

APPEAL NO. 122262
FILED JANUARY 14, 2013

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 October 1, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues before her, the hearing officer determined that: (1) the appellant/cross-respondent (claimant) did not waive the right to contest the Texas Department of Insurance, Division of Workers' Compensation (Division) order denying extension of the statutory maximum medical improvement (MMI) date by failing to file a dispute within 10 days after receiving the order; (2) the claimant reached MMI on October 12, 2011, the date of statutory MMI; and (3) the claimant's impairment rating (IR) is 10%. The claimant appealed the hearing officer's MMI and IR determinations. The respondent/cross-appellant (self-insured) responded, urging affirmance of the MMI and IR determinations. The self-insured cross-appealed the hearing officer's waiver determination. The appeal file does not contain a response to the self-insured's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The determination on the waiver issue is dispositive of the MMI and IR issues. It was undisputed that on June 8, 2012, the claimant filed with the Division a Request for Extension of [MMI] for Spinal Surgery (DWC-57). In an unappealed finding of fact, the hearing officer found that on June 8, 2012, the Division issued an order denying the claimant's DWC-57. In evidence is the order denying the DWC-57, which states it was denied by the Division because the "[r]equest received was more than 110 weeks from date income benefits begin to accrue" and because "[s]pinal [s]urgery was not performed or approved between 92-104 weeks from date benefits began to accrue."

SECTION 408.104 AND 28 TEX. ADMIN. CODE § 126.11(g) (RULE 126.11(g))

Section 408.104 provides:

- (a) On application by either the [claimant] or the insurance carrier, the commissioner by order may extend the 104-week period described by Section 401.011(30)(B) if the [claimant] has had spinal surgery, or has been approved for spinal surgery under Section 408.026 and commissioner 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 commissioner.

- (b) Either the [claimant] or the insurance carrier may dispute an application for extension made under this section. A dispute under this subsection is subject to Chapter 410.
- (c) The commissioner shall adopt rules to implement this section, including rules establishing procedures for requesting and disputing an extension.

Rule 126.11(g) provides in pertinent part:

[A claimant] or an insurance carrier may dispute the approval, denial, or the length of the extension granted by the [Division] order by filing a [Request for a Benefit Review Conference (BRC) (DWC-45)] in accordance with [Rule] 141.1 of this title . . . no later than [10] days after the date the order is received.

In the Background Information section of her decision, the hearing officer stated:

[The] [c]laimant argued that his statutory [MMI] [date] of October 12, 2011, should be extended because of extenuating circumstances. [The self-insured] argued that Texas law ([Section] 408.104 and Rule 126.11) requires strict adherence to its provisions, explaining that [the] [c]laimant who did not follow the law cannot now request a special exception.

The hearing officer further stated:

[The] [c]laimant signed three forms requesting an extension of the date of MMI. On May 7, 2012, and on June 6, 2012, he signed requests for a [BRC] on the issue of extending the date of MMI. At some point on or prior to June 8, 2012 [the] [c]laimant signed, but did not date, a form requesting the Division to issue an order to extend the date of MMI. . . .

[The] [c]laimant testified that he received the Division's denial 1 or 2 months prior to the date of the [CCH] [October 1, 2012]. The only times he requested a [BRC] was before he received the Division's order denying his request. [The] [c]laimant did not follow provisions of Texas law when he attempted to have the date of MMI extended. He filed his request many months after the date of his statutory MMI. Then he filed a [DWC-

45] prior to the date he had notice of the Division's order that denied the request for an extension of the date of MMI.

In Finding of Fact No. 4, the hearing officer stated that “[a]lthough the exact date [the] [c]laimant received a copy of the June 8, 2012, order is unknown, prior to June 8, 2012 [the] [c]laimant twice requested a [BRC] on the issue of extending the date of [MMI] which in essence timely disputed the Division order of June 8, 2012.” The hearing officer concluded that the claimant did not waive the right to contest the Division order denying the extension of statutory MMI date by failing to file a dispute within 10 days after receiving the order. We disagree.

Under the facts of this case, the hearing officer erred in not finding that the claimant is deemed to have received the Division order dated June 8, 2012, by June 13, 2012. See Rule 102.5(d) regarding deemed receipt. There is no evidence that the claimant filed a DWC-45 disputing the Division order denying the claimant's DWC-57 within 10 days of receiving the Division's order of June 8, 2012.

We note that the requirements of Rule 126.11(g) provide that a dispute of an order denying the extension of statutory MMI date must be filed no later than 10 days after receiving the Division order. A dispute filed prior to the receipt of the Division order is premature and not in compliance with Section 408.104 and the plain language of Rule 126.11(g). Under the facts of this case, the claimant's attempt to request a BRC on the issue of extending the date of MMI prior to receiving a Division order would not be a dispute of the Division order. See Appeals Panel Decision 042275-s, decided November 8, 2004.

Accordingly, we reverse the hearing officer's decision that the claimant did not waive the right to contest the Division order denying the extension of statutory MMI date by failing to file a dispute within 10 days after receiving the order and render a new decision that the claimant waived the right to contest the Division order denying extension of statutory MMI date by failing to file a dispute within 10 days after receiving the order.

MMI AND IR

The hearing officer's determinations that the claimant reached MMI on October 12, 2011, statutorily, with 10% IR are supported by sufficient evidence and are affirmed.

SUMMARY

We reverse the hearing officer's decision that the claimant did not waive the right to contest the Division order denying the extension of statutory MMI date by failing to file a dispute within 10 days after receiving the order and render a new decision that the claimant did waive the right to contest the Division order denying the extension of statutory MMI date by failing to file a dispute within 10 days after receiving the order.

We affirm the hearing officer's decision that the claimant reached MMI on October 12, 2011, statutorily, with 10% IR.

The true corporate name of the insurance carrier is, **[a certified self-insured]** and the name and address of its registered agent for service of process is

**[CORPORATION]
[ADDRESS]
[CITY], TEXAS [ZIP].**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge