APPEAL NO. 020955
FILED MAY 29, 2002

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 November 20, 2001, with (hearing officer) presiding as hearing officer, to resolve the following disputed issues:

1. Is the [appellant] Claimant entitled to have the statutory maximum medical improvement [MMI] date extended pursuant to TEX. LAB. CODE ANN. Section 408.104 and, if so, to what date;

2. Did the claimant abandon medical treatment without good cause, justifying the suspension of temporary income benefits [TIBs] under [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.4] Rule130.4; and

3. Did the Claimant have disability as a result of the injury sustained on _____, from March 24, 2000, through August 6, 2000.

The hearing officer issued his Decision and Order on December 5, 2001, concluding that the claimant is not entitled to have the statutory MMI date extended pursuant to Section 408.104; [that the claimant did not have disability beginning March 24, 2000, through August 6, 2000;] and that the claimant abandoned medical treatment without good cause, justifying the suspension of TIBs under Rule 130.4 beginning on January 24, 2000, and continuing until March 20, 2000. The claimant appealed these adverse determinations on evidentiary sufficiency grounds and the respondent (carrier) filed a response urging affirmance. In Texas Workers' Compensation Commission Appeal No. 020020, decided February 27, 2002, the Appeals Panel remanded this case for reconstruction of the hearing record because the audio tape of the hearing was inaudible. The hearing officer held a remand hearing on March 21, 2002. The parties appeared, the claimant again testified, the parties agreed that the date of statutory MMI was June 20, 2001, and the record of the prior hearing was incorporated into the record before us on appeal. The hearing officer made the same findings of fact and conclusions of law he made after the previous hearing and the claimant has again appealed these adverse determinations, attaching to his appeal certain medical records which were excluded from admission at the remand hearing. The claimant also contends that the statutory MMI date is June 24, 2001, and that he did not authorize the ombudsman to agree to the date of June 20, 2001. The carrier has responded urging the absence of error and the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed.

The claimant's testimony and medical evidence reflected that he was injured at work in (city 1), Texas on _____, when the ladder rung he was standing on broke and he fell to the floor, and that his injuries included the discs at L4-5 and L5-S1. He said he has not been able to work since that date because of his back injury. The claimant further testified that he underwent chemotherapy for hepatitis C from January through April 2000; that he was in the hospital with encephalopathy from April 28 to May 7, 2000; that later in May 2000 he moved to (city 2), Texas and visited emergency rooms on June 3 and June 20, 2000, with complaints of low back pain; and that in March 2001 he returned to city 1.

Section 401.011(30) defines MMI to mean the earlier of "(A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104." *And see* Rule 130.4. Our decision in Appeal No. 020020 suggested that the hearing officer revisit his determination that the claimant's statutory MMI date is June 16, 2001, since the parties had agreed that the date of statutory MMI is June 20, 2001. At the close of the remand hearing, the parties discussed the MMI date; the carrier stated that an exhibit reflected the statutory MMI date as June 20, 2001; the ombudsman noted that the claimant's first day of lost time from work was June 17, 1999, and that, considering the Leap Year, the statutory MMI date was June 20, 2001, using a date wheel to calculate it; and the hearing officer then stated that the parties had previously agreed that the statutory MMI date was June 20, 2001. Accordingly, we find no error in his finding of fact to that effect.

Section 408.104 provides, in part, that the Texas Workers' Compensation Commission (Commission) "may extend the 104 week period 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." *And see* Rule 126.11, Extension of the Date of [MMI] for Spinal Surgery. The claimant testified that he underwent spinal surgery by Dr. S on January 16, 2001, and again on November 27, 2001, when the hardware and bone growth stimulator were removed. In evidence is the claimant's "Request for Extension of [MMI] for Spinal Surgery (TWCC-57)," which he signed on June 20, 2001, together with the Commission order on that form, signed on June 26, 2001, extending the statutory MMI date an additional 26 weeks to December 19, 2001, based on a benefit accrual date of June 24, 1999. Also in evidence is a separate Commission "Order for Extension of the Statutory Date of [MMI]," dated June 26, 2001, extending the statutory MMI date to December 19, 2001, and stating that Dr. S "will do/or had surgery on January 16, 2000, or one due on August 9, 2001." The evidence reflects that the carrier then disputed this Order, requesting an expedited benefit review conference. Also in evidence is a Recommendation for Spinal Surgery (TWCC-63) signed by Dr. S on July 17, 2001, and a Commission notification letter dated August 24, 2001, advising that the claimant has been approved for spinal surgery. In his statement of the evidence, the hearing officer states that the claimant does not qualify to have his date of statutory MMI extended because his initial spinal surgery occurred on January 16, 2001,

a date more than 12 weeks in advance of June 20, 2001, and because his second surgery was neither performed nor approved within 12 weeks before June 20, 2001. The hearing officer's factual findings supporting his conclusion of law on extension of the date of statutory MMI issue are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951);Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

With regard to the abandonment of medical care issue, Section 408.101(a) provides that TIBs shall be paid so long as the employee has disability and until MMI is reached. Section 408.102(b) provides that the Commission shall by rule establish a presumption that MMI has been reached based on a lack of medical improvement in the employee's condition. Rule 130.4(b) and (c), effective March 8, 1991, through January 1, 2002, provides, in part, that if there has not been a certification from a doctor that an injured employee has reached MMI, a carrier may follow the procedure outlined in this rule and shall presume, only to invoke this procedure, that an employee has reached MMI if "it appears that the employee has failed to attend two or more consecutively scheduled health care appointments." The hearing officer's statement of the evidence states that the claimant "missed appointments scheduled for January 24, 2000, and January 30, 2000," that after December 15, 1999, the claimant did not see Dr. B, his treating doctor at the time, until March 20, 2000; and that, "[a]ccordingly, the preponderance of the evidence shows that since the Claimant missed two medical appointments, the Claimant had abandoned medical treatment beginning January 24, 2000, the date of the first missed appointment, until March 20, 2000, the date the Claimant next saw [Dr. B]." The hearing officer also made findings of fact to this effect in Finding of Fact Nos. 5 and 6. The hearing officer obviously applied the version of Rule 130.4 in effect at the time of the first hearing and made the same comments and findings in his remand decision. Since the original decision was reversed and remanded only because the tape recording of the hearing was inaudible, and the remand hearing was held essentially to reconstruct the record, we do not find error in the hearing officer's continuing to apply the provisions of Rule 130.4 in effect prior to January 2, 2002. We are satisfied that the findings of fact on this issue, based on the rule in effect at the earlier hearing, are sufficiently supported by the evidence. King, *supra*; Cain, *supra*.

Finally, with respect to the disability issue, the hearing officer sets forth in his statement of the evidence the several reasons why he determined that the claimant failed to meet his burden of proof on this issue, including the claimant's not having been treated by his treating doctor after December 15, 1999, until March 20, 2000; his being treated for hepatitis C and later for encephalopathy and his move to city 2; and commencement of treatment with Dr. S on August 6, 2000. Again, under our standard of review, we are satisfied that the hearing officer's factual determination that the claimant "did not show that he was unable to obtain or [sic] retain employment at preinjury wages as a result of the compensable injury of _____, after December 15, 1999, until August 6, 2000," is sufficiently supported by the evidence.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

C T CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge