

OFFICIAL ORDER
of the
TEXAS COMMISSIONER OF WORKERS' COMPENSATION

Date: **SEP 16 2019**

Subject Considered:

JAVIER SAMUEL HERNANDEZ, D.C.
11890 Vista Del Sol Drive, Suite A-117
El Paso, Texas 79936

AMENDED CONSENT ORDER
TDI-DWC ENFORCEMENT FILE NO. 16499

General remarks and official action taken:

The commissioner of workers' compensation (commissioner) considers whether disciplinary action should be taken against Javier Samuel Hernandez, D.C. (Dr. Hernandez).

WAIVER

Dr. Hernandez acknowledges that the Texas Labor Code and other applicable laws provide certain rights. Dr. Hernandez 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. Hernandez holds Texas Board of Chiropractic Examiners License No. 09979, which was issued by the Texas Board of Chiropractic Examiners on February 11, 2005.
2. Dr. Hernandez is a designated doctor (DD) in the Texas workers' compensation system. Dr. Hernandez is certified to rate maximum medical improvement (MMI) and assign an impairment rating (IR). Dr. Hernandez was first certified as a DD, to rate MMI, and to assign IRs on September 2, 2014. Dr. Hernandez's certification as a DD, to rate MMI, and to assign IRs will expire on October 2, 2020. Dr. Hernandez identified Genesis Medical Management Solutions as his scheduling company since April 21, 2014.
3. Dr. Hernandez was not classified in the 2007, 2009, 2011, 2013, 2015, or 2017 Performance Based Oversight (PBO) assessments.

MEDICAL QUALITY REVIEW NO. 18-28-DD

4. The Texas Department of Insurance, Division of Workers' Compensation (DWC), as authorized by TEX. LAB. CODE §§ 414.002 and 408.1225(b), monitors DDs to determine compliance with the Texas Workers' Compensation Act and DWC rules promulgated by the commissioner.
5. 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. 18-28-DD) of 10 cases in which Dr. Hernandez conducted DD examinations of injured employees. The purpose of the audit was to evaluate the medical necessity and appropriateness of additional testing or a referral by Dr. Hernandez to resolve a question at issue in each examination.

SUBMITTING UNNECESSARY REFERRALS/ORDERING OR PERFORMING UNNECESSARY TESTING

6. Dr. Hernandez submitted unnecessary referrals to other health care providers or performed unnecessary testing of an injured employee as part of a DD examination in 70% of cases examined (7 out of 10).

FAILURE TO FILE DD REPORT IN THE FORM AND MANNER REQUIRED BY DWC

7. Dr. Hernandez failed to explain in the DD report why additional testing or a referral was necessary to resolve the question at issue in 100% of cases examined (10 out of 10).

SUBMISSION OF INACCURATE OR INAPPROPRIATE REPORTS DUE TO INAPPROPRIATE OR UNREASONABLE EVALUATIONS

8. Dr. Hernandez submitted an inaccurate or inappropriate DD report due to insufficient medical history or physical examination and analysis of medical records in 100% of cases examined (10 out of 10).
9. Return-to-work (RTW) was at issue in seven of the 10 cases. Dr. Hernandez inappropriately or unreasonably failed to consider the Medical Disability Advisor (MDA) in 70% of the cases where RTW was an issue (7 out of 10).

ASSESSMENT OF SANCTION

10. Submitting unnecessary referrals to other health care providers or ordering or performing unnecessary testing of an injured employee as part of a DD examination imposes extraneous medical costs on the workers' compensation system and unreasonably delays the completion of the DD's report.
11. Failure to file a DD report in the form and manner required by DWC increases the likelihood of disputes and hinders the ability of DWC and system participants to resolve disputes promptly and fairly.

12. In assessing the penalty 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 in 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 violations, including the nature, circumstances, consequences, extent, and gravity of the prohibited act; and the penalty necessary to deter future violations.
14. In assessing the sanction in 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 history and extent of previous administrative violations (none); other matters that justice may require, including but not limited to, the size of the practice and after the MQR 18-28-DD review and this enforcement action, evidence of heightened awareness of the legal duty to comply with the Texas Workers' Compensation Act and DWC rules.
15. Dr. Hernandez acknowledges that DWC and Dr. Hernandez have communicated regarding the relevant statutes and rules violated; the facts establishing that violations occurred; and the appropriateness of the proposed sanction, including how DWC considered applicable factors set forth in TEX. LAB. CODE § 415.021(c) and 28 TEX. ADMIN. CODE § 180.26(e).
16. Dr. Hernandez 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).

CONCLUSIONS OF LAW

The commissioner makes the following conclusions of law:

1. The commissioner has jurisdiction over this matter pursuant to TEX. LAB. CODE §§ 401.021, 402.001, 402.00111, 402.00114, 402.00116, 402.00128, 408.0041, 408.1225, 413.002, 413.044, 413.0511, 413.0512, and 414.002.
2. The commissioner has authority to informally dispose of this matter as set forth herein 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 § 415.003(3), a health care provider commits an administrative violation if the person makes an unnecessary referral.
6. Pursuant to TEX. LAB. CODE § 415.003(5), a health care provider commits an administrative violation if the person violates a commissioner rule.
7. Pursuant to 28 TEX. ADMIN. CODE § 127.210(a)(5), the commissioner may sanction a DD for submitting unnecessary referrals to other health care providers.
8. Pursuant to 28 TEX. ADMIN. CODE § 127.210(a)(6), the commissioner may sanction a DD for ordering or performing unnecessary testing of an injured employee as part of a DD examination.
9. Dr. Hernandez violated TEX. LAB. CODE §§ 415.003(3) and (5) and 28 TEX. ADMIN. CODE § 127.210(a)(5) and (6) each time he submitted unnecessary referrals to other health care providers and ordered or performed unnecessary testing of an injured employee as part of his DD examination.
10. Pursuant to 28 TEX. ADMIN. CODE § 127.220(a)(7), DD narrative reports must be filed in the form and manner required by DWC and at a minimum summarize any additional testing conducted or referrals made as part of the evaluation and explain why the testing or referral was necessary to resolve a question at issue in the examination.
11. Dr. Hernandez violated TEX. LAB. CODE § 415.003(5) and 28 TEX. ADMIN. CODE § 127.220(a)(7) each time he filed a DD report that failed to explain why the testing or referral was necessary to resolve a question at issue in the examination.

12. Pursuant to 28 TEX. ADMIN. CODE § 127.210(a)(7), the commissioner may sanction a DD for submission of inaccurate or inappropriate reports due to insufficient medical history or physical examination and analysis of medical records.
13. Pursuant to TEX. LAB. CODE § 408.0231(c)(3), the commissioner may sanction a DD based on evidence from DWC's medical records that a DD's charges, fees, diagnoses, treatments, evaluations, or IRs are substantially different from those the commissioner finds to be fair and reasonable.
14. Dr. Hernandez violated 28 TEX. ADMIN. CODE § 127.210(a)(7) and TEX. LAB. CODE §§ 408.0231(c)(3) and 415.003(5) each time he submitted an inaccurate or inappropriate DD report that inappropriately or unreasonably addressed the question or questions he was ordered to answer.
15. Pursuant to 28 TEX. ADMIN. CODE § 137.10(a), the DD is required to apply the appropriate edition of the MDA or other evidence-based medicine when appropriate to determine RTW.
16. Dr. Hernandez violated 28 TEX. ADMIN. CODE § 137.10(a), each time he failed to apply the MDA or other evidence-based medicine when RTW was an issue.

ORDER

Javier Samuel Hernandez, D.C. is ORDERED:

1. To pay an administrative penalty of \$4,000 within 60 days from the date of this Order;
2. To attend and complete a KSTAR medical recordkeeping 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;
3. To complete the *Designated Doctor 101 Webinar* within 90 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;
4. To complete the *Designated Doctor Case-Based Webinar Series: Module 1 – Maximum Medical Improvement* within 90 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;
5. To complete the *Designated Doctor Case-Based Webinar Series: Module 2 – Spine, Maximum Medical Improvement, Impairment Rating, and Extent of Injury* within 90 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;
6. To complete the *Designated Doctor Case-Based Webinar Series: Module 3 – Upper Extremity Maximum Medical Improvement and Impairment Rating* within 90 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; and

7. To complete the *Designated Doctor Case-Based Webinar Series: Module 4 – Lower Extremity Maximum Medical Improvement and Impairment Rating* within 90 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."

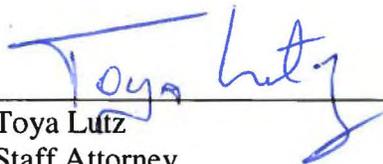
Javier Samuel Hernandez, D.C. must mail the administrative penalty to the Texas Department of Insurance, Attn: DWC Enforcement, MC 9999, P.O. Box 149104, Austin, Texas, 78714-9104.

Javier Samuel Hernandez, D.C. must mail certificates of completion to the Texas Department of Insurance, Attn: Neal Bertling, DWC Enforcement, 7551 Metro Center Drive, Suite #100, MS-11, Austin, Texas 78744.



Cassie Brown *NCM*
Commissioner of Workers' Compensation

Approved as to Form and Content:



Toya Lutz
Staff Attorney
DWC Enforcement
Compliance and Investigations
Texas Department of Insurance

