APPEAL NO. 002418

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 September 15, 2000. With respect to the issues before her, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on August 4, 1999, and that his impairment rating (IR) is 13% as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In his appeal, the claimant asserts that the hearing officer erred in determining that the claimant's surgery after statutory MMI was not contemplated at the time he reached MMI and, in not sending the claimant back to the designated doctor for a reevaluation to determine the effect of his surgery on his IR. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

Because of the limited nature of the issue before us on appeal, our factual recitation will be limited to those facts most germane to that issue. The parties stipulated that the claimant sustained a compensable low back injury on _____, while lifting cases of soda bottles. The claimant underwent fusion surgery at L4-5 and L5-S1 on February 9, 1998. On August 4, 1999, Dr. W, the claimant's surgeon, certified that the claimant reached MMI with an IR of 25%. In the narrative report accompanying his Report of Medical Evaluation (TWCC-69), Dr. W stated:

> [Claimant] is not at MMI because he is still not completely fused. We did a full set of films. He is getting a pretty good fusion on one side but the other side at L4-5 does not look that well. The 5-1 looks excellent. In February it will be two years. He just may be not showing up the bone well. On one side he has pretty good bone formation and on the opposite side at 4-5 he does not have as good a bone formation. At this point he is probably facing putting some more bone graft if he does not develop more in that area.

Dr. W's IR was disputed and Dr. T was selected by the Commission to serve as the designated doctor, apparently for IR only. In a TWCC-69 dated September 14, 1999, Dr. T certified that the claimant reached MMI on August 4, 1999, with an IR of 13%, which was comprised of 11% 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 and 2% for loss of lumbar left lateral flexion range of motion.

On February 29, 2000, Dr. W submitted a Recommendation for Spinal Surgery (TWCC-63) to perform repeat fusion surgery at L4-5 and L5-S1. On March 27, 2000, Dr. G, the carrier's spinal surgery second opinion doctor, concurred in the claimant's need for the proposed surgery. On March 31, 2000, the Commission sent a letter approving the

surgery. In May 2000, the claimant underwent repeat fusion surgery at L4-5 and L5-S1. In an August 16, 2000, letter to the claimant's attorney, Dr. W addressed the question of when surgery was being contemplated. Specifically, Dr. W stated that the "plain x-ray films over the months of August and September 1999 showed that he was definitely developing a pseudoarthrosis. I informed [claimant] that he most likely may need refusion, but that I could not be certain at that time." In addition, Dr. W stated that he had certified the claimant at MMI at that time because he thought the claimant had reached statutory MMI. Finally, Dr. W stated that the claimant "definitely had a pseudoarthrosis at the time of the designated doctor's exam and we were contemplating surgical treatment at that time."

The claimant contends that the evidence does not support the hearing officer's determination that his surgery "was not under active consideration or contemplated on or about Claimant's date of [MMI]." 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 (Unpublished). Thus, the question here becomes one of whether sufficient evidence supports the hearing officer's determination that the claimant's surgery was not under active consideration or contemplated as of the date of statutory MMI, which the hearing officer noted was September 15, 1999. The claimant relies on the language used in Dr. W's August 4, 1999, report to establish that surgery was being contemplated at the time of statutory MMI. In that report, Dr. W stated that the claimant was "probably facing" more surgery. In addition, in his August 16, 2000, letter, Dr. W stated that in August and September 1999, he had told the claimant that "he most likely may need refusion, but that I could not be certain at that time." The hearing officer could reasonably interpret that language to determine that the claimant's surgery was not being contemplated or actively considered at the time of statutory MMI. While that is not the only reasonable interpretation that could be given to that language, it is a reasonable interpretation of the same. Nothing in our review of the record demonstrates that the hearing officer's determination in that regard 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 her determination that the surgery was not being actively considered or contemplated at the time of statutory MMI 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). Thus, the hearing officer did not err in giving presumptive weight to the designated doctor's 13% IR without sending the claimant back for reexamination to determine the effects of his post-statutory MMI surgery on his IR.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge