APPEAL NO. 030737-s
FILED MAY 14, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on February 10, 2003. With respect to the issue before her, the hearing officer determined that Dr. T, is the designated doctor pursuant to Section 408.0041 for the determination of an impairment rating (IR). In his appeal, the appellant (claimant) argues that the hearing officer erred in determining that (Dr. B, was no longer qualified to serve as the designated doctor in this case pursuant to Section 408.0041 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(d)(2)(C) (Rule 130.5(d)(2)(C)), and in determining that that Dr. T was qualified to serve as the designated doctor under those provisions. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and rendered.

The only issue at the hearing was framed in terms of whether Dr. T or Dr. B was the designated doctor pursuant to Section 408.0041. It is undisputed that the claimant sustained a compensable injury to his cervical, thoracic, and lumbar spine on _____. He was treated conservatively by a chiropractor until he underwent spinal surgery on July 24, 2001. Prior to undergoing spinal surgery, the claimant was seen by Dr. B, who had been appointed by the Texas Workers' Compensation Commission (Commission) to act as the designated doctor, for an assessment of whether the claimant had reached maximum medical improvement (MMI) and, if so, his IR. At that time, Dr. B certified that the claimant had not yet reached MMI. The parties stipulated that the claimant was granted an extension of statutory MMI to November 28, 2001, pursuant to Section 408.104. The claimant testified that following the surgery he continued to see his treating doctor, a chiropractor, but that the treating doctor was just monitoring the claimant's condition and was not providing active treatment. After his spinal surgery, the claimant developed a staph infection in his back and the record reflects that the claimant has been under the continuing care of an orthopedic surgeon, a pain management specialist, an infectious disease specialist, and a plastic surgeon following his surgery and the development of the infection.

On May 28, 2002, the claimant's attorney filed a request for the appointment of a designated doctor with the Commission because the claimant had reached MMI, but had not been assigned an IR. In the form accompanying the request, the claimant's attorney identified the types of treatment provided to the claimant as physical medicine, prescription medication, therapeutic injections, and surgery and none of the boxes that ask if any of those types of treatment have been discontinued are checked. The phrase physical medicine is defined on that form as "non-invasive treatment that involves manual movements of the affected body part. This includes treatments such as massage, myofacial release, physical therapy, manipulations, mobilizations,

acupuncture, work hardening, work conditioning, etc." On June 6, 2002, the claimant's attorney filed a document requesting to cancel the request for a designated doctor because a referral doctor from the treating doctor had assigned a 28% IR to the claimant. On June 7, 2002, the Commission sent a letter to Dr. B and the parties canceling a designated doctor appointment that had ostensibly been set for June 27, 2002. On June 10, 2002, the Commission issued the letter appointing Dr. B as the designated doctor and setting the appointment for June 27, 2002. On June 14, 2002, the carrier filed a request for a designated doctor in response to the referral doctor's IR. In its request, the carrier specifically requested that the designated doctor be an orthopedic surgeon and not a chiropractor. On the form completed by the adjuster, the claimant's treatment types were identified as physical medicine, prescription medication, therapeutic injections, and surgery as they had been identified by the claimant's attorney in her request. The adjuster also did not indicate that any of the identified treatment types had been discontinued at the time of the request or that the claimant had been released by the surgeon. On June 27, 2002, the claimant attended a designated doctor examination by Dr. B, who assigned claimant a 20% IR. By letter dated July 2, 2002, the Commission appointed Dr. T, a plastic surgeon, as the designated doctor. On July 25, 2002, Dr. T examined the claimant and assigned a 17% IR.

The resolution of the issue of who is the designated doctor in this case depends upon the application of Section 408.0041(b) and Rule 130.5(d)(2)(C). Section 408.0041(b) provides in relevant part that the designated doctor should be one:

> [W]hose credentials are appropriate for the issue in question and the injured employee's medical condition. The designated doctor doing the review must be trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition, and the treatment and procedures performed must be within the scope of practice of the designated doctor.

Rule 130.5(d)(2)(C) provides that:

> If at the time the request is made, the commission has previously assigned a designated doctor to the claim, the commission shall use that doctor again, if the doctor is still qualified in this subsection and available. Otherwise, the commission shall select the next available doctor on the commission's Designated Doctor List who: . . . has credentials appropriate to the issue in question, is trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition, and whose scope of practice includes the treatment and procedures performed. In selecting a designated doctor, completed medical procedures may be considered secondary selection criteria.

In this case, the evidence reflects that at the time of both the claimant's and the carrier's request for a designated doctor, the claimant had not yet been released from the care of the orthopedic surgeon who had performed his spinal surgery. In addition, the claimant's treatment with physical medicine, prescription medication, and therapeutic injections had not been discontinued. The hearing officer determined that under Section 408.0041(b) and Rule 130.5(d)(2)(C), Dr. B was no longer qualified to serve as the designated doctor in this instance, because he was not trained and experienced with the treatment and procedures used by the doctors treating the claimant's medical condition. In so doing, the hearing officer looked to the specific language of the statute and the rule, which requires not only that the designated doctor be trained in the treatment and procedures currently being used to treat the claimant's medical condition, but also that the designated doctor be experienced in the treatments and procedures. The requirement that the designated doctor be experienced with the treatments and procedures is embodied in the requirement that the treatments and procedures be within the scope of the doctor's practice. Our review of the record reveals that the evidence does not demonstrate that the scope of Dr. B's practice as a chiropractor includes the treatment and procedures being used to treat the claimant's condition at the time of the appointment. Accordingly, we find no merit in the assertion that the hearing officer erred in applying the requirements of Section 408.0041(b) and Rule 130.5(d)(2)(C), or in determining that Dr. B was no longer qualified to act as the designated doctor at the time of his June 27, 2002, examination of the claimant because the treatments being used to treat the claimant, namely the surgery, prescription medications, and the therapeutic injections, were not within the scope of Dr. B's practice as a chiropractor.

Next, we consider the hearing officer's determination that Dr. T was qualified to serve as the designated doctor at the time of his July 25, 2002, examination of the claimant. In determining that Dr. T was qualified to act as designated doctor, the hearing officer stated:

> According to [Dr. T's] Curriculum Vita, his medical practice is in the area of plastic surgery and he is a member of various Boards and Associations including the American College of Surgeons. Further, he is certified in the performance of exams for disability and has not only performed the exam[s] for years he is an instructor for TWCC/AADEP designated doctor course for the State of Texas. While [Dr. T] might not likely perform the surgery that the [c]laimant underwent, as a surgeon he is experienced with the treatment and procedures used by the doctor treating the patient's medical condition and capable of assessing an [IR].

The factors emphasized by the hearing officer go to Dr. T's training in relation to the treatment and procedures that were being used to treat the claimant's medical condition at the time that Dr. T was selected to serve as the designated doctor. However, as we noted above, that is only one factor to be considered in Section 408.0041(b) and Rule 130.5(d)(2)(C). The hearing officer does not address how the treatments and procedures used to treat the claimant were within the scope of Dr. T's

practice as a plastic surgeon. Indeed, the hearing officer acknowledges that Dr. T "might not likely perform the surgery the claimant underwent." Nevertheless, she concludes that Dr. T was qualified to serve as the designated doctor at the time he examined the claimant. In this case, the evidence simply does not establish that Dr. T performs spinal surgery, or that the scope of his practice includes therapeutic injections, infection control, and/or physical medicine. As such, the hearing officer erred in determining that Dr. T was qualified to serve as the designated doctor. Thus, we reverse her determination that Dr. T is the designated doctor pursuant to Section 408.0041 and render a new determination that there is no designated doctor in this case that is qualified under Section 408.0041(b) and Rule 130.5(d)(2)(C).

The hearing officer's decision and order that Dr. T is the designated doctor pursuant to Section 408.0041 is reversed and a new decision rendered that there is no designated doctor in this case qualified to serve. Thus, another designated doctor should be appointed by the Commission in accordance with Section 408.0041 and Rule 130.5 to determine the claimant's IR.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge