APPEAL NO. 040633-s
FILED MAY 7, 2004

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 17, 2004. The hearing officer determined that: (1) the correct version of the AMA Guides to be applied is the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides third edition); and (2) Dr. T was not properly selected by the Texas Workers' Compensation Commission (Commission) to be the designated doctor in this case. Appellant (carrier) appealed these determinations contending that the hearing officer erred in applying the law to the facts in this case. Respondent (claimant) responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We reverse and render.

Carrier contends the hearing officer erred in determining that the third edition of the AMA Guides applies in this case. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(2) (Rule 130.1(c)(2)) states that the appropriate edition of the AMA Guides to use for certifying examinations conducted on or after October 15, 2001, is the third edition if, at the time of the certifying examination, there is a certification of maximum medical improvement (MMI) by a doctor pursuant to subsection (b) of the rule made prior to October 15, 2001, which has not been previously withdrawn through agreement of the parties or previously overturned by a final decision. Carrier contends that the January 3, 2001, certification by Dr. D was not signed, so it is not a certification of MMI for the purposes of Rule 130.1(c)(2). We agree. Rule 130.1(c)(2)(B)(ii) specifically requires that the certification of MMI made prior to October 15, 2001, be made pursuant to subsection (b). Rule 130.1(b)(4)(D) states that in order to certify MMI the certifying doctor shall "complete and submit required reports and documentation." The reporting requirements of Rule 130.1(d)(1) provide that in order to certify MMI and assign an IR, the doctor must sign the certification. Thus, in order for there to have been a certification made prior to October 15, 2001, in this instance that certification had to have been signed. Since Dr. D's certification was not signed, there was no certification made prior to October 15, 2001, and as a result, the correct edition of the AMA Guides to be used in this case is the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides fourth edition).

Carrier contends the hearing officer erred in applying Section 408.0041 and Rule 130.5(d) and concluding that the Commission did not properly select Dr. T to be the designated doctor in this case. The designated doctor doing the review must have credentials appropriate to the issue in question and be trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition.

The Commission issued Advisory 2004-03, dated April 19, 2004, regarding what the words "scope of practice" mean and has clarified that "this phrase is synonymous with a doctor's licensure." The advisory was meant to clarify the meaning of the words "scope of practice" in Section 408.0041 and Rule 130.5. Although the advisory was not signed until April 19, 2004, we will consider it, along with the preamble to Rule 130.5, as instructive regarding the issue concerning the selection of the designated doctor in this case. We conclude that Dr. T, a medical doctor, meets the above requirements of Rule 130.5(d). The medical records indicate that the surgeon and urologist who were treating claimant are both medical doctors. After considering the advisory, we conclude that because Dr. T is also a medical doctor, then he is a qualified designated doctor pursuant to Section 408.0041 and Rule 130.5(d). We retreat from Texas Workers' Compensation Commission Appeal No. 030737-s, decided May 14, 2003, to the extent that it conflicts with this case. We reverse the hearing officer's determination that Dr. T was not properly selected by the Commission as the designated doctor in this case.

We reverse that part of the hearing officer's decision and order that determined that the third edition of the AMA Guides applies. We render a decision and that the fourth edition of the AMA Guides applies. We reverse that part of the hearing officer's decision and order that determined that Dr. T was not properly selected by the Commission as the designated doctor in this case and render a decision that Dr. T was properly selected.

According to information provided by carrier, the true corporate name of the insurance carrier is **ST. PAUL FIRE & MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.

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Judy L. S. Barnes
Appeals Judge

CONCUR:

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Daniel R. Barry
Appeals Judge

CONCURRING OPINION:

I concur in the majority decision; however, I write separately to explain how we reached the decision in Appeal No. 030737-s, *supra*, from which we now retreat based upon Advisory No. 2004-03. Section 408.0041 and Rule 130.5(d) provide that the designated doctor must have credentials appropriate for the issue in question, be trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition, and that those treatments and procedures must be within the scope of practice of the designated doctor. Before Section 408.0041 and Rule 130.5(d) became effective, the statute did not contain a specific provision addressing the qualifications of the designated doctor. The Commission used Rule 130.6(b)(4) to aid in the selection of the designated doctor. That rule provided that to the extent possible the designated doctor should "be in the same discipline and licensed by the same board of examiners" as the treating doctor. By amending the statute to require that the designated doctor be trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition and that those procedures be within the scope of practice of the designated doctor, it seemed apparent that factors other than licensure were to be considered in selecting the designated doctor. It is under this framework that we approached the issue of determining the meaning of the phrase "scope of practice" in Appeal No. 030737-s. We determined that the legislature's use of the phrase "scope of practice" in addition to "training and experience" demonstrated an intent that the designated doctor actually perform the treatment procedures that had been used to treat the claimant's compensable injury.

Were that not the case, it seemed that that phrase would not have a different meaning than "training and experience" and the use of the phrase would be superfluous. Based upon that understanding, and in an effort to give both phrases meaning, as is the usual practice of an appellate body that is called upon to determine the meaning of a statute, we determined that the phrase "scope of practice" meant the type of medical procedures that the designated doctor actually performed in his daily practice. By analogy, we determined that a doctor's scope of practice was like a lawyer's scope of practice and that while all lawyers might theoretically be trained and experienced in all areas of law, the reality is that lawyers specialize in certain areas of the law and that, as such, the scope of practice of a personal injury trial lawyer and a bankruptcy or tax attorney are very different. Similarly, it appeared that the scope of practice of a plastic surgeon, who primarily performed cosmetic surgery, and an orthopedic surgeon were similarly divergent. However, in Advisory 2004-03, the Executive Director has stated that the "phrase 'scope of practice' as it is commonly used is synonymous with a doctor's licensure." Under the advisory, because Dr. T is a medical doctor, he satisfies the requirement of having the same licensure as the doctor treating the claimant and he was, therefore, properly appointed as the designated doctor.

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Elaine M. Chaney
Appeals Judge