APPEAL NO. 94153

This appeal is brought 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 4, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the respondent (claimant) sustained a compensable injury to his back in addition to a wrist injury on (date of injury); whether the claimant reached maximum medical improvement (MMI) and, if so, when; and what was the claimant's correct impairment rating (IR). The hearing officer determined that the claimant sustained a compensable back injury in addition to his compensable wrist injury; that the claimant had not reached MMI, and, for this reason, an IR cannot be determined. The appellant (carrier) appeals only that portion of the decision of the hearing officer that finds a compensable back injury arguing that this determination is contrary to the great weight and preponderance of the credible evidence. The claimant has not submitted a response.

DECISION

The decision and order of the hearing officer are affirmed.

It is not disputed that the claimant injured his left arm and wrist on (date of injury), in the course and scope of his employment at a car dealership when he slipped on loose gravel and fell while getting out of a vehicle. What is disputed is whether his injuries as a result of this accident also extended to his lower back.

The claimant testified that the accident occurred near quitting time. He is Spanish speaking and has very little English language capability. He said he was able to get up by himself after the accident and, with the aid of a coworker who could translate for him, reported it the same day to a supervisor. He stated that his arm was hurting so much that he forgot to mention to his supervisor that his back also hurt and admitted that he never told his employer that he injured his back. A friend took him to a local emergency clinic shortly thereafter. He insisted that he mentioned to a nurse or nurses that he injured his back as well as his arm. No records from the emergency room were in evidence. He was diagnosed with a fracture to his left arm above the wrist, and an external fixator was put in place by (Dr. L) who became his treating physician for the fracture over the succeeding months. According to the claimant, he told Dr. L four or five times that he needed an interpreter to explain to him that he also hurt his back, but Dr. L gave him very little attention. The claimant also testified that he later told coworkers that his wrist was now okay, but he was still having back pains.

Dr. L referred the claimant to a rehabilitation center for physical therapy. Records from the center from September 9, 1992 through November 12, 1992, refer only to care for the wrist, hand and finger. No mention is made of a back injury. The claimant testified that he told therapists on three occasions that his back hurt, but they did nothing other than to suggest he tell Dr. L, but, as the claimant testified, Dr. L did not have an interpreter available to assist him.

On March 18, 1993, the claimant submitted to the Texas Workers' Compensation Commission (Commission) a request to change treating doctors from Dr. L to (Dr. H), a chiropractor. He listed as reasons for the requested change that he could not communicate with Dr. L and that Dr. L only takes a minute to look at his arm and then says good-bye. No mention of back injury was made in the request to change doctors. It was approved on March 22, 1993. In her initial report of April 4, 1993, Dr. H addresses only complaints about the left wrist and arm and reports the claimant as saying only he slipped and fell fracturing his left arm. However, in a follow-on letter of April 26, 1993, Dr. H states that her earlier letter "omitted by mistake" mentioning that the claimant on his first visit complained of constant low back pain since he fractured his left arm. On May 10, 1993, Dr. H diagnosed aggravated spondylolisthesis and posttraumatic lumbar strain.

The claimant on April 15, 1993, submitted to the Commission the Spanish language "Employee's Notice of Injury or Occupational Disease and Claim for Compensation" (TWCC-41S) on which he wrote at the top "amended" and in which he lists both his left arm and "espalda" (back) as the body parts injured and states that because his arm hurt so much at the time of the accident he directed his attention to it and did not report his back injury.

In a Report of Medical Evaluation (TWCC-69) prepared by (Dr. E)[1] as a result of an office visit by the claimant on May 28, 1993, Dr. E determined MMI to be the same date and assigned a 15% IR. He rated only the claimant's upper left extremity and did not mention any complaints about a back injury. The claimant is in agreement with this insofar as it relates only to his wrist injury. On July 19, 1993, (Dr. C), an independent medical examination doctor, examined the claimant and recorded his chief complaint as "pain of the left wrist and inability to make a tight fist" and directed his attention almost entirely to the claimant's left wrist. He determined MMI to be the date of his examination and assigned a 15% IR for the left upper extremity. (Dr. P), the Commission-selected designated doctor, examined the claimant on August 26, 1993. He records that the claimant complained of a back injury resulting from his (date of injury), accident and attempted to tell Dr. L about his back complaints, but Dr. L was unwilling to assess this problem believing that the primary concern was the left arm. The claimant reported to Dr. P continuing pain in the lower back. Dr. P diagnosed spondylolisthesis of L5 on S1 secondary to a bilateral pars interarticularis defect "with a superimposed traumatic event as the precipitating episode." Dr. P further states that he was asked to assess the back pain only. He determined that the claimant had not yet reached MMI because of his back problems.

The claimant also introduced into evidence statements from three coworkers all written in June 1993 which state essentially that the claimant complained of back pain shortly after his accident and treatment of his wrist and had difficulty communicating this to his doctor. The claimant also submitted a written statement in which he contends that a physical therapist who treated him at the rehabilitation center would confirm his complaints of back pain and that the claimant was unable to explain this to his doctor because of

[1]It is not clear from the record how this referral to Dr. E came about.

language problems and the doctor's apparent unwillingness to spend more than a few minutes with him.

Based on her evaluation of this evidence, the hearing officer found that the claimant injured his back, as well as his wrist, in the course and scope of his employment on (date of injury). The carrier asserts that the "credible" evidence requires a different result because "it is inconceivable and certainly not credible" that the claimant could be treated by three separate medical care providers (in the emergency clinic, by Dr. L and at the rehabilitation center) and not be able to communicate to any of them that he was also claiming a back injury.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer as fact finder may believe all, part or none of the testimony of any witness and the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). It has been held that the existence of a compensable injury may be established by the testimony of the claimant alone, if found credible by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. There was medical evidence in this case that the claimant's current back condition was likely caused by some trauma. The hearing officer could accept the claimant's account of how he injured his back and the claimant's explanation that he tried numerous times to explain that he also injured his back, but was frustrated at every turn by the language barrier.[2] Having reviewed the record in this case, we conclude that the hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence. We, therefore, will not substitute our judgment for that of the hearing officer. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

[2]Timely notice of the injury under Section 409.001 was not an issue at the hearing.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge