ADVISORY NO. 463

TOPIC: DWC PLANS FOR EMERGENCY RULEMAKING ON PHARMACY FEES

The Division has notified system stakeholders that it anticipates the adoption of an emergency rule related to Pharmacy Fee guidelines. The notice comes in response to two independent, but related events: 1) the dispute over the continued ability of pharmacy benefit managers to process pharmacy claims using a discounted agreement after January 1, 2011; and 2) the Division's ongoing effort to develop a new pharmacy fee schedule.

The informally proposed rule to seeks to amend 28 Texas Administrative Code (TAC) §134.503 regarding the Pharmacy Fee Guideline. The informal proposal rule drafts were posted on October 25, 2010 and may be viewed at: http://www.tdi.state.tx.us/wc/rules/drafts.html.

The comment period on the informal proposal closes Monday, November 15, 2010 at 5:00 p.m. [Central Standard Time (CST)].

For many months the Division has attempted to develop a new fee schedule for pharmacy benefits. The planned rule proposes to do this by tying pharmacy reimbursement to the average wholesale price of prescription drugs "as reported by a nationally recognized pharmaceutical price guide or other publication of pharmaceutical pricing data."

The rule also creates a contingency plan in connection with the Division's request that the Texas Attorney General provide the agency with an opinion whether after January 1, 2011 insurance carriers may agree with pharmacies to discount reimbursement through informal or voluntary networks.

In other words, the Division is trying to put a rule in place in the event that the AG determines that a PBM can utilize a discount as well as a rule in place in the event that the AG fails to issue a timely opinion or determines that a PBM cannot utilize a discount. The rule incorporates a "Draft A" and "Draft B" concept.

In the event that the AG authorizes the discount, "Draft A" of the Rule provides that pharmacy benefits are payable at a contract rate that is greater than the fee schedule or at the lesser of: 1) fee schedule, or 2) a contract rate that is lower than the fee schedule.

Under "Draft A" the MAR is calculated by applying *a percentage higher than* "a nationally recognized pharmaceutical price guide or other publication of pharmaceutical pricing data in effect on the day the prescription drug is dispensed." For generics the fee is 1.25% of AWP plus a $4 dispensing fee. For brand name drugs the fee is 1.09% of AWP plus a $4 dispensing fee. For compounded drugs, "a single compounding fee of $15 per prescription shall be added to the calculated total." If no MAR can be calculated using the formula described above, payment shall be made in accordance with Rule 134.1 (fair and reasonable).

In the event that the AG declines to authorize the discount, "Draft B" of the Rule provides that pharmacy benefits are payable at a contract rate that is greater than the fee schedule or at fee schedule.

The difference here is that the fee schedule will be calculated using a discount. Under "Draft B" the MAR is calculated by applying *a percentage lower than* "a nationally recognized pharmaceutical price guide or other publication of pharmaceutical pricing data in effect on the day the prescription drug is dispensed." For generics the fee is .85% of AWP plus a $4 dispensing fee. For brand name drugs the fee is .96% of AWP plus a $4 dispensing fee. For compounded drugs, "a single compounding fee of $15 per prescription shall be added to the calculated total." If no MAR can be calculated using the formula described above, payment shall be made in accordance with Rule 134.1 (fair and reasonable).

The Attorney General is required to provide an opinion to the Division within 180 days of the agency's request. That means that the opinion is due to be issued on or before November 20, 2010. Presumably, the Division will move to adopt the "Draft B" concept in the event that the AG does not issue a timely opinion.

Note that both versions of the rule are applicable to reimbursement of prescription and nonprescription drugs that are dispensed on or after January 1, 2011 and before September 1, 2011. This date appears to have been selected in anticipation of the passage of curative legislation during the 82nd Session, which would become effective on September 1, 2011. Presumably if the Division adopts "Draft A" in response to a favorable AG's opinion, it would move to extend the life of the rule following the passage of curative legislation. On the other hand, if the Division adopts "Draft B" in response to an unfavorable AG's opinion, it would pass a new rule along the lines of "Draft A" next year if curative legislation is enacted.

We continue to monitor the Attorney General's announced decisions as well as the Division's rule making efforts in this area. If you have any questions in this regard, please contact James Sheffield or Bobby Stokes.