

ADVISORY NO. 386

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TOPIC: DJA RE: HIGH IMPAIRMENT AWARDS CASE TRIED

On September 30, 2005, Judge Darlene Byrne issued a ruling on the Declaratory Judgment Action filed by FO&L involving DWC/TWCC Advisories 2003-10 and 2003-10B (which increases impairment ratings on spinal fusion cases in violation of the *AMA Guidelines*).

Judge Byrne found that: 1) Rule 130.1 (adopting the 4th Edition of the *AMA Guidelines*) is a valid rule, the plain language of which does not contain exceptions; 2) Advisories 2003-10/2003/10B are not applicable to establish impairment ratings and constitute *ad hoc* rulemaking and therefore the application of these advisories is *an ultra vires* (without authority) act; and 3) the DWC/TWCC is permanently enjoined from the application and enforcement of these Advisories.

As reported in the July 2004 issue of *FOLIO*, this firm filed a declaratory judgment action against the TWCC over the issuance of the increased spinal fusion ratings in Advisories 2003-10 and 2003-10B. These advisories attempted to artificially inflate impairment ratings by equating fusion surgery with a spinal fracture (a “broken” back). This interpretation changes the impairment rating from the 5% or 10% specified by the *AMA Guidelines* to 20% or 25%, thus creating an additional IIBs obligation as well as SIBs exposure. The advisories only applied to instances where fusion surgery had taken place prior to the performance of flexion and extension x-rays.

By the time this lawsuit went to trial, the lead plaintiff, Lumbermens Mutual Casualty Company, had been joined by five other party intervenors. Trial took place on September 13, 2005 before Judge Darlene Byrne of the 126th Judicial District Court of Travis County. The DWC/TWCC called its medical advisor, Dr. Charles Nemeth, as its expert witness. Dr. Nemeth is an orthopedic surgeon and author of both advisories. The carriers called Dr. Marc Taylor. Dr. Taylor was a contributor to both the 4th and 5th editions of *AMA Guides to the Evaluation of Permanent Impairment* (the *Guides*).

At trial, the carriers noted that both §408.124 of the Labor Code and Rule 130.1 require impairment ratings in Texas to be based on the *Guides*. We argued that both advisories were inconsistent with the 4th edition of the *Guides* and thus effectively modified Rule 130.1. We argued that neither the DWC/TWCC nor the executive director had authority to modify or change a rule or statute by advisory.

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The DWC argued at trial that the advisories were consistent with the 4th edition of the *Guides*. DWC claimed that “surgery” was not being rated under the advisories; instead, the “condition produced by the surgery” was rated. DWC also argued that the lawsuit should not have been filed in Travis County and should have been filed in the county where venue was appropriate for each.