STATE OFFICE OF ADMINISTRATIVE HEARINGS
300 West 15th Street, Suite 502
Austin, Texas 78701

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JEFFREY STANDIFER, D.C.,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	**OF**
	§	
LIBERTY MUTUAL FIRE INSURANCE COMPANY,	§	
	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Jeffrey S. Standifer, D.C. (the Petitioner) seeks reimbursement from Liberty Mutual Fire Insurance Company (the Carrier or Respondent) for physical therapy and office visits during the period May 2, 2002, through June 7, 2002, provided to workers' compensation claimant___. The Petitioner challenges the decision of an Independent Review Organization, which found the disputed services were not medically necessary and were inadequately documented. This decision finds that reimbursement should be granted.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing initially convened on April 15, 2003, at the Hearings Facility of the State Office of Administrative Hearings (SOAH) before SOAH Administrative Law Judge (ALJ) Shannon Kilgore. The parties appeared and jointly requested a continuance to allow them to pursue further settlement negotiations. By order dated April 15, 2003, ALJ Kilgore granted the motion for continuance and re-sets the case for May 1, 2003, at 1:30 p.m.

On May 1, 2003, on or about 1:30 p.m., ALJ Lilo D. Pomerleau reconvened the hearing on the merits. The Petitioner represented himself and appeared by telephone. The Carrier did not appear. After receipt of the Petitioner's evidence, the record was closed the same day.

On May 6, 2003, the Carrier filed a motion to set aside the default judgement and to re-open the record. In support of the motion, Carrier's counsel stated that her assistant failed to docket the hearing on their calendar. Counsel for the Carrier also attached to the motion: (1) her affidavit stating that she was attending another hearing at SOAH at the time of hearing; the case at bar was not set on the firm's centralized docket; and her failure to attend was not intentional; and (2) the affidavit of counsel's assistant, which stated that she did not put the hearing date on the calendar because counsel already had another hearing scheduled for that date and time and that she faxed a letter to Dr. Standifer advising him of the conflict and asking him to contact the firm with alternative dates; she further affirms that she did not hear back from Dr. Standifer.

In response, Dr. Standifer filed a pleading stating that he had contacted opposing counsel several times, but his calls were not returned. This pleading was not forwarded to the Carrier.

On May 14, 2003, the ALJ issued an order denying the request to set aside default order and re-open the record. On May 15, 2003, the Carrier filed a second motion to set aside the default judgement and to re-open the record. On May 16, 2003, the ALJ issued an order filing the documents that the Petitioner failed to serve on the Respondent, as provided by 1 TEX. ADMIN. CODE § 155.25(c), and notifying the parties that the ALJ would convene a telephonic conference to discuss the merits of the second motion and to allow the parties the opportunity to address the allegations contained in the pleadings.

On May 27, 2003, the ALJ issued a notice of a telephonic conference for May 29, 2003 at 9:00 a.m. The ALJ convened the conference as scheduled. Appearances were entered by the Petitioner, represented by H. Douglas Pruett, and the Carrier, represented by Charlotte Salter. During the conference, Ms. Salter explained that she had taken on additional responsibilities and was very busy during the events that led to her failure to appear at the scheduled hearing. She also admitted that Dr. Standifer had returned her phone calls but she likely deleted them without listening to the message or noting the substance of the message. The ALJ ruled at the conference that good cause did not exist to re-open the record and denied the second motion to set aside the judgement.

The ALJ observes that there is some procedural confusion in this case. This is not a default hearing as contemplated by 1 TEX. ADMIN. CODE § 155.55, which requires specified notice and disclosure that, upon failure to appear, the relief sought in the notice of hearing might be granted by default. *See* 1 TEX. ADMIN. CODE § 155.55(b). Instead, at the hearing on May 1, 2003, Petitioner presented a *prima facie* case. Accordingly, this final order will be based on the evidence admitted at the hearing. The Petitioner bears the burden of proof.

As SOAH's procedural rule is not directly applicable, the ALJ turns to case law for guidance. In *Craddock v. Sunshine Bus Lines, Inc*., 133 S.W.2d 124, 126 (Tex. 1939), the Texas Supreme Court established the standards that apply when a defendant fails to appear at a properly noticed hearing:

> A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgement was not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident; provided the motion for new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. *Id.* at 126.

*See also O'Connor's Texas Rules * Civil Trials*, Commentaries § 15.1, pp. 609-611 (2002).

Under the *Craddock* test, the trial court must set aside the default if the defendant shows the failure to appear at the hearing was not intentional or the result of conscious indifference but was due to a mistake or accident. Directly on point is a case were the attorney's secretary made a mistake in

setting a new trial setting as the attorney was in another trial. *Aero Mayflower Transit Co. v. Spoljaric*, 669 S.W.2d 158, 160 (Tex.App.--Fort Worth 1984, writ dism'd). However, in the case at bar, counsel for the Carrier failed to listen to and/or to return phone calls from the Petitioner concerning new hearing dates. If Carrier's counsel had listened to the text of the Petitioner's messages and/or returned his calls, it is likely that she would have realized the necessity of securing a different hearing date.

The failure to reasonably communicate with the opposing party demonstrates conscious indifference. The Carrier failed to meet the first requirement of the *Craddock* test.[1]

The *Craddock* test also requires the movant to set up a meritorious defense and show that no delay or injury would occur to the plaintiff. If proved, a meritorious defense is one that would cause a different result on retrial. *Liepelt v. Oliveira*, 818 S.W.2d 75, 77 (Tex. App.--Corpus Christi 1991, no writ). A showing that there would be no injury may be an offer to reimburse the plaintiff for all reasonable expenses incurred in getting the default. *Director v. Evans*, 889 S.W.2d 266, 270 n. 3 (Tex. 1994). The ALJ concludes that the Carrier did not meet the first prong and failed to plead the second and third prongs of the *Craddock* test; thus, the Carrier's motion for new trial should be denied.

Uncontested issues concerning the notice of hearing are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

II. EVIDENCE AND BASIS FOR DECISION

Petitioner's Exhibit No. 1 consists of the documents provided to the Independent Review Organization (IRO). The Petitioner also testified on his own behalf and was the only witness called at the hearing.

At the hearing, the Petitioner requested an opportunity to submit additional evidence and submitted such on May 5, 2003. It does not appear that the Petitioner served this filing on the Carrier. In the filing, the Petitioner states that he is seeking a default judgement of $17,715.00, consisting of services rendered from May 2, 2002, through July 31, 2002, for $12,255.00, plus IRO fees of $460.00, and $5,000.00 of costs for his own time. The ALJ declines to admit this filing into evidence because it includes: (1) a large number of hand-written entries for services and corresponding charges with no CPT codes and no or insufficient explanation for such charges; and (2) information that was already included in the Petitioner's Exhibit No. 1. Moreover, the ALJ declines to admit this filing into evidence because it was not served on all parties. As to the

[1] The good cause standard under 1 TEX. ADMIN. CODE § 155.55 is very similar to the first prong of the Craddock case. In ascertaining whether a movant has shown good cause, the actions of counsel are significant. *Webb v. Ray*, 944 S.W.2d 458 (Tex.App.--Houston [14th Dist.] 1997, no writ). In this instance, the failure to calendar an entry may have constituted mistake, which the courts have found indicative of good cause. However, if Carrier's counsel had acknowledged and timely returned Petitioner's phone calls, she would likely have remembered that the case was set on the SOAH docket and timely filed a motion for continuance. The failure to acknowledge and return phone calls approached that of conscious indifference and mitigates against a finding of good cause in this instance.

Petitioner's request for more money than what appears to have been submitted to the IRO, IRO fees, and the Petitioner's costs, the ALJ finds these requests are outside the scope of this proceeding.

A. The Evidence

On ____, the Claimant developed bilateral pain across the flexor wrist from repetitive computer work. On February 13, 2002, the Petitioner examined the Claimant and diagnosed carpal tunnel syndrome, wrist paresthesia, and restriction of motion.[2] On April 23, 2002,

Pedro Nosnik, M.D. examined the Claimant and found that she presented with "post repetitive activity with on the job injury with acute and chronic bilateral carpal tunnel syndrome."[3] On June 21, 2002, Kenneth Driggs, M.D. diagnosed the Claimant with bilateral carpal tunnel syndrome and recommended night splints, no work, and medication. If symptoms continued, he found that surgery would be necessary.[4] The Petitioner testified that the Claimant underwent surgery. A report from Dr. Driggs, dated February 24, 2003, stated that the Claimant was three months "postop" and would resume regular work March 3, 2003.[5]

William R. Culver, M.D., examined the Claimant on June 4, 2002, on behalf of the Carrier. He concluded that the Claimant did not have carpal tunnel syndrome but showed signs of significant symptom magnification.[6] At the hearing, the Petitioner testified that he disagreed with Dr. Culver and found that a number of diagnostic tests performed on the Claimant clearly confirmed a diagnosis of carpal tunnel syndrome. He testified that the Claimant needed the care and treatment provided by him.

The evidence included a table of dates and CPT codes for the disputed services. Although the IRO stated that the disputed services consisted of physical therapy and office visits during the period April 15, 2002, through June 7, 2002, the record evidence (which the Petitioner affirmed was the information that he provided to the IRO) reflects services starting on May 2, 2002, through June 7, 2002. The ALJ will consider only those disputed services found in Petitioner's Exhibit No. 1 from pages 27 through 35, which total $3,992.00.[7]

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[2] Petitioner's Ex. 1 at 57.

[3] Petitioner's Ex. 1 at 48.

[4] Petitioner's Ex. 1 at 21-22.

[5] Petitioner's Ex. 1 at 4.

[6] Petitioner's Ex. 1 at 38-40.

[7] See Petitioner's Ex. 1 at 27-35. The totals on each page are as follows: $522.00, $501.00, $483.00, $470.00, $468.00, $522.00, $497.00, $497.00, and $32.00.

2. Applicable Law

Pursuant to the Texas Workers' Compensation Act, an employee who has sustained a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The employee is specifically entitled to health care that cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment.[8]

The Petitioner bears the burden of proof in this proceeding pursuant to 28 TEX. ADMIN. CODE §§ 148.21(h) and (i).

C. Analysis

The evidence indicates that several medical doctors diagnosed the Claimant with carpal tunnel syndrome. The Claimant's treating doctor also testified that the Claimant had such an injury and that she needed the care and treatment provided by him, controverting the opinion of Dr. Culver. The ALJ concludes that the Petitioner met his burden of proof in this matter and finds that the Petitioner is entitled to reimbursement for the services performed on May 2, 2002, through June 7, 2002.

III. FINDINGS OF FACT

1. On___, the Claimant developed bilateral pain across the flexor wrist from performing repetitive computer work.

2. At the time of the Claimant's compensable injury, Liberty Mutual Fire Insurance Company (Carrier) was the workers' compensation insurer for Claimant's employer.

3. From May 2, 2002, through June 7, 2002, Jeffrey S. Standifer, D.C., (Petitioner) provided the Claimant various services to treat the injury and reduce pain.

4. The Carrier denied reimbursement totaling $3,992.00 for the expenses associated with the services identified in Finding of Fact No. 3.

5. The Petitioner timely requested dispute resolution by the Texas Workers' Compensation Commission, which referred the matter to an Independent Review Organization.

6. The Independent Review Organization found in favor of the Carrier.

7. The Petitioner timely requested a hearing on January 30, 2003.

8. Notice of the hearing was sent on March 4, 2003.

[8] TEX. LAB. CODE ANN. § 408.021(a).

9. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

10. The hearing was convened on April 15, 2003, but was continued to May 1, 2003, at the request of the parties.

11. The hearing reconvened on May 1, 2003. The Petitioner appeared and represented himself *pro se*. The Carrier did not appear.

12. On May 6, 2003, the Carrier filed a motion to set aside the default judgement and to re-open the record.

13. On May 15, 2003, the Carrier filed a second motion to set aside the default judgement and to re-open the record.

14. The ALJ convened a telephonic conference on May 29, 2003, to address the merits of the second motion.

15. The Carrier's counsel was attending another hearing on May 1, 2003.

16. The assistant for the Carrier's counsel erred by not placing the date and time of the re-set hearing on the firm's centralized docket.

17. The assistant for counsel notified the Petitioner that there was a conflict and requested him to contact the firm with alternative dates.

18. The Petitioner called the office of Carrier's counsel several times.

19. Counsel for the Carrier did not listen to and/or respond to the phone calls of the Petitioner.

20. The Carrier failed to show good cause why a default decision should be set aside and the record re-opened.

21. The Carrier failed to show that its failure to appear at the noticed hearing was not the result of conscious indifference.

22. The Petitioner presented uncontroverted evidence of the disputed services and dates of those services.

23. The Petitioner presented uncontroverted evidence that the disputed services were reasonable and medically necessary to treat the Claimant's injury and pain.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ANN. § 413.031.

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.

3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.

4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

5. The Petitioner has the burden of proof in this proceeding. 28 TEX. ADMIN. CODE §§ 148.21.

6. The Carrier failed to demonstrate that the failure to appear at the hearing was not based on conscious indifference. *Craddock v. Sunshine Bus Lines, Inc*., 133 S.W.2d 124, 126 (Tex. 1939).

7. The disputed services were shown to be medically necessary health care for the Claimant.

8. The disputed services were adequately documented.

9. Based on the foregoing, the Petitioner's claim for reimbursement from the Carrier for the disputed services should be granted.

ORDER

The claim by Petitioner Jeffrey S. Standifer, D.C., is granted. Liberty Mutual Fire Insurance Company shall reimburse the Petitioner in the amount of $3,992.00.

SIGNED this 18th day of June 2003.

LILO. D. POMERLEAU
Administrative Law Judge
State Office of Administrative Hearings