

AMERICAN HOME ASSURANCE CO.,
Petitioner

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BEFORE THE STATE OFFICE

V.

OF

RAYMOND PERRY, D.C.,
Respondent

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Petitioner, American Home Assurance Company (Carrier), appealed a Texas Workers' Compensation Commission (Commission) Medical Review Division (MRD) decision denying its request for a refund of \$2,829.00, which Carrier paid Respondent, Raymond Perry, D.C., for treating Claimant ____ for an injury the Commission subsequently determined to be noncompensable. The MRD concluded that Carrier waived its right to a refund because it did not request a refund within the 45-day deadline set forth in the Commission's rules at 28 TEX. ADMIN. CODE § 133.304(a) and (b)(3).¹ In this decision, the Administrative Law Judge (ALJ) concludes that Carrier's failure to request a refund within 45 days did not waive its right to medical dispute resolution or a refund. The ALJ concludes that Carrier's refund request should be granted because the condition for which the underlying services were provided has been deemed noncompensable.

II. PROCEDURAL HISTORY

The hearing in this matter convened on April 14, 2004, before ALJ Renee M. Rusch at the hearings facility of the State Office of Administrative Hearings (SOAH) in Austin, Texas. Carrier was represented by attorney Dan Kelley. Respondent appeared *pro se*. After taking evidence and argument, the Administrative Law Judge (ALJ) held the record open so as to give Respondent an opportunity to retain legal counsel to assist him in analyzing the legal issue raised in this matter, if he so chose; give both Carrier and Respondent an opportunity to submit written closing briefs; and give Commission staff an opportunity to brief the Commission's interpretation of the applicable

¹ It is unclear from the wording of the MRD's decision whether the MRD concluded Carrier waived a right to a refund, the right to medical dispute resolution, or both.

Commission rule. The record closed on June 14, 2004, following receipt of written arguments from the parties and the Commission's staff.

III. DISCUSSION

1. Background Facts

Claimant alleged she suffered a left knee injury on the job on _____. At the time, Claimant was an employee of _____, and Carrier was _____'s workers' compensation carrier. Carrier contested the compensability of Claimant's injury. On December 16, 2002, a Commission Benefit Review Officer issued an interlocutory order directing Carrier to begin paying workers' compensation benefits to Claimant. (Respondent Ex. A, p. 166.)

Respondent treated Claimant from October 11, 2002, through February 1, 2003, and Carrier paid him \$2,829.00 for those services.² The Explanations of Benefits (EOBs) Carrier provided all reflected that the Carrier was contesting compensability. (Petitioner Ex. 1.) It is unclear from the record precisely when Carrier received and paid Respondent's statements.

On February 13, 2003, a contested case hearing on the compensability issue was conducted at the Commission, and on February 18, 2003, a Commission hearing officer ruled that Claimant's injury was noncompensable. (Petitioner Ex. 1.) Claimant received a copy of that decision on February 24, 2003. Thereafter, Claimant had 15 working days to appeal the Commission's decision but apparently did not do so; thus, the determination of noncompensability became final on March 11, 2003. Carrier requested a refund on June 18, 2003, which, the parties stipulated, was more than 45 days after Carrier received Respondent's statements. (Petitioner Ex. 1.) The Commission's MRD, relying on Rule 133.304(a) and (b)(3), ruled that the Carrier was not entitled to a refund because it did not request reimbursement within 45 days after receiving the medical bills at issue.

2. The Legal Issue Here

² The services Respondent provided included office visits, joint mobilization, ultrasound therapy, electrical stimulation, massage therapy, therapeutic exercises, neuromuscular stimulation, and report preparation.

Commission Rule 133.304(a) provides in relevant part:

[A]n insurance carrier shall take final action on a medical bill not later than the 45th day after the date the insurance carrier received a completed medical bill.

Rule 133.304(b)(3) provides that “final action” on a medical bill includes paying the charges on the bill, denying a charge on the bill, or requesting reimbursement for an overpayment.

The issue in this proceeding is whether Rule 133.304(a) and (b)(3) preclude Carrier from obtaining a refund through the Commission’s medical dispute review process because Carrier requested a refund later than 45 days after it received Respondent’s completed statements.

3. The Parties’ Positions

Notwithstanding the language of Rule 133.304(a) and (b)(3), the Carrier argued that it is entitled to a refund because the adoption preamble to the rule published in the March 10, 2000, *Texas Register* states:

Section 408.027 for the Texas Labor code requires payment or dispute of a medical bill within 45 days; section 409.021 of the Texas Labor Code allows 60 days to review compensability. If an insurance carrier pays a medical bill for services that are later finally adjudicated to be not compensable, the insurance carrier may pursue a refund from the health care provider, and the refund request is then outside the scope of the time frames in § 133.304 governing refund requests because this rule applies only to compensable injuries and illnesses. 25 *Tex. Reg.* 2123.

Respondent countered that Rule 133.304 does not, on its face, provide an exception for noncompensable injuries. Respondent explained that he had no knowledge of the limiting language in the adoption preamble and, like the Commission’s MRD, relied on the plain language of the rule. In a brief filed by an attorney in the Commission’s Litigation Division, Commission staff argued that the ALJ should be governed by the plain wording of the rule without consideration of the statements contained in the adoption preamble because, unless a rule is ambiguous, a court must follow the rule’s clear language.

Carrier maintained that Respondent, like all citizens, was on notice of the adoption preamble to the rule because it is available in the archives of the *Texas Register*. Carrier noted too that courts

construe administrative rules in the same manner as courts construe statutes (citing *Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 [Tex. 1976]), and argued that a court's primary objective, in construing a rule, should be to give effect to the Commission's intent (citing *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 [Tex. 1997]). According to Carrier, the Texas Supreme Court has stated the best source of information about the Commission's intent is the *Texas Register*, which contained notice of the rule when it was being proposed, the Commission's explanation of the rule, and its response to public comment it received about the rule. *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999), citing TEX. GOV'T CODE §§ 2001.023 - 2001.030.

4. ALJ's Analysis

Presently, at least three conflicting SOAH decisions address the issue of whether a carrier's failure to meet the 45-day deadline contained in Rule 134.304(a) and (b)(3) mandates dismissal of a carrier's request for dispute resolution. SOAH Docket No 453-03-621.M4 (ALJ Norman, February 9, 2004, Order Denying Motions to Dismiss) (Carrier's failure to request a refund of overpayment within 45 days did not waive its right to medical dispute resolution); SOAH Docket No. 453-04-3588.M4 (ALJ Zukauckas, April 23, 2004) (Rule 133.304(a) and (b)(3) do not preclude Carrier from requesting a refund approximately seven months after receipt of provider's bill); *contra*, SOAH Docket No. 453-02-1809.M4 (ALJ Kilgore, June 11, 2002) (ALJ agreed with provider, apparently solely on the basis of the wording of Rule 134.304, that a carrier was not entitled to refund if it did not request refund within 45 days). The ALJ does not believe the analyses contained in any of these decisions to be dispositive here.

Though Rule 133.304(a) and (b)(3) expressly state a carrier must request reimbursement for an overpayment within 45 days of receiving a provider's completed medical bill, the ALJ is not convinced the rule is unambiguous. The rule does not specify the consequences of noncompliance. Nor, as a threshold matter, does it define what constitutes an "overpayment." It is not clear to the ALJ that a carrier's payment for services provided for a *noncompensable* injury necessarily constitutes an *overpayment*, as the carrier did not, in those circumstances, actually *owe* the provider *anything*. Thus, the ALJ questions whether the scenario presented in this case falls squarely within the four corners of Rule 133.304(a) and (b)(3).

The Code Construction Act expressly provides that when a court is construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider: (1) the object to be attained, (2) circumstances under which the statute was enacted, (3) legislative history, (4) common law, former, or similar statutory provisions, (5) consequences of a particular construction, (6) administrative construction of the statute, and (7) the title, preamble, and emergency provisions. TEX. GOV ' T CODE § 311.023(1)-(7). The Texas Supreme Court has held that these factors will be considered even when a statute is clear and unambiguous on its face. *In re Canales*, 52 S.W.2d 698, 702 (Tex. 2001). And, as Carrier has pointed out, the Texas Supreme Court has stated that the best source of the Commission ' s intent is the *Texas Register*. *Rodriguez*, 997 S.W.2d at 254. The canons of statutory construction do not contain a hierarchy; in construing statutes, courts are to be governed by the rule of common sense. *Nat ' l Surety Co. Ladd*, 115 S.W.2d 600, 603 (Tex. 1938).

The adoption preamble to the relevant sections of Rule 133.304 explains how the rule relates to its statutory underpinnings, TEX. LABOR CODE § § 408.027 and 409.021(c). Pursuant to TEX. LABOR CODE § 408.027(a), a carrier is required to pay a provider ' s fee within 45 days of receiving the provider ' s statement unless the carrier disputes the amount of the payment or the carrier ' s entitlement to payment. Sections 408.027(b)-(d) set forth the procedures a carrier must follow in those circumstances. TEX. LABOR CODE § 409.021(c) provides that a carrier has 60 days after being notified of an injury to contest compensability, and if the carrier does not contest compensability within that time frame, it waives the right to contest compensability. Section 409.021(c) further provides that a carrier ' s initiation of payments does not waive its right to contest compensability.

When Rule 133.304 is considered in conjunction with these underpinning statutes, common sense dictates that the "final action" a carrier must take within 45 days relates to action on a statement relating to a *compensable* injury. A carrier has 60 days to *contest* compensability, and a carrier ' s right to request a refund cannot mature until *after* the Commission had *adjudicated* the issue of compensability. Thus, in many, if not most, cases, a carrier cannot possibly request a refund within the 45 days set forth in Rule 133.304(a).

Case law provides that when a statute is silent about the consequences of noncompliance, a

court will look to its purposes to determine a proper construction³ In this case whether noncompliance with Rule 133.304 should cause a waiver. Viewing Rule 133.304 by itself, an argument can be made that its purpose—requiring prompt decisions by insurance carriers—would be frustrated by not concluding that a late decision results in a waiver. However, requiring a carrier to do the impossible—request a refund before compensability has been decided—would make no sense. Moreover, in reviewing other rules promulgated by the Commission, the ALJ found numerous instances where, when the Commission intended the consequence of noncompliance to be waiver, the Commission enacted rules expressly providing for waiver. *See, for example*, 28 TEX. ADMIN. CODE §§ 133.307(d) and (i), 133.308(e), and 180.11(b)(3)(E) and (4)(B).

Finally, the ALJ observes that in response to a suggested rule attaching a “presumption of medical necessity” to a carrier’s failure to *pay* a provider within 45 days, the Commission stated that untimely action does *not* result in waiver of a carrier’s right to dispute a bill at the MRD:

[A]n insurance carrier that does not pay or deny medical bills timely is out of compliance with these rules, which is an issue for the Division of Compliance and Practices to review. *The Commission will not deem that services are medically reasonable and necessary based solely on the insurance carrier’s failure to process a bill timely.* [Emphasis added.] 25 TEX. REG. 2119 (March 10, 2000.)

This comment indicates that a carrier can make or deny payment later than 45 days after receipt of a provider’s bill *without* waiving the right to medical dispute resolution. Though such action or inaction may constitute an administrative violation in certain circumstances, it does not preclude the MRD from determining substantive issues relating to medical necessity and the adequacy of a carrier’s payment. It follows that a carrier who requests a refund later than 45 days after receiving a provider’s bill for a noncompensable injury has not waived the right to a refund or medical dispute resolution.⁴

5. Conclusion

The outcome here is harsh for Respondent. Nonetheless, the ALJ concludes that, where, as

³ *Helena Chemical Co. v. Wilkins*, 47 S.W. 3d 486, 494 (Tex. 2001); *Albertson’s Inc. v. Sinclair*, 984 S.W. 2d 958, 961 (Tex. 1999).

⁴ Depending on the circumstances, however, action by the Commission’s Compliance and Practices Division may be warranted.

here, a carrier requests a refund more than 45 days after receiving a provider's completed medical bills, and the basis for the refund request is that the underlying injury has been adjudicated noncompensable, Rule 133.304 does not preclude the carrier from obtaining a refund through medical dispute resolution.

IV. FINDINGS OF FACT

1. Claimant ___ alleged she suffered a left knee injury on the job on ___.
2. At the time, Claimant was an employee of ___, Inc., and American Home Assurance Company (Carrier) was ___ compensation carrier.
3. Carrier contested the compensability of Claimant's injury.
4. On December 16, 2002, a Texas Workers' Compensation Commission (Commission) Benefit Review Officer issued an interlocutory order directing Carrier to begin paying workers' compensation benefits to Claimant.
5. Raymond Perry, D.C. (Respondent) treated Claimant from October 11, 2002, through February 1, 2003, and Carrier paid him \$2,829.00 for those services. The Explanations of Benefits (EOBs) Carrier provided all reflected that the Carrier was contesting compensability.
6. On February 13, 2003, a contested case hearing on the compensability issue was conducted at the Commission, and on February 18, 2003, a hearing officer ruled that Claimant's injury was noncompensable.
7. The determination of noncompensability became final on March 11, 2003.
8. More than 45 days after Carrier received Respondent's statements, Carrier requested a refund of the \$2,829.00 it had paid Respondent for treating Claimant.
9. Respondent denied Carrier's request for a refund.
10. Carrier requested medical dispute resolution at the Commission's Medical Review Division (MRD).
11. The Commission's MRD, relying on Commission Rule 133.304(a) and (b)(3), ruled that the Carrier was not entitled to a refund because it did not request reimbursement within 45 days after receiving the medical bills at issue.
12. Carrier requested a hearing not later than the twentieth day after receiving notice of the MRD decision.
13. All parties received not less than 10 days' notice of the time, place, and nature of the

hearing; the authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

14. The hearing in this matter convened on April 14, 2004, before Administrative Law Judge Renee M. Rusch at the hearings facility of the State Office of Administrative Hearings (SOAH) in Austin, Texas. Carrier was represented by attorney Dan Kelley. Respondent appeared *pro se*.
15. All parties had an opportunity to present evidence and argument on the issues involved in this matter.

V. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §413.031 and TEX. GOV' T CODE ANN. ch. 2003.
2. All parties received adequate and timely notice of the hearing. TEX. GOV' T CODE ANN. §§ 2001.051 and 2001.052.
3. Carrier did not waive its right to seek a refund from Respondent by not requesting the refund within 45 days of receiving Respondent's complete medical bills. 28 TEX. ADMIN. CODE § 133.304; 25 *Tex. Reg.* 2123 (March 10, 2000).
4. Carrier did not waive its right to medical dispute resolution by not requesting a refund from Respondent within 45 days of receiving a complete medical bill. 28 TEX. ADMIN. CODE § 133.304; 25 *Tex. Reg.* 2123 (March 10, 2000).
5. Respondent should pay Carrier \$2,829.00 plus interest. 28 TEX. ADMIN. CODE §133.304(r).

ORDER

IT IS THEREFORE ORDERED that Raymond Perry, D.C., pay American Home Assurance Company \$2,829.00 plus interest.

SIGNED July 21, 2004.

RENEE M. RUSCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS