APPEAL NO. 001757

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 July 13, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) is entitled to have the statutory date of maximum medical improvement (MMI) extended pursuant to Section 408.104 to June 16, 2000, a date derived after considering factors enumerated at Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.11(f) (Rule 126.11(f)). The appellant/ cross-respondent (carrier) appealed, contended that the delay in the claimant's surgery resulted from his choice to delay surgery, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to have his date of MMI extended. The claimant did not respond to the carrier's request for review, but filed an appeal. He contended that the surgery was delayed so that his wife could take care of him and that the hearing officer did not extend the date of MMI long enough. The claimant requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he reached MMI on August 31, 2000, or on August 10, 2000. The carrier responded; restated its position in its appeal; and requested that, if the Appeals Panel did not reverse the decision of the hearing officer and render a decision in its favor, the decision of the hearing officer be affirmed.

DECISION

We affirm.

It is undisputed that the claimant sustained a compensable low back injury on April 24, 1998; that in July 1999, the possibility of surgery was discussed; that on September 21, 1999, Dr. P recommended surgery; that on October 25, 1999, the carrier's choice of doctor concurred in the need for surgery; that on October 28, 1999, the Texas Workers' Compensation Commission (Commission) issued an order approving spinal surgery; that Dr. P and Dr. S performed surgery on March 18, 2000; that Dr. P told the claimant the projected date for medical stability is five to six months after the fusion; and that in a letter dated March 30, 2000, a Commission official actions officer ordered that the statutory MMI date was extended to August 31, 2000.

Mr. C, an adjuster for the third-party administrator handling the claim, testified that records indicate that a November 12, 1999, conversation with Ms. L in Dr. P's office reveals that on November 9, 1999, the claimant said that he and his wife were still discussing the issue of surgery; that on November 23, 1999, Ms. L said that they had not heard from the claimant; that on November 30, 1999, Ms. L stated that on November 29, 1999, the claimant said that he wanted to have surgery, he wanted to wait until after the holidays to have surgery, and surgery would be sometime in January 2000; that on December 13, 1999, Ms. S in Dr. P's office advised that she wanted to schedule the surgery as soon as possible; that on January 10, 2000, Ms. S stated that the surgery was scheduled for February 9, 2000, but the claimant wanted to wait until March to have the surgery; and that on February 3, 2000, Ms. S advised that surgery was scheduled for

March 8, 2000. Mr. C said that there was nothing in the notes about medical reasons for delaying the surgery.

The carrier had admitted into evidence a letter dated March 30, 2000, in which a Commission official actions officer ordered that the extended date of statutory MMI is August 31, 2000. That letter indicates that there were attachments, but there is nothing attached to the copy of the letter in the record. The record does not contain a request, information from the treating doctor or surgeon as required in Rule 126.11, or other document or documents on which that order is based.

The carrier also had Commission Dispute Resolution Information System (DRIS) records admitted into evidence. A DRIS note dated February 15, 2000, reveals that the claimant had a note and information explaining the type of surgery from the doctor and that the Commission employee requested a copy of the documents. A DRIS entry dated February 16, 2000, states that the information was received and that surgery is scheduled for March 8, 2000. A DRIS entry dated March 7, 2000, states that the claimant called and advised that surgery had been postponed until March 17, 2000. A DRIS entry dated March 23, 2000, indicates that the Commission employee spoke with Ms. S in Dr. P's office and was told that the claimant was doing well and everything appeared to be on schedule for the fusion to take hold in "5-6 months." A DRIS entry dated March 30, 2000, states:

> [NAME OF COMMISSION EMPLOYEE] APPROVED EXTENSION OF MMI - STAT MMI DATE IS NOW: AUGUST 31, 2000.
>
> TYPE OF SURGERY: ANTERIOR APPROACH L5-S1 DISKECTOMY ILIAC FUSION, POSTERIOR DECOMPRESSION, ILIAC POSTEROLATERAL FUSION WITH POSSIBLE PEDICAL SCREW...
>
> TYPICAL RECOVERY TIME TABLE: 19 WKS
>
> [DR.P'S] (SURGEON'S OPINION) : 24 WEEKS FROM SURGERY F11
>
> PER DRAFT PROCEDURE, I CAN APPROVE UP TO 150% OF TYPICAL RECOVERY TIME = 28 WKS.
>
> I WENT W/SURGEONS OPINION OF 24 WKS.

A DRIS note dated May 12, 2000, indicates that the claimant stated that the holidays did come into play with scheduling the surgery.

In a letter dated May 11, 2000, Ms. S said that surgery for the claimant was originally scheduled for February 8, 2000; that scheduling it then was a mistake on her part; that the claimant wanted the surgery in March so that his wife could be off work to care for him; and that there was another delay because of the injury to Dr. S. In a letter dated May 31, 2000, Dr. P wrote:

> [Claimant] received his second opinion agreement towards the end of October and apparently the paperwork did not come to this office approving the surgery until about mid-November. Since he was having an anterior surgery, he had to have an appointment with [Dr. S] and, due to the holidays and his busy schedule, he did not see him until January 25, 2000. From January 25, he was then scheduled for surgery on March 7, which was delayed until March 18 because of an accident that [Dr. S] was involved in.
>
> As far as the two month delay, I think there are some reasonable explanations; 1) it is a major decision to have spine surgery and I am certain he had some uncertainty, as we have seen other patients delay in making the final decision and 2) he has two children and his wife had to take 3-4 weeks off from work and she may not have been able to do that until that period of time.

The claimant testified that he did not delay having the surgery; that he did a lot of praying and thinking about having surgery; that he did not tell people in Dr. P's office that he wanted to wait until after the holidays to have surgery; that the short DRIS note of a 30- to 45-minute conversation could be misleading; that his wife worked for her employer only a short time and could not take off to take care of him until March 2000; that after the surgery was scheduled for February 8, 2000, he told a person in the doctor's office he wanted the surgery scheduled for March so that his wife could take care of him; and that Dr. S could not participate in the surgery on March 8, 2000, because of a back problem.

Section 408.104 is entitled [MMI] After Spinal Surgery and applies to claims for injuries that occur on or after January 1, 1998. It provides in part:

> (a) On application by either the employee or the insurance carrier, the commission by order may extend the 104-week period described by Section 401.011(30)(B) if the employee has had spinal surgery, or has been approved for spinal surgery under Section 408.026 and commission rules, within 12 weeks before the expiration of the 104-week period. If an order is issued under this section, the order shall extend the statutory period for [MMI] to a date certain, based on medical evidence presented to the commission.

Rule 126.11 is entitled Extension of the Date of [MMI] for Spinal Surgery. Subsection (c) provides:

> Prior to submission to the commission of a request for an extension of the date of [MMI], the requestor shall request from the treating doctor or surgeon the information listed in subsection (f) of this section. The request shall also be sent to the injured employee, the injured employee's representative, and the insurance carrier by first class mail on the same day it is submitted to the treating doctor or surgeon. The treating doctor shall provide to the injured

> employee, the injured employee's representative, and the insurance carrier the information requested in subsection (f) of this section within 10 days of the date the request is received. If the requesting party has not received the information from the treating doctor or surgeon within 15 days, the request may be submitted to the commission without this information.

Subsection (d) provides in part:

> If the information from the treating doctor or surgeon is absent when the request is received, commission staff may invoke the provisions of §102.9 of this title (relating to Submission of Information Requested by the Commission) to secure any necessary information.

Rule 102.9(c) provides for written orders by the Commission to produce information. Rule 126.11(f) states:

> In making the determination to approve or deny a request for an extension of the date of [MMI], the Commission shall consider:
>
> (1) typical recovery times for the specific spinal surgery procedure;
>
> (2) projected date and information regarding when the condition may be medically stable as provided by the treating doctor or surgeon;
>
> (3) case specific information regarding any extenuating circumstances that may have resulted in variances from conservative treatment protocols and time frames specified in §134.1001 (relating to Spine Treatment Guideline) or that may impact recovery times as provided by the treating doctor or the surgeon;
>
> (4) information from any source regarding intentional or non-intentional delays in securing the surgery or medical treatment for the compensable injury;
>
> (5) any pending, unresolved disputes regarding the date of [MMI]; and
>
> (6) any pertinent information provided by the insurance carrier, injured employee, and/or the injured employee's representative regarding the extension being requested under this section.

The hearing officer made the following findings of fact:

FINDINGS OF FACT

10. An order for spinal surgery was issued on October 28, 1999.

11. On March 18, 2000, claimant underwent a 360 degree interbody fusion with femerol ring placement under the direction of [Dr. P] and [Dr. S].

12. The typical recovery time for the specific spinal surgery procedure which Claimant underwent is 5 to 6 months.

13. The projected date as to when the Claimant may be medically stable as provided by the treating doctor or surgeon is 5 to 6 months from the date of surgery.

14. There were no extenuating circumstances that may have resulted in variances from conservative treatment protocols and time frames or that may impact recovery times, except possibly, that Claimant may heal more quickly than usual because he is relatively young.

15. Claimant's stomach did not heal at first, but this did not result in a delay in the projected recovery time.

16. There are no pending, unresolved disputes regarding the date of [MMI].

17. Claimant intentionally delayed surgery to think and pray.

18. Surgery was non-intentionally delayed due to a scheduling error and a health problem experienced by [Dr. S].

19. A reasonable assessment of the time required to schedule surgery is 42 days or six weeks, based on a May 31, 2000, letter from [Dr. P] which states that "From January 25, he [Claimant] was then scheduled for surgery on March 7."

20. Claimant's May 6, 2000 104-week statutory date of [MMI] should be extended to June 16, 2000 based on taking the October 28, 1999 date of the order for spinal surgery, adding seven days for mailing and receipt of the order by the Claimant, adding 42 days for scheduling surgery, and adding 183 days for recuperation from the specific spinal surgery procedure.

The hearing officer made a conclusion of law that

> Claimant is entitled to have the statutory [MMI] date extended pursuant to [Section 408.104] to June 16, 2000, a date derived after due consideration of the factors enumerated at Rule 126.11(f).

Neither party contended that the treating doctor or surgeon did not provide the information listed in Rule 126.11(f) as required by Rule 126.11(c). The DRIS entry dated March 30, 2000, includes information about the surgery and references to 19 weeks and 24 weeks that were obtained from a source that is not revealed. Clearly, the better practice is to offer into evidence a copy of the information provided by the treating doctor or surgeon under the provisions of Rule 126.11(c). The hearing officer was placed in the position of making findings of fact related to the information listed in Rule 126.11(f) without the report required by Rule 126.11(c). Clearly, that was not intended.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

At the CCH and on appeal, the claimant contended that he had one year from the date the Commission approved spinal surgery. Rule 133.206(b)(4) provides that a determination of carrier liability for spinal surgery made under Rule 133.206 is valid for one year from the date the determination is made. But that provision pertains to liability for spinal surgery and not to extending the date of MMI that is covered in Rule 126.11. The claimant also stated that the surgery was delayed so that his wife could take care of him and contended that he should be entitled to a reasonable time after the surgery to recover. We do not find merit in the claimant's argument that the date of statutory MMI should be extended because the surgery was delayed so that his wife could take care of him, a personal reason.

The carrier specifically appealed Finding of Fact No. 19 and stated that Dr. P's letter dated May 31, 2000, does not state that a reasonable assessment of time required to schedule surgery is six weeks. While the letter dated May 31, 2000, and other evidence concerning the timing of the scheduling of the surgery are subject to different interpretations and conclusions, Finding of Fact No. 19 is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). The other determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. King, Pool.

Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge