

APPEAL NO. 012325
FILED NOVEMBER 21, 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 August 27, 2001. With respect to the issues before her, the hearing officer determined that the appellant (claimant) is not entitled to have the date of statutory maximum medical improvement (MMI) extended pursuant to Section 408.104 and that the respondent (carrier) did not waive the right to contest the Texas Workers' Compensation Commission's (Commission) order dated February 5, 2001, extending the statutory MMI date. In her appeal, the claimant asserts error in each of those determinations and asks that we render a decision in her favor. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant's date of statutory MMI is February 5, 2001; that a Recommendation for Spinal Surgery (TWCC-63) requesting Intra Discal Electro Thermal (IDET) treatment was filed on November 10, 2000; that the Commission did not issue a spinal surgery approval; that on January 31, 2001, a Request for Extension of [MMI] for Spinal Surgery (TWCC-57) was filed with the Commission; that on February 5, 2001, the Commission issued an order approving an extension of the claimant's statutory date of MMI; that as of the date of the hearing, the claimant had not undergone spinal surgery or IDET treatment; and that on April 20, 2001, the Commission issued a rescission of the approval of the extension of the date of statutory MMI.

As noted above, the TWCC-63 dated November 10, 2000, requested approval of an IDET procedure. On January 26, 2001, the Commission issued a Result of Spinal Surgery Second Opinion Process notifying the parties that "[i]t has been determined that the [Commission] does not have jurisdiction over this case or it has been voluntarily withdrawn by one of the parties involved." The claimant requested an extension of statutory MMI, and the Commission approved an extension on February 5, 2001. Specifically, the Commission approved a 24-week extension of statutory MMI based upon a benefit accrual date of February 8, 1999. The Commission then identified the extended date of statutory MMI as July 23, 2000.

We note that the extension to July 23, 2000, is an obvious typographical error. The parties stipulated that the date of statutory MMI in this case, in the absence of an extension, is February 5, 2001. Thus, a 24-week extension of that date would necessarily be July 23, 2001, not July 23, 2000, as the approved TWCC-57 states. In any event, it defies logic and common sense to suggest that the Commission could intend to specify a date prior to the claimant's statutory MMI date on a form purporting to approve an extension of that date. Indeed, the Commission does not have a basis for shortening

statutory MMI in that statutory MMI is specifically defined in Section 401.011(30)(B) as occurring on the expiration of 104 weeks from the date on which income benefits begin to accrue.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.11(g) (Rule 126.11(g)) provides that an injured employee or a carrier "may dispute the approval, denial, or length of the extension granted by the commission order by filing a request for a benefit review conference [BRC] . . . no later than ten days after the date the order is received." Rule 126.11(h) states that if the request for the BRC "is not received by the commission within ten days after the date the order granting or denying the extension was received by the disputing party, the parties waive their right to dispute the commission order." There is no evidence that the carrier disputed the February 5, 2001, Commission order extending statutory MMI by requesting a BRC within the 10-day period provided for doing so. Thus, pursuant to Rule 126.11(h), the carrier waived its right to dispute the order extending statutory MMI. The hearing officer determined that there was no waiver because the extension was invalid and should not have been granted by the Commission in that the claimant had not satisfied the requirements of Section 408.104 of either having had or been approved for spinal surgery 12 weeks or less before statutory MMI. We cannot agree that the waiver provision of Rule 126.11(h) applies only if the Commission's order is otherwise valid. To the contrary, if an extension is correctly or incorrectly granted or denied under Section 408.104 and Rule 126.11, the party disputing the order must file a BRC request within the 10-day period for doing so or the party loses the right to challenge that order. If the waiver provision of Rule 126.11(h) were not so interpreted, it would be meaningless.

The hearing officer erred in finding that the carrier had not waived its right to dispute the Commission's order extending the claimant's date of statutory MMI. Accordingly, we reverse that determination and render a new decision that the claimant is entitled to an extension of statutory MMI in this instance because the carrier waived its right to dispute the extension. We likewise reverse the determination that the correct date of MMI is February 5, 2001, and render a new decision that the correct date of MMI is July 23, 2001, in accordance with the Commission's February 5, 2001, order.

The true corporate name of the insurance carrier is **HARTFORD INSURANCE COMPANY OF THE MIDWEST** and the name and address of its registered agent for service of process is

**BARBARA SACHSE
9020 NORTH CAPITAL OF TEXAS HIGHWAY, SUITE 555
AUSTIN, TEXAS 78759-7232.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge