DOCKET NO. 453-03-2719.M4
MDR Tracking Number: M4-02-2314-01

LIBERTY MUTUAL FIRE INS. CO.,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	**OF**
	§	
TEXAS WORKERS' COMPENSATION	§	
COMMISSION and	§	
LAKE ARLINGTON CENTER FOR	§	
PAIN MANAGEMENT,	§	
Respondents	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Liberty Mutual Fire Insurance Company (Carrier) appeals the Findings and Decision of the Texas Workers' Compensation Commission's Medical Review Division (MRD) in a medical fee dispute. MRD found the hourly rate Lake Arlington Center for Pain Management (Provider) billed for a pain management program ($175) to be fair and reasonable. The Carrier has deemed an hourly rate of $125 as appropriately payable.

A total of 238 hours of services were provided. MRD ordered payment of $11,900, the difference between the amount billed ($41,650) and the amount the Carrier had already paid for the services ($29,750). This decision finds $156 an hour to be a fair and reasonable rate and orders the Carrier to pay an additional amount of $7,378, instead of the previously ordered amount.

I. Procedural History, Notice, and Jurisdiction

At the hearing on June 24, 2003, attorney Charlotte Salter represented the Carrier, and attorney Peter Rogers represented the Provider. The record closed on the same day at the conclusion of the evidence. Notice and jurisdiction are addressed only in the Findings of Fact and Conclusions of Law.

II. Evidence And Arguments

The workers' compensation claimant suffered a compensable injury on ____, when his employer had workers' compensation coverage with the Carrier. The parties did not dispute the medical necessity or proper provision of chronic pain management (CPM) services provided to the claimant from June 5, 2001, through July 17, 2001. They disagreed only upon the level of reimbursement that is fair and reasonable. The Provider is a CARF-accredited facility.[1]

The parties stipulated to various charges CARF-accredited facilities had charged the Carrier from January 11, 2001, to December 20, 2001. The average hourly rate was $156 an hour.

[1]CARF is an acronym for Commission of Accreditation of Rehabilitation Facilities.

1. The Carrier

Because there is no established maximum allowable reimbursement (MAR) for chronic pain management (CPM) services, a Carrier is required to:

(1) develop and consistently apply a methodology to determine fair and reasonable reimbursement amounts to ensure that similar procedures provided in similar circumstances receive similar reimbursement;

(2) explain and document the method it used to calculate the rate of pay, and apply this method consistently;

(3) reference its method in the claim file; and

(4) explain and document in the claim file any deviation for an individual medical bill from its usual method in determining the rate of reimbursement.[2]

In response to this requirement, the Carrier developed a CPM payment rate based on a discounted average of various providers' usual and customary hourly charges. The Carrier also averaged the various components of a typical CPM program to develop another average. According to Marilyn Balsam,[3] manager of the Carrier's clinical review department, the Carrier consistently pays $125 an hour for multi-disciplinary pain management at CARF-accredited facilities, even for those that have higher usual and customary charges.

To determine the Carrier's payment rate, Ms. Balsam and other of the Carrier's employees first developed a database using the averaged charges from eleven CPM facilities. Not all of the facilities were CARF-accredited. Nevertheless, the charges ranged from $100 to $185, and averaged $149.36. Because the Carrier does not consider the usual and customary charge to be the same as a fair and reasonable charge, Ms. Balsam discounted the $149 average by 15%. She said this is a common managed-care discount. After the discount, the average charge was $126, and Ms. Balsam further rounded down the number to $125. Only the Provider and one other facility challenged the Carrier's payment rate. The Carrier pays $100 an hour for non-CARF certified providers' services.

Another approach the Carrier used to develop its payment rate was to ask various CPM providers for a standard, daily schedule. Staff members then assigned the individual MARs from the Medical Fee Guideline (MFG) for various activities and developed an estimate of the reasonable charges. Valuing each scheduled daily activity at the MAR rate and dividing the total by the number of program hours per day netted an hourly charge of $116.28. That number did not include team conferences or supervision. Ms. Balsam included the following items:

Individual psychotherapy B $122 per hour;

Group psychotherapy $140;

[2]28 TEX. ADMIN. CODE (TAC) §133.304(i)

[3]Ms. Balsam is a registered nurse and holds certificates in utilization management and is a certified professional coder.

Group physical therapy $108;

Occupational therapy $108;

Biofeedback $120;

Individual exercise $108; and

Hypnosis $108.

Paying $125 an hour allowed an additional $9 an hour for overall program coordination, Ms. Balsam testified. She included seven hours to calculate the average amount because she believes that even when a CPM clinic record indicates a patient was present for eight hours, a patient could be expected to have a one-hour lunch break.

The Provider listed certain non-face-to-face patient activities for which it charged, but short of listing the activities each day, it did not document them. The activities included physician supervision, clinical director supervision, clinical director conference with case manager, and case management.[4] Based on Ms. Balsam's nursing and coding experience, she thought it inappropriate to include charges for these activities in her calculations because they were not adequately documented. She noted, however, that if the activities were separately billed, the MAR for them would have been $421 per day.[5]

Ms. Balsam also compared the $125 hourly rate times seven hours to the charge for one day in an acute-care hospital. At $125 an hour, the CPM services for seven hours would be $875. The Commission's maximum in-patient daily hospital rate is $870, unless it exceeds stop loss.

2. The Provider

Michael R. Walker, the Provider's administrative director, testified for the Provider.[6] The Provider objected to any comparison to an in-patient rate because hospital care and CPM are quite different services. Also, according to Dr. Walker, when the Provider received its last CARF-certification review, the reviewers told the Provider that the facility was documenting too much, particularly for routine activities. Documentation was necessary to show what was being done for the patient, but too much documentation could interfere with patient care, he was told. Physician supervision, clinical director supervision, and the clinical director conferences with the case manager occur regularly throughout the day. Therefore, Dr. Walker does not believe it is appropriate to include more in the patient records than the name of the activity, such as "physician supervision."

[4] *E.g.*, Ex. 3, p. 15.

[5] On the other hand, a team conference to discuss ongoing treatment was listed each week, and the weekly team conference notes do discuss ongoing treatment and plans for the next week.

[6] Dr. Walker has a Ph.D. in counseling and masters degrees in counseling/psychology, health law, and business with a speciality in health care administration.

He noted that if the non-face activities were added, the average hourly rate would be $150 to $180 an hour.

The Provider is a fairly small, independent clinic and has between four and eight patients in the clinic at one time. Even so, the clinic must hire the required types of health care providers in order to provide interdisciplinary services. If the clinic were larger, it might be able to have economies of scale by treating more patients at a time. Dr. Walker had never heard of a 15% "managed-care discount."

The Provider reviewed payment rates from the 44 insurance companies that have paid the Provider for CPM treatment. Their payment rates ranged from $88 to $175 an hour. Sixteen of the companies paid the billed hourly rate of $175. Twenty-three paid more than $125 and twenty paid $125 an hour or less. The average amount paid was $138.50.[7] The Provider has been charging $175 an hour since beginning the program about ten years ago. The Provider's owners developed that rate based on what it would cost to provide a program to meet CARF standards in the Provider's geographic area.

In its arguments, the Provider emphasized the need for coordination and supervision in CPM programs and urged recognition of the non-face time required; the CPM program requires an interdisciplinary approach, and $116 does not take into account the administrative and interdisciplinary requirements.

III. Analysis

As the appealing party, the Carrier had the burden of proof. The MFG's general instructions (under the heading "VI. Reimbursement") provide the following:

> . . . . CPT codes for which no reimbursement is listed (DOP)[8] shall be reimbursed at the fair and reasonable rate. . . . In the event of a dispute, fair and reasonable shall be determined by the commission in accordance with the Texas Workers' Compensation Act and commission rules and procedures.

Within the TWCC rules, the one that perhaps addresses the application of this "fair and reasonable" standard most broadly is 28 TAC §133.307, which enumerates the requirements of a request for medical dispute resolution. When health care has been provided for which there is no MAR, Subsection (g)(3)(D) of the rule requires documentation to discuss, demonstrate, and justify that the payment amount being sought is a fair and reasonable rate of reimbursement in accordance with §133.1 (relating to Definitions) and §134.1 (relating to Use of the Fee Guidelines).

> In turn, 28 TAC § 133.1(8) defines "fair and reasonable reimbursement" as:
>
> reimbursement that meets the standards set out in § 413.011 of the Texas Labor Code, and the lesser of a health care provider's usual and customary charge, or . . .

[7]Ex. 3, p. 40.

[8]Documentation of procedure.

> (B) the determination of a payment amount for medical treatment(s) and/or service(s) for which the commission has established no maximum allowable reimbursement amount. . .

Rule 28 TAC § 134.1 (c) requires services not identified in an established fee guideline to be reimbursed at fair and reasonable rates as described in the Texas Workers' Compensation Act, §413.011, until such period that specific fee guidelines are established.

The specific statutory provision invoked by the ruleB*i.e.*, § 413.011(d) of the ActBstates the following:

> Guidelines for medical services fees must be fair and reasonable and designed to ensure the quality of medical care and to achieve effective medical cost control. The guidelines may not provide for payment of a fee in excess of the fee charged for similar treatment of an injured individual of an equivalent standard of living and paid by that individual or by someone acting on that individual's behalf. The commission shall consider the increased security of payment afforded by this subtitle in establishing the fee guidelines.

These statutes and rules provide a rather vague and to some extent circular basis for evaluating whether charges are fair and reasonable.[9] The Carrier's methodology raises concerns about fairness and reasonableness because of the arbitrary discounts. Given Ms. Balsam's experience, she may be familiar with a "managed-care discount," but there was insufficient supporting evidence for a pre-determined discount. If such a discount is routine, it stands to reason that the Commission would have adopted it. In addition, the $149 average rate the Carrier developed was based on information that included a non-CARF facility, even though the Carrier recognizes the difference between accredited and nonaccredited programs in its payment structure.

Further, the analysis that relies on dissecting the CPT code 97799 into constituent services is inconsistent with the MFG's framework which declares that DOP services are unusual or too variable to have an assigned MAR.[10] In the calculations using that method, the Carrier included only $9 per hour for overall program coordination. Granted, the documentation for non-face activities was skeletal. Even so, the amount the Provider allowed fails to account in any quantifiable way for the extent to which an integrated program exceeds the sum of it parts in value and efficacy.

In the ALJ's opinion, the most convincing evidence was the average hourly rate ($156) calculated from Exhibit 2, the parties stipulations. The exhibit included charges that various CARF-accredited facilities had submitted to the Carrier in 2001. Of course, a rate that is charged does not

[9]It is interesting to note that effective August 2003, the Commission's payment rate for CPM will be $125 an hour, but that rate is not applicable to the service dates in question.

[10]MFG, General Instructions, heading III. Documentation of Procedure.

necessarily equate to a fair and reasonable rate. But, the exhibit does reflect what is charged by a number of providers who treat workers' compensation claimants with CPM. Further, Exhibit 2's averaged rate falls roughly between what the Provider charges and what the Carrier pays. The amount is also relatively close to the average amount the Carrier used as its base ($149) before including any discounts. As previously stated, there was insufficient evidence to support the downward discounts, and the $149 amount included information from non-CARF accredited facilities.

The ALJ was not convinced by Dr. Walker's testimony that the Provider's $175 an hour rate is what is required for a CARF-accredited program in its area. There was no evidence comparing costs in various geographical areas, and without more explanation as to why the Provider's charges needed to be greater because of its location, the ALJ is not inclined to order a higher payment based on the Provider's statements. Dr. Walker also testified that the Provider is a small facility and could realize cost savings through economies of scale. However, he did not contrast the Provider's facility with other facilities providing the same services. Therefore, even though adopting an averaged usual and customary charge seems to fall short of the ideal, the ALJ finds it is the most convincing choice based on the record in this case.

IV. Findings of Fact

1. A workers' compensation claimant suffered a compensable injury under the Texas Worker's Compensation Act (the Act), TEX. LABOR CODE ANN. § 401.001 *et seq*., on January 9, 1999, when his employer had workers' compensation coverage with the Liberty Mutual Fire Insurance Company (the Carrier).

2. The claimant's subsequent treatment included a pain management program from June 5, 2001, through July 17, 2001, at Lake Arlington Center for Pain Management (Provider).

3. A total of 238 hours of services were provided.

4. The Carrier paid $125 an hour for the services, even though the Provider billed $175 an hour for them.

5. Provider made a timely request to the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission) for medical dispute resolution with respect to the disputed reimbursement.

6. The MRD ordered the Carrier to reimburse the Provider $11,900 in a decision dated February 12, 2003. The order reflected a determination that $175 per hour is a fair and reasonable rate for pain management program services.

7. On March 4, 2003, the Carrier requested a hearing with the State Office of Administrative Hearings (SOAH), seeking review and reversal of the MRD decision regarding reimbursement.

8. The Commission mailed notice of the hearing's setting to the parties at their addresses on April 8, 2003.

9. The notice included the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

10. At the hearing on June 24, 2003, attorney Charlotte Salter represented the Carrier, and attorney Peter Rogers represented the Provider.

11. The average hourly rate for chronic pain management services charged to the Carrier by CARF-accredited facilities in 2001 was $156 an hour.

12. The averaged amount the CARF-accredited facilities charged the Carrier in 2001 is relatively close to the average amount the Carrier used as its base ($149) before including any discounts.

13. The Carrier's base amount calculations included one facility that was not CARF-accredited.

14. There was insufficient evidence to support the Carrier's downward discounts to its base.

15. There was insufficient evidence to support any deduction from the $156 an hour amount.

16. There was insufficient evidence that the $156 an hour amount should be increased because of differences in geographic locations and economies of scale.

V. Conclusions of Law

1. The Commission has jurisdiction to decide the issues presented pursuant to §413.031 of the Act.

2. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.

3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

4. The Carrier, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC §148.21(h).

5. The Carrier properly effected an appeal of the MRD decision to SOAH.

6. A rate of $156 per hour for CPM services, CPT Code 97799 under the Commission's Medical Fee Guideline, is a fair and reasonable charge, consistent with 28 TAC §133.1(8) and TEX. LABOR CODE § 413.011.

7. Based upon the foregoing Findings of Fact and Conclusions of Law, the Carrier should reimburse the Provider an additional amount of $7,378.

ORDER

IT IS THEREFORE, ORDERED that the Carrier reimburse the Provider an additional $7,378 for pain management program services provided to the claimant.

SIGNED September 4, 2003.

SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS