APPEAL NO. 010673

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 March 1, 2001. In response to the issues before her, the hearing officer determined that respondent (claimant) reached maximum medical improvement (MMI) on May 23, 1997, with an impairment rating (IR) of two percent. The hearing officer had rejected the designated doctor's first report and accorded presumptive weight to his second report. Appellant self-insured ("carrier" herein) appealed, contending that the hearing officer erred in according presumptive weight to the second report. Claimant did not respond on appeal.

DECISION

We affirm in part and reverse and render in part.

Carrier contends the hearing officer erred in according presumptive weight to the amended report of the designated doctor. In this case, claimant sustained a compensable left knee injury on _____. On May 23, 1997, the designated doctor, Dr. R, certified that claimant reached MMI on May 23, 1997, with a zero percent IR. Claimant continued to experience problems with her knee and saw Dr. F, who diagnosed a torn medial mensicus in May 2000. Dr. F then recommended surgery, which was performed in July 2000. The surgery report was sent to the designated doctor, who then amended his Report of Medical Evaluation (TWCC-69) and on February 10, 2001, certified that claimant reached MMI on May 23, 1997, with an IR of two percent.

The parties agreed that the date of statutory MMI would be March 25, 1999, and it is clear that surgery was not contemplated on the date of statutory MMI. Rather, the record reflects that surgery was not contemplated until it was discussed by Dr. F in May 2000.

The hearing officer determined that the designated doctor amended his report for a proper reason. At the time of the first report, the designated doctor did not have information before him regarding the torn medial meniscus. We agree that the hearing officer could find from the evidence before her that the designated doctor amended the IR report for a proper reason. However, we must also consider whether the amendment was made within a reasonable time. *See* Texas Workers' Compensation Commission Appeal No. 992858, decided January 3, 2000; Texas Workers' Compensation Commission Appeal No. 010090, decided February 20, 2001.

The designated doctor's February 10, 2001, amendment took place almost five years post injury, over three years after his first report, and well after statutory MMI. Further, the record does not reflect that surgery was contemplated at the time of statutory MMI. *See* Texas Workers' Compensation Commission Appeal No. 002002, decided October 3, 2000. Therefore, we disagree that the designated doctor's amendment was within a reasonable time and conclude that the hearing officer erred in according presumptive weight to the designated doctor's amended report. We note that the MMI date

did not change and was the same in both of the designated doctor's reports. We affirm the determination that claimant reached MMI on May 23, 1997. We reverse the determination that claimant's IR is two percent and render a decision that claimant's IR is zero percent, which is in accordance with the designated doctor's first report.

Judy L. S. Barnes
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

I would affirm the decision of the hearing officer. I have signed a number of decisions in which we have applied the doctrine that the surgery must be under consideration at the time of statutory maximum medical improvement (MMI) to permit an amendment of impairment rating (IR) based upon post-statutory MMI surgery. I have done so with increasing concern. First, it has never been altogether clear to me what the basis of this doctrine is in statute or rule. Second, it appears to me that this doctrine rather arbitrarily permits an amended IR in some cases and not in others based upon a distinction that has little or nothing to do with merits of whether or not the amendment was justified.

I believe that the underlying basis of the doctrine was to restrict the amendment of IR after statutory MMI to protect the finality of most IR determinations and to prevent the endless relitigation of IR. While I certainly agree that finality of dispute resolution is an important goal, I think it is a goal that generally should yield, absent a clear statutory or rule authority to the contrary, to the goal of accuracy of the dispute resolution.

In the present case, it is not really disputed that the amended IR is the more accurate rating. The argument really revolves around whether or not it was simply too late to amend the IR. This would be true under those Appeals Panel cases which say that the subsequent surgery must be under consideration at the time of statutory MMI to be included in an amendment of IR. Upon deeper reflection, I simply do not find a sound basis for these prior holdings and I would explicitly overrule these prior cases.

This does not mean that there would never be any time limit on obtaining impairment income benefits due to an amendment of IR which reflected a more accurate assessment of impairment. Section 408.083 provides that income benefits terminate 401 weeks after the date of injury, or, for an occupational disease, 401 weeks after the date on which benefits begin to accrue. This section provides finality for IR disputes by rendering any change in IR meaningless in the sense that no amendment past this point would permit the awarding of any additional income benefits.

Gary L. Kilgore
Appeals Judge