

**SOAH DOCKET NO. 454-11-4878.M4
DWC NO.**

VISTA HEALTHCARE, INC., Petitioner	§	BEFORE THE STATE OFFICE
	§	
V.	§	OF
	§	
ZURICH AMERICAN INSURANCE COMPANY, Respondent	§	ADMINISTRATIVE HEARINGS
	§	
	§	

DECISION AND ORDER

Vista Healthcare, Inc. (Vista) challenges the denial of additional reimbursement by Zurich American Insurance Company (Zurich) for a lumbar caudal epidural steroid injection via an epidural catheter (lumbar ESI), CPT Code 62311, provided to an injured worker on May 10, 2002, at Vista's ambulatory surgical center (ASC). The Administrative Law Judge (ALJ) finds that the evidence failed to prove Vista it is entitled to additional reimbursement for services rendered in connection with the lumbar ESI procedure. Accordingly, Vista's request for additional reimbursement is denied.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Vista filed a request for medical fee dispute resolution with the Medical Review Division (MRD) of the Texas Department of Insurance, Division of Workers' Compensation (Division).¹ On March 21, 2011, MRD issued its Medical Fee Dispute Resolution Findings and Decision (MRD Decision), denying Vista additional reimbursement. By letter dated April 14, 2011, Vista requested a hearing at State Office of Administrative Hearings (SOAH) to contest MRD's determination. A hearing convened before ALJ Michael J. O'Malley on April 11, 2012, at SOAH's facilities in Austin, Texas. Vista was represented by attorney Christina Hernandez.

¹ Effective September 1, 2005, the legislature dissolved the Texas Workers' Compensation Commission (Commission) and created the Division of Workers' Compensation within the Texas Department of Insurance. Act of June 1, 2005, 79th Leg., R.S., ch. 265, § 8.001, 2005 Tex. Gen. Laws 469, 607. This Decision and Order refers to the Commission and its successor collectively as the Division.

Zurich was represented by attorney Steven M. Tipton. The record closed on June 18, 2012, when the parties filed their closing briefs.

Zurich challenges the jurisdiction of SOAH to consider a theory of recovery not raised by Vista before MRD. Zurich presented this argument for the first time in its post-hearing brief. Although Vista presented in the SOAH proceeding a new theory to support its request for additional reimbursement, the issue before SOAH is the same issue that was before MRD, fair and reasonable reimbursement. Accordingly, SOAH has jurisdiction to determine the fair and reasonable reimbursement for the lumbar ESI.

II. DISCUSSION

A. Applicable Law

This case is governed by Tex. Lab. Code (Labor Code) § 401.001*et seq.*, also known as the Texas Workers' Compensation Act (Act). The workers' compensation insurance program created by the Act covers all medically necessary health care.² Although amended several times, Section 413.011 of the Act generally directs the Division's Commissioner to establish medical policies and guidelines relating to fees charged or paid for medical services for employees who suffer compensable injuries, including guidelines relating to payment of fees for specific medical treatments or services.³ The Act has consistently required that the fee guidelines for medical

² Tex. Lab. Code § 401.011.

³ This section of the Act has been amended on several occasions as follows:

Acts 1993, 73rd Leg. ch. 269, Sec. 1, eff. Sept. 1, 1993. Amended by Acts 2001, 77th Leg., ch. 1456, Sec. 6.02, eff. Jun. 17, 2001; Acts 2003, 78th Leg., ch. 962, Sec. 1, 2, eff. Jun. 20, 2003.

Amended by:

Acts 2005, 79th Leg., ch. 265, Sec. 3.233, eff. Sept. 1, 2005.

Acts 2007, 80th Leg. R.S., ch. 1177, Sec. 2, eff. Sept. 1, 2007.

Acts 2007, 80th Leg., R.S. ch. 1177, Sec. 2, eff. Jan. 1, 2011.

services be fair and reasonable, ensure quality medical care, and achieve effective medical cost control.⁴ Moreover, the guidelines may not provide for 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.⁵ In setting such guidelines, the increased security of payment afforded by the Act also must be considered.⁶

Prior to May 9, 2004, the Division did not have a fee guideline for medical services provided in an ASC.⁷ In reimbursing providers for services without a fee guideline, an insurance carrier is required to reimburse at a fair and reasonable rate, as described in Section 413.011(d) of the Act.⁸ At the time the services at issue were provided, "fair and reasonable reimbursement" was defined as follows:

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

(A) the maximum allowable reimbursement, when one has been established in an applicable Commission fee guideline,

(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, or

(C) a negotiated contract amount.⁹

⁴ Tex. Lab. Code § 413.011(d).

⁵ Tex. Lab. Code § 413.011(d).

⁶ Tex. Lab. Code § 413.011(d).

⁷ Effective May 9, 2004, the Division adopted a fee guideline for ASC services. 28 TAC § 134.402. By its terms, that fee guideline applies only to ASC services provided on or after September 1, 2004.

⁸ 28 Tex. Admin. Code § 134.1(f) from Oct. 7, 1991 until May 16, 2002, when it became 28 TAC § 134.1(c). On May 2, 2006, it became 28 TAC § 134.1(c)(3). On March 1, 2008 it was amended to become 28 TAC § 134.1(e)(3).

⁹ 28 TAC § 133.1(8).

Effective May 2, 2006, the Division defined "fair and reasonable reimbursement" as reimbursement that:

- (1) is consistent with the criteria of Labor Code § 413.011;
- (2) ensures that similar procedures provided in similar circumstances receive similar reimbursement; and
- (3) is based on nationally recognized published studies, published Division medical dispute decisions, and values assigned for services involving similar work and resource commitments, if available.¹⁰

When the Division has not established a fee guideline for a particular procedure, service, or item, the Commission's rules require carriers to develop and consistently apply a methodology to determine fair and reasonable reimbursement.¹¹

B. Discussion

In its request for reimbursement presented to the Carrier, Vista asked for \$5,321.81 for the services it provided to the injured worker. Zurich reimbursed Vista \$387.60 for those services. Vista sought additional reimbursement of \$4,932.71 in its request for medical fee dispute resolution filed at MRD. At MRD, Vista contended that 70% of its billed charges constituted fair and reasonable reimbursement. The MRD Decision found that Vista did not establish the amount it requested was fair and reasonable.

For the SOAH hearing, Vista altered its theory and requested recovery based on the average of 382 payments it received from multiple payers for services it provided during 2002 under CPT Code 62311. Depending on which payers and payments were included,¹² the

¹⁰ 28 TAC § 134.1(d)(1)-(3).

¹¹ 28 TAC § 133.304(i)(1) (eff. July 15, 2000); 28 TAC § 134.1(e) (eff. May 2, 2006).

¹² In various iterations Vista excluded non-workers' compensation payments, workers' compensation payments still

payments averaged within a range of \$4,207.74 to \$4,253.97. Vista asserted that payments within this range for CPT Code 62311 were fair and reasonable reimbursement.

To support its position, Vista relied on two recent Division decisions involving Renaissance Hospital. In those cases, the Division found that the average payment by all insurance carriers in the Texas workers' compensation system during the same year and involving the same procedures that Renaissance provided was the best evidence in those cases of an amount that would achieve a fair and reasonable reimbursement. Based on these averages, Vista is seeking additional reimbursement within a range of \$4,207.74 to \$4,253.97, plus interest.

Vista also argued that Zurich did not present any evidence that its methodology produces a fair and reasonable reimbursement under the statutory standards. Although Zurich offered evidence showing the amount it reimbursed Vista, it did not present evidence that the amount it reimbursed Vista was fair and reasonable under the statutory standards.

Zurich argued that Vista's theory of recovery asserted at the SOAH hearing was flawed because Vista offered no evidence that the payments it received for the lumbar ESI during 2002 were based on the criteria for fair and reasonable reimbursement established in the Act and the Division's rules. Zurich further asserted that Vista's use of its limited, unsubstantiated historical payment data not only failed to establish a fair and reasonable rate, it also failed to demonstrate cost control. Zurich contended that Vista provided no statistical validation for use of its own historical payment database and that the use of Vista's own reimbursement data is inherently biased and offers no comparisons to other Texas hospitals.

in dispute resolution, and Medicare payments. Medicare payments were excluded because the Division has indicated that the base Medicare payment is not fair and reasonable reimbursement under the Texas regulatory standards for workers' compensation.

For a number of reasons, Zurich also disagreed with the MRD decisions rendered in the Renaissance Hospital cases cited by Vista. Zurich contended that, even if one accepted the rationale of the Renaissance decisions, they averaged payments for the entire workers' compensation system, whereas Vista averaged payments it received at only the one facility.

Vista's theory of recovery was not consistent with the Division's decisions in the two Renaissance cases.¹³ Furthermore, Vista failed to establish how its proposed reimbursement level of \$4,207.74 to \$4,253.97 for CPT Code 62311 complied with criteria contained in the Act and rules for fair and reasonable reimbursement. Therefore, Vista did not meet its burden of proof.

Nonetheless, MRD did not determine that Zurich's payment to Vista was fair and reasonable. And, like Vista, Zurich failed to prove its methodology yielded a fair and reasonable reimbursement and complied with the criteria contained in the Act and the Division's rules. Consequently, the evidence in the record is insufficient for the ALJ to determine a fair and reasonable reimbursement for the services rendered by Vista in this case.

C. Conclusion

Vista did not prove it is entitled to additional reimbursement from Zurich for the lumbar ESI in question.

¹³ The ALJ offers no opinion and makes no decision on whether the methodology used in the Renaissance cases is valid for determining fair and reasonable reimbursement.

III. FINDINGS OF FACT

1. On May 10, 2002, Vista provided ASC services for the administration of a lumbar ESI to a workers' compensation claimant.
2. Zurich was the responsible workers' compensation insurer for the claimant.
3. Vista billed Zurich \$5,321.81 for the lumbar ESI services.
4. Zurich reimbursed Vista \$387.60 for the ESI services.
5. At the time Vista provided the services, there was no fee guideline in place for ASC services.
6. Vista requested additional reimbursement for the services in dispute.
7. Zurich denied Vista's request for additional reimbursement.
8. Vista timely filed a request for medical fee dispute resolution with the Division.
9. On March 21, 2011, MRD issued its Medical Fee Dispute Resolution Findings and Decision and found that no additional reimbursement was owed to Vista.
10. Vista timely requested a hearing at SOAH to contest the MRD Decision.
11. A Notice of Hearing informed the parties of the date, time, and location of the hearing, the matters to be considered, the legal authority under which the hearing would be held, and the statutory provisions applicable to the matters to be considered.
12. A hearing convened before ALJ Michael J. O'Malley on April 11, 2012, at SOAH's facilities in Austin, Texas. Vista was represented by attorney Christina Hernandez. Zurich was represented by attorney Steven M. Tipton. The record closed on June 18, 2012, when the parties filed their closing briefs.
13. During 2002, Vista received 382 payments from multiple carriers and other payers for various injection procedures. These payments averaged \$4,207.74.
14. If Vista includes only the 325 payments made by workers' compensation carriers in 2002 that are not being disputed, then the average payment is \$4,253.97.

15. Vista failed to prove that using an average range of payments of \$4,207.74 to \$4,253.97 constituted fair and reasonable reimbursement based upon the applicable criteria.

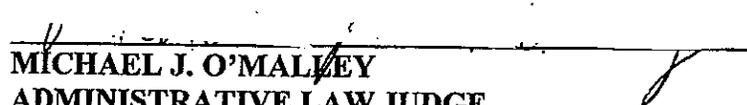
IV. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to Tex. Lab. Code § 413.031 and Tex. Gov't Code ch. 2003.
2. Adequate and timely notice of the hearing was provided in accordance with Tex. Gov't Code §§ 2001.051 and 2001.052.
3. The services provided to the Claimant were not covered by a fee guideline issued by the Division, and so were required to be billed and reimbursed at a fair and reasonable rate, within the meaning of Tex. Lab. Code § 413.011.
4. Vista had the burden of proof in this proceeding by a preponderance of the evidence.
5. Vista did not prove the additional reimbursement it sought complied with the applicable criteria for fair and reasonable reimbursement.
6. Vista failed to prove it is entitled to additional payment from Zurich for the services provided to the claimant.

ORDER

IT IS ORDERED that Zurich is not required to pay Vista any additional reimbursement for the services provided to the claimant.

SIGNED August 3, 2012.



MICHAEL J. O'MALLEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING