APPEAL NO. 002379

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 August 30, 2000. With respect to the single issue before her, the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 17% as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission) in an amended report. The parties resolved an issue as to the claimant's date of maximum medical improvement (MMI) by stipulating that the claimant reached MMI on November 30, 1998, in accordance with Section 401.011(30)(B). In its appeal, the carrier asserts error in the hearing officer's having given presumptive weight to the designated doctor's amended IR and in the hearing officer's having determined the claimant's MMI date was statutory MMI. In his response to the carrier's appeal, the claimant urges affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____, when he slipped and fell at work, landing on his tailbone and low back. In a Report of Medical Evaluation (TWCC-69) dated November 14, 1997, Dr. L, a doctor who examined the claimant at the request of the carrier, certified that the claimant reached MMI as of that date with an IR of 10%. That certification was disputed and Dr. R was selected by the Commission to serve as the designated doctor. Dr. R examined the claimant on March 24, 1998, and in a TWCC-69 dated March 26, 1998, Dr. R stated that the claimant had not yet reached MMI. On August 31, 1998, Dr. R reexamined the claimant and certified that he had reached MMI as of that date with an IR of 10%.

The claimant's treating doctor is Dr. S. In progress notes dated February 25, 1998, Dr. S noted that he was going to refer the claimant to Dr. V, an orthopedic surgeon, for a surgical consultation. In progress notes from March 1998, Dr. S noted that Dr. V was pursuing a course of epidural steroid injections (ESI) and requesting additional diagnostic testing before making a recommendation for spinal surgery. Dr. S's progress notes reflect that the claimant had three ESIs , with the third injection occurring on May 13, 1998. After pursuing the course of ESIs, Dr. V recommended a discogram, which was ultimately performed on June 25, 1998. Dr. S's progress notes of July 1, 1998, state that the "[d]iscogram revealed 3 level disc disruption" at L3-4, L4-5, and L5-S1. In July 1998, Dr. V recommended a myelogram and CT scan, which was not approved until August 10, 1998. On August 13, 1999, Dr. S noted that the myelogram and CT scan "revealed some significant positive findings; [claimant] will follow up with the surgeon for scheduling to get this taken care of." In a progress note dated October 12, 1998, Dr. S noted that he discussed surgery extensively with the claimant and that "he has decided that he will have the surgery." Dr. S also noted the claimant's agreement to go forward with surgery in notes dated November 16, 1998, November 23, 1998, and December 14, 1998. On January 12, 1999, Dr. V completed a Recommendation for Spinal Surgery (TWCC-63) to begin the

spinal surgery second opinion process and on February 23, 1999, the Commission approved spinal surgery.

On August 25, 1999, Dr. V performed a decompressive laminectomy at L3-4 and L4-5. On September 28, 1999, the claimant filed a dispute of the designated doctor's MMI date and his IR. The claimant introduced evidence that he contacted the Commission numerous times in an attempt to pursue his dispute of the designated doctor's rating; however, it was not until May 2000, that the Commission sent the claimant back to the designated doctor to consider the effects of the claimant's surgery on his MMI date and IR. In a TWCC-69 dated May 22, 2000, Dr. R, the designated doctor, certified that the claimant reached MMI on May 17, 2000, with an IR of 17%, which was comprised of an 8% rating for a specific disorder of the lumbar spine under Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), 2% for loss of lumbar flexion range of motion (ROM), and 7% for loss of lumbar extension ROM.

The carrier asserts that the hearing officer erred in determining that the claimant's MMI date is November 30, 1998, the date of statutory MMI. This argument is wholly without merit. The parties stipulated at the hearing that the claimant reached MMI on that date. Transcript p. 39. As such, the carrier cannot now be heard to complain about the hearing officer's having found a date of MMI consistent with the parties' stipulation.

The carrier essentially argues that the claimant has "waived" the right to contest the designated doctor's certification in this case because he did not file his dispute until September 1999, nearly a year after the designated doctor had certified him at MMI and assigned a 10% IR. In Texas Workers' Compensation Commission Appeal No. 991081, decided July 8, 1999, we considered and rejected a similar argument. In that case we noted that "[a] challenge made to the IR before claimant's surgery most likely would have been baseless . . . ." Thus, Appeal No. 991081 concluded that the claimant did not waive the right to dispute the IR "through delay in challenging the designated doctor's report." That reasoning applies with equal force here. As the claimant noted, his basis for disputing the designated doctor's certification did not arise until he had surgery in August 1999. The claimant filed his dispute in September 1999, and thereafter, the delay in getting the claimant back to the designated doctor appears to be attributable to the Commission. Our review of the record does not demonstrate that the hearing officer's determination that the claimant did not waive his right to dispute the designated doctor's certification is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier also argues that by permitting the amendment of a designated doctor's report, the Appeals Panel has engaged in impermissible, informal rule making, citing Rodriguez v. Service Lloyds Ins. Co., 997 S.W.2d 248 (Tex. 1999). At the outset, we note that the carrier did not raise this argument at the hearing and thus, it did not preserve its

error for purposes of appeal. However, we further note that we rejected similar arguments in Texas Workers' Compensation Commission Appeal No. 001339, decided July 26, 2000, Texas Workers' Compensation Commission Appeal No. 001109, decided June 21, 2000, and Texas Workers' Compensation Commission Appeal No. 000589, decided May 8, 2000.

Lastly, the carrier contends that the evidence does not support the hearing officer's determination that the claimant's surgery was under consideration at the time of the designated doctor's initial certification. Although there was a line of cases that stated that the focus of whether it was appropriate to amend an IR for a surgery subsequent to the date the IR was assigned was on whether the surgery was being considered at the time of the certification, subsequent cases have pointed out that those cases were a departure from a previous line of cases and have reaffirmed that the focus is properly on whether the surgery was being considered or contemplated at the time of statutory MMI. Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999; Texas Workers' Compensation Commission Appeal No. 992672, decided January 18, 2000. Thus, the question here becomes one of whether sufficient evidence supports the hearing officer's determination that on the date of statutory MMI, November 30, 1998, surgery was under active consideration. Dr. S's records reflect that the claimant had agreed to have the surgery in October 12, November 16, and November 23, 1998, all dates prior to statutory MMI. Sufficient evidence supports that hearing officer's determination that the surgery was being actively considered at the time of statutory MMI and thus, the amendment of the IR was made for a proper purpose. Nothing in our review of the record demonstrates that that determination is so against the great weight of the evidence as to compel its reversal on appeal. Pool, *supra*; Cain, *supra.*

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge