

## APPEAL NO. 93719

This case is before us again following our remand in Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993. The hearing on remand was conducted pursuant to the Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S. art. 8308-1.01 *et seq.*). The case was remanded as a result of the evidence of record indicating that the designated doctor did not perform the required examination of the respondent (claimant) in rendering his certification of maximum medical improvement (MMI) and an impairment rating (IR). The presiding hearing officer, (hearing officer), held two hearing sessions on remand, May 21, 1993 and July 12, 1993, and determined that the claimant reached MMI on August 24, 1992 with a seven percent IR and that the claimant did not sustain a neck injury in his work-related accident of (date of injury). The claimant appeals contesting whether the designated doctor's report is entitled to presumptive weight and urging that the preponderance of evidence establishes that a cervical injury existed at the time of the injury. Respondent (carrier) asks that the decision be upheld.

### DECISION

Finding the great weight and preponderance of the evidence contrary to the hearing officer's determination that a neck injury was not related to the claimant's compensable injury of (date of injury), we reverse and render on that issue and determine the correct IR to be 11%. The remainder of the decision is affirmed.

Although the remand was occasioned by a relatively narrow and easily cured point of error, the subsequent proceedings became somewhat more complicated, including the raising of an issue involving what appears to us to be a question of the extent of injury as opposed to an issue concerning a new or distinct injury. In any event, the original designated doctor was apparently not available to conduct any necessary exam required by the remand. Another designated doctor, (Dr. W), was appointed and initially certified MMI on May 5, 1993 with an 11% IR which included 4% for the cervical area. Unfortunately, the carrier's counsel made *ex parte* contact with Dr. W questioning his MMI date in view of three other doctor's records and reports which indicated an earlier MMI date. Subsequently Dr. W rendered a new report (TWCC-69) certifying an MMI date of August 24, 1992.

At the hearing held on May 21, 1993, the claimant's counsel complained about the *ex parte* communication by the carrier's counsel with the designated doctor and also voiced concern that all medical records, including a recent MRI, had not been made available to Dr. W at the time of his examination. Also, the matter of whether the rating regarding the cervical area was properly included in the designated doctor's certification of MMI and IR was surfaced during this hearing. At the conclusion of the May 21st session, the hearing officer stated that another session would be necessary and that in the meantime he would write directly to Dr. W, attach all the medical records on the claimant including the recent MRI as desired by the claimant, advise Dr. W that it was inappropriate for the carrier's counsel to contact him directly, ask Dr. W to render a separate IR not including the cervical area, and issue another report including whether MMI had been reached and if so, when.

The hearing officer also indicated there was a new issue in the case concerning whether the claimant sustained a cervical injury on (date of injury).

At the hearing session on July 12, 1993, the claimant testified that he had been treated for head, neck and shoulder pain during the course of his treatment following the (date of injury) accident although the more serious problem was in his low back which is reflected in most of the medical reports. He stated that he did not know if his neck was injured when the heavy bolt of cloth fell on him and twisted him but that he complained about shoulders and headaches sometime after he started treatment for his injuries and that he received treatment for neck, shoulder and lower back problems (it appeared he was not familiar with the term cervical from questions asked). He acknowledged that he did not specifically state "neck" in describing the extent of claimed injury in pre-hearing interrogatories but that he was so stating when he answered "my shoulders hurt, my legs and my head and my back; this has caused me a lot of distress." There are references to "cervical stretches" in the claimant's treatment plan and "neck" as an area of pain in records from the physical therapy program in which the claimant was enrolled. Notations in a report entitled Initial Patient Assessment dated "date" reflect positive for headaches "which have increased in frequency" and that an examination of the neck disclosed "bilateral cervicothoracic tenderness present" and "right paravertebral spasm present." Of perhaps greater significance is the report of Dr. W which shows some tenderness in the neck and states after noting a four percent cervical spine rating and some dispute regarding any cervical injury that "[h]owever, it is my understanding from his earlier treating doctor, [Dr. P], and we have discussed this with the patient, a cervical component was present from the original injury."

The claimant's testimony that he experienced pain in the neck, shoulder and head area shortly after the (date) incident and that he mentioned this to health care providers, together with the nature of the accident (a heavy bolt of cloth falling on him) which is consistent with the overall injury described by claimant, the fact that medical coverage was continuously extended for treatment which included the neck, shoulder and head, the reflection in medical records showing complaints of and treatment for this condition as well as lower back problems, and the medical opinions of a treating doctor and the designated doctor stating that a cervical component was present from the original injury constitute the great weight and preponderance of the evidence that there was a cervical aspect to the claimant's condition warranting the designated doctor's medical opinion and assessment of an impairment rating for the cervical area. Under these circumstances, we do not believe an issue of a distinct and separate injury unrelated to the (date) incident was present. See Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992. Accordingly, we find that part of the hearing officer's decision that the claimant's IR was 7% to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust and determine that the designated doctor's IR of 11% to be the correct one.

We do not find merit to the claimant's assertion that the designated doctor's certification is not entitled to presumptive weight. While we fully agree with the complaint concerning the carrier's counsel's ex parte correspondence with the designated doctor on the matter of MMI, and have so firmly cautioned against on several occasions (Texas Workers' Compensation Commission Appeal No. 93702, decided September 27, 1993; Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993; Texas Workers' Compensation Commission Appeal No. 93455, decided July 22, 1993), we believe the action taken by the hearing officer in obtaining another opinion and report from the designated doctor cured any harmful error. We have stated that a designated doctor can, under limited and appropriate circumstances, amend or correct his certification and report. See Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992; Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992. We do not find any inappropriate circumstances here that have not been effectively cured by the action of the hearing officer. Accordingly, we affirm that part of the hearing officer's decision determining that the claimant reached MMI on August 24, 1992 as certified by the designated doctor. The date of maximum medical improvement is August 24, 1992 and the impairment rating is 11%.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Robert W. Potts  
Appeals Judge