

APPEAL NO. 002749-S

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 November 16, 2000. With regard to the only issue before him, the hearing officer determined that the appellant (claimant) is not entitled to have the statutory maximum medical improvement (MMI) date extended pursuant to Section 408.104.

The claimant appealed, contending that the spinal surgery was not approved or performed within 12 weeks before the statutory MMI date due to delay caused by the respondent (carrier) or the carrier's second opinion doctor. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The carrier responds, urging affirmance.

DECISION

Affirmed.

The claimant had been employed as a carpenter when, on _____, he slipped and twisted his body and sustained a compensable low back injury. The claimant had spinal surgery for the compensable injury on August 27, 1998, and a second spinal surgery on June 22, 1999. The claimant continued to have back complaints. It is undisputed, and the hearing officer, in an unappealed finding, found that July 31, 2000 (all dates are 2000 unless otherwise stated), is the date of the expiration of 104 weeks from the date income benefits began to accrue (statutory MMI, Section 401.011(30)(B)).

The claimant was evaluated by Dr. T, his treating doctor, on April 12 and, in a report of that date, Dr. T recommended further diagnostic studies including "a lumbar myelogram/CT scan" with the claimant to return after the studies for reevaluation. Dr. T requested preauthorization for the lumbar myelogram/CT scan on April 26, which was denied by the carrier on May 2. The claimant testified that he discussed his options with the Texas Workers' Compensation Commission (Commission) and decided to have the procedure performed using his own health insurance coverage. The lumbar myelogram/CT scan was performed on June 15. (The carrier ultimately authorized the procedure on July 10.)

On a Recommendation for Spinal Surgery (TWCC-63) dated June 28, Dr. T recommended additional spinal surgery at L4-5. The carrier requested a second opinion spinal surgery doctor on July 14, and selected Dr. H, who examined the claimant on July 24. On July 25 Dr. H, on a "SpineLine Fax Response Form," concurred in the recommended procedure; however, contrary to the instructions on the form, Dr. H did not submit his narrative report "within ten days of the exam." On July 26 the claimant requested an "MMI extension per Rule #126" (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126 (Rule 126)) past the "mandatory" (statutory) MMI date. In a letter dated August 24 the claimant's request for extension of MMI was denied "due to spinal surgery not being

completed or approved within the 12 weeks prior to your statutory date of February 16 [sic, should be July 31 or possibly August 4]."

According to the claimant's testimony, Dr. H's narrative report was received by the Commission on August 31 and notification of approval ("preauthorization") for spinal surgery was sent to the claimant by letter dated September 8. Spinal surgery was performed on September 19 and the claimant requests that the MMI date be extended for one year, to September 19, 2001. The applicable statutory provision is Section 408.104. 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 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.

The claimant contends that Rule 126.11(f) provides for an extension under extenuating circumstances which allow for an extension of the date of MMI for spinal surgery. The claimant contends, and to some extent the hearing officer agrees, that the carrier's denial of diagnostic testing in April/May and Dr. H's failure to timely submit his narrative report on July 25 constitute such an exception as to allow the extension of MMI beyond the statutory date, citing specifically Rule 126.11(f)(3) and (4). Those particular subsections deal with "extenuating circumstance that may have resulted in variances from conservative treatment . . . or that may impact recovery times" and "delays in securing the surgery or medical treatment." We disagree with the claimant's contention. The beginning of Rule 126.11, in subsection (a) provides:

- (a) The Commission may approve an extension of the date of [MMI] subject to subsection (f) of this section, if the injured employee has had spinal surgery or has been approved for spinal surgery 12 weeks or less before the expiration date of 104 weeks from the date income benefits began to accrue. . . . Approval for spinal surgery is either the notification from the spinal surgery section of the Commission or a decision from the appeal process finding the insurance carrier liable for the reasonable costs of spinal surgery. Any extension of the date of [MMI] ordered by the Commission must be to a specific and certain date. [Emphasis added.]

Approval is specifically defined as being when there is notification from the Commission (or an Appeals Panel decision) finding the carrier liable for reasonable costs of spinal surgery. 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].” Neither condition occurred here. Spinal surgery, or the approval of spinal surgery, 12 weeks or less before statutory MMI, is a condition precedent to the application of Rule 126.11(f).

The hearing officer made the following conclusions of law:

3. The statutory requirement at Tex. Labor Code [A]nn §408.104 that a Claimant have spinal surgery or be approved for spinal surgery within 12 weeks before the expiration of the 104 week period from the date income benefits begin to accrue is mandatory and does not allow for an exception.
4. The factors listed at Rule 126.11(f) apply only to Claimants who have satisfied the statutory requirement at Tex. Labor Code [A]nn. §408.104 that a Claimant have spinal surgery or be approved for spinal surgery within 12 weeks before the expiration of the 104 week period from the date income benefits begin to accrue.

We find that the hearing officer has correctly interpreted and applied Section 408.104 and Rule 126.11.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge