APPEAL NO. 000927

On April 5, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. The hearing officer resolved the disputed issues by deciding that appellant (claimant) did not sustain a compensable injury on _____; that claimant has not had disability; that there is no issue of extent of injury because there was no compensable injury; and that respondent (carrier) did not waive the right to contest compensability. Claimant requests that the hearing officer's decision on all issues be reversed and that a decision be rendered in her favor. Carrier requests that the hearing officer's decision be affirmed.

DECISION

Affirmed.

Claimant began working for employer preparing medical records for microfilming on July 26, 1999. It is undisputed that on _____, claimant was performing her normal work duties when she lifted and carried a box of medical records and the box handle on the left side broke. Claimant said that she felt a pop in her left shoulder and had pain in her left shoulder and the left side of her neck as she held on to the box to keep it from hitting a coworker. Claimant said that she immediately reported to her lead person that she had hurt herself and that the lead person told her to inform the supervisor, PE, of her injury. Claimant said that about five minutes later she told PE that she had hurt her left arm, left shoulder, and neck when the box handle broke. Claimant said that she was in pain but continued to work her regular job duties with the help of her coworkers until she was terminated from employment for excessive absenteeism on October 27, 1999. Claimant said that her absences were not due to any work-related injury. Claimant said that she had no injury at work other than the injury of _____, and that she has not worked since October 27, 1999.

Claimant went to Dr. V, on October 29, 1999, and Dr. V wrote that claimant told him that she was picking up boxes on _____, and injured her left shoulder and cervical spine. Dr. V wrote that a cervical x-ray showed a reversal of the cervical lordosis and that cervical and left shoulder motion was abnormal. Dr. V diagnosed claimant as having shoulder impingement syndrome, cervical segmental dysfunction, and shoulder myofascitis. Dr. V and Dr. G, have continued to treat claimant for complaints of left shoulder and neck pain since October 29, 1999, and they have noted that claimant has muscle spasms and trigger points in her left upper extremity and neck as well as reduced cervical and left upper extremity motion. Since October 29, 1999, Drs. V and G have written that due to her injuries, claimant is to be excused from work. Dr. Lancaster, D.C. (Dr. L), reviewed medical records and other documents at carrier's request and reported on February 10, 2000, that a November 11, 1999, left shoulder x-ray was negative. Dr. L opined that there was no compensable injury to claimant's cervical spine and that there may be a sprain/strain injury to claimant's shoulder. Dr. B examined claimant at carrier's

request on March 16, 2000, and he assessed a resolved left shoulder rotator cuff strain but in doing so noted that there was no objective evidence of injury at the time of his examination, that claimant had full range of motion of her cervical spine, that impingement tests of the left shoulder were negative, and that claimant did not appear to give a full effort in upper extremity motion testing.

PE testified that about 8 to 10 days before the incident of _____, claimant told her that she had hurt her left hand picking up a box at work but that claimant told her that she was okay. PE said that immediately after the box handle broke on _____ she asked claimant if she was okay and claimant said that she was. She said that claimant did not report to her on October 11th or on any day after that that she was in pain or that she was injured in any way. PE said that after the box-handle incident of_____, claimant did not appear to have any difficulty doing her job and did not say that she needed assistance. PE said that when she terminated claimant from employment for excessive absenteeism, which started about a week after claimant was hired, claimant said nothing about having been injured. PE said that the undated accident reports that she filled out were done after claimant had been terminated from employment because that is when she became aware that claimant was claiming an injury and that there was some confusion as to whether the claimed injury was from lifting a box prior to _____ or from the box handle breaking on _____. The coworker that was almost hit by the box on _____ stated in a written statement that after the box handle broke, claimant continued to work and made no comment about having hurt herself. Another coworker, who did not sign her statement, wrote that claimant frequently complained about her back and hand hurting.

Injury, compensable injury, and disability are defined in Sections 401.011(26), (10), and (16), respectively. Claimant had the burden to prove that she was injured in the course and scope of her employment and that she had disability. The hearing officer found that on _____, claimant did not injure any part of her body when she kept the box from falling when the handle broke and that claimant's inability to obtain and retain employment is because of something other than an injury at work. The hearing officer concluded that claimant did not sustain a compensable injury on _____; that claimant has not had disability; and that because there was no compensable injury, there is no issue of extent of injury. Claimant contends that the hearing officer's findings and conclusions are against the great weight and preponderance of the evidence. The hearing officer wrote in his decision that he did not find claimant to be credible. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. Without a compensable injury, claimant would not have disability as defined by Section 401.011(16). We conclude that the hearing officer's findings and conclusions on the issues of compensable injury and disability are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Another issue was whether carrier waived the right to contest compensability pursuant to Section 409.021. Carrier's Payment of Compensation or Notice of Refused/ Disputed Claim (TWCC-21) states that carrier's first written notice of injury was received on November 22, 1999. Carrier filed the TWCC-21, which disputed compensability of the claimed injury of _____, with the Texas Workers' Compensation Commission on December 2, 1999. Claimant contended at the CCH that carrier had seven days in which to contest compensability. The hearing officer found that, because there was no injury, carrier was not required to contest compensability and he concluded that carrier did not waive the right to contest compensability. Claimant contends on appeal that the hearing officer's finding of no injury in regard to the waiver issue is against the great weight and preponderance of the evidence and that the hearing officer erred in his conclusion on that issue.

It is clear from the hearing officer's decision that he did not find claimant's testimony credible and that he gave little weight to the medical records as he did not find them persuasive. Much of the medical evidence was dependent upon what claimant told her doctors regarding her complaints of pain. A fact finder is not bound by the testimony (or evidence) of a medical witness where the credibility of that testimony (or evidence) is manifestly dependent upon the credibility of the information imparted to the medical witness by the claimant. Rowland v. Standard Fire Ins. Co., 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). While we disagree with the hearing officer's finding that carrier was not required to contest compensability, given that it did receive written notice of injury and it refused to pay benefits, it is clear from the hearing officer's decision that he determined that claimant has no injury, not just that she had no injury that occurred in the course and scope of her employment. In Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.), the court held that if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law. In the instant case, the hearing officer's finding of no injury is not against the great weight and preponderance of the evidence and thus under Williamson any purported failure of carrier to timely contest compensability would not create an injury as a matter of law.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge