

APPEAL NO. 231502
FILED DECEMBER 14, 2023

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 September 12, 2023, with the record closing on September 19, 2023, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issue by deciding that the respondent (claimant) is entitled to have the date of statutory maximum medical improvement (MMI) extended pursuant to Section 408.104 to June 5, 2024. The appellant (carrier) appealed the ALJ's determination. There was no response from the claimant to the carrier's appeal in the appeal file.

DECISION

Reversed and rendered.

The parties stipulated, in part, that: (1) the claimant sustained a compensable injury on (date of injury), in the form of a lumbar strain/sprain injury, disc bulges/herniations/extrusions/intervertebral disc displacements at L4-5 and L5-S1, destabilization of spondylosis, aggravation of spondylolisthesis, bilateral neural foraminal stenosis, neural claudication, and neural impingement at L4-5 and L5-S1; (2) the date of statutory MMI in this case is May 3, 2023; and (3) the claimant underwent spinal surgery on June 5, 2023. The claimant, an electronics technician, was injured on (date of injury), while lifting a 90-pound canister.

Section 408.104 is titled "[MMI] After Spinal Surgery" and provides in part:

(a) On application by either the employee or the insurance carrier, the commissioner 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 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.

28 Tex. Admin. Code § 126.11 (Rule 126.11) is titled "Extension of the Date of [MMI] for Spinal Surgery." Subsection (f) provides:

In making the determination to approve or deny a request for an extension of the date of MMI, the Texas Department of Insurance, Division of Workers' Compensation (Division) 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 the surgeon;
- (3) case specific information regarding any extenuating circumstances that may have resulted in variances from conservative treatment protocols and time frames 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 claimant had surgery for the compensable lumbar injury on June 25, 2021. However, following the initial surgery, the claimant had complications with the hardware loosening and contacting his spinal cord. A revision surgery was performed on December 15, 2021. The claimant continued to have pain and complications following the second surgery, and the claimant's surgeon, (Dr. M), submitted a preauthorization request on March 23, 2023, for a redo L4-S1 laminectomy, facetectomy, reversal of hardware, and exploration of fusion, with possible L4-S1 instrumented fusion. The carrier denied the request on March 28, 2023, because a peer-to-peer consultation could not be performed. The request was re-submitted on March 30, 2023, and denied a second time on April 4, 2023, due to the lack of a psychological evaluation.

The claimant filed a Request to Extend the Date of MMI for an Approved Spinal Surgery (DWC-57) on May 1, 2023, despite surgery not having been approved or performed. The request was denied by the Division on that basis. The requested surgery was approved by the carrier on May 19, 2023, and the claimant filed another DWC-57 on May 25, 2023. However, on May 31, 2023, the Division again denied the request due to the approval not taking place within 12 weeks before the date of statutory MMI. The claimant had the surgery on June 5, 2023.

In the Discussion section of his decision, the ALJ correctly noted that in this case, both the approval for surgery and the surgery came after the date of statutory MMI. However, in determining that the claimant is entitled to have his statutory date of MMI

extended, the ALJ cited Rule 126.11(f)(4) and stated that the delay in the approval and performance of the June 5, 2023, surgery was shown to be unintentional due to the review process which ultimately resulted in the approval of surgery 16 days after the statutory MMI date.

In Appeals Panel Decision (APD) 002749-s, decided January 10, 2001, the claimant likewise contended that the delays in getting the recommended surgery approved constituted an exception as to allow the extension of MMI beyond the statutory date, citing to Rule 126.11(f)(3) and (4). The Appeals Panel rejected that argument, stating that Rule 126.11(f) only comes into play if the injured employee has had spinal surgery or has been approved for spinal surgery 12 weeks or less before statutory MMI. As such, spinal surgery, or the approval for spinal surgery, 12 weeks or less before statutory MMI, is a condition precedent to the application of Rule 126.11(f). See *also* APD 020705, decided May 6, 2002.

As the recommended surgery in this case was neither approved nor performed within 12 weeks before May 3, 2023, the date of statutory MMI, we reverse the ALJ's determination that the claimant is entitled to have the date of statutory MMI extended pursuant to Section 408.104 to June 5, 2024, and we render a new decision that the claimant is not entitled to have the date of statutory MMI extended pursuant to Section 408.104.

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

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge