

APPEAL NO. 043139  
FILED JANUARY 25, 2005

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 November 17, 2004. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 20%. The appellant (carrier) appealed, disputing the IR determination. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that the claimant reached maximum medical improvement on May 6, 2004. The sole issue at the CCH was the claimant's IR. The claimant testified that he sustained a compensable injury to his low back on \_\_\_\_\_, and that as a result of his low back injury he had surgery on October 14, 2003. The operative report in evidence reflects that the claimant had a multi-level fusion. The designated doctor evaluated the claimant on May 6, 2004, and issued a 10% 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), placing the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III. The claimant's treating doctor evaluated the claimant on July 29, 2004, and assessed a 20% IR. In his report, the treating doctor stated "[a]ccording to [Texas Workers' Compensation Commission (Commission)] Advisory 2003-10 [signed July 22, 2003], multilevel fusions fall into DRE Category IV. Therefore, [the claimant's] proper [IR] is a DRE Lumbosacral Category IV, which is a 20% whole person impairment."

As noted by the hearing officer, the claimant contended that the designated doctor did not have discretion to apply Advisory 2003-10 and since he refused to apply the advisory, presumptive weight should not be afforded to his findings. The carrier contended that while the designated doctor did have to consider Advisory 2003-10 it was within his discretion to decide whether or not he wished to apply it.

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, Texas Workers' Compensation Commission Appeal No. 042108-s, decided October 20, 2004, stated 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, Commission Advisories 2003-10 and 2003-10B, signed February 24, 2004, merely give the certifying doctor this additional option.

The hearing officer specifically found that the designated doctor was notified in a letter of clarification of Advisory 2003-10, and did not change his finding of a 10% IR and that the treating doctor applied Advisory 2003-10. The hearing officer additionally found that the great weight of the other medical evidence has overcome the presumptive weight afforded the findings of the designated doctor. However, the hearing officer does not point to anything other than the application of Advisory 2003-10 to support this finding.

Section 408.125(c) provides that for injuries that occur on or after June 17, 2001, where there is a dispute as to the IR, the report of the Commission-selected designated doctor shall have presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 130.6(i) (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 the designated doctor 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%.

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

**CORPORATION SERVICE COMPANY  
800 BRAZOS, COMMODORE 1, SUITE 750  
AUSTIN, TEXAS 78701.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Robert W. Potts  
Appeals Judge