APPEAL NO. 94199

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 January 27, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was whether the condition of the respondent's (claimant herein) back, for which two doctors have opined a need for spinal surgery, was caused by or was a result of his (date of injury) injury. The hearing officer ruled that the claimant's condition was caused by his compensable injury and that the claimant is entitled to all reasonable medical treatment for it. The carrier appeals contending that evidence established that the claimant's prior injury, and not his present compensable injury, is the sole cause of his need for spinal surgery. The claimant does not file a response to the carrier's request for review.

DECISION

Finding sufficient evidence e to support the decision of the hearing officer and no reversible error in the record, we affirm.

The claimant testified that he injured his low back on (date of injury), while lowering the hood and assembly of his truck. The claimant's treating doctor, (Dr. L), recommended surgery to repair the claimant's low back. Dr. L sent the claimant to (Dr. Le) for a second opinion. The carrier requested the claimant be seen by (Dr. H), who also recommended surgery.

The claimant had previously sustained an on-the-job injury for which he had undergone a lumbar fusion at the L5-S1 level. This is the same level on which surgery has been recommended for his current injury. The carrier previously contested the compensability of the claimant's injury contending that the sole cause of claimant's condition was his previous injury. The hearing officer held that the claimant's injury was compensable and the carrier appealed to the Appeals Panel. In an unpublished opinion in Texas Workers' Compensation Commission Appeal No. 93097, decided March 24, 1993, the Appeals Panel affirmed the decision of the hearing officer.

The carrier contended at the CCH that the claimant's present need for spinal surgery was due to his previous injury and not the compensable injury made the basis of this claim. The hearing officer states that the evidence presented at the CCH in the present case was largely the same as presented in the previous CCH we reviewed in Appeal No. 93097. We question whether it is appropriate for the carrier by restating the issue to repeatedly relitigate the same matter.[1] This raises the possibility that the doctrines of either *res judicata* or collateral estoppel might apply. However, neither *res judicata* nor collateral estoppel was raised below, or on appeal, so we shall confine our discussion to the issue raised by the carrier on appeal which is essentially that the findings of the hearing officer that the

[1] There is some indication in the record that the carrier has requested medical review to review the necessity for the claimant's surgery raising the possibility of further litigation of this issue.

claimant's present need for surgery is due to his compensable injury and is not solely caused by his previous injury are against the great weight and preponderance of the evidence.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

Having reviewed the record, we do not find that the hearing officer's findings are against the great weight and preponderance of the evidence. While there is some evidence that the claimant's previous surgery was not entirely successful, and is partly responsible for his present need for surgery, the carrier does not present evidence that the claimant's previous injury and surgery are the sole cause of his present need for surgery. There is a great deal of medical evidence showing that his injury aggravated his prior condition and contributed to his need for surgery.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge