SOAH DOCKET NO. 454-15-4237.M4-NP
MDR TRACKING NO. _____

TEXAS MUTUAL INSURANCE COMPANY	**§**	**BEFORE THE STATE OFFICE**
	§	
	§	**OF**
v.	**§**	
	§	**ADMINISTRATIVE HEARINGS**
SALMAN KHAN, D.C.	**§**	
	§	

DECISION AND ORDER

Texas Mutual Insurance Company (Carrier) sought a contested case hearing regarding a Medical Fee Dispute Decision (MFD Decision) issued by the Texas Department of Insurance, Division of Workers' Compensation (Division). The MFD Decision ordered Carrier to reimburse Salman Khan, D.C. (Provider) the additional sum of $150.00 for an impairment rating (IR) evaluation he performed as a designated doctor. The Administrative Law Judge (ALJ) finds the MFD Decision is correct and that Carrier owes Provider the additional sum of $150.00, plus any applicable interest, for the IR evaluation he performed in this case.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no disputed issues of notice or jurisdiction in this case. Therefore, those matters are addressed in the Findings of Fact and Conclusions of Law without discussion here.

After Carrier made a reduced payment of Provider's claim for reimbursement for the service in question, Provider filed a request for medical fee dispute resolution with the Division. On March 20, 2015, the Division issued the MFD Decision, in which it determined that Carrier owed an additional $150.00 in reimbursement for the IR evaluation performed by Provider. Carrier requested a benefit review conference on the MFD Decision, and such benefit review conference was concluded on May 12, 2015. Thereafter, on May 29, 2015, Carrier requested a hearing at the State Office of Administrative Hearings (SOAH) to contest the MFD Decision. On June 11, 2015, the Division issued a Notice of Hearing.

Prior to the scheduled hearing, both parties filed motions for summary disposition, contending that the facts were undisputed and no evidentiary hearing was necessary. On November 20, 2015, the ALJ issued Order No. 3, canceling the hearing and granting summary disposition to Provider. The record closed on December 18, 2015, after the parties were given the opportunity to file proposed findings of fact and conclusions of law, and objections thereto.

II. APPLICABLE LAW

As the party seeking relief from the MFD Decision, Carrier has the ultimate burden of proof.[1] Unresolved disputes "over the payment due for services determined to be medically necessary and appropriate for treatment of a compensable injury" may be resolved by a contested case hearing at SOAH.[2] The issue in this case revolves around interpretation of 28 Texas Administrative Code § 134.204(j)(4)(C)(ii), which states:

> (4) The following applies for billing and reimbursement of an IR evaluation.
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> * * *
>
> (C) For musculoskeletal body areas, the examining doctor may bill for a maximum of three body areas.
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> * * *
>
> (ii) The MAR for musculoskeletal body areas shall be as follows.
>
> (I) $150 for each body area if the Diagnosis Related Estimates (DRE) method found in the AMA Guides 4th edition is used.
>
> (II) If full physical evaluation, with range of motion, is performed:
>
> (-a-) $300 for the first musculoskeletal body area; and
>
> (-b-) $150 for each additional musculoskeletal body area.

Carrier argues that the IR evaluation was conducted using the DRE method noted above and, therefore, reimbursement is limited to $150.00 for the IR evaluation. In contrast, Provider asserts that the IR evaluation was a "full physical evaluation, with range of motion" and, therefore, reimbursement is at $300.00.

III. ANALYSIS

The dispute in this case hinges on the parties' interpretation of the Division's reimbursement rule for IR evaluations. Carrier asserts there are two types of IR evaluations recognized in the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides 4th Edition): (1) the DRE method; and (2) the Range of Motion (ROM) method. Carrier argues that reimbursement under 28 Texas Administrative Code § 134.204(j)(4)(C)(ii) is

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[1] 28 Tex. Admin. Code § 148.14(b).

[2] Tex. Labor Code §§ 413.031(c), .0312(a), (e).

based upon which method is used. If the DRE method is used, then reimbursement is $150.00 per body part; if the ROM method is used, then reimbursement is $300.00 for the first body part, with $150.00 per additional body part. Because Provider did not use the ROM method in determining the IR for the injured worker, Carrier contends he was limited to the $150.00 reimbursement for the DRE method in 28 Texas Administrative Code § 134.204(j)(4)(C)(ii)(I).

Provider acknowledges that he did not use the ROM method for assigning the IR, but disagrees that the rule required him to do so in order to be reimbursed the higher amount. Rather, he contends that the rule, as written, allows for the higher reimbursement as long as he conducted a full physical evaluation, including assessment of the patient's range of motion—even if he ultimately utilized a DRE method for assigning the IR.[3] Essentially, Provider contends that the reimbursement limit provided for in the rule is not based solely upon the "method" used to assess the IR. He points out that the term "method" is used in 28 Texas Administrative Code § 134.204(j)(4)(C)(ii)(I) only, and is not used in subpart (II) that immediately follows. He argues that if the $300.00 reimbursement provided for in subpart (II) was intended to apply only if the ROM method was used to provide the IR, then the rule could have used that phrase. But, it did not. Instead, subpart (II) simply states that if a "full physical evaluation, with range of motion, is performed" then reimbursement is $300.00. Therefore, Provider argues that $300.00 is the proper reimbursement if this condition is met, even if the DRE method is ultimately used to assign the IR.

After considering the arguments of the parties, the ALJ agrees with Provider. The rule does not require that the ROM method be used in order for reimbursement to be at $300.00. Instead, subpart (II) of the rule simply states that if a full physical examination, with range of motion, is done, then the reimbursement is $300.00 for the first body part. The ALJ construes this not as standing in direct contrast with subpart (I) that sets the reimbursement under the DRE method at $150.00, but as further clarifying or expanding upon it. So, if the DRE method is used, then reimbursement is limited to $150.00, *unless* the requirement of subpart (II) is also met—namely, a full physical examination, with range of motion, is performed. In that situation, the reimbursement is increased to $300.00—even if the DRE method is used to assign the IR.

The ALJ disagrees with Carrier's argument that this reading of the rule is contrary to prior Commission precedent. Carrier's main authorities on this point are a Bulletin from the Executive Director of the Division's predecessor agency and a subsequent newsletter by that same agency staff from 2005 interpreting similar language from a prior rule. However, both the Bulletin and subsequent newsletter distributed to interested parties are neither a rule nor a final decision of the agency that are binding or entitled to any deference. Thus, those authorities have no precedential value and are not determinative of the outcome of this case.

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[3] As Provider points out, a full physical examination with a range of motion evaluation can be conducted even if the DRE method is ultimately utilized as superior for determining the correct impairment rating.

Moreover, as Provider notes, the Commission later explicitly rejected a proposed revision to its rule that would have clarified that the $300.00 reimbursement was available only if the ROM method was used to determine the IR. Instead, the Division chose to keep the language of the rule as it was and to not include the term "method" in subpart (II). If such a change had been accepted, then the rule would read exactly as Carrier asserts it should be read. But, the change was not accepted by the Division. This supports Provider's argument that subpart (II) should not be read as requiring the ROM method before the higher reimbursement will be allowed. Finally, as Provider argues, the Division's own MFD Decision in this case found in his favor and is a better indicator of the Division's interpretation of its own rules than bulletins and newsletters from a decade ago, applying a former rule.

Therefore, after considering the arguments presented by the parties, the ALJ disagrees that the ROM method must be used to assign the IR before the $300.00 reimbursement set out in 28 Texas Administrative Code § 134.204(j)(4)(C)(ii)(II) is applicable. Rather, as long as a full physical evaluation, with range of motion, is performed, then the $300.00 reimbursement for the first body part is available to Provider. This is true even though Provider ultimately chose to use the DRE method to assign the IR. Because Provider did perform a full physical evaluation, with range of motion, he was entitled to be reimbursed $300.00 for the first body part, pursuant to 28 Texas Administrative Code § 134.204(j)(4)(C)(ii)(II). Accordingly, Carrier owes Provider the additional sum of $150.00, plus interest.

IV. FINDINGS OF FACT

1. An injured worker suffered a compensable back injury that was covered by workers compensation insurance provided by Texas Mutual Insurance Company (Carrier).

2. On or about September 27, 2014, Salman Khan, D.C. (Provider), was appointed as Designated Doctor by the Texas Department of Insurance, Division of Workers' Compensation (Division or DWC) to examine the injured worker to address the issues of maximum medical improvement, impairment rating, and return to work.

3. On October 21, 2014, Provider evaluated the injured worker as a Designated Doctor pursuant to his appointment by the Division.

4. Provider wrote a narrative report of his evaluation on October 21, 2014, stating that a "full physical examination with range of motion was performed of the lumbar spine. In addition, a neurologic examination is performed, including testing of reflexes and girth measurements to determine the presence of atrophy, and to evaluate for impairment of strength and sensation of the lower extremities as a result of the lumbar spine injury."

5. Also on October 21, 2014, Provider completed a DWC Form 69 (Report of Medical Evaluation) and a DWC Form 73 (Work Status Report) on the injured worker whom he evaluated.

6. On October 28, 2014, Provider billed Carrier the amount of $650.00 using Current Procedural Terminology (CPT) Code 99456 with modifiers W5 and WP for Provider's certification of maximum medical improvement pursuant to 28 Texas Administrative Code (Division Rule) § 134.204(j)(3)(C) and for assignment of an impairment rating per Division Rule § 134.204(j)(4)(C)(ii)(II)(-a-).

7. Carrier did not file a request with the Division for clarification of Provider's Designated Doctor's report, nor request additional documentation from Provider regarding the services rendered.

8. Carrier did not reimburse the billed amount of $650.00, but reimbursed only $500.00 for Provider's certification of maximum medical improvement and assignment of an impairment rating. Carrier reduced the amount because it determined that the physical evaluation portion of Provider's services was entitled to reimbursement of only $150.00, not the $300.00 billed by Provider.

9. Provider requested reconsideration of the reduced reimbursement. After reconsidering the billing, Carrier continued to deny additional reimbursement.

10. After Carrier again denied Provider's claim for additional reimbursement, Provider filed a request for medical fee dispute resolution with the Division on March 4, 2015.

11. On March 20, 2015, the Division issued a Medical Fee Dispute Resolution Decision and Findings (MFD Decision), concluding that reimbursement for the impairment rating of the spine was allowed at $300.00 in accordance with the requirements of Division Rule § 134.204(j)(4)(C)(ii)(II)(-a-) and determining that Provider was entitled to additional reimbursement for the services involved in the dispute. Thus, the Division ordered Carrier to reimburse Provider the additional amount of $150.00 plus applicable accrued interest per Division Rule § 134.130, within 30 days of Carrier's receipt of the MFD Decision.

12. On April 10, 2015, Carrier requested a Benefit Review Conference with the Division to resolve the issue of whether Provider was entitled to total reimbursement of $300.00 for his impairment rating of the musculoskeletal body area.

13. On May 12, 2015, the Benefit Review Conference was held, but Carrier and Provider were unable to resolve the fee dispute.

14. On June 10, 2015, the Division referred the matter to the State Office of Administrative Hearings (SOAH) for assignment of an Administrative Law Judge (ALJ) to conduct a hearing and issue a decision.

15. On June 11, 2015, the Division issued a Notice of Hearing. The notice 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 statutes and rules applicable to the matters to be considered.

16. On October 28, 2015, Provider filed a Motion for Summary Disposition pursuant to 1 Texas Administrative Code § 155.505.

17. On October 30, 2015, Carrier filed a Motion for Summary Disposition as well.

18. On November 20, 2015, the ALJ issued Order No. 3 canceling the hearing, granting summary disposition to Provider, and denying Carrier's motion for summary disposition.

19. Division Rule 134.204(j)(4)(C)(ii)(II)(-a-) provides for $300.00 in reimbursement if the examining doctor performs a full physical evaluation with range of motion of the spine of the injured worker.

20. Provider performed a full physical evaluation with range of motion on the injured worker's spine in this case, although Provider ultimately assigned an impairment rating using the Diagnosis Related Estimates method and not the Range of Motion method.

21. The record closed on December 18, 2015, after the parties were given the opportunity to file proposed findings of fact and conclusions of law, and objections thereto.

V. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to Texas Labor Code § 413.0312 and Texas Government Code chapter 2003.

2. Adequate and timely notice of the hearing was provided in accordance with Texas Government Code §§ 2001.051 and 2001.052.

3. The pleadings and summary disposition evidence show there is no genuine issue of material fact and that Provider is entitled to a decision in his favor as a matter of law, pursuant to 1 Texas Administrative Code § 155.505.

4. Carrier had the ultimate burden of proof in this proceeding, pursuant to 28 Texas Administrative Code § 148.14(b), but each party bore the burden of proof on their respective summary disposition motions. 1 Tex. Admin. Code § 155.505.

5. Carrier failed to show that reimbursement was limited to $150.00 for the first body part for the impairment rating evaluation conducted by Provider.

6. Provider demonstrated, as a matter of law, that he was entitled to reimbursement of $300.00 under 28 Texas Administrative Code § 134.204(j)(4)(C)(ii)(II)(-a-) for the first body part for the impairment rating evaluation he conducted of the injured worker in this case.

7. Provider is entitled to reimbursement by Carrier of the additional sum of $150.00, plus applicable interest.

ORDER

THEREFORE, IT IS ORDERED THAT Texas Mutual Insurance Company is required to pay the additional sum of $150.00, plus applicable interest, to Salman Khan, D.C. as compensation for the services at issue in this case.

NON-PREVAILING PARTY DETERMINATION

Texas Labor Code § 413.0312(g) and 28 Texas Administrative Code § 133.307(h) require the non-prevailing party to reimburse the Division for the cost of services provided by SOAH. Texas Labor Code § 413.0312(i) requires SOAH to identify the non-prevailing party and any costs for services provided by SOAH in its final decision. For purposes of Texas Labor Code § 413.0312, Texas Mutual Insurance Company is the non-prevailing party. The costs associated with this decision are set forth in Attachment A to this Decision and Order and are incorporated herein for all purposes.

SIGNED February 16, 2016.

CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS