

APPEAL NO. 030741  
FILED MAY 1, 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 (CCH) was held on February 24, 2003. With respect to the sole disputed issue before him,<sup>1</sup> the hearing officer determined that the appellant (claimant) is not entitled to have her statutory maximum medical improvement (MMI) date extended pursuant to Section 408.104. The claimant appeals, arguing that the hearing officer committed legal error and applied the wrong standard in determining whether the claimant's statutory MMI date could be extended. The respondent (carrier) responds, urging that the hearing officer be affirmed.

DECISION

Finding no reversible error, we affirm.

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 [Texas Workers' Compensation Commission (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 or surgeon 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

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<sup>1</sup> The parties stipulated to the claimant's average weekly wage at the CCH, thus disposing of the second certified issue from the benefit review conference.

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;
- (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 is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The parties do not dispute that the claimant sustained a compensable injury to her spine on \_\_\_\_\_; that she had a three-level lumbar fusion (after approval in the spinal surgery process) on August 13, 2002 (within 12 weeks of her original statutory date of MMI); that she originally had a statutory MMI date of September 17, 2002; and that the Commission extended her statutory MMI date following her July 2002 request, but before her actual spinal surgery, until November 16, 2002<sup>2</sup>. The hearing officer determined that the facts did not support the extension of the claimant's statutory MMI date, as the medical reports from her treating doctor (surgeon) were prospective and speculative in nature because the treating doctor predicted the claimant would require an additional 12 to 18 months to recover following her surgery *before* she had her surgery. The hearing officer found, and noted that the claimant

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<sup>2</sup> While the whole of the Commission's file as we received it has documentation regarding the claimant's request for, the Commission's granting, and the carrier's challenging, an extension of her statutory MMI date, no such documents were entered into evidence at the CCH. Given that the parties did not seem to dispute the chain of events leading them to the CCH, we only comment that we do not wish to disabuse the hearing officer of the notion that such documents are helpful in our review and often need to be admitted into the record.

testified, that the claimant experienced no relief as a result of the surgery and that the claimant's lumbar spine, postsurgery, became medically stable no later than September 17, 2002, her original statutory MMI. In so finding, the hearing officer noted the above-referenced Section 408.104 and Rule 126.11(f); he clearly considered the relevant legal guidance. The hearing officer did not abuse his discretion or misapply the germane legal provisions with respect to his determination that the claimant is not entitled to an extension of her statutory MMI date. The hearing officer followed guiding rules and principles in making his determination, and we thus perceive no abuse of discretion. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The hearing officer was acting within his province as the fact finder in resolving the conflicting evidence and nothing in our review of the record demonstrates that the hearing officer's determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **UNITED STATES FIDELITY AND GUARANTY COMPANY** and the name and address of its registered agent for service of process is

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

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Michael B. McShane  
Appeals Panel  
Manager/Judge

CONCUR:

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Chris Cowan  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge