

ADVISORY NO. 407
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TOPIC: SUPREME COURT DECLINES TO HEAR DWC ADVISORIES CASE

This morning the Texas Supreme Court denied the Division of Workers' Compensation's petition for review in a case involving the Agency's use of certain advisories to calculate impairment ratings. The court's denial of the Division's petition leaves standing a decision of the Austin Court of Appeals.

The Austin court concluded last fall that impairment ratings in workers' compensation cases must be based upon the *AMA Guides to the Evaluation of Permanent Impairment* and that the Division cannot issue advisories that permit doctors to issue ratings in contradiction of the Guides. An opinion in the case, *Lumbermen's Mutual Cas. Co. et al. v. Texas Department of Insurance*, Division of Workers' Compensation was published by the Third Court on October 24, 2006.

The Austin court had rejected DWC jurisdictional arguments and held that DWC Advisories 2003 10 and 2003 10b constituted invalid attempts at ad hoc rulemaking and that the application of the advisories was an ultra vires act. The appellate court affirmed the trial court's order enjoining any further use of the advisories by the Division.

Implementation of the Court of Appeals' judgment in this case has been stayed pending the Division's appeal. When the Court's judgment and mandate become effective, doctors rating impairment under the workers' compensation act will be required to apply the AMA Guides as they have been written and will be precluded from utilizing the Division's Advisories when calculating an impairment rating.

The Supreme Court's refusal to review the Austin court's judgment will clear the way for the case to be cited as binding authority at administrative and judicial review proceedings throughout the state. The Division may still file a motion for rehearing with the court, but the court has now demonstrated a lack of interest in the original petition. Chances are small that the court will grant a petition on motion for rehearing.

The Austin Court's opinion is notable for a number of propositions, as set out below:

The *Guides* unambiguously states that "[w]ith the Injury Model, surgery to treat an impairment does not modify the original impairment estimate, which remains the same in spite of any changes in signs or symptoms that may follow the surgery and irrespective of whether the patient has a favorable or unfavorable response to treatment." Thus, under the injury model of the *Guides*, doctors may

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not use their medical judgment or experience to take surgery or the effect of surgery into account when assigning impairment ratings. By issuing and applying advisories that allow doctors to do just that, the Division has acted outside its statutory authority because the fourth edition of the *Guides* is the only permissible source for determining impairment ratings within the Texas workers' compensation system. Tex. Lab. Code Ann. § 408.124; 28 Tex. Admin. Code § 130.1(c); *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 526 (Tex. 1995) (discussing workers' compensation laws in other states and concluding that "[o]ur Act, however, does not allow such flexibility, as it specifically requires all determinations of impairment to be made under the *Guides*").

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The Division misconstrues the carriers' position. While the carriers do object to the appeals panels' holdings regarding the advisories, the carriers also complain of the issuance of the advisories. The carriers contend that the fourth edition of the *Guides* is the only permissible source for determining impairment ratings in Texas. Tex. Lab. Code Ann. § 408.124; 28 Tex. Admin. Code § 130.1(c); *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 526 (Tex. 1995) (discussing workers' compensation laws in other states and concluding that "[o]ur Act, however, does not allow such flexibility, as it specifically requires all determinations of impairment to be made under the *Guides*"). The carriers assert that because the advisories allow doctors to take spinal fusion surgeries into account when assigning impairment ratings, and because the fourth edition of the *Guides* expressly forbids taking surgery into account when determining impairment using the injury model, the advisories are inconsistent with the *Guides* and thus their issuance was outside the Division's authority. The carriers' argument does not rest on the advisories being mandatory, but rather has the same force whether the advisories allow consideration of surgery or require it. Because the carriers challenge the issuance of the advisories, we reject the Division's argument that the availability of judicial review of contested case hearings under section 410.251 of the labor code bars the carriers' UDJA action.

Flahive, Ogden & Latson filed and pursued this litigation on behalf of Lumbermen's Mutual Casualty Co. A number of carriers and self-insureds intervened in the case. At trial, Lumbermen's was represented by trial counsel, and FO&L firm member, Greg Solcher. FO&L firm member Robert D. Stokes handled the case on appeal on behalf of Lumbermen's.

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