

No. **DWC-10-0023**

OFFICIAL ORDER
of the
COMMISSIONER OF WORKERS' COMPENSATION
of the
STATE OF TEXAS
AUSTIN, TEXAS

Date: **MAR 23 2010**

Subject Considered:

HUMBERTO VARELA, M.D.
506 Gale St
Laredo, TX 78041-6003

CONSENT ORDER
DISCIPLINARY ACTION
TDI ENFORCEMENT FILE NOS. 55669

General remarks and official action taken:

On this date came on for consideration by the Commissioner of Workers' Compensation, the matter of whether disciplinary action should be taken against Humberto Varela, M.D. (Dr. Varela). The Texas Department of Insurance, Division of Workers' Compensation Staff (Division Staff) alleges that Dr. Varela violated the Texas Labor Code and that such conduct constitutes grounds for the imposition of sanctions pursuant to TEX. LAB. CODE ANN., ch. 415.

Division Staff and Dr. Varela announce that they have compromised and settled all claims and agree to the entry of this Consent Order. The parties request that the Commissioner of Workers' Compensation informally dispose of this case pursuant to TEX. GOV'T CODE ANN. § 2001.056, TEX. LAB. CODE ANN. § 402.00128(b)(7), and 28 TEX. ADMIN. CODE § 180.8(h).

JURISDICTION

The Commissioner of Workers' Compensation has jurisdiction over this matter pursuant to TEX. LAB. CODE ANN. §§ 402.001, 402.00111, 402.00114, 402.00116, 402.00128, 402.072, 408.1225, 414.002, 414.003, 415.003, and 415.021; and 28 TEX. ADMIN. CODE §§ 126.7, 130.1, 130.3, 130.6, 180.3, 180.7, 180.8, 180.10, 180.21, 180.22, 180.23, and 180.26; and TEX. GOV'T CODE ANN. §§ 2001.051-2001.178.

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WAIVER

Dr. Varela acknowledges the existence of certain rights provided by the Texas Labor Code and other applicable law, including the right to receive a written notice of possible administrative violations as provided for by TEX. LAB. CODE ANN. § 415.032, the right to request a hearing as provided for by TEX. LAB. CODE ANN. § 415.034, and the right to judicial review of the decision as provided for by TEX. LAB. CODE ANN. § 415.035. Dr. Varela waives these rights, as well as any other procedural rights that might otherwise apply, in consideration of the entry of this Consent Order.

FINDINGS OF FACT

The Commissioner of Workers' Compensation makes the following findings of fact:

System Participant – Certifying Doctor

1. In accordance with 28 TEX. ADMIN. CODE § 130.1(a)(1), only an authorized doctor may certify Maximum Medical Improvement (MMI), determine whether there is permanent impairment, and assign an impairment rating.
2. In accordance with 28 TEX. ADMIN. CODE § 130.1(a)(1)(A)(i)-(iii), doctors serving in the following roles may be authorized: the treating doctors (or a doctor to whom the treating doctor has referred the employee for evaluation of maximum medical improvement and/or permanent whole body impairment in the place of the treating doctor), a designated doctor, and a required medical examination doctor selected by the carrier and approved by the commission after a designated doctor has performed a maximum medical improvement and/or permanent whole body impairment exam.
3. In accordance with 28 TEX. ADMIN. CODE § 130.1(a)(1)(B)(i)-(ii), a doctor serving in one of the roles described in subsection 28 TEX. ADMIN. CODE § 130.1(a)(1)(A), is authorized as follows: a doctor whom the commission has certified to assign impairment ratings or otherwise given specific permission by exception to, is authorized to determine whether an injured employee has permanent impairment, assign an impairment rating, and certify MMI; and a doctor whom the commission has not certified to assign impairment ratings or otherwise given specific permission by exception to is only authorized to determine whether an injured employee has permanent impairment and, in the event that the injured employee has no impairment, certify MMI.
4. In accordance with 28 TEX. ADMIN. CODE § 130.1(a)(3), a doctor who is authorized under this subsection to certify MMI, determine whether permanent impairment exists, and assign an impairment rating and who does, shall be referred to as the "certifying doctor."

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5. Dr. Varela is a certifying doctor.
6. Dr. Varela was last certified to assign impairment ratings on June 11, 2009. This certification expires on June 11, 2011.

**Certification of Maximum Medical Improvement and
Evaluation of Impairment Ratings**

7. In accordance with TEX. LAB. CODE ANN. § 408.123(a), after an employee has been certified by a doctor as having reached maximum medical improvement, the certifying doctor shall evaluate the condition of the employee and assign an impairment rating.
8. In accordance with TEX. LAB. CODE ANN. § 408.123(b), a certifying doctor shall issue a written report certifying that maximum medical improvement has been reached, stating the employee's impairment rating, and providing any other information required by the commissioner to the Division, the employee, and the insurance carrier.
9. In accordance with 28 TEX. ADMIN. CODE § 130.1(d)(1), certification of maximum medical improvement and assignment of an impairment rating requires submission of a Report of Medical Evaluation, also known as the DWC Form-69.
10. In accordance with 28 TEX. ADMIN. CODE § 130.1(d)(2), the DWC Form-69 must be filed with the Division, employee, employee's representative, and the insurance carrier no later than the seventh working day after the later of the date of the certifying examination or the receipt of all of the medical information required by 28 TEX. ADMIN. CODE § 130.1.
11. In accordance with 28 TEX. ADMIN. CODE § 130.1(d)(3)(A)-(B), the Report of Medical Evaluation shall be filed with the insurance carrier by facsimile or electronic transmission; and the Report of Medical Evaluation shall be filed with the commission, the injured employee and the injured employee's representative by facsimile or electronic transmission if the doctor has been provided the recipient's facsimile number or email address; otherwise, the report shall be filed by other verifiable means.
12. In accordance with 28 TEX. ADMIN. CODE § 130.1(e)(1)-(3), the certifying doctor shall maintain the original copy of the Report of Medical Evaluation and narrative as well as documentation of the date of the examination; the date any medical records necessary to make the certification of maximum medical improvement were received, and from whom the medical records were received; and the date, addressees, and means of delivery that reports required under 28 TEX. ADMIN. CODE § 130.1 were transmitted or mailed by the certifying doctor.

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System Participant -- Designated Doctor

13. A "designated doctor", as defined by TEX. LAB. CODE ANN. § 401.011(15), means a doctor appointed by mutual agreement of the parties or by the Division of Workers' Compensation (Division) to recommend a resolution of a dispute as to the medical condition of an injured employee.
14. In accordance with 28 TEX. ADMIN. CODE § 180.21(b), in order to serve as a designated doctor, a doctor must be on the Designated Doctor List (DDL).
15. In accordance with 28 TEX. ADMIN. CODE § 180.21(d)(1)-(4), to be on the DDL on or after January 1, 2007, the doctor shall at a minimum: meet the registration requirements, or the exceptions thereto, of 28 TEX. ADMIN. CODE § 180.21(c)(1) or, upon expiration or waiver of the Approved Doctor List (ADL) in accordance with TEX. LAB. CODE ANN. § 408.023(k), comply with all successor requirements, including but not limited to financial disclosure under TEX. LAB. CODE ANN. §413.041; have filed an application to be on the DDL, which must be renewed biennially; have successfully completed Division-approved training and examination on the assignment of impairment ratings using the currently adopted edition of the American Medical Association Guides, medical causation, extent of injury, functional restoration, return to work, and other disability management topics; and have had an active practice for at least three years during the doctor's career.
16. Dr. Varela is a designated doctor.
17. Dr. Varela was last approved to be on the Division's Designated Doctor List on June 11, 2009. This certification expires on June 11, 2011.

Designated Doctor's Role and Responsibilities

18. In accordance with TEX. LAB. CODE ANN. § 408.0041(a), a designated doctor may be called upon to perform medical examinations, as requested by an insurance carrier, employee, or the Division, to resolve any question about the impairment caused by the compensable injury, the attainment of MMI, the extent of the employee's compensable injury, whether the injured employee's disability is a direct result of the work-related injury, the ability of the employee to return to work, and other similar issues.

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19. In accordance with 28 TEX. ADMIN. CODE § 126.7(n), a designated doctor must file a report, as required by 28 TEX. ADMIN. CODE §§ 130.1 and 130.3, when the designated doctor determines that an employee has reached MMI, when the designated doctor assigns an impairment rating, or when the designated doctor determines that the employee has not reached MMI. The report must be sent to the insurance carrier, the employee, the employee's representative, if any, the treating doctor, and the Division.
20. In accordance with 28 TEX. ADMIN. CODE § 126.7(q), the designated doctor shall maintain accurate records, including the employee records, analysis (including supporting information), and narratives provided by the insurance carrier and treating doctor, to reflect: the date and time of any designated doctor appointments scheduled with an employee; the circumstances regarding a cancellation, no-show or other situation where the examination did not occur as initially scheduled or rescheduled; the date of the examination; the date medical records were received from the treating doctor or any other person or organization; the date the medical evaluation report, including the narrative report described in subsection 28 TEX. ADMIN. CODE § 126.7 (n), was submitted to all parties; the name of all referral health care providers, date of appointments and reason for referral by the designated doctor; and the date the doctor contacted the Division for assistance in obtaining medical records from the insurance carrier or treating doctor.

2009 Compliance Audit of Dr. Varela

21. The Division, as authorized by TEX. LAB. CODE ANN. § 414.002 and 28 TEX. ADMIN. CODE § 180.3, conducts audits of system participants to determine compliance with the Texas Workers' Compensation Act (Act) and Title 28 of the Texas Administrative Code (Rules).
22. Dr. Varela was issued a notice of audit for Audit #69-09-147 on January 20, 2009, and the final report was issued on April 2, 2009.
23. The purpose of the audit was to determine if Dr. Varela was timely in filing the DWC Form-69 with the insurance carrier. The audit also examined the method by which the report was delivered.
24. The audit evaluated Dr. Varela's performance during the period of January 1, 2008 through June 30, 2008.
25. Auditors determined that Dr. Varela filed 63 DWC Form-69s with the Division during the period of review.

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26. Of the 63 DWC Form-69s identified, nineteen were sent to the insurance carrier in a timely manner, and thirteen were sent to the carrier via facsimile or electronic transmission.
27. Of the DWC Form-69s filed by Dr. Varela, 30.16% were timely filed with the carrier and 20.63% were sent to the carrier via facsimile or electronic transmission.
28. Of the 63 DWC Form-69s identified, Dr. Varela failed to timely send the DWC Form-69 to the insurance carrier in 44 instances.
29. Of the 63 DWC Form-69s identified, Dr. Varela failed to send the DWC Form-69 to the insurance carrier via facsimile in 50 instances.

Aggravating Factors

Harm to Injured Employees

30. Pursuant to TEX. LAB. CODE ANN. § 408.121 (a)-(b), an employee's entitlement to impairment income benefits begins on the day after the date the employee reaches MMI and the insurance carrier must begin paying impairment income benefits not later than the fifth day after receiving the doctor's report certifying MMI.
31. Pursuant to TEX. LAB. CODE ANN. § 408.122, a claimant may not recover impairment income benefits unless there is evidence of impairment based on objective clinical or laboratory finding. If the finding of impairment is made by a doctor chosen by the claimant and the finding is contested, a designated doctor or a doctor selected by the insurance carrier must be able to confirm the objective clinical or laboratory finding on which the finding of impairment is based.
32. Failure to timely file the DWC Form-69 impedes the dispute resolution process, which harms injured employees by delaying their receipt of effective medical care, their benefit payments, and their return to work.
33. The payment of impairment income benefits to injured employees may have been delayed as a result of Dr. Varela's inability to submit the DWC Form-69 in a timely manner.

Warning Letter

34. On or about August 24, 2005, the Division issued a warning letter, Referral Number: 126970, to Dr. Varela for failing to timely file a DWC Form-69.

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Mitigating Factors

35. Dr. Varela agrees to adopt and implement the following compliance plan to prevent future administrative violations.
 - a. Dr. Varela will use checklists and attestation forms for each file to document when the required steps were completed;
 - b. The checklist will specify the documentation that needs to be retained in Dr. Varela's files, such as facsimile confirmation sheets, and the applicable deadlines for transmitting said documentation;
 - c. Dr. Varela or an assistant will initial the attestation form that accompanies the checklist after each step is completed; and
 - d. For each individual facsimile sent, Dr. Varela or his assistant will initial the attestation form, record the recipient of the facsimile on the form, and count the pages in the facsimile transmission and record the number of pages successfully transmitted on the form to better ensure accuracy and full compliance with the Act and Rules.
 - e. Dr. Varela will keep facsimile confirmations in the respective files, along with a record of the date any documents were mailed.
36. Dr. Varela agrees to be suspended from the Designated Doctor List for eighteen months. During this suspension, the Division will not assign, nor shall he accept, any initial designated doctor appointments.
37. During this suspension Dr. Varela agrees, upon request of the Division, that he will accept appointments and will timely conduct re-examinations and subsequent examinations of injured workers for which he was previously assigned to as a designated doctor and will timely respond to all Division requests for letters of clarification.
38. Dr. Varela agrees that he will not modify his appointment location matrix for eighteen months without prior approval from the Office of the Medical Advisor. Therefore, for eighteen months there will be no additions or deletions of counties unless approved by the Office of the Medical Advisor.
39. Dr. Varela agrees to file the DWC Form-69 in a timely manner as required by 28 TEX. ADMIN. CODE §§ 126.7 and 130.1.
40. Dr. Varela agrees to file the DWC Form-69 with the carrier via facsimile or electronic transmission as required by 28 TEX. ADMIN. CODE §§130.1(d)(2) and 130.1(d)(3)(A).

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41. Dr. Varela agrees to maintain proper records and documentation as required by 28 TEX. ADMIN. CODE §§ 126.7(q)(1)-(7) and 130.1(e)(1)-(3).

Other Considerations

42. This Consent Order, and the actions required hereby, is entered into in the nature of compromise and settlement and in order to avoid the time, trouble, and expense to the Division and to Dr. Varela of resolving this dispute through administrative or judicial proceedings.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Commissioner of Workers' Compensation makes the following conclusions of law:

1. The Commissioner of Workers' Compensation has jurisdiction over this matter pursuant to TEX. LAB. CODE ANN. §§ 402.001, 402.00111, 402.00114, 402.00116, 402.00128, 402.072, 408.1225, 414.002, 414.003, 415.003, and 415.021; and 28 TEX. ADMIN. CODE §§ 126.7, 130.1, 130.3, 130.6, 180.3, 180.7, 180.8, 180.10, 180.21, 180.22, 180.23, and 180.26; and TEX. GOV'T CODE ANN. §§ 2001.051-2001.178.
2. The Commissioner of Workers' Compensation has authority to informally dispose of this matter as set forth herein under TEX. GOV'T CODE ANN. § 2001.056, TEX. LAB. CODE ANN. § 402.00128(b)(7), and 28 TEX. ADMIN. CODE § 180.8(h).
3. Dr. Varela has knowingly and voluntarily waived all procedural rights to which he may have been entitled regarding the entry of this Order, including, but not limited to, written notice of possible administrative violations, a hearing, and judicial review.
4. In accordance with TEX. LAB. CODE ANN. § 415.021, in addition to any sanction, administrative penalty, or other remedy authorized by this subtitle, the Commissioner of Workers' Compensation may assess an administrative penalty against a person who commits an administrative violation.
5. In accordance with TEX. LAB. CODE ANN. § 415.023(a), a person who commits an administrative violation under Section 415.001, 415.002, 415.003, or 415.0035 as a matter of practice is subject to an applicable rule adopted under TEX. LAB. CODE ANN. § 415.023(b) in addition to the penalty assessed for the violation.

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6. In accordance with 28 TEX. ADMIN. CODE § 180.21(m), in addition to the grounds for deletion or suspension from the ADL or for issuing other sanctions against a doctor under 28 TEX. ADMIN. CODE § 180.26, the Commissioner shall delete or suspend a doctor from the DDL, or otherwise sanction a designated doctor for noncompliance with the requirements of this section or if any of the following conduct occurs:
 - a. failure to timely respond as a pattern of practice to a request for clarification from the Division regarding an examination.
 - b. other violation of applicable statutes or rules while serving as a designated doctor.
7. In accordance with 28 TEX. ADMIN. CODE § 180.26(d)(1), the Medical Advisor may recommend a sanction against a doctor or a carrier or the deletion or suspension of a doctor from the ADL if they violate the Statute, Rules, or a commission decision or order or agreement.
8. In accordance with TEX. LAB. CODE ANN. § 415.003(5), a health care provider, like a designated doctor, commits an administrative violation each time he or she violates a commissioner's rule.
 - a. Humberto Varela, M.D. violated 28 TEX. ADMIN. CODE § 130.1(d)(2), each time he failed to file the DWC Form-69 in a timely manner.
 - b. Humberto Varela, M.D. violated 28 TEX. ADMIN. CODE §§ 130.1(d)(2) and 130.1(d)(3)(A) each time he failed to send the DWC Form-69 to the carrier via facsimile or electronic transmission.
9. In accordance with TEX. LAB. CODE ANN. § 415.021(a), in addition to any other provisions in this subtitle relating to violations, a person commits an administrative violation if the person violates, fails to comply with, or refuses to comply with this subtitle or a rule, order, or decision of the commissioner.
 - a. Humberto Varela, M.D. violated 28 TEX. ADMIN. CODE § 130.1(d)(2), each time he failed to file the DWC Form-69 in a timely manner.
 - b. Humberto Varela, M.D. violated 28 TEX. ADMIN. CODE §§ 130.1(d)(2) and 130.1(d)(3)(A) each time he failed to send the DWC Form-69 to the carrier via facsimile or electronic transmission.
10. Humberto Varela, M.D. failed to timely file the DWC Form-69 with the carrier in forty-four (44) instances.

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11. Humberto Varela, M.D. failed to file the DWC Form-69 with the carrier via facsimile or electronic transmission in fifty (50) instances.

Based on the Findings of Fact and Conclusions of Law above, the Commissioner of Workers' Compensation has determined that the appropriate disposition is imposition of the following sanctions and full compliance with the terms of this Order.

IT IS THEREFORE ORDERED that thirty (30) days from the date of this Order, Humberto Varela, M.D. shall be suspended from the designated doctor list for a period of eighteen (18) months. During this suspension, Humberto Varela, M.D. will not be assigned, nor shall he accept, initial designated doctor appointments.

IT IS FURTHER ORDERED that during this eighteen (18) month suspension, Humberto Varela, M.D., upon request of the Division, shall accept appointments and timely conduct re-examinations and subsequent examinations of injured workers for which he was previously assigned to as a designated doctor and shall timely respond to all Division requests for Letters of Clarification.

IT IS FURTHER ORDERED that Humberto Varela, M.D. will not modify his appointment location matrix for eighteen (18) months without prior approval from the Office of the Medical Advisor. Therefore, for eighteen (18) months there will be no additions or deletions of counties unless approved by the Office of the Medical Advisor.

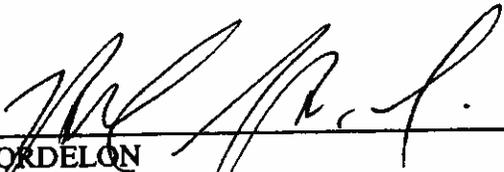
IT IS FURTHER ORDERED that Humberto Varela, M.D. will file the DWC Form-69 in a timely manner as required by 28 TEX. ADMIN. CODE § 130.1(d)(2).

IT IS FURTHER ORDERED Humberto Varela, M.D. will file the DWC Form-69 with the carrier via facsimile or electronic transmission as required by 28 TEX. ADMIN. CODE §§ 130.1(d)(2) and 130.1(d)(3)(A).

IT IS FURTHER ORDERED Humberto Varela, M.D. will maintain documentation as required by 28 TEX. ADMIN. CODE §§ 130.1(e) and 130.3(e).

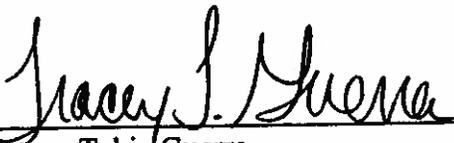
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IT IS ALSO ORDERED by the Commissioner of Workers' Compensation that should Humberto Varela, M.D. fail to comply with the terms of this Order that Humberto Varela, M.D. will have committed an additional administrative violation and his failure to comply with the terms of this Order may subject Humberto Varela, M.D. to further penalties as authorized by the Texas Labor Code, which, pursuant to TEX. LAB. CODE ANN. § 415.021(a), includes the right to impose an administrative penalty of up to \$25,000 per day per occurrence.



ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

FOR THE STAFF:



Tracey Tobin Guerra
Staff Attorney, Enforcement Division
Texas Department of Insurance

COMMISSIONER'S ORDER
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AGREED, ACCEPTED, and EXECUTED on this 25th day of January, 2010 by:



Signature of Humberto Varela, M.D.

