APPEAL NO. 071023-s
FILED JULY 23, 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 12, 2007. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 25%. The appellant (carrier) appealed, arguing that the hearing officer's IR determination is not supported by legally or factually sufficient evidence. The carrier further argued 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 25% IR determination and render an IR determination of 10%. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) on _____, the claimant sustained a compensable injury to his neck and back; (2) Dr. D was the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor; (3) the date of maximum medical improvement (MMI) is June 23, 2006, as certified by Dr. D; (4) Dr. D assigned the claimant a 10% IR on June 23, 2006; and (5) Dr. D assigned the claimant a 25% IR on October 21, 2006.

The sole issue in dispute was the claimant's IR. It was undisputed that the claimant had a multilevel cervical fusion prior to the date of MMI. The evidence reflects that Dr. D examined the claimant on June 23, 2006, and certified that the claimant reached MMI on that date with a 10% IR. Dr. D assessed 5% impairment for the claimant's neck injury, placing the claimant in Cervicothoracic Diagnosis-Related Estimate (DRE) Category II, and 5% impairment for the claimant's low back injury, placing the claimant in Lumbosacral DRE Category II. After reviewing the certification from Dr. D, the claimant's treating doctor wrote a letter disagreeing with the certification given by Dr. D. The focus of the letter from the treating doctor was her opinion that the claimant had not yet reached MMI. 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 had re-examined all his records and did not find any reason why the claimant would not be at MMI. However, Dr. D then stated that "[a]ccording to Advisory 2003-10 . . . this examinee rates an [IR] equivalent to a cervical spine DRE Category IV, which is equivalent to 25% . . . ." Dr. D went on to state that he was changing the claimant's IR from 10% to 25% not based on anything the treating doctor said but based on the "now accepted provision of . . . Advisory 2003-10 is appropriate to use in these instances." Dr. D did not discuss impairment of the lumbar

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

spine, which he had assessed as 5% in his prior certification. Therefore, the 25% IR provided in Dr. D's amended certification did not rate the entire compensable injury.

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 DRE Category IV, Structural Inclusions, as this multilevel fusion is equivalent to 'multilevel spine segment structural compromise' per DRE IV." Lumbermens Mutual Casualty Company filed suit against the Division seeking in part a declaratory judgment that the Advisories are inconsistent with 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1) and that their issuance and application is outside the Division's statutory authority. After a trial, the district court entered judgment declaring that the issuance of the Advisories was an invalid attempt at *ad hoc* rulemaking and that the application of the Advisories is an *ultra vires* act, and enjoined the Division from applying the Advisories. The Division appealed the district court judgment and the injunction was stayed pending the appeal to the Court of Appeals and subsequently stayed pending the petition for review to the Texas Supreme Court. The Court of Appeals did not adopt the trial court's characterization of the issuance of the Advisories as *ad hoc* rulemaking but did hold the Advisories were invalid from their issuance because they exceeded the Division's statutory authority. *See* Section 408.124 and Rule 130.1(c).[2] The Court of Appeals held that the Advisories contradict 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 4th edition) and thus contradict Section 408.124 and Rule 130.1. The Texas Supreme Court denied the petition for review of this case on June 15, 2007.

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*. Therefore, the adoption of an IR that is based on the Advisories is legal error and must be reversed. Prior Appeals Panel decisions applying the Advisories to rate impairment for spinal fusion surgery have been overruled by the Lumbermens case.

Dr. D initially certified that the claimant had a 10% IR for his entire compensable injury (cervical and lumbar), 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. The 10% IR assigned by the designated doctor is supported by the documented findings in his narrative report and is supported by a preponderance of the medical evidence. We reverse the hearing officer's determination that the claimant's IR is 25% and render a new decision that the claimant's IR is 10%.

[2] We note that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides 3rd edition) is still required under certain circumstances and that the Commissioner is authorized by statute to adopt a subsequent edition of the AMA Guides by Rule.

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

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251-2237.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge