APPEAL NO. 042589
FILED DECEMBER 6, 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 September 7, 2004. The hearing officer resolved the disputed issues by deciding that Dr. T was properly appointed as the designated doctor in accordance with Section 408.0041 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5); that the respondent's (claimant) impairment rating (IR) is 20%; and that the claimant did not waive the right to dispute the appointment of the designated doctor, Dr. T, by failing to contest the appointment in a timely manner. The appellant (carrier) appealed, requesting reversal of the determination that the claimant did not waive the right to dispute the appointment of the designated doctor by failing to contest the appointment in a timely manner and the determination of IR. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____, to his lumbar spine; that on March 13, 2003, the claimant was examined by designated doctor, Dr. T; that Dr. T found the claimant was at maximum medical improvement (MMI) on September 10, 2002, with a 10% IR; and that on April 30, 2004, the claimant disputed the appointment of the designated doctor. It was undisputed that the claimant reached MMI on September 10, 2002.

Waiver of the right to dispute appointment of the Designated Doctor

The hearing officer's findings that Dr. T is a medical doctor licensed in the state of Texas; that Dr. T's scope of practice includes the treatment and procedures performed on the claimant and that Dr. T is trained and experienced with the treatments and procedures used by the doctors in treating the claimant are not appealed. The carrier contends that the hearing officer erred in his determination that the claimant did not waive the right to dispute the assignment of the designated doctor by failing to contest the appointment in a timely manner. In Texas Workers' Compensation Commission Appeal No. 022277, decided October 23, 2002, we stated as follows:

> Under Rule 130.5(d)(2), the [Texas Workers' Compensation Commission (Commission)] is charged with the responsibility of ensuring that a designated doctor is still qualified before scheduling an appointment with the designated doctor to reexamine the claimant. We find no authority for relieving the Commission of its obligation in that regard, even if the party's challenge to the qualifications of the designated doctor comes after the results of the examination are known.

We perceive no reversible error. *See* also Texas Workers' Compensation Commission Appeal No. 040080, decided March 5, 2004.

Impairment Rating

Dr. T assessed a 10% IR using 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) based on Diagnosis-Related Estimate (DRE) Lumbosacral Category III. The evidence reflects that the claimant underwent spinal surgery, which included bilateral posterior lumbar interbody fusions at L4-5 and L5-S1, on May 30, 2002. In a letter of clarification, Dr. T discussed Advisory 2003-10, signed July 22, 2003, and Advisory 2003-10B, signed February 25, 2004, but stated that DRE Lumbosacral Category IV is for a very specific injury to the spine creating a back and forth type of "loss of motion segment integrity which is rarely found in a workers' compensation situation." He went on to explain that this only occurs with a severe flexion and extension motion injury creating a high force disrupting the supporting ligaments of the spine and noted that the claimant did not have this kind of injury.

In Texas Workers' Compensation Commission Appeal No. 032399-s, decided November 3, 2003, we said that, for hearings held after July 22, 2003, involving IRs for spinal surgery that would be affected by Advisory 2003-10, it is error not to consider and apply that advisory. However, in subsequent cases a determination of IR has been affirmed where it was clear that the designated doctor considered Advisory 2003-10 but declined to assess a rating based on DRE Category IV, where the hearing officer found that the great weight of the other medical evidence was not contrary to the report, or amended report, of the designated doctor. *See* Texas Workers' Compensation Commission Appeal No. 041894, decided September 22, 2004, and Texas Workers' Compensation Commission Appeal No. 041190, decided July 7, 2004. Further, in Texas Workers' Compensation Commission Appeal No. 042108-s, decided October 20, 2004, we stated that under Advisory 2003-10 and 2003-10B, a certifying doctor has the option to assign an IR based on DRE Category IV to an injured employee with a multilevel fusion. Rather than stripping the certifying doctor of the ability to exercise his or her independent medical judgment in assigning an appropriate IR in each individual case, the two Commission advisories merely give the certifying doctor this additional option. Although these Commission advisories do not require the assignment of an IR based on DRE Category IV if there is a multilevel spinal fusion, the Commission advisories must be considered as part of the certifying doctor's process in determining the appropriate IR.

In the instant case, it is clear that the designated doctor considered the Advisories but declined to assign impairment based on DRE Lumbosacral Category IV. The hearing officer noted in the Background Information portion of the decision that "the proper application of Advisory 2003-10 combined with the absence of any x-ray flexion

and extension views of the lumbar spine constitute the great weight of medical evidence opposing Dr. T's [IR] of 10%."

Under Advisory 2003-10 and Advisory 2003-10B a rating under DRE Category IV, Structural Inclusions, is permissible if preoperative x-rays were not performed. *See* Texas Workers' Compensation Commission Appeal No. 041429-s, decided August 4, 2004, and Texas Workers' Compensation Commission Appeal No. 040489, decided April 26, 2004. The parties dispute whether preoperative x-ray flexion and extension views of the lumbar spine were taken. The record indicates that on August 28, 2001, a lumbar myelogram followed by computerized tomographic scan of the lumbar spine was performed. The conclusion in the medical report detailing the procedure stated "[t]he myelogram definitely demonstrated broad-based bulges at L4-5 and L5-S1 in the flexion and extension views." After reviewing the claimant's medical records, Dr. T concluded that the claimant "has no evidence on diagnostic studies performed preoperatively of any loss of motion segment integrity in the lumbar spine." However, the claimant's treating doctor stated that after reviewing the medical records available he did not see any flexion or extension x-rays. The AMA Guides at page 3/98 state that motion of the spine segments is evaluated with flexion and extension roentgenograms and defines loss of integrity of the lumbosacral joint as angular motion between L5-S1 that is 15° greater than the motion at the L4-5 level. Further, loss of integrity is defined as an antero-posterior motion or slipping of one vertebra over another greater than 5 mm for a vertebra in the thoracic or lumbar spine. Although there is mention of flexion and extension views in the medical report detailing the claimant's myelogram, it is not clear from the existing record whether this was adequate to determine loss of motion segment or structural integrity as defined in the AMA Guides.

The treating doctor acknowledged that he reviewed the assessment and IR assigned by Dr. T and agreed that it was accurate according to the AMA Guides but opined that the application of the Advisories required an assignment of IR based on DRE Lumbosacral Category IV.

The hearing officer determined that the claimant's IR was 20%. He noted that the treating doctor properly applied Advisory 2003-10 in arriving at the IR of 20%. The record did not contain a Report of Medical Evaluation (TWCC-69) from the treating doctor nor did the letter from the treating doctor in evidence specifically mention an IR of 20%. The treating doctor did note that in his opinion, after applying the Advisories, the claimant's IR should be assigned based on DRE Lumbosacral Category IV. We note that the AMA Guides do provide that the IR for someone placed in DRE Lumbosacral Category IV would be 20%.

The hearing officer determined that the certification of IR by Dr. T is contrary to the great weight of the other medical evidence because Dr. T did not place the claimant in DRE Category IV "applying" Advisory 2003-10 and because he found no records indicating preoperative x-rays for motion segment integrity were in evidence. It was error for the hearing officer to find the certification of Dr. T was contrary to the great weight of the other medical evidence because he refused to apply Advisory 2003-10.

Section 408.125(c) provides that for injuries that occurred prior to June 17, 2001, where there is a dispute as to the IR, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Rule 130.6(i) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. *See also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. It was error for the hearing officer to reject the IR certified by Dr. T simply because he exercised his medical judgment in declining to place the claimant in DRE Lumbosacral Category IV as permitted by Advisory 2003-10. We reverse the hearing officer's determination that the claimant's IR is 20% and render a new determination that the claimant's IR is 10%.

We affirm the hearing officer's determination that the claimant did not waive the right to dispute the appointment of the designated doctor, Dr. T, by failing to contest the appointment in a timely manner. We reverse the hearing officer's determination that the claimant's IR is 20% and render a new determination that the claimant's IR is 10%.

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

DONALD E. PAGE
320 WESTWAY PLACE, SUITE 521
ARLINGTON, TEXAS 76018.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge