APPEAL NO. 990948

This appeal arises pursuant to the Texas Workers' Compensation Act. Of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 13, 1999, a hearing was held. She (hearing officer) determined that the respondent (claimant) sustained a cervical disc injury and a left shoulder injury on _____, in addition to the cervical strain and head contusion injuries previously agreed to by the parties. She also found that claimant incurred disability from October 4, 1998, through the date of the hearing and that claimant's treating doctor is Dr. R, D.C. Appellant (carrier) asserts that the hearing officer did not determine whether claimant had herniations as addressed by the issue, that the determination of a shoulder injury is "contrary to the evidence," and that claimant's employer was willing to provide limited work for claimant, implying that no disability should be found. Finally, carrier states that claimant made the emergency room (ER) doctor, Dr. Ha, his treating doctor. The appeals file contains no reply from claimant.

DECISION

We affirm.

Claimant worked for (employer) on _____, as a laborer. He testified that on that date a vacuum hose, under pressure, hit him in the face, knocking him off his feet and onto the ground and rendering him unconscious for some period of time. He was conscious by the time an ambulance arrived. The hospital to which he was taken then kept him overnight to address possible effects of a concussion. Claimant said he told the ER personnel that his left arm, neck, and back were painful, in addition to his lacerated face. He was seen by Dr. Ha. He had about 10 stiches and was told to return for their removal.

Claimant returned on October 7, 1998, and Dr. Ha noted that the stitches were removed. He returned on October 14, 1998, and Dr. Ha noted that he had full motion of his left shoulder. Dr. Ha also said that claimant could work light duty without using his left arm. The hearing officer found that Dr. Ha provided follow-up care related to claimant's initial visit to the ER. The evidence sufficiently supported that determination which was consistent with the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(c) (Rule 126.9(c)), which state that an emergency care doctor is not the treating doctor unless the claimant seeks treatment other than follow-up care. Claimant first saw Dr. R on October 23, 1998. The evidence sufficiently supports the finding of fact that Dr. R is claimant's treating doctor.

While Dr. Ha had stated to the employer that claimant could do light duty, Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991, pointed out that Rule 129.5(b) allowed only two people to provide the basis for a *bona fide* offer of limited work–the employee himself or his treating doctor–which could serve to reduce temporary income benefits even if not accepted. There was no issue concerning whether a *bona fide* offer was made, and Dr. Ha was not found to be the treating doctor.

Dr. R took claimant off work in his note of October 23, 1998; he also took him off work through an off-work slip dated October 26, 1998, and through similar statements regarding claimant's inability to work in December 1998, and in January, February, and March 1999. Dr. R noted cervical spasms on examination. With Dr. Ha having restricted claimant's work, with claimant not having worked after the date of injury, and with Dr. R taking claimant off work as recently as March 1999, the hearing officer was sufficiently supported in finding that claimant had disability from October 4, 1998, until the date of the hearing.

As stated, the parties agreed that claimant's injury included a cervical strain. Carrier is correct in stating that the hearing officer "did not make findings . . . on the issue as worded." The issue asked whether the injury extended to "cervical herniations," so technically, even if there were one herniated cervical disc, the answer to the question posed by the issue would still be in the negative. Such an issue, particularly with the parties having agreed that a cervical sprain injury has occurred, in effect, asks what is the current extent of the claimant's cervical injury, implying further that the question is addressing the extent of the cervical disc(s) injury. The hearing officer determined that tests show claimant has "cervical disc problems" and that it has not been determined whether one or more cervical discs are herniated; she then concluded that the cervical injury included "cervical disc injury."

Claimant had one, and possibly two, cervical MRIs. Dr. L may be referring to an MRI dated November 30, 1998; he gives that date at the top of his report and gives a dictated date at the conclusion of December 1, 1998. On a shoulder MRI, Dr. L gives a date at the top of the report of November 17, 1998, and gives a dictated date at the conclusion of November 18, 1998. Dr. La stated that he reviewed a cervical MRI made on November 17, 1998, and dictated his report on December 7, 1998; Dr. La said there was no evidence of "focal discrete protrusion or herniation" and said the exam was "normal." Dr. L considered the MRI, possibly made on November 30, 1998, as showing a 2.5 mm bulging disc at C2-3 that was "indenting upon the thecal sac"; a protruding disc at C3-4 that had "mild indenting upon the thecal sac; another protruding disc at C4-5 with "minimal indenting upon the thecal sac"; and at C5-6 he noted a shallow bulging disc.

Two doctors besides Dr. R considered one or more of the cervical MRIs. Dr. H examined claimant on behalf of the carrier in January 1999, and concluded that claimant's sprained or contused cervical spine and left shoulder have resolved leaving symptoms and studies that reflect previous conditions. Dr. M examined claimant in February 1999, on referral from Dr. R. He reported that claimant had a "post-traumatic internal disc derangement in the cervical and lumbar spine," but said the most severe problem was in regard to the left rotator cuff. Dr. M stated that the MRI did not show "frank herniation," but did show disc desiccation and bulging throughout the cervical spine.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. She considered that a shoulder injury was reported beginning with the initial hospitalization and that the shoulder MRI showed a probable tear in determining that a left shoulder injury was sustained. She also referred to Dr. H's opinion that any

cervical injury had resolved but stated that claimant could work without problem before the injury and concluded that claimant's neck and shoulder problem are a natural result of the force exerted on claimant, noting it caused him to "fly in the air" before falling to the ground. With Dr. R's, Dr. Ha's, and Dr. M's opinions in the record we cannot say that the determinations of a left shoulder injury and a cervical disc injury are against the great weight and preponderance of the evidence.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge