



ADVISORY NO. 467

TOPIC: DIVISION ISSUES PBM FIX VIA EMERGENCY RULE

Today, the Texas Department of Insurance, Division of Workers' Compensation, rule amendments on an emergency basis to 28 TAC §134.503 in an effort to clarify the right of carriers to continue to take advantage of negotiated contract rates for pharmacy benefits on and after January 1, 2011.

The emergency rule is adopted under Government Code §2001.034 and §2001.036 and subsection (e) of §8.005 of House Bill 7, enacted by the 79th Legislature, Regular Session. The emergency rule will take effect on January 1, 2011 and may remain in effect for a maximum of 180 days if renewed.

This rulemaking effort was made in an effort to confirm the right of carriers to continue to utilize the services of pharmacy benefit managers in the wake of a December 10, 2010 opinion by the Texas Attorney General.

In that opinion, GA-0828, the AG concluded that “sections 408.027, 408.028, and 413.011 of the Texas Labor Code do not establish a minimum allowable rate at which workers' compensation insurance carriers may pay for a prescription drug, medicine, or other remedy.” In addition, the AG determined that “a workers' compensation insurance carrier may contract with a workers' compensation health care network to obtain a contract with a health care provider to pay for a prescription drug, medicine, or other remedy at negotiated rates that are permitted by law.”

It has been generally recognized that the Attorney General's opinion was hard to understand in light of the questions posed by the Division. Thus, the Division adopted emergency rulemaking to avoid “mass market dislocation and disruption” and to prevent “pharmacies and/or their agents being confused about their ability to be paid and the appropriate reimbursement rates for prescription medications and services after January 1, 2011.” In its rule adoption order, the Division noted that such system-wide “confusion would drastically delay, limit, or alter injured employees' access to prescription medications services and, therefore, place them in near-term imminent peril after January

1, 2011.”

The Division’s emergency rule adoption order, and the full text of the amended rule, can be found at <http://www.tdi.state.tx.us/wc/rules/adopted/documents/134503ephar1210.pdf>. The Division has published a memo describing the rule amendment, which can be found at <http://www.tdi.state.tx.us/wc/rules/adopted/documents/eaorxfg1210.pdf>.

The adopted amendments permit insurance carriers to continue to reimburse prescription drugs dispensed on or after January 1, 2011 at rates either above or below the fees determined by the Division’s fee guideline using written contracts between insurance carriers and pharmacies or their processing agents, if applicable. In the absence of a negotiated or contracted rate, insurance carriers shall reimburse prescription drugs using the lesser of the fees established under the Division’s pharmacy fee guideline or the health care provider’s billed amount. If an amount to calculate the prescription drug cannot be determined using contracts or through the fees determined by the Division’s fee guidelines, reimbursement shall be determined in accordance with 28 TAC §134.1.

We anticipate that the delivery of pharmaceutical benefits within the Texas workers’ compensation system will be the subject of clarifying legislation during the upcoming legislative session, which begins January 11, 2011.

If you have questions regarding this issue, please contact Steve Tipton, James Sheffield or Bobby Stokes in our office.