APPEAL NO. 001368

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 22, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury to his cervical area (neck) in addition to his low back. The appellant (carrier) appeals, contending that this determination is against the great weight and preponderance of the evidence and based on improper considerations. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant testified that while loading baggage on _____, he injured his low back and neck. Initial treatment records of Dr. N reflect only a complaint of low back pain radiating up to the mid-back even though the claimant testified that he immediately felt neck pain and that after three days his entire back was stiff. The claimant conceded he never mentioned neck pain to Dr. N. The claim was apparently processed as a low back injury. The carrier disputed compensability until a low back injury was accepted by the carrier in November 1999. There is no treatment by Dr. N from May 11, 1999, until January 14, 2000. Dr. N's treatment record for this latter date does not mention complaints of neck pain. Dr. N referred the claimant to Dr. H, whose treatment records from January through May 1999 also make no mention of neck pain or injury. The claimant said he did not mention neck pain to Dr. H because he thought the low back was connected to the neck and that therapy to the former would provide relief to the latter. The claimant also underwent a designated doctor's evaluation on May 17, 1999, which still did not reflect complaints of neck pain. The claimant apparently returned to full duty on June 6, 1999, but was subsequently taken off work for another injury. On July 26, 1999, the claimant requested a change of treating doctors to Dr. VB. The reasons for the requested change referred to pain levels in the "lower back & spine," without specific mention of neck pain.

The first mention of complaints of neck pain in the medical records appears in Dr. VB's report of the claimant's first visit on August 4, 1999. Dr. VB accepted the claimant's history of this condition and concluded that the claimant injured his neck in the original injury on _____. He requested a cervical CT scan which revealed degeneration at C5-6 and bulging and spurring at C6-7. Dr. VB also testified that it was possible that the claimant's neck injury, as reflected in the CT scan, could have arisen after _____.

Also in evidence were the reports of two carrier-selected doctors who reviewed the claimant's medical records and concluded that there was no evidence of a connection between the condition of the cervical spine and the incident on _____.

The claimant had the burden of proof that he injured his neck at the same time he injured his low back. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so presented a question of fact for the hearing officer to decide. The hearing officer commented in her decision and order that she found the claimant credible, presumably in his general description of the incident and immediate onset of neck pain and specifically in "his accounting of the difficulty he experienced obtaining proper medical treatment, while his claim was being disputed." She determined that the compensable injury included the neck. The carrier asserts on appeal that the hearing officer "seemed to base her opinion on the fact that the claim was initially denied, and she believes the claimant had difficulty obtaining medical treatment" and that this was an "improper basis for determining that the cervical area is part of the compensable injury." Because the main position of the carrier was that the absence of references in the medical records to a neck injury was proof that the neck was not injured on _____, we do not consider it prejudicial error for the hearing officer to comment on the difficulty the claimant had in seeking medical care until the low back claim was accepted.

More troublesome is the lack of reference to the neck in those records of the claimant's actual treatment up to August 4, 1999, including the absence of any such reference in the designated doctor's report. The claimant had an explanation for this, which another hearing officer may well have found not persuasive. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In her role as fact finder, she could accept or reject all, part, or none of the evidence. She obviously rejected the opinions of the carrier's doctor in favor of the claimant's testimony and the opinion of Dr. VB. 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 find the evidence deemed credible by the hearing officer sufficient to support her determination that the claimant's compensable injury included her neck.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge