

APPEAL NO. 031689  
FILED AUGUST 5, 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 (CCH) was held on May 30, 2003. The hearing officer decided that the decision of the Independent Review Organization (IRO) against surgery was not supported by a preponderance of the evidence. The appellant (carrier herein) files a request for review, arguing that the decision of the hearing officer was contrary to the evidence and that the hearing officer failed to accord the IRO's opinion the proper weight. The respondent (claimant herein) replies that the decision of the hearing officer should be affirmed. The claimant also requests that we sanction the carrier and its attorney for statements made during the CCH concerning her treating doctor.

DECISION

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

The hearing officer did not err in concluding that the IRO's decision and order is not supported by a preponderance of the evidence. Dr. J recommended spinal surgery and the carrier disputed this recommendation. The Texas Workers' Compensation Commission assigned this case to an IRO and the IRO recommended against surgery. The hearing officer found that the surgery is medically necessary for the treatment of the claimant's injury and concluded that the IRO decision was not supported by the preponderance of the evidence.

The carrier argues that the hearing officer made legal error in applying a "preponderance of the evidence" standard in her 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 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.

As far as the claimant's request that we sanction the carrier and its attorney, we have no legal authority to consider the claimant's request.

The decision and order of the hearing officer are affirmed.

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  
AUSTIN, TEXAS 78701.**

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Robert W. Potts  
Appeals Judge