ADVISORY NO. 187

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TOPIC: NEW PROCEDURES FOR MEDICAL BENEFIT DISPUTE HEARINGS

TWCC rules regarding hearings that are conducted under the Texas Administrative Procedure Act have been amended significantly. Attached for your information is a copy of our new procedures outlining the preparation and handling of these hearings.

New Procedures for Medical Benefit Dispute Hearings

I. Introduction

Amendments to the TWCC rules governing hearings conducted under the Texas Administrative Procedure Act which have gone into effect for cases commenced after January 1, 1996 have required a significant change in our firm's procedures for preparing these files for hearing. Primarily affected are cases involving medical benefit disputes where a hearing is sought by a provider or carrier after an unfavorable decision from the TWCC Medical Review Division (MRD).

The purpose of this advisory is to outline the high points of the new rule changes, and our accompanying file work-up procedure changes, as they affect adjusters dealing with medical benefit disputes.

The major rule changes come in the following areas: (1) who hears the cases, (2) when cases are set, and (3) what evidence is admitted at the hearing. These rule changes have affected our procedures in the initial submission of information to the MRD and in the work-up of cases for hearing.

II. Who Hears the Cases

For all cases where the record was opened and evidence taken, but the hearing was not concluded before January 1, 1996, the hearing will be finished by one of the former medical review dispute hearing officers employed by the TWCC. Please note that one of these TWCC hearing officers "opened the record" on a number of cases late in 1995, so if you

have a case which got started in 1995 there is a good chance it will be heard under this "grandfather" clause. For such cases the new rules and procedures described here do not apply.

Those cases where the record was not opened before January 1, 1996 are now being heard by the State Office of Administrative Hearings (SOAH), the state agency which conducts administrative hearings for other state agencies on a contract basis. None of these new judges have any previous experience in workers compensation, so they do not hold some of the prejudices against the Medical Review Division and its decisions that we saw with the TWCC hearing officers who were previously hearing medical benefit dispute cases. This has also presented us with a good opportunity to get off on the right foot with these new judges by educating them in the law and gaining credibility through a quality presentation of cases. However, the procedures are a bit more formal than when cases were heard by TWCC hearing officers, and certain deadlines will require adjusters to be more responsive to our firm's requests for documentary information and decisions concerning the hiring and use of testifying medical experts in these cases.

III. Initial Submission to MRD: Carrier Files and Evidence

The most important thing that adjusters must do in medical dispute cases is to get our firm information from your file relevant to the medical dispute as soon as it is requested. This request may come at one of various stages in the medical dispute review process.

Most medical disputes arise when a doctor goes to the Medical Review Division to dispute a carrier's denial of payment of a bill or denial of preauthorization. Our firm will receive a request directed to the carrier to respond to the provider's dispute. The carrier has ten (10) working days to respond to this MRD request for submission of a response and any supporting documents. Our firm can prepare a response for you -- Erin Allen (ext. 181) is your contact person if you wish to utilize this service. However, regardless of whether our firm or the adjuster files the

response, it is important to keep in mind that the evidence at any eventual hearing may be limited to what is submitted to the MRD for its initial determination at this stage. That is why it is important to make sure that all documentary evidence that you may want considered at a hearing is submitted to the MRD initially.

Also, if the dispute is one that is likely to end up going to hearing, and particularly if it involves substantial money in terms of the medical charges at issue or because an adverse decision could set bad precedent for comparatively inexpensive but frequently billed procedures (for example, “unbundling” of injection charges), then the adjuster should begin thinking at this initial stage about authorizing the hiring of a medical expert who could provide live testimony and/or an additional report to shore up what already has been provided in support of the carrier’s denial, usually a peer review.

It is important to understand that, in these cases, after the Medical Review Division makes its determination, the TWCC ceases to take an active role in the case apart from certifying its official record and making sure the agency is represented at the hearing. The MRD is not providing witnesses to support its determinations, and one of the new procedural rules specifically exempts MRD employees from being required to testify at medical benefit dispute hearings. Thus, if any live expert testimony is to be presented at a hearing, it will be the carriers providing it.

We recommend the use of live testifying experts in these new medical benefit dispute cases now being heard by SOAH hearing officers because these new judges are still learning about the law and the personalities involved in these disputes. The provider will always be testifying as an expert in these cases and it is preferable for carriers to have their own live expert to counter the testimony of the provider. Such testimony also will be crucial in cases where evidentiary objections are raised to medical reports and peer reviews, as discussed below. Usually peer review doctors or RME doctors will be available to provide live

testimony. You may decide in any given case, however, that the expense of the expert is not justified given the low-dollar exposure involved in the dispute, so this is a decision that will be left with the adjuster in all cases. But, again, as we are shaping the law before these new hearing officers it is our recommendation to hire a testifying expert.

IV. Notification of MRD Decision, Request for and setting of Hearing

When the Medical Review Division issues its decision it is put in our TWCC box as Austin representative and is forwarded to the carrier. Nothing further needs to be done by the adjuster at this time unless the MRD has ruled against the carrier and ordered payment or preauthorization and you wish to request a hearing on the adverse MRD decision. Most cases that go to hearing are based on requests by providers who get an adverse MRD decision, but there will be some cases where carriers who lose will want to request a hearing. In these "carrier loss" cases you will receive written notice of the decision and only one follow-up call regarding whether you wish to request a hearing. We have only twenty (20) days from an adverse decision to request a hearing so further follow-up is not possible.

In the great majority of cases the next activity after receipt of a favorable MRD determination will be our receipt of a set notice from the TWCC stating that the provider has requested a hearing and scheduling same. A copy of this set notice will be faxed to the adjuster along with a letter advising that our firm will represent the carrier at the hearing unless the adjuster instructs us otherwise. Barbara Thyng (ext. 263) will be the person who should be notified if representation is not desired, and she will also be the coordinator of all the medical benefit dispute cases which we do work up for hearing. Cases in which our firm will be representing the carrier will be assigned to an attorney and paralegal team who will be the primary contact persons for the case work-up.

At this time if we have not already received copies of all relevant documents from your file, it is imperative that this information be provided immediately. Under the new rules there are two crucial deadlines that must be met regarding possible evidence at the hearing. The first is that if any party wishes to introduce evidence which was not submitted to the MRD for its initial review, a request to consider this new evidence must be filed no later than seven (7) days before the hearing, along with a showing of good cause as to why it should be considered. The intention is to limit the evidence to that considered by the MRD, and usually we will not have to file requests to consider additional evidence, particularly if all relevant documents were submitted for the initial MRD decision.

However, we will need to make these requests in two circumstances: (1) where the certified MRD file does not contain all of the documents initially submitted on behalf of the carrier, and (2) where an expert is hired after the submission to MRD. So it is important at this stage that our office get copies of all relevant file material and that you make a decision on the hiring of any new expert if these steps have not already been taken. This will be particularly crucial in preauthorization cases where new rule deadlines for setting hearings have meant very short

notice of hearing dates and even shorter time periods to prepare the case for hearing.

It will be our policy to try to avoid requesting continuances on quick set cases and instead strive to get the evidence together so we can go forward on the first scheduled hearing date. However, if it gets to be ten (10) days before the hearing and we still do not have all relevant file documents (or we don't have the certified TWCC-MRD file to compare them against) we will be forced to request a continuance to make sure we will have no problems with evidence. So, again, prompt submission to us of all relevant file materials upon request will prevent us having to unnecessarily request continuances. Furthermore, it is not likely that continuances will be frequently granted in preauthorization cases, so we may be forced to hearing in these cases without an ability to put on all of our evidence if your file documents have not been timely sent to us.

V. Objections to the Certified Record

The new rules specifically provide that any objections to the consideration of any portion of the certified TWCC-MRD file at the hearing must be filed at least five (5) days before the hearing. Usually we will not be seeking to exclude any documents in the certified file but this will be reviewed on a case-by-case basis.

However, in a small number of cases we are seeing providers, usually represented by attorneys, objecting to medical reports and peer reviews supporting the carrier denial on the evidentiary bases of hearsay, lack of authentication and lack of foundation for expert testimony. Because the Rules of Evidence apply in these SOAH hearings, these are valid objections based on clear administrative law precedent and these documents are being excluded. Up until now in cases where these objections are raised the initial hearing setting is converted into a pretrial conference where the objections are heard and ruled on, and the case is reset to give the carrier time to cure the evidentiary problems through the use of medical records affidavits and, most often, the retention of an

expert (if one has not already been lined up) to testify live to the same opinions contained in the excluded documents.

Again, we believe these cases where portions of the record are excluded will prove to be a small minority of the total of medical benefit dispute cases, but when this procedural wrinkle occurs it will be necessary to do additional preparation to cure the evidentiary objections raised.

VI. The Hearing, Decision, and Further Appeal

Hearings will continue to take place in Austin, with telephonic testimony regularly used for out of town providers, adjusters and experts. When the SOAH hearing officer's decision is issued a copy will be sent to the adjuster. In almost every case that is the end of the matter, with very few providers or carriers filing an appeal to state district court. However, such an appeal is an option for either party, with the district court review being based on the "substantial evidence" test, and our firm is available to continue representing carriers at this level, whether the appeal is filed by the provider or the carrier.

VII. Settlements

The TWCC will not object to settlements of medical benefit dispute cases by carriers and providers with one exception: it will oppose settlements where the carrier agrees to pay for services in excess of fee guidelines. This settlement option in all non-fee guideline cases is something that should obviously be considered in appropriate cases.

VIII. Conclusion

The new procedures for medical benefit dispute cases should not cause too much trouble for you as adjusters as long as you keep two things in mind as soon as you see a dispute brewing: (1) our firm will need copies of all documents in your file relevant to the medical dispute in question as early as possible in the dispute process, and (2) you should consider early on whether and who to use as a testifying medical expert when the

case comes to hearing. As with any new procedures it will take a little time before things run smoothly in these cases, but we are confident that it will not be long before the bumps are smoothed out and things are working like clockwork.

Should you have any questions about these new procedures please contact John Gillespie (ext 173), Barbara Thyng (ext 263) or Erin Allen (ext 181).