APPEAL NO. 030381
FILED APRIL 10, 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 January 16, 2003. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) request for spinal surgery is medically necessary and is approved. The appellant (carrier) appealed, arguing that the hearing officer erred by determining that the decision and order of the Independent Review Organization (IRO) is not supported by a preponderance of the evidence and also contending that the claimant did not timely dispute the IRO decision. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

At the outset, we note that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Rule 133.308 (Rule 133.308), applicable to this case, was the version in effect between January 2, 2002, and January 1, 2003. *See* 26 Tex. Reg. 10934. Amendments that were effective on January 1, 2003, do not apply to this case. 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 her low back on _____, and her doctor recommended lumbar surgery in order to alleviate some of the claimant's pain and other symptoms. The carrier disputed the doctor's recommendation, and the Texas Workers' Compensation Commission (Commission) assigned this case to an IRO. The IRO resolved that the claimant had no need for lumbar surgery. In his Statement of the Evidence, the hearing officer wrote that, "…it appears that the author of the IRO report has completely failed to delineate his or her particular area of expertise and/or qualification in the report, as required by the rules."

Rule 133.308(o)(1) provides in pertinent part that:

Notification of decision by the [IRO] must include: . . .

(C) a description of the qualifications of the reviewing physician or provider; and

(D) a certification by the IRO that the reviewing provider has certified that no known conflicts of interest exist between that provider and any of the treating providers or any of the providers who reviewed the case for decision prior to referral to the IRO.

Because the IRO neither provided a description of his or her qualifications nor certified that there were no known conflicts, the hearing officer did not err in determining that the IRO's report was not supported by a preponderance of the evidence.

The carrier further contends that the claimant did not timely dispute the IRO decision by filing a written appeal pursuant to Rule 133.308(u) within 10 days after receipt of the IRO decision. The hearing officer determined that the IRO report was sent to the claimant on October 8, 2002, and by presumption the claimant received the report on October 13, 2002. We note that Rule 102.5(d) provides that for purposes of determining the date of receipt of written communications sent by the Commission, the Commission shall deem the received date to be five days after it was mailed. Although the carrier argues that Rule 102.5(d) only applies to communications sent by the Commission, we point out that Rule 133.308(o)(5) states that an IRO decision is deemed to be a Commission decision and order. Therefore, the hearing officer correctly deemed that the claimant had receipt of the IRO report on October 13, 2002, five days after it was mailed. Further, we note that the Commission received the dispute of the IRO decision from the claimant, as evidenced by the file-stamped copy, on October 23, 2002, which is within 10 days. After review of the record before us, we find the carrier's contention without merit.

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 true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Roy L. Warren
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

CONCURRING OPINION:

I concur in the affirmance of the hearing officer's decision. However, my concurrence is based on Finding of Fact No. 5 that the preponderance of the medical evidence is contrary to the IRO report. In reaching that determination, the hearing officer could consider the surgery recommendations of Dr. M and Dr. R, as well as the extensive diagnostic testing that has been performed.

_____
Robert W. Potts
Appeals Judge