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| TEXAS MUTUAL INSURANCE CO., <i>Petitioner,</i> | § | BEFORE THE STATE OFFICE |
| | § | |
| VS. | § | OF |
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| JACOB ROSENSTEIN, M.D., <i>Respondent.</i> | § | ADMINISTRATIVE HEARINGS |
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DECISION AND ORDER

The Medical Review Division (MRD) of the Texas Workers' Compensation Commission (TWCC or Commission) has ordered Texas Mutual Insurance Company (Texas Mutual or the Carrier) to reimburse Jacob Rosenstein, M.D. \$200.00 for conscious sedation he administered during a facet joint injection procedure. Texas Mutual considers the procedure global to the surgery Dr. Rosenstein performed and appeals the MRD order. The ALJ concludes that Texas Mutual failed to prove that conscious sedation is global to the facet block procedure, but Texas Mutual succeeded in proving that Dr. Rosenstein should not be reimbursed at the rate set for anesthesiologists in the Anesthesiology Ground Rules. She finds that Dr. Rosenstein is entitled to reimbursement in the amount of \$72.84 for the disputed claims in this case.

I. Jurisdiction, Notice, and Procedural History

The Commission has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act (Act), TEX. LAB. CODE ANN. ch. 401 *et seq.* The State Office of Administrative Hearings (SOAH) has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §413.031 and TEX. GOV'T CODE ANN. ch. 2003.

The MRD issued its decision on September 2, 2002. Texas Mutual filed a timely request for hearing on October 18, 2002, after receiving the MRD decision on October 1, 2002. Proper and timely notice of the hearing was issued on December 11, 2002. The hearing was convened February 5, 2003, with ALJ Deborah L. Ingraham presiding. Patricia Eads represented Texas Mutual and Dr. Rosenstein represented himself. The record closed after the parties submitted written closing arguments on February 21, 2003. Texas Mutual, as the petitioner, had the burden of proof in this case. 28 TEX. ADMIN. CODE §148.21(h).

II. Discussion

Issue: Can a surgeon bill separately for the conscious sedation he administered during the surgery and be reimbursed at the rate paid to anesthesiologists under the TWCC Anesthesiology Ground Rules?

Background. On October 12, 2001, Dr. Rosenstein performed bilateral lumbar facet injections at L1-L2, L2-L3, and L5-S1 to relieve a workers' compensation claimant's pain caused by lumbar radiculopathy. *See* Ex.1, Operative Report at pp.18-19. During that surgical procedure, Dr. Rosenstein placed the claimant under conscious sedation and billed Texas Mutual \$200.00 for the conscious sedation under the CPT Code for *Unlisted Anesthesia Procedure*, 01999. The Carrier denied payment using denial code G, and explained that a separate reimbursement is not allowed because the April 1, 1996 TWCC Medical Fee Guideline Ground Rules identify the service as an integral component of another service, procedure, or program. *See* Ex.1 at p.10.

The MRD ordered reimbursement on the grounds that CPT Code 01999 is not global to any other procedure performed on the date in dispute.¹ In his decision, the Dispute Resolution Officer referenced the 1994 Global Service Data for Orthopaedic Surgery (GSDOS) publication, the Medical Fee Guideline Surgery Ground Rules (I)(D), (II)(A), the Medical Fee Guideline Anesthesia Ground Rules, and the CPT Descriptor.

Texas Mutual's position. Texas Mutual makes two arguments to support its position that the conscious sedation charges should not be separately reimbursed. First, it asserts that billing separately for providing conscious sedation during facet blocks is not the usual and customary billing practice of physicians who perform that surgical procedure. The Carrier relies on the testimony of its expert, Robert Joyner, M.D., who is board certified in anesthesiology, has substantial experience performing facet injections, and acts as a peer bill reviewer for various insurance companies. Dr. Joyner testified that he does not bill separately for sedation and has never seen another physician do so in his peer reviews.

Second, Texas Mutual argues that, according to the Anesthesia Ground Rules in the 1996 Medical Fee Guideline and the 1995 Global Service Data for Orthopaedic Surgery, conscious sedation is global to the larger facet block procedure and should, therefore, be included in those charges. The 1994 CPT Codes apply to this case and the facet blocks are billed using surgical CPT Code 64442. The Carrier argues that the TWCC Medical Fee Guideline requires participants to apply the ground rules in the Global Services Data for Orthopaedic Surgery, and those ground rules include in the global surgical package anesthesia administered by the surgeon for most musculoskeletal procedures.

The Carrier also draws a distinction between the *surgical* CPT Code for facet blocks and the *anesthesia* CPT Code Dr. Rosenstein used to bill the conscious sedation, CPT Code 01999. In its view, Dr. Rosenstein cannot bill as both a surgeon and an anesthesiologist. The Carrier also points out that, as a catch-all code, CPT Code 01999 does not have a maximum allowable reimbursement (MAR) and would be reimbursed at a fair and reasonable rate. *See* Texas Mutual Closing Argument at pp.1-3.

¹ The MRD decision contains two conflicting dates of service: October 12, 2001 and March 15, 2002. Neither party mentioned this discrepancy, so the judge assumes the March date is a typographical error. *See* Ex. 1 at p. 2, ¶ 3.

Dr. Rosenstein's position. Dr. Rosenstein asserts that injections into the facet joints to relieve a patient's back pain are very painful themselves, so the patient is placed under conscious sedation to make the procedure tolerable, safe, and more comfortable. During the surgical procedure performed on the workers' compensation claimant, Dr. Rosenstein used very large needles to inject the medications Phenol (a chemical neurolytic agent), Depo Medrol (a steroid), and Sensorcaine (an anesthetic agent) into the claimant's low back, specifically the facet joints (the small joints of the low back that connect the vertebra together). (The Phenol destroys the nerve and gives long term pain

relief; the Sensorcaine is a local anesthetic agent, which only works for several hours; the steroid reduces inflammation.) Dr. Rosenstein explained that some patients receive only the local anesthetic agent and the steroid, while some patients receive Phenol for long-term pain relief. He administered all three drugs to this claimant

In addition, Dr. Rosenstein placed the claimant under conscious sedation by intravenously administering 1 milligram of versed and 10 milligrams of morphine sulfate. The Claimant also received 80 milligrams of morphine sulfate and 25 milligrams of phenergan one hour before the surgery. He described conscious sedation as having the patient well-sedated so that he feels the pain as little as possible, without over-sedating the patient to the point where he stops breathing and needs to be intubated. During conscious sedation, the patient is closely monitored to obtain the optimal level of sedation. Dr. Rosenstein does not agree that conscious sedation is global to the facet injection procedure. In his view, the only thing considered global to the surgical procedure is local anesthesia, which involves use of local anesthetic to infiltrate the skin or digital nerve. Conscious sedation, however, is a much greater level of service in Dr. Rosenstein's view, and nowhere in the surgery ground rules does it say that conscious sedation is global to the surgical procedure. *See* Rosenstein Letter Brief at p. 3.

III. Analysis

Usual and Customary Billing Practice. Texas Mutual argues that billing separately for providing conscious sedation during facet blocks is not the usual and customary billing practice of physicians who perform this procedure. The Carrier proffered Dr. Joyner's testimony, but the judge found it insufficient to support this point. While Dr. Joyner testified that he never bills separately for sedation, he also testified that most patients receiving facet injections do not need conscious sedation. The judge concludes from this testimony that it is Dr. Joyner's usual and customary practice not to bill separately for the sedation his nurse administers. How Dr. Joyner handles billing for conscious sedation was unclear because much of his testimony focused on the *need* for conscious sedation during the procedure. Because this is not a medical necessity case, the judge found all of that testimony superfluous. Moreover, Dr. Joyner's testimony about what he sees other surgeons bill for in his peer review duties was not detailed enough to be of assistance on the issue.

Global Fee Concept. Texas Mutual also argues that, according to the Anesthesia Ground Rules in the 1996 Medical Fee Guideline and the 1995 Global Service Data for Orthopaedic Surgery, conscious sedation is global to the larger facet block procedure. The judge disagrees. The Guideline for Global Service Data for Orthopaedic Surgery (Orthopaedic Surgery Guideline) provides that:

[a]nesthesia administered by the surgeon is included in the global surgical package for most musculoskeletal procedures and cannot be coded separately; [t]his includes local anesthetic, fracture hematoma infiltration, digital, metacarpal, metatarsal and distal periperal nerve injection blocks.

The Anesthesia Ground Rules state that *for diagnostic or therapeutic nerve blocks performed by the surgeon, anesthesiologist, or CRNA, only one reimbursement per procedure shall be allowed, regardless of the time required. See Anesthesia Ground Rules Section V. D.* Nerve blocks are a form of anesthesia. It appears from the evidence, however, that conscious sedation is something different from the anesthesia administered in the nerve blocks.

Dr. Rosenstein billed and was reimbursed for the nerve block injections coded 64442 and 64443 for this claimant. TWCC Modifier -47 governs *Anesthesia by Surgeon* and provides some guidance on what the Commission's rules include in a nerve block procedure. TWCC Modifier -47 states that:

[w]hen regional anesthesia (i.e. the administration of nerve blocks, see codes 64400-64640) is provided by the surgeon, use modifier -47. The explanation for TWCC Modifier -47 states that *[l]ocal infiltration, digital block, or topical anesthesia is included in the MAR of the procedure code.*² The steroid Depo Medrol and the local anesthetic agent Sensorcaine Dr. Rosenstein used fall into this category and were included in the maximum amount reimbursable for the procedure code.³

While conscious sedation may or may not be a type of anesthesia "it is unclear in this record" the judge can conclude from the evidence that conscious sedation is different from a local anesthetic and nerve block injections.

Moreover, under TWCC Modifier -47, the administration of nerve blocks under CPT Codes 64400-64640 does not include the administration of sedatives, tranquilizers, hypnotics, and analgesics. The modifier explanation states that *[r]egional anesthesia excludes the administration of sedatives, tranquilizers, hypnotics, and analgesics.* The exclusion of these drugs suggests that they are something separate from the nerve block procedure. To the extent they encompass a narcotic or an anti-inflammatory drug, surgeons may simply include them in the surgery charges as does Dr. Joyner. Conscious sedation, however, appears to be something more than a tranquilizer, but less than general anesthesia.

² Although the parties did not mention Modifier -47 in their arguments, the Carrier referenced the modifier as the proper billing code in the certified record.

³ See 1996 Medical Fee Guideline General Instructions. Regarding the Phenol, Dr. Rosenstein explained in his brief that he used Code 01999 for *unlisted anesthesia procedure(s)* because there is no specific anesthesia code listed for injection of Phenol into the facet joint. The judge did not understand the doctor's argument to include Phenol in the conscious sedation. To the extent Dr. Rosenstein is making that argument, the judge concludes that the administration of Phenol is included in and global to the facet block injections.

Dorland's Medical Dictionary defines anesthesia as loss of the ability to feel pain, caused by the administration of a drug or by other medical interventions.⁴ A sedative is *an agent that allays excitement*. Conscious sedation refers to *the state of sedation in which the conscious patient is rendered free of fear, apprehension, and anxiety through the use of pharmacological agents*.⁵ According to his Operative Report, Dr. Rosenstein established conscious sedation by intravenously administering 1 milligram of versed and 10 milligrams of morphine sulfate. The claimant also received 80 milligrams of morphine sulfate and 25 milligrams of phenergan one hour before the surgery. The global fee concept for surgical procedures requires that a single fee be billed and paid for all necessary services normally performed by the surgeon before, during, and after the surgical procedure. See Surgery Ground Rules, Section I. A. According to Dr. Joyner, conscious sedation is not normally needed during nerve block injections. Dr. Rosenstein testified that the claimant was nervous about the procedure, and he administered conscious sedation to ensure that the claimant did not become agitated while the needles were inserted next to his spinal column. Therefore, the judge concludes that conscious sedation is separate from anesthetic nerve block injections and not normally performed with nerve blocks. Dr. Rosenstein may, under the current TWCC rules, bill separately for the conscious sedation this claimant needed.

Texas Mutual further challenges Dr. Rosenstein's use of an anesthesiology billing code for reimbursement. The Carrier argues that he cannot bill as an anesthesiologist because he is double-billing for his time. Dr. Rosenstein billed Texas Mutual \$200.00 using CPT Code 01999, an anesthesia code listed in TWCC's Anesthesia Ground Rules. Those Ground Rules allow reimbursement for total anesthesia value for each procedure, which includes the basic value plus modifying units plus time units. Dr. Rosenstein explained that he arrived at the amount of \$200.00 by referring to the reimbursement for anesthesia in addition to a lumbar discogram procedure in the anesthesia section of 1996 TWCC Fee Guideline, reasoning that facet injections are just as painful as a lumbar discogram. He notes that the CPT code for the lumbar discogram is 01912 - *anesthesia for injection procedure for diskography; lumbar*, which has an RVU of 5 units with each unit valued at

⁴ DORLAND'S MEDICAL DICTIONARY 74 (28th Ed.1994).

⁵ *Id.* at 1501; both parties also pointed out that after the 1996 Medical Fee Guideline was adopted, the AMA CPT 2003 coding book established code 99141 for conscious sedation. The code is defined as:

sedation with or without analgesia (conscious sedation); intravenous, intramuscular or inhalation. Conscious sedation is further defined as sedation with or without analgesia and is used to achieve a medically controlled state of depressed consciousness while maintaining the patient's airway, protective reflexes, and ability to respond to stimulation or verbal commands. Conscious sedation includes performance and documentation of pre and post sedation evaluations of the patient, administration of the sedation and/or analgesic agents, and monitoring of cardiorespiratory function (i.e., pulse oximeter, cardiorespiratory monitor and blood pressure). The use of these codes requires the presence of an independent trained observer to assist the physician in monitoring the patient's level of consciousness and physiological status.

See Rosenstein Letter Brief at p. 3 and Texas Mutual's Reply.

\$40.00; and concluded that anesthesia for a lumbar diskography injection procedure also has a value of \$200.00.

Texas Mutual insists that Dr. Rosenstein cannot bill for the conscious sedation as an anesthesiologist because he was also the surgeon and should not be allowed to bill for time units for the same time he was performing the surgery. The judge agrees and concludes that Dr. Rosenstein is entitled to reimbursement for the conscious sedation, but not at the same level as an anesthesiologist.

Dr. Rosenstein testified that he should be allowed to bill in this manner because he is assuming the risk of liability when he performs the conscious sedation himself. The judge is not persuaded by his reasoning and observes that if conscious sedation is accompanied by a higher risk of complications, then an anesthesiologist or CRNA should be used.

According to the record, the Carrier determined at one point that the conscious sedation had a fair and reasonable value of \$72.84. Based on the above analysis, the judge has determined that \$72.84 is as fair and reasonable reimbursement for the conscious sedation service Dr. Rosenstein provided.

IV. Findings of Fact

1. On October 12, 2001, Jacob Rosenstein, M.D. performed bilateral lumbar facet nerve block injections at L1-L2, L2-L3, and L5-S1 (facet injections or nerve blocks) to relieve a workers' compensation claimant's (____) pain caused by lumbar radiculopathy.
2. During that surgical procedure, Dr. Rosenstein placed the claimant under conscious sedation by intravenously administering one milligram of versed and 10 milligrams of morphine sulfate.
3. Dr. Rosenstein billed Texas Mutual \$200.00 for the conscious sedation under the CPT Code 01999 for *Unlisted Anesthesia Procedure* at the base value, time value, and modifier rates set in the Texas Workers' Compensation Commission's (TWCC or Commission) Anesthesiology Ground Rules.
4. Texas Mutual Insurance Company (Texas Mutual or the Carrier) denied payment using denial code G on the grounds that a separate reimbursement is not allowed because the April 1, 1996 TWCC Medical Fee Guideline Ground Rules identify the service as an integral component of another service, procedure, or program.
5. The Commission's Medical Review Division (MRD) ordered Texas Mutual to reimburse Dr. Rosenstein \$200.00 for conscious sedation he administered during a facet joint injection procedure.
6. The Carrier appealed the MRD decision.

7. Notice of the hearing was issued November 6, 2003; 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.
8. A hearing was held before the State Office of Administrative Hearings on February 5, 2003; briefing was completed on February 21, 2003.
9. The conscious sedation Dr. Rosenstein administered is not the same as the anesthetic nerve block injections administered during the surgical procedure.
10. Conscious sedation is not normally performed with nerve block injections.
11. A fair and reasonable reimbursement for the conscious sedation service Dr. Rosenstein provided is \$72.84.

V. Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act (Act), TEX. LAB. CODE ch. 401 *et seq.*
2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE § 413.031; TEX. GOV'T CODE ch. 2003.
3. Adequate and timely notice of the hearing was provided in accordance with the Administrative Procedure Act. TEX. GOV'T CODE § 2001.052.
4. Texas Mutual had the burden of proof in this matter. 28 TEX. ADMIN. CODE §148.21(h).
5. Under the the1996 Medical Fee Guideline Surgery Ground Rules, the Anesthesia Ground Rules, and the1995 Global Service Data for Orthopaedic Surgery, conscious sedation is not global to the facet nerve block injection procedure. 28 TEX. ADMIN. CODE §§134.201, 133.305.
6. Dr. Rosenstein may bill separately for the conscious sedation administered to ___ and be reimbursed a fair and reasonable amount.
7. Dr. Rosenstein is not entitled to reimbursement at the base value, time value, and modifier rates set for anesthesiologists and certified registered nurse anesthetists in the Anesthesiology Ground Rules. 28 TEX. ADMIN. CODE §§133.201.

8. Based on the Findings of Fact, Dr. Rosenstein is entitled to separate reimbursement for the conscious sedation he administered to ____ during the facet block procedure.
9. Based on the Findings of Fact and Conclusions of Law Nos. 6 - 8, Dr. Rosenstein is entitled to reimbursement in the amount of \$72.84.

ORDER

IT IS, THEREFORE, ORDERED that Texas Mutual Insurance Company pay Jacob Rosenstein, M.D. \$72.84 for conscious sedation health care services provided to claimant ____ on October 12, 2001.

ISSUED this 23rd of April, 2003.

**DEBORAH L. INGRAHAM
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**