APPEAL NO. 032317-s
FILED OCTOBER 2, 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 11, 2003. With respect to the issues before him, the hearing officer determined that the appellant's (claimant) impairment rating (IR) is 14% and that he is not entitled to reimbursement for travel expenses for medical treatment at the direction of Dr. I, his treating doctor. In his appeal, the appellant (claimant) argues that the hearing officer erred in not giving presumptive weight to the designated doctor's 20% IR and in determining that he is not entitled to travel expense reimbursement for medical treatment at the direction of Dr. I. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and rendered in part and affirmed in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement (MMI) on February 19, 2002; and that Dr. M was the doctor selected by the Texas Workers' Compensation Commission (Commission) to serve as the designated doctor. In a Report of Medical Evaluation (TWCC-69) dated August 12, 2002, Dr. I assigned an IR of 19%. In the narrative report accompanying his TWCC-69, Dr. I stated that he used 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) and explained that the 19% was assigned pursuant to Table 75 on page 3/113 for specific disorders of the lumbar spine. Thus, it is apparent that Dr. I used the range of motion (ROM) model to assess the claimant's IR rather than the Diagnosis-related Estimates (DRE) model.

On September 10, 2002, Dr. M examined the claimant and certified that he had reached MMI statutorily on February 19, 2002, with an IR of 20%, in accordance with lumbosacral DRE category IV. In his narrative report, Dr. M stated that the claimant "appears to best fit DRE Lumbosacral Category III" and that he "does not meet the criteria precisely" for DRE Lumbosacral Category IV. In explaining his decision to nevertheless place the claimant in DRE Category IV, Dr. M stated:

> However, in consideration of the fact that he has had a fusion, I believe that he should be considered to have the structural equivalent of instability, which is a different type of motion segment disorder. On that basis, the percentage that best considers all of the aspects of his findings would be [DRE] Lumbosacral category IV: Loss of Motion Segment Integrity. This would yield a compromise number of 20% whole person

impairment, which I believe is the best percentage of impairment for his physical circumstance.

Therefore, although he does not precisely fit that category in every way, it best characterizes his situation and I believe it is entirely appropriate to state that he has a 20% whole person impairment.

I note that [Dr. I] used the [ROM] model to arrive at a 19% impairment of the whole person, which is very close to my own assessment of his situation. Although arrived from a slightly different standpoint [sic]. I believe that in this case there is good corroboration between the [ROM] model and the DRE model.

On December 9, 2002, the Commission sent a letter of clarification to the designated doctor attaching the peer review report of Dr. B and a letter from the carrier's adjuster, which both criticized Dr. M's having assigned a 20% IR to the claimant because the claimant did not meet the criteria associated with DRE lumbosacral category IV. On December 13, 2002, Dr. M responded to the letter of clarification, as follows:

In reviewing their rationale, it is certainly correct that the patient most precisely meets a DRE category 3, which would merit 10%.

However, the patient appeared to be more impaired than a 10% would reflect. He had atrophy in the right leg at the quadriceps and calf and complete absence of the right patella reflex. His [ROM] was substantially limited, and generally, he appeared to have significant disability in addition to impairment.

Additionally, [Dr. I] used a [ROM] model to arrive at a 19% impairment of the whole person. It is my opinion that the [ROM] model can be used as additional corroborating evidence as a means to determine the best DRE category for the patient. [Dr. I's] 19% agrees exceedingly closely with the 20% that is my own best assessment.

I believe that it is certainly reasonable to use the 4th edition of the [AMA Guides] as a guideline and not an absolute bible as it relates to arriving at percentage of impairment of the whole person.

It is still my best opinion that this patient has 20% impairment of the whole person.

On March 3, 2003, Dr. W conducted an IR examination on behalf of the carrier. Dr. W certified that the claimant's IR was 14%. Dr. W assigned 10% pursuant to DRE Lumbosacral Category III for radiculopathy. The additional 4% was assigned pursuant

to Table 37 "Impairments for Leg Muscle Atrophy" on page 3/77 of the 4th edition. Dr. W explained his decision to add the additional 4%, as follows:

> A further allowance should be given for the atrophy that is present although DRE Category III allows for 2 centimeters of atrophy. This gentleman has over 2 centimeters, has a gait disturbance because of it, and has muscular weakness and cramping because of it. If the DRE Category III is read carefully, it says "Loss of relevant reflexes or measured unilateral atrophy." This gentleman has loss of relevant reflexes and measured atrophy, and I think the "and" deserves some extra impairment for the atrophy, gait disturbance and instability of the leg that accompanies it. In Table 37, between 2 and 2.9 centimeters of atrophy would be classified as "moderate", and a 4% whole person impairment. The total impairment for this gentleman's condition, then, is a combination of 10% and 4%, or 14% whole person impairment in accordance with the [4th edition].

The hearing officer determined that the great weight of the other medical evidence was contrary to the report of the designated doctor and thus, that his report and the 20% IR were not entitled to presumptive weight. The hearing officer explained that the designated doctor had improperly rated the claimant under DRE Category IV because he did not meet the criteria of "at least 5 mm of translation of one vertebra on another, or angular motion at the involved motion segment that is 11º more than that at an adjacent motion segment." The designated doctor acknowledged that the claimant did not strictly fit the criteria for DRE Category IV; nevertheless, he maintained that the 20% IR was the most appropriate rating of the claimant's condition. We note initially, that like the designated doctor, Dr. W did not believe that DRE Category III adequately rated the claimant's condition. Indeed, both the designated doctor and Dr. W felt it was appropriate to assign additional impairment beyond the 10% allowed in DRE Category III to more accurately reflect the true nature of the claimant's impairment. Where Dr. W and the designated doctor parted ways was in how they decided what additional impairment to assign. The designated doctor turned to the claimant's 19% IR calculated under the ROM model as differentiator to assist in determining the claimant's placement within one of the DRE categories. The 4th edition provides for using the ROM model in such a manner. On page 3/99 the last paragraph in the left hand column states that "[i]f the physician cannot decide into which DRE category the patient belongs, the physician may refer to and use the [ROM] Model . . . ." That paragraph concludes that "[t]he proper DRE category is the one having the impairment percent that is closest to the impairment percent determined with the [ROM] Model." Similarly, on page 3/112 the 4th edition explains that the ROM model is properly used where "more clinical data on the spine are needed to categorize the individual's spine impairment." By providing a method where the ROM model can be used as a differentiator, the 4th edition 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. Accordingly, we cannot agree with the hearing officer's determination that the designated doctor

improperly used the 4th edition in determining the claimant's IR. Rather, we believe that the designated doctor properly looked to the ROM model to determine that the claimant should be placed in DRE Category IV and that the claimant's IR is 20%. As such, the hearing officer erred in failing to give presumptive weight to the designated doctor's report and his 20% IR in accordance with Section 408.125. Thus, we reverse the hearing officer's determination that the claimant's IR is 14% and render a new determination that the claimant's IR is 20% in accordance with the report of the designated doctor.

The hearing officer did not err in determining that the claimant is not entitled to reimbursement of travel expenses for medical treatment at the direction of his treating doctor. The hearing officer determined that the claimant did not sustain his burden of proving that he is entitled to reimbursement under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 134.6 (b) (Rule 134.6(b)) because he did not demonstrate to the hearing officer's satisfaction that "medical treatment for the compensable injury is not reasonably available within 20 miles of the injured employee's residence." Our review of the record does not reveal that the hearing officer's determination in that regard is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb the hearing officer's determination that the claimant is not entitled to reimbursement for travel expenses under Rule 134.6(b).

The hearing officer's determination that the claimant is not entitled to reimbursement for travel expenses for medical treatment at the direction of Dr. I is affirmed. The determination that the claimant's IR is 14% is reversed and a new decision rendered that the claimant's IR is 20% as certified by the designated doctor. Accrued and unpaid benefits, if any, should be paid in a lump sum with interest.

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

LEO MALO
ZURICH NORTH AMERICA
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Edward Vilano
Appeals Judge