APPEAL NO. 001339

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 19, 2000. The hearing officer determined that: (1) the respondent (claimant) had disability from March 22, 1999, through the date of the CCH; and (2) claimant has not reached maximum medical improvement (MMI). The appellant (carrier) appealed both determinations. The appeals file does not contain a response from claimant.

DECISION

We affirm as reformed.

Carrier contends the hearing officer erred in determining that claimant was not yet at MMI. Carrier asserts that: (1) the designated doctor had already stated in his first report dated March 22, 1999, that claimant reached MMI on that same day with an impairment rating (IR) of five percent, and the hearing officer should have accorded presumptive weight to this first report; (2) the hearing officer should not have given presumptive weight to the designated doctor's amended report; (3) the Texas Workers' Compensation Commission (Commission) rules do not permit a second designated doctor report; and (4) if such an amended report is permitted, then the designated doctor did not amend within a reasonable time and for a proper purpose.

The report of a Commission-selected designated doctor is given presumptive weight with regard to MMI status and IR. Sections 408.122(c) and 408.125(e). 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. The fact that a claimant has surgery does not automatically mean that the designated doctor must amend the IR. If the designated doctor, after reviewing the medical evidence, uses his or her 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. 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. Where there is a new medical report, new evidence, or a changed condition, these factors may be considered regarding whether there is a proper reason for the designated doctor to amend the IR report. Appeal No. 94492, *supra;* Appeal No. 94288, *supra*. The designated doctor's report also 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. If the designated doctor's medical opinion is that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) require an amendment to the IR, then this may be considered a proper reason for amending the IR.

The hearing officer determined that: (1) claimant's cubital tunnel syndrome was not determined to be compensable until December 1999, after the date of the designated doctor's first report; (2) claimant underwent surgery for this condition in February 2000 and her condition improved somewhat after the surgery; (3) the designated doctor has withdrawn his first IR report and issued an amended report in February 2000; (4) the statutory MMI date had not yet passed; and (5) the designated doctor amended his report for a proper purpose and within a reasonable time. Given the designated doctor's explanation that he amended the IR in order to rate claimant's ulnar nerve impairment, we conclude that the hearing officer's determination regarding proper purpose is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Regarding whether the amendment was accomplished within a reasonable time, we note that there is a much greater concern regarding amendment of the designated doctor's IR after the date of statutory MMI. Texas Workers' Compensation Commission Appeal No. 992951, decided February 14, 2000. However, that is not a concern in this case. The surgery and the designated doctor's amendment both took place before statutory MMI. Therefore, there is greater flexibility to allow the designated doctor to amend an initial MMI/IR report to take into account additional surgery that takes place within this recovery period. *See* Texas Workers' Compensation Commission Appeal No. 992813, decided January 31, 2000. The designated doctor amended his report two months after it was determined that claimant's cubital tunnel syndrome is compensable. The record does not show that claimant delayed in seeking an amendment of the designated doctor's report. The record shows that in February 2000, after claimant had just undergone cubital tunnel surgery, the designated doctor amended the MMI/IR report and determined that claimant was not yet at MMI. Considering these facts, we conclude that the hearing officer's determination regarding reasonable time 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).

Carrier asserts that, by permitting the amendment of a designated doctor's report, the hearing officer and Appeals Panel engaged in impermissible, informal rule making, citing Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). Carrier contends that a designated doctor is prohibited from amending an IR report and

that Appeals Panel decisions permitting this amounts to rule making without authority. The Appeals Panel considered this same question in Texas Workers' Compensation Commission Appeal No. 000589, decided May 8, 2000. In that case, the Appeals Panel set forth the provision of Section 408.122(c) concerning designated doctors and MMI and Section 408.125 concerning designated doctors and IR and wrote:

> 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.

Rodriguez involved a Commission rule that states, essentially, that a first certification of IR becomes final if it is not disputed within 90 days. In Rodriguez, the Texas Supreme Court said there were no express exceptions to that particular rule, so the Commission could not add exceptions without doing so formally, through rule making. The case before us does not involve the 90-day rule or a first certification of MMI and IR. This is a designated doctor case and there is no rule or statute that states that a designated doctor may not amend an IR report. Instead, as stated in Appeal No. 000589, there are two reports from the designated doctor, and presumptive weight must be accorded to one or the other. There is no rule or statute stating that only the first designated doctor report is valid. The Appeals Panel has not made "broad amendments" to a rule nor have we engaged in statutory interpretation that is "inconsistent with" a rule or statute. Carrier also contends that the hearing officer abused his discretion in admitting the designated doctor's amended report. Carrier apparently asserts that the hearing officer should have excluded the report because only the designated doctor's first report is valid. Carrier has not shown that the hearing officer "failed to consider guiding rules and principles" in admitting the designated doctor's amended report. We perceive no error or abuse of discretion.

Carrier next contends the hearing officer erred in determining that claimant had disability from March 22, 1999, through the date of the hearing. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Our appellate standard of review regarding sufficiency points of error is stated in Texas Workers' Compensation Commission Appeal No. 000032, decided February 18, 2000.

Claimant testified that she returned to full-time, light-duty work for employer from March 22, 1999, through April 8, 1999. She said that, during this period, she never made as much money as she had previously while working for employer. Claimant said she was taken off work after that period due to her pain and that she has not worked since then, except for a few weeks in December 1999 when she earned wages less than her preinjury

wage working at a part-time job. She said her doctor again released her to part-time work in March 2000, but that employer did not have work for her to do.

Whether claimant had disability was a fact issue for the hearing officer. The hearing officer heard claimant's testimony, reviewed the medical evidence, and decided what facts the evidence established. The hearing officer determined that claimant met her burden to prove that she was unable, because of her compensable injury, to obtain and retain employment at wages equivalent to her preinjury wage. Section 401.011(16). The hearing officer was the sole judge of the credibility of the evidence. We will not substitute our judgment for the hearing officer's because his disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.* The hearing officer's Finding of Fact no. 5 is reformed to state that the disability date begins March 22, 1999, as stated in Conclusion of Law no. 3 and in the order.[1]

As reformed, we affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Susan M. Kelley
Appeals Judge

[1]Finding Of Fact No. 5 is misnumbered as number three but should be number five.