

SOAH DOCKET NO. 453-04-4223.M4
TWCC MR NO. M4-03-0775-01

AMERICAN HOME ASSURANCE COMPANY, Petitioner	'	BEFORE THE STATE OFFICE
	'	
	'	
V.	'	OF
	'	
BAYLOR UNIVERSITY MEDICAL CENTER, Respondent	'	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

This is a dispute over interpretation of the stop-loss provisions of the Texas Workers' Compensation Commission's (the Commission's) 1997 Acute Care Inpatient Hospital Fee Guideline. The Administrative Law Judge (ALJ) concludes the stop-loss provisions apply and that the workers' compensation carrier should reimburse the hospital an additional \$11,600.70, as ordered by the Commission's Medical Review Division, plus interest.

I. HISTORY AND ISSUES

On October 22, 2001, the workers' compensation claimant (Claimant) underwent spinal fusion surgery at Baylor University Medical Center (BUMC). The Claimant remained in the hospital through October 25, 2001. BUMC calculated the bill for its services at \$40,375.18, and requested reimbursement of 75 percent of that amount, which is \$30,281.39. The 75 percent figure was based on the stop-loss provisions of the Commission's 1997 Acute Care Inpatient Fee Guideline (the Guideline), 28 TEX. ADMIN. CODE (TAC) §134.401(c)(6). Under the Guideline, hospital stays typically are reimbursed at a *per diem* rate. As explained in that subsection of the Guideline, however,

Stop-loss is an independent reimbursement methodology established to ensure fair and reasonable compensation to the hospital for unusually costly services rendered during treatment to an injured worker. This methodology shall be used in place of and not in addition to the per diem based reimbursement system

The minimum level for application of the stop-loss methodology-the stop-loss threshold-is \$40,000. If a bill qualifies for the stop-loss methodology, reimbursement for the entire admission is paid at 75 percent of the audited charges.

In this case, BUMC's bill included a charge of \$22,691.47 for implantables,¹ which was its usual and customary charge of cost plus 68 percent. In its audit, the workers' compensation carrier, American Home Assurance Company (AHAC), reduced the pricing for the implantables to cost plus ten percent, which it claims is the fair and reasonable level mandated by the Guideline. That reduction brought the total bill below the stop-loss threshold of \$40,000. Therefore, AHAC paid the *per diem* amounts, plus the cost of the implantables plus ten percent and other minor items. The difference between that amount and what BUMC believes is appropriate reimbursement is \$11,600.70.

After its request for reconsideration was denied, BUMC filed a timely request for medical dispute resolution. The Commission's Medical Review Division ruled in BUMC's favor, whereupon AHAC filed a timely request for a hearing.

The hearing was convened June 14, 2004, with ALJ Henry D. Card presiding. Both AHAC and BUMC appeared at the hearing, which was adjourned the same day. The record closed June 30, 2004, with the filing of AHAC's responsive written argument.

¹ Implantables are hardware, *e.g.* screws and rods, implanted in a patient during back fusion surgery.

AHAC argues that it was entitled, and indeed required, to audit BUMC's bill under the Guideline itself, 28 TAC §134.401(b)((2)(C) and the Commission's rule for retrospective review of medical bills, 28 TAC §133.301. In its audit, AHAC determined that the fair and reasonable charge for implantables was cost plus ten percent.² Reducing the implantables to that level brought the bill below the stop-loss threshold.

AHAC further argues that even if the bill were properly over \$40,000, BUMC still has to prove that the fusion procedure was "unusually costly" or "unusually extensive" as set out in the stop-loss portion of the Guideline itself, 28 TAC §134.401(c)(6). It provided testimony that this was a typical, rather than an unusual, back fusion surgery.

AHAC cited three previous SOAH cases that have dealt with these issues.³ All three were decided in favor of the carriers.

BUMC contends that it is entitled, and indeed required, to bill its "usual and customary charges" under 28 TAC §134.401(b)(2)(A). Its charge for implantables was its usual and customary charge. BUMC argues that the scope of a carrier audit of a stop-loss claim, as set forth in the stop-loss methodology, is limited to deducting for personal items (*e.g.* telephone, television) and items not related to the compensable injury. See 28 TAC ' 134.401(c)(6)(A)(v).

Even if a more extensive audit were appropriate, BUMC claims its charges were fair and reasonable. It presented evidence showing its mark-up on implantables to be below that of other

² In its Explanation of Benefits (EOB), AHAC encoded the reason for its reduction as M - Reduced to fair and reasonable. M is one of the codes established by the Commission for use on EOB forms, also known as TWCC 62s. That code is for reductions on treatments and services for which the Commission has not established a maximum allowable reimbursement (MAR).

³ Docket No. 453-00-2092.M4 (April 24, 2001); Docket No. 453-01-1612.M4 (September 6, 2001); and Docket No. 453-03-0910.M4 (April 10, 2003). *See also* Docket No. 453-03-1626.M4 (May 20, 2003). However, the opposite conclusion was reached in Docket No. 453-03-1233.M4 (October 9, 2003).

comparable providers. It further presented evidence that the average managed care payer reimburses implantables at 80 percent of billed charges, which is considerably above the cost plus ten percent used by AHAC as its "fair and reasonable" standard.

BUMC contends there is not a separate requirement that a provider show the services rendered were unusually costly or extensive. According to BUMC, services by definition are unusually costly or extensive if they meet the \$40,000 stop-loss threshold.

II. ALJ'S ANALYSIS

Under 28 TAC ' 148.21(h), the Petitioner, in this case AHAC, has the burden of proof. The ALJ concludes it did not meet that burden.

The first issue is the extent to which AHAC could audit the bill. The ALJ agrees with AHAC, and with the earlier SOAH decisions, that AHAC was entitled to review the bill retrospectively under the provisions of 28 TAC §133.301. Despite the language of 28 TAC '134.401(c)(6), the audit was not limited to the deduction of personal items and items unrelated to the compensable injury. Both 28 TAC §134.401(b)(1)(C) and 28 TAC §133.301 authorize and require a more extensive audit. The statutory scheme and common sense require a more extensive audit as well. If the audit were limited to the issues set out in 28 TAC §134.401(c)(6)(A)(v), a carrier would not be allowed to consider such basic problems as duplicate billing or inaccurate mathematical calculations, which are elements of the auditing rule. Nor could it consider whether a provider had billed far above its usual and customary charges.⁴

⁴ The ALJ is not suggesting BUMC has, or would, do so.

The second issue is whether, in the audit, AHAC properly reduced the implantables charge to the "fair and reasonable" level of cost plus ten percent. The Guideline, at 28 TAC §134.401(c)(4)(A)(i), establishes cost plus ten percent as the level of reimbursement for implantables. The preamble to the rule discusses the fairness and reasonableness of that level. As BUMC points out, however, that subsection of the rule only establishes the level of additional reimbursements, supplementing the *per diem* rates, when total charges fall below the stop-loss threshold. Section 134.401(c)(4) specifically states:

Additional reimbursements apply only to bills that do not reach the stop-loss threshold described in subsection (c)(6) of this section.

Moreover, the preamble to the rule observes,

In the case of pharmaceutical carve outs and carve outs identified by revenue codes, the whole bill is paid according to stop-loss provision if the stop-loss threshold is reached.

22 Tex Reg. at 6279, 6288 (July 4, 1997)

Implantables are one of the carve outs identified by revenue codes to which that sentence refers. From the Guideline itself and the preamble, it is clear that the Guideline does not set a reimbursement rate for implantables for all purposes.

As was pointed out in Docket No. 453-03-1233.M4, the use of cost plus ten percent, combined with application of the stop-loss factor, would actually reduce reimbursement for implantables below their cost. If, for example, the implantables cost \$1,000, the purported "fair and

reasonable reimbursement level would be \$1,100. The hospital would actually be reimbursed 75 percent of that amount, or \$825.⁵

In 28 TAC §134.401(b)(2), the Guideline instructs hospitals how to bill and sets the basic parameters for reimbursement:

- (1) All hospitals shall bill their usual and customary charges. The basic reimbursement for acute care hospital inpatient services shall be the lesser of:
 - (i) a rate for workers' compensation cases pre-negotiated between the carrier and hospital;
 - (ii) the hospital's usual and customary charges; or
 - (iii) reimbursement as set out in subsection (c) of this section for that admission.

In this case, there is no pre-negotiated rate. Nor is there a specific rate set out in subsection (c) for implantables, except in the context of additional reimbursement to supplement the *per diem* levels. The Guideline does not set a general implantables rate to be used in the auditing process.

Nor does 28 TAC §133.301, contain a provision that allows carriers generally to reduce rates to "fair and reasonable" levels. Instead, the Guideline states that BUMC is to bill its usual and customary rate. AHAC may audit the bill to ensure that rate was charged, but may not impose its own "fair and reasonable" rate. BUMC proved, however, that it had billed its usual and customary charges.

⁵ That problem would not occur if implantables were always carved out and paid at 110 percent, regardless of whether the stop-loss threshold were met. In the ALJ's view, that is not the treatment envisioned by the Guideline.

The third issue is whether BUMC must prove this surgery was unusually costly or unusually extensive, beyond showing that it met the stop-loss monetary threshold. AHAC argues that the stop-loss provisions of the rule require that additional element of proof. The Guideline, at 28 TAC §134.401(c)(6) states, in pertinent part,

- (6) Stop-Loss Method. Stop-loss is an independent reimbursement methodology established to ensure fair and reasonable compensation to the hospital for unusually costly services rendered during treatment to an injured worker.

* * * *

- (A)(ii) This stop-loss threshold is established to ensure compensation for unusually extensive services required during an admission.

The ALJ disagrees. He interprets the language in the Guideline as explaining the purpose of the stop-loss provisions. Nothing in those sections directs a hospital to provide additional information concerning the relative cost or extensiveness of admissions in order to qualify for stop-loss. Nor does the preamble suggest any such requirement. The ALJ concludes that an admission meets the stop-loss criteria if the properly audited charges for that admission exceed \$40,000. A hospital need not show that the procedure was otherwise unusually costly or extensive.

AHAC argues that basing reimbursement on the hospitals' usual and customary charges would defeat the cost-control objectives of the Labor Code and the Commission's rules. It cited examples of charges for implantables well above those billed by BUMC in this case.⁶ The ALJ appreciates that argument. However, the Commission considered its cost-control responsibilities in promulgating the Guideline. It is for the Commission, not SOAH, to determine how to meet those objectives.

⁶ BUMC provided similar information to support the reasonableness of its own charges.

The ALJ concludes the stop-loss provisions of 28 TAC §134.401 should be applied in this case, as determined by the Medical Review Division. Therefore, AHAC should reimburse BUMC an additional \$11,600.70, plus interest.

III. FINDINGS OF FACT

1. On October 22, 2001, the workers' compensation claimant (Claimant) underwent spinal fusion surgery at Baylor University Medical Center (BUMC).
2. The Claimant remained in the hospital through October 25, 2001.
3. BUMC calculated the bill for its services at \$40,375.18, and requested reimbursement of 75 percent of that amount, which is \$30,281.39.
4. The 75 percent figure was based on the stop-loss provisions of the Commission's 1997 Acute Care Inpatient Fee Guideline (the Guideline), 28 TEX. ADMIN. CODE (TAC) ' 134.401(c)(6).
5. BUMC's bill included a charge of \$22,691.47 for implantables, which was its usual and customary charge of cost plus 68 percent.
6. BUMC's usual and customary charges for the services rendered the Claimant were \$40,375.18.
7. In its audit, the workers' compensation carrier, American Home Assurance Company (AHAC), reduced the pricing for the implantables to cost plus ten percent.
8. AHAC's reduction brought the total bill below the stop-loss threshold of \$40,000.
9. Because the audited total bill was below \$40,000, AHAC paid the *per diem* amounts set out in the Guideline, plus the cost of the implantables plus ten percent and other minor items.
10. The difference between the amount paid by AHAC and the amount that would be payable under the stop-loss methodology is \$11,600.70.
11. After its request for reconsideration was denied, BUMC filed a timely request for medical dispute resolution.

12. The Commission's Medical Review Division ruled in BUMC's favor, whereupon AHAC filed a timely request for a hearing.
13. Notice of the hearing was sent to all parties March 31, 2004.
14. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
15. The hearing was convened June 14, 2004, with ALJ Henry D. Card presiding. Both AHAC and BUMC appeared at the hearing, which was adjourned the same day.
16. The record closed June 30, 2004, with the filing of AHAC's responsive written argument.

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. ' 413.031(d) and TEX. GOV'T CODE ANN. ch. 2003.
2. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. ' 2001.052.
3. Under 28 TAC ' 148.21(h), the Petitioner, in this case AHAC, has the burden of proof.
4. Under the Guideline, hospital stays typically are reimbursed at a *per diem* rate.
5. The stop-loss provisions of the Guideline, 28 TEX. ADMIN. CODE (TAC) ' 134.401(c)(6), establish an independent reimbursement methodology in lieu of the *per diem* methodology.
6. AHAC was entitled to review BUMC's bill retrospectively under the provisions of 28 TAC ' 133.301.
7. Pursuant to 28 TAC ' 134.401(b)(1)(C) and 28 TAC ' 133.301, AHAC's audit was not limited to the deduction of personal items and items unrelated to the compensable injury.
8. The Guideline, at 28 TAC ' 134.401(c)(4)(A)(i), establishes cost plus ten percent as the level of reimbursement for implantables only when the implantables are additional reimbursements, supplementing the *per diem* rates, when total charges fall below the stop-loss threshold.

9. The Guideline does not set a reimbursement rate for implantables for all purposes.
10. The Guideline does not set a general implantables rate to be used in the auditing process.
11. The Guideline, at 28 TAC ' 134.401(b)(2), instructs hospitals to bill their usual and customary charges.
12. Under 28 TAC §133.301, a carrier may audit bills submitted under the stop-loss provisions of the Guideline to ensure that hospitals billed their usual and customary charges.
13. Under 28 TAC §133.301, carriers may not impose their own "fair and reasonable" rate for implantables.
14. Under 28 TAC ' 134.401(c)(6), hospitals do not need to show that surgery was otherwise unusually costly or unusually extensive, beyond showing that the properly audited charges met the stop-loss monetary threshold.
15. The stop-loss provisions of 28 TAC ' 134.401 should be applied in this case.
16. AHAC should reimburse BUMC an additional \$11,600.70, plus interest.

SIGNED August 19, 2004.

HENRY D. CARD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS