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WORKERS' COMPENSATION UPDATE

TWCC ADVISORIES 2003-10 AND 2003-10B "TURN OUT THE LIGHTS, THE PARTY IS OVER!"

In 2003, the former Texas Workers' Compensation Commission issued TWCC Advisory 2003-10, which addressed impairment ratings given for spinal fusions. The Advisory provided that impairment for spinal fusions should be based on loss of segmental integrity calculated by an analysis of preoperative motion segment integrity x-rays. If there were no preoperative x-rays, a single level fusion would fall within DRE Category II (5% impairment) and a multilevel fusion would fall within DRE Category IV (20% impairment). This had a significant impact in that the 20 percent impairment under DRE Category IV obligates a carrier to pay an additional 45 weeks of impairment income benefits (IIBs) and creates supplemental income benefits exposure (SIBs) that would not exist under a five percent impairment rating under DRE Category II.

Concerns were raised over the former TWCC's actions because the *Guides to the Evaluation of Permanent Impairment (the Guides)* do not specifically provide for the calculation of impairment in spinal fusions in this way or limit the methods of calculation to only these methods. Additionally, from a legal standpoint, the methods provide for the rendition of impairment for conditions (loss of segmental integrity) that may not exist at maximum medical improvement (MMI). A fusion will likely cure any segmental integrity loss that might exist at the levels of the fusion. Most troubling was that the TWCC Appeals Panel adopted the advisory and required its use in calculating impairment in all spinal fusion cases, thus restricting the ability of doctors to interpret and implement the *Guides*. See TWCC Appeal Nos. 032251, 032399-S, 032402-S, 032536.

In response to concerns raised by system participants the TWCC issued Advisory No. 2003-10B, which maintained the same language as the original advisory; however the following paragraph was added:

- c. Health care providers may utilize the range-of-motion or other methodology if indicated (as with any condition in the 4th Edition Guides) that most accurately reflects the impairment rating evident for each injured worker.

In *Lumbermens Insurance Company et al., v. Texas Workers' Compensation Commission, et. al.* (Cause No. GN401643; In the District Court of Travis County, Texas; 200th Judicial District) a number of carriers challenged the two advisories, contending that, among other things, they were inconsistent with the Texas Workers' Compensation Act and TWCC Rule 130.1. On September 30, 2005, Judge Darlene Byrne issued a declaratory judgment finding that TWCC Rule 130.1 is a valid rule, the plain language of which does not contain exceptions. The Judge determined that "Advisories 2003-10 and 2003-10B are not applicable to establish impairment ratings . . . and constitute an invalid attempt at *ad hoc* rulemaking." The Judge described that application of the advisories as *ultra vires* (*ultra vires* refers to acts beyond the scope of an agency's powers or authority). The Judge permanently enjoined the Texas Department of Insurance, Division of Workers' Compensation (DWC, formerly the TWCC) from applying or enforcing Advisories 2003-10 and 2003-10B. However, the DWC appealed the decision.

As Led Zeppelin noted on its 1973 "Houses of the Holy" album, "The Song Remains the Same" and on October 24, 2006, the Third District Court of Appeals issued a decision affirming Judge Byrne's decision (No. 03-05-00785-CV).¹ The Third Court of Appeals agreed that the DWC exceeded its statutory authority in issuing and applying Advisories 2003-10 and 2003-10B because the impairment rating calculations provided for in the advisories are not contained in the *Guides*, whose use is mandated by the Act. Accordingly, the Court of Appeals held that Judge Byrne did not err in enjoining the continued use of the advisories.

The DWC appealed the Court of Appeals decision to the Texas Supreme Court. On June 15, 2007, the Supreme Court denied the DWC's petition for review. Accordingly, the Court of Appeals' decision is now the final, binding decision. Under that decision, Advisories 2003-10 and Advisory 2003-10B are invalid because they conflict with the Texas Workers' Compensation Act. Accordingly, any impairment rating calculated pursuant to the advisories is invalid as a matter of law. This decision will be instrumental in resolving pending impairment rating disputes where an impairment rating was calculated pursuant to the advisories. Additionally, in reviewing impairment ratings associated with spinal fusions, it would be worthwhile to pay particular attention to whether the impairment rating was calculated pursuant to the advisories.

As always, feel free to contact us with any questions.

¹ *Texas Dep. of Ins., Div. of Workers' Compensation v. Lumbermens Mut. Cas. Co.*, 212 S.W.3d 870 (Tex App.—Austin 2006, pet. denied).