SOAH DOCKET NO. 453-05-7061.C1
VTRA#/ AUDIT PA-05-0005

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

DECISION AND ORDER

I. INTRODUCTION

On June 2, 2005, the staff of the Texas Department of Insurance, Division of Workers' Compensation (Division) issued notices of violation to the _____ (the City), notifying it of various violations of Commission rules relating to the preauthorization for medical services provided to injured workers. On June 21, 2005, the Division issued a Notice of Hearing indicating its intention to proceed to hearing on the alleged violations and informing the City it intended to seek $60,637 in administrative penalties pursuant to TEX. LAB. CODE ANN. § 415.021.[1]

The hearing commenced on June 14, 2007, with Administrative Law Judge (ALJ) Gary Elkins presiding. The Division appeared and was represented by Staff Attorney Renee Crenshaw. The City appeared and was represented by Attorney Timothy White. Neither notice of the hearing nor jurisdiction were disputed. The hearing closed on July 27, 2007, following receipt of post-hearing briefs.

Because the Division failed to provide the City prior notice of noncompliance for which the City could be penalized for subsequent violations, the City has committed no violations for which administrative penalties can be assessed. Consequently, the Division's request for such penalties is denied.

II. DISCUSSION

A. Background

On June 2, 2005, the Division issued 53 notices of violation to the City, notifying it of the following violations:

- Failure on five instances to timely respond to a request for preauthorization, in violation of 28 TEX. ADMIN. CODE (TAC) § 134.600;
- Failure on one occasion to include all required information in the notification, in violation of § 134.600;
- Failure on 11 occasions to timely send written notification of a preauthorization approval within one working day of the approval, in violation of § 134.600(f)(4); and
- Denial of reimbursement for medical services provided without sufficient reason for the denial and when preauthorization was previously obtained from the City, in violation of TEX. LAB. CODE ANN. (the Code) § 408.027 and 28 TAC § 133.304.

B. Summary and Conclusion

The initial issue in this case, as a prerequisite to reaching the substance of the alleged violations outlined above, is whether the Division has met all notice requirements for the assessment of administrative penalties. Only then would a determination on whether violations have occurred be necessary. Based on a review of the Labor Code provisions applicable to the assessment of administrative penalties, the ALJ concludes that the Division has not met the requirements. Thus, as a matter of law administrative penalties are not available to the Division at this time for any of the alleged violations.

C. Evidence and Argument

It is undisputed that the Division's May 2005 audit focused on four general categories of compliance by the City: timeliness of written responses, completeness of written responses, timeliness of verbal responses, and the processing of preauthorization requests. The City argues that the Division failed to give it prior notice of any of the alleged violations. Consequently, it failed to meet a prerequisite to the assessment of administrative penalties under Tex. Lab. Code

1 The proposed penalties for individual violations range from $89.00 to $5246.00.

Ann. § 415.0035(f). The portions of § 415.0035 pertinent to the resolution of this case, subparts (e) and (f), provide the following:

> (e) An insurance carrier or health care provider commits an administrative violation if that person violates this subtitle or a rule, order, or decision of the commission.
>
> (f) A subsequent administrative violation under this section, after prior notice to the insurance carrier or health care provider of noncompliance, is subject to penalties as provided by Section 415.021. Prior notice under this subsection is not required if the violation was committed willfully or intentionally, or if the violation was of a decision or order of the commission.

The City interprets these subsections to say that it can be assessed administrative penalties for a violation of a Commission rule only if the violation was committed willfully or intentionally, it violated a decision or order of the Commission, or it was a subsequent violation after prior notice of noncompliance. Because it had not committed any violations after having received the notices of noncompliance for the alleged violations, and because the Division was not claiming that any of the alleged violations were willful, intentional, or violations of Commission decisions or orders, it was not subject to any administrative penalties.

The Division apparently agrees that prior notice of violations is required, but it presented evidence through the testimony of Division employee Calvin Shannon that such notice had been provided to the City via warning letters issued in 2002 and 2003. Thus, the Division concluded that the prerequisite of prior notice was met, it had authority to issue penalties under § 415.0035(f), and, because the City failed to present evidence that it was in compliance with the

applicable statutory provisions and rules, the Division properly assessed the administrative penalties.

Mr. Shannon explained that the 2002 and 2003 warning letters had been shredded by the State Library in the course of its document retention program. As a result, the Division was left to rely on a computer printout Mr. Shannon described as confirming the issuance of the warning letters and the existence of violations via reference to various code numbers. He also explained that the Labor Code requires carriers to maintain a box at the Division from which a designated carrier representative receives correspondence. The two warning letters would have been placed in the City's designated box, thus evidencing its receipt of the letters. Over the objection of the City, the computer printout was admitted into evidence.[2]

The City objected to consideration of the computer screen printout as, at best, reflecting a claim by the Division of some type of non-compliance by the City. It argued that there was no proof of the warning letters' contents or that they were ever even received by the City. While not denying that the Division had issued the letters, it presented a witness who testified to having no knowledge of them. However, the witness, Beverly Davis, testified that she would not necessarily have known whether the letters were received by the City because her expertise was in the area of utilization review instead of audit. She explained that Joan Bates, the person who handled audits and would be familiar with any such letters, had recently died. Nonetheless, the City argued, the Division bore the burden of proving that the warning letters had been provided to it, and no such evidence was produced.

2 Division Exhibit 2.

Following both the hearing and the City's submission of its post-hearing brief, the Division filed its reply brief. Without explanation, qualification, or a request for a late offer of evidence, and to the surprise of the City, the Division attached to the brief as Exhibits "A" and "B" what it claimed were copies of the two warning letters, the same letters Division witness Calvin Shannon had testified were destroyed by the State Library. In conjunction with the production of the two letters, the Division offered detailed argument on them as though they had been formally offered and admitted as exhibits.

In response to the Division's brief, the City vehemently objected to the ALJ's consideration of the purported warning letters, characterizing them as untimely, improperly submitted, not properly authenticated, and hearsay. On the assumption that the letters might be considered as evidence, the City then presented extended argument on them.

D. Analysis and Conclusion

The ALJ agrees with the City's objections to the consideration of the purported warning letters and is baffled by their unexplained appearance in the Division's closing brief. The manner in which they were presented, either oblivious too or in total disregard for principles of procedure and evidence, was particularly puzzling. They are not in evidence in this proceeding.

The most reasonable interpretation of the § 415.0035 is that prior notice of a violation is required unless the violation was willful or intentional or the violated a decision or order of the

Commission. Because the Division presented no persuasive evidence that it had provided notice of noncompliance to the City before assessing administrative penalties for a subsequent violation, the ALJ does not reach the substance of the alleged violations.

As ALJ Stephen Pacey stated in his Decision and Order in SOAH Docket No. 453-05-7059.C1:

> In 2001, when the amendments [to § 415.0035] were added by House Bill 2600, both the House Research Organization bill analysis (HRO) and the DWC interpreted the amendments to require prior notice before assessing administrative penalties. The HRO said: "[P]rovider would be subject to administrative penalties for a repeat violation after a prior notice of noncompliance. . . ." The DWC said, "The commission may issue an administrative penalty under this new legislation if the violation is repeated after the commission has previously provided notice to the carrier or provider of noncompliance. . . ."

Because no notice of the alleged violations was provided to the City prior to the instant enforcement action, the Division's enforcement action fails.

IV. FINDINGS OF FACT

1. In 2005, the Texas Workers' Compensation Commission, presently the Texas Department of Insurance, Division of Workers' Compensation (the Division) issued 53 notices of violation to the _____ (the City), notifying it of various violations of Division rules relating to the preauthorization to provide medical services to injured workers.

2. On June 21, 2005, the Division issued a Notice of Hearing indicating its intention to proceed to hearing on the alleged violations and informing the City it intended to seek $60,637 in administrative penalties.

3. The City disputed the administrative penalties and the alleged violations and timely requested a hearing.

4. Notice of the hearing was mailed to the City on June 21, 2005. 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.

5. The Division did not allege that the City's violations were willful or intentional or that they violated a decision or order of the Commission

6. The Division did not send the City a prior notice of noncompliance before assessing administrative penalties.

V. CONCLUSIONS OF LAW

7. 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 TEX. LAB. CODE ANN. (the Code) § 401.001 et seq and TEX. GOVT. CODE § 2001.001 et seq.

8. Pursuant to the provisions of TEX. LAB. CODE ANN. § 415.032, the Division served the City with Notices of Violation(s) dated July 30, 2004, alleging violations of 28 TEX. ADMIN. CODE §§ 133.304, 134.600, and § 408.027 of the Code.

9. The City timely filed a written request for a hearing contesting the Notice of Violation(s) as provided by TEX. LAB. CODE ANN. §§ 415.032 and 415.034.

10. The Division cannot assess administrative penalties under § 415.035 of the Code because the City's violations were not willful or intentional and did not violate a decision or order of the Commission, and the Division did not issue a prior notice of noncompliance for a previous violation.

11. Based on the above Findings of Fact and Conclusions of Law, the Division's assessment of penalties against the City is not warranted.

ORDER

IT IS ORDERED that the Texas Department of Insurance, Division of Workers' Compensation shall not assess administrative penalties against the _____ for the alleged violations.

SIGNED September 10, 2007.

_____
GARY W. ELKINS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS