APPEAL NO. 030590
FILED APRIL 22, 2003

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 February 6, 2003. The hearing officer determined that appellant (claimant) reached maximum medical improvement (MMI) on August 8, 2001, with an impairment rating (IR) of one percent. The hearing officer also determined that claimant is not entitled to have statutory MMI extended pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.11 (Rule 126.11). Claimant appealed these determinations on sufficiency grounds. Claimant also contends that the hearing officer abused his discretion in failing to add a disability issue. Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm as reformed.

We first note it is undisputed that Finding of Fact No. 3 contains a clerical error. It states, "The certification of [Dr. C], the designated doctor, was not was contrary to the great weight of the other medical evidence." It is apparent that the hearing officer meant to state "was not" rather than "was not was." Therefore, we reform Finding of Fact No. 3 to state, "The certification of [Dr. C], the designated doctor, was not contrary to the great weight of the other medical evidence."

Claimant contends that the hearing officer erred in determining that he reached MMI on August 8, 2001, with a one percent IR. Claimant asserts that the great weight of the other medical evidence is contrary to the report of the designated doctor. Claimant sustained a compensable injury on _____. Claimant underwent an MRI on January 9, 2001, which revealed a herniated disc at L5-S1. Dr. M stated in a March 8, 2001, report that he did not feel that spinal surgery was appropriate. After a discogram, Dr. M noted a symptomatic disc and stated on January 30, 2002, that an opinion on spinal surgery would be appropriate. The designated doctor was informed of the discogram results. On February 4, 2002, the designated doctor made his MMI and IR certification. On March 15, 2002, the Texas Workers' Compensation Commission (Commission) wrote to the designated doctor asking him to review additional medical information. The designated doctor responded that he did not think claimant had a surgical lesion or neurological deficit and declined to change his MMI date or IR. Carrier preauthorized spinal surgery on August 9, 2002, after the designated doctor had already certified claimant to be at MMI. On August 27, 2002, the Commission again wrote to the designated doctor asking him to review his MMI date in light of the fact that surgery had been preauthorized. The designated doctor noted that surgery has a high risk of failure, but stated that the appropriate time to reexamine claimant would be after his postoperative rehabilitation. September 14, 2002, was the date of statutory MMI. Claimant underwent a laminectomy, diskectomy, and fusion on September 23, 2002.

On October 31, 2002, following the surgery, the Commission again wrote to the designated doctor regarding the surgery and any possible change in the date of MMI and the IR. The designated doctor responded that his previous report would remain unchanged. However, he said that if the treating doctor "feels substantial and objective evidence of improvement has occurred, [he] would be happy to re-examine [claimant] at a later date" that should be at least six months after surgery.

Claimant asserts that the designated doctor should not have found he was at MMI because his condition was not stable and he was about to undergo surgery. Claimant complains that the designated doctor did not think he had any neurological deficit or that he needed surgery.

Sections 408.122(c) and 408.125(e) of the 1989 Act provide that the report of a Commission-appointed designated doctor determining the date of MMI and the claimant's IR shall have presumptive weight and the Commission shall base its determination on such report, unless the great weight of other medical evidence is to the contrary. We have held that a "great weight" determination requires more than a mere balancing or preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 960897, decided June 28, 1996. No other doctor's report, including the treating doctor's report, is accorded the special presumptive status; and the designated doctor's report should not be rejected absent a substantial basis for doing so. Appeal No. 960897.

We have recognized that a designated doctor may choose to amend the MMI date and IR based on contemplated surgery that actually takes place after statutory MMI. Texas Workers' Compensation Commission Appeal No. 020457, decided April 5, 2002. The length of time that surgery occurs after statutory MMI has been reached may be considered by the hearing officer as a factor in whether the "great weight" of contrary medical evidence overcomes the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 021971, decided September 5, 2002. We have said, however, that the occurrence of spinal surgery approved through the second opinion process at any point after statutory MMI in the "life" of a claim does not necessarily compel reevaluation by the designated doctor. Appeal No. 021971.

In this case, at the hearing, claimant declined to ask that the Commission seek further clarification from the designated doctor regarding the effects of claimant's surgery and whether he would amend his MMI date and IR. Claimant sought, instead, for the hearing officer to find that the great weight of the other medical evidence is contrary to the designated doctor's report based on the evidence before the hearing officer. The hearing officer determined that the great weight of the other medical evidence was not contrary to the designated doctor's report. We conclude that that determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We further conclude that the hearing officer did not err in according presumptive weight to the designated doctor's report and in determining that claimant reached MMI on August 8, 2001, with a one percent IR.

Claimant next contends that the hearing officer erred in determining that he is not entitled to have the statutory MMI date extended pursuant to Section 408.104. The designated doctor certified on February 4, 2002, that claimant reached MMI on August 8, 2001, and claimant then disputed the designated doctor's report by asking for a benefit review conference. The hearing officer found that claimant filed a Request for Extension of [MMI] for Spinal Surgery (TWCC-57) on September 9, 2002, and that it was denied that same day. At the hearing on the MMI and IR issues, the hearing officer then determined that the designated doctor's report is entitled to presumptive weight and we have affirmed that determination. Therefore, the MMI determination has been "finally resolved." Applying Rule 126.11(k), we conclude that claimant's MMI date may not be extended because claimant reached MMI prior to requesting an extension under this section.

The preamble to Rule 126.11 states that, "If the certification was timely disputed and the resolution of such a dispute determines that the injured employee reached [MMI] at a date which is different than the date of [MMI] specified in the order for the extension, the earlier date shall apply." Even though there was no order extending MMI in this case, we will still consider this as indicative of the meaning of the rule. The preamble indicates that a determination that an employee has "reached MMI" for the purposes of Rule 126.11(k) does not depend solely on whether a designated doctor has merely certified that a claimant is at MMI. The preamble to Rule 126.11 indicates that if a claimant has been certified to be at MMI before the statutory MMI date and that claimant disputes the designated doctor's certification, the claimant may still seek an extension of MMI under Rule 126.11 and Section 408.104 during the pendency of the dispute. However, when the MMI issue is "finally resolved" through the dispute resolution process, and a claimant is found to be at MMI before the statutory date in accordance with the designated doctor's certification, then the claimant is not entitled to an extension under Rule 126.11. Rule 126.11(k).

Claimant also contended that the hearing officer erred in failing to add an issue regarding disability. We perceive no reversible error in this regard.

As reformed, we affirm the hearing officer's decision and order.

According to information provided by carrier, 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

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Judy L. S. Barnes
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the result.

I write separately because I do not agree that MMI was finally resolved prior to the claimant requesting an extension of MMI per Rule 126.11(k). MMI was not finally resolved[1] until the hearing officer issued his decision on February 12, 2003. The claimant filed a TWCC-57 on September 9, 2002. The claimant requested the extension prior to a final determination on the MMI issue. However, in this particular case, I concur in the result because there is evidence to support the hearing officer's determination that the MMI date is August 8, 2001.

_____
Roy L. Warren
Appeals Judge

[1] Section 410.169 provides that a decision of a hearing officer is final in the absence of an appeal and is binding during the pendency of the appeal.