

APPEAL NO. 071068
FILED JULY 25, 2007

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 April 11, 2007. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 20%. The appellant (carrier) appealed, arguing that the IR determination is legally wrong because it is based on Advisory 2003-10, signed July 22, 2003, citing Texas Dep't. of Ins. v. Lumbermens Mutual Cas. Co., 212 S.W.3d 870 (Tex. App.-Austin, 2006, pet. denied¹). The carrier requests the Appeals Panel reverse the 20% IR determination and render an IR determination of 10%. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The sole issue in dispute is the claimant's IR. The parties stipulated that the claimant sustained a compensable injury on _____, and that the claimant reached maximum medical improvement (MMI) on November 29, 2006, as determined by the designated doctor.

Dr. S, the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, examined the claimant on November 29, 2006, and certified that the claimant reached MMI on that same date with a 10% IR. Dr. S assigned a 10% IR for Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy, for the lumbar spine using 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). A letter of clarification was sent to Dr. S regarding the applicability of Advisory 2003-10 and Advisory 2003-10B, signed February 24, 2004 (Advisories). In a response dated January 26, 2007, Dr. S stated that the claimant had a severe injury with multiple fusions, as well as severe atrophy, and amended the claimant's IR from 10% to 20%, DRE Lumbosacral Category IV, based on the Advisories.

Section 408.125(c) provides that the report of the designated doctor shall have 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. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment 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

¹ We note that at the time of the CCH the petition for review was still pending before the Texas Supreme Court.

certifying examination. 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). See Appeals Panel Decision (APD) 040313-s, decided April 5, 2004.

The 20% IR determined by the hearing officer in this case as certified by Dr. S was based on the application of the Advisories. The Advisories have been declared invalid and their application an *ultra vires* act. Lumbermens, *supra*. The Texas Supreme Court denied the petition for review of this case on June 15, 2007. Therefore, the adoption of an IR that is based on the Advisories is legal error and must be reversed. See APD 071023-s, decided July 23, 2007. We reverse the hearing officer’s determination that the claimant’s IR is 20%.

Dr. S initially certified that the claimant reached MMI on November 29, 2006, with a 10% IR, based on DRE Lumbosacral Category III: Radiculopathy, and the evidence supports this rating. See Table 71, page 109. We reverse the hearing officer’s determination that the claimant’s IR is 20% and render a new decision that the claimant’s IR is 10%.

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

**RUSSELL OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge