APPEAL NO. 031708
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 June 4, 2003. The hearing officer decided that the determination of the Independent Review Organization (IRO) against spinal surgery was not supported by a preponderance of the evidence and should not be upheld. The appellant (carrier herein) files a request for review in which it argues that the hearing officer did not accord the IRO's opinion the presumptive weight to which it was entitled and that had the hearing officer given the IRO's determination the proper weight it would have been upheld. The carrier, therefore, requests we reverse the decision of the hearing officer. The respondent (claimant herein) responds that the decision of the hearing officer not to uphold the determination of the IRO is sufficiently supported by the evidence.

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. B recommended spinal surgery and the carrier disputed this recommendation. The Texas Workers' Compensation Commission assigned this case to an IRO. The IRO recommended against surgery on the basis that surgery was not justified for discitis or for radiculitis of uncertain etiology. Dr. B testified at the CCH that he had ruled out discitis and that surgery was needed to relieve discogenic pain. In his Findings of Fact, the hearing officer stated that Dr. B ruled out discitis, that the surgery is based on discogenic pain, that surgery is an appropriate treatment for such pain, and that the other medical evidence overcame the presumption in favor of the IRO decision.

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 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 insurance carrier is **STAR INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Michael B. McShane
Appeals Panel
Manager/Judge

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Edward Vilano
Appeals Judge