APPEAL NO. 031865
FILED SEPTEMBER 5, 2003

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 June 10, 2003. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 22% as certified by Dr. J, the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In its appeal, the appellant (carrier) argues that the hearing officer erred in giving presumptive weight to the designated doctor's IR. Specifically, the carrier contends that the designated doctor's IR is not entitled to presumptive weight because he did not properly use the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides 4th edition) to determine the claimant's IR relating to the cervical spine because he employed the range of motion (ROM) model to determine the IR and not the diagnosis-related estimates (DRE) model. In her response, the claimant urges affirmance of the hearing officer's decision.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a cervical spine and shoulder injury in the course and scope of her employment on _____. She subsequently underwent surgery to her cervical spine on November 3, 2000, and surgeries to her right shoulder on July 19, 2001, and August 20, 2002. In order to resolve a dispute relating to the claimant's IR, Dr. J, the designated doctor, examined the claimant on July 26, 2002. In a Report of Medical Evaluation (TWCC-69) of the same date, Dr. J certified that the claimant reached maximum medical improvement (MMI) on April 8, 2002, with a 22% IR. Dr. J used the ROM model to determine the claimant's IR and his 22% IR is comprised of 14% for the cervical spine (11% for specific disorders of the cervical spine, and 3% for loss of ROM in the cervical spine) and 9% for the right shoulder (15% for loss of ROM). Dr. J gave no explanation in his initial report as to why he relied on the ROM model, as opposed to the DRE model, in assessing the claimant's cervical spine impairment.

The carrier employed three peer review doctors, all of whom opined that Dr. J improperly used the ROM model to assess the cervical spine impairment and that the claimant should properly be rated under Category II of the DRE model. In response to these opinions, the Commission sent Dr. J a letter of clarification. Dr. J responded, explaining that he utilized the ROM model because the claimant "did not fall under the Differentiators marked with an asterisk on Table 71." Dr. J went on to confirm that he "continue[d] to remain with the whole person [IR] of 22%, and do not find any basis to make any amendments to the assessment using the [AMA Guides 4th edition]". Dr. J also confirmed that the 9% whole person impairment assigned for the claimant's

shoulder was correctly calculated. The hearing officer found that the great weight of the other medical evidence was not sufficient to overcome the presumptive weight afforded to the designated doctor's opinion and concluded that the claimant's IR is 22%.

In Texas Workers' Compensation Commission Appeal No. 030288-s, decided March 18, 2003, we had occasion to consider the issue of whether use of the ROM model instead of the DRE model is a matter left to the discretion of the examining physician. The designated doctor in Appeal No. 030288-s took the position that the AMA Guides 4th edition "clearly leaves" the decision of which model to use to the evaluating doctor pointing to the language that the DRE model "should" be used and further noting that he "thought it most appropriate to use the [ROM] model to obtain the most appropriate [IR]." The hearing officer agreed with the designated doctor and gave presumptive weight to his IR. We disagreed that the evaluating physician had the discretion to use whichever model he or she felt was most appropriate. In determining that "use of the DRE Model is not optional and is to be used unless there is a specific explanation why it cannot be used," Appeal No. 030288-s focused on language from page 3/94 of the AMA Guides 4th edition that states:

> The evaluator assessing the spine should use the Injury Model, if the patient's condition is one of those listed in Table 70 (p.108). That model, for instance, would be applicable to a patient with a herniated lumbar disk and evidence of nerve root irritation. If none of the eight categories of the Injury Model is applicable, then the evaluator should use the [ROM] Model.

The first sentence in this paragraph suggests that if a claimant's condition is one of those listed in Table 70, then the claimant will fall within one of the DRE categories. Turning to Table 70, it appears that the claimant's cervical condition would fall within the second to last row. In his response to the Commission's request for clarification, Dr. J did not clarify why the claimant did not fall into one of the DRE categories with regard to her cervical spine. In the absence of such an explanation, we are without sufficient information to determine whether the designated doctor's use of the ROM model to determine that claimant's IR was appropriate. *See* Texas Workers' Compensation Commission Appeal No. 031874-s, decided September 5, 2003. Accordingly, we remand the case to the hearing officer to seek additional clarification from the designated doctor regarding the claimant's cervical spine IR. Initially, the designated doctor should be asked if our initial assumption that the claimant will fall within one of the DRE categories if her cervical condition is listed in Table 70 is correct. Next, the designated doctor should be asked if the claimant's condition is listed in Table 70 and, more specifically, if the second to last row of the table encompasses the claimant's condition. If the designated doctor determines that the claimant's condition is listed in Table 70, then he should be asked to determine if the claimant falls within any of the DRE categories that correspond to that condition. If he decides that the claimant does not fit into any of the DRE categories, the designated doctor should provide a detailed explanation of why she does not fall within the categories and then he can turn to the ROM model either to calculate the claimant's IR or as a differentiator to assist in

determining placement within one of the DRE categories (*see* Texas Workers' Compensation Commission Appeal No. 022509, decided November 21, 2002). If the designated doctor does not or cannot provide the requested information, then the hearing officer should consider whether the appointment of a second designated doctor is warranted in this case. As the carrier does not dispute the 9% IR assigned for the claimant's shoulder, the matters on remand should be limited to the claimant's cervical spine IR.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

With the deepest respect and affection for my colleagues in the majority, I dissent.

In her decision the hearing officer stated as follows:

> The Carrier relies on various peer review reports who opined that the designated doctor erred by using ROM and not the DRE's. However, the report of the designated doctor shall have presumptive weight, and the Commission shall base the [IR] on that report unless the great weight of the other medical evidence is to the contrary. The Appeals Panel has recognized the unique position that a designated doctor occupies under the 1989 Act in resolving disputes concerning the date of [MMI] and [IR], and have stated that no other doctor's report, including that of a treating doctor is accorded this special presumptive status. The medical evidence in this case is not so contrary to rebut the presumptive weight that is afforded to the designated doctor's [IR]. The designated doctor responded to the Commission and adequately explained why he used ROM instead of the DRE's.

I disagree that the decision of the hearing officer should be reversed. I recognize that the AMA Guides 4th edition envisions that in most cases the DRE method will be used in calculating impairment. However, the AMA Guides 4th edition also clearly provide that in some circumstances the ROM method will be used in calculating impairment. In the present case, the designated doctor has provided a reasoned medical opinion as to why the protocols of the AMA Guides 4th edition the ROM method should be used in this case. Three carrier peer review doctors have provided contrary opinions. The hearing officer as the finder of fact as found that the opinions of the peer review doctors do not constitute the great weight of medical evidence overcoming the presumption afforded to the opinion of the designated doctor. I do not find that the opinions of the carrier peer review doctors constitute the great weight and preponderance of the evidence contrary to the decision of the hearing officer. I would therefore affirm the decision of the hearing officer.

_____

Gary L. Kilgore
Appeals Judge