APPEAL NO. 090332
FILED APRIL 23, 2009

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 February 2, 2009. The hearing officer decided that the respondent's (claimant) impairment rating (IR) was 25%. The appellant (carrier) appealed the hearing officer's IR determination. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

FACTUAL SUMMARY

The parties stipulated that: (1) on _____, the claimant sustained a compensable low back injury while in the course and scope of his employment; and (2) the claimant reached maximum medical improvement (MMI) statutorily on March 27, 2008, per the reports of (Dr. A), the designated doctor, and (Dr. S), the post-designated doctor required medical examination (RME) doctor. The sole issue in dispute is the claimant's IR.

The facts of this case are undisputed. The designated doctor, Dr. A, initially examined the claimant on April 7, 2008, and certified that the claimant had not reached MMI. In a letter of clarification (LOC) dated April 30, 2008, the Texas Department of Insurance, Division of Workers' Compensation (Division) informed Dr. A that in her "report dated April 7, 2008, you stated the [claimant] will not reach MMI until July 6, 2008. However, the [claimant] reached statutory MMI on March 27, 2008." Also, in that LOC, the Division requested that Dr. A submit a Report of Medical Evaluation (DWC-69) assigning an IR. In a response dated May 8, 2008, Dr. A stated that the claimant reached statutory MMI on March 27, 2008, with a 15% IR, based on Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy using 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). Dr. A opined that based on her examination the claimant should be placed in "category 3 DRE for the lumbar spine and is, therefore, a whole person [IR] of 15%."[1] In another LOC dated May 29, 2008, the Division asked Dr. A whether she meant to assign an IR of 10% for DRE Lumbosacral Category III: Radiculopathy, and whether her physical examination noted loss of relevant reflexes or atrophy. In a response dated June 5, 2008, Dr. A asked to re-examine the claimant to determine his IR.

The designated doctor, Dr. A, re-examined the claimant on June 25, 2008, and certified that the claimant reached MMI on that date with a 25% IR. In her narrative

[1] We note that the AMA Guides list a whole person impairment for DRE Lumbosacral Category III: Radiculopathy as 10%, rather than 15%.

report dated June 25, 2008, Dr. A noted 2 cm atrophy in the claimant's left calf as compared to his right calf and a reflex deficit on both lower extremities. Dr. A states that based on the examination findings "[t]his would place him in DRE 3 for Lumbosacral. At this exam, however, the Range of Motion [(ROM)] [M]odel was used as it better indicates the disability of this injured-worker." Again, in a LOC dated July 24, 2008, the Division asked for clarification regarding the claimant's date of MMI and assessment of IR using the ROM Model. In an undated response to the LOC, Dr. A stated that the claimant reached MMI statutorily on March 27, 2008, with a 25% IR, and amended the DWC-69 accordingly. Additionally, in her response Dr. A cited the AMA Guides on page 3/112 and stated that "[w]hile it is not my habit to use the ROM [M]odel, clinically [the claimant] cannot be fully explained or rated based upon the DRE categories, based upon my TWO assessments of [the claimant]. His disability at the time of my examinations was such that it was necessary to use MORE CLINICAL DATA TO CATEGORIZE HIS SPINE IMPAIRMENT." (Emphasis in the original.) Dr. A stated that she stood by her assessment of a 25% IR.

The hearing officer states in the Background Information section of her decision that the designated doctor, Dr. A "has specifically explained why she used the ROM Model to evaluate the [c]laimant's impairment, and why in [Dr. A's] opinion the DRE Model is inapplicable, as well as the fact that more clinical data on the [c]laimant's spine are needed to categorize his impairment." The hearing officer found that the preponderance of the medical evidence is not contrary to Dr. A's latest report on the issue of IR and it has presumptive weight. The hearing officer determined that the claimant's IR is 25% per Dr. A's narrative report.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Section 408.124(a) provides that an award of an impairment income benefit must be based on an IR determined using the IR guidelines described by that section and the appropriate edition of the AMA Guides, which, in this case, is the fourth edition.

The AMA Guides on page 3/112 states that "[t]he [ROM Model] should be used only if the Injury Model [hereinafter referred to the DRE Model], is not applicable, or if more clinical data on the spine are needed to categorize the individual's spine impairment." The AMA Guides on page 3/99 states that:

> If the physician cannot decide into which DRE category the patient belongs, the physician may refer to and use the [ROM] Model, which is described in Section 3.3j (p.113). Using the procedures of that model, the physician combines an impairment percent based on the patient's

> diagnosis with a percent based on the patient's spine motion impairment and a percent based on neurologic impairment, if it is present. The physician uses the estimate determined with the [ROM] Model to decide placement within one of the DRE categories. The proper DRE category is the one having the impairment percent that is closest to the impairment percent determined with the [ROM] Model.

The AMA Guides on page 3/94 states that "[t]he evaluator assessing the spine should use the [DRE] Model, if the patient's condition is one of those listed in Table 70 (p.108)." Also the AMA Guides on page 3/101, Section 3.3(f) "Specific Procedures and Directions" (in paragraph No. 3) instructs the physician to select the region primarily involved, that is, the lumbosacral, thoracolumbar, or cervicothoracic spine region and identify the patient's most serious objective findings and refer to clinical differentiators if necessary (Table 71), "especially to differentiators 4, 5, and 7, which may provide objective clinical information." (*See also* Appeals Panel Decision (APD) 022509-s, decided November 21, 2002, in which the Appeals Panel discussed the use of the DRE Model and how the ROM Model could be used as a differentiator or if none of the eight categories of the DRE Model is applicable, citing the AMA Guides.)

In APD 030288-s, decided March 18, 2003, the Appeals Panel stated that although there are instances when the ROM Model may be used, such as if none of the categories of the DRE Model are applicable, or as a differentiator, the use of the DRE Model is not optional and is to be used unless there is a specific explanation why it cannot be used. A comment that the evaluator merely prefers "to use the Model that he or she feels is most appropriate" is insufficient justification for not using the DRE Model. In APD 061529-s, decided September 26, 2006, after the claimant reached MMI, the designated doctor assigned a 10% IR under DRE Lumbosacral Category III: Radiculopathy. Subsequently, the designated doctor re-examined the claimant and assessed a 29% IR using the ROM Model. The Appeals Panel held that the hearing officer erred in determining that the claimant's IR is 29% and rendered a decision that the claimant's IR is 10%. In that case, the designated doctor failed to specifically explain why the ROM Model should be used to assess the IR and why the DRE Model could not be used to assess the claimant's IR. *See also* APD 071818, decided December 6, 2007. The Appeals Panel has held that a designated doctor may utilize the ROM Model as opposed to the DRE Model if the designated doctor gives a specific explanation as to why he or she does so. *See* APD 033280, decided February 11, 2004.

We distinguish this case from APD 032317-s, decided October 2, 2003, in which the Appeals Panel reversed and rendered a new determination that the claimant's IR was 20%, which had been calculated by the designated doctor using the ROM Model as a differentiator after the designated doctor determined that the claimant's IR that had been determined under the DRE Model did not accurately reflect the true nature of his impairment from the compensable injury. In that case, the claimant had a fusion and the designated doctor contemplated placing the claimant in Lumbosacral DRE Category III or IV based on his clinical findings. The designated doctor explained in his LOC that

he did not believe that Lumbosacral DRE Category III rating reflected the true nature of the claimant's impairment that resulted from the compensable injury and used the ROM Model as a differentiator to place the claimant in Lumbosacral DRE Category IV. The Appeals Panel stated in that case that by providing a method where the ROM Model can be used as a differentiator, the AMA Guides recognizes that in certain circumstances, a person's impairment may be properly determined by placing them in a DRE category despite the fact that they do not specifically satisfy the criteria identified for placement in that category.

In the instant case, Dr. A does not indicate in her responses or narrative reports that she could not decide into which DRE category the claimant belonged, and she did not use the ROM Model as a differentiator to decide placement within one of the DRE categories. Rather, Dr. A states that she used the ROM Model because it "better indicates the disability of" the claimant. Dr. A cites to the AMA Guides on page 3/112 that because it is necessary to use more clinical data to categorize the claimant's spine impairment she used the ROM Model as opposed to the DRE Model. Dr. A did not indicate what clinical data was necessary to categorize the claimant's spine using the DRE Model. Although Dr. A stated in her response to the LOC that more clinical data was necessary to determine the claimant's spine impairment, in her prior narrative report dated June 25, 2008, Dr. A stated that based on the examination findings (atrophy and loss of relevant reflexes) the claimant is placed in DRE Category III: Radiculopathy. Dr. A does not indicate why it was necessary to use the ROM Model or why the claimant's condition did not meet one of the spine impairment categories listed in Table 70 of the AMA Guides, using the DRE Model. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 25%.

Review of the record shows that the only other certification of MMI and IR in evidence with a date of MMI of March 27, 2008, is from Dr. S, the RME doctor. The evidence reflects that Dr. S examined the claimant on October 21, 2008, and he certified that the claimant reached MMI statutorily on March 27, 2008, with a 10% IR, based on DRE Lumbosacral Category III: Radiculopathy. In his narrative report, Dr. S states that the claimant's diagnosis is lumbar radiculopathy and that the examination findings indicate evidence of loss of relevant reflexes. Accordingly, we render a new decision that the claimant's IR is 10%.

SUMMARY

We reverse the hearing officer's determination that the claimant's IR is 25% and we render a new decision that the claimant's IR is 10%.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063-2732.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge