APPEAL NO. 030583
FILED APRIL 28, 2003

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 023088, decided January 31, 2003. The hearing officer reconstructed the record on remand and issued a second decision and order on February 19, 2003, without the necessity of a second contested case hearing (CCH). The purpose of the remand was to permit the hearing officer to reconstruct the record with respect to Hearing Officer Exhibit No. 2, which she named "[Texas Workers' Compensation Commission (Commission)] file from Medical Review." Specifically, we requested that the hearing officer explicitly mark those documents considered a part of Hearing Officer's Exhibit No. 2 as such and identify those as documents she reviewed. On remand, the hearing officer reconstructed and marked Hearing Officer's Exhibit No. 2 as directed. Resolving the sole certified disputed issue before her, the hearing officer decided that the Independent Review Organization's (IRO) "decision and order is [sic] supported by a preponderance of the evidence." Following the November 18, 2002, CCH, with respect to what is deemed a jurisdictional argument raised by the appellant (carrier), the hearing officer determined that she was acting within her province in resolving the IRO issue certified from the benefit review conference. The carrier filed an appeal (and filed an identical appeal following the hearing officer's new decision and order on remand), arguing that the respondent's (claimant) failure to request the carrier to reconsider its initial denial of the claimant's request for precertification for her spinal surgery prior to the claimant's requesting an IRO determination, was violative of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.308(e) (Rule 133.308(e)). Thus, the carrier argued that because the claimant failed to comply with the request for reconsideration portion of the rule, the hearing officer did not have jurisdiction to address the merits (the certified issue) of the claim, as the claimant's compliance with the rule was jurisdictional. The carrier argued, in the alternative, that the record did not support the hearing officer's conclusion that the IRO's decision is supported by a preponderance of the evidence. The file does not contain a response from the claimant to the carrier's reurged request for review.

DECISION

Affirmed.

## PROCEDURAL HISTORY

This case is one of first impression with the Appeals Panel and, as such, we first address how the parties proceeded to this point. It is undisputed that the claimant sustained a compensable spinal injury on _____. According to the medical records introduced by the hearing officer at the CCH, and the findings of fact made, the claimant's treating doctor requested that the carrier preapprove the surgery (anterior cervical discectomy and fusion) that he felt was medically necessary for the claimant. On March 13, 2002, the carrier's medical review contractor (MRC) reviewed the

preauthorization for surgery and denied the proposed surgery. The claimant's treating doctor then requested Medical Review's[1] approval for surgery and an IRO was appointed. On July 10, 2002, the IRO stated that based on the MRI and cervical discography findings, the requested C4-5 and C5-6 cervical discectomy and fusion was recommended, and was approved by the IRO as medically necessary and reasonable for the treatment of the claimant's compensable back injury.

According to the Medical Review records of this claim, in a letter dated October 10, 2002, the carrier wrote that it was "maintaining its dispute" of the claimant's request for spinal surgery. Both parties appeared for a CCH set for August 8, 2002, at which CCH, the claimant stated that she did not want to proceed with the surgery request. The carrier wanted to proceed, and reurged its previously filed Motion to Dismiss for Want of Jurisdiction, which was not in the record as we received it. Nonetheless, the hearing officer "cancelled" the CCH in a brief, taped hearing on August 8, 2002, at the claimant's request, and continued it "indefinitely" without a future setting. On the record of that hearing, both parties appear acquiescent to the hearing officer's ruling.

After the hearing officer's cancellation of the August 8, 2002, CCH [by order dated August 9, 2002], the record reflects that the claimant's treating doctor's office contacted the MRC and informed it that the Commission had approved the claimant's surgery, and sent the MRC a copy of the IRO's recommendation. The IRO's approval of the claimant's surgery is not in dispute. Apparently, and this is not made plain in the record, there was some dispute regarding whether the MRC rescinded its denial or issued a preauthorization for the surgery. We glean from the record, and specifically from the carrier's letter requesting another CCH (at issue here), that the claimant has decided to move forward with her treating doctor's recommendation for surgery. Nothing in the record of the CCH of November 18, 2002, indicates that the claimant does not wish to proceed. However, we note that the medical records supporting the hearing officer's determination were admitted into evidence by the hearing officer and that the claimant introduced no testimonial or documentary evidence, only summary and argument by her ombudsman.

## THE CARRIER'S "JURISDICTIONAL" ARGUMENT

We next address the issue raised by the carrier at the CCH: did the Commission have jurisdiction to address the issue of whether the IRO's decision was supported by a preponderance of the evidence? The hearing officer couched the issue as one of "waiver," i.e., did the claimant waive her right to request a decision from the IRO because she failed to request a reconsideration of the carrier's, vis-à-vis the MRC, denial of preauthorization for the surgery proposed by her treating doctor?

The carrier's appeal would have us ignore a determination by an independent body and render a decision due to an isolated reading of the provisions of Rule 133.308(e), and without recourse to consideration of any other part of the rule. Such a

[1] "Medical Review" as referenced here means the Medical Review Division of the Commission.

limited reading may defeat the overall purpose of the procedure as outlined in the rule, at great cost to the parties, the medical personnel involved, and the Commission.

Rule 133.308(e) reads, in pertinent part, as follows:

> (e) Timeliness. A person or entity that fails to timely file a request ***waives*** the right to independent review or medical dispute resolution. The commission shall deem a request to be filed on the date the division and the carrier receive the initial request, and timeliness shall be determined as follows:
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> * * * * *
>
> (2) A request for prospective necessity dispute resolution shall be considered timely if it is filed with the carrier and the division no later than the 45th day after the date the carrier denied approval of the party's ***request for reconsideration*** of denial of health care that requires preauthorization or concurrent review pursuant to the provisions of §134.600. (Emphasis added.)

Subsection (f) of Rule 133.308 details the requirements of a Request for Independent Review (RIR), subsection (g) details what the carrier must add to the RIR, and subsection (h) describes the manner and time that the carrier is to file its response to the RIR. As we interpret the filing requirements in the rule, there appears to be a schedule of duties for both parties, i.e.:

> (1) The claimant files her initial request for a prospective procedure with the carrier;
>
> (2) If the carrier denies the initial request, the claimant files a request for reconsideration of denial of health care with the carrier;
>
> (3) If the carrier denies the request for reconsideration, or fails to respond to it, the claimant files her RIR with the Medical Review Division (2 copies) and Medical Review sends one copy to the carrier; and
>
> (4) The carrier files its response to the RIR and the Commission assigns an IRO and notifies the parties

Reviewing the facts and the record before us, the claimant filed a request for review, the carrier denied it, then the claimant filed her RIR, an IRO was assigned by the Commission, and the IRO performed its duty (ultimately approving the surgical procedure), then the carrier requested a CCH on the matter, arguing that since the

claimant never filed a request for reconsideration with the carrier, she waived her right to filing and RIR.

We note here that the issue raised by the carrier is not one of "jurisdiction." Due to all manner of procedural *faux pas*, the claimant's RIR reached the IRO before the carrier responded to the claimant's RIR and without the claimant having filed a request for reconsideration with the carrier, according to Finding of Fact No. 6 in the hearing officer's decision and order, which reads, "[t]here was no evidence provided that reconsideration was not requested, as the rules require, in this case." In her first decision and order, the hearing officer notes in her Statement of the Evidence that while the rule indicates that a "carrier shall file a response [to the claimant's request for review], but must do so within 3 days," the hearing officer continues and writes "[t]here was nothing to indicate that a response had or had not been filed and whether the defect [claimant's failure to file a request for reconsideration with the carrier] was also pointed out at that time." In fact, writes the hearing officer, the parties did not introduce the relevant documents (presumably the initial request forms and objections, if any) into evidence, and proceeded on argument only. In other words, while the carrier argues that the claimant has failed to meet her duties as outlined in the rule, the hearing officer opines that the carrier has also failed to introduce evidence of its compliance with the rule, i.e., its response or objection to the claimant's RIR. We find that because the carrier did not present evidence of its objection to the claimant's RIR (if it made one), and because the IRO proceeded with an evaluation and opinion, the carrier failed to preserve its objection to the claimant's RIR, and we affirm the hearing officer on that basis. *See* Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied) (We will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence).

In addition, we find that the hearing officer did not abuse her discretion in determining that the Commission, and she, had jurisdiction to determine whether the IRO's decision was supported by a preponderance of the evidence. Clearly, the hearing officer did not act without reference to guiding principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 92054, decided March 27, 1992. We are satisfied that her ruling is not an abuse of discretion.

The hearing officer did not err in determining that the IRO's decision is supported by a preponderance of the evidence. There is conflicting medical evidence from the Medical Review Division's file in the record on this issue. According to Rule 133.308(v)[2], the IRO's determination is to be given presumptive weight. The hearing officer found that there was only a difference of opinion between the two doctors that was not sufficient to overcome the presumptive weight afforded to the IRO. The issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v.

[2] *See also* Texas Workers' Compensation Commission Appeal No. 021958-s, decided September 16, 2002.

Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The factors emphasized by the carrier in challenging the hearing officer's determination on appeal are the same factors it emphasized at the hearing. The significance, if any, of those factors was a matter for the hearing officer in making her credibility determinations. The medical records support the hearing officer's determination. Nothing in our review of the record reveals that the challenged determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **TEXAS POLITICAL SUBDIVISIONS JOINT SELF-INSURANCE FUNDS** and the name and address of its registered agent for service of process is

**TIM OFFENBERGER**
**12720 HILLCREST, SUITE 100**
**DALLAS, TEXAS 75230**.

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Robert W. Potts
Appeals Judge