

SOAH DOCKET NO. 454-06-1284.C1

JUSTIN C. BENEDICT, D.C., § **BEFORE THE STATE OFFICE**
Petitioner §
§
V. § **OF**
TEXAS DEPARTMENT OF §
INSURANCE, DIVISION OF §
WORKERS' COMPENSATION, §
Respondent § **ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

I. INTRODUCTION

Staff of Texas Department of Insurance, Division of Workers' Compensation (Staff/Division), Respondent, alleged that Justin C. Benedict, D.C., Petitioner, violated TEX. LABOR CODE ANN. § 415.003 and 28 TEX. ADMIN. CODE (TAC) § 134.801 by submitting medical bills for aquatic therapy services that he did not provide. Dr. Benedict was paid a total of \$9,904.99 by five different carriers or self-insureds (Carriers) for aquatic therapy services rendered to five different patients. Staff is seeking reimbursement of \$9,770.35 of the amounts paid to Dr. Benedict and an administrative penalty of \$250.00.¹ After reviewing the evidence, the Administrative Law Judge (ALJ) determines that Staff's request should be granted and that Dr. Benedict should repay \$9,770.35. No administrative penalty is assessed.

II. PROCEDURAL HISTORY

On December 2, 2005, the Division notified Dr. Benedict that he had violated TEX. LABOR CODE ANN. § 415.003 by billing the Carriers for aquatic therapy treatment for five of his patients. On December 17, 2005, Dr. Benedict contested the allegation that he had violated the law, and he requested a hearing.

¹ Staff's Closing Argument at unpaginated sheet 7. The reason for the discrepancy is unclear since Staff listed each of the amounts paid, totaling \$9,904.99.

On February 3, 2006, the Division submitted the case to the State Office of Administrative Hearings (SOAH) for docketing. On February 7, 2006, the Division sent Dr. Benedict notice of the hearing to be held on August 24, 2006.² No further activity occurred in the case for six months. On August 22, 2006, two days before the hearing, Dr. Benedict filed a motion for continuance on the grounds that he needed time to hire counsel. On August 24, 2006, the Administrative Law Judge (ALJ) granted the motion.

On September 27, 2006, the ALJ ordered the parties to submit proposed dates for the hearing on the merits. On October 13, 2006, the ALJ set the hearing on the merits for April 3, 2007, as part of a prehearing scheduling order.

On March 30, 2007, four days before the scheduled hearing on the merits, the Division filed a Statement of Matters Asserted/More Definite Statement. On that same date, the parties filed an agreed motion for continuance on the grounds that the parties were making progress toward settlement. On April 2, 2007, the ALJ granted the motion for continuance and notified the parties that the matter would be dismissed from the docket on May 31, 2007, if the parties neither agreed on a date for the hearing on the merits or dismissed the claim.

On May 3, 2007, Staff asserted that the case was about to be settled and requested an extension of the May 31, 2007, dismissal deadline to finalize the terms of the settlement. On May 7, 2007, the ALJ granted Staff's motion on the grounds that the parties were about to settle the case.

On June 12, 2007, after receiving no further information from the parties about the status of the case, the ALJ set the matter for hearing on July 9, 2007. As of the date of the order, the matter had been on SOAH's docket for sixteen months. On July 3, 2007, two working days before the hearing on the merits, Staff filed a non-agreed motion for continuance. The ALJ denied the motion.

On July 9, 2007, the hearing on the merits was convened as scheduled. Amy Morehouse made an appearance as counsel for Staff, and neither Dr. Benedict nor his counsel made an appearance. With Staff's concurrence, the ALJ attempted to reach Dr. Benedict's counsel by

² TDI Ex. 1.

telephone, but he was unavailable. The hearing proceeded without participation by Dr. Benedict or his counsel.

III. EVIDENCE AND ANALYSIS

At the hearing on the merits, Staff presented evidence that Dr. Benedict is a licensed chiropractor³ who was treating workers' compensation patients __, __, __, __, and __.⁴ Dr. Benedict billed the Carriers the following amounts for his treatment of the patients with aquatic therapy:⁵

Claimant	Carrier/Self-Insured	Amount Paid
____	_____	\$4,851.39
____	Sentry Insurance Co.	416.00
____	Ace-USA	933.84
____	American Home Assurance	1,593.28
____	American Manufacturers Mutual Insurance	2,110.48
Total		\$9,904.99

The basis of the alleged violation was that Dr. Benedict was paid for a service that he did not perform. Specifically, Staff alleged that between January 1, 2003, and November 31 [sic], 2004,⁶ Dr. Benedict prescribed and charged for the delivery of aquatic therapy services. However, a physical therapist, Shane Hernandez, actually rendered the care.⁷ In its Statement of Matters Asserted/More Definite Statement of March 30, 2007, Staff alleged that the provisions of 28 TAC §

³ Staff Ex. 15.

⁴ The names of the patients are confidential. Initials are used for purposes of limited identification.

⁵ TDI Ex. 9. The amount paid by Sentry Insurance Co. for CDC's aquatic therapy was \$416.00, rather than the \$311.36, as reflected in the summary at TDI Ex. 9. The \$416.00 is regarded as accurate.

⁶ Statement of Matters Asserted/More Definite Statement at 2.

⁷ TDI Ex. 3. In addition, Staff presented signed statements from some of the patients in which they explained that Mr. Hernandez, the physical therapist, and not Dr. Benedict, actually provided the aquatic therapy treatments. Although admitted into evidence, these statements were hearsay (some of which were in untranslated Spanish) and were not considered in reaching this decision. TDI Exs. 16, 19, and 22.

134.801(f)⁸ and TEX. LABOR CODE ANN. § 415.003 prohibit a health care provider from submitting a bill for treatments and/or services that the provider did not actually provide. Copies of Dr. Benedict's claim forms to the Carriers confirmed that he made the claims in the amounts alleged for the patients identified.⁹

In a letter from Dr. Benedict dated June 14, 2006, to Dean L. Krohn, one of the attorneys representing Staff at the time, Dr. Benedict stated, "... I contracted with two facilities to provide the aquatics therapy by their Licensed Physical Therapists. And I paid the facilities/physical therapists ['] hourly wage to provide these services to my patients."¹⁰ Dr. Benedict went on to explain that he had no intention of violating any law and that he did not know that his billing practices were illegal: "If I had known that this was illegal, believe me I would not engaged in such an arrangement."¹¹

At the conclusion of the hearing, the ALJ left open the record until August 9, 2007, for the submission of closing briefs and arguments. Each party timely filed a closing argument, and Dr. Benedict's counsel also filed a "Motion to Dismiss and/or Quash Violation."

Dr. Benedict's closing argument and motion asserted three separate defenses. Each is briefly reviewed.

A. The Division's charges are vague and non-specific.

Dr. Benedict noted that the statute (in effect during the alleged violations) provided that a health care provider commits an administrative violation if the person wilfully or intentionally: (1) submits a charge for health care that was not furnished, (2) administers improper, unreasonable,

⁸ The pleading includes references to both 28 TAC § 134.801(f) and to 29 TAC § 134.801(f). This second citation is non-existent and appears to have been a typographical error. No Chapter 29 exists in the Texas Administrative Code, and Chapter 28 deals with insurance regulatory matters, including workers' compensation. The provisions of 28 TAC § 134.801(f) state: "A health care provider or other entity, except as described in subsections (f) and (h) of this section, may not submit a bill for treatment(s) and/or service(s) the health care provider did not provide." As noted by both parties, the rule was repealed on May 1, 2006.

⁹ TDI Exs. 17, 20, 21, 23, and 25. Some of the payments were made to business entities that Dr. Benedict owned. Staff proved the relationship between Dr. Benedict and the business entities with the admission of TDI Ex. 26, consisting of records from the El Paso County Clerk and the Texas Secretary of State.

¹⁰ TDI Ex. 27.

¹¹ *Id.*

or medically unnecessary treatment or services, (3) makes an unnecessary referral, (4) violates the commission's fee and treatment guidelines, (5) violates a commission rule, or (6) fails to comply with a provision of the subtitle.¹² Dr. Benedict objected to the Division's "failure to specifically state what provision of Section 415.003 it contends Benedict has violated"

Dr. Benedict went on to point out that none of Staff's allegations pertained to any of Dr. Benedict's alleged conduct, with the possible exception of item (5), "violation of a commission rule." In reviewing the provisions of 28 TAC § 134.801, Dr. Benedict noted that the rule has ten subparts, (a) through (j). Dr. Benedict complained that the Division, "despite request [sic] from Benedict, [Staff] has failed to identify what specific subpart of Rule 134.801 Benedict has violated."¹³

Dr. Benedict alleged that he propounded interrogatories to Staff asking them to identify the specific subpart that was the basis of their request for relief. Dr. Benedict complained that Staff's response was that he had violated "Rule 134.801(4)," a non-existent subpart. As a consequence, Dr. Benedict argued, Staff failed to plead its case adequately. As a remedy, Dr. Benedict urged the ALJ to dismiss the proceeding and/or "quash the violation" under 1 TAC § 155.56¹⁴ on the basis that Staff failed to state a claim for which relief may be granted.¹⁵

Although Dr. Benedict is correct that there is no Rule 134.801(4), the remedy that he seeks is not appropriate.¹⁶ If his objection is that Staff failed to respond to discovery completely or accurately, then he should have filed a motion to compel under SOAH Rule 155.31(l). No discovery motions were filed in this protracted and often-delayed proceeding. If Dr. Benedict's objection is that notice was defective, then he should have objected to notice prior to the hearing or in his post-hearing brief. He did neither. By failing to object and allowing the case to proceed to hearing more than nine months after his counsel's appearance in this matter, Dr. Benedict waived the objection.

¹² TEX. LABOR CODE ANN. § 415.003.

¹³ Petitioner's Written Closing Argument at unpaginated sheet 5.

¹⁴ The reference is to the SOAH procedural rules. Subsequent references will be to "SOAH Rule ____."

¹⁵ SOAH Rule 155.56(b)(4).

¹⁶ Dr. Benedict's request to "quash the violation" is unclear and will be taken to mean "strike the portion of the pleading that alleges the violation."

B. Benedict did not “willfully or intentionally” violate Section 415.003.

Dr. Benedict asserted that to prove a violation, Staff must prove the existence of a *mens rea*. Although Dr. Benedict asserted that no such evidence exists in the record,¹⁷ he disregards the fact that he admitted his intention to render the services through a physical therapist and that he paid a physical therapist to render the services for which Dr. Benedict billed the Carriers.¹⁸ Proof of a state of mind does not require a showing that the actor intended to violate the law but only to take the action that is violative of the law. In this case, Dr. Benedict admitted that he intentionally committed the acts that violated the law.

C. Rule 134.801 is unconstitutionally vague, in violation of both the Texas and United States Constitutions.

In asserting this challenge, Dr. Benedict also asserts that Mr. Hernandez was Dr. Benedict’s employee. Nothing in the record reflects that Mr. Hernandez was anything other than an employee of one or more independent contractors to which Dr. Benedict made payment for rendering the aquatic therapy services.¹⁹ According to counsel, the alleged vagueness of the rule in prohibiting an employee from rendering services is a violation of Dr. Benedict’s due process rights. Dr. Benedict offered not a single appellate citation in support of his contention. In light of the absence of any legal or evidentiary support for this defense, it is rejected.

IV. DECISION

It is clear that Dr. Benedict provided health care services to his five patients. For the aquatic therapy portion of their care, he contracted with a physical therapy service. He then billed the Carriers for the services rendered. The law at the time prohibited this action. Dr. Benedict was not aware of the prohibition and would not have engaged in the act if he had known about the law.

¹⁷ Petitioner’s Written Closing Argument at unpaginated sheet 6.

¹⁸ TDI Ex. 27.

¹⁹ TDI Ex. 27.

If Dr. Benedict had appeared at the hearing on the merits, he might have offered contrary evidence to that offered by Staff or evidence in mitigation of the remedies sought by Staff. However, despite his having had counsel for nine months prior to the hearing, neither Dr. Benedict nor his attorney made an appearance at the hearing on the merits. In addition, Dr. Benedict failed to prefile any evidence that might have been considered at the hearing, did not seek a continuance of the hearing, and did not attempt to participate in the hearing by telephone.²⁰ Following the hearing, Dr. Benedict complained that Staff had failed to respond accurately to his discovery request about the scope of the alleged violation. By failing to file a special exception or a discovery motion on the issue prior to the hearing on the merits, Dr. Benedict waived his right to object.

With regard to notice, the provisions of SOAH Rule 155.27 require that notice comply with the provisions of the Section 2001.052 of the Administrative Procedure Act (APA).²¹ Subsection (3) of that provision requires the agency to include in the notice “a reference to the particular sections of the statutes and rules involved.” Although the Notice of Hearing issued on February 7, 2006, was defective in that it made no reference to statutes or rules that Dr. Benedict allegedly violated, Staff’s Statement of Matters Asserted/More Definite Statement issued on March 30, 2007, included specific references to 28 TAC § 134.801(f) and TEX. LABOR CODE ANN. § 415.003. The Statement of Matters Asserted/More Definite Statement cured the notice errors in the original Notice of Hearing. In any case, Dr. Benedict did not object to notice at any stage in this process. Dr. Benedict’s defenses, raised for the first time in the closing arguments and without reference to notice, are without merit.

Staff proved its claim against Dr. Benedict by a preponderance of the evidence. Dr. Benedict shall repay to the Carriers a total of \$9,770.35. However, Staff failed to prove the basis for its request for an administrative penalty of \$250.00, and that element of relief is denied.²²

²⁰ On March 20, 2007, counsel for Dr. Benedict filed a motion seeking the right to present Mr. Hernandez’ testimony by telephone. The motion was timely and was unopposed. SOAH Rule 155.45(a) provides that such motions “will be deemed granted without the necessity of an order, unless denied by order of the judge.”

²¹ TEX. GOV’T CODE ANN. 2001.001 *et seq.*

²² For reasons unknown, Staff increased its request for administrative penalties to \$500.00 in its closing brief.

V. FINDINGS OF FACT

1. Justin C. Benedict, D.C., Petitioner, is a licensed chiropractor.
2. Between January 1, 2003, and November 30, 2004, Dr. Benedict prescribed aquatic therapy services for five workers' compensation patients.
3. Dr. Benedict engaged the services of a physical therapist, Shane Hernandez, through two physical therapy facilities to render the services.
4. Dr. Benedict submitted claims to the patients' employers' workers' compensation carriers or self-insured employer (Carriers).
5. Dr. Benedict was paid \$9,904.99 for the aquatic therapy services rendered by Mr. Hernandez to the five patients.
6. Dr. Benedict willfully and intentionally engaged the services of Mr. Hernandez to provide aquatic therapy services to his patients and then submitted the claims to the Carriers as though Dr. Benedict had provided the services himself.
7. On December 2, 2005, Staff of the Texas Department of Insurance, Workers' Compensation Division (Staff/Division) notified Dr. Benedict that he had violated TEX. LABOR CODE ANN. § 415.003 by billing the Carriers for aquatic therapy treatment for the five patients.
8. On December 17, 2005, Dr. Benedict contested the allegation that he had violated the law and requested a hearing.
9. On February 3, 2006, the Division submitted the case to the State Office of Administrative Hearings (SOAH) for docketing.
10. On February 7, 2006, the Division sent Dr. Benedict notice of the hearing.
11. The notice of hearing of February 7, 2006, failed to state the statutes and rules that Dr. Benedict allegedly violated.
12. On March 30, 2007, the Division filed a Statement of Matters Asserted/More Definite Statement that cured the notice deficiencies by listing TEX. LABOR CODE ANN. § 415.003 and 28 TEX. ADMIN. CODE (TAC) § 134.801(f) as the statute and rule that Dr. Benedict had allegedly violated.
13. On July 9, 2007, Administrative Law Judge Paul Keeper held a hearing on the merits at SOAH pursuant to notice.
14. All parties received adequate notice of not less than 10 days of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

15. Staff was represented at the hearing on the merits by its counsel, Amy Morehouse.
16. Neither Dr. Benedict nor his counsel made an appearance at the hearing on the merits, and neither filed a motion for continuance.
17. The administrative record was left open until August 9, 2007, for the submission of written closing arguments and briefs.
18. The record closed at 5:00 p.m. on August 9, 2007.

VI. CONCLUSIONS OF LAW

19. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §§ 402.073(b), 415.034, and 415.003, and TEX. GOV'T. CODE ANN. ch. 2003.
20. Notice of the hearing, as amended, was proper and timely. TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
21. A health care provider commits an administrative violation if the person: (1) submits a charge for health care that was not furnished; (2) administers improper, unreasonable, or medically unnecessary treatment or services; (3) makes an unnecessary referral; (4) violates the division's fee and treatment guidelines; (5) violates a commissioner rule; or (6) fails to comply with a provision of this subtitle. TEX. LABOR CODE ANN. § 415.003.
22. A health care provider or other entity, except as otherwise described, may not submit a bill for treatment(s) and/or service(s) the health care provider did not provide. 28 TEX. ADMIN. CODE (TAC) § 134.801(f) (repealed May 1, 2006).
23. Staff has the burden of proving its claim for relief by a preponderance of the evidence. 1 TAC § 155.41(b); 28 TAC § 148.14(a).
24. Staff showed by a preponderance of the evidence that Dr. Benedict violated the provisions of TEX. LABOR CODE ANN. § 415.003 and 28 TAC § 134.801(f).
25. Based on the above Findings of Fact and Conclusions of Law, Dr. Benedict should reimburse the Carriers the sum of \$9,770.35.

SIGNED September 11, 2007.

**PAUL D. KEEPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**