APPEAL NO. 000589

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 March 1, 2000. The hearing officer determined that the amended report of Dr. A, the Texas Workers= Compensation Commission (Commission)-selected designated doctor, dated December 13, 1999, is entitled to presumptive weight; that the great weight of the other medical evidence is not contrary to that report; that the respondent (claimant) reached maximum medical improvement (MMI) by operation of law on June 26, 1998; that the claimant's impairment rating (IR) is 23% as assigned by Dr. A in his amended report; and that the claimant had disability from May 29, 1997, to June 26, 1998. The appellant (carrier) requested review, contended that the hearing officer erred by not applying Appeals Panel decisions concerning a designated doctor amending a report for a proper reason and in a reasonable time, urged that the determination that the claimant had disability is not supported by the evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor. The appeal file does not contain a response from the claimant.

DECISION

We affirm in part and reverse and remand in part.

We first address the determination that the claimant had disability from May 29, 1997, to June 26, 1998. The claimant testified that he had a prior low back injury in _____; that he had low back surgery in 1994; that he again injured his low back on _____; that from May 29, 1997, to June 26, 1998, he did not work because of instructions of doctors; and that on March 3, 1999, he had surgery on his low back at a different level than the level where he had surgery in 1994. Reports from Dr. H dated May 27, 1997; July 15, 1997; August 26, 1997; October 14, 1997; November 11, 1997; January 6, 1998; May 12, 1998; June 16, 1998; and August 11, 1998, state that the claimant is not able to work.

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 trier of fact may believe all, part, or none of any witness=s testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness=s testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref=d n.r.e.); Texas Workers= Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Determinations concerning disability, the date MMI is reached, and entitlement to temporary income benefits are separate determinations. The hearing officer's determination that the claimant had disability from May 29, 1997, to June 26, 1998, is not so against the great weight and preponderance of the

evidence as to be clearly wrong or unjust and is affirmed. 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 address the determinations concerning the date the claimant reached MMI and his IR. A Report of Medical Evaluation (TWCC-69) from Dr. A dated July 25, 1997, states that the claimant reached MMI on that date with a 10% IR. In a narrative attached to the TWCC-69 Dr. A said that the claimant had a prior fusion; represented a failed back case; had conservative treatment; had reached MMI largely based on the opinion of Dr. Ro; that the claimant was not a surgical candidate; that there did not appear to be any indication of further intervention at that point; that Dr. H planned further workup, including a discogram; and A[c]ertainly if the discogram is performed and is positive in correlation with SEPs, then this determination of MMI could be rescinded if this is carried out.@ In a TWCC-69 dated September 4, 1997, Dr. A certified that the claimant reached MMI on May 29, 1997, with a 10% IR. The record does not contain an attachment to that TWCC-69. A lumbar discogram was performed on December 15, 1997. In a letter to Dr. RR dated February 16, 1998, Dr. H stated that the claimant was referred to him for another opinion; mentioned the claimant=s previous lumbar fusion and discogram; and stated that he did not believe the claimant=s current situation was amenable to further surgery directed toward stabilization, but believed he should undergo the insertion of a spinal cord stimulator. In a follow-up progress note dated September 15, 1998, Dr. RR recommended a fusion and later that month stated that the claimant would have to get off alcohol and reduce smoking before he would perform surgery. The surgery was performed on March 3, 1999. In a TWCC-69 dated May 25, 1999, Dr. A stated that the claimant had not reached MMI. In a TWCC-69 dated December 13, 1999, Dr. A certified that the claimant reached MMI on that day with a 23% IR.

At the hearing, the claimant contended that Dr. A amended his first certification of MMI and IR in a reasonable time; cited Appeals Panel decisions; and argued that his IR is 23% as certified by Dr. A in the report dated December 13, 1999. The carrier argued that Dr. A did not amend his report in a reasonable time; cited Appeals Panel decisions; and argued that the 1997 TWCC-69s of Dr. A should be used to determine the date the claimant reached MMI and his IR. In his Decision and Order, the hearing officer stated that the 1989 Act does not have provisions regarding the amendment of reports of designated doctors; mentioned Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999); stated that the Appeals Panel decisions concerning a designated doctor amending a report amounted to rule making through administrative adjudication; and wrote A[a]ccordingly, I conclude, absent statutory provisions or adopted rules to the contrary, that [Dr. A=s] revised report is entitled to presumptive weight.@

Section 408.122(c) provides:

> If a dispute exists as to whether the employee has reached [MMI], the commission shall direct the employee to be examined by a designated doctor chosen by mutual agreement of the parties. If the parties are unable to agree on

a designated doctor, the commission shall direct the employee to be examined by a designated doctor chosen by the commission. The designated doctor shall report to the commission. The report of the designated doctor has presumptive weight, and the commission shall base its determination of whether the employee has reached [MMI] on the report unless the great weight of the other medical evidence is to the contrary.

Section 408.125 provides in part:

(a) If an [IR] is disputed, the commission shall direct the employee to be examined by a designated doctor chosen by mutual agreement of the parties.

(b) If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor chosen by the commission.

(c) The designated doctor shall report in writing to the commission.

(d) If the designated doctor is chosen by the parties, the commission shall adopt the [IR] made by the designated doctor.

(e) If the designated doctor is chosen by the commission, the report of the designated doctor shall have presumptive weight, and the commission shall base the [IR] on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the [IR] contained in the report of the designated doctor chosen by the commission, the commission shall adopt the [IR] of one of the doctors.

In some cases, a designated doctor issued more than one report concerning MMI and IR. Disputes arose as to which of the reports was entitled to presumptive weight. In the absence of statutory or regulatory guidance, the Appeals Panel rendered decisions to resolve the dispute as to which report of the designated doctor was entitled to presumptive weight. Rodriguez, *supra,* concerned exceptions to a Commission rule. The circumstances of the case before us do not involve exceptions to a Commission rule and are clearly different from those in Rodriguez.

The parties had opposite positions on whether the designated doctor amended his report in a reasonable time. The hearing officer did not make a finding of fact or a conclusion of law to resolve that dispute. We reverse the decision of the hearing officer concerning MMI and IR and remand for him to apply applicable Appeals Panel decisions concerning a designated doctor amending a report to resolve those disputed issues. 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.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCUR IN PART AND DISSENT IN PART:

I concur in the affirmance of the disability determination. I respectfully dissent with regard to the reversal of the hearing officer's decision on Maximum Medical Improvement (MMI) and Impairment Rating (IR). I believe there is sufficient evidence to support the hearing officer's decision on MMI and IR, although I do not necessarily agree with his discussion of applicable law. I would affirm the hearing officer's decision on MMI and IR.

Robert W. Potts
Appeals Judge