

STATE OFFICE OF ADMINISTRATIVE HEARINGS

300 West 15th Street, Suite 502

Austin, Texas 78701

DOCKET NO. 453-02-3466.M4

MDR NO. M4-02-2246-01

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| OXYMED, INC., | § | BEFORE THE STATE OFFICE |
| Petitioner | § | |
| | § | |
| v. | § | OF |
| | § | |
| TEXAS WORKERS' COMPENSATION | § | |
| COMMISSION and TML | § | |
| INTERGOVERNMENTAL RISK POOL | § | |
| Respondents | § | ADMINISTRATIVE HEARINGS |

DECISION AND ORDER

I. Summary

Petitioner, OxyMed, Inc., sought reimbursement for durable medical equipment consisting of a knee brace from TML Intergovernmental Risk Pool (Carrier). Carrier reimbursed a portion of the amount requested. The Texas Worker's Compensation Commission's Medical Review Division (MRD) denied Petitioner's request for additional reimbursement of \$443.48 for the knee brace. Petitioner challenged that denial.

A hearing was convened in this matter by Suzanne Formby Marshall, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH) on August 15, 2002. Peter Rogers, attorney appeared on behalf of Petitioner. Attorney Steve Tipton appeared on behalf of the Carrier. The hearing concluded and the record closed on that same day.

Based on the evidence, the ALJ concludes that Petitioner's claim for reimbursement for the additional amount of \$443.48 for the knee brace should be denied. The particular facts and reasoning in support of this decision are set forth below in the Findings of Fact, and the legal conclusions derived from those facts appear in the Conclusions of Law.

II. Evidence

The record in this case consisted of the certified record of the MRD proceeding and the testimony of Mr. Emil Cerullo, the owner of OxyMed, Inc.

According to Mr. Cerullo, the usual and customary rate for the Defiance knee brace provided to Claimant is \$1,530.00. One other carrier has reimbursed Petitioner \$1,530.00 for the same type of brace. Exhibit 1, p. 23. There was no evidence of whether other carriers had reimbursed the brace at a different rate or whether this brace had been dispensed only twice by the Petitioner. Mr. Cerullo testified that the Defiance knee brace is custom-fitted to the individual for whom it is prescribed. Extensive measurements are taken prior to ordering the brace and the brace must be adjusted to the individual after it is received from the manufacturer. Because of the custom nature of the brace, it cannot be returned to the manufacturer.

Petitioner also relies on the information submitted to Carrier during its pre-authorization request as evidence that the Carrier was aware of the brace's cost before its authorization. On the pre-authorization request, the price of the brace was noted to be \$1,530.00. Exhibit 1, p. 20. Additionally, the record contains a response from Petitioner's Collections Agent, which notes that the brace is "priced at \$1800.00." Exhibit 1, p. 18.

The Carrier argued that the amount requested was not fair and reasonable, relying upon its use of the Ingenix Comprehensive Healthcare Payment System, which is a national database that compiles prevailing fees that are referenced by zip code and procedure codes. The amount paid to Petitioner was based upon the system's information for the procedure. Exhibit 1, pp. 31-32.

The ALJ finds that the pre-authorization approval did not constitute approval of the charge for the knee brace, but was merely an approval that a knee brace was medically necessary for the Claimant. Although Petitioner made an initial showing that its charge was fair and reasonable through evidence that it charged its usual and customary rate, it did not rebut Carrier's evidence that its database methodology supported the payment it made on the basis of a fair and reasonable rate. Petitioner could have introduced additional evidence, for example, such as the invoice for the brace showing its actual cost from the manufacturer, a reasonable profit above actual cost, or other instances of payment at the billed charge by other providers, to support the claim that the actual and customary charge was also fair and reasonable.

III. FINDINGS OF FACT

1. ____ (Claimant) sustained a compensable work-related injury on _____. Claimant's injury is covered by worker's compensation insurance written for Claimant's employer, the _____, by the TML Intergovernmental Risk Pool (Carrier).
2. The Claimant's doctor prescribed a knee brace as part of Claimant's treatment.
3. Carrier pre-authorized the knee brace as being medically necessary.
4. Oxymed, Inc. (Petitioner) supplied a Defiance knee brace to the Claimant.
5. The Defiance knee brace is custom-fitted to an individual's knee and acts to stabilize the knee.
6. Petitioner billed Carrier \$1,530.00 for the knee brace, his usual and customary rate.
7. The brace's actual cost to Petitioner was not presented at the hearing.
8. Carrier reimbursed Petitioner the amount of \$1,086.52.
9. The Provider and Carrier did not agree on a pre-negotiated amount for the knee brace.
10. Carrier denied additional payment for the brace on the ground that the amount billed was not a fair and reasonable rate, as supported by the reimbursement methodology used by the Carrier.

11. Petitioner requested dispute resolution by the Texas Workers' Compensation Medical Review Division (MRD) on February 13, 2002.
12. The MRD issued its findings and decision on May 31, 2002, concluding that there was not enough evidence to determine a fair and reasonable rate for the brace and recommended that additional reimbursement be denied.
13. The Petitioner appealed the decision of the MRD to the State Office of Administrative Hearings (SOAH).
14. Notice of the hearing on the merits in this case was mailed to the Petitioner, the Carrier, and the Commission on July 8, 2002. The hearing convened on August 15, 2002, at 9:00 a.m.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction to decide the issues presented pursuant to TEX. LABOR CODE § 413.031.
2. 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. LABOR CODE § 413.031 and TEX. GOV'T CODE ch. 2003.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. § 2001.052.
4. Petitioner has the burden of proving by a preponderance of the evidence that it should prevail in this matter. 28 TEX. ADMIN. CODE (TAC) § 148.21(h).
5. The Durable Medical Equipment (DME) Ground Rules found in the Commission's 1996 Medical Fee Guideline, adopted by reference at 28 TAC § 134.201 apply in this case.
6. Durable Medical Equipment Ground Rule IV. provides that there is no maximum allowable reimbursement (MAR) for DME items and that such items should be billed at the usual and customary rate of the DME provider.
7. As the party with the burden of proof, Petitioner was required to show the existence of a pre-negotiated rate between the provider and carrier for the brace or a fair and reasonable rate. DME Ground Rules IV. and IX C.
8. Preauthorization of the knee brace did not amount to a pre-negotiated agreement by the Carrier to pay the price of the knee brace, but was approval of the medical necessity of the brace. 28 TAC §134.600.
9. Petitioner did not prove by a preponderance of the evidence that the usual and customary charge for the Defiance knee brace is fair and reasonable.
10. Petitioner is not entitled to reimbursement.

ORDER

The claim by Petitioner, OxyMed, Inc., for additional payment from TML Intergovernmental Risk Pool is denied.

ISSUED this 10th day of October 2002.

**SUZANNE FORMBY MARSHALL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**