APPEAL NO. 991436

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 27, 1999, a hearing was held. He (hearing officer) determined that respondent's (claimant) compensable injury to his low back and left ankle of _____, was a producing cause of the claimant's left ankle internal derangement, and that appellant (carrier) waived its right to dispute compensability of the left ankle derangement. Carrier asserts that it disputed "the left ankle injury," stating that its dispute of June 29, 1998, was timely and sufficient; it also stated that claimant's ankle condition was preexisting and there was no evidence that aggravation of that condition was other than temporary. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____; he testified that on that day he slipped and fell on some stairs at work injuring his left ankle and low back. He was taken for medical care that day to an emergency room in (City). Claimant was diagnosed at that time as having a left ankle sprain and was placed in a splint. Claimant saw Dr. M beginning on April 9, 1998, who noted a history of "chronic left ankle pain as the result of a childhood injury" with an _____, fall injuring that ankle and his low back. Dr. M noted that claimant was on crutches and observed swelling of the left ankle. On April 20, 1998, Dr. M stated that claimant reported his ankle felt better and that "his level of left ankle discomfort is similar" to that before the injury. Dr. M estimated that maximum medical improvement (MMI) could be reached in six to 12 weeks. (He did not differentiate between the low back and left ankle in providing the estimate as to MMI.) On May 4, 1998, Dr. M recorded that claimant's back was worse than his ankle, adding, "he says that he has only low grade left ankle pain similar to that which he had prior to this injury." Claimant was observed to walk with a normal gait "without a brace." Dr. M, however, extended his estimate of the date of MMI by saying it should be reached in six to 12 weeks.

Carrier cited the above reports by Dr. M in a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) it dated June 25, 1998, in which it said, "per Dr. M's report dated May 4, 1998, the employee reached preinjury status for his left ankle by his own admission." Carrier then dated another TWCC-21 July 7, 1998, and said in that form, "per Dr. M's report dated April 20th, the employee reached preinjury status for his left ankle by his own admission." Thereafter, carrier in a TWCC-21 dated January 20, 1999, said, "the accident with insured did aggravate the employee's pre-existing arthritic condition in his left ankle." The parties stipulated that carrier received written notice of the internal derangement of the left ankle on July 15, 1998. The hearing officer found that the carrier did not dispute internal derangement of the ankle until March 1999 when a benefit review conference was held. The hearing officer says in his Statement of Evidence and Discussion that the phrase used by carrier about preinjury status, according to pain

claimant felt, does not amount to a dispute concerning internal derangement of the left ankle.

Whether or not a statement constitutes a dispute of a particular injury is generally a fact question for the hearing officer to determine. While the Appeals Panel has said the disputing language may be considered as a whole, the language used in this case may be reasonably interpreted as not constituting a dispute of an internal derangement ankle injury; it may also be reasonably interpreted as not sufficiently saying that the carrier disputes any injury other than an ankle sprain. The determination that carrier waived its right to dispute compensability of the internal derangement injury to the ankle is sufficiently supported by the evidence.

Whether or not a claimant sustains an aggravation injury to a preexisting condition is also a fact question for the hearing officer to determine. *See* Section 410.165 which specifies that the hearing officer is the sole judge of the weight and credibility of the evidence. Both claimant and his supervisor provided evidence indicating that claimant was able to regularly work full-time prior to the compensable injury of April 1998. The hearing officer could still question whether there was an aggravation of claimant's ankle condition based on claimant's own admission in late April 1998 that his pain had returned to the level he had prior to the compensable injury. On the other hand, the hearing officer could give weight to a June 10, 1998, report of Dr. C that said claimant had lateral instability of the left ankle along with the pain, and the hearing officer could note that claimant never admitted in April that his instability in the left ankle was at the same level as before the injury. While not addressing claimant's ankle injury, claimant was seen in August 1998 by Dr. B on a referral about the low back. In that report, Dr. B noted degenerative changes at L3-4 and L4-5, as shown by studies and then commented:

> While the patient's degenerative changes clearly pre-exist his injury, they were silent prior to his falling. It is <u>not unusual</u> for such a significant trauma to ignite previously asymptomatic difficulties. [Emphasis added.]

A fact finder could consider that statement in evaluating whether claimant's fall aggravated his preexistent ankle condition or whether the fall merely caused a temporary problem in the ankle that had passed no later than April 1998. In addition, the hearing officer could give significant weight to the handwritten January 1999 statement of Dr. Ch of Hospital, who stated that the ankle "sprain" in April 1998, "<u>aggravated</u> severely" a preexisting condition. (Emphasis as written.) Dr. Ch added that rehabilitation was not successful and fusion surgery was performed. (Claimant said the surgery occurred in October 1998.) Claimant also testified that his ankle "tendons were torn severely," but a copy of the operative report was not submitted by either party to show whether tears had occurred and whether they were acute or not. Nevertheless, considering all the evidence, including that of Dr. Ch and the admission of carrier in its 1999 TWCC-21, the hearing officer was sufficiently supported in determining that the compensable injury was a producing cause of the internal derangement of the left ankle.

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:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge