

**BEFORE THE
STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ZURICH AMERICAN INSURANCE COMPANY,
PETITIONER
v.
HOLMES PROSTHETIC CENTER, LLC,
RESPONDENT**

DECISION AND ORDER

Holmes Prosthetic Center, LLC (Holmes) sought additional reimbursement from Zurich American Insurance Company (Zurich) for services rendered to an injured worker (Claimant), who sustained a work-related compensable injury on [REDACTED]. After reviewing the evidence presented and the applicable law, the Administrative Law Judge (ALJ) concludes that Zurich owes Holmes no additional reimbursement.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

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

Holmes appealed the Medical Fee Dispute (MFD) Decision issued by the Texas Department of Insurance, Division of Workers' Compensation (Division) on September 27, 2021. The MFD Decision ordered Zurich to reimburse Holmes \$54,097.08 for implantables¹ used during outpatient surgery provided to Claimant. Holmes appealed the MFD Decision to the State Office of Administrative Hearings (SOAH) and sought \$92,720.85 in additional reimbursement.

On February 9, 2023, SOAH ALJ Steve Rivas convened a hearing on the merits by Zoom videoconference. Attorney Larry Trimble represented Holmes. Attorney William Wright represented Zurich. The record closed on March 3, 2023, after the parties submitted written closing arguments.

II. APPLICABLE LAW

Under Texas Labor Code section 413.011(a), the Commissioner shall adopt health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems with minimal modifications to those reimbursement methodologies as necessary to meet occupational injury requirements. Furthermore, under Texas Labor Code section

¹ 28 Tex. Admin. Code § 134.403(e)(2).

413.011(d), fee guidelines must be fair and reasonable and designed to ensure the quality of medical care and to achieve effective medical cost control.

28 Texas Administrative Code section 134.403 applies to medical services provided in an outpatient acute care hospital. Absent a contracted fee schedule, reimbursement to a provider shall be the maximum allowable reimbursement (MAR) amount, including any applicable outlier payment amounts and reimbursement for implantables.² An “implantable” is an object or device that is surgically implanted, embedded, inserted, or otherwise applied, and related equipment necessary to operate, program, and recharge the implantable.³ MAR for implantables is calculated as follows:

(f) The reimbursement calculation used for establishing the MAR shall be the Medicare facility specific amount, including outlier payment amounts, determined by applying the most recently adopted and effective Medicare Outpatient Prospective Payment System (OPPS) reimbursement formula and factors as published annually in the *Federal Register*. The following minimal modifications shall be applied.

(1) The sum of the Medicare facility specific reimbursement amount and any applicable outlier payment amount shall be multiplied by:

(A) 200 percent; unless

(B) a facility or surgical implant provider requests separate reimbursement in accordance with

² 28 Tex. Admin. Code § 134.403(e)(2).

³ 28 Tex. Admin. Code § 134.403(b)(2).

subsection (g) of this section, in which case the facility specific reimbursement amount and any applicable outlier payment amount shall be multiplied by 130 percent.

- (2) When calculating outlier payment amounts, the facility's total billed charges shall be reduced by the facility's billed charges for any item reimbursed separately under subsection (g) of this section.

- (g) Implantables, when billed separately by the facility or a surgical implant provider in accordance with subsection (f)(1)(B) of this section, shall be reimbursed at 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.⁴

Fair and reasonable reimbursement shall be consistent with the criteria of Texas Labor Code section 413.011, 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.⁵

For products and services for which no relative value unit or payment has been assigned by Medicare, Texas Medicaid as set forth in 28 Texas Administrative Code sections 134.203(d) or 134.204(f), or the Division, reimbursement shall be provided

⁴ 28 Tex. Admin. Code § 134.403(f)-(g).

⁵ 28 Tex. Admin. Code § 134.1(f).

in accordance with 28 Texas Administrative Code section 134.1 (relating to Medical Reimbursement).⁶

Unresolved disputes “over the amount of 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.⁷ As the party seeking relief from the MFD Decision, Holmes has the burden of proof by a preponderance of the evidence.⁸

III. EVIDENCE

Holmes offered 10 exhibits,⁹ which were admitted as evidence, and called its owner, John Holmes, to offer testimony. Zurich offered 24 exhibits,¹⁰ which were admitted, but called no witnesses.

A. BACKGROUND FACTS

The facts of this case are mostly undisputed. On [REDACTED], Claimant sustained a work-related compensable injury. Due to his injury, both of Claimant’s legs were amputated around his knees and Claimant was fitted with implantables on

⁶ 28 Tex. Admin. Code § 134.203(f).

⁷ Tex. Labor Code § 413.031(c).

⁸ 28 Tex. Admin. Code § 148.14(b), (e).

⁹ Holmes Exhibits 1-10.

¹⁰ Zurich Exhibits A-X.

both legs. However, it is unclear from the record who provided Claimant his implantables prior to 2018.

On October 4, 2018, due to infections caused by of Claimant's original implantables, Holmes fitted Claimant with new implantables on both legs.¹¹ The implantable on Claimant's left leg consisted of a prosthetic patella and other parts that made up his left leg.¹² The implantable on Claimant's right leg consisted of prosthetic parts fitted below Claimant's natural patella that made up his right leg.¹³ Holmes raised no issue with the reimbursement he received for his services in 2018.

On [REDACTED], Claimant lost his left leg implantable while either jet skiing or waterskiing.¹⁴ The parties seemed unclear as to how the accident occurred. Mr. Holmes was not certain if it occurred on [REDACTED] Lake or [REDACTED]. Regardless, Zurich did not dispute this point. On July 17, 2019, Holmes sought preauthorization to replace Claimant's left leg implantable,¹⁵ which Holmes received on July 25, 2019.¹⁶ The preauthorization letter stated, "This is a review of medical necessity only. This does not guarantee that benefits will be payable under Workers

¹¹ Zurich Exs. V, W, X.

¹² *Id.*

¹³ *Id.*

¹⁴ Holmes Ex. 3 at 2. The medical record from [REDACTED] Hospital in [REDACTED], dated [REDACTED], indicated that Claimant "lost left ... prosthesis in lake last week." *Id.* Claimant did not testify.

¹⁵ Holmes Ex. 3 at 1.

¹⁶ Holmes Ex. 3 at 11.

Compensation coverage. Benefit payments are always subject to a determination by a claims adjuster at the time the service was rendered.”¹⁷

On September 11, 2019, Holmes provided Claimant the implantable and billed Zurich a total of \$146,817.93. Of that amount, \$80,000 was billed under Healthcare Common Procedure Coding System (HCPCS) Code L5999, attributable to a prosthetic part manufactured by the German-based company Ottobock.¹⁸ Zurich denied full reimbursement on the basis that Holmes lacked preauthorization or precertification for the procedure¹⁹ and that Zurich was not liable for replacement of a lost implantable.²⁰ On August 26, 2021, Holmes filed a request for MFD resolution with the Division. On September 27, 2021, the MFD Decision awarded \$54,097.08 reimbursement to Holmes, which Zurich has paid. Holmes appealed the MFD Decision to SOAH for additional reimbursement.

B. TESTIMONY OF JOHN HOLMES

John Holmes testified that on [REDACTED], he received a phone call from Claimant, who stated that he lost his implantable at “the lake.” Mr. Holmes explained that on that date, he commissioned a diver to search the area where Claimant claimed he lost the prosthesis, but it could not be located. Mr. Holmes said a police report was not made for the lost implantable.

¹⁷ *Id.*

¹⁸ Holmes Ex. 5. *See also* 28 Tex. Admin. Code § 134.203(d).

¹⁹ Zurich Exs. E, F.

²⁰ Zurich Ex. G.

Mr. Holmes testified that despite losing the implantable in a lake accident, Claimant still needs it to remain employed and to promote recovery of his [REDACTED] compensable injury. Mr. Holmes believed Zurich owes reimbursement for all of Claimant's medical expenses regardless of whether the expenses rise out of Claimant's own negligence.

C. THE MFD DECISION

The MFD Decision found that Holmes received preauthorization for the replacement of the implantable and that Zurich waived its right to deny reimbursement based on medical necessity or because Claimant lost the implantable. The MFD Decision also found (and the parties agree) that Code L5999 has no assigned value and, in the absence of an applicable fee guideline or negotiated contract, reimbursement shall be fair and reasonable under 28 Texas Administrative Code section 134.1(f).

The MFD Decision noted that in considering reimbursement, the Division requested supporting documentation from Holmes to support full reimbursement; however, Holmes's documentation, which included a manufacturer's note that the cost of the implantable was \$115,000, did not discuss, demonstrate, or justify a reimbursement of \$80,000 for Code L5999.²¹ As such, the MFD Decision applied 28 Texas Administrative Code section 134.203(d)(3), which mandates that the MAR

²¹Zurich Ex. R at 4.

be calculated according to 28 Texas Administrative Code sections 134.203(f) and 134.1.²²

IV. ANALYSIS

Holmes billed Zurich under several HCPCS codes for the procedure to replace Claimant's implantable. In determining \$54,097.08 of reimbursement, the MFD Decision found a MAR for all but one code, that being HCPCS Code L5999. There is no question that Code L5999 has no assigned value and, as such, reimbursement shall be fair and reasonable under the Division's rules. In addition to the peculiarities of this case (such as how and where Claimant lost the implantable), the ALJ finds the MFD Decision appropriately determined reimbursement.

The testimony provided by Mr. Holmes at the hearing was unhelpful. Obviously, a new implantable would benefit Claimant. The question, however, is whether the reimbursement amount was fair and reasonable. Under these circumstances, the ALJ finds that \$54,097.08 is appropriate.

Under Texas Labor Code section 413.011, fair and reasonable reimbursement shall ensure that similar procedures provided in similar circumstances receive similar reimbursement. In this case, Holmes failed to demonstrate a similar circumstance where a provider of implantables was fully reimbursed following a loss of an implantable under any circumstance, not to mention a loss sustained during a recreational activity. Moreover, Holmes failed to show full reimbursement is

²² Zurich Ex. R at 4-5.

appropriate based on nationally recognized published studies, published Division medical dispute decisions, and/or values assigned for services involving similar work and resource commitments. In short, there is no precedence for ordering full reimbursement under the circumstances presented in this matter. Despite the manufacturer's \$115,000 cost of the item billed under Code L5999, the ALJ finds Holmes did not meet its burden to prove by a preponderance of the evidence that Zurich owes any additional reimbursement.

V. FINDINGS OF FACT

1. On [REDACTED], an injured worker (Claimant) sustained a work-related compensable injury.
2. Due to Claimant's injury, both of his legs around his knees were amputated.
3. Prior to 2018, Claimant was fitted with "implantables" on both of his legs.
4. On October 4, 2018, due to infections caused by Claimant's original implantables, Holmes Prosthetic Center, LLC (Holmes) fitted Claimant with new implantables on his legs.
5. Holmes raised no issue with the reimbursement he received for his services in 2018.
6. On [REDACTED], Claimant lost his left leg implantable in a jet ski or waterskiing accident on [REDACTED] Lake or [REDACTED].
7. Claimant did not file a police report for the lost implantable.
8. On July 17, 2019, Holmes sought preauthorization to replace Claimant's left leg implantable.
9. On July 25, 2019, Holmes received preauthorization.

10. The preauthorization letter stated, “This is a review of medical necessity only. This does not guarantee that benefits will be payable under Workers Compensation coverage. Benefit payments are always subject to a determination by a claims adjuster at the time the service was rendered.”
11. On September 11, 2019, Holmes provided the implantable to Claimant and billed Zurich American Insurance Company (Zurich) a total of \$146,817.93.
12. Of that total amount, \$80,000 was billed under Healthcare Common Procedure Coding System (HCPCS) Code L5999, attributable to a prosthetic part manufactured by the German-based company Ottobock.
13. Zurich denied full reimbursement on the basis that Holmes lacked preauthorization or precertification for the procedure and that Zurich was not liable for replacement of a lost implantable.
14. On August 26, 2021, Holmes filed a request for medical fee dispute (MFD) resolution with the Texas Department of Insurance, Division of Workers’ Compensation (Division).
15. On September 27, 2021, the MFD Decision awarded \$54,097.08 reimbursement to Holmes, which Zurich has paid. Holmes appealed the MFD Decision to the State Office of Administrative Hearings (SOAH) for \$92,720.85 additional reimbursement.
16. On November 2, 2021, the Division issued a Notice of Hearing.
17. On November 3, 2022, SOAH issued an Order Scheduling Hearing on the Merits.
18. The notice, along with the SOAH Order Scheduling Hearing on the Merits, informed the parties of the time, place, and nature of the hearing; the factual matters to be considered; the legal authority and jurisdiction under which the hearing would be held; and the statutory provisions applicable to the matters to be considered.
19. On February 9, 2023, SOAH Administrative Law Judge Steve Rivas convened a hearing on the merits by Zoom videoconference. Attorney Larry Trimble represented Holmes. Attorney William Wright represented Zurich. The

record closed on March 3, 2023, after the parties submitted written closing arguments.

20. Zurich adequately reimbursed Holmes for services provided to Claimant.

VI. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order. Tex. Lab. Code § 413.031; Tex. Gov't Code ch. 2003.
2. Adequate and timely notice of the hearing was provided. Tex. Gov't Code §§ 2001.051-.052.
3. Holmes had the burden of proof in this proceeding by a preponderance of the evidence. 28 Tex. Admin. Code § 148.14(b), (e).
4. The MFD Resolution Findings and Decision concluding that Zurich owes \$54,097.08 is fair and reasonable. Tex. Lab. Code § 413.011; 28 Tex. Admin. Code § 134.403(f).

VII. ORDER

Zurich is not required to pay Holmes any additional reimbursement for services provided to Claimant.

VIII. NON-PREVAILING PARTY DETERMINATION

Texas Labor Code section 413.0312(g) and 28 Texas Administrative Code section 133.307(h) require the non-prevailing party to reimburse the Division for the cost of services provided by SOAH. Texas Labor Code section 413.0312(i) requires SOAH to identify the non-prevailing party and any costs for services provide by SOAH in its final decision. For purposes of Texas Labor Code section 413.0312, Holmes Prosthetic Center, LLC 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 April 26, 2023.

**STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**