APPEAL NO. 000773

This appeal after remand 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 October 11, 1999. The record closed on November 22, 1999. In her first decision and order, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on November 18, 1997, with an impairment rating (IR) of one percent, as certified by the designated doctor in his first report. Claimant appealed, contending that the hearing officer should have given presumptive weight to the designated doctor's amended report, in which a September 5, 1998, MMI date and a 10% IR was certified. Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision. In Texas Workers= Compensation Commission Appeal No. 992856, decided January 31, 2000, the Appeals Panel reversed the hearing officer=s decision and remanded the case to the hearing officer. The hearing officer supplemented the record and determined that no further hearing was necessary. In a decision and order on remand, the hearing officer again determined that the designated doctor=s first report is entitled to presumptive weight and again found that claimant has a one percent IR. The claimant again appealed, contending that the designated doctor=s amended report should be accorded presumptive weight because it was certified after her last surgery. Carrier responded that the hearing officer=s decision is correct.

DECISION

We reverse and render.

Claimant contends the hearing officer erred in according presumptive weight to the designated doctor=s first report. The facts of this case and the applicable law are set forth in our prior decision. Appeal No. 992856. This case was remanded so that the hearing officer could apply the correct standard in considering whether the designated doctor amended the IR for a proper reason.[1] The hearing officer has now issued a decision after being made aware of the correct standard. This IR/MMI case involves two designated doctor=s reports and a repetitive trauma right upper extremity injury. The designated doctor amended his IR report about 10 months after statutory MMI, to consider the effects of surgery that was contemplated at the time of statutory MMI and performed a few weeks after statutory MMI. Briefly, the relevant facts and dates are as follows:

date of injury, right wrist	_____
first two surgeries	both in 1997

[1]The Appeals Panel had reconsidered in this standard. *See* Texas Workers= Compensation Commission Appeal No. 990833, decided June 7, 1999.

designated doctor=s first report	January 14, 1998
designated doctor declines to change IR	February 23, 1998
EMG studies results Anormal@	August 12, 1998
third surgery authorized	August 1998
statutory MMI	September 5, 1998
CTS release surgery	September 29, 1998
benefit review conference (BRC) regarding claimant=s IR	May 6, 1999
surgery records sent to designated doctor	May 7, 1999
designated doctor reexamines claimant	July 2, 1999
designated doctor=s amended report	July 2, 1999

In a letter to the hearing officer regarding his amended report, the designated doctor stated that he would have found an MMI date later than the September 1998 statutory MMI date, but that the field office had informed him of the statutory MMI date.

In her decision after remand, the hearing officer determined that the designated doctor amended his report in July 1999, after claimant=s third surgery, but that this was not done within a reasonable time or for a proper purpose. The hearing officer determined that: (1) claimant underwent the third CTS surgery even though her EMG studies were normal; (2) claimant=s condition did not improve after the September 1998 surgery; (3) claimant did not undergo a change in condition between the time of the designated doctor=s first (January 14, 1998) and amended (July 2, 1999) reports; (4) the designated doctor did not have a proper reason to amend his IR report and did not do so within a reasonable time; (5) the designated doctor=s first report is correct, entitled to presumptive weight, and the great weight of the other medical evidence is not contrary to that first report; and (6) claimant reached MMI on November 18, 1997, with a one percent IR.

The parties should not have to wait indefinitely for the IR issue to be determined, while the claimant undergoes a course of continuing medical treatment. Texas Workers' Compensation Commission Appeal No. 992829, decided February 2, 2000. The legislature has specifically provided that MMI is reached upon, if not before, the passage of 104 weeks (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 (AMA Guides), 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. Appeal No. 990833. We would note that a claimant is not required to show that the surgery improved his or her condition at any particular time after the surgery before an amendment to the IR is justified. Texas Workers= Compensation Commission Appeal No. 962107, decided December 2, 1996; Texas Workers= Compensation Commission Appeal No. 962654, decided February 6, 1997.

A hearing officer is not automatically required to accord presumptive weight to the second report of a designated doctor. For instance, if the designated doctor amends the report and then fails to rate the entire injury, the hearing officer need not accord presumptive weight to that amended report. *See* Texas Workers= Compensation Commission Appeal No. 951367, decided September 28, 1995. A designated doctor may amend the IR report after a claimant undergoes needed surgery. Texas Workers= Compensation Commission Appeal No. 94492, decided June 8, 1994. Whether the surgery is a Aproper reason@ to amend the report largely depends on whether the surgery was contemplated at the date of statutory MMI. One of the Alimited reasons@ for amending a post-statutory MMI assignment of IR can occur when surgery was under active consideration at the time of statutory MMI and it might be expected to affect the claimant=s IR. Texas Workers= Compensation Commission Appeal No. 962107, decided December 2, 1996; Texas Workers= Compensation Commission Appeal No. 992672, decided June 18, 1999. However, even if surgery was contemplated at the time of statutory MMI, this does not automatically mean that the designated doctor must amend the IR. If the designated doctor, after reviewing the medical evidence, uses his medical judgment and decides that the surgery will not change the IR or MMI date, then the designated doctor is not required to amend the IR. Texas Workers= Compensation Commission Appeal No. 992951, decided February 14, 2000; Texas Workers= Compensation Commission Appeal No. 992337, decided December 6, 1999; Texas Workers= Compensation Commission Appeal No. 93290, decided June 1, 1993; Texas Workers= Compensation Commission Appeal No. 94288, decided April 26, 1994. Where there is a new medical report, new evidence, or a changed condition, this may be considered as a proper reason the designated doctor may consider in deciding whether to amend the IR report. Appeal No. 94492; Texas Workers= Compensation Commission Appeal No. 94288, decided April 26, 1994. The designated doctor=s report may be amended where there were incomplete or erroneous facts considered when the first report was certified. Texas Workers= Compensation Commission Appeal No. 992288, decided December 1, 1999. The fact that, upon reexamination, the designated doctor finds claimant in a worsened condition, with more impairment, may be a proper reason for an amendment to the IR, but a designated doctor should not amend an IR just to be equitable or charitable. Texas Workers= Compensation Commission Appeal No. 992849, decided February 3, 2000; *see* Texas Workers= Compensation Commission Appeal No. 992857, decided January 31, 2000. The hearing officer may look to see if there is any

evidence that the designated doctor had an improper motive for amending the IR. Texas Workers= Compensation Commission Appeal No. 92441, decided October 8, 1992. If the designated doctor=s medical opinion is that the AMA Guides require an amendment to the IR, then this may be considered a proper reason for amending the IR. Texas Workers= Compensation Commission Appeal No. 991996, decided October 28, 1999. A claimant need not show an improvement in her condition before the hearing officer may find there was a proper reason for the amendment of the designated doctor=s report. Texas Workers= Compensation Commission Appeal No. 990659, decided May 12, 1999. We note that the time period up to statutory MMI has been referred to the injured worker=s Amaximum healing period.@ We have said that there is g reater flexibility to allow a designated doctor to amend an initial IR report to take into account additional surgery that takes place within that recovery period. *See* Texas Workers= Compensation Commission Appeal No. 992813, decided January 31, 2000. In this regard, it is also more likely to be a proper reason for a designated doctor=s amendment where the surgery was contemplated at the time of statutory MMI, even if it is not performed until shortly thereafter. Texas Workers= Compensation Commission Appeal No. Appeal No. 000554, decided April 28, 2000; Appeal No. 992672.

We first consider whether there was any evidence that the designated doctor=s report was amended for a proper reason. Claimant=s September 1998 surgery was contemplated at the time of statutory MMI, was performed very shortly thereafter, the designated doctor asked to reexamine claimant, the designated doctor found additional impairment, the amendment was performed about 10 months after statutory MMI, and the designated doctor never indicated that claimant=s IR should not change. The designated doctor had previously declined to amend claimant=s IR before claimant had the September 1998 surgery; however, he never stated that claimant should not have surgery or that her IR would not be affected by surgery. There is no medical evidence that claimant=s surgery was not needed or that claimant=s IR did not change. In this case, claimant=s treating doctor noted that her CTS condition was complicated by the fact that she had a right wrist ganglion cyst and right DeQuervains tenosynovitis, that DeQuervains can aggravate CTS, that claimant had been treated for reflex sympathetic dystrophy (RSD), and that CTS can be treated with surgery but it sometimes recurs. He did not say that claimant=s surgeries were not necessary. Considering the facts of this case, the overwhelming medical evidence supports a determination that the designated doctor amended the IR report for a proper reason.

We now consider the hearing officer=s rationale for determining that the designated doctor did not have a proper reason to amend the IR report. In the discussion portion of her decision and order, the hearing officer stated that Athere was simply no proper reason to amend the [designated doctor=s first] report based on claimant=s increased complaints of pain for which prior symptom magnification had been noted by the designated doctor and for which a third surgery was performed despite normal EMG studies.@ Whether the report was amended for a proper reason was a fact question for the hearing officer, which we review using a sufficiency standard of review. We reject the hearing officer=s rationale that the

impairment found by the designated doctor was somehow invalid because of symptom magnification.

The hearing officer appears to have made a determination that claimant=s third surgery was not needed and that, for this reason, the designated doctor should not have considered any effects of that third surgery. No medical evidence in the record before us states that claimant=s September 1998 surgery was not needed. No doctor stated or even indicated that the surgery should not have been performed or that it was inappropriately performed despite symptom magnification or unsubstantiated complaints of pain. The hearing officer stated that the surgery was performed Adespite normal EMG studies,@ again implying that surgery was not needed. As stated in our prior decision, the EMG study results were questioned by Dr. T. He noted that claimant had taken some tranquilizing medication that could Aarguably@ affect the test results. There is no medical evidence regarding the possible effect of the two prior wrist surgeries on subsequent EMG testing. There is no evidence to support a conclusion that a doctor cannot diagnose CTS even though EMG study results are negative. Because claimant=s surgeon performed the CTS surgery and this was approved by carrier, we will not substitute our judgment for the medical judgment of claimant=s doctors regarding whether claimant needed CTS release surgery. We reject the hearing officer=s determination that claimant did not need surgery and that the designated doctor should not have considered the effects of the surgery.

The hearing officer stated that the designated doctor should not have amended the report Abased on claimant=s increased complaints of pain.@ However, the designated doctor did not state that his amendment was based on increased pain complaints by claimant. The designated doctor said he asked to reexamine claimant because of her September 1998 surgery. The designated doctor=s 10% IR in the amended report does not include impairment for pain and the designated doctor did not state that he was rating claimant=s pain. The designated doctor stated that he used Table 10 to rate claimant=s A*sensory deficit*@ and noted A*reduced sensation in the distribution of the right median nerve and the right ulnar nerve,*@ which is not a rating for Apain.@ [Emphasis added.] Such sensory loss is rated under Table 10 of the AMA Guides, whether or not a claimant has pain. Whether claimant=s IR should include impairment for sensory loss was a question for the designated doctor to consider using his medical judgment. *See* Texas Workers= Compensation Commission Appeal No. 950387, decided April 26, 1995. Whether valid sensory loss was objectively shown by reduced sensation in the pattern of or distribution of the appropriate nerves was an issue for the designated doctor to consider using his medical judgment.

The hearing officer stated that the designated doctor had noted Asymptom magnification.@ The designated doctor did not ever note symptom magnification, inappropriate pain response, or discuss Waddell=s signs. If the designated doctor believed, using medical judgment, that claimant did not have any true impairment for her compensable injury, he could have stated this. However, the designated doctor did find that claimant had

sensory impairment. The designated doctor found no ratable range of motion (ROM) losses and said that there was no objective motor loss, noting claimant was giving Amarginal effort@ in grip strength tests. Thus, in his medical judgment, he chose not to include impairment in this regard. However, he did find and rate sensory loss.

In general, regarding claimant=s complaints of pain, we note that Dr. T stated in September 1999 that claimant has been treated for RSD. Further, the designated doctor stated that he reviewed several medical reports which were not in the record before us. What these reports stated could have been considered by the designated doctor in making his medical determinations regarding MMI and claimant=s impairment in this case. IR is an issue that necessarily involves medical opinions and medical judgment. *See* Appeal No. 93539. Further, this case involves a designated doctor=s opinion in this regard, which is not merely weighed with the other medical evidence, but is given presumptive weight. We note that hearing officers should state a rationale and valid reasons for disregarding or criticizing a designated doctor=s report; Lay opinions of a claimant=s condition are only marginally relevant. *See* Texas Workers= Compensation Commission Appeal No. 961191, decided August 5, 1996; Texas Workers= Compensation Commission Appeal No. 982380, decided November 18, 1998; Texas Workers= Compensation Commission Appeal No. 971126, decided July 24, 1997; Texas Workers= Compensation Commission Appeal No. 93539, decided August 12, 1993. The fact that a claimant has a condition or some findings on a test does not automatically mean that Aimpairment@ has or has not resulted. The determination of whether there is permanent impairment is one to be made with the exercise of medical judgment. Appeal No. 93539. A person who is not medically trained may come to certain conclusions about the AMA Guides and medical issues, but these are essentially medical determinations best made by a doctor. Appeal No. 93539.

The hearing officer stated that claimant=s condition did not change after her third surgery. There was conflicting medical evidence regarding whether claimant=s *pain* changed. The designated doctor indicated that there was some improvement in the frequency of claimant=s pain. Dr. T stated that claimant had not enjoyed actual resolution of her symptoms. However, the designated doctor examined claimant and his report does show a change in claimant=s condition. The designated doctor=s medical evidence in this regard was not controverted. No other doctor stated that claimant=s IR should not change or that claimant did not have the sensory impairment found by the designated doctor.

Given the facts of this case, we conclude that the hearing officer=s determination that the designated doctor=s amendment was not for a proper reason is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we reverse it. Cain, *supra*. In reversing, we note that it is inappropriate to make a lay determination of the effects of the surgery in deciding, using hindsight, whether surgery was needed and impairment resulted, and then deny benefits accordingly. These were medical issues for claimant=s doctors and the designated doctor to consider. The workers=

compensation system exists in part to award income benefits to injured workers and benefits are tied to impairment resulting from the injury. The goal is to award compensation for the injured worker=s impairment. Careful consideration should be given to this matter. It is not proper for lay persons to pick and choose among impairment ratings without considering the reason for an IR. Consideration must be given to the impairment that the injured worker actually has due to the injury, as shown by the *medical evidence.*

Regarding reasonable time, there was nothing in the record to indicate that claimant delayed in seeking an amendment of her IR after her surgery, which took place in September 1998, a few weeks after statutory MMI. The BRC in this regard was requested after the surgery and took place on May 6, 1999, about six months after claimant=s surgery. The next day, the designated doctor was asked to review claimant=s new medical records. In July 1999, ten months after statutory MMI, the designated doctor issued the amended report. We reverse the hearing officer=s determination regarding reasonable time because it is against the great weight and preponderance of the evidence. Cain, *supra.*

We reverse the hearing officer=s decision and order and render a determination that the designated doctor=s July 1999 amendment of the IR report was accomplished for a proper reason and within a reasonable time. We render a determination that claimant reached MMI as of the statutory MMI date with an IR of 10%, as certified by the designated doctor in his amended report.

Judy L. Stephens
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge