APPEAL NO. 011530
FILED AUGUST 1, 2001

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 May 30, 2001. The hearing officer determined that the respondent (claimant) is entitled to have the statutory date of maximum medical improvement (MMI) extended to May 3, 2001, pursuant to Section 408.104. The appellant (carrier) contends that the hearing officer erred in making this determination and requests that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to have the date of statutory MMI extended. The claimant urges affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable low back injury on _____; that spinal surgery was initially considered in June 1999; that on March 9, 2000, the Texas Workers' Compensation Commission-appointed designated doctor Dr. O determined that the claimant had not yet reached MMI and projected that, if surgery were to be performed, the claimant would not reach MMI until four months postoperatively; that on August 7, 2000, the claimant's treating doctor, Dr. C, recommended surgery; that one of the second opinion doctors concurred in the need for surgery; that on October 13, 2000, the Commission issued an order approving spinal surgery; that surgery was performed on December 29, 2000; that the statutory MMI date was February 7, 2001; and that in a letter dated February 20, 2001, a Commission official actions officer ordered that the statutory MMI date was extended to June 28, 2001, which was 26 weeks after the date of the claimant's surgery.

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.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.11 (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.

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;
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> (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 carrier contends that the information provided to the Commission by Dr. C, the treating doctor, was not sufficient to serve as a basis for the Commission's approval of extension of MMI. Specifically, the carrier asserts that because evidence was presented establishing that there was a delay in surgery and medical treatment, Rule 126.11(f)(4), and an unresolved dispute regarding the date of MMI, Rule 126.11(f)(5), the Commission was required to deny the extension. We disagree. The rule requires the Commission to consider the enumerated factors. The hearing officer's decision clearly reflects that in making the determination that the claimant is entitled to an extension of the MMI date, he considered the information provided to the Commission by Dr. C, evidence relating to the delay in having spinal surgery performed, and the unresolved status of the MMI date. In accordance with the designated doctor's projected MMI date, the hearing officer determined that claimant reached MMI on May 3, 2001, which was four months after the date of the surgery.

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). 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 and we do not find it to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge