

APPEAL NO. 92534

A contested case hearing was held on June 17, 1992, at (city), Texas, (hearing officer) presiding as hearing officer. Her decision was appealed and in Texas Workers' Compensation Appeal No. 92330, decided August 31, 1992, we reversed and remanded the case because the hearing officer's decision appeared to be principally predicated upon an issue not before her, namely an issue regarding the sufficiency of the carrier's (appellant herein) statement of controversion of the claim. Upon remand, the hearing officer reconsidered her decision and modified it to reflect that she determined that on (date of injury), the claimant (respondent herein) sustained an "additional cervical disc injury" which was compensable. (He had sustained a prior cervical injury in (month), (year). She ordered the payment of medical and income benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq.* (Vernon Supp. 1992). The carrier urges error in the hearing officer's holding that the claimant sustained an injury in the course and scope of his employment and in the order to pay medical benefits. The claimant requests that the hearing officer's decision be affirmed.

DECISION

Finding the evidence sufficient to support the determinations of the hearing officer, the decision is affirmed.

The single issue before the hearing officer at the original hearing and again on the remand was whether the claimant "sustained a compensable injury, specifically an aggravation of a preexisting condition on (date of injury)." The evidentiary posture of the case was set out in the previous decision and will not be repeated here. Suffice it to say, the claimant had an automobile accident in (month year) which resulted in a serious cervical injury. Indeed, surgery was contemplated, and planned at one time, following the accident. The claimant re-injured or aggravated the cervical injury by pushing a cart into a door jamb on (date of injury) and several days later had cervical surgery. Considerable medical evidence was admitted, together with the testimony of the claimant, regarding the sustaining of an additional injury or aggravation of the earlier cervical injury. The hearing officer considered the evidence of record, judged the credibility of the claimant's testimony, and determined that the claimant sustained an additional cervical injury on (date of injury), and that it was compensable. Aggravation of a preexisting injury can be a compensable injury in its own right. Texas Workers' Compensation Commission Appeal No. 92515, decided November 5, 1992. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the testimony (Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and she may believe all, part or none of a witness's testimony and may believe one witness and not believe another. Cobb V. Dunlap, 656 S.W.2d 550 (Tex. Civ. App.-Corpus Christi 1983, writ ref'd n.r.e.). As indicated above, we find the evidence sufficient to support her decision.

Carrier further complains that the order for medical benefits should not be sustained because there was no second opinion sought prior to the spinal surgery, no showing that the carrier waived its right to an examination, and no showing of an emergency circumstance warranting surgery without a second opinion. Article 8308-4.67. Aside from the matter that this was not an issue reported out of the benefit review conference or the issue before the hearing officer (which might well preclude consideration on appeal, Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992), disputes regarding medical treatment of the nature involved here and payment therefore, are governed by Article 8308-8.26 and Texas W.C. Comm'n., 28 TEX. ADMIN. CODE §133.305 (Rule 133.305). Accordingly, we do not address or resolve this assertion of error on appeal.

The modified decision of the hearing officer, which satisfactorily cures the matter on remand, is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge