APPEAL NO. 040714
FILED MAY 13, 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 on February 11, 2004, with the record closing on March 11, 2004. The hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on March 2, 2003, with a 25% impairment rating (IR) as certified by the Texas Workers' Compensation Commission (Commission)-appointed designated doctor in his amended report. The appellant (carrier) appealed, asserting legal and factual error. The claimant responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____. The record reflects that the claimant underwent a two-level, 360 degree fusion on October 23 and October 27, 2001. On October 9, 2002, the designated doctor certified that the claimant had reached clinical MMI as of that date with a 10% IR. The IR was awarded under Table 72, Diagnosis-Related Estimate (DRE) Category III 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). On April 24, 2003, the designated doctor indicated that his opinion regarding MMI and IR remained unchanged in a response to a letter of clarification. On October 15, 2003, the claimant's treating doctor referred the claimant for evaluation. The referral doctor certified that the claimant reached MMI as of the statutory date, and that his IR is 25% under DRE Category V of the AMA Guides. On December 23, 2003, the claimant was reevaluated by the designated doctor. The designated doctor certified that the claimant reached MMI as of the statutory date, March 2, 2003, with a 19% IR. The designated doctor declined to use the DRE model, and instead based his rating on Table 75 (specific disorders) and range of motion (ROM).

At the CCH, the claimant argued that he reached MMI on March 2, 2003, with a 25% IR. It was the claimant's position that he is entitled to a rating under DRE Category V based on a two-level fusion with radiculopathy and Commission Advisory 2003-10, dated July 22, 2003. The carrier argued that, "[the designated doctor] used the fourth edition of the AMA Guides. [The designated doctor] gave a 10% [IR], lumbar lesion with radiculopathy. There was nothing improper about that at all." The carrier further argued that it is improper for the Commission to apply Advisory 2003-10 because that amounts to ad hoc rule making. There was little dispute that the designated doctor's 19% IR was not adequately explained. In the hearing officer's Statement of the Evidence, it is clear that he had concerns regarding the use of DRE Category III or DRE Category V because of a "lack of objective, clinical support for radiculopathy." The hearing officer

left the record open and sent the designated doctor a letter of clarification. In the letter, the designated doctor was asked what objective, clinical signs of radiculopathy he relied on; why he chose to use the ROM model in arriving at his amended 19% IR; and would his opinion change in view of Commission Advisory 2003-10. On February 28, 2004, the designated doctor responded to the hearing officer's letter of clarification. In his response, the designated doctor indicated that he had overlooked Commission Advisory 2003-10, and since the claimant has radiculopathy, his proper IR is 25%. The hearing officer determined that the designated doctor's response to the letter of clarification is entitled to presumptive weight.

On appeal, the carrier asserts that there is no evidence that the claimant has radiculopathy, and there is no legal basis for applying Commission Advisory 2003-10. We note that at the CCH on this matter, the carrier conceded that the designated doctor properly placed the claimant in DRE Category III, which requires "significant signs of radiculopathy." In arguing that the claimant's IR should be 10%, the carrier acknowledged that the designated doctor examined the claimant and properly gave a rating for a lumbar spinal injury with radiculopathy. The designated doctor has examined the claimant on two occasions, and his opinion that the claimant has radiculopathy remains unchanged. We are not persuaded by the carrier's position that a rating for radiculopathy is proper when the result is a 10% IR, but that it is improper if the IR is 25%. Even on appeal, the carrier maintains its position that the designated doctor's 10% IR based upon DRE Category III should have been adopted.

In the case before us, the only difference between a rating under DRE Category III or DRE Category V is the application of Commission Advisory 2003-10. We have previously addressed a similar challenge to the validity of Commission Advisory 2003-10 as is set forth by the carrier in the instant case. In Texas Workers' Compensation Commission Appeal No. 032402-s, decided November 3, 2003, we stated:

> The carrier essentially contends that in issuing Advisory 2003-10, the Commission engaged in ad hoc rulemaking, and as such, the hearing officer's reliance on the advisory is tantamount to applying the "wrong legal standard." Whether the Commission exceeded its authority in issuing Advisory 2003-10 is a matter for the courts. *See* Texas Workers' Compensation Commission Appeal No. 031441, decided July 23, 2003. The hearing officer did not err in relying on the advisory, which was effective at the time of the hearing, even though it was not the basis for Dr. P's IR. Nor was it error for the hearing officer to adopt an IR which rates a condition, loss of motion segment integrity, which presumably did not exist at the time of MMI because it had been corrected by the fusion, as the advisory makes clear the rating is warranted in cases where surgery has been performed for the condition in question.

Just as in Appeal No. 032402-s, *supra*, we decline to make a determination that the Commission exceeded its authority in issuing Advisory 2003-10.

Sections 408.122(c) and 408.125(c) provide that the report of the designated doctor has presumptive weight, and the Commission shall base its determinations of MMI and IR on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. The hearing officer found that the presumptive weight afforded the opinion of the designated doctor was not overcome by the great weight of the other medical evidence, and concluded that the claimant reached MMI on March 2, 2003, with a 25% IR as reported by the designated doctor. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

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

PARKER W. RUSH
1445 ROSS AVENUE, SUITE 4200
DALLAS, TEXAS 75202-2812.

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Robert W. Potts
Appeals Judge