Texas Department of Insurance
Division of Workers' Compensation
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RQ-0890-GA

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The Honorable Greg Abbott
Attorney General of Texas
Price Daniel Building
P.O. Box 12548
Austin, Texas 78701-2548

Re: The authority of workers' compensation insurance carriers to pay for a prescription drug, medicine, or other remedy at a lower fee rate than the fee rates allowed under the Texas Department of Insurance, Division of Workers' Compensation's fee guidelines after January 1, 2011.

Dear General Abbott:

This letter requests your opinion as to whether a workers' compensation insurance carrier may, after January 1, 2011, contract with health care providers to pay for a "prescription drug, medicine, or other remedy"[1] (prescriptions) at a lower fee rate than the fee rates allowed under the Texas Department of Insurance, Division of Workers' Compensation's (the Division) fee guidelines. If so, this letter also requests your opinion as to whether insurance carriers may contract with informal or voluntary networks, as defined by Texas Labor Code §413.0115, to obtain these contractual agreements.

Texas Labor Code §413.011(d-1) currently grants insurance carriers or their authorized agents the authority to contract with health care providers, including pharmacies, for fee rates that deviate from the Division's fee guidelines. It also permits carriers to use informal or voluntary networks to obtain these contractual agreements. On January 1, 2011, however, this provision will expire along with §413.011(d-2) and (d-3). Section 413.011(d-4), which only permits insurance carriers or their authorized agents to contract with health care providers for fees in excess of the Division's fee guidelines, will remain in effect. Furthermore, §413.0115 requires that all informal or voluntary networks become certified workers' compensation health care networks (WCHCNs) under Chapter 1305 of the Insurance Code by January 1, 2011, and, pursuant to §1305.101, WCHCNs cannot provide prescription medication or services. Taken together then, it appears that the expiration of §413.011(d-1) through (d-3) and the certification requirement of §413.0115 may prohibit insurance carriers and informal or voluntary networks from contracting for prescriptions at fees lower than the Division's fee guideline rates after January 1, 2011. Texas Labor Code §408.028(g), however, will remain in effect after January 1, 2011, and it provides that insurance carriers must reimburse health care providers for pharmacy benefits using the division's fee schedule or at contract rates. The Division believes this implied permission to reimburse pharmacies at contracted fee rates may conflict with the implied

[1] Texas Labor Code §401.011(19)

prohibition from contracting for prescriptions at fee rates lower the Division's guidelines imposed on carriers by the expiration of §413.011(d-1) through (d-3) and on informal and voluntary networks by the certification requirement of §413.0115.

Thus, the Division asks for your opinion on this difficult issue of statutory interpretation. Texas Labor Code §§408.028, 413.011, 413.031, and 413.0311 specifically require the Division to adopt and enforce fee guidelines that are fair and reasonable and to resolve disputes regarding the payment of health care not provided by a WCHCN, and, without clarification of these statutory issues, the Division cannot effectively administer these provisions.

Discussion

Prior to 2001, the Texas Workers' Compensation Act (the Act) made no mention of networks. However, many carriers contracted with health care providers for discounted fee rates during that time period to form what were referred to as "voluntary networks." Carriers could not compel injured employees to obtain medical care from any of the providers in these involuntary networks; however, if these contracted health care providers billed the carrier for medical services to treat an injured employee, the provider would receive payment at the discounted rate.

In 2001, House Bill 2600 (HB 2600) codified voluntary networks for the first time.[2] HB 2600 also created regional networks, which were to be networks somewhat similar to WCHCNs today; however, HB 2600 specifically excepted voluntary networks from the extensive statutory and regulatory framework that governed regional networks. Furthermore, HB 2600 also made voluntary networks subject to the provisions of Texas Insurance Code Article 3.70-3C, regarding preferred provider organizations, as minimum standards for their operation, and it gave the former Texas Workers' Compensation Commission rule-making authority to implement additional standards as necessary. Thus, after HB 2600, insurance carriers could not only contract for discounted fee rates with health care providers, but they could also do so through voluntary networks with express statutory authorization.

In 2005, the Legislature passed House Bill 7 (HB 7), which made five substantial changes that affected insurance carriers' authority to contract for discounted fee rates and the operation and continued validity of voluntary networks. First, the Legislature repealed the statute regarding voluntary networks, Texas Labor Code §408.0223. Second, the Legislature created, in Chapter 1305 of the Insurance Code, WCHCNs and appeared to intend for these networks to be the sole networks in the workers' compensation system. For the Legislature stated in Texas Insurance Code §1305.051:

> [a] person may not operate a workers' compensation healthcare network in this state unless the person holds a certificate issued under [Chapter 1305 of the Insurance Code] and rules adopted by the commissioner [of Insurance].

In addition, HB 7 added this language to Texas Labor Code §408.027(f) that appears to support the exclusivity of Chapter 1305 networks in the workers' compensation system:

[2] Tex. Lab. Code §408.0223 (repealed in Tex. H.B. 7, 79th Leg., R.S., § 3.275 (May 28, 2005)).

> Any payment made by an insurance carrier under this section shall be in accordance with the fee guidelines authorized under this subtitle if the health care service is not provided through a workers' compensation health care network under Chapter 1305, Insurance Code, or at a contracted rate for that health care service if the health care service is provided through a workers' compensation health care network under Chapter 1305, Insurance Code.

Because this section prohibits an insurance carrier from paying a health care provider a contracted rate unless the carrier does so through a WCHCN, it may also prohibit insurance carriers from directly contracting with a provider or by using voluntary networks to obtain these contracts. Thus, this language in §408.027(f), the language in Chapter 1305 of the Insurance Code, and the repeal of §408.0223 (regarding voluntary networks) appeared to potentially eliminate insurance carriers' authority to contract for discounted fee rates directly and through voluntary networks.

Two other changes made in HB 7, however, confound this conclusion. First, the Legislature added this language to §408.028(g):

> Insurance carriers must reimburse for pharmacy benefits and services using the fee schedule as developed by this section, or at rates negotiated by contract.

Even though it appears that under §408.027(f) insurance carriers could not contract with health care providers after HB 7 unless it was through a WCHCN, this section appears to fathom that insurance carriers can contract with pharmacies outside of WCHCNs, since WCHCNs cannot provide prescription medications or services under Texas Insurance Code §1305.101(c) (or at least not in network). An amendment made to Texas Labor Code §413.011(d) further supports this conclusion. It stated:

> Notwithstanding Section 413.016 or any other provision of this title, an insurance carrier may pay fees to a health care provider that are inconsistent with the fee guidelines adopted by the division if the insurance carrier or a network under Chapter 1305, Insurance Code, has a contract with the health care provider and that contract includes a specific fee schedule.

This provision appears to trump the prohibition of §408.027(f), because §413.011(d) applies "notwithstanding...any other provision of this title." Thus, even though the Legislature appeared to take a number of steps toward removing insurance carriers' authority to contract for discounted fee rates both directly or through voluntary networks from the workers' compensation system, including repealing the voluntary network statute, the newly added provisions of §408.028(g) and §413.011(d) appeared to permit this contracting to continue.

In the months following the effective date of HB 7, the Texas Department of Insurance (Department), which is tasked with the regulation of WCHCNs in Chapter 1305 of the Insurance Code, issued two bulletins addressing this apparent conflict between the repeal of voluntary networks and insurance carriers' continued ability to contract with providers for non-guideline

fees under §§408.028(g) and 413.011(d). First, the Department issued Commissioner's Bulletin 0071-05 that reached two conclusions:

> ...this bulletin serves as a reminder that voluntary networks or "informal networks" must be certified with the Department to continue providing or arranging to provide medical care to injured employees.
>
> The Department also reminds insurance carriers and other system participants that with the enactment in HB 7 of Section 413.011(d), Labor Code, certain contracts for fee reimbursement in non-network settings are permitted if the contractual agreement does not attempt to manage the delivery of health care services. Specifically, Section 413.011(d), Labor Code, allows an insurance carrier to contract with a health care provider outside of a certified network for fees either above or below the Division of Workers´ Compensation´s medical fee guideline for the treatment of injured employees outside of certified networks as long as the contract includes a specific fee schedule. Contracts outside of a certified network for fees that are different than the Division´s medical fee guidelines and that are not between an insurance carrier and a health care provider are inconsistent with Section 413.011(d), Labor Code.

Thus, after HB 7, the Department initially took the position that though voluntary or informal networks could no longer operate without WCHCN certification, carriers themselves could still contract with health care providers directly pursuant to §413.011(d).

Less than three months after the Department issued Bulletin 0071-05, it released another bulletin to clarify its first bulletin pursuant to stakeholder request. In Commissioner's Bulletin 0005-06, the Department stated:

> Many of the inquiries received recently by the Department focus on whether insurance carriers may continue to contract through other entities, such as preferred provider organizations, to obtain contracted fee arrangements with health care providers. Section 413.011(d), Labor Code allows *an insurance carrier* to contract with *a health care provider* to provide health care services under a specific fee arrangement that is different from the fee guidelines of the Division of Workers' Compensation (Division). Consistent with Section 413.011(d), Labor Code, an insurance carrier may utilize a third party as its authorized agent to obtain a contractual fee arrangement that is different from the Division's fee guidelines...
>
> Carriers that contract for fee arrangements that are not consistent with Section 413.011(d), Labor Code may be subject to enforcement action and charges under Sections 415.002 and 413.020, Labor Code. Additionally, any person operating or performing the acts of a workers' compensation network that has not applied to be certified as a workers´ compensation health care network with the Department may be subject to disciplinary action under Chapter 1305, Insurance Code.

This second bulletin adds a nuance to the authority of carriers to contract for discounted fees not found in the first bulletin. For even though the Department continued to assert that all workers' compensation networks must be certified as WCHCNs, it expanded upon its reasoning in Bulletin 0071-05 by stating that not only could carriers still contract with providers for non-guideline fees directly, but they could also use authorized agents to do so pursuant to §413.011(d).

In 2007, the Legislature passed House Bill 473 (HB 473), which it primarily intended to clarify the intent of the above discussed provisions of HB 7 and to respond to the Department's interpretation of those provisions in its two commissioner bulletins. Specifically, the Legislature stated in the HB 473 Engrossed Bill Analysis that:

> After the effective date of HB 7 carriers requested guidance from the Department on the legality of voluntary networks arguing that although the references to a voluntary network had been eliminated, there was no prohibition either. TDI issued Bulletin B-0071-05 which stated that under the provisions of HB 7, all networks must be certified by TDI.
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> Immediately, the carriers requested further clarification of whether voluntary networks were authorized, in light of a provision added by HB 7 in Section 413.011(d), Labor Code, that stated that deviations from the medical fee guideline were allowed as long as a contract existed between the carrier and the provider with a specific fee schedule. TDI then issued Bulletin B-0005-06, which states a voluntary network could continue to exist as long as it contracted for a fee discount only — if any management of the claims existed then certification was required. The original intent of the language of that provision, however, was to allow a deviation from the fee guideline to treat an individual injured worker in a non-network situation if the carrier was having difficulty securing necessary medical treatment within the fee guidelines.
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> H.B. 473 clarifies the Labor Code to fit the law authorizing deviations from the medical fee guidelines to its original intent and to close the loophole under which voluntary networks have been operating.[3]

The Legislature thus attempted to "close the loophole" by significantly amending Chapter 413 of the Texas Labor Code. Specifically, the Legislature added the following provisions:

1. In §413.011(d-1) WCHCNs were given authority to contract for fees inconsistent with the Division's adopted guidelines.

2. In the same section, the insurance carriers maintained their authority to contract for non-guideline fees with health care providers, but they and their authorized agents were also given the authority to contract with voluntary or informal networks to obtain contractual fee agreements with health care providers provided they met certain regulatory requirements; this authority, however, expires on January 1, 2011, pursuant to §413.011(d-6). After that date, insurance carriers and their authorized agents will only

[3] House Comm. On State Affairs, Bill Analysis, Tex. H.B. 473, 80th Leg., R.S. (May 15, 2007).

retain the authority, at least under §413.011, to contract with health care providers for fees in excess of the Division's fee guidelines, pursuant to §413.011(d-4).

3. In §413.0115, both "informal network" and "voluntary network" were defined, and both types of networks were made subject to certain regulatory requirements. Additionally, after January 1, 2011, §413.0115 requires both informal and voluntary networks to become certified WCHCNs, which may imply that, pursuant to Tex. Ins. Code §1305.101(c), they cannot provide prescription medications or services through their networks after that date.

4. Finally, in §413.011(d-1), the Legislature removed the language that previously stated that "notwithstanding Section 413.016 or any other provision of this title" an insurance carrier may pay fees that deviate from the fee guidelines if the carrier has a contract with a health care provider. The Legislature replaced that language with "notwithstanding subsection (b) through (d) [of Section 413.011] and section 413.016."[4]

Additionally, it is worth noting that the Legislature did not amend or repeal §408.028(g).

Lastly, on July 18, 2008, the Division adopted three rules, 28 Texas Administrative Code §§133.2, 133.4, and 133.5, that implemented the provisions of §§413.0115 and 413.011(d-1)-(d-6). In the preamble to these adopted rules, the Division addressed a comment that may be relevant to analyzing these issues:

> Section 133.4: A commenter states that the Division should specifically clarify that these provisions do not apply to pharmacy benefit management programs. The commenter explains that pharmaceutical services are specifically excluded from networks certified under Chapter 1305 of the Insurance Code. The commenter further states that since voluntary networks and informal networks are required to be certified in accordance with Chapter 1305 by 2011, it serves to reason that these rules should not apply to pharmaceutical providers.
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> Agency Response: The Division clarifies that this section applies to any contractual agreement between an insurance carrier, or the insurance carrier's authorized agent, and an informal or voluntary network, and a health care provider, that provides for fees different from the fees authorized under the Division's fee guidelines pursuant to Labor Code § 413.011(d-1). The Division agrees that pursuant to Labor Code § 413.0115(b), not later January 1, 2011, each informal network or voluntary network must be certified as a workers' compensation health care network under Chapter 1305, Insurance Code. The Division further agrees that prescription medication or services, as defined by Labor Code § 401.011(19)(E), may not be delivered through a workers' compensation health care network under Insurance Code § 1305.101(c), but, are instead, reimbursed as provided by the Texas Workers' Compensation Act and

[4] Note that HB 473 took the bulk of the provisions of §413.011(d), enacted by HB 7, and moved them to §413.011(d-1).

applicable rules of the Commissioner of workers' compensation in accordance with Insurance Code § 1305.101(c). Whether or not a pharmacy benefit management program can be licensed as a certified network in the future is not contingent on HB 473 (80th Legislature); rather, the issue is whether or not the pharmacy benefit management program meets the certification requirements under Chapter 10 rules and TIC Chapter 1305 on January 1, 2011. However, the Division points out that a prescription medication is defined as "health care" under Labor Code § 401.01119) and that pharmacists and pharmacies are considered health care providers under Labor Code § 401.011(21) and (22). Additionally, if an entity is performing the acts of an informal or voluntary network as defined by Labor Code § 413.0115 and Division rule § 133.2, then that entity is subject to regulation under the provisions of HB 473 and applicable Division rules.[5]

Taken together, the Division believes that these amendments and their history potentially lead to conflicting conclusions and, therefore, asks for your opinion as to whether an insurance carrier may contract for prescriptions at fees lower than the Division's fee guidelines after January 1, 2011; and, if so, may it use an informal or voluntary network to obtain these discounts.

Thank you for your consideration of this request. Should you need any additional information, please contact me or Dirk Johnson, General Counsel, at (512) 804-4400.

Sincerely,

Rod Bordelon
Commissioner of Workers Compensation

[5] 33 TexReg 5701, 5705 (July 18, 2008).