

<b>G. KENNETH MARSHALL M.D.,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>v.</b>	§	<b>OF</b>
	§	
	§	
<b>TEXAS WORKERS' COMPENSATION</b>	§	
<b>COMMISSION,</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

G. Kenneth Marshall M.D., (Petitioner), challenged the Findings and Decision of the Texas Workers' Compensation Commission (Commission) assessing a penalty of \$113.00 due to Petitioner's failure to file a Work Status Report<sup>1</sup> after a patient experienced a change in work status, and Petitioner's failure to file a copy of the Work Status Report with both the insurance carrier and the employer within two days of the initial medical examination.

After considering the evidence and arguments of the parties, the Administrative Law Judge (ALJ) concludes that Petitioner must pay an administrative penalty of \$113.00 for failure to file a copy of the Work Status Report with the insurance carrier within two days of the patient's initial examination.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

The hearing convened on March 10, 2005, with State Office of Administrative Hearings (SOAH) ALJ Stephen J. Pacey presiding. Petitioner appeared *pro se*, and Respondent appeared through its attorney, E. Renee Crenshaw. The hearing concluded and the record closed that same day.

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<sup>1</sup> TWCC 73.

## II. DISCUSSION

On \_\_\_\_, the patient, \_\_\_\_, was found semi-conscious in a hospital parking lot. He was admitted to the hospital that day and diagnosed with a fractured skull. \_\_\_\_ was under the care of a neurosurgeon and was discharged from the hospital on February 10, 2003. Initially, the hospital and doctors opined that the patient was the victim of a mugging. Petitioner initially examined the patient on January 31, 2003, and saw him again as his treating physician on February 14, 2003.<sup>2</sup>

On April 16, 2004, Petitioner, signed a settlement agreement for failing to file a timely complete Work Status Report (Report).<sup>3</sup> Petitioner agreed to pay \$113.00 within 20 days after receiving the Notice of Violation (NOV), which he received on April 27, 2004.<sup>4</sup> The NOV alleged that Petitioner, as the treating doctor, examined the employee on \_\_\_\_.<sup>5</sup> The NOV reported that Petitioner failed to provide the TWCC 73 to the employee at the time of the initial examination and to the insurance carrier and employer within two working days of the examination. The NOV alleged that the TWCC 73 was filed with the Carrier on March 4, 2003, which was 35 days late. The NOV additionally alleged that the TWCC 73 did not include the date the patient could return to work or a description of how the injury prevents the employee from returning to work. The NOV concluded that the Petitioner did not properly complete or timely file an initial TWCC 73 in compliance with 28 TEX. ADMIN. CODE (TAC) §129.5.<sup>6</sup>

On December 9, 2004, the Commission sent Petitioner a Notice of Hearing which stated that at least ten days prior to the hearing date, its attorney would transmit to Petitioner a Statement of Matters Asserted, setting out the issues and the relevant law and rules. On March 1, 2005, Ms.

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2 The date of visit on the TWCC 73 was altered. The date of visit could have been 1-14-03 (before the injury occurred), 2-24-03 (two weeks after discharge), or 2-14-03 (four days after discharge). Because of its proximity to the date of discharge and Dr. Marshall's highly credible testimony, the ALJ concludes that the correct date of service was 2-14-03.

3 The Work Status Report is prepared as the TWCC 73.

4 SOAH does not have jurisdiction to enforce a settlement agreement; therefore this case will be decided on the facts as presented.

5 The NOV mistakenly determined the date of Petitioner's initial examination of the patient to be \_\_\_\_\_. This was the date that the patient was admitted to the hospital under the care of a neurosurgeon. Actually, the neurosurgeon made the initial exam, and Petitioner made a follow up exam.

6 28 TAC § 129.5(e) states:

The Work Status Report filed as required by subsection (d) of this section shall be provided to the employee at the time of the examination and shall be sent, not later than the end of the second working day after the date of examination, to the carrier and the employer.

Crenshaw sent Petitioner a Statement of Matters Asserted (Statement). The Statement alleged that Petitioner failed to file a Report after the initial examination and after the patient experienced a change in work status; that Petitioner failed to file a copy of the Report to both the insurance carrier and the employer within two days of the initial medical examination; and requested that Petitioner pay a penalty of \$113.00.

The Statement did not include all the provisions reflected on the NOV. The Statement did not mention the NOV's allegations that Petitioner failed to properly complete the TWCC 73 by failing to explain when the patient could return to work, or that the TWCC 73 failed to include a description of how the injury prevents the employee from returning to work. Because these items were not included in the Statement, they will not be considered in this decision.

### **III. DECISION**

This decision does not attempt to enforce the contract, and it is limited to and by those issues included in the Statement.

Petitioner filed a Work Status Report after the initial examination. Petitioner testified that when he examined the patient on January 31, 2003, he understood that the patient had been mugged, and did not know that the patient was subject to worker's compensation. Petitioner explained this to the Commission, but to no avail. Logically, if a doctor does not know or should not have known that a particular injury is work-related, then the doctor is not under any obligation to file a Report.

Petitioner's second examination of the patient occurred on February 14, 2003. By this time, he had determined that while at work the patient had fallen off a truck and was covered by workers' compensation. Petitioner testified that a Report was prepared at this visit.<sup>7</sup> The ALJ concludes that Petitioner prepared a Report on the first examination in which he was aware the patient was covered by workers' compensation, consequently, Petitioner did not fail to file a Work Status Report after the initial examination.

However, Petitioner did fail to file a copy of the Report with both the insurance carrier and the employer within two days of the second medical examination. The carrier's date stamp on the

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The Work Status Report was the TWCC 73 admitted into evidence as Exhibit 3.

TWCC 73 indicated that the carrier did not receive the report until March 4, 2003, which is approximately 20 days after the February 14, 2003, examination. The ALJ concludes that Petitioner violated one part of 28 TAC § 129.5, and is subject to an administrative penalty of \$113.00.<sup>8</sup>

#### IV. FINDINGS OF FACT

1. \_\_\_\_ (Patient) suffered an injury on \_\_\_\_, when he was found unconscious in the parking lot of the hospital.
2. The Patient was admitted to the hospital \_\_\_\_ under the care of a neurosurgeon, and discharged from the hospital on February 10, 2003.
3. The treating doctors initially thought that the Patient was the victim of an attack, when in fact, he had fallen off a truck while working and was covered by workers' compensation.
4. G. Kenneth Marshall, M.D. (Petitioner), first examined the Patient on January 31, 2003.
5. At the time of Petitioner's initial examination of the Patient, Petitioner thought that the Patient was the victim of an attack and not a workers' compensation patient.
6. On February 14, 2003, Petitioner examined the Patient for the second time, and, by this time, Petitioner had determined that the Patient was subject to workers' compensation.
7. On February 14, 2003, Petitioner prepared a Work Status Report (TWCC 73).
8. The insurance carrier received the TWCC 73 on March 4, 2003.
9. Petitioner disputed the Texas Worker's Compensation Commission's (Commission) April 27, 2004, Notice of Violation(s).
10. On December 9, 2004, the Commission sent Petitioner a notice of hearing that included the time, place, and nature of the hearing, and the legal authority and jurisdiction under which the hearing was to be held.
11. On March 1, 2005, the Commission sent Petitioner a Statement of Matters asserted, which stated the particular sections of the statutes and rules involved, and a short plain statement of the matters asserted.
12. The hearing convened on March 10, 2005, with State Office of Administrative Hearings ALJ Stephen J. Pacey presiding. Petitioner appeared *pro se*, and the Commission appeared through its attorney, E. Renee Crenshaw. The hearing concluded and the record closed that same day.

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The ALJ is aware that, at the hearing, Commission's attorney requested an administrative penalty of \$225.00. The ALJ is also aware that \$225.00 was the original penalty which was reduced to \$113.00 in consideration of Petitioner executing the contract; however, the Commission is bound by its pleadings and in the Statement of Matters Asserted Staff requested \$113.00.

## V. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to the Texas Workers' Compensation Act, specifically TEX. LABOR CODE ANN. §415 *et seq* and TEX. GOV'T CODE ANN. ch. 2003.
2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and 28 TEX. ADMIN. CODE ch. 148.
3. Adequate and timely notice of the hearing was provided according to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Petitioner violated 28 TEX. ADMIN. CODE § 129.5 by failing to send to the insurance carrier a Work Status Report within two days of the initial examination.
5. Pursuant to TEX. LABOR CODE §415.32 Petitioner is subject to an administrative penalty of \$113.00.

### ORDER

**THEREFORE IT IS ORDERED** that G. Kenneth Marshal, M.D., must pay an administrative penalty of \$113.00.

**SIGNED May 6, 2005**

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**STEPHEN J. PACEY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**