

SOAH DOCKET NO. 454-17-4926.M4-NP
MR NO. _____

CARRIER,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
v.	§	OF
	§	
HEALTHCARE PROVIDER,	§	
Respondent	§	
	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

This case involves a claim for reimbursement of amounts billed for implantable surgical devices (implantables) used in a June 24, 2016 surgery on an injured worker. (Insurance Company) paid \$31,589.53 of the amounts billed. In a medical fee dispute resolution (MFDR) before the Texas Department of Insurance Division of Workers Compensation (Division), (Healthcare Provider (HCP)) sought additional reimbursement of \$13,741.47. In its MFDR Findings and Decision, the Division found additional reimbursement of \$11,482.97 to be appropriate.¹ Insurance Company requested a hearing at the State Office of Administrative Hearings (SOAH) to contest the Division’s determination. The Administrative Law Judge (ALJ) concludes (HCP) is not entitled to any reimbursement beyond the \$31,589.53 it has already received.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no issues of notice or jurisdiction in this proceeding. Those matters are thus addressed in the Findings of Fact and Conclusions of Law without further discussion.

ALJ convened the hearing on September 13, 2017, at SOAH’s hearing facility in Austin, Texas. Insurance Company was represented by (attorney). (HCP) was represented by its employees, who are not attorneys: Chief Operating Officer & Vice President of Operations.

¹ Insurance Company Ex. 1.

Insurance Company Exhibits 1-13 and hcp Exhibit 1 were admitted in evidence. No witness testified. Closing statements were filed by (HCP) on September 18, 2017, and Insurance Company on September 20, 2017. As the parties had agreed, no reply closing statements were filed.

On September 18, 2017, (HCP) filed two post-hearing exhibits: one entitled (HCP) Evidence, and one entitled Corrected HCFA (CMS-1500) & Certified Letter from HCP. SOAH Order No. 4, issued September 26, 2017, required the parties to notify each other of their positions regarding those exhibits and then, by October 5, 2017, to file pleadings stating whether (HCP) was offering the exhibits in evidence; whether, if so, Insurance Company objected to such admission and on what grounds; and (HCP's) position regarding any such objection. On September 28, 2017, (HCP) filed a letter explaining that it was offering the exhibits in evidence. On October 5, 2017, Insurance Company filed objections to admitting in evidence part of the exhibits. The record closed with that filing on October 5, 2017. SOAH Order No. 5, issued November 22, 2017, admitted in evidence (HCP) Exhibit 2 (the Corrected HCFA (CMS-1500) & Certified Letter from HCP) but not the post-hearing exhibit entitled (HCP) Evidence.

II. REASONS FOR DECISION

The facts are not in dispute. At the hearing, the parties agreed Insurance Company has the burden of proof.² In its closing statement, Insurance Company raised three objections to being required to pay the additional reimbursement beyond what it has already paid:

- That a required form, CMS-1500, was certified by the implants manufacturer, St. Jude Medical, rather than by (HCP) (the improper certification issue);³
- That Insurance Company has already paid more than the maximum amount allowed (the maximum allowable reimbursement issue); and
- That (HCP) failed to limit fees to usual and customary costs and to apply any available rebates and discounts (the reasonable cost issue).

² 1 Tex. Admin. Code § 155.427.

³ As discussed later, Insurance Company's first objection at the hearing differed somewhat from its first objection in its closing statement. At the hearing, Insurance Company objected that the CMS-1500 showed the wrong service facility location (the service facility location error).

The ALJ finds in (HCP's) favor regarding the first and third issues. Regarding the second issue, Insurance Company met its burden to prove (HCP) is not entitled to additional reimbursement because the amount Insurance Company paid already exceeds the maximum allowable reimbursement. The applicable law, the evidence, the parties' contentions, and the ALJ's analysis regarding those issues are discussed below.

A. Improper Certification Issue and Service Facility Location Error

In its written closing statement, Insurance Company objects that, in the CMS-1500 form, St. Jude Medical, rather than (HCP), certified the implant cost.⁴ At the hearing, Insurance Company framed its first objection differently: that the CMS-1500 incorrectly listed the service facility location as St. Jude Medical instead of Covenant High Plains Surgery Center (Covenant).⁵ At the hearing, Insurance Company described the service facility location error as a clerical error for which correction was a "quick fix" and said its second and third objections (the maximum allowable reimbursement issue and the reasonable cost issue) were more significant. Insurance Company indicated that if (HCP) "would like to just submit **a new CMS-1500 with the proper certification**, I think that would cure that first issue." (HCP) said, "That's fine, we can provide that," and Insurance Company responded, "Okay." Both parties agreed when the ALJ asked them to confirm that if (HCP) did so, the only remaining contested issues would be the maximum allowable reimbursement issue and the reasonable cost issue.

The post-hearing exhibit in evidence, (HCP) Exhibit 2, corrects both errors raised by Insurance Company, providing a revised CMS-1500 that lists the service facility instead of St. Jude Medical.⁶ Two days after that exhibit was filed, Insurance Company filed its closing statement, which discusses the improper certification issue but not the service facility location error. The ALJ concludes Insurance Company waived its objection to the service facility location error. At the hearing, Insurance Company said (HCP's) provision of a certification by HCP rather than St. Jude Medical would leave only the two contested issues discussed below.

⁴ Insurance Company Ex. 10 at 64.

⁵ Insurance Company Ex. 9 at 55.

⁶ (HCP) Ex. 2 at 2-4.

The ALJ concludes that (HCP) satisfied the certification requirement and that Insurance Company waived the improper certification issue.

B Maximum Allowable Reimbursement Issue

28 Texas Administrative Code § 134.402(e) states: “[r]egardless of billed amount, reimbursement shall be: . . . the maximum allowable reimbursement (MAR) amount under subsection (f) of this section, including any reimbursement for implantables.” Insurance Company argues the maximum allowable reimbursement is limited by a mathematical calculation pursuant to 28 Texas Administrative Code § 134.402(f)(2)(B), quoted below. Both parties cite 28 Texas Administrative Code § 134.402(f)(2)(B) in their closing statements. The ALJ concludes that subsection applies, in that here the surgical implant provider (HCP) and Covenant, the ambulatory surgical center (ASC) facility, separately requested reimbursement for a device-intensive procedure involving an implantable.⁷

Subsection (f)(2)(B) states:

(2) Reimbursement for device intensive procedures shall be:

. . .

(B) If an ASC facility or surgical implant provider requests separate reimbursement for an implantable, **reimbursement for the device intensive procedure shall be the sum of:**

- (i) the lesser of the manufacturer’s invoice amount or the net amount (exclusive of rebates and discounts) plus 10 percent or \$1,000 per billed item add-on, whichever is less, but not to exceed \$2,000 in add-on’s per admission; **and**
- (ii) the ASC service portion multiplied by 235 percent.⁸

In their closing statements, Insurance Company discusses all of Subsection (f)(2)(B), whereas (HCP) focuses on that subsection without (f)(2)(B)(ii). Insurance Company argues the rule limits the maximum allowable reimbursement to the sum of the amounts under (f)(2)(B)(i) and

⁷ See, e.g., (HCP) Ex. 1 at 6, 8.

⁸ Emphasis added.

(ii). (HCP) did not address that argument. The ALJ concludes the rule's express language supports Insurance Company's interpretation.

Insurance Company Exhibit 12, admitted in evidence without objection, sets out a calculation Insurance Company states is a step-by-step breakdown of the formula for determining the maximum allowable reimbursement under 28 Texas Administrative Code § 134.402(f)(2)(B). Covenant was reimbursed \$31,150.02 for the procedural part of this claim, while (HCP) was reimbursed \$31,589.53 for the implant portion, so the total reimbursement was \$62,739.55.⁹ Insurance Company Exhibit 12 indicates that, under the Subsection (f)(2)(B) formula, the maximum allowable reimbursement was \$29,692.26.¹⁰ Insurance Company argues it has already paid more than the maximum allowed under § 134.402(f)(2)(B)(i) and (ii), so (HCP) is not due any additional payment.

(HCP) was aware of Insurance Company's position described above long before the hearing.¹¹ (HCP) did not present evidence or argument countering that position. The ALJ concludes Insurance Company met its burden of proof on this issue and thus HCP is not due any additional reimbursement.

C. Reasonable Cost Issue

Insurance Company argues that to be reimbursable, the actual costs must be reasonable and that its Exhibit 11 shows the actual cost of the implantable device at issue was not reasonable. (HCP) disputes those contentions. The ALJ concludes Insurance Company did not meet its burden of proof regarding this issue.

Insurance Company cites 28 Texas Administrative Code § 134.402(f), which states:

The reimbursement calculation used for establishing the MAR shall be the Medicare ASC reimbursement amount determined by applying the most recently adopted and effective Medicare Payment System Policies for Services Furnished in Ambulatory Surgical Centers and Outpatient Prospective Payment System

⁹ Insurance Company Ex. 6 at 40.

¹⁰ Insurance Company Ex. 12 at 77.

¹¹ See Insurance Company Ex. 6 (April 20, 2017 letter to Healthcare Provider discussing that position).

reimbursement formula and factors as published annually in the Federal Register. Reimbursement shall be based on the fully implemented payment amount as in ADDENDUM AA, ASC COVERED SURGICAL PROCEDURES FOR CY 2008, published in the November 27, 2007 publication of the Federal Register, or its successor.

Insurance Company argues Subsection (f) uses Medicare guidelines to limit reimbursable amounts to “reasonable cost or customary charges.”¹²

Insurance Company also cites a different Division rule, stating that the maximum allowable reimbursement is the maximum amount payable to a health care provider that is consistent with a statutory requirement that “fee guidelines must be fair and reasonable and designed to ensure the quality of medical care and to achieve effective medical cost control.”¹³ The rule further provides that fair and reasonable reimbursement must “ensure that similar procedures provided in similar circumstances receive similar reimbursement” and “be based on nationally recognized published studies, published Division medical dispute decisions, and/or values assigned for services involving similar work and resource commitments, if available.”¹⁴

In an effort to show the billed cost of the implantables did not meet those standards, Insurance Company points to its Exhibit 11, a set of invoices from St. Jude Medical,¹⁵ the same implant manufacturer that was used here. Insurance Company argues the exhibit shows the customary cost for primary billing code 63685, the same code at issue here. According to Insurance Company, the exhibit demonstrates that the customary cost for the implantables at issue was far less than that shown on (HCP’s) invoices.

¹² Insurance Company argues 28 Texas Administrative Code § 134.402(f) references 42 Code of Federal Regulations (C.F.R.) § 413.118(c)(1). 42 C.F.R. § 413.118(c) states that the “aggregate amount of payments for facility services, furnished in a hospital on an outpatient basis, that are related to covered ASC surgical procedures . . . is equal to the lesser of . . . (1) [t]he hospital’s reasonable cost or customary charges, as determined in accordance with § 413.13, reduced by deductibles and coinsurance; or . . .” 42 C.F.R. § 413.13(a) defines “reasonable cost” as “cost actually incurred, to the extent that cost is necessary for the efficient delivery of the service . . .” Insurance Company also quotes Medicare Managed Care Manual, Rev. 30 (Sept. 5, 2003), but that manual was not provided and is not in evidence or officially noticed.

¹³ 28 Tex. Admin. Code § 134.1(l)(a), *referencing* Tex. Labor Code § 413.011.

¹⁴ 28 Tex. Admin. Code § 134.1(f).

¹⁵ Insurance Company Ex. 11 at 68-78.

(HCP) responds that the physician chooses the implantables and implantable manufacturer to be used, St. Jude Medical provided (HCP) the list price, and (HCP) billed its actual costs in its invoices.¹⁶ (HCP) argues Insurance Company Exhibit 11 is irrelevant because the Division's rules do not use historical pricing as a basis for reimbursement, but rather the actual cost of the devices. According to (HCP), the Division's rules do not mention "reasonable cost" as a standard regarding the payment amounts. (HCP) also objects that the historical invoices do not have the same pricing for implants bearing identical part numbers. An example is Part No. 3662ANS.¹⁷

The costs shown in Insurance Company Exhibit 11 are significantly lower than the costs at issue here. The evidence is insufficient, however, to prove the costs at issue are not reasonable or customary. According to (HCP), different facilities have different pricing contracts with the manufacturer. In Exhibit 11, the facilities' names and most of their addresses are redacted, but the unredacted part shows most of the ASCs are not in Texas and none is in the same zip code as Covenant, the ASC here. The invoice dates in Exhibit 11 (September 2 and 4, 2015, and February 26, April 29, May 5, July 29, August 30, and September 7, 2016) are fairly close but not identical to the invoice date here (July 1, 2016).¹⁸ Given the differences in facilities, locations, and dates, the evidence is insufficiently detailed or explained to find that the circumstances were similar, such that the reimbursable amounts should be comparable.

The MFDR Findings and Decision state:

[Insurance Company] submitted Foresight Medical LLC's position statement that shows a reduction in "reimbursement for implants was based on a reasonable cost amount . . . plus \$2,000." A review of the documentation does not demonstrate or support how Foresight Medical determined the "reasonable cost." The Division concludes that [Insurance Company's] position is not supported.¹⁹

¹⁶ Insurance Company Ex. 10.

¹⁷ Compare Insurance Company Ex. 11 at 66, 70-71, 74-75 with (HCP) Ex. 1 at 3-5.

¹⁸ HCP Ex. 1 at 3-5.

¹⁹ Insurance Company Ex. 1 at 5.

Similarly, the ALJ finds Foresight Medical LLC's conclusory statements do not establish that the costs at issue were not reasonable.²⁰

Finally, Insurance Company cites 28 Texas Administrative Code § 134.402(f)(2)(B)(i), which requires that reimbursable amounts be "exclusive of rebates and discounts." (HCP) contends there were no such rebates or discounts. It provided certifications from St. Jude Medical and (HCP) stating that "I hereby certify under penalty of law that the following is the true and correct actual cost to the best of my knowledge" and that the representative "has personal knowledge of the cost of the implantable and any rebates or discounts to which the facility or surgical implant provider may be entitled."²¹ Insurance Company argues (HCP) "has not applied any rebates or discounts (**to the extent they exist**)."²² The ALJ concludes Insurance Company did not allege or prove that any rebates or discounts exist, and did not meet its burden of proof regarding them.

III. FINDINGS OF FACT

1. (HCP) billed (Insurance Company) for providing implantable surgical devices used in a June 24, 2016 surgery on an injured worker.
2. The surgery was performed at an ambulatory surgical center facility, Covenant High Plains Surgery Center (Covenant). The implantable surgical devices were manufactured by St. Jude Medical.
3. Insurance Company paid only \$31,589.53 of the amounts billed by HCP.
4. (HCP) filed a request for medical fee dispute resolution with the Texas Department of Insurance Division of Workers' Compensation (Division).
5. In its request for medical fee dispute resolution, (HCP) sought additional reimbursement of \$13,741.47. The Division found additional reimbursement of \$11,482.97 to be appropriate.
6. Insurance Company timely requested a hearing at the State Office of Administrative

²⁰ See Insurance Company Exs. 4, 6-7.

²¹ (HCP) Ex. 1 at 7; (HCP) Ex. 2 at 4.

²² Insurance Company's Written Closing Statement (Sep. 20, 2017) at 3 (emphasis added).

Hearings (SOAH) to contest the Division's determination.

7. Notice of the hearing was provided in the Division's June 6, 2017 request to schedule a contested case hearing and SOAH Order No. 2, issued August 21, 2017. The notice informed the parties of the time, place, and nature of the hearing; the legal authority and jurisdiction under which it was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted.
8. On September 13, 2017, Administrative Law Judge Elizabeth Drews convened the hearing at SOAH's hearing facility in Austin, Texas. Insurance Company was represented by attorney. HCP was represented by three of its employees, who are not attorneys: CL; Chief Operating Officer and Vice President of Operations.
9. Closing statements were filed by (HCP) on September 18, 2017, and by Insurance Company on September 20, 2017.
10. On September 18, 2017, (HCP) filed two post-hearing exhibits.
11. SOAH Order No. 4, issued September 26, 2017, set an October 5, 2017 deadline to file pleadings about whether (HCP) was offering its post-hearing exhibits in evidence; if so, whether Insurance Company objected to such admission and on what grounds; and (HCP's) position regarding any such objection.
12. In a September 28, 2017 filing, (HCP) explained it was offering its post-hearing exhibits in evidence. On October 5, 2017, Insurance Company filed objections to admitting part of the post-hearing exhibits in evidence. The record closed with that filing on October 5, 2017.
13. SOAH Order No. 5, issued November 22, 2017, admitted in evidence one of the two post-hearing exhibits, (HCP) Exhibit 2.
14. At the hearing, Insurance Company stated that if (HCP) submitted a revised form CMS-1500 correcting the service facility location from St. Jude Medical to Covenant and a certification by (HCP) instead of St. Jude Medical, the only remaining contested issues would be Insurance Company's objections to paying any additional reimbursement on the basis that: (1) Insurance Company already paid more than the maximum amount allowed; and (2) (HCP) billed costs that were not reasonable and customary and failed to apply any available rebates and discounts.
15. In (HCP) Exhibit 2, (HCP) supplied a revised CMS-1500, correcting the service facility location from St. Jude Medical to Covenant, and providing a certification by (HCP) instead of St. Jude Medical.
16. (HCP) and Covenant separately requested reimbursement for the surgery.

17. Covenant was reimbursed \$31,150.02 for the procedural part of the claim for the surgery, and HCP was reimbursed \$31,589.53 for the implant portion, so the total reimbursement was \$62,739.55.
18. The St. Jude Medical invoices, which Insurance Company submitted to show that (HCP) billed costs that were not reasonable or customary, were for different facilities, locations, and dates than those relating to the costs at issue.
19. The statements by Foresight Medical LLC, which Insurance Company submitted to show HCP billed costs that were not reasonable, were conclusory and unexplained.
20. The evidence does not show the costs at issue were not reasonable or customary or that HCP failed to seek available rebates or discounts for the implantables.

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to Texas Labor Code § 413.031 and Texas Government Code ch. 2003.
2. Adequate and timely notice of the hearing was provided in accordance with Texas Government Code §§ 2001.051-.052.
3. Insurance Company has the burden of proof in this proceeding. 1 Tex. Admin. Code § 155.427.
4. Insurance Company waived any objection that the original CMS-1500 stated the incorrect service facility location and the original certification was by the manufacturer of the implantable surgical devices rather than by the service provider.
5. The maximum allowable reimbursement under 28 Texas Administrative Code § 134.402(f)(2)(B) was \$29,692.26.
6. Insurance Company proved it has already paid an amount in excess of the maximum allowable reimbursement and thus (HCP) is not entitled to additional reimbursement. 28 Tex. Admin. Code § 134.402(f)(2)(B).
7. Insurance Company did not prove the invoiced costs were not reasonable or not customary or that (HCP) failed to apply any available rebates and discounts. 28 Tex. Admin. Code § 134.402(f).

ORDER

IT IS ORDERED THAT (Insurance Company) is not required to pay any amount over the sum of \$31,589.53 already paid to (HCP) 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 in its final decision the non-prevailing party and any costs for services SOAH provided. For purposes of Texas Labor Code § 413.0312, (HCP) is the non-prevailing party. The costs for services SOAH provided are set forth in Attachment A to this Decision and Order, which is incorporated herein for all purposes.

SIGNED November 30, 2017.



ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS