APPEAL NO. 071186
FILED AUGUST 1, 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 30, 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. denied[1]). 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 parties stipulated that the claimant sustained a compensable injury on _____, and that the claimant reached maximum medical improvement (MMI) on July 6, 2006, as certified by Dr. D, the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor.

The sole issue in dispute was the claimant's IR. It was undisputed that the claimant had a multilevel lumbar spine fusion prior to the date of MMI. The evidence reflects that Dr. D examined the claimant on July 6, 2006, and certified that the claimant reached MMI on that date with a 10% IR. Dr. D assessed 10% impairment for the claimant's low back injury, placing the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category III: Radiculopathy. After reviewing the certification from Dr. D, the claimant's treating doctor wrote a letter disagreeing with the certification given by Dr. D. The letter from the treating doctor asked Dr. D to consider whether or not the claimant should be placed in Lumbosacral DRE IV due to his two-level fusion, questioned the MMI date and questioned whether or not impairment should be assessed for the left knee. In his initial certification, Dr. D assessed 0% impairment for the claimant's left knee. A letter of clarification was then sent to Dr. D which enclosed the letter written by the claimant's treating doctor. Dr. D responded to the letter of clarification, noting that he has not changed his mind about the date of MMI. However, Dr. D then stated that "I do agree that the claimant is entitled to a [L]umbosacral DRE Category IV based upon the Advisory 2003-10 . . . ." Dr. D then amended his certification of IR to 20%.

Advisory 2003-10 and Advisory 2003-10B, signed February 24, 2004 (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

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

DRE Category IV, Structural Inclusions, as this multilevel fusion is equivalent to 'multilevel spine segment structural compromise' per DRE IV."

The IR determined by the hearing officer in this case as certified by Dr. D 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. Appeals Panel Decision 071023-s, decided July 23, 2007.

Dr. D initially certified that the claimant had a 10% IR for the claimant's compensable injury, without applying the Advisories. This is the only other certification of IR in evidence. 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. In the narrative report of Dr. D that assigned a 10% IR for radiculopathy based on his examination of July 6, 2006, loss of deep tendon reflexes for the lower extremities is noted. Medical records reviewed by the designated doctor note that the claimant was diagnosed with partial foot drop in the left ankle and foot and an EMG obtained on March 3, 2006, showed lumbar radiculopathy at L5-S1 bilaterally. The peer review report in evidence states the claimant had documented signs of radiculopathy. The 10% IR assigned by Dr. D is supported by a preponderance of the medical evidence. 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 **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Veronica L. Ruberto
Appeals Judge