr. G diagnosed a "left radial head fracture, healing" and "left elbow restricted by residual limited range of motion."

In a report of June 24, 1998, Dr. W, who conducted a records review on behalf of the carrier, stated:

> The reported new injury of _____, I feel, according to the records, was a strain of the left elbow. I feel there is no documentation of a serious injury, only that of a strain. I do not feel there was any additional structural damage to the left elbow in the incident of _____.

On September 1, 1998, Dr. FL examined the claimant at the request of the carrier. Dr. FL diagnosed conversion reaction, explaining that "conversion reaction infers that the claimant is emotionally involved with his physical abnormality but does not infer that a physical abnormality does not exist. Indeed, a physical abnormality at times becomes worse with an emotional magnification of the problem." Dr. FL concluded:

> His injury of _____, appears to be a continuation of the previous elbow injuries. I should think that there was reinforcement of his conversion reaction as a result of his incident on _____.

The claimant argues that the hearing officer's determination that he did not sustain a new left elbow injury on _____, is against the great weight of the evidence. That issue presented a question of fact for the hearing officer to resolve. Generally, an injury issue can be established on the basis of the claimant's testimony alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of the claimant is not determinative, it only raises an issue of fact for the hearing officer to resolve. Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence under Section 410.165(a). A review of the hearing officer's decision demonstrates that she gave more weight to the opinion of Dr. FL that the _____, injury appeared to be a continuation of the previous injuries rather than a new injury. The hearing officer was acting within her province as the fact finder in resolving the conflicts and inconsistences in the testimony and evidence by accepting Dr. FL's opinion over the evidence tending to demonstrate that the claimant had sustained a new strain/sprain injury in the _____, incident at work. Our review of the record does not demonstrate that the hearing officer's injury determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, no sound basis exists for us to reverse that determination on appeal.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Judy L. Stephens
Appeals Judge