



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



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A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.

Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101  
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401  
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

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### **USE OF DIVISION ADVISORY OPINION 2003-10 ALONE TO DETERMINE AN IMPAIRMENT RATING IS HELD INSUFFICIENT IN A WORKERS COMPENSATION CLAIM**

Susan Poehler was injured while working as a machine operator for FKI Industries. The division assigned Dr. Phillip Williams to examine Poehler and provide an impairment rating. Williams returned with a twenty percent impairment rating based on Division Advisory 2003-10. American Home insured FKI Industries and challenged the rating. In a letter of clarification, Dr. Williams changed his assessment to five percent if based solely on the injury model of the Guides, utilizing Table 72, without reference to Division Advisory 2003-10 -- resulting in a reduced amount of benefits recovered by Poehler. An impairment rating of fifteen percent is the supplemental income benefit threshold.

After a series of hearings, the hearing officer ruled that Poehler's impairment rating is twenty percent and that she is entitled to supplemental benefits for the time period in question. American Home appealed the hearing officer's ruling to the appeal panel. The appeals panel affirmed the hearing officer's rulings, and American Home then sought judicial review. The trial court agreed with the Division that Poehler's impairment rating was twenty percent and that she was entitled to supplemental benefits. The trial court also awarded attorney's fees, and American Home appealed.

The court in *American Home Assurance Company v. Poehler*, Case number 12-09-00293-CV, 2010 WL 4111503, at \*4 (Tex. App.—Tyler, [October 20, 2010]) held Dr. Williams's opinion of Poehler's impairment rating using Division Advisory 2003-10 is based on legally insufficient evidence and is an invalid impairment rating. Further, the court held it was immaterial that there was no evidence of a change in Poehler's condition at trial, because Dr. Williams's testimony lacked an exact percentage of impairment for Poehler with a range of motion being used as a differentiator. Additionally, the court found that the expert trial testimony failed to reference a finding regarding Poehler's proper placement in Table 70 of the Guide.

Because American Home did not present evidence and sought no findings to support its position that it did not forfeit the right to contest supplemental benefits for quarter 1, the court held that Poehler was entitled to supplemental income benefits for quarter 1. And, because American Home did not win on all issues pursuant to Texas Labor Code, section 408.221(c) the court held that Poehler is entitled to some attorneys' fees.

### **CLEAR AND UNAMBIGUOUS POLICY LANGUAGE PROHIBITS COVERAGE FOR ON THE JOB INJURY OCCUPATIONAL INJURY**

Pete Gonzales worked for Auto Zone as a parts sales manager on December 17, 2007, when he slipped and fell during his shift at Auto Zone. Auto Zone is a nonsubscriber under Texas's workers' compensation insurance statute, and instead provides benefits for work-related injuries and illnesses through the Auto Zone Texas Occupational Injury Benefit Plan. Gonzales's claim under the plan was denied. Auto Zone also provided its employees with three distinct forms of disability income insurance coverage.

Two years later, Gonzales filed suit against Auto Zone for failure to provide a safe workplace, and against Auto Zone and the disability carrier on all three policies, Unum, for wrongfully denying the claims made by Plaintiff for his occupational injury plan benefits and his short and long term disability plan benefits.

Unum and Gonzales filed cross motions for summary judgment. Gonzales filed a motion to continue to open discovery. In *Gonzales v. AutoZone, Inc.*, Case Number H-09-4054, 2010 WL 4102273 (S.D. Tex. [October 18, 2010]), the unambiguous language of all policies administered or issued by Unum provide that there is no coverage for occupational injuries for persons who are not sole proprietors and partners, and it is undisputed that plaintiff was neither and plaintiff suffered an occupational injury. Further Plaintiff never made a claim under any of the AutoZone disability policies issued by Unum, so there was no coverage.

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