APPEAL NO. 041893
FILED SEPTEMBER 22, 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 was held on July 13, 2004. The hearing officer resolved the disputed issue by determining that the respondent's (claimant) impairment rating (IR) is 20%. The appellant (carrier) appealed, arguing that because Texas Workers' Compensation Commission (Commission) Advisory 2003-10, dated July 22, 2003, is contrary to 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), it should not have been applied and therefore, the claimant's correct IR is 10%. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____, and that he reached statutory maximum medical improvement (MMI) on October 7, 2001. The record reflects that in July of 2000, the claimant underwent a 360 degree fusion with instrumentation at the L4-5 level; that on September 18, 2001, the Commission sent notice to the claimant's treating doctor that a second surgery was preauthorized; that on October 11, 2001, the claimant underwent a posterior lumbar interbody discectomy and interbody fusion at L5-S1; and that on June 27, 2002, the claimant underwent an excision of the pedicle screw fixation at the L5-S1 disc on the right side. On September 3, 2002, the claimant was examined by a Commission-appointed designated doctor to determine the claimant's MMI date and IR. The designated doctor placed the claimant at statutory MMI as of October 7, 2001, and awarded a 10% IR based on Table 72, Diagnosis-Related Estimate (DRE) Category III of the AMA Guides. On September 14, 2002, the claimant's treating doctor indicated he agreed with the designated doctor by signing off on the Report of Medical Evaluation (TWCC-69) containing the designated doctor's certification.

On April 26, 2004, the claimant's treating doctor sent a letter of clarification indicating that he is now aware of Advisory 2003-10, and stated that because of the multilevel fusions, the claimant is entitled to a rating under DRE Category IV, which would be 20%. On May 20, 2004, the Commission forwarded the treating doctor's letter to the designated doctor and asked if it changed his opinion. On May 28, 2004, the designated doctor responded to the Commission's inquiry. The designated doctor stated that Advisory 2003-10 has caused controversy in the industry. It is clear from his response that the designated doctor felt the claimant's proper IR was 10%, but noted that if Advisory 2003-10 is applied to this case, the claimant's IR would be 20%. The designated doctor concluded by stating that whether or not Advisory 2003-10 is applied in this case is an administrative decision.

Under the facts of this case, part 2. b. of Advisory 2003-10 does not apply because on the date of statutory MMI, the claimant had not yet had a multilevel fusion. The second fusion did not occur until October 11, 2001, a date which is after the date of MMI in this case. The fact that the second fusion was under consideration prior to the statutory MMI date is irrelevant. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the "[a]ssignment of an [IR] for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination." That rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. The preamble of Rule 130.1(c)(3) clarifies that IR assessments "must be based on the injured employee's condition as of the date of MMI." 29 Tex Reg. 2337 (2004). In response to public comment, the Commission in the preamble responded that "[I]n the event the MMI date is changed due to a post-MMI change in the injured employee's conditions, there should be a re-evaluation of the IR as of the new MMI date." The preamble also notes that in the event that the MMI date is changed, the IR would have to be based on the injured employee's condition as of the changed MMI date. This interpretation is consistent with Section 408.123(a) and the Texas Supreme Court statement in Texas Workers' Compensation Commission, *et al*. v. Garcia, 893 S.W.2d 504 (Tex. 1995), which states that the IR is determined at MMI. Applying this interpretation to Section 408.123(a), the IR must be assessed as of the unappealed date of statutory MMI of October 7, 2001. We recognize that this version of Rule 130.1(c)(3) did not become effective until March 14, 2004, however, we have applied it retroactively. *See* Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004.

We reverse the hearing officer's decision that the claimant's IR is 20%, and we render a decision that the claimant's IR is 10%, as certified by the Commission-appointed designated doctor.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Robert E. Lang
Appeals Panel
Manager/Judge

_____
Veronica L. Ruberto
Appeals Judge