

APPEAL NO. 031903
FILED AUGUST 28, 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 June 24, 2003. With respect to the sole disputed issue before her, 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 her legal conclusion as well as stating that the hearing officer's Finding of Fact No. 7 is incorrect in that the carrier did not request the appointment of an IRO. 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 _____, had lumbar surgery on January 23, 2002, and his neurosurgeon recommended further lumbar surgery in order to alleviate the claimant's pain and other symptoms. The carrier disputed the neurosurgeon's recommendation based on a peer review by a nonexamining neurosurgeon. The Texas Workers' Compensation Commission assigned this case to an IRO. The IRO agreed with the adverse determination of the carrier that the claimant had no need for further lumbar surgery. There is conflicting medical evidence from the Medical Review Division's file in the record on this issue. According to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.308(v) (Rule 133.308(v)), the IRO's determination is to be given presumptive weight. We have previously addressed the "presumptive weight" provision of Rule 133.308(v) and determined that it is an evidentiary rule which creates a rebuttable presumption, as distinguished from a conclusive presumption, that the IRO decision is the correct decision which should be adopted by the hearing officer and the Appeals Panel unless rebutted by contrary evidence. See Texas Workers' Compensation Commission Appeal No. 021958-s, decided September 16, 2002. In the instant case, the hearing officer found that the opinion of the treating doctor and that of two designated doctors that the claimant needed further surgery was 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. 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).

Regarding the assertion that the hearing officer was incorrect in her Finding of Fact No. 7 in stating that the carrier requested the IRO, we can find no evidence in the record pertaining to which party requested the IRO. We note that it is clear from the record that the carrier denied the claimant's request for further surgery on three different occasions. Under Rules 133.308(c) and 134.600(3)(g), the requestor or employee may appeal a denial of reconsideration of a preauthorization request to the IRO. Even assuming what happened, any possible error is harmless error.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TWIN CITY FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JIM ADAMS, ATTORNEY
450 GEARS ROAD, SUITE 500
HOUSTON, TEXAS 77067.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge