

No. 2019 6070

OFFICIAL ORDER
of the
TEXAS COMMISSIONER OF WORKERS' COMPENSATION

Date: SEP 03 2019

Subject Considered:

JAMES KEITH ROSE, M.D.
11559 Leopard Street
Corpus Christi, Texas 78410-3415

CONSENT ORDER
TDI-DWC ENFORCEMENT FILE NO. 17418

General remarks and official action taken:

The commissioner of workers' compensation (commissioner) considers whether disciplinary action should be taken against James Keith Rose, M.D. (Dr. Rose).

WAIVER

Dr. Rose acknowledges that the Texas Labor Code and other applicable laws provide certain rights. Dr. Rose waives all of these rights and any other applicable procedural rights in consideration of the entry of this consent order.

FINDINGS OF FACT

The commissioner makes the following findings of fact:

1. Dr. Rose was granted a license by the Texas Medical Board on November 20, 1993. Dr. Rose holds Texas Medical License Number J4486.
2. Dr. Rose was classified as "Poor" tier in the 2009 Performance Based Oversight (PBO) assessment. Dr. Rose was classified as "Average" tier in the DWC Form-73 measure in the 2011 PBO assessment. Dr. Rose was classified as "Average" tier in the MRI measure in the 2013 PBO assessment. Dr. Rose was classified as "Poor" tier in the Completeness measure, "Average" tier in the Documentation measure of the DWC Form-73 and "Average" tier in the MRI measure in the 2015 PBO assessments. Dr. Rose was classified as "High" tier in the Completeness measure and "Average" tier in the Documentation measure of the DWC Form-73 in the 2017 PBO assessments. Dr. Rose was not classified in the 2007 PBO assessment.

MEDICAL QUALITY REVIEW NO. 18-33HCP

3. The Texas Department of Insurance, Division of Workers' Compensation (DWC), as authorized by TEX. LAB. CODE §§ 414.002 and 408.1225(b), monitors system participants

to determine compliance with the Texas Workers' Compensation Act and rules promulgated by the commissioner.

4. Pursuant to the requirements of TEX. LAB. CODE §§ 413.0511 and 413.0512, DWC's Medical Advisor and Medical Quality Review Panel conducted an audit-based medical quality review (MQR No. 18-33 HCP) of 10 cases in which Dr. Rose ordered an MRI of the lumbar spine. The purpose of the audit was to evaluate the application of the *Official Disability Guidelines—Treatment in Workers' Comp* (ODG guidelines) by Dr. Rose to determine the medical necessity and appropriateness of ordering an MRI before at least one month of conservative therapy.

UNREASONABLE OR UNNECESSARY REFERRAL OF SERVICES

5. Dr. Rose ordered an MRI of the lumbar spine that was not reasonable or necessary in 90% of cases evaluated based on the ODG guidelines (9 out of 10).
6. Additionally, Dr. Rose failed to document the rationale or justification for ordering an MRI of the lumbar spine before at least one month of conservative therapy (9 out of 10).

FAILURE TO APPLY DWC TREATMENT GUIDELINES

7. Dr. Rose failed to apply the ODG guidelines when he ordered an MRI of the lumbar spine in 90% of cases evaluated (9 out of 10).
8. Specifically, Dr. Rose ordered an MRI of the lumbar spine without first providing at least one month of conservative therapy to the injured employee, as recommended in the ODG guidelines; and Dr. Rose did not provide a basis for a reasonable deviation or exception to the ODG guidelines when ordering an MRI of the lumbar spine.

TREATMENTS AND EVALUATIONS WERE SUBSTANTIALLY DIFFERENT FROM WHAT THE COMMISSIONER FINDS TO BE FAIR AND REASONABLE

9. Dr. Rose's treatment and evaluations were substantially different from what the commissioner finds to be fair and reasonable in 90% of cases examined (9 out of 10).
10. Specifically, Dr. Rose failed to document the rationale or justification for ordering an MRI of the lumbar spine before at least one month of conservative therapy.

ASSESSMENT OF SANCTION

11. Ordering or performing tests of an injured employee without properly applying the ODG guidelines imposes (or risks imposing) unnecessary testing and extraneous medical costs on the Texas workers' compensation system.

12. In assessing the sanction for this case, DWC appropriately and fully considered the following factors set forth in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e):
 - the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the prohibited act;
 - the history and extent of previous administrative violations;
 - the demonstrated good faith of the violator, including actions taken to rectify the consequences of the prohibited act;
 - the penalty necessary to deter future violations;
 - whether the administrative violation has negative impact on the delivery of benefits to an injured employee;
 - the history of compliance with electronic data interchange requirements;
 - other matters that justice may require, including but not limited to:
 - PBO assessments;
 - the promptness and earnestness of actions to prevent future violations;
 - self-report of the violation;
 - the size of the company or practice;
 - the effect of a sanction on the availability of health care; and
 - evidence of heightened awareness of the legal duty to comply with the Texas Workers' Compensation Act and DWC rules; and
 - to the extent reasonable, the economic benefit resulting from the prohibited act.
13. In assessing the sanction for this case, DWC found the following factors set forth in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e) to be aggravating: the seriousness of the violation, including the nature, circumstances, consequences, extent, and gravity of the prohibited act; and other matters that justice may require including the penalty necessary to deter future violations.
14. In assessing the sanction for this case, DWC found the following factors set forth in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e) to be mitigating: the demonstrated good faith of the violator, including actions taken to rectify the consequences of the prohibited act, as the office has instituted a new note-taking process.
15. Dr. Rose acknowledges that DWC and Dr. Rose have communicated regarding the relevant statutes and rules violated; the facts establishing that the administrative violation occurred; and the appropriateness of the proposed sanction, including how DWC considered the factors under TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e).
16. Dr. Rose acknowledges that, in assessing the sanction, DWC considered the factors set forth in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e).
17. Dr. Rose neither admits nor denies the allegations set forth in this consent order but does not contest the entry of this order. This consent order and its requirements are entered into in the nature of compromise and to avoid the costs of litigation and further expenditure of resources in this matter.

CONCLUSIONS OF LAW

The commissioner makes the following conclusions of law:

1. The commissioner has jurisdiction over this matter pursuant to TEX. LAB. CODE §§ 402.001, 402.00111, 402.00114, 402.00116, 402.00128, 413.002, 413.0511, 413.0512, 414.002, 415.021, and 415.0215; 28 TEX. ADMIN. CODE § 180.26; and TEX. GOV'T CODE §§ 2001.051 – 2001.178.
2. The commissioner has authority to informally dispose of this matter as set forth under TEX. GOV'T CODE § 2001.056; TEX. LAB. CODE §§ 401.021, 402.00128(b)(7), and 415.034; and 28 TEX. ADMIN. CODE § 180.26(h).
3. Pursuant to TEX. LAB. CODE § 415.021, in addition to any sanction, administrative penalty, or other remedy authorized by this subtitle, the commissioner may assess an administrative penalty against a person who commits an administrative violation.
4. Pursuant to TEX. LAB. CODE § 408.0231(f)(7), the commissioner may impose sanctions against a doctor who commits an administrative violation, including mandatory participation in training classes.
5. Pursuant to TEX. LAB. CODE § 408.0231(c)(3), one of the criteria for imposing sanctions on a doctor may include evidence from the medical records that the doctor's evaluations are substantially different from those the commissioner finds to be fair and reasonable.
6. Pursuant to TEX. LAB. CODE § 415.003(3), a health care provider commits an administrative violation if the person makes an unnecessary referral.
7. Dr. Rose violated TEX. LAB. CODE §§ 408.0231(c)(3) and 415.003(3), each time he ordered an MRI of the lumbar spine that was not reasonable or necessary.
8. Pursuant to TEX. LAB. CODE § 415.003(4), a health care provider commits an administrative violation if the person violates DWC's fee and treatment guidelines.
9. Pursuant to TEX. LAB. CODE § 415.003(5), a health care provider commits an administrative violation if the person violates a commissioner rule.
10. Pursuant to 28 TEX. ADMIN. CODE § 137.100(a), health care providers shall provide treatment in accordance with the current edition of the ODG guidelines.
11. Dr. Rose violated TEX. LAB. CODE §§ 415.003(4) and (5), when he failed to apply the ODG guidelines and when he failed to provide a basis for a reasonable deviation or exception to the ODG guidelines when ordering an MRI of the lumbar spine before at least one month of conservative therapy.

12. Pursuant to TEX. LAB. CODE § 415.003(6), a health care provider commits an administrative violation if the person fails to comply with a provision of the Texas Workers' Compensation Act.
13. Pursuant to TEX. LAB. CODE §§ 408.023(l) and 408.025(c) and 28 TEX. ADMIN. CODE § 180.22(c)(2), the treating doctor is responsible for the efficient utilization and management of health care.
14. Dr. Rose violated TEX. LAB. CODE §§ 408.0231(c)(3), 415.003(5), and 415.003(6), each time he unreasonably ordered an MRI of the lumbar spine before at least one month of conservative therapy without documenting the rationale or justification for doing so.

ORDER

James Keith Rose, M.D. is ORDERED:

1. To pay an administrative penalty of \$2,500 within 30 days from the date of this Order;
2. To purchase and maintain a current subscription to the *Official Disability Guidelines—Treatment in Workers' Comp*, published by Work Loss Data Institute, for two years following the date of this Order. Confirmation of the purchase of the first year of subscription must be provided to DWC within 14 days of the date of this Order and confirmation of the purchase of the second year subscription must be provided to DWC within 14 days of the one year anniversary date of this Order; and
3. To attend and complete a KSTAR Medical Record Keeping course within 180 days from the date of this Order. Confirmation of the attendance and completion of the workshop must be provided to DWC within 14 days of completion.

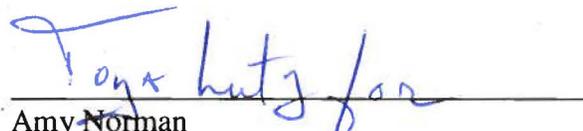
The administrative penalty must be paid by company check, cashier's check, or money order made payable to the "State of Texas." Dr. Rose must mail the administrative penalty to the Texas Department of Insurance, Attn: DWC Enforcement, MC 9999, P.O. Box 149104, Austin, Texas, 78714-9104.

Dr. Rose must mail certificates of completion to the Texas Department of Insurance, Attn: Mary Hughes, DWC Enforcement, 7551 Metro Center Drive, Suite #100, MS-11, Austin, Texas 78744.



Cassie Brown *ncp*
Commissioner of Workers' Compensation

Approved as to Form and Content:



Amy Norman
Staff Attorney, DWC Enforcement
Texas Department of Insurance

