APPEAL NO. 031874
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 July 2, 2003. With respect to the single issue before him, the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 16% as certified by Dr. FS, 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) (4th edition) to determine the claimant's IR because he employed the range of motion (ROM) model to determine the IR and not the diagnosis-related estimates (DRE) model. The appeal file does not contain a response to the carrier's appeal from the claimant. Neither party appealed the hearing officer's determination that the claimant reached maximum medical improvement (MMI) on April 30, 2002, and that determination has, therefore, become final. Section 410.169.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a lumbar spine injury in the course and scope of her employment as a flight attendant on _____. The claimant's treating doctor for her compensable injury is Dr. WB, an orthopedic surgeon. In a Report of Medical Evaluation (TWCC-69) dated April 30, 2002, Dr. WB certified that the claimant reached MMI on that date with an IR of 24%. Dr. WB used the ROM model to assess the claimant's IR and assigned 16% for specific disorders of the lumbar spine and 9% for loss of lumbar ROM. The carrier disputed Dr. WB's IR and Dr. FS was selected by the Commission to serve as the designated doctor. Dr. FS examined the claimant on June 19, 2002. In a TWCC-69 of the same date, Dr. FS certified that the claimant reached MMI on April 30, 2002, with an IR of 16%. Dr. FS used the ROM model to determine the claimant's IR and his 16% IR is comprised of 12% for specific disorders of the lumbar spine and 4% for loss of right and left lateral flexion ROM.

The carrier employed Dr. BB to conduct a peer review of the designated doctor's IR. In a report dated August 14, 2002, Dr. BB states that the designated doctor's IR is not in accordance with the 4th edition of the AMA Guides because he used the ROM model to determine the claimant's IR and not the DRE model, which Dr. BB identifies as the "primary tool" to assess IRs under the 4th edition. On August 28, 2002, the Commission forwarded Dr. BB's peer review to Dr. FS to consider its effect, if any, on his certification of the claimant's IR. In a letter dated September 6, 2002, Dr. FS

responded to the request for clarification. Dr. FS referenced the language on page 3/94 of the 4th edition that states that the evaluator assessing the spine should use the DRE model "if the patient's condition is one of those listed in Table 70." He further stated that the claimant "did not fit into any of the eight categories" of the DRE model so he used the ROM model. He concluded his response by stating that the claimant's IR "stands."

On December 4, 2002, Dr. HS examined the claimant as a carrier required medical examination (RME) doctor and was asked to comment on the designated doctor's IR. Dr. HS noted that the designated doctor had used the ROM model to assess the claimant's IR and further noted that "based on the [Commission] guidelines under the fourth edition one has to use the [DRE] model and not the [ROM] model when providing an [IR] for the lumbar spine." Dr. HS stated that if the DRE model was used, the claimant "would fall under category III resulting in a 10% [IR] of the whole person using table 72 on page 110." On February 3, 2003, the Commission sent a second request for clarification to the designated doctor asking him to "explain why the claimant did not fit into any of the 8 categories [of the DRE model] and why you used [the ROM model] instead." In a letter dated March 25, 2003, Dr. FS responded, as follows:

> I am in receipt of you letter, which is a rebuttal from the previous letter of clarification and my [IR] done on 06/19/02. I have gone through the history and examination of this patient. The patient has had multiple surgeries on her back. Going through the DRE evaluation I was unable to put her into any DRE category because this patient did not have any spasms, no neurologic deficit and not [sic] structural abnormality. Therefore this patient had to be classified according to the [ROM] model. Which is on page 3-112 and further diagnosis based specific spine disorder was given. [sic] Therefore my evaluation was proper and correct.

Dr. HS also testified at the hearing. He again stated that Dr. FS incorrectly used the 4th edition by using the ROM model to determine the claimant's IR rather than the DRE model. Dr. HS explained that the DRE model is the preferred method for assigning an IR under the 4th edition and noted that the ROM model can be used where there is a question of which DRE category the patient falls into; however, he maintained that the ROM model should never be used by itself to determine an IR under the 4th edition. In response to cross-examination from the ombudsman assisting the claimant, Dr. HS stated that the 4th edition does not say that the ROM model cannot be used to determine an IR; rather, he stated that an Appeals Panel decision establishes that the DRE model is the accepted model for providing an IR. We note that we have never said that the use of the ROM model is prohibited; rather, we have said that it can only be used in limited circumstances.

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 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 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.

Our reading of 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 to us that the claimant's condition in this case would fall within the second to last row, namely a previous spine operation *without* loss of motion segment integrity or radiculopathy or a previous spine operation *with* loss of motion segment integrity or radiculopathy. (Emphasis in original.) Thus, it would seem that the claimant would fall in lumbosacral DRE Category II, III, IV, or V. As noted above, two requests for clarification were sent to the designated doctor and he responded. However, his responses did not provide a specific explanation of why the claimant did not fall within any of the DRE categories. 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 in this instance. Accordingly, we remand the case to the hearing officer to seek additional clarification from the designated doctor. Initially, the designated doctor should be asked if our assumption that the claimant will fall within one of the DRE categories if her 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.

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, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

JIM MALLOY
AMERICAN INTERNATIONAL GROUP
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I dissent in this case for essentially the same reasons that I dissented in Texas Workers' Compensation Commission Appeal No. 031865, decided September 5, 2003. I think this case really revolves around factual and not legal issues. To me, what we have here is a difference of medical opinions between the designated doctor and the other doctors as to whether or not the claimant fits into any of the DRE categories. The hearing officer, as the finder of fact, resolved this factual conflict by finding the opinions of the other doctors did not constitute the great weight and preponderance of the other medical evidence overcoming the presumptive weight afforded to the opinion of the designated doctor. Not finding the opinions of the other doctors, which are internally inconsistent and conflict with one another, constitutes the great weight and

preponderance of the evidence contrary to the decision of the hearing officer, I would affirm the decision of the hearing officer.

_____
Gary L. Kilgore
Appeals Judge