APPEAL NO. 000389

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 January 26, 2000. The hearing officer determined that appellant (claimant) reached maximum medical improvement (MMI) on October 16, 1998, with an impairment rating (IR) of five percent, as certified by the designated doctor in his first report. Claimant appealed, contending that, because surgery was contemplated at the time of statutory MMI, the hearing officer should have given presumptive weight to the designated doctor's amended report. Respondent (carrier) responds that the hearing officer correctly accorded presumptive weight to the designated doctor's first report.

DECISION

We reverse and remand.

Claimant contends the hearing officer erred in determining that he reached MMI on October 16, 1998, with an IR of five percent, as certified by the designated doctor in his first report. Claimant asserts that surgery was contemplated before statutory MMI and he underwent surgery, so the hearing officer should have accorded presumptive weight to the designated doctor's amended report.

Claimant testified that he sustained a compensable injury on _____, from a work-related motor vehicle accident. Claimant said he underwent physical therapy with Dr. B and after this did not help Dr. B referred him to Dr. G. Claimant said he saw the designated doctor in October 1998. The designated doctor's five percent IR included impairment for six months of documented pain. A Dispute Resolution Information System note states that claimant called and disputed the designated doctor's five percent IR on June 8, 1999. A June 1999 medical record from Dr. G states that claimant was in the spinal surgery second opinion process and that surgery was to be scheduled. On August 31, 1999, a Texas Workers' Compensation Commission (Commission) employee wrote to the designated doctor, sent him additional medical records, told him surgery had been scheduled for claimant, and asked whether this would cause the designated doctor to amend his first report. On September 14, 1999, the designated doctor stated that he would need to reexamine claimant and that claimant's IR would change. After carrier disputed the spinal surgery, the commission approved the spinal surgery and claimant underwent lumbar fusion surgery on September 30, 1999. On November 17, 1999, the designated doctor issued a second report stating that claimant had undergone surgery, that it was too soon to perform range of motion testing, and that claimant was not yet at MMI.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has

established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

We have held that "[a] designated doctor may, with proper reason, and in a reasonable amount of time, amend his original report of MMI and IR for various reasons which can include, but are not limited to, the need for surgery." *See* Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994. The report may be amended to consider the entire compensable injury, Texas Workers' Compensation Commission Appeal No. 94435, decided May 27, 1994, or where there are incomplete or erroneous facts when the first report is rendered that are subsequently taken into account in amending the report. Texas Workers' Compensation Commission Appeal No. 941600, decided January 12, 1995. Whether a doctor has amended his report for a proper reason and within a reasonable amount of time is essentially a question of fact. Texas Workers' Compensation Commission Appeal No. 960888, decided June 18, 1996.

The Appeals Panel has recognized that a designated doctor can change or amend his or her opinion because of matters coming to his or her attention subsequent to his or her determination of MMI. Texas Workers' Compensation Commission Appeal No. 94421, decided May 25, 1994; Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992. Surgery subsequent to a finding of MMI by the designated doctor may show the finding of MMI to be against the great weight of the other medical evidence. Texas Workers' Compensation Commission Appeal No. 93702, decided September 27, 1993. However, subsequent surgery for the compensable injury does not automatically invalidate a prior finding of MMI. *See* Texas Workers' Compensation Commission Appeal No. 93987, decided December 14, 1993; Texas Workers' Compensation Commission Appeal No. 94011, decided February 16, 1994.

In this case, the injury was on _____; there was evidence that statutory MMI had not passed at the time claimant had surgery in September 1999 because claimant did not lose time from work such that disability accrued until the time of surgery; the designated doctor's five percent IR was certified in October 1998; claimant disputed the designated doctor's first report in June 1999; claimant's surgery was approximately 11 months after the injury, in September 1999; and the designated doctor's amended report stating that claimant had not yet reached MMI was certified on November 17, 1999.

Dr. G's June 1999 report and the September 1999 surgical report indicate that surgery was contemplated and also performed before statutory MMI. In the discussion portion of the decision and order, the hearing officer noted that having surgery could be a proper reason for amending the designated doctor's IR. The hearing officer also said that claimant timely requested the amendment and said the amendment was "arguably" made within a reasonable time. The hearing officer's reason for not giving presumptive weight to

the designated doctor's amended report was that the surgery was not contemplated *at the time of the designated doctor's first report*. However, this is not the standard for determining whether a designated doctor's report should be given presumptive weight. The Appeals Panel has retreated from the cases that indicated that a key factor in such cases is whether surgery was contemplated at the time of the designated doctor's first report. The Appeals Panel has said that, instead the hearing officer should consider whether surgery was contemplated *at the time of statutory MMI.* Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999. The Appeals Panel noted that it was not following Texas Workers' Compensation Commission Appeal No. 971385, decided August 25, 1997, which held that the focus is on whether surgery was contemplated on the date of the designated doctor's first examination. In this case, surgery was contemplated at the time of statutory MMI. Given the hearing officer's determinations in this case, we reverse the hearing officer's MMI and IR determinations and we remand this case to the hearing officer to determine whether the designated doctor has amended his report for a proper reason and within a reasonable amount of time, which involves essentially a question of fact. In the decision and order on remand, the hearing officer should explain his reasoning regarding both the "proper reason" and "reasonable time" factors.

We conclude that the hearing officer erred in according presumptive weight to the designated doctor's first report and we remand for reconsideration of this issue. We reverse the hearing officer's decision and order and remand this case to the hearing officer for reconsideration 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.

Judy L. Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Dorian E. Ramirez
Appeals Judge