APPEAL NO. 022468
FILED NOVEMBER 8, 2002

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 August 29, 2002. The hearing officer determined that the respondent (carrier) is not liable for the cost of spinal surgery pursuant to the decision of the Independent Review Organization (IRO) because the IRO's decision recommending against spinal surgery is supported by a preponderance of the evidence, and because the IRO's decision is entitled to presumptive weight. The appellant (claimant) appealed, asserting both sufficiency of the evidence grounds and that the hearing officer erred as a matter of law by giving the IRO's decision presumptive weight. The carrier responded, urging affirmance.

DECISION

Affirmed.

Initially, we note that the hearing officer sent a document entitled "Reconstruction of the Record" to both the parties and the Appeals Panel. In that document, the hearing officer stated that when the record was being prepared to be forwarded to the Appeals Panel the micro-cassette tape recording of the hearing could not be located. However, the tape was subsequently located and was available for our review on appeal.

The claimant first argues that he met his burden of proof by a preponderance of the evidence. Conflicting evidence was presented on the disputed issue. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The medical records in evidence sufficiently support the challenged factual findings and these findings, in turn, sufficiently support the challenged legal conclusion.

We turn now to the claimant's assertion of legal error concerning the evidentiary standard employed by the hearing officer to overcome the presumptive weight to be given the IRO's decision and order. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §133.308 (Rule 133.308) provides for medical dispute resolution by IROs including prospective medical disputes of the medical necessity of proposed spinal surgery for which the initial dispute resolution request was filed on or after January 1, 2002. Rule 133.308(o)(5) provides that an IRO decision is deemed to be a decision and order of the Texas Workers' Compensation Commission (Commission); Rule 133.308(u) provides,

among other things, that a party to a prospective necessity dispute regarding spinal surgery may appeal the IRO decision by requesting a hearing and that the hearing and further appeals shall be conducted in accordance with the Commission rules in Chapters 140, 142, and 143; and Rule 133.308(v) provides that "[i]n all appeals from reviews of prospective or retrospective necessity disputes, the IRO decision has presumptive weight." Rule 133.308 is silent concerning the quantum of evidence necessary to overcome the presumptive weight accorded the IRO decision and the Preamble for Adoption of this rule is similarly silent on this matter. *See* 26 Tex. Reg. 10934 (December 28, 2001).

The claimant asserts that it is error to afford an IRO decision presumptive weight as set out in Rule 133.308(v) because Section 413.031 never mentions such language. This tribunal lacks jurisdiction to invalidate a rule of the Commission, and, as a result, we will not further address this argument. We have previously addressed the "presumptive weight" provision of Rule 133.308(v) and determined that it is an evidentiary rule which creates a rebuttable presumption, as distinguished from a conclusive presumption, that the IRO decision is the correct decision which should be adopted by the hearing officer and the Appeals Panel unless rebutted by contrary evidence. *See* Texas Workers' Compensation Commission Appeal No. 021958-s, decided September 16, 2002. In the instant case, the hearing officer concluded that the decision of the IRO was supported by a preponderance of the evidence and thus was entitled to presumptive weight. Based upon our review of the record and decision in this case, we find no error in the hearing officer's having done so.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **ASSOCIATION CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

HAROLD FISHER, PRESIDENT
3420 EXECUTIVE CENTER DRIVE, SUITE 200
AUSTIN, TEXAS 78731.

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Elaine M. Chaney
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Veronica Lopez
Appeals Judge