APPEAL NO. 011881
FILED SEPTEMBER 26, 2001

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 July 9, 2001, with the hearing being closed at 2:47 p.m. on July 9, 2001, and the record closing on July 20, 2001. The hearing officer determined that the scope of the _____, compensable injury of the appellant (claimant) did not include cervical brachial plexus or impingement of the left shoulder. The hearing officer also determined that claimant reached maximum medical improvement (MMI) on August 31, 1994, with an impairment rating (IR) of six percent, as certified by the Texas Workers' Compensation Commission (Commission)-selected designated doctor, Dr. S. Claimant appealed these determinations on sufficiency grounds. Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order. The parties stipulated that the issue of whether the injury extended to include depression and anxiety was improvidently certified and is not an issue.

DECISION

We affirm in part and reverse and remand in part.

Claimant contends the hearing officer erred in determining that she reached MMI on August 31, 1994, with a six percent IR. She asserts that the hearing officer should have found that she reached MMI on January 24, 2001, with an IR of 17%, as certified by the designated doctor in his amended report. The record reflects that after the _____, injury, claimant's doctors discussed whether surgery would be necessary. Dr. W noted that an x-ray from 1995 showed cervical disc disruption. It was apparently decided in 1996 that surgery would not be performed because, although claimant had tingling in her hand, she did not have radicular symptoms.

She testified that she sustained a second compensable injury to her neck on _____, and that, at that time, her employer had a different workers' compensation insurance carrier. She said both carriers thereafter denied testing and treatment for her neck. Claimant then sought a benefit review conference (BRC) for a determination regarding producing cause. The record reflects that a hearing was held in November 1998 regarding whether the1994 injury was a producing cause of claimant's cervical problems at three levels. The carriers for the 1994 and 1997 injuries appeared at the hearing and each asserted that the other injury caused the cervical problems. The hearing officer determined that claimant's cervical problems were the result of the _____, injury and that her problems after March 19, 1997, were a continuation of the _____, injury. The Appeals Panel affirmed that determination on January 7, 1999. Texas Workers' Compensation Commission Appeal Nos. 982846 & 982904, decided January 7, 1999.

After it was determined that the old 1994 injury, and not the newer 1997 injury, was

the producing cause of the cervical problems, claimant then saw Dr. R. On September 13, 1999, Dr. R noted cervical radiculopathy and recommended that claimant undergo repeat myelogram testing. By December 20, 1999, Dr. R was still recommending myelogram, MRI, and EMG testing and said claimant "planned to go through [BRC]." In a January 24, 2000, report, Dr. R stated that a January 10, 2000, myelogram report showed diminished filling bilaterally, widening of the spinal cord, disc narrowing at C5-6, a large ventral defect at C5-6 and spinal cord compression, and C5 on C6 retrolisthesis. Dr. R said he would submit a Recommendation for Spinal Surgery (TWCC-63) and wait for verification and approval. In May 2000, Dr. R noted that Dr. K had concurred with the surgical recommendation and that claimant's surgery had been scheduled for July 7, 2000. Claimant underwent surgery on July 7, 2000. By September 2000, a BRC was held regarding claimant's MMI date and IR. On September 28, 2000, the Commission sent a letter to the designated doctor asking whether certain medical reports would have an affect on his IR report and the designated doctor replied on October 2, 2000, that it would. The Commission sent a letter to claimant on October 17, 2000, about a reexamination by the designated doctor. However, it appears that as of March 27, 2001, there was some confusion regarding whether claimant had already reached statutory MMI in 1996. In a March 2001 letter, a Commission benefit review officer (BRO) wrote to the designated doctor and told him that claimant reached statutory MMI in 1996. Whether this incorrect information caused further delay is not clear from the record. The designated doctor examined claimant on January 24, 2001, and later submitted his amended IR certification.

The legislature has specifically provided that MMI is reached upon, if not before, the passage of the 104 weeks from the date on which income benefits begin to accrue (except for certain cases of spinal surgery set forth in Section 408.104). However, if surgery is contemplated before, and performed close in time to, the statutory MMI date, then the designated doctor should be permitted to use medical judgment and the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, to consider whether the IR should be amended. The fact that surgery was contemplated at the time of statutory MMI is strong evidence of a proper reason to permit the designated doctor's amendment of the IR, provided this is sought and accomplished within a reasonable time. Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999. The reasons for any delay after the surgery in seeking amendment of the designated doctor's report should be considered. Claimant was not yet at statutory MMI in this case.

We reverse the hearing officer's MMI and IR determinations and remand this case for reconsideration. On remand, the hearing officer should determine whether the designated doctor amended his report in a reasonable period of time and for a proper purpose. We remand this question for consideration, not solely in terms of the elapsed time between the designated doctor's two reports, but in terms of the elapsed time between the active consideration of surgery, which did take place before statutory MMI, and the amended report, and what circumstances existed that might have had a bearing on claimant's actions to obtain an amended report after the surgery. *See* Texas Workers'

Compensation Commission Appeal No. 992133, decided November 17, 1999; Texas Workers' Compensation Commission Appeal No. 991081, decided July 8, 1999.

Claimant contends the hearing officer erred in determining that the compensable injury did not include cervical brachial plexus or impingement of the left shoulder. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We note that some documents were faxed to the Appeals Panel with handwritten notations on them. It is not clear who sent them or that they were intended as an appeal or supplement to an appeal, and we will not consider them. Claimant's attorney filed an appeal in this case, which we have considered.

We affirm that part of the hearing officer's decision and order that determines that the scope of the _____, compensable injury did not include cervical brachial plexus or impingement of the left shoulder. We reverse that part of the hearing officer's decision and order regarding MMI and IR and remand for reconsideration of these issues consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

PARKER W. RUSH
1445 ROSS AVENUE, SUITE 4200
DALLAS, TEXAS 75202-2812.

Judy L. S. Barnes
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

DISSENTING OPINION:

I respectfully dissent regarding the determination to reverse and remand on the issues of maximum medical improvement (MMI) and impairment rating (IR). I believe there is sufficient evidence to support the hearing officer's determinations on the MMI and IR issues, and that these determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

Robert W. Potts
Appeals Judge