

## APPEAL NO. 991926

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 9, 1999. The Texas Workers' Compensation Commission (Commission)-selected designated doctor, Dr. F, on April 3, 1997, certified that the respondent (claimant) reached maximum medical improvement (MMI) on January 10, 1997, with a four percent impairment rating (IR). The claimant had cervical surgery on March 25, 1998. Dr. F reexamined the claimant and on May 7, 1999, certified that the claimant's IR is 16%. The hearing officer determined that Dr. F amended his report for a proper purpose and within a reasonable time; that the great weight of the other medical evidence is not contrary to the May 7, 1999, report of Dr. F; that the claimant reached MMI by operation of law on April 20, 1998; that the claimant's IR is 16%; and that the claimant had disability beginning on March 18, 1996, and continuing through March 19, 1996, beginning on April 22, 1996, and continuing through June 11, 1996, and beginning on October 31, 1996, and continuing through the date of the hearing. The appellant (carrier) requested review; urged that the determinations that Dr. F amended his report for a proper reason and within a reasonable time are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; stated that the claimant is not entitled to temporary income benefits (TIBS) after the date she reached MMI; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant reached MMI on January 10, 1997, with a four percent IR and that she is not entitled to TIBS after the date she reached MMI. A response from the claimant has not been received.

### DECISION

We affirm.

In unappealed findings of fact the hearing officer determined that the claimant sustained a compensable injury that included herniated discs at C5-6 and C6-7 on March 14, 1996; that on April 3, 1997, Dr. F certified that the claimant reached MMI on January 10, 1997, with a four percent IR; that at the time that Dr. F issued his April 3, 1997, report, he was unaware that the claimant's compensable injury included herniated discs at C5-6 and C6-7; that the claimant continued to experience ongoing neck pain and right upper extremity pain after Dr. F's assignment of a four percent IR and continued to receive treatment for those complaints; that in late 1997, the claimant's doctors determined that she had focal herniations of the cervical spine; that the claimant underwent spinal surgery on March 25, 1998, to treat cervical herniated nucleus pulposus and disc disruption at C5-6 and C6-7; that at some time prior to May 7, 1999, the Commission asked Dr. F to reexamine the claimant in light of the herniated nucleus pulposus, disc disruption, and surgery; and that Dr. F reexamined the claimant on May 7, 1999, and as a result of the examination amended his initial report. The claimant testified and had difficulty remembering dates. The record contains three claimant's exhibits, six carrier's exhibits, and two hearing officer's exhibits. In an undated letter of medical necessity, Dr. B stated that he saw the claimant on July 24, 1997; that he requested facet injections at C3-4, C4-5,

and C5-6; and that the reason for the injections was to attempt to identify pain generators and to improve her neck pain conservatively without surgery. The claimant testified that Dr. G, who performed the surgery, considered surgery all along and recommended the surgery in January 1998. The record does not indicate when she first saw Dr. G. Dr. B and Dr. G work in the same clinic. The benefit review conference (BRC) report indicates that the BRC was held on June 29, 1999. The record does not reveal when the request for a BRC was made. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §141.1(d) provides that the Commission shall set a BRC to be held within 40 days of the date the request for a BRC is received.

We first address the determination that Dr. F amended his first report for a proper reason. In Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999, the Appeals Panel cited numerous cases involving designated doctors' amending reports before and after statutory MMI; stated that the key distinguishing fact was whether the surgery was under active consideration at the time of statutory MMI; rejected the contention that the designated doctor cannot amend a report unless there was active consideration of surgery at the time of the first report by the designated doctor; and noted that in Texas Workers' Compensation Commission Appeal No. 962654, decided February 6, 1997, that the Appeals Panel affirmed a determination of an amendment for a proper purpose when the surgery was scheduled over a month before MMI was reached by operation of law. In the case before us, the surgery was requested at least two months before MMI was reached by operation of law and was performed before that MMI date. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer's determination that Dr. F amended his first report for a proper reason is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We next consider the determination that Dr. F amended the report in a reasonable time. At the hearing, the carrier cited Texas Workers' Compensation Commission Appeal No. 980355, decided April 6, 1998, and argued that the claimant did not act with diligence and did not act within a reasonable time after the discovery was made that her condition had changed. In that decision, the Appeals Panel wrote:

In the absence of a Commission rule establishing a time in which a designated doctor may amend a certification of IR, the Appeals Panel has looked at the circumstances of individual cases in deciding whether the hearing officer erred in determining whether the designated doctor amended the report concerning an IR in a reasonable time. In a case involving a substantial change of medical condition, the Appeals Panel may look to, among other things, when a discovery was made and the diligence used after the discovery was made.

In Texas Workers' Compensation Commission Appeal No. 991081, decided July 8, 1999, the claimant had surgery in April 1998, the claimant disputed the first IR in August 1998, and the designated doctor amended his report in March 1999. The hearing officer determined that the claimant waived her right to dispute the first certification of MMI and IR. The Appeals Panel held that the claimant acted in a reasonable time and reversed the determination that claimant waived her right to dispute the first certification of her IR. In Texas Workers' Compensation Commission Appeal No. 991012, decided June 25, 1999, the designated doctor amended his report 16 months after it was made. The Appeals Panel cited cases holding that 18 months was not a reasonable time and that 20 was a reasonable time to amend a designated doctor's report and remanded for the hearing officer to make several determinations, including whether 16 months was a reasonable time. That a different fact finder could have made different determinations based on the same evidence is not a sufficient basis to overturn a factual determination of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer's determination that the designated doctor amended his first report in a reasonable time is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust.

Finally, we address the carrier's statement that the claimant is not entitled to TIBS after she reached MMI. Disability, not entitlement to TIBS, was an issue before the hearing officer. Disability, MMI, and entitlement to TIBS are separate issues. Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991. A claimant may have disability after reaching MMI, but will not be entitled to TIBS after reaching MMI. We agree with the statement of the carrier concerning TIBS in its appeal; however, considering the appeal of the carrier, there is nothing for us to review concerning entitlement to TIBS.

We affirm the decision and order of the hearing officer.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Robert W. Potts  
Appeals Judge