

APPEAL NO. 021437  
FILED JUNE 26, 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 (CCH) was held on April 24, 2002. With regard to the two issues before him, the hearing officer determined that the appellant's (claimant) compensable injury "does not extend to include a mild disc bulge at C6-7 or a bulge at T5-6," that the claimant reached maximum medical improvement (MMI) on November 16, 2001, and has a 6% impairment rating (IR). The hearing officer's decision on the extent of injury has not been appealed and has become final pursuant to Section 410.169.

The claimant appeals the MMI date and IR on three grounds: (1) that the hearing officer erred in failing to accept the designated doctor's amended report finding the claimant not at MMI; (2) pursuant to Fulton v. Associated Indemnity Corporation 46 S.W. 3d 364 (Tex. App.-Austin 2001, pet. denied) the claimant has 104 weeks to reach MMI and (3) offering newly discovered evidence not available at the CCH. The respondent (carrier) responds urging affirmance.

DECISION

On the appealed issue the hearing officer's decision is reversed for the reasons stated and a new decision is rendered.

It is relatively undisputed that the claimant sustained a compensable back injury on \_\_\_\_\_. The parties stipulated that Dr. F was the Texas Workers' Compensation Commission (Commission)-selected designated doctor.

In a Report of Medical Evaluation (TWCC-69) and narrative both dated November 16, 2001, Dr. F certified MMI on that date with a 6% IR (based on 3% impairment for cervical loss of range of motion (ROM) and 3% impairment for lumbar loss of ROM). The claimant's attorney wrote the Commission by letter dated January 9, 2002, enclosing a report dated January 3, 2002, from Dr. D, which states that the claimant is "a candidate for an L5-S1 disectomy and fusion." The letter to the Commission requested that Dr. D's report be sent to the designated doctor to see whether his opinion that the claimant has reached MMI remains the same. The Commission by letter dated March 8, 2002, sent the attorney's letter and attachment to the designated doctor asking for his "review and comment." Dr. F in an "Amended Report" TWCC-69 dated April 3, 2002, checked the box that the claimant was not at MMI and gave an estimated MMI date of September 24, 2002, the statutory date of MMI.

MMI is defined in Section 401.011(30) as the earlier of: (A) the earliest date which, based on reasonable medical probability, further material recovery from or

lasting improvement to an injury can no longer reasonably be anticipated; or (B) the expiration of 104 weeks from the date income benefits began to accrue (referred to as statutory MMI). We note that nothing in the definition of MMI mentions a requirement of active consideration of surgery.

Before January 2, 2002, there was no Commission rule which specifically discussed a designated doctor's amendment of IR. However, the Commission has now promulgated a rule which specifically refers to amendments by designated doctors. That rule is Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)), which provides, in relevant part:

The designated doctor shall respond to any commission requests for clarification no later than the fifth working day after the date on which the doctor receives the commission's request. The doctor's response is considered to have presumptive weight as it is part of the doctor's opinion.  
[Emphasis added.]

In Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002, we held that Rule 130.6(i) "does not permit the analysis of whether an amendment was made for a proper purpose or within a reasonable time." Appeal No. 013042-s also provided an explanation for the decision to give immediate effect to Rule 130.6(i). The Commission has left no doubt about its position on this issue. Consequently the designated doctor's "Amended Report" has presumptive weight.

The hearing officer gave two reasons for rejecting the designated doctor's amended report: (1) "lack of any persuasive evidence that surgery has ever been under active consideration" and (2) "the lack of any explanation from [Dr. F] for the amendment." The hearing officer also notes that Dr. D, who in January 2002 stated that the claimant was a surgical candidate, had written in a report dated October 11, 2001, that the claimant "is not eager to undergo . . . any type of surgical procedure" and recommended continued conservative care. As we previously noted nothing in the definition of MMI or Rule 130.6(i) makes consideration of spinal surgery a prerequisite for an amendment of the designated doctor's opinion on MMI. Similarly the clear inference from the amended TWCC-69 is that Dr. F, after considering Dr. D's latest (at that time) report that the claimant was a surgical candidate, determined within reasonable medical probability that further material recovery could reasonably be anticipated, and certified the claimant was not at MMI. The hearing officer's determination that the claimant reached MMI on November 16, 2001, with a 6% IR is reversed and we render a new decision that the claimant had not reached MMI, as certified by the designated doctor in his amended report of April 3, 2002, which has presumptive weight pursuant to Rule 130.6(i).

Regarding the claimant's assertion that under Fulton, *supra*, the claimant would automatically have 104 weeks to reach MMI, we categorically reject that contention. Both Section 401.001(30)(A) and Fulton, provide that an injured employee may reach

MMI before 104 weeks when a doctor certifies that material recovery or lasting improvement can no longer be reasonable anticipated.

Regarding the claimant's appeal asserting newly discovered evidence, in light of our reversal of the hearing officer's decision on MMI and IR we no longer need to address that point.

The hearing officer's decision and order are reversed and we render a new decision that the claimant has not reached MMI and therefore an IR is premature.

The true corporate name of the insurance carrier is **FIRE AND CASUALTY INSURANCE COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
800 BRAZOS  
AUSTIN, TEXAS 78701.**

---

Thomas A. Knapp  
Appeals Judge

CONCUR:

---

Daniel R. Barry  
Appeals Judge

---

Susan M. Kelley  
Appeals Judge