



December 21, 2010

### **Texas Emergency Pharmacy Rule – Continued Operation of PBMs**

Following the recent Texas Attorney General opinion, the Texas Division of Workers' Compensation (TDWC) released an emergency pharmacy fee schedule rule on December 17, 2010. The emergency rule was adopted under Texas Government Codes §2001.034 and §2001.036, subsection (e) of §8.005 of House Bill 7, which was originally enacted by the Texas Legislature in 2005. The new rule not only implements an emergency pharmacy fee schedule; it also confirms the ability of payors to continue provisioning pharmacy services at negotiated contract rates, less than fee schedule, through a Pharmacy Benefit Manager (PBM). Additionally, it contains modified fee schedule language.

Specifically the emergency rule addresses two issues—continued operations of PBMs and modifications to the pharmacy fee schedule. Both are discussed in further detail following. It will take effect on January 1, 2011 and will remain in effect for up to 180 days if renewed by the agency.

#### **PBMs to Continue Operations**

The new rule confirms that regardless of the Attorney General opinion issued on December 10, 2010, payors can use PBMs to provide pharmacy services at discounted rates after January 1, 2011. The Commissioner determined it was necessary to adopt the rule on an emergency basis to avoid the interruption of pharmacy services and pharmacy payments administered by a payor's agent. Specifically, the Division stated in the rule preamble:

“If the Division does not adopt these amendments on an emergency basis, uncertainty regarding insurance carriers' continued authority (after January 1, 2011) to negotiate for contracts that permit them to pay for medications and services at fee rates currently permitted under the Labor Code, could lead to mass expiration of currently existing contracts and inability to negotiate new contracts in their place. This mass market disruption, without clearly authorized and implemented alternative(s) . . . would drastically delay, limit, or alter injured employees' access to prescription medications and services after January 1, 2011.”

To address the concern that PBMs were not specifically identified as entities allowed to contract for pharmacy services after January 1, 2011, the Division stated in the rule preamble:

“The Division, therefore, adopts amendments to §134.503 to clarify that: (1) §134.503 is a pharmacy fee guideline and (2) health care providers and insurance carriers may continue to contract for pharmaceutical services at rates above or below the Division's pharmacy fee guideline. Additionally, these amendments do not limit insurance carriers' authority to negotiate these written contracts with pharmacies or pharmacy processing agents, directly or to do so through the use of their authorized agents, such as **pharmacy benefit managers**.”

#### **Pharmacy Fee Schedule Modifications**

The emergency rule also implemented a modified version of “Draft A” from the proposed fee schedule rule published by the Division in November, 2010. The current adopted emergency rule contains language



similar to the November draft; however, modifications were made to Usual and Customary (U&C) and contractual reimbursement. This is consistent with the Division’s response to the Attorney General opinion and **retains current pharmacy fee schedule rates and dispensing fees**. The modifications allow for continued contracting at rates less than fee schedule, but remove the current U&C language replacing it with “Provider’s billed amount” language. Specifically, it states:

§134.503 Pharmacy Fee Guideline – (c) The reimbursement for prescription drugs shall be as follows:

- (1) A negotiated or contract amount between the insurance carrier and the pharmacy, or processing agent, if applicable, that is greater than the reimbursement established by paragraph (3)(A) – at times when it is necessary to secure health care for an injured employee;
- (2) A negotiated or contract amount between the insurance carrier and the pharmacy, or the pharmacy processing agent, if applicable, that is less than the reimbursement established by paragraph (3)(A); or
- (3) In the event a negotiated or contract amount . . . does not exist, the lessor of:
  - (A)(i) Generic drugs = AWP + 25% or AWP x 1.25 + \$4.00 dispensing fee
  - (A)(ii) Brand drugs = AWP + 9% or AWP x 1.09 + \$4.00 dispensing fee
  - (A)(iii) Compounds shall add a single compounding fee of \$15 per prescription to the calculated total for either (A)(i) or (A)(ii)
  - (B) Provider’s billed amount

### **Conclusion**

The emergency pharmacy rule temporarily resolves uncertainty surrounding payment and reimbursement of pharmacy services while the Texas Legislature considers possible statutory changes to clarify contracted/negotiated rates for pharmaceutical services within the Texas workers’ compensation system. TDWC noted this in the rule preamble and also confirmed that additional rulemaking will be necessary at the conclusion of the 2011 legislative session to adopt a long-term pharmacy fee guideline, which confirms any corrections made by the Legislature.

PMSI supports these TDWC actions, because they support the important role PBMs play in the delivery of cost-effective and timely pharmacy care to injured workers in Texas. We will continue to provide retail and mail order pharmacy services to our Texas-based clients under the emergency rule, and will work with key policy makers to implement a sound resolution. We encourage clients to contact our Director of Government Affairs directly if they are interested in help to craft a long-term solution with key policy makers. We welcome the opportunity to work with our clients as key industry partners to affect this important legislation.

If you have any questions about this alert or any other government-related topic, please contact your dedicated Account Manager. You may also contact our Director of Government Affairs, Kevin Tribout at [Kevin.Tribout@pmsionline.com](mailto:Kevin.Tribout@pmsionline.com) or 813.627.2445.

**PMSI—Proven Solutions for Cost Containment.** Founded in 1976, PMSI is a leader in developing solutions to control the growth of medical costs in workers’ compensation. As one of the nation’s largest and most experienced companies focused solely on workers’ compensation, we deliver proven solutions for cost containment across the claims lifecycle. PMSI’s clinically integrated solutions for Pharmacy, Medical Services and Equipment, and Settlement Solutions deliver quantifiable results and improve the quality of care for injured workers. We provide our customers with the innovation, focus, expertise, analytics and technology needed to successfully deliver workers’ compensation benefits. For more information, visit [www.pmsionline.com](http://www.pmsionline.com) or call 877.ASK.PMSI.

© 2010 PMSI, Inc. All rights reserved. Proprietary and confidential. Do not copy or distribute outside original intent.