APPEAL NO. 990184

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 14, 1998. He (hearing officer) determined that the respondent's (claimant) compensable injury of _____, included the low back and both shoulders. The appellant (carrier) appeals only the determination that the injury included the low back, contending that this determination is against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The finding that the compensable injury included both shoulders has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant worked as a truck driver. He testified that on _____, while hooking up a double set of trailers, the con gear pinned his left hand against the trailer. He was able to wrestle with the con gear and release his hand. The parties stipulated that the claimant sustained a compensable left hand crush injury. The finding that the claimant also injured his shoulders in the process of attempting to hook up the trailers has not been appealed. The claimant contended, and the carrier disputed, that he also injured his low back in this incident.

The claimant testified that his left hand became numb and swollen and that he concentrated most on this rather than his other claimed injuries. He said he delivered his load and returned with a throbbing hand. He admitted that he experienced some general soreness in his back during the preceding week from "manhandling" the con gear, but indicated that this became worse after _____. The claimant continued working despite his injury, he said, because he needed the money, wanted to qualify for "personal insurance" with the employer, and had recently attended a safety meeting where an emphasis was on reducing workers' compensation injuries. He first sought treatment at a clinic on September 8, 1998, where he saw Ms. M, a physician's assistant. The "Workers Compensation Declaration" he completed at this initial visit refers only to soreness in the shoulders, "but it really hurt my hand." In her report, Ms. M mentions only the left hand and radiating pain into the left shoulder region. The claimant testified that the next day he called Ms. M to make sure she included his back in her report and insists he mentioned his back at least in passing even though his and her main concern was with the left hand. Ms. M wrote an "addendum" to her report of September 8, 1998, on September 10, 1998, and commented that she asked the claimant to provide a detailed statement of the full extent of his injuries and that, if he complained of the back, she would certainly have written it down. The claimant saw Dr. P, for whom Ms. M worked, on September 14, 1998. Dr. P's diagnoses included lumbosacral strain. In his report of this visit, Dr. P commented that the claimant "denies any previous back problem or injury" and that the strain was related to the "original" injury. An examination on October 14, 1998, revealed "no remarkable low back

tenderness." Dr. P referred the claimant to Dr. M, a neurologist, who wrote on October 12, 1998, based presumably on a history provided by the claimant, that he injured his low back at the time of the left hand crush injury.

Mr. D, the dispatcher, testified that the claimant reported an injury to him the next morning, but never mentioned anything but the hand. Mr. D said he never asked the claimant if anything else was injured. Mr. G, the line haul manager, testified that he talked to the claimant the next day about the circumstances of the injury and the claimant mentioned only his hand as injured. A month later, he said, toward the end of September 1998, the claimant called him and asked him to amend the report of injury to include the back. Mr. G said he refused to do so because of the time delay since the injury. In rebuttal, the claimant said he had earlier tried to add the back to his claimed injury, but was told only Mr. G could do this and he, the claimant, should wait until Mr. G returned from his vacation. Similarly, the claimant said he called Ms. M the day after his initial visit to make sure her report mentioned a back injury because a doctor at the hospital where his hand was x-rayed stressed the importance of reporting every aspect of a workers' compensation injury.

The claimant had the burden of proving he sustained a compensable low back injury in the manner claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer found the claimant credible and persuasive and determined that he injured his low back on _____, at the time he suffered the left hand crush injury. The carrier appeals this determination for essentially three reasons: (1) that the diagnosis of lumbar strain is not based on any objective testing; (2) that the diagnosis is based on misleading information from the claimant that he had no prior history of a back injury; and (3) that the claimant failed to initially complain of a back injury. The claimant acknowledged at the CCH that he had a prior back injury and that his back was hurting for a few days before the injury, but does not explain how the various doctors reflected no prior back problems in their reports. Clearly this raised questions about the reliability, not so much of the lumbar strain diagnosis, but of the causation analysis. Similarly, the omission of a mention of the back injury in the report of injury and Ms. M's report raises questions about the claimant's credibility and his stated reason for the omission, that is, that he and the health care providers were concentrating on the obviously more serious hand injury. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. It was his responsibility to determine from the evidence what facts had been established. In doing so, he could accept or reject in whole or in part any of the evidence. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer. Rather, we find the testimony of the claimant

deemed credible by the hearing officer sufficient to support his finding that the compensable injury included the low back.

With regard to the lack of objective medical testing to support a strain diagnosis, we observe that the carrier does not identify what testing beyond clinical examination would be necessary or appropriate. According to the claimant, the carrier was denying the compensability of this claim and not authorizing medical care of a back injury. In any case, the diagnoses of Dr. P and Dr. M were based on a clinical examination of the claimant. Dr. P even refers to "no remarkable low back tenderness," from which comment the hearing officer could infer that Dr. P performed some degree of palpation. Contrary to the argument of the carrier, we believe this type of examination constitutes some objective medical testing and data especially in light of the fairly limited nature of the sprain diagnosis.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Tommy W. Lueders
Appeals Judge