APPEAL NO. 022999
FILED JANUARY 15, 2003

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 October 23, 2002. With respect to the sole disputed issue before him, the hearing officer determined that the decision and order of the Independent Review Organization (IRO), which determined that the spinal surgery proposed for the respondent (claimant) is not medically necessary, is "not supported by a preponderance of the evidence." The appellant (carrier) has appealed, contesting the sufficiency of the evidence supporting the hearing officer's findings of fact, and disputing his legal conclusions. In addition, the carrier maintains that the hearing officer committed reversible legal error in applying the "preponderance of the evidence" standard instead of the "great weight of the other medical evidence" standard. The claimant did not file a response.

DECISION

Affirmed.

The hearing officer did not err in concluding that the IRO's decision and order is not supported by a preponderance of the evidence. The claimant sustained a compensable injury to his low back on _____, and his neurosurgeon recommended lumbar surgery in order to alleviate some of the claimant's pain and other symptoms. The carrier disputed the neurosurgeon's recommendation, and the Texas Workers' Compensation Commission assigned this case to an IRO. The IRO resolved that since the "unnamed reviewer"[1] agreed with the prior adverse determination of the carrier, the claimant had no need for lumbar surgery. In his Statement of the Evidence, the hearing officer wrote that the "reviewer further notes that the medical records do not support evidence of a neurological deficit" which might require surgical correction.

The carrier argues that the hearing officer made legal error in applying a "preponderance of the evidence" standard in his determination, as opposed to a "great weight of the other medical evidence" standard, as we do in cases where a designated doctor's opinion is given presumptive weight. *See* Section 408.125(c). We have previously addressed this issue of IRO "presumptive weight" versus designated doctor's report "presumptive weight" in Texas Workers' Compensation Commission Appeal No. 021958-s, decided September 16, 2002. In that case, upon review of the "presumptive weight" provision in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE, § 133.308(v) (Rule 133.308(v)), the Appeals Panel determined that it is an evidentiary rule creating a rebuttable presumption, as distinguished from a conclusive presumption, as is the case with the designated doctor rule. As explained in Appeal No. 021958-s (designated as a significant case by the Appeals Panel when it was decided), the consequence of this being a rebuttable presumption, as opposed to a conclusive presumption, is that "its

[1] The doctor performing the independent review is not named, the report simply says that the 'independent review was performed by a medical doctor board certified in orthopedic surgery."

effect is to shift the burden of producing evidence to the party against whom it operates . . . . The evidence is then evaluated, as it would be in any other case." In this case, the hearing officer concluded that the decision and order of the IRO was not supported by a preponderance of the evidence and was not thus entitled to presumptive weight.

Section 410.165(a) provides that the 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). 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). Based upon our review of the record, we find no error in the hearing officer's determination.

The decision and order of the hearing officer are affirmed.

The true corporate name of the carrier is **FIRST AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JAMES W. FISHER
8111 LBJ FREEWAY
DALLAS, TEXAS 75251.

_____
Terri Kay Oliver
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Edward Vilano
Appeals Judge