

APPEAL NO. 032399-s  
FILED NOVEMBER 3, 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 (CCH) was held on August 19, 2003. The hearing officer determined that the appellant's (claimant) impairment rating (IR) was 12% as assessed by the designated doctor selected by the Texas Workers' Compensation Commission (Commission), whose opinion was not contrary to the great weight of other medical evidence. The claimant appealed, contending that the designated doctor's opinion was against the great weight of medical evidence and that the treating doctor's IR of at least 38% should be adopted. There was no response on file from the respondent (carrier). The appeal file contained a letter dated September 22, 2003 from Dr. H, who opines that the claimant should have received a 25% IR applying Texas Workers' Compensation Commission (TWCC) Advisory 2003-10 (signed July 22, 2003). Dr. H does not appear to be a party at the CCH and in any event his letter is untimely as an appeal.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_; reached statutory maximum medical improvement (MMI) on July 25, 2002; that Dr. A was selected by the Commission to serve as the designated doctor; and that Dr. A assigned the claimant a 12% IR. On May 15, 2001, the claimant underwent surgery during which a laminectomy and fusion with instrumentation with decompression from L3 to S2 and fusion from L4 to S2 were performed. In his narrative report, Dr. A stated that the claimant falls within Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy, of 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). After Dr. A initially certified the claimant at MMI on May 30, 2001, with an 11% IR, Dr. S, the claimant's treating doctor, disagreed with Dr. A's IR and MMI. In a letter dated September 1, 2002, Dr. S asserted that the claimant couldn't possibly be at MMI, as she was only two weeks postsurgery at that time, that she had a postmyelogram CT scan that showed evidence of a herniated disk at L3-4 above the fusion at L5-S1 and decreased root filling and a bulging disk at L2-3, and that the claimant's loss of motion segment integrity placed her in DRE Lumbosacral Category V: Radiculopathy and Loss Of Motion Segment Integrity. The Commission sent Dr. S's letter to Dr. A on September 30, 2002, and he responded in a letter dated October 4, 2002, stating that he had made a mistake on his date of MMI, and, given the new medical information, he requested the opportunity to reexamine the claimant. He reexamined her on November 11, 2002, certified a new date of MMI, and assessed the claimant with a 10% impairment plus 1% for the additional level at L5-S1 and 1% for the additional level at L3-4, for which Dr. S was recommending an additional fusion, for a total whole person impairment of 12% for

her lumbar spinal injury, using DRE Category III. Dr. S wrote another letter on November 28, 2001, again asserting that Dr. A's assessment of 12% IR was incorrect, as DRE Category III is not consistent with a fused lumbar segment that defines loss of motion segment integrity. Dr. S examined the claimant on May 6, 2003, and certified the claimant at MMI on that date and assessed a whole person impairment of 40% using DRE Lumbosacral Category V, plus a component from DRE Category VI, to arrive at the 40% IR, or alternatively, a 38% IR using the range of motion model. Dr. M, a required medical examination doctor, performed a medical record review on May 27, 2003, and opined that the correct IR would be 10% using DRE Lumbosacral Category III.

Neither party, nor the hearing officer, at the CCH, nor the claimant on appeal reference TWCC Advisory 2003-10 (contrary to the allegations in Dr. H's September 22, 2003 letter). In Texas Workers' Compensation Commission Appeal No. 032402-s, the hearing officer applied TWCC Advisory 2003-10 in arriving at a 33% IR (reformed to 36%). Appeal No. 032402-s quoted a portion of TWCC Advisory 2003-10 and held that it was properly applied in a multilevel fusion case. The applicable portion of TWCC Advisory 2003-10 states:

2. Clarification of Rating for Spinal Fusion(s).

For spinal fusion, the impairment rating is determined by the preoperative x-ray tests for "motion segment integrity" (page 102, 4<sup>th</sup> Edition of the Guides to the Evaluation of Permanent Impairment). If preoperative x-rays were not performed, the rating may be determined using the following criteria:

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- b. Multilevel fusion meets the criteria for DRE Category IV, Structural Inclusions, as this multilevel fusion is equivalent to "multilevel spine segment structural compromise" per DRE IV.

Although neither of the parties nor the hearing officer referenced TWCC Advisory 2003-10 at the CCH, we hold that in CCH's held after July 22, 2003, involving IR for spinal surgery which would be effected by TWCC Advisory 2003-10, it is error not to consider and apply that advisory. Accordingly we reverse and remand the case for the designated doctor to consider and apply TWCC Advisory 2003-10. We would also note that we find no authority to add the 1% impairment for the additional level at L5-S1 and 1% impairment for the additional level at L3-4 to DRE Category III.

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 Texas Workers' Compensation 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. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

**CORPORATION SERVICE COMPANY  
800 BRAZOS  
AUSTIN, TEXAS 78701.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Chris Cowan  
Appeals Judge

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Margaret L. Turner  
Appeals Judge