APPEAL NO. 021958-s
FILED SEPTEMBER 16, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Following a contested case hearing (CCH) held on July 10, 2002, the hearing officer resolved the sole disputed issue by concluding that the decision and order of the Independent Review Organization (IRO), which determined that the additional 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, challenging the sufficiency of the evidence to support the hearing officer's substantive factual findings as well as the legal conclusion. The carrier further contends that the hearing officer committed reversible legal error in applying the "preponderance of the evidence" standard to overcome the presumptive weight to be given the IRO report rather than the "great weight of the other medical evidence" standard. The claimant's response urges the absence of error and seeks our affirmance.

DECISION

Affirmed.

The claimant testified that on _____, while at her place of employment, she slipped and fell backwards on a freshly waxed floor and sustained a lumbar spine injury. The medical evidence reflects that on April 24, 2000, she underwent an intradiscal thermal annuloplasty procedure, apparently by her surgeon, Dr. Pa; that on April 12, 2001, she underwent lumbar spine surgery at the L5-S1 level, namely, an interior interbody fusion with insertion of a BAK cage; that by September 2001 she was complaining of left lower extremity pain; that later in 2001 she was given a transforaminal steroid injection; that by January 4, 2002, she had not obtained relief from the injection and on January 31, 2002, was given a nerve root block at the L5 level; that on March 6, 2002, Dr. Pi examined the claimant, felt she had L5 radiculopathy probably due to compression at the L5 disc space, and recommended decompression surgery with instrumentation; and that on or about March 28, 2002, her surgeon recommended surgical exploration with a foraminotomy at the L5-S1 level on the left and possibly proceeding to a mass fusion at that level. The documentary evidence further reflects that the carrier opposed the proposed spinal surgery as medically unnecessary for the following reasons: medical reports stated that the claimant had already had two invasive procedures without lasting relief; no diagnostic tests showed nerve root impingement; nerve conduction velocity testing was negative for lower extremity radiculopathy; the April 17, 2002, peer review report of Dr. B reflected the absence of medical justification for the proposed additional spinal surgery; and the June 13, 2002, decision of the IRO determined that the proposed left foraminotomy at L5-S1 with possible lateral mass fusion at that level is not medically necessary.

The carrier challenges the sufficiency of the evidence to support the following factual findings and legal conclusion:

FINDINGS OF FACT

4. Claimant had good relief of her symptoms following the interbody fusion surgery for approximately three months when a sudden movement caused pain to return to her lower back with pain radiating down the left lower extremity.

5. After six months of treatment and testing [Dr. Pa] believes Claimant has compression of the L5 nerve root and he has recommended decompression surgery.

6. Claimant was referred to [Dr. Pi] on March 6, 202, for evaluation and a second opinion. [Dr. Pi] believes Claimant most likely has L5 radiculopathy due to compression at the L5 disc space. [Dr. Pi] recommends decompression surgery.

8. Claimant's radicular symptoms documented by [Dr. Pa] and [Dr. Pi] were not mentioned by the physician reviewer in the IRO decision.

9. Lumbar surgery, as recommended by [Dr. Pa], is medically necessary for the treatment of Claimant's low back injury.

CONCLUSIONS OF LAW

3. The IRO's decision and order is not supported by a preponderance of the evidence.

Not appealed is the finding that "[t]he unnamed doctor who reviewed the unidentified medical records of the Claimant for the [IRO] found that Claimant had a clinical history of lumbosacral strain/strain with no evidence of nerve root compression on the mylogram or CT scan."

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The medical records in evidence sufficiently support the challenged factual findings and these findings, in turn, sufficiently support the challenged legal conclusion.

We turn now to the carrier's assertion of legal error concerning the evidentiary standard employed by the hearing officer to overcome the presumptive weight to be given the IRO decision and order. 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 (Commission); Rule 133.308(u) provides, among other things, that a party to a prospective necessity dispute regarding spinal surgery may appeal the IRO decision by requesting a CCH and that the hearing and further appeals shall be conducted in accordance with the Commission rules in Chapters 142, 143, and 144; 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." Rule 133.308 is silent concerning the quantum of evidence necessary to overcome the presumptive weight accorded the IRO decision and the Preamble for Adoption of this rule is similarly silent on this matter. *See* 26 Tex. Reg. 10934 (December 28, 2001).

The carrier urges us to require that the presumptive weight accorded an IRO decision can only be overcome by the great weight of the other medical evidence because that is the evidentiary standard required to overcome the presumptive weight accorded the reports of designated doctors (Sections 408.122(c) and 408.125(e) of the 1989 Act) and the two concurring opinions on a request for spinal surgery (Rule 133.206(k)(4), still applicable to Recommendation for Spinal Surgery (TWCC-63) forms filed after July 1, 1998, and before January 1, 2002). This we decline to do. In the absence of explanation in the Preamble for Adoption of Rule 133.308 as to why the rule does not specify the quantum of evidence required to overcome the presumptive weight accorded the IRO decision, we must resort to the common law. In our view, the "presumptive weight" provision in Rule 133.308(v) 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. Though dealing with a presumption arising from the evidence, rather than one created by agency rule as we consider in the instant case, the Texas Supreme Court, in a product liability case, took the occasion to state the following legal principals applicable to rebuttable presumptions:

> The presumption is subject to the same rules governing presumptions generally. Its effect is to shift the burden of producing evidence to the party against whom it operates. [Citation omitted.] Once that burden is discharged and evidence contradicting the presumption has been offered, the presumption disappears and "is not to be weighed or treated as evidence." [Citation omitted.] The evidence is then evaluated, as it would be in any other case. [Citation omitted.] The presumption has no effect on the burden of persuasion. [Citation omitted.] The facts upon which the presumption was based remain in evidence, of course, and will

support any inferences that may be reasonably drawn from them. [Citations omitted.] GMC v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993).

And see City of Garland v. Dallas Morning News, 969 S.W.2d 548, 555 (Tex. App.-Dallas 1998, aff'd 22 S.W.3d 351 (Tex. 2000)). In the absence of language in the statute (or agency rule) creating a presumption which specifies a quantum of evidence necessary to overcome the presumption, the Texas courts do not require any particular quantum of evidence but apparently defer to the fact finders to determine whether the opposing party has offered evidence which rebuts the presumption.

We do not, therefore, find error in the hearing officer's applying a preponderance of the evidence standard in determining that the IRO decision is not supported by the evidence.

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

ROBERT PARNELL
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231-4813.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Robert W. Potts
Appeals Judge