APPEAL NO. 060452
FILED MAY 8, 2006

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 1, 2006. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on June 14, 2004, with a 5% impairment rating (IR). The claimant appealed, arguing that the designated doctor never amended his original assessment of 25% IR. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on ___, and that (Dr. M) was the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor. The claimant states in her appeal that she agrees with the determination of MMI. The hearing officer's determination that the claimant reached MMI on June 14, 2004, is affirmed. However, the claimant appeals the determination that her IR is 5%. The evidence reflected that on November 20, 2003, the claimant underwent a fusion at the C5-6 level and the C6-7 level. It was undisputed that there were no preoperative flexion and extension x-rays.

Dr. M examined the claimant on June 14, 2004, and certified that the claimant reached MMI on that date with a 25% IR, placing the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category IV, 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). Dr. M noted that the claimant showed no diagnosis related impairment for the left knee, right wrist, left and right shoulder that would be ratable. Dr. M further noted that the claimant showed clinical evidence of a cervicothoracic injury and mistakenly referred to a three level fusion, although he refers to the correct levels of the cervical spine that surgery was performed on. As discussed above, the evidence reflects that the claimant had a two level fusion. The carrier was granted permission to forward deposition on written questions to Dr. M pursuant to 28 TEX. ADMIN. CODE § 142.13(e) (Rule 142.13(e)). In his responses, Dr. M confirmed that he examined the claimant in the capacity of a designated doctor at the request of the Division and that as a result of his examination, he assigned a 25% IR. Further, Dr. M stated that he relied on Advisory 2003-10 signed July 22, 2003, and Advisory 2003-10b signed February 24, 2004, which indicate that if preoperative lateral flexion/extension films were not completed and the individual undergoes a multilevel fusion, then that individual would meet the criteria for a DRE Category IV, as a multilevel fusion is equivalent to multilevel spine segment structural compromise. Dr. M confirmed that this situation applied to the claimant. Dr. M was asked specifically that "if [he] was to assign an [IR] based solely

upon the [AMA Guides], [to] identify what that [IR] would be and explain how [he] arrive[d] at that [IR]." In response to this question, Dr. M stated that "utilizing the [AMA Guides] solely, [claimant] would receive a 5% whole person impairment via Table 73, DRE Category II, page 110." Dr. M further noted that the claimant did not have any clinical evidence of a cervical radiculopathy and there were no cervical, lateral flexion/extension x-rays films that showed loss of motion segment integrity as defined on page 98 of the AMA Guides. Specific questions were asked of the designated doctor regarding the use of Advisories 2003-10 and 2003-10b. There is no indication that Dr. M believed that the application of the Advisories 2003-10 and 2003-10b was mandatory but rather he chose to apply the referenced Advisories at his discretion.

The hearing officer noted in his Background Information that upon a deposition on written questions, the designated doctor amended his finding to a 5% IR. We disagree. The hearing officer further noted that "[e]ven if the designated doctor were required to use the Advisories, his original finding of 25% impairment was erroneous because claimant met neither the DRE Category III nor IV criteria." Advisories 2003-10 and 2003-10b note that for spinal fusion, the IR is determined by the preoperative x-ray tests for motion segment integrity, and that if preoperative x-rays were not performed, the rating may be determined using the following criteria: b. 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. In the instant case, it was undisputed that there were no preoperative x-rays and that the claimant had a multilevel fusion. We cannot under these circumstances agree that the designated doctor's 25% IR is erroneous. In Appeals Panel Decision 042108-s, decided October 20, 2004, we held that Commission Advisories 2003-10 and 2003-10b, do not require the assignment of an IR based on DRE Category IV if there is a multilevel spinal fusion, but that the Commission advisories must be considered as part of the certifying doctor's process in determining the appropriate IR and that under the Advisories the assignment of an IR based on DRE Category IV for a multilevel spinal fusion is not required but is an option.

We note that Section 408.125(c), effective September 1, 2005, provides that the report of the designated doctor has presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. The preponderance standard in Section 408.125(c) applies to this case because the CCH was held on or after September 1, 2005.

The designated doctor in his response to deposition on written questions was simply answering the question posed to him about what the claimant's IR would be based solely on the AMA Guides. This does not mean that the designated doctor changed his mind regarding the IR he assessed. In the same deposition on written questions, the designated doctor specifically states that the Advisories 2003-10 and 2003-10b specifically apply to the claimant's situation. There is no indication in the

record that the designated doctor thought he was required to apply the Advisories but rather did so at his own discretion.

The carrier argued at the CCH and reiterates in its response, that a Travis County District Court has enjoined the Division from the application and enforcement of Advisories 2003-10 and 2003-10b. However, the claimant correctly notes in her response that the District Court ruling has been stayed pending appeal.

We reverse the hearing officer's determination that the IR is 5% and render a new determination that the IR is 25%.

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

CORPORATION SERVICE COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge