APPEAL NO. 071200
FILED AUGUST 14, 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, with the record closing on May 21, 2007. With regard to the only issue before him the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 25%.

The appellant (carrier) appealed, contending that the hearing officer erred because the IR was based on the use of Advisory 2003-10, signed July 22, 2003, and Advisory 2003-10B, signed February 24, 2004 (Advisories) and that the claimant's IR should be 5% pursuant to an alternative rating from the designated doctor. The claimant responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the claimant reached maximum medical improvement (MMI) on April 17, 2006, as certified by Dr. J the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor. It is undisputed that the claimant worked as a flight attendant and sustained a cervical injury on _____. The claimant had cervical spine surgery in the form of a two-level cervical discectomy and fusion at C5-6 and C6-7 on June 23, 2005. The medical records reflect that preoperative flexion/extension x-rays were not done.

Dr. J, in a Report of Medical Evaluation (DWC-69) and narrative, both dated April 17, 2006, certified MMI on that date and assessed a 25% IR 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) (AMA Guides). A note indicates that the 25% IR was assessed "according to TWCC Advisory in 2003, this was noted to correspond with a Diagnosis-Related Estimate (DRE) Category IV." A peer review report dated May 19, 2006, stated that the 25% IR was inconsistent with the Guides according to "a recent court decision." Based on the records the peer review report indicates the claimant belongs in DRE Cervicothoracic Category II: Minor Impairment. A letter of clarification, together with the peer review report, was sent to Dr. J with the inquiry whether the peer review report had changed his mind. Dr. J responded by letter dated July 3, 2006, stating that since flexion/extension x-rays were not done, he was using "TWCC Advisory 2003-10". Subsequently, a carrier required medical examination doctor examined the claimant and on a DWC-69 dated September 7, 2006, certified MMI on that date with a 5% IR.[1] In a second letter of clarification dated October 4, 2006, Dr. J was informed that it was within

[1] This report cannot be adopted because it has an MMI date different than the stipulated MMI date.

his discretion whether or not to follow the Advisories and Dr. J was requested to give alternative ratings using the Advisories, "ignoring" the advisories, and asking Dr. J whether he was following or ignoring the Advisories. In an addendum dated November 2, 2006, Dr. J responded that using the Advisories the claimant would have a 25% IR, that ignoring the Advisories would result in a Cervicothoracic DRE Category II: 5% IR, and that he was following the guidance in 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 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 25% IR determined by the hearing officer in this case as certified by Dr. J 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[2]). 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 25%. Dr. J, in his addendum, dated November 2, 2006, gave alternative IRs, using and not using the Advisories. Also in evidence is a DWC-69 from Dr. J certifying the April 17, 2006, MMI date with the 5% IR not using the Advisories. The 5% IR assigned by Dr. J 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 5%.

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

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

CORPORATION SERVICE COMPANY
800 BRAZOS STREET, SUITE 750
COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge