APPEAL NO. 071081
FILED AUGUST 7, 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 May 14, 2007. The hearing officer resolved the disputed issues by deciding that the respondent/cross-appellant's (claimant) impairment rating (IR) is 20% and that the claimant is not entitled to supplemental income benefits (SIBs) for the first or second quarters. The appellant/cross-respondent (carrier) appealed, disputing the IR determination because it is based on Advisory 2003-10, signed July 22, 2003. The carrier requests that the Appeals Panel reverse the 20% IR determination and render an IR determination of 5%. Additionally, the carrier appeals the hearing officer's findings that the claimant was underemployed as a direct result of the impairment from the compensable injury and that the claimant's housekeeping work did not fall within her restrictions, arguing they are against the great weight of the credible evidence. The appeal file does not contain a response from the claimant to the carrier's appeal.

The claimant also filed an appeal, disputing the hearing officer's determination of non-entitlement to SIBs for the first and second quarters. The carrier responded, urging affirmance of the SIBs determinations of non-entitlement for the first and second quarters.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that Dr. K was appointed as the second Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor; and that the claimant reached maximum medical improvement (MMI) on August 26, 2005, as certified by Dr. K.

The claimant's IR and entitlement to SIBs for the first and second quarters were in dispute. It was undisputed that the claimant had a multi-level lumbar fusion on August 19, 2004. The evidence reflects that the first designated doctor examined the claimant on July 9, 2004, prior to her multi-level lumbar spine fusion, and certified the claimant at MMI on July 9, 2004, with a 5% IR. The first designated doctor assessed impairment for the claimant's lumbar spine, placing the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category II: Minor Impairment 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). The first designated doctor later learned of the claimant's multi-level spinal fusion and rescinded his finding of clinical MMI. Subsequently, Dr. K was appointed as the second designated doctor.

Dr. K examined the claimant on April 15, 2005, but found the claimant had not yet reached MMI. Dr. K examined the claimant again on August 26, 2005, and certified that the claimant reached MMI on that date with a 20% IR. Dr. K assessed 20% impairment for the claimant's low back injury, placing the claimant in Lumbosacral DRE Category IV: Loss of Motion Segment Integrity. Letters of clarification were sent to Dr. K. In response to the letter of clarification dated December 5, 2006, Dr. K stated that "ignoring the guidance in Advisory 2003-10 and 2003-10B, [signed February 24, 2004 (Advisories)]" he would assign the claimant a 5% IR. Dr. K stated that he chose to follow the Advisories and his IR of 20% remains.

The Advisories provided in part that "[i]f 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."

The 20% IR determined by the hearing officer in this case as certified by Dr. K was based on the application of the Advisories. The Advisories have been declared invalid and their application an *ultra vires* act. Texas Dep't. of Ins. v. Lumbermens Mutual Cas. Co., 212 S.W.3d 870 (Tex. App.-Austin, 2006, pet. denied). 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. Appeals Panel Decision 071023-s, decided July 23, 2007.

Dr. K stated that without applying the Advisories, he would assess an IR for the claimant of 5%. Section 408.125 (c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination on that report unless the preponderance of the other medical evidence is to the contrary. There is no other certification of IR in evidence on the stipulated date of MMI. The 5% IR assessed by Dr. K is not contrary to the preponderance of the other medical evidence.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) which provides in part that to be entitled to SIBs, an injured worker must have an IR of 15% or more from the compensable injury. Since we have rendered a decision that the claimant has a 5% IR, the claimant does not meet the eligibility requirements for SIBs specified in the statute and, therefore, is not entitled to SIBs.

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 5%. We affirm the hearing officer's determination that the claimant is not entitled to SIBs for the first or the second quarters.

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.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge