APPEAL NO. 042275-s
FILED NOVEMBER 8, 2004

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 August 9, 2004. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to change treating doctors to Dr. M pursuant to Section 408.022, and that the appellant (carrier) waived the right to contest the Texas Workers' Compensation Commission's (Commission) Order extending the date of statutory maximum medical improvement (MMI) by failing to file a dispute within 10 days after receiving the Order. The carrier appeals the hearing officer's determinations on the disputed issues. No response was received from the claimant.

DECISION

Affirmed.

TREATING DOCTOR ISSUE

The claimant testified that he requested to change his treating doctor to Dr. M because his initial treating doctor stopped handling workers' compensation cases and that is a reason he put on his Employee's Request to Change Treating Doctors (TWCC-53). No contrary evidence was presented at the CCH on the treating doctor issue. The hearing officer decided that the claimant is entitled to change treating doctors to Dr. M pursuant to Section 408.022. We conclude that the hearing officer's determination on the treating doctor issue is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

WAIVER ISSUE

The claimant testified that he was approved for spinal surgery, but that he has not had the spinal surgery as of the date of the CCH because of a lung problem. The evidence reflects that the claimant's Request for Extension of [MMI] for Spinal surgery (TWCC-57) was filed with the Commission on June 16, 2003, and that the Commission approved the request by Order dated August 4, 2003. The Order extended the statutory date of MMI to December 8, 2003, which was an additional 28 weeks. Section 408.104 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.11 (Rule 126.11) are the relevant statutory and rule provisions. The hearing officer decided that the carrier waived the right to contest the Order extending the date of statutory MMI by failing to file a dispute within 10 days after receiving the Order.

The carrier contends that the Order is invalid because it was not issued within 10 days of the date the request was received by the Commission as required by Rule 126.11(b). We do not agree with the carrier's contention. Although the Order was not

issued within the 10-day period, Rule 126.11 does not make the Order invalid for failing to comply with the 10-day provision. In Texas Workers' Compensation Commission Appeal No. 033096, decided January 13, 2004, the Appeals Panel rejected a claimant's argument that he did not have to comply with the provisions of Rule 126.11(g) (the dispute provision) because the Commission failed to comply with the 10-day provision of Rule 126.11(b). The Appeals Panel stated that where the Commission's noncompliance with a rule provision does not prevent the claimant from complying with his obligations under the rules, the Commission's noncompliance does not necessarily relieve the claimant of his compliance obligations. A similar 10-day provision is in Rule 142.16(c), which provides that no later than the 10th day after the close of the CCH, the hearing officer shall file all decisions with the division of hearings. The Appeals Panel has held that a hearing officer's decision is not void for failure to file the decision within the 10-day time frame provided in Rule 142.16(c), and that the time line set out in that rule is directory, and not mandatory. Texas Workers' Compensation Commission Appeal No. 011399, decided August 1, 2001. We hold that the Order extending the date of statutory MMI is not invalid for failure to issue the Order within the 10-day period provided for in Rule 126.11(b).

The carrier contends that the Order is null and void under Rule 126.11(j) because the claimant has not had surgery. We disagree with the carrier's contention under the facts of this case. In discussing Rule 126.11(j), the preamble at 23 Tex. Reg. 553 (1998) states:

> Subsection (j) addresses the situation where an extension is granted but surgery is not performed. The Legislative Committee Bill Analysis indicates that it was the intent of HB 3522 to provide extensions of [MMI] when spinal surgery is performed. In the event that surgery is not performed (possibly through a finding of non-concurrence through the appeals process or some other reason), any order granting an extension becomes null and void. This is because the statute requires spinal surgery as a prerequiste for the granting of an extension.

Rule 126.11(j) provides as follows:

> In the event that the extension of the date of [MMI] is granted based on a finding of liability for spinal surgery within the 12 week period and a party appeals the preauthorized approval to a benefit [CCH], any extension of the date of [MMI] ordered by the commission shall be conditional pending final decision under the commission's jurisdiction of the liability for spinal surgery. If spinal surgery is not performed within six weeks after the date the final decision of the commission is issued, the order for the extension of the date of [MMI] shall be null and void.

Despite the broad language in the preamble regarding Rule 126.11(j), a plain reading of that rule provision reflects that it is limited to a situation where there is an appeal to a CCH of preauthorized approval of liability for spinal surgery and the

Commission issues a final decision on the issue of liability for spinal surgery. In that event, if spinal surgery is not performed within six weeks after the date the final decision of the Commission is issued, the final decision being the final decision on the appeal of the preauthorized approval of liability for spinal surgery, then the order for the extension of the date of MMI shall be null and void. In the case under review, there is no evidence, nor even a contention, that there was ever any appeal of a preauthorized approval of liability for spinal surgery. Consequently, there is no evidence of a final decision by the Commission on any such appeal of liability for spinal surgery and since there is no such final decision on liability for spinal surgery, there is no final decision to which the six-week period provided for in Rule 126.11(j) can apply. Since the Commission has set forth in Rule 126.11(j) the circumstance under which an order for the extension of the statutory date of MMI becomes null and void, the Appeals Panel does not have the authority to informally amend the rule through an Appeals Panel decision to make an order for the extension of statutory MMI null and void in situations not set forth in Rule 126.11(j). *See* Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). Consequently, since the carrier has failed to show that Rule 126.11(j) applies to the facts of this case, the carrier has failed to show that the Order extending the MMI date in this case is null and void under that rule provision.

Rule 126.11(g) provides in part that an injured employee or an insurance 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] (TWCC-45) in accordance with Rule 141.1 no later than 10 days after the date the order is received. Rule 126.11(h) provides that if a TWCC-45 is not received by the Commission within 10 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. The claimant's request for an extension of MMI was filed with the Commission on June 16, 2003. An adjuster for the carrier stated in an affidavit that she filed a TWCC-45 on June 26, 2003, in which the carrier disputed the claimant's request for an extension of MMI. The hearing officer noted that the TWCC-45 was not file stamped by the Commission. The hearing officer found that the carrier is deemed to have received the Commission's Order of August 4, 2003, extending the date of statutory MMI, by August 9, 2003. *See* Rule 102.5(d) regarding deemed receipt. There is no evidence that the carrier filed a TWCC-45 disputing the Commission's approval of the claimant's request for extension of MMI within 10 days after receiving the Commission's Order extending the date of statutory MMI. The hearing officer found that the carrier did not request a BRC within 10 days of receiving the Commission's Order of August 4, 2003. The hearing officer concluded that the carrier waived its right to contest the Commission's Order extending the date of statutory MMI by failing to file a dispute within 10 days after receiving the order.

The carrier contends that it did not waive the right to dispute the Commission's Order extending the date of statutory MMI because it filed a TWCC-45 disputing the claimant's request for extension of MMI on June 26, 2003, and that to hold that its dispute was premature would be to place form over substance. We do not agree with the carrier's contention. In the preamble to Rule 126.11 at 23 Tex. Reg. 556 (1998) a

commenter requested that the language in Rule 126.11(g) be changed to allow for a dispute of the application (request) and not the action of the Commission based on the application. The Commission disagreed, citing language in Section 408.104(c), and stating that "[t]his allows the Commission to determine the dispute resolution process and indicates that it is the extension that may be disputed as opposed to simply the application for an extension." In an analogous situation, in applying the provisions of Rule 130.108(c) regarding a carrier's dispute of first quarter supplemental income benefits (SIBs), the Appeals Panel held in Texas Workers' Compensation Commission Appeal No. 033137-s, decided January 20, 2004, that "[a]ny action by the carrier to dispute the claimant's entitlement to first quarter SIBs prior to the Commission's initial determination of entitlement is simply premature and of no effect."

The hearing officer found that the carrier did not request a BRC on June 26, 2003, to dispute the extension of the claimant's MMI. It was undisputed at the CCH that a BRC request was filed on June 26, 2003, even though the TWCC-45 in evidence was not date stamped by the Commission. We hold that if the carrier filed a TWCC-45 on June 26, 2003, disputing the claimant's request for an extension of MMI, it was premature and of no effect because it was not filed "no later than ten days after the date the order is received" as provided in Rule 126.11(g). Consequently, the hearing officer did not err in determining that the carrier waived its right to contest the Commission's Order of August 4, 2003, extending the claimant's date of statutory MMI because there is no evidence that the carrier complied with Rule 126.11(g) by filing a TWCC-45 no later than 10 days after the date the Order was received and thus waived its right to dispute the Commission Order under Rule 126.11(h).

The carrier also asserts as a basis for overturning the hearing officer's decision that the claimant was told he needed surgery more than 12 weeks before the expiration of 104 weeks after his income benefits began to accrue and that the claimant was told he was not a surgical candidate before his application for extension of MMI. In Texas Workers' Compensation Appeal No. 012325, decided November 21, 2001, the Appeals Panel applied the waiver provision of Rule 126.11(h) stating:

> 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.

We affirm the decision and order of the hearing officer.

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

DOROTHY A. LANGLEY
10000 N. CENTRAL EXPRESSWAY
DALLAS, TEXAS 75231.

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Robert W. Potts
Appeals Judge

CONCUR:

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Judy L. S. Barnes
Appeals Judge

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Daniel R. Barry
Appeals Judge