Opinion issued August 25, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00478-CV

AMERICAN ZURICH INSURANCE COMPANY, Appellant

V.

DANIEL SAMUDIO, Appellee

On Appeal from the 127th District Court
Harris County, Texas
Trial Court Case No. 2006-18753

MEMORANDUM OPINION

In this worker's compensation suit, appellant, American Zurich Insurance Company, appeals a summary judgment that found in favor of appellee, Daniel Samudio. In five issues on appeal, Zurich argues that (1) the trial court failed to comply with the judgment and mandate of the Texas Supreme Court; (2) the trial

court's judgment is inconsistent with and beyond the scope to give full effect to the Texas Supreme Court's judgment and mandate; (3) the trial court erred in implicitly finding that there had been a substantial change of condition or in placing the burden of proof on Zurich to negate the existence of a substantial change of condition; (4) the trial court erred in implicitly finding that the remedy of remand was not available in this case; and (5) the trial court erred in awarding fee-shifted attorneys' fees.

We reverse and remand.

Background

In October 2001, Samudio, an employee of HC Beck, Ltd., suffered a compensable injury when he fell from a ladder. He had four surgeries, including a spinal fusion and a laminectomy. Samudio made a worker's compensation claim for impairment benefits, and the Texas Department of Insurance Division of Workers' Compensation ("Division") appointed Dr. Machado as the designated doctor who would evaluate Samudio and assign an impairment rating that would determine the length and amount of impairment benefits paid. In a letter dated May 11, 2004, Dr. Machado reported to the Division that Samudio had an impairment rating of 20% based on the Guides to the Evaluation of Permanent Impairment, published by the American Medical Association ("Guides"). Dr. Machado's letter included a report, which stated, "According to the TWCC

Advisory 2003-10, a multilevel fusion meets the criteria for [diagnosis-related estimate (DRE)] Category IV of the lumbar spine. I am therefore awarding him a 20% whole person impairment."

After Zurich's expert, Dr. Obermiller, disputed Dr. Machado's impairment rating,[1] the Division asked Dr. Machado for clarification on "segmental instability" and whether Samudio needed to be re-examined. In response, Dr. Machado referenced the Division's Advisories 2003-10 and 2003-10b in that they "both state that when examining an injured worker who has had spinal surgery, the rating is to be determined by preoperative x-ray tests for motion segment integrity. If those x-rays are not available, the type of surgery can be used to rate the individual.[2] In this case, the preoperative films do not appear to be motion studies; therefore, *I believe I was correct in using the type of surgery to determine the impairment rating*."

Samudio and Zurich proceeded to a benefit review conference but were unable to resolve the impairment rating, among other issues. The parties then proceeded to a contested case hearing before the Division on October 19, 2005. In

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[1] Dr. Obermiller wrote that Dr. Machado's 20% impairment rating was "not in accordance with the [Guides]." He also pointed out that Dr. Machado's report noted Samudio had a "30% compression of the superior end plate," and for this to be a DRE IV, Samudio would have had to have a "greater than 50% compression fracture."

[2] Samudio did not have preoperative x-ray tests for motion segment integrity.

its Decision and Order, the Hearing Officer stated that Dr. Machado, "initially certified that Claimant was at maximum medical improvement (MMI) on October 21, 2003 with 20% impairment pursuant to the [Guides]." The Hearing Officer clarified that "Dr. Machado placed Claimant in DRE Category IV for multilevel fusion pursuant to TWCC Advisory 2003-10 and 2003-10b." The Hearing Officer further stated, "[Dr. Machado] explained in a December 27, 2004 letter that there were no pre-operative x-rays for motion segment integrity and he noted that a March 20, 2002 x-ray showed a 50% compression deformity of the L-1 vertebral body and 30% compression deformity of the L-2. Dr. Machado declined to change the impairment rating in response to letters of clarification." The Hearing Officer concluded that Samudio had a 20% impairment rating.

Zurich appealed the Hearing Officer's decision to the Division's appeals panel and was notified in February 2006 that the Hearing Officer's decision was final. In March 2006, Zurich filed suit for judicial review of the Division's decision to the trial court. Zurich argued that Dr. Machado's 20% impairment rating was invalid because it was derived from the Division's Advisories 2003-10 and 2003-10b and not the Guides. Zurich further argued that the proceedings should be abated until the Austin Court of Appeals issued an opinion in *Texas Department of Insurance Workers Compensation Division v. Lumbermens Mutual*

Casualty Company, that the 20% impairment rating should be set aside, and that Samudio's impairment rating should be 10%.

After the Austin Court of Appeals issued the opinion in *Lumbermens*, which held that the Advisories were inconsistent with the Guides and thus invalid,[3] Samudio sought dismissal in the trial court of Zurich's suit based on lack of jurisdiction. Samudio argued that "Zurich's claims raised no justiciable controversy because (i) the Texas Labor Code required a court to adopt one of the impairment ratings that the parties had presented to the Division and (ii) the only rating that any party had ever presented to the Division was Dr. Machado's impairment rating." The trial court granted Samudio's motion to dismiss for want of jurisdiction and granted attorneys' fees to Samudio pursuant to section 408.221 of the Labor Code.[4]

Zurich appealed the trial court's order granting Samudio's plea to the jurisdiction. This Court affirmed, holding that because Zurich requested relief that the trial court had no jurisdiction to grant, such as allowing "the fact finder to craft a new impairment rating," and that the trial court did not have jurisdiction to remand the case to the Division, the trial court properly granted Samudio's plea to

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[3] *Texas Dep't of Ins. Workers Comp. Div. v. Lumbermens Mut. Cas. Co.*, 212 S.W.3d 870, 875–76 (Tex. App.—Austin 2006, pet. denied).

[4] TEX. LAB. CODE ANN. § 408.221(c) (West 2015).

the jurisdiction. *See American Zurich Ins. Co. v. Samudio*, 317 S.W.3d 336, 348–49 (Tex. App.—Houston [1st Dist.] 2010, pet. granted), *rev'd*, *American Zurich Ins. Co. v. Samudio*, 370 S.W.3d 363, 368 (Tex. 2012).

The Texas Supreme Court disagreed, holding that section 410.301[5] is not a jurisdictional limit and that the "trial court may remand to the Division to allow it to determine a valid impairment rating if the court concludes that no valid impairment rating was presented to the agency in the underlying contested case." *American Zurich*, 370 S.W.3d at 368. The supreme court stated that the trial court is "deciding a purely legal question: whether the proffered rating was made in accordance with statutory requirements." *Id.* It concluded that, "If the trial court determines that no rating made in conformance with the Guides was presented to the agency, it should remand to the Division for a new impairment determination." *Id*. at 369.

After remand to the trial court, on December 12, 2013, Zurich filed an amended traditional motion for summary judgment asserting that the evidence presented to the Division conclusively established that Dr. Machado assigned Samudio a 20% impairment rating based on the Division's Advisories 2003-10 and that Dr. Machado's impairment rating was "the only basis for the Hearing Officer's

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[5] Section 410.301 provides that "Judicial review of a final decision of the appeals panel regarding compensability or eligibility for or the amount of income or death benefits shall be conducted as provided by this subchapter." TEX. LAB. CODE ANN. § 410.301(a) (West 2015).

decision and order finding that Mr. Samudio had a 20% impairment rating." Zurich explained that *Lumbermens* held that Advisories 2003-10 and 2003-10b were invalid, and therefore, "Dr. Machado incorrectly calculated the defendant's impairment rating because he relied on an invalid and illegal Division advisory." *See* 212 S.W.3d at 875–76 (holding that Advisories were invalid from issuance). Zurich asserted that remand was the appropriate remedy so that "Mr. Samudio [would] receive a valid impairment rating calculated under the appropriate version of the *Guides*."

On January 9, 2014, Samudio's counsel filed a suggestion of death, stating that Samudio died on or about August 7, 2013, and noted that "Defendant believes that the proper Defendant is now the Estate of Daniel Samudio."[6] In response, Zurich filed an amended petition naming Keith Morris, administrator of the Estate of Daniel Samudio, deceased, as defendant. On May 7, 2014, Keith Morris, as Administrator of the Estate of Daniel Samudio, Deceased, filed his original answer.

On May 22, 2014, Samudio filed an amended traditional and no-evidence motion for summary judgment, contending that the evidence demonstrated that "Samudio had a compression fracture greater than 50%, which entitled him to a

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[6] Although the defendant-appellee is now the Estate of Samudio, we will refer to Samudio for consistency.

20% impairment rating under the AMA Guides."[7] Samudio reached this conclusion by relying on an affidavit from Dr. Jose Rodriguez, who had treated and performed multiple surgeries on Samudio. Samudio asserted that "Because it is . . . Zurich's burden to establish Mr. Samudio's condition and impairment rating, and they cannot, Mr. Samudio is entitled to summary judgment."

Zurich responded to Samudio's amended motion for summary judgment, stating that "[n]either party contends in their cross-motions for summary judgment that Dr. Machado's certification of MMI and impairment rating is valid." Zurich further argued that Dr. Rodriguez's evidence of impairment was invalid and inadmissible because it was not presented to the Division.

Without stating its reasons, the trial court granted Samudio's amended motion for summary judgment. After a hearing on whether Samudio was entitled to attorneys' fees, the trial court signed a final judgment on February 27, 2015, awarding attorneys' fees through trial and conditional appellate attorneys' fees. Zurich filed a "Motion to Modify the Judgment, Enter an Alternative Judgment, or for New Trial," arguing that the trial court exceeded the scope of the Supreme Court's order on remand by "refusing to conclude that no impairment rating made

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[7] Pursuant to the Guides, a claimant could reach DRE IV for the lumbosacral spine by either loss of motion segment integrity or a structural inclusion. *Lumbermens Mut. Cas.*, 212 S.W.3d at 872–73. One of the structural inclusions for DRE IV category for the lumbosacral spine is (1) Greater than 50% compression of one vertebral body without residual neurologic compromise. *Id*. at 873.

in conformance with the AMA Guides was presented to the agency" and that the trial court erred in "awarding fee-shifted attorney's fees because the fees reflected in this court's order are not supported by factually sufficient evidence." The appellate record does not contain an order on Zurich's motion and thus it was overruled by operation of law. *See* TEX. R. CIV. P. 329b(c). Zurich timely appealed.

Standard of Review

We review de novo the trial court's ruling on a motion for summary judgment. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary-judgment evidence presented by both sides and determine all questions presented. *Mann Frankfort Stein & Lipp Advisors*, 289 S.W.3d at 848; *Comm'rs Court of Titus Cty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). In such a situation, we render the judgment as the trial court should have rendered. *Mann Frankfort Stein & Lipp Advisors*, 289 S.W.3d at 848; *Agan*, 940 S.W.2d at 81.

The party moving for traditional summary judgment bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *see also Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). A plaintiff

moving for summary judgment must conclusively prove all essential elements of its claim. *See Rhone–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). If the movant meets its burden, the burden then shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). A defendant moving for summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). When a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary judgment grounds are meritorious. *See Star–Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995).

Impairment Rating

In its first and second issues on appeal, Zurich argues that the trial court failed to comply with the judgment and mandate of the Texas Supreme Court and

that its "judgment is inconsistent with and beyond the scope of that which was necessary to give full effect to the Supreme Court's judgment and mandate in this case." In essence, Zurich argues that "[t]he summary judgment evidence proved, as a matter of law, that Dr. Machado's impairment rating had not been made in conformance with the Guide."

The supreme court's opinion gave the following guidance to the trial court upon remand: (1) "[I]n considering whether an impairment rating submitted to the Division is valid, a reviewing court is not making a 'determination of impairment.' Instead, the court is deciding a purely legal question: whether the proffered rating was made in accordance with statutory requirements;" (2) "section 410.3[06](c) limits the evidence that a trial court may consider in reviewing an impairment rating assigned by the Division and precludes the court from assigning a rating that was not presented to the agency;" and (3) "[i]f the trial court determines that no rating made in conformance with the Guides was presented to the agency, it should remand to the Division for a new impairment determination." *American Zurich*, 370 S.W.3d at 368–369.

Section 410.306(c) provides, "Except as provided by Section 410.307, evidence of extent of impairment shall be limited to that presented to the division. The court or jury, in its determination of the extent of impairment, shall adopt one of the impairment ratings under Subchapter G, Chapter 408." TEX. LAB. CODE

ANN. 410.306(c) (West 2015). Section 408.124(b) requires that "the division shall use [the Guides]." TEX. LAB. CODE ANN. § 408.124(b) (West 2015). Here, it is undisputed that the only doctor who gave an impairment rating to the Division was Dr. Machado.[8] Dr. Machado initially stated to the Division that Samudio had a 20% impairment rating in accordance with the Guides. After the Division asked for clarification, Dr. Machado stated that he used Advisories 2003-10 and 2003-10b in determining the impairment rating. Specifically, Dr. Machado wrote,

> TWCC Advisory 2003-10 and Advisory 2003-10b both state that when examining an injured worker who has had spinal surgery, the rating is to be determined by preoperative x-ray tests for motion segment integrity. If those x-rays are not available, the type of surgery can be used to rate the individual. In this case, the pre-operative films do not appear to be motion studies; therefore, I believe I was correct in using the type of surgery to determine the impairment rating.

In its Decision and Order, the Hearing Officer likewise stated that Dr. Machado "initially certified that Claimant was at maximum medical improvement . . . with 20% impairment pursuant to [the Guides]. . . . Dr. Machado placed Claimant in DRE Category IV for multilevel fusion pursuant to TWCC Advisory 2003-10 and 2003-10b." Samudio even admits in its brief that Dr. Machado had improperly relied on the Advisories. We agree. Because Dr. Machado based

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[8] Samudio's brief asserts that, in its motion to dismiss for lack of jurisdiction, one of its arguments was that "the only rating that any party had ever presented to the [Division] was Dr. Machado's impairment rating." Samudio further states, "the only impairment rating in evidence at the contested case hearing was Dr. Machado's 20% impairment rating."

Samudio's impairment rating on the Advisories, the rating did not comply with statutory requirements, and therefore, is invalid. *See American Zurich*, 370 S.W.3d at 368; *Lumbermens*, 212 S.W.3d at 875–76 (holding that Advisories were inconsistent with Guides and thus invalid); *DeLeon v. Royal Indem. Co.*, 396 S.W.3d 527, 528 (Tex. 2012) (affirming court of appeals opinion that claimant had no valid impairment rating based on the Guides); *Bell v. Zurich Am. Ins. Co.*, 311 S.W.3d 507, 509–10 (Tex. App.—Dallas 2009, pet. denied) (holding that examining doctor may not base impairment rating on Advisories); TEX. LAB. CODE ANN. §§ 408.124(b) (impairment rating must comply with Guides), 410.306(c) (stating that court shall adopt impairment rating under Subchapter G, Chapter 408).

Acknowledging that Dr. Machado based Samudio's impairment rating on the Advisories, Samudio argued in its summary judgment motion and on appeal that Dr. Rodriguez, a surgeon who performed Samudio's spinal fusion, provided an affidavit confirming that Dr. Machado's 20% impairment rating was valid. Dr. Rodriguez's affidavit averred that Samudio suffered from a compression fracture of greater than 50% and therefore would nonetheless be entitled to a 20% impairment rating.

However, as the Texas Supreme Court emphasized, "section 410.3[06](c) limits the evidence that the trial court may consider in reviewing an impairment rating assigned by the Division and precludes the court from assigning a rating that

was not presented to the agency. . . ." *American Zurich*, 370 S.W.3d at 369; TEX. LAB. CODE ANN. § 410.306(c) (stating that "evidence of extent of impairment shall be limited to that presented to the division"). Here, the evidence before the Division consisted of Samudio's exhibits: (1) a medical note from Dr. Lubor Jarolimek; (2) Requests for Benefit Review Conference; (3) Records from Dr. Machado; and (4) Samudio's interrogatories. Zurich's exhibits included: (1) its exhibit list; (2) Dr. Obermiller's letter; (3) Dr. Machado's letters and report; (4) an x-ray report; (5) a four-page operative report from Dr. Rodriguez; (6) DRIS notes; and (7) TWCC Form 45's. Because Dr. Rodriguez's affidavit was not presented to the Division, the trial court could not consider it.[9] *See Bell*, 311 S.W.3d at 512 (noting that doctor's answer to deposition on written questions that answered impairment rating based on Guides was not before the Division); *Ausaf v. Highlands Ins. Co.*, 2 S.W.3d 363, 367 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (amended certification of maximum medical improvement not admissible in district court because it was not evidence presented to Division); *Deleon v. Royal Indem. Co.*, 396 S.W.3d 597, 602 (Tex. App.—Austin 2010, pet. granted)

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[9] Samudio also argues on appeal that "Dr. Ronald Flasner, in another report presented to the Division, noted that Samudio 'sustained a compression fracture at L1 and L2'" and that Dr. Flasner "noted that Saudio's fracture had rapidly degenerated from the time of his injury and, by April 2002, was at 50% and continuing to degenerate." Dr. Flasner's report was not an exhibit before the Division at the contested case hearing, and Dr. Flasner did not give an impairment rating. Because this evidence was not presented to the Division, we do not consider it. *See* TEX. LABOR CODE ANN. § 410.306(c)

(holding that trial court erred in admitting doctor's deposition on written questions not presented to Division, but that error harmless because impairment rating based on Advisories and thus invalid), *rev'd on other grounds*, *DeLeon v. Royal Indemnity Co*., 396 S.W.3d 527 (Tex. 2012). Zurich likewise relies on deposition testimony that Dr. Machado gave on September 24, 2007, which was taken after the Division's hearing. For the same reasons, the trial court could not consider the deposition evidence. *See* TEX. LAB. CODE ANN. § 410.306(c).

Samudio relies on *Old Republic Insurance Company v. Rodriguez*, 966 S.W.2d 208, 210 (Tex. App.—El Paso 1998, no pet.) to argue that section 410.306(c) does not bar Samudio from offering Dr. Rodriguez's affidavit as summary judgment evidence. In *Old Republic*, the claimant appealed the Division's impairment rating to the trial court, but before trial, the claimant's doctor died. *Id*. at 209. The claimant presented the testimony of Dr. Moreno, who had not testified before the Division. *Id*. In determining whether the trial court erred in allowing Dr. Moreno to testify at trial when he had not testified before the Division, the appellate court stated that after reviewing the record, they found that Dr. Moreno did not testify about the claimant's extent of impairment, which is "forbidden by [section 410.306]." *Id*. at 210. "Rather, Dr. Moreno explained the procedures used during medical examinations to assess impairment ratings, discussed the American Medical Association guidelines for impairment ratings,

and explained how the guidelines are used by doctors to arrive at the percentage impairment ratings employed in workers' compensation cases." *Id*.

In contrast to *Old Republic*, Samudio relies on Rodriguez's affidavit and medical report to show that Samudio had a compression fracture of greater than 50%, and thus, Dr. Machado's 20% impairment rating is valid. This evidence that Samudio presented at summary judgment is precisely the type of evidence that the statute forbids, and therefore, the trial court could not consider it. *See* TEX. LAB. CODE ANN. § 410.306(c).

Accordingly, we conclude that the trial court erred in granting summary judgment for Samudio. We further conclude that Zurich demonstrated as a matter of law that the Division did not enter a valid impairment rating.

We sustain Zurich's first and second issues on appeal.

Substantial Change of Condition

In its third issue on appeal, Zurich argues that the trial court erred in implicitly finding that a substantial change of condition occurred pursuant to Texas Labor Code section 410.307 or in placing the burden of proof on Zurich to negate the existence of a substantial change of condition.

In his amended motion for summary judgment, Samudio argued that he "is entitled to summary judgment because Zurich has no evidence to establish that Mr. Samudio did not have a substantial change in his condition."

In the district court, extent of impairment evidence is limited to evidence that was presented to the Division, "[e]xcept as provided in Section 410.307." TEX. LAB. CODE ANN. § 410.306(c). Under section 410.307, if the court, after a hearing, finds a substantial change of condition, then extent of impairment evidence is not limited to that presented to the Division. *See* TEX. LAB. CODE ANN. § 410.307 (West 2015). Section 410.307 is a rule of evidence that applies to modified de novo judicial review. *See Lumbermens Mut. Cas. Co. v. Manasco*, 971 S.W.2d 60, 63 (Tex. 1998) ("Under section 410.307, the evidence on judicial review regarding the extent of impairment is not limited to that presented to the Commission if the court, after a hearing, finds a substantial change of condition.").

Here, the record demonstrates that neither party attempted to show that Samudio had a substantial change of condition, nor did the trial court hold a hearing on substantial change of condition. Thus, to the extent that the trial court allowed the parties to present new evidence pursuant to this section, the trial court erred. Because section 410.307 requires the trial court to hold a hearing on a substantial change of condition and make a finding, and the record does not contain evidence of either requirement being met, we conclude that the trial court could not have granted summary judgment on this issue.

We sustain Zurich's third issue.

Remedy of Remand

In its fourth issue on appeal, Zurich argues that the trial court erred in implicitly finding that the remedy of remand was not available in this case. Zurich argued that the live controversy is "whether the impairment rating adopted by the Division in this case is correct" and that the "resolution of this controversy affects Zurich's substantive right to seek reimbursement from the Texas Subsequent Injury Fund of the benefits that Zurich has paid Samudio." *See* TEX. LAB. CODE ANN. § 410.209 (West 2015).

On appeal, Samudio argues for the first time that the trial court could not remand because Samudio had received all of his benefits. Samudio asserts that as of June 23, 2009, he had received all of the benefits that he could have received and Zurich could no longer get those benefits returned from him. In his amended motion for summary judgment, Samudio relied on *State Bar of Texas v. Gomez* to argue that because Dr. Machado and Samudio are both decased, a justiciable controversy no longer exists between the parties and therefore the remedy of remand is no longer available. 891 S.W.2d 243 (Tex. 1994). Samudio acknowledges that Zurich's sole remedy is against the Texas Subsequent Injury Fund.

Section 410.209 provides, "[t]he subsequent injury fund shall reimburse an insurance carrier for any overpayments of benefits made under an interlocutory

order or decision if that order or decision is reversed or modified by final arbitration, order, or decision of the commissioner or a court." TEX. LAB. CODE ANN. § 410.209.

At least one court of appeals has already addressed Samudio's complaint that a live controversy does not exist. *See Lumbermens Mut. Cas. Co. v. Portillo*, 13–10–00470–CV, 2001 WL 2976869, at *2 (Tex. App.—Corpus Christi July 21, 2011, no pet.) (mem. op.). In *Portillo*, the claimant argued in its plea to the jurisdiction that the judgment that the insurance company sought would be advisory because "'it would not have a practical affect [sic] on a now existing controversy between the parties.'" 2001 WL 2976869, at *2. In a footnote, the Corpus Christi Court of Appeals noted that the insurance company's pleadings did not seek reimbursement from the claimant, but rather its sole recourse was to seek reimbursement from the Subsequent Injury Fund. *See id*. 2001 WL 2976869, at *2 n.5. Disagreeing with the claimant, the court of appeals held that the judgment the insurance company sought, a judgment reversing or modifying the Division's decision on the claimant's impairment rating, "would not be merely advisory" because it is a statutory prerequisite for the insurance company to seek reimbursement for any overpayment with the Subsequent Injury Fund. *Id.*

We agree with the court of appeals to the extent that the insurer must be allowed to comply with the statutory prerequisite, and we are mindful that the

Texas Supreme Court gave guidance to the trial court by stating that if the trial court determined that the impairment rating was invalid, it would have to remand to the Division.[10] Because Zurich seeks reimbursement from the Subsequent Injury Fund, we conclude that there is a justiciable controversy.

Samudio next argues on appeal that even if the trial court erred in finding that Samudio had a 20% impairment rating, the error was harmless. Samudio's arguments are based on his belief that even if Dr. Machado's impairment rating of 20% was invalid, the only other doctor who can give an impairment rating is Dr. Rodriguez, who stated in an affidavit that Dr. Machado's 20% rating was valid. While we agree that the Worker's Compensation Act does not address a situation in which the designated doctor and claimant have died during the course of appellate proceedings, we are nevertheless constrained by the Division assigning an invalid impairment rating, and the Texas Supreme Court's conclusion that, if no rating was made in conformance with the Guides and presented to the agency, the trial court "should remand to the Division for a new impairment determination." *American Zurich*, 370 S.W.3d at 369. Because Dr. Machado's impairment rating was invalid, we conclude that the trial court rendered an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1). To the extent that the trial court implicitly determined

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[10] According to Samudio, he had received all of his benefits as of June 23, 2009. Thus, while this proceeding was before the Texas Supreme Court, Zurich had already paid Samudio all of the benefits to which he was entitled.

that it could not remand the case, the trial court erred. *See American Zurich*, 370 S.W.3d at 368 ("[A] trial court may remand to the Division to allow it to determine a valid impairment rating if the court concludes that no valid impairment rating was presented to the agency in the underlying contested case.").

We sustain Zurich's fourth issue.

Attorneys' Fees

In its fifth issue, Zurich argues that the trial court erred in awarding fee-shifted attorneys' fees in this case. Zurich argues generally that because of the arguments outlined in its appellate brief that "the trial court erred in concluding that Samudio has a valid, 20 percent impairment rating," Samudio is not a prevailing party and Zurich is "not liable for the payment of fee-shifted attorneys' fees." Zurich also argues that the trial court's fee award includes "$49,000 in fee-shifted attorneys' fees arising out of work performed by Samudio's attorneys in connection with the first appeal."

Because we have sustained Zurich's first, second, third, and fourth issues, we must also reverse the trial court's award of attorney's fees because Samudio is not the prevailing party. *See* TEX. LAB. CODE ANN. § 408.221 (West 2015) (insurance carrier responsible for claimant's attorney fees if claimant prevails on an issue on which judicial review is sought by insurance carrier).

Conclusion

We reverse the trial court's order granting summary judgment to Samudio. Because a valid impairment rating was not presented to the Division, we remand the matter to the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Jennings and Lloyd.