

APPEAL NO. 040226  
FILED MARCH 24, 2004

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 January 13, 2004. The hearing officer determined that the respondent (claimant) has a 22% impairment rating (IR), as certified by the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). The appellant (carrier) appeals this determination, asserting that the designated doctor improperly applied Commission Advisory 2003-10, dated July 22, 2003, in rating the claimant's low back injury. The claimant did not file a response.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_, to his right shoulder and low back. The carrier's required medical examination doctor certified the claimant with a 1% IR under 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), comprised of 0% under Diagnosis-Related Estimate (DRE) Lumbosacral Category I and 2% upper extremity (1% whole person) for right shoulder range of motion (ROM) deficits. The parties stipulated that the claimant subsequently underwent a multilevel fusion with instrumentation at L3-4 and L4-5 as a result of the compensable injury to his low back. The parties agreed that the claimant reached maximum medical improvement on August 19, 2002, consistent with the designated doctor's report. It is undisputed that the designated doctor certified the claimant with a 22% IR, comprised of 20% under DRE Lumbosacral Category IV and 2% for ROM deficits in the right upper extremity. The carrier's peer review doctor opined that the claimant's condition warranted a rating under DRE Lumbosacral Category III, absent x-rays showing "interior posterior motion or slipping of 1 vertebra over another greater than 5 millimeters...or a difference in angular motion of 2 adjacent motion segments greater than 11 degrees in response to spine flexion and extension." In his most recent clarification, the designated doctor maintained his rating for the claimant's low back injury, citing Advisory 2003-10 which provides that "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.'" The claimant's orthopedic surgeon agreed that a rating under DRE Lumbosacral Category IV was appropriate for the claimant's condition.

The hearing officer did not err in determining that the claimant has a 22% IR, as certified by the Commission-appointed designated doctor. The carrier argues that it was improper to apply Advisory 2003-10, when determining the claimant's rating for the low back, and that any rating under DRE Lumbosacral Category IV for loss of segment

integrity must be based on flexion and extension x-rays. The Appeals Panel rejected a similar argument in Texas Workers' Compensation Commission Appeal No. 032402-s, decided November 3, 2003. Moreover, we have held that it is error not to consider and apply Advisory 2003-10 in CCH's held after July 22, 2003, involving an IR for spinal surgery which would be affected by the advisory. Texas Workers' Compensation Commission Appeal No. 032399-s, decided November 3, 2003. Nothing in our review indicates that the designated doctor misapplied the AMA Guides or Advisory 2003-10. In view of the evidence and the applicable law, we cannot conclude that the hearing officer's IR determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier also argues that the Commission exceeded its authority in issuing Advisory 2003-10. Whether the Commission exceeded its authority in issuing Advisory 2003-10 is a matter for the courts and will not be addressed here. See Texas Workers' Compensation Commission Appeal No. 032260, decided October 16, 2003.

The hearing officer's decision and order is affirmed.

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

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

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Edward Vilano  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge