APPEAL NO. 101194
FILED OCTOBER 14, 2010

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 June 17, 2010. The hearing officer resolved the disputed issues before her by determining that: (1) the Texas Department of Insurance, Division of Workers' Compensation (Division) did not abuse its discretion in appointing a second designated doctor, (Dr. T); (2) there is not a disqualifying association between the first designated doctor, (Dr. N) and the second designated doctor, Dr. T, as defined in 28 TEX. ADMIN. CODE § 180.21 (Rule 180.21); and (3) there is not a disqualifying association between the first designated doctor, Dr. N, and the employer as defined in Rule 180.21.

The appellant (claimant) appealed the hearing officer's determinations regarding the alleged disqualifying associations. The respondent (carrier) responded, urging affirmance. The hearing officer's determination that the Division did not abuse its discretion in appointing a second designated doctor was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that on _____, the claimant was the employee of (TK) (employer) and on that date, the claimant sustained a compensable injury while in the course and scope of his employment with employer. The claimant testified that he was a mechanic for employer, and that his low back was injured when he bent to pick up a bracket.

DISQUALIFYING ASSOCIATION BETWEEN THE FIRST DESIGNATED DOCTOR AND EMPLOYER

It is undisputed that the first designated doctor appointed in this case is Dr. N. The claimant was initially scheduled for a designated doctor exam on May 28, 2009, at (Address 1). The Division received notification that Dr. N's office rescheduled the designated doctor's exam to May 29, 2009, at Address 1. The claimant testified that prior to that exam, Dr. N's office contacted him by telephone and moved the exam to the address of (Address 2).

The claimant testified that when he arrived at the office building at Address 2, he looked at the directory on the first floor and noticed that TK was listed for Suite 400. When he got off the elevator on the fourth floor, the TK offices and secretary were to the left, with other offices located to the right. The claimant testified that he went to the left to a TK secretary seated at a desk, whom he heard answering the phone, "[TK] [Business 1]." The claimant also testified that the employees he saw in the offices to

the left in the suite had on the TK blue shirts. The claimant testified that the TK secretary took him to a big office, like a meeting office, where Dr. N waited for him. There was no medical equipment in the room. Dr. N was sitting in front of a video camera. The claimant estimated that he spent 1-2 minutes with him, was asked a few questions and that was the extent of the examination, which was to determine maximum medical improvement, impairment rating, and return to work. The claimant testified that it made him "feel weird" that the designated doctor exam was in the TK offices. The claimant also testified on cross-examination that he did not know of any agreements, contracts, associations, or personal/family relationships between Dr. N and the employer.

In his testimony, the claimant characterized TK as a very large corporation with more than one division, mentioning the divisions of TK (Business 1), TK (Business 2), and his employer. The claimant stated that he was familiar with the different divisions by seeing different employees of the divisions at his job sites or at the employer's offices at (Address 3).

When asked about other businesses located at Address 2 and listed on the building's directory, the claimant testified he was not familiar with them but that the way the floor was laid out, TK's offices were to the left of the elevator and the other businesses were to the right. He believed "Suite 400" referred to the floor that all the different businesses were on.

In evidence is the Division's automated system (TXCOMP) Contact Summary for Dr. N which lists Address 1 and Address 2 as designated doctor appointment (traveling) addresses.

In evidence is a letter dated October 13, 2009, written by the claimant's attorney. Attached to the letter was a request for a new designated doctor to be appointed in the claimant's case because the first designated doctor, Dr. N, was disqualified due to his examination of the claimant at the employer's office at Address 2.

In evidence are Dispute Resolution Information System (DRIS) notes. DRIS Sequence Number 37 of 70, dated October 12, 2009, referred to the claimant's request for a second designated doctor because the exam was done at the employer's location. DRIS Sequence Number 41 of 70, dated October 23, 2009, referred to the first designated doctor, Dr. N, no longer having the credentials appropriate to the issues in question, and that the Division would re-designate to the next qualified and available doctor on the designated doctor list.

In her Background Information section of her decision, the hearing officer stated that:

> The [c]laimant's testimony showed that he thought that it was odd that such an examination would be scheduled to be held at the offices of a

company owned by or affiliated with his employer, so he took pictures of the building and the building directory to document the information.

The hearing officer further stated that:

> . . . it is easy to believe the [c]laimant's testimony that [employer] and [TK] [Business 1] are related in some way, given the unique first name of these entities, but the evidence does not establish how they are related or the nature of the relationship. The evidence does not establish that they are one and the same. The [c]laimant's testimony about his brief encounter with [Dr. N] was credible, as was his testimony that he met with [Dr. N] in a room or conference room that was not outfitted for conducting medical examinations. However, given that the [c]laimant did not establish the nature of the relationship between the employer and [TK] [Business 1], and given that the evidence shows that [Address 2] is a location where [Dr. N] conducts [designated doctor exams] and where several other businesses are located, it cannot be determined that a disqualifying association was proven to exist between [Dr. N] and the employer.

Rule 126.7(h)(2) references Rule 180.21 with regard to disqualifying associations. In pertinent part, in Rule 180.21(a)(2), a disqualifying association is defined as any association that may reasonably be perceived as having the potential to influence the conduct or decision of a doctor, which may include:

* * * *

> (G) . . . any other association with the injured employee, the employer, or insurance carrier that may give the appearance of preventing the designated doctor from rendering an unbiased opinion.

In this case, the evidence establishes that the claimant was sent by Dr. N's office to Address 2, where he submitted to a certifying designated doctor's exam performed by Dr. N. At Address 2, TK was included in the building's directory of companies. The claimant testified that when he got off the elevator on TK's floor, after turning to the left and going to the area occupied by TK, he saw TK employees in a distinctive blue TK shirts, and heard a secretary answering the phone with "TK [Business 1]." The claimant testified that he believes both his employer and TK (Business 1) to be divisions of TK. The hearing officer erred in finding that the claimant must prove the exact relationship between his employer, TK, and TK (Business 1). The evidence reflects an arrangement, association, and shared space may reasonably be perceived as having the potential to influence the conduct or decision of the designated doctor, Dr. N, which includes an association with the employer that may give the appearance of preventing the designated doctor from rendering an unbiased opinion.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is

so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Accordingly, we hold that the hearing officer's determination that there is no disqualifying association between the first designated doctor, Dr. N, and the employer as defined in Rule 180.21 to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that there is no disqualifying association between the first designated doctor, Dr. N, and the employer, as defined in Rule 180.21 and we render a new decision that there is a disqualifying association between the first designated doctor, Dr. N, and the employer, as defined in Rule 180.21.

DISQUALIFYING ASSOCIATION BETWEEN THE FIRST AND SECOND DESIGNATED DOCTORS

On October 29, 2009, the Division appointed Dr. T, as the second designated doctor for the claim, and an exam was scheduled for November 17, 2009, at Address 1. In a DRIS Sequence Number 43 of 70, dated November 16, 2009, the Division noted that the designated doctor exam was rescheduled for December 22, 2009, at a new location, [Address 4].

The claimant testified that he thought he went to Address 1 for the designated doctor exam with Dr. T. Dr. T was reading Dr. N's report when he arrived for his examination. The claimant testified that Dr. T told him that Dr. N was a good doctor and a good guy; that Dr. T touched his body a little bit but mostly he did nothing; that Dr. T did not take any history from him; and that the claimant did not recite a mechanism of injury involving lifting tomato juice from a basket, as reported in Dr. T's narrative report. The claimant testified that Dr. T spent only about 9-12 minutes with the claimant.

In evidence are the following: (1) Report of Medical Evaluation (DWC-69) dated May 29, 2009, signed by Dr. N, listing Address 1 as the "certifying doctor's address" and phone number as "[number]" and facsimile (fax) number as "[fax number];" (2) Texas Workers' Compensation Work Status Report (DWC-73) dated May 29, 2009, signed by Dr. N, listing the doctor's address as Address 1, with the same phone and fax numbers as on the DWC-69; and (3) Dr. N's designated doctor exam narrative dated May 29, 2009, listing the same phone and fax numbers as on his DWC-69 and DWC-73.

Also in evidence are the following: (1) DWC-69 dated December 22, 2009, signed by Dr. T, listing the certifying doctor's address as address 1 with the same phone and fax numbers as those listed on Dr. N's DWC-69, DWC-73, and narrative report; (2) Dr. T's designated doctor exam narrative dated December 22, 2009, listing the same phone and fax numbers as on his DWC-69, Dr. N's DWC-69, Dr. N's DWC-73, and Dr. N's narrative report; and (3) DRIS Sequence Number 56 of 70 referring to the same fax number that was previously listed as the fax number to which the Division sent Dr. T a

letter of clarification (LOC) on February 3, 2010. DRIS Sequence Number 57 of 70 reflects that the Division received a response to that LOC on February 9, 2010.

In her Background Information section of her decision the hearing officer states:

> The [c]laimant's testimony and answers to interrogatories assert that both [Dr. N] and [Dr. T] are employed by [employer name]. The TXCOMP Contact Summaries in evidence show that both [Dr. N] and [Dr. T] are traveling designated doctors for the Division, and that [Address 1] is one where both doctors may conduct [designated doctor exams]. The TXCOMP Contact Summary in evidence for [Dr. N], however, does not list an address of [Address 5] for him, which the [c]laimant asserts is the address for [employer name]. The Contact Summary in evidence for [Dr. T] does list this address for [Dr. T].
>
> * * * *
>
> It is not clear from the evidence, including the TXCOMP Contact Summaries, that both [Dr. N] and [Dr. T] are employed by [employer name] and, thus, it is determined that a disqualifying association was not proven to exist between the two doctors under Rule 180.21. If it were shown that there was a disqualifying association between [Dr. N] and the employer, and if it were also shown that both doctors were employed by [employer name], then the [c]laimant would likely prevail on this issue, especially given the remarks [Dr. T] made to the [c]laimant reflecting his professional admiration of [Dr. N], as well as his reliance upon the conclusions reached by [Dr. N].

In this case, the evidence reflects that, regardless of whether Dr. N and Dr. T are associated with [employer name], both Dr. N and Dr. T list Address 1 as a business address and list the same phone number and the same fax number as contact information. The TXCOMP Contact Summary lists a total of five shared facilities that each doctor uses as a site for his designated doctor examinations, which includes the Address 1 office. We hold that Dr. T cannot serve as a designated doctor for this claimant in this claim because of the perception of a disqualifying association. The evidence reflects that Dr. T openly held Dr. N in professional esteem. The evidence reflects a shared association through the common facilities, phone and fax numbers. Rule 180.21(a)(2) pertaining to the designated doctor list defines a disqualifying association not only that as previously mentioned in Rule 180.21(a)(2)(G) but also Rule 180.21(a)(2)(D):

> (2) Disqualifying association - Any association that may reasonably be perceived as having potential to influence the conduct or decision of a doctor, which may include:

* * * *

(D) contracts or agreements for space or equipment rentals, personnel services, management contracts, referral services, or warranties, or any other services related to the management of the doctor's practice.

See Appeals Panel Decision (APD) 091660, decided December 30, 2009, and APD 091210, decided October 16, 2009.

Accordingly, we hold that the hearing officer's determination that there is no disqualifying association between the first designated doctor, Dr. N, and the second designated doctor, Dr. T, as defined in Rule 180.21 to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that there is no disqualifying association between the first designated doctor, Dr. N, and the second designated doctor, Dr. T, as defined in Rule 180.21 and we render a new decision that there is a disqualifying association between the first designated doctor, Dr. N, and the second designated doctor, Dr. T, as defined in Rule 180.21.

SUMMARY

We reverse the hearing officer's decision that there is not a disqualifying association between the first designated doctor, Dr. N, and the employer as defined in Rule 180.21 and we render a new decision that there is a disqualifying association between the first designated doctor, Dr. N, and the employer as defined in Rule 180.21.

We reverse the hearing officer's decision that there is not a disqualifying association between the first designated doctor, Dr. N, and the second designated doctor, Dr. T, as defined in Rule 180.21 and we render a new decision that there is a disqualifying association between the first designated doctor, Dr. N, and the second designated doctor, Dr. T, as defined in Rule 180.21.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

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

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge