

**SUBCHAPTER F – PHARMACEUTICAL BENEFITS**  
28 TAC §134.503

1. **INTRODUCTION.** The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance (Department), Division of Workers' Compensation (Division) adopts on an emergency basis amendments to §134.503, concerning the pharmacy fee guideline, pursuant to House Bill (HB) 7, §8.005(e) and Government Code §2001.034 because of the near-term imminent peril to injured employees in the workers' compensation system if the rules are not adopted on an emergency basis. Because of this imminent peril and pursuant to Government Code §2001.036(a)(2), these amendments shall become effective on January 1, 2011.

The title of this section is amended from "Reimbursement Methodology" to "Pharmacy Fee Guideline" to conform to statutory nomenclature. This section also applies to networks certified under Insurance Code Chapter 1305, because Insurance Code §1305.101(c) specifically states that "prescription medication and services as defined by Section 401.011(19)(E), Labor Code, may not be delivered through a workers' compensation health care network" and that "prescription medication and services shall be reimbursed as provided by the Texas Workers' Compensation Act and applicable rules of the commissioner of workers' compensation."

The amendments to §134.503 are necessary to implement portions of HB 7, enacted during the 79th Legislature, Regular Session, effective September 1, 2005 as they apply to reimbursement of pharmaceutical services. The amendments will permit expedited compliance with statutory changes to the Labor Code as a result of changes to §408.028. The changes affected by HB 7 include revisions to Labor Code §408.028 which added section (f)

requiring the Commissioner by rule to adopt a fee schedule for pharmacy and pharmaceutical services that will: "(1) provide reimbursement rates that are fair and reasonable; (2) assure adequate access to medications and services for injured workers; and (3) minimize costs to employees and insurance carriers." HB 7 also added the following language to Labor Code §408.028(g): "Insurance carriers must reimburse for pharmacy benefits and services using the fee schedule as developed by this section, or at the rates negotiated by contract."

In addition, HB 7 added the following language to Labor Code §413.011(d):

"Notwithstanding Section 413.016 or any other provision of this title, an insurance carrier may pay fees to a health care provider that are inconsistent with the fee guidelines adopted by the division if the insurance carrier or a network under Chapter 1305, Insurance Code, has a contract with the health care provider and that contract includes a specific fee schedule." Labor Code §413.011(d) was then further amended under HB 473 during the 80th Legislature, Regular Session, effective September 1, 2007, to grant insurance carriers or their authorized agents the authority to use an informal or voluntary network as defined by Labor Code §413.0115 to contract with health care providers, including pharmacies, for fees different from the fees authorized under the Division's fee guidelines.

On January 1, 2011, however, certain provisions enacted by of HB 473 under Labor Code §413.011, specifically subsections (d-1), (d-2), and (d-3), relating to contractual agreements with informal or voluntary networks, will expire. Section 413.011(d-4) will remain in effect, which permits insurance carriers, their authorized agents, or certified networks arranging for non-network services, to contract with health care providers to secure health care for injured employees for fees in excess of the Division's fee guidelines. Additionally, the

§408.028(f) requirement that the Division adopt a pharmacy fee guideline that ensure adequate access to prescription medications and services will remain in effect. On May 20, 2010 the Division requested an opinion from the Office of the Attorney General regarding whether a workers' compensation insurance carrier may, on or after January 1, 2011, pay for a prescription drug at rates lower than the fee rate allowed by the Division's fee guidelines and if so, whether insurance carriers may contract with informal or voluntary networks to obtain these discounted rates. The Office of the Attorney General issued Opinion No. GA-0828 on December 10, 2010 in response to this request. The Division did not request an opinion regarding the expiration of §413.011, Subsections (d-1), (d-2), and (d-3) or the application of §413.0115 as these provisions relate to contractual agreements between insurance carriers and health care providers for health care services other than pharmacy services.

The Division has determined it is necessary to adopt these amendments on an emergency basis to continue uninterrupted dispensing and payment of prescription drugs, medicines or other remedies after January 1, 2011 and for the Division to meet the statutory mandates of Labor Code §408.028(f)(2) and §413.011(d) that require that the Division's pharmacy fee guidelines must ensure the quality of and adequate access to prescription medication services. Furthermore, the emergency adoption of these amendments is necessary to ensure that the Division meets the Labor Code §402.021(b)(4) requirement that the workers' compensation system of Texas provide timely, appropriate, and high-quality medical care that supports the restoration of the injured employee's physical condition and earning capacity. If the Division does not adopt these amendments on an emergency basis, uncertainty regarding insurance carriers' continued authority, after January 1, 2011, to

negotiate for contracts that permit them to pay for prescription medications and services at the fee rates currently permitted under the Labor Code would lead to mass expiration of currently existing insurance carrier contracts and the inability to negotiate new written contracts in their place. Furthermore, alternate mechanisms to negotiate pharmacy payment under this uncertain statutory authorization for pharmacy contracting cannot be implemented before January 1, 2011. This mass market dislocation and disruption, without any clearly authorized and implementable alternative, will result in pharmacies and/or their agents being confused about their ability to be paid and the appropriate reimbursement rates for prescription medications and services after January 1, 2011. This confusion will drastically delay, limit, or alter injured employees' access to prescription medications services and, therefore, place them in near-term imminent peril after January 1, 2011.

These amendments, however, are only intended to temporarily resolve the uncertainty regarding payment and reimbursement of pharmacy and pharmaceutical services while the Legislature considers possible statutory changes to clarify the reimbursement of pharmaceutical services within the workers' compensation system. Additional rulemaking will be necessary at the conclusion of the 82nd legislative session to adopt a long-term pharmacy fee guideline that conforms with all applicable law.

The Division, therefore, adopts amendments to §134.503 to clarify that: (1) §134.503 is a pharmacy fee guideline and (2) health care providers and insurance carriers may continue to contract for pharmaceutical services at rates above or below the Division's pharmacy fee guideline. Additionally, these amendments do not limit insurance carriers' authority to

negotiate these written contracts with pharmacies or pharmacy processing agents directly or to do so through the use of their authorized agents, such as pharmacy benefit managers.

**2. STATUTORY AUTHORITY.** The section is adopted on an emergency basis under the Labor Code §§408.028, 401.011, 402.021, 408.021, 413.011, 413.0111, 413.0115, 402.00111, 402.00116, 402.00128, and 402.061; Insurance Code Chapter 1305; Government Code §§2001.034 and 2001.036 as well as §8.005 of House Bill 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005 (HB 7). Labor Code §408.028 requires the Commissioner by rule to adopt a fee schedule for pharmacy and pharmaceutical services that will provide reimbursement rates that are fair and reasonable; assure adequate access to medications and services for injured employees and minimize costs to employees and insurance carriers. Section 408.028 also provides that insurance carriers must reimburse health care providers for pharmacy benefits and services using the Division's fee schedule or at rates negotiated by written contract. Section 401.011 contains definitions used in the Texas workers' compensation system (in particular, §401.011(19)(E), the definition of "health care," which includes a prescription drug, medicine or other remedy, §401.011(22), the definition of "health care provider," and §401.011(42), the definition of "health care reasonably required.>"). Section 402.021 states that the workers' compensation system of this state must provide timely, appropriate, and high-quality medical care supporting restoration of the injured employee's physical condition and earning capacity. Section 408.021 states that an injured employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Section 413.011 requires the Commissioner

by rule to establish medical policies and guidelines relating to necessary treatment for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control. Section 413.0111 requires that a rule on reimbursement of prescription medication or services must authorize pharmacies to use agents or assignees to process claims and act on behalf of pharmacies. Section 413.0115 requires that all informal or voluntary networks must be certified as a workers' compensation health care network under Insurance Code Chapter 1305 by January 1, 2011. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Labor Code Title 5, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the Division or Commissioner. Section 402.00128 provides general operational powers to the Commissioner to conduct daily operations of the Division and implement Division policy including the duty to delegate, assess and enforce penalties and enter appropriate orders as authorized by Labor Code Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act (Act). Insurance Code Chapter 1305 is the Workers' Compensation Health Care Network Act that authorizes the establishment of certified networks for the provision of workers' compensation benefits. In particular, §1305.101(c) sets forth that prescription medication and services may not be delivered through a workers' compensation health care network and that prescription medication and services for certified network claims shall be reimbursed as provided by the Act and applicable rules of the Commissioner. Further,

§1305.051 provides that a person may not operate a certified network in this state unless the person holds a certificate issued under Chapter 1305 and rules adopted by the Commissioner of Insurance. Government Code §2001.034 provides for the adoption of administrative rules on an emergency basis without notice and comment if an agency finds that an imminent peril to the public health, safety, or welfare, or requirement of state or federal law, requires adoption of a rule on fewer than 30 days notice. Government Code §2001.036 provides that if a state agency finds that an expedited effective date is necessary because of imminent peril to the public health, safety, or welfare, a rule is effective immediately on filing with the secretary of state, or on a state date less than 20 days after the filing date. In addition, §8.005(e) of HB 7 gives the Commissioner the authority to adopt rules on expedited basis using the procedures established in Government Code §2001.034 without making the finding described in Government Code §2001.034(a).

3. **TEXT.**

**§134.503. Pharmacy Fee Guideline [Reimbursement Methodology].**

(a) Applicability of this section is as follows:

(1) This section applies to the reimbursement of prescription and nonprescription drugs that are:

(A) dispensed on or after January 1, 2011; and

(B) for outpatient use in the Texas workers' compensation system, which includes claims:

(i) subject to a certified workers' compensation health care network as defined in §134.500 of this title (relating to Definitions); and

(ii) not subject to a certified workers' compensation health care network.

(2) This section does not apply to:

(A) parenteral drugs; or

(B) claims subject to Labor Code §504.053(b)(2).

(b) For coding, billing, reporting, and reimbursement of prescription and nonprescription drugs, Texas workers' compensation system participants shall apply the provisions of Chapters 133 and 134 of this title (relating to General Medical Provisions and Benefits--Guidelines for Medical Services, Charges, and Payments, respectively).

(c) [(a)] The [maximum allowable ] reimbursement [(MAR)] for prescription drugs shall be as follows [the lesser of]:

(1) A negotiated or contract amount between the insurance carrier and the pharmacy, or the pharmacy processing agent, if applicable, that is greater than the reimbursement established by paragraph (3)(A) of this subsection may be paid for prescription drugs used for an injured employee's claim at any time when it is necessary to secure health care for an injured employee; [The provider's usual and customary charge for the same or similar service;]

(2) A negotiated or contracted amount between the insurance carrier and the pharmacy, or the pharmacy processing agent, if applicable, that is less than the reimbursement established by paragraph (3)(A) of this subsection; or

(3) In the event a negotiated or contract amount between the insurance carrier, pharmacy, or pharmacy processing agent does not exist, the lesser of:

(A) [(2)] the fee [The fees] established by the following formulas based on the average wholesale price (AWP) as reported [determined] by [utilizing] a nationally recognized pharmaceutical price guide or other publication of pharmaceutical pricing data [reimbursement system (e.g. Redbook, First Data Bank Services)-] in effect on the day the prescription drug is dispensed; [-]

(i) [(A)] Generic drugs: ((AWP per unit) x (number of units) x 1.25) + \$4.00 dispensing fee = reimbursement amount [MAR];

(ii) [(B)] Brand name drugs: ((AWP per unit) x (number of units) x 1.09) + \$4.00 dispensing fee = reimbursement amount [MAR];

(iii) When compounding, a single compounding fee of \$15 per prescription shall be added to the calculated total for either subparagraph (A)(i) or (ii) of this paragraph; or

(B) the provider's billed amount.

~~[(C) A compounding fee of \$15 per compound shall be added for compound drugs; or]~~

~~[(3) A negotiated or contract amount.]~~

(d) Reimbursement for nonprescription drugs or over-the-counter medications shall be the retail price of the lowest package quantity reasonably available that will fill the prescription.

(e) If an amount to calculate the reimbursement cannot be determined in accordance with subsections (c) or (d) of this section, reimbursement shall be determined in accordance with §134.1 of this title (relating to Medical Reimbursement).

(f) [(b)] When the prescribing doctor has written a prescription for a generic drug or a prescription that does not require the use of a brand name drug in accordance with §134.502(a)(3) of this title (relating to Pharmaceutical Services), reimbursement shall be as follows:

(1) the pharmacist shall dispense the generic drug as prescribed and shall be reimbursed the fee established for the generic drug in accordance with subsection (c) ~~[(a)]~~ of this section; or

(2) when an injured employee chooses to receive a brand name drug instead of the prescribed generic drug, the pharmacist shall dispense the brand name drug as requested and shall be reimbursed:

(A) by the insurance carrier, the fee established for the prescribed generic drug in accordance with subsection (c) ~~[(a)]~~ of this section; and

(B) by the injured employee, the cost difference between the fee established for the generic drug in subsection (c) of this title and the fee established for the brand name drug in accordance with subsection (c) of this section ~~[§134.503(a)(2) of this title]~~.

(g) [(e)] When the prescribing doctor has written a prescription for a brand name drug in accordance with §134.502(a)(3) of this title , reimbursement shall be in accordance with subsections (c) - (e) [subsection(a) ] of this section.

~~[(d) Reimbursement for over-the-counter medications shall be the retail price of the lowest package quantity reasonably available that will fill the prescription.]~~

~~[(e) This section applies to the dispensing of all drugs except inpatient drugs and parenteral drugs.]~~

(h) [(f)] Upon request by the health care provider or the division, the insurance carrier shall disclose the source of the pricing reference [AWP] used to calculate the reimbursement.

(i) Where any provisions of this section are determined by a court of competent jurisdiction to be inconsistent with any statutes of this state, or to be unconstitutional, the remaining provisions of this section shall remain in effect.

**4. CERTIFICATION.** This agency hereby certifies that the adopted sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, December 17, 2010.

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Dirk Johnson  
General Counsel  
Texas Department of Insurance,  
Division of Worker's Compensation

**IT IS THEREFORE THE ORDER** of the Commissioner of Workers' Compensation, Texas Department of Insurance, that amendments to §134.503, concerning pharmacy fee guideline, are adopted on an emergency basis and shall be effective January 1, 2011.

**AND IT IS SO ORDERED.**

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ROD BORDELON  
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

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Dirk Johnson  
General Counsel

COMMISSIONER'S ORDER NO.