APPEAL NO. 040348
FILED MARCH 18, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 032649, decided November 26, 2003. We had remanded the case for the hearing officer to decide the disputed issue of whether the decision of the Independent Review Organization (IRO) was supported by a preponderance of the evidence since we held that the hearing officer's decision that he lacked jurisdiction to decide this issue was erroneous. The hearing officer held a contested case hearing (CCH) on remand on January 5, 2004. The parties were excused from appearing at the CCH on remand and did not appear. The hearing officer issued a decision on remand in which he decided that the decision of the IRO that a cervical laminectomy with decompression C4-T1 was not medically necessary as of July 19, 2003, was supported by a preponderance of the medical evidence at the time it was issued, is entitled to presumptive weight, and is upheld. The appellant (claimant herein) files a request for review, pointing to medical evidence in favor of surgery and arguing that the preponderance of the medical evidence is contrary to the IRO. The respondent (carrier herein) replies that the decision of the hearing officer is supported by the evidence and should be affirmed.

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.

In his appeal, the claimant argues that the hearing officer erred in giving presumptive weight to the IRO's determination against spinal surgery. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.308 (Rule 133.308) provides for medical dispute resolution by IROs including prospective medical disputes of the medical necessity of proposed spinal surgery for which the initial dispute resolution request was filed on or after January 1, 2002. Rule 133.308(o)(5) provides that an IRO decision is deemed to be a decision and order of the Texas Workers' Compensation Commission; and Rule 133.308(v) provides that "[i]n all appeals from reviews of prospective or retrospective necessity disputes, the IRO decision has 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 concluded that the decision of the IRO was supported by a preponderance of the evidence and thus was entitled to presumptive weight.

There is clearly conflicting medical evidence in the present case. 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 to 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). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). 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). Applying this standard, we find no basis to overturn the decision of the hearing officer.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** 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.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Margaret L. Turner
Appeals Judge