APPEAL NO. 980395

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 4, 1998, a hearing was held in (city), Texas, with (hearing officer) presiding. He determined that claimant's compensable injury to his low back on (date of injury), did not include the thoracic and cervical spine. The claimant did not appeal but appellant (subclaimant) did. She asserts that therapy records show that the thoracic area of the spine was identified as painful two days after the injury and adds that claimant did report thoracic and neck pain during the first week after his injury; she asks that therapy notes attached to her appeal be reviewed. Respondent (carrier) replied that subclaimant has no authority to appeal on claimant's behalf, states that the decision is sufficiently supported by the facts and asks for one modification of the Statement of Evidence.

DECISION

We affirm.

At the hearing both claimant and subclaimant appeared with the ombudsman assisting both. There was no indication there that subclaimant was representing claimant, there is no document in the record that indicates subclaimant represents claimant (*see* Tex. W.C. Comm'n, 28 TEX ADMIN. CODE § 150.3(a)(3) (Rule 150.3(a)(3)), and subclaimant on appeal does not indicate that the appeal is being made on behalf of anyone other than herself as subclaimant. We conclude that claimant did not appeal.

Claimant testified that he worked for (employer) at the time he was injured. He had worked for this employer, as a plumber's helper, about seven months at the time of the accident. On that date, claimant testified he and another worker were moving a large diameter length of PVC pipe when the weight shifted and it fell against claimant's shoulder knocking him backward and to the ground. He immediately complained of, and was taken for medical care for, his low back. The question at this hearing was whether such incident also caused injury to the thoracic and cervical spine.

On (date of injury), claimant was taken to Dr. H; the record only contains an "activity report" for (date of injury) by Dr. H which shows claimant was seen for a lumbar strain and that he was returned to work with limitations. Apparently Dr. H did not record a history or it, along with other possible comments, was not offered into evidence. The record does show that claimant saw Dr. H again (four days after the date of injury); Dr. H on that date provided actual comments about claimant's condition and treatment. Claimant is said to have reported improvement in his low back with some "deep down achy pain" and a change in employers, brought on by having been laid off, which would interfere with therapy in progress. Dr. H noted a limited lumbar range of motion and tenderness in the low back, but normal gait. He closed by commenting that claimant

wanted to return to regular duty, that he warned claimant about lifting and standing, and that claimant still needed more therapy.

Claimant said that (one week after the date of injury), he began his new job with a new employer and at some point during the day went to see subclaimant for the first time. Subclaimant did provide a history which indicated that when claimant and another employee were moving a large pipe it "leaned into his right shoulder too far and brought him down quickly." Claimant was said to have told subclaimant of immediate pain in the low back and "now" has headaches, neck, mid-back, and low-back pain.

Claimant testified that his immediate pain was to the low back but that the next day his neck hurt. He said that when he saw Dr. H the day of the accident he complained of his low back and also reported a "jumbled up feeling" in his upper back. He said he reported the pain in his neck and mid-back to the physical therapist but did not to Dr. H because he was present when the physical therapist told Dr. H of his report of neck and mid-back pain. On cross-examination he said that he did mention his upper back to Dr. H but it "wasn't that big a deal," but said he told Dr. H it did not feel right. In regard to whether Dr. H examined claimant's upper back, claimant said that the doctor "had his hands all over my back." He agreed that (four days after the date of injury) he asked Dr. H to give him a full release. Dr. H gave him the release, but claimant said that Dr. H later called his new employer and put him on light duty.

Claimant said that he worked for the new employer who hired him (one week after the date of injury), about two months. Since then, in October 1997, claimant returned to work for employer again.

No medical evidence shows that claimant complained of his neck or mid-back during the remainder of the week after the accident occurred on Monday, (date of injury). In addition, the evidence in the record shows that claimant complained of his neck and mid-back to subclaimant after he had begun work for the new employer, although claimant did testify that he did little work and did not hurt himself that first day, (one week after the date of injury), at his new job. The subclaimant attached a copy of physical therapy notes dated (two days after the date of injury), which noted both lumbar and thoracic pain on that date, but which also contain a posterior diagram of a human torso with only the low back marked as being involved (although that marking appears to include the upper part of the lumbar area up to, and possibly including, the lowest segment of the thoracic spine). This document was in being at the time of the hearing and no explanation was given as to why subclaimant with due diligence could not have offered it at the time of the hearing, so it will not be used now as a basis for a remand to the hearing officer for him to consider. *See* Texas Workers' Compensation Commission Appeal No. 92326, decided August 28, 1992.

With only Dr. H's records in evidence as documenting medical care during the remainder of the first week after the accident, the hearing officer could believe that Dr. H

would have recorded any notification of complaints to the cervical and thoracic areas had they been communicated to him by a physical therapist as claimant testified. While the hearing officer's Statement of Evidence indicates that subclaimant could not explain how claimant could be treated for a week without noticing and reporting pain to the thoracic and cervical areas, both subclaimant and claimant did not try to explain why there was no report, but rather attempted to show that claimant did complain in physical therapy of such pain. While this comment appears to confuse the positions of the claimant and subclaimant, it is not reversible error, especially in view of the lack of any documentary evidence of such complaints having taken place during the time period in question. Certainly, the hearing officer simply did not have to believe the claimant when he said he reported such pain during the first four days after the accident.

The hearing officer could, and did, question that reports of cervical and thoracic pain only began after claimant changed jobs and changed doctors, according to the available medical evidence.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. While questions of whether a compensable injury also included injury to another area of the body not initially complained of have been answered positively even after delays of many months, the hearing officer could consider the facts peculiar to this hearing. Those facts included that the initial medical care notes conflict with what claimant testified about a discussion between the doctor and the physical therapist about what the injury involved. Those facts also included that claimant asked for a full release before any medical record notes any injury other than the low back. And those facts also included that claimant's complaints of other injuries are only recorded after he changed employers and after he changed doctors.

The Appeals Panel is not a fact finder. While other inferences could have been made from the evidence provided, that is not a sufficient basis upon which to reverse a decision. The Appeals Panel will only overturn a hearing officer in regard to a factual determination when that determination is against the great weight and preponderance of the evidence; in this case, based on the evidence admitted at the hearing, the determination that the compensable injury does not include the cervical and thoracic spine is not against the great weight and preponderance of the evidence. While subclaimant testified that the mechanism of injury would cause injury to the cervical and thoracic spine, the hearing officer did not have to give weight to that opinion (*see* Gregory v. Texas Employers Insurance Association, 530 S.W.2d 105 (Tex. 1975). In addition, the hearing officer could also consider that whether or not claimant reported a cervical and thoracic injury to Dr. H, claimant himself said that Dr. H "had his hands all over my back" in his examination--and Dr. H recorded no tenderness, spasm, or any other abnormality in any area of the back except the low back.

As the carrier points out, in one part of the Statement of Evidence the hearing officer incorrectly states that the evidence does not show the injury includes the "lumbar

and cervical strain," while the words "thoracic and cervical" were probably meant to be provided in that sentence. With no mistake as to the areas of the spine set forth in the findings of fact, the conclusions of law, or the decision and order, that mistake has no effect on the decision in this case.

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:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge