APPEAL NO. 991984

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 August 5, 1999, with the record closing August 16, 1999, at the Hearing Site. The single issue at the CCH was the appellant's whole person impairment rating (IR). The hearing officer determined that the IR was 13% as certified by a Texas Workers' Compensation Commission (Commission)-selected designated doctor. The claimant appeals, urging that at the time of his certification, August 10, 1995, the designated doctor did not know of a herniated nucleus pulposus (HNP) at the L-4-5 level which was shown on a MRI performed on October 22, 1996, and for which he had surgery (lumbar laminectomy at L4-5) in November 1996, and thus, his IR should have been 15% because the designated doctor should have used a different table in the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The respondent (carrier) argues that the decision of the hearing officer is correct and based upon sufficient evidence and that the designated doctor's report correctly applied the AMA Guides and is not overcome by the great weight of other medical evidence.

DECISION

Affirmed.

The claimant sustained a compensable injury to his knee and back on _____, when he fell down some stairs. He had two surgeries on his knee and, although initially disputed, the carrier ultimately accepted compensability of a back injury. The claimant continued to experience low back pain and a medical report from Dr. H dated November 11, 1994, states "I feel it would be appropriate to recommend lumbar MRI for the lower back." Apparently an MRI was not performed and the claimant asserts the carrier denied the MRI and the record is silent regarding any appeal of any denial to the Commission's Medical Review Division. Previously, the claimant's treating doctor certified MMI on September 23, 1994 and assessed a six percent IR, and because of a dispute with his doctor's certification of maximum medical improvement (MMI)/IR, the claimant was eventually examined by Dr. F, a Commission-selected designated doctor, on August 10, 1995. Dr. F's narrative report shows that, in addition to the knee injury, he examined, reviewed medical records, considered, and rated a back injury. Dr. F found MMI, stating there was "no evidence of a radicular nature obtained during a careful examination today and I believe that his symptoms are probably on the basis of some degenerative changes in the lower lumbar area." Dr. F assessed a rating of seven percent for the lumbar area, consisting of two percent range of motion (ROM) deficits and five percent from Table 49 IIB of the AMA Guides.

The claimant continued to experience back pain, apparently moved to a new location, and subsequently changed treating doctors. At the recommendation of Dr. G, he underwent an MRI in November 1996, which showed spine within normal limits except a

"left posterolateral HNP obliterating the superior aspect of the left lateral recess and, I would anticipate associated with compression of the proximal left L5 root sleeve." He underwent a laminectomy in November 1996. According to Commission computer notes in evidence, in December 1998 the claimant indicated he had medical documentation to dispute Dr. F's MMI/IR, based on the undiagnosed HNP and subsequent surgery. The claimant asserts that his back should be rated under Table 49 llC of the AMA Guides, which would increase the rating two percent and render a whole body IR of 15%.

In response to an inquiry from the Commmision, Dr. F stated that he did, in fact, include and rate the claimant's back injury at the time of his examination and that he assigned two percent for abnormal ROM and five percent for medically documented pain in excess of six months. He noted that the claimant subsequently had surgery and, if it met the criteria, he assumed it would be appropriate for a reexamination for an "amended MMI date and possibly a change in the IR could be assigned." He stated it was up to the Commission to decide whether or not this would be appropriate at this late stage.

The hearing officer, in considering the single IR issue before him, compared the medical records and various measurements of lumbar movement over the course of the claimant's treatment as it related to his back, and determined that at the time of Dr. F's certification, the claimant did not yet have an HNP and that during the time frame, the claimant had no or minimal degenerative changes in his lumbar spine which would place the rating under Table 49, line llB as done by Dr. F, as opposed to line llC urged by the claimant. Thus, the hearing officer also determined that the great weight of the medical evidence did not contradict the IR of Dr. F. The date of MMI was not in issue. An IR is generally to be assessed and given at the time MMI is reached. Texas Workers' Compensation Commission Appeal No. 94149, decided March 16, 1994. And, an IR is not generally changed or permitted to be amended just because surgery is subsequently performed, particulary where it is not actively considered at the time of the rendering of the IR. Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994; Texas Workers' Compensation Commission Appeal No. 941265, decided November 1, 1994; Texas Workers' Compensation Commission Appeal No. 980503, decided April 27, 1998. *Compare* Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994. In the case under review, the hearing officer considered the medical records, diagnosis, and course of treatment regarding the claimant's lumbar area; concluded that the condition was appropriately rated by the designated doctor at the time of his certification, a time when surgery was not being actively considered; and determined that the subsequent surgery for the HNP, which developed at some later time and was diagnosed in November 1996 leading up to the surgery, did not overcome or otherwise warrant a reexamination and reconsideration of the initial IR by Dr. F. As has been held by the Appeals Panel, the report of a designated doctor occupies a unique position under the 1989 Act and is the only medical report entitled to presumptive weight. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. In the final analysis, the hearing officer determined that Dr. F's IR was in accord with the AMA Guides and that the great weight of the medical evidence was not contrary to his report. From our review of the evidence, we cannot conclude that the determinations of the hearing officer

were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Accordingly, the decision and order are affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge