No. 19-0533

IN THE SUPREME COURT OF TEXAS

PATIENTS MEDICAL CENTER,
Petitioner,

V.
FACILITY INSURANCE CORPORATION, Respondent.

On Petition for Review from the Third Court of Appeals, Austin, Texas
Appeal No. 03-17-00666-CV

BRIEF OF AMICUS CURIAE, TEXAS ORTHOPAEDIC ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES:

STATUTES:

AGENCY RULES:

OTHER SOURCES:

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INTEREST OF AMICUS CURIAE TEXAS ORTHOPAEDIC ASSOCIATION

The Texas Orthopaedic Association ("TOA") was founded in 1936 as the united voice of orthopaedic surgeons. Its mission is to ensure outstanding musculoskeletal health for Texans.

Texas orthopaedic surgeons require fair an adequate reimbursement for their services, which are always provided with the utmost skill and care to Texas patients. When reimbursement challenges take place, these physicians should expect and obtain a fair process with a level playing field, in order to resolve such disputes.

The Opinion of the Third Court of Appeals in this matter, if left to stand, would make the process completely unfair to Texas physicians who care for Workers' Compensation patients, and threatens patients' access to medical care in that program.

TOA supports the Petitioner in its petition to this court. The Third Court of Appeals' decision will greatly and detrimentally impact TOA's member physicians who participate in the Workers' Compensation program, by providing insurance carriers complete control of the Division of Workers' Compensation ("DWC" or "Department") Fee Dispute Resolution Process. This holding, if left to stand, will so detrimentally affect physicians' ability to be compensated for their services, that it may undermine their ability to continue to provide care to Texas patients under the program. The opinion incentivizes insurance carriers to deny medical claims. Texas workers' access to quality medical care may inadvertently be compromised by the Third Court of Appeals' decision in this case. Accordingly, TOA, which represents Texas Orthopaedic Surgeons, has an interest in reversing the Court of Appeals' erroneous judgment, and respectfully urges the Court to grant the Petitioner's Petition for Review.

Texas Orthopaedic Association ("TOA") has received no financial or other assistance from Petitioner, nor from any other party on behalf of Petitioner, to prepare this Amicus Curiae Brief to this Honorable Court. No fee has or will be paid to TOA to prepare this Brief.

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IN SUPPORT OF PETITIONER

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Texas Orthopaedic Association (TOA) submits this amicus curiae brief in support of Petitioner, Patients Medical Center's, Petition for Review, and respectfully shows the Court as follows:

ARGUMENT

A. Background

This case involves application and interpretation of specific provisions of the Texas Labor Code and state agency rules regarding medical fee disputes between medical care providers and insurance carriers. The Third Court of Appeals

committed error by holding that the burden of proof remains with the health care provider throughout the medical fee dispute resolution process. The Court of Appeals' holding contravenes 28 Tex. Admin. Code § 148.14(b), which clearly assigns the burden of proof to the party seeking relief under Texas Labor Code § 413.031.

The current dispute resolution process allows a physician who is dissatisfied with a reimbursement amount paid by an insurance carrier to initiate the Medical Fee Dispute Resolution Process. See 28 Tex. Admin. Code § 133.307(b)(1). The Division of Workers' Compensation ("DWC") makes an initial decision "resolving" the dispute. 28 Tex. Admin. Code § 133.307(f)(4). Either party may seek review of the DWC's decision by requesting a benefit review conference.[1] 28 Tex. Admin. Code § 133.307(g). At that point, either party, i.e. the aggrieved party, may appeal via a contested case proceeding with the State Office for Administrative Hearings (SOAH). 28 Tex. Admin. Code § 133.307(g)(3).

Historically, this dispute resolution process applied the burden of proof to the party who was appealing the prior decision, i.e. the party aggrieved by the determination made regarding payment. The court of appeals' decision, however, changes this burden application. The court's decision makes unfair the Texas Department of Workers' Compensation's dispute resolution process, by shifting the

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[1] Please note that this case predates the 2008 amendments to Rule 133.307, and Respondent Facility Insurance Company could at that time request a direct hearing to the state Office for Administrative Hearings (SOAH), without engaging in a benefit review conference.

costly and time consuming burden *to the health care provider throughout the entire process*.

Physicians throughout the state, who have not been reimbursed for their services or who have been inadequately reimbursed for their services, would bear the burden to prove that the insurance carrier's reimbursement (or lack thereof) was improper. Under the court's ruling, Physicians would *continue* to have this burden *even if* they were satisfied with the DWC's determination. Physicians would *continue* to have this burden *even if* they did not appeal the DWC's determination.

Physicians would have no control over insurance carriers' appeals of DWC's resolutions in a physician's favor, yet would be tasked with carrying the burden and the cost throughout an insurance carrier's appeal.

B. Burden of Proof is With the Party Seeking Relief During the Process

1) Legislature vested authority of the process with DWC

It is the Legislature's prerogative to take jurisdiction over specific disputes out of the courts and place it in an administrative body. *See Houston Mun. Emps. Pension Sys. v. Ferrell,* 248 S.W.3d 151, 160 (Tex.2007) ("the Texas Constitution expressly allows the Legislature to grant jurisdiction to administrative bodies rather than the courts"); *In re Mid-Century Ins. Co. of Texas*, 426 S.W.3d 169, 177

(Tex. App.—Houston [1st Dist.] 2012, orig. proceeding). The Legislature has granted the Texas Department of Insurance, Division of Workers' Compensation broad powers to adopt rules and implement a system for setting medical fees, and for creating and administering a system to address medical fee disputes between medical providers and insurance carriers. The Labor Code provides that where a dispute is "over the amount of payment due for services determined to be medically necessary and appropriate for treatment of compensable injury," the DWC "is to adjudicate the payment given the relevant statutory provisions and commission rules." Tex. Labor Code § 413.031(c). Had the Legislature intended the burden of proof to remain with the health care provider throughout the process, it would have stated so clearly. Rather, the Legislature provided the DWC with exclusive authority to create its dispute resolution process. The DWC, in turn, has clearly stated that the burden of proof is with the party "seeking relief". "The burden of proof rests with the party seeking relief in hearings conducted pursuant to Labor Code [sections 413.031 and 413.0312, relevant here, pertaining to medical-fee disputes]." 28 Tex. Admin. Code § 148.14(b); *see* Tex. Labor Code §§ 413.031(k), .0312(e).

2) DWC resolves the dispute when it renders its decision

The Legislature understood the need for a fair DWC dispute resolution process as it pertains to providers' reimbursements, when it granted exclusive jurisdiction to the Department on these matters. The court of appeals' decision has

unfortunately undermined the Legislature's intent in granting such authority to DWC, by *pretending that the dispute remains unresolved* after it leaves the DWC. *Facility Insurance Corporation v. Patients Medical Center*, 574 S.W.3d 436, 443 (Tex. App.—Austin 2019, pet. filed August 23, 2019)("Indeed, the MFDR process continues until ultimately decided by SOAH precisely because the dispute "remains unresolved" until that point.") This reasoning is incorrect— DWC makes a "decision" resolving the dispute. 28 Tex. Admin. Code § 133.307(f)(4) and (g).

Section 133.307(f)(4) provides: "The division shall send a ***decision*** to the disputing parties or to representatives of record for the parties, if any, and post ***the decision*** on the department's website." 28 Tex. Admin. Code § 133.307(f)(4). Black's law dictionary defines "decision" as: In practice. A judgment or decree pronounced by a court in settlement of a controversy submitted to it. Blacks Law Dictionary (11th ed.).

Furthermore Administrative Code Section 133.307(g) speaks clearly to the fact that issues are resolved once the decision is made. Section 133.307(g) states that the MFDR decision *is final* if the request for the benefit review conference is not timely made. 28 Tex. Admin. Code § 133.307(g). Additionally, the issues are resolved—"if a party provides the benefit review officer or administrative law judge with documentation ***that shows unresolved issues*** regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the

fee dispute, then the benefit review officer or administrative law judge shall abate the proceedings until those issues have been resolved." *Id*.

Indeed, the DWC has a dispute "resolution" process, and once DWC issues its decision, the dispute is resolved. Of course, if a party is aggrieved by the DWC's decision, it can "seek relief". The party seeking relief bears the burden of proof.

3. Burden of proof is on party contesting an earlier decision

The Preamble to DWC Rule 148.14 is clear evidence of the Agency's intention in assigning the burden of proof on the party contesting an earlier decision. The preamble to 28 TAC § 148.14 provides in pertinent part:

> The ***burden of proof will be on the party seeking relief*** in hearings conducted pursuant to Texas Labor Code § 408.024 (when an insurance carrier seeks to be relieved of liability for health care that otherwise would be payable), § 413.031 (when a party seeks to change the result of an initial medical dispute decision rendered by the commission's Medical Review division or an Independent Review Organization), and § 413.055 (when a party disputes an interlocutory medical order issued by the commission pursuant to the rigorous requirements of § 133.306 of the title (relating to interlocutory Orders for Medical Benefits)). In each of these situations, the party requesting the hearing is either seeking: (1) to overturn a previous decision of the commission after a previous proceeding has been held in which the party has had the opportunity to present its position and support its position or (2) is seeking to overturn liability normally established for a medical benefit under other provisions of the Act and the commission's rules. ***Setting the burden of proof upon the party contesting an earlier decision is in accordance with general judicial practices and encourages***

finality and resulting reduction in dispute costs to system participants of the original decision.

30 Tex. Reg. 3237, 3241 (June 3, 2005) (emphasis added).

The Third Court of Appeals has erred in holding that the burden of proof remains with the medical provider throughout the process. It has undermined the Legislature's intent in granting such authority to DWC, and has undermined the DWC's authority, by disregarding the holdings of the DWC and *pretending that the dispute remains unresolved* after it leaves the DWC's dispute resolution process. The court of appeals wrote, "In this administrative-adjudicative context, the salient dispute remains a constant throughout the MFDR process, including the hearing at SOAH: to how much reimbursement is the provider entitled? Indeed, the MFDR process continues until ultimately decided by SOAH precisely because the dispute "remains unresolved" until that point." *Facility Insurance Corporation v. Patients Medical Center*, 574 S.W.3d 436, 443 (Tex. App.—Austin 2019, pet. filed Aug. 23, 2019). This is incorrect. If a carrier and provider disagree on the reimbursement amount, DWC and not the carrier, makes the decision on the proper payment, subject to review. *Tex. Workers' Comp. Comm' v. Patient Advocates*, 136 S.W.3d 643, 656-57 (Tex. 2004). DWC makes this decision, and a party not satisfied with the outcome may seek review through SOAH. *Id*.

As in this case, once the health care provider has obtained a resolution from the DWC, and is satisfied with such resolution (i.e., has been awarded the

compensation he or she sought, or has been awarded an additional compensation which he or she finds satisfactory, such that no additional appellate review is desired), then the health care provider is ***not aggrieved and does not seek relief—he or she has obtained the relief sought***. Once the health care provider chooses not to appeal further, and has accepted the DWC's resolution, the health care provider is ***no longer aggrieved and is not seeking relief***. Should the insurance carrier become unsatisfied with the DWC's resolution and choose to appeal the resolution, then the insurance carrier ***aggrieved by the earlier decision and therefore seeks relief from SOAH***.

A party seeking relief is synonymous with an aggrieved party. Indeed, unless aggrieved, there is no need to seek relief. A non-aggrieved party lacks standing to appeal. "While a party of record is generally entitled to appellate review, the right of appeal rests only in an aggrieved party to a lawsuit." *Jay Kay Bear Ltd. v. Martin*, No. 04-14-00579-CV, 2015 WL 6736776, at *5 (Tex. App.—San Antonio Nov. 4, 2015, pet. denied); *John Deloach Enterprises, Inc. v. Telhio Credit Union, Inc.*, No. 04-17-00820-CV, 2019 WL 1139911, at *2 (Tex. App. Mar. 13, 2019). And his injury must be "likely to be redressed by the requested relief." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 154 (Tex. 2012); *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (to meet repressibility requirement for standing, there must be substantial likelihood that requested relief will remedy

alleged injury). Clearly, the party seeking relief is the aggrieved party, else there would be no reason to seek relief.

The legal definition of aggrieved party includes one who has been adversely affected by a legal determination by a tribunal. Black's Law Dictionary defines "aggrieved party" as:

> A party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions *or by a court's decree or judgment*.

Aggrieved Party, Black's Law Dictionary (10th ed.) (emphasis added).

Therefore, an aggrieved party is one whose rights are modified by a determination made by a court, or in this case by the DWC which has exclusive jurisdiction over the matter. The insurance carrier had its rights adversely affected, when it was ordered to pay additional compensation to the health care provider, and became the party seeking relief from DWC's determination. Therefore the insurance carrier had the burden of proof in its appeal to SOAH.

C. TEXAS PUBLIC POLICY SUPPORTS THE PATIENT IN WORKERS' COMPENSATION SYSTEM

1) Public policy of Texas Workers' Compensation Act supports patients and physicians

The Texas Workers' Compensation Act was created to assist patients in obtaining healthcare when they suffer workplace injuries. Texas physicians who

participate in the Workers' Compensation Program are necessary to achieving the Legislature's goals of supporting Texas workers.

The cost of operating a medical practice have increased every year, and physicians must be compensated fairly for their services. The DWC's dispute resolution process has in the past fairly, reasonably, and efficiently resolved disputes between physicians and insurance carriers pertaining to compensation matters. The Third Court of Appeals' decision makes this process unfair, by shifting the burden to Texas physicians throughout the process, forcing these physicians to carry the burden and the cost throughout the process, incentivizing insurance carriers to limit reimbursements and to appeal any recovery the physician could obtain from DWC. Any physician who is not compensated, or who is inadequately and unfairly compensated who obtains relief from DWC would thereafter be at the mercy of the insurance carrier's continued appeals of that relief.

2) Insurers Win, and Patients and Physicians Lose Again

The country's biggest health insurers earned more than $11 billion in profit in the second quarter of 2019. Fierce Healthcare, Paige Minemyer, Aug. 23, 2019. Cigna's revenues increased from 11.5 billion in the second quarter of 2018 to $34.4 billion in the second quarter of 2019. UnitedHealth posted $60.6 billion in Q2 earnings, an increase of about 4.4 billion over the previous year. Likewise, Humana's year to date profits are double that of 2018.

Physicians, however, are feeling the struggles of practicing medicine, and many are leaving the practice altogether. See "The doctor is out? Why physicians

are leaving their practices to pursue other careers", Spector, N., Aug. 18, 2018. Not only are established physicians leaving medicine, but fewer people are pursuing a career in medical school. In fact, New York University has recently reported that it will offer free tuition to all its medical students, in the hope of encouraging more doctors to choose lower paying specialties. "Medical school will be free at NYU", NBCnews.com, Aug. 17, 2018. According to the American Academy of Family Physicians, the average debt for medical students is more than $100,000, and the Association of American Medical Colleges estimates the average debt is nearly $180,000. *Id*.

A recent report from The Association of American Medical Colleges has projected a shortage of 42,600 to 121,300 physicians by 2030, up from its 2017 projected shortage of 40,800 to 104,900 physicians. "New research shows increasing physician shortages in both primary and specialty care," AAMC News, April 11, 2018.

With looming physician shortages and increasing insurance carrier profits, why would the Third Court of Appeals make its strained interpretation of the DWC rules in order to shift the burden of proof and risk of costs to physicians throughout the fee dispute process? The insurance carriers have the control of paying reasonable reimbursement, or of withholding payment altogether. Physicians do not have this control, but rather simply focus on providing excellent care to their patients. Where is the fairness in not requiring insurance carriers to be accountable

for improper or inadequate reimbursement? In the past, the DWC had a fair process in which fee disputes could be resolved, requiring those who appeal a previous holding to carry the burden of proof. Now, however, the dispute resolution process will be unfair, requiring physicians to hold all of the risk, all of the burden, and none of the control. Unfortunately, Texas physicians may have no recourse other than to leave the Workers' Compensation system, leaving Texas workers without adequate care.

PRAYER

For the reasons above, TOA urges this Honorable Court to grant the Petition's petition for review, and to reverse the Third Court of Appeals' incorrect holding on this matter.

Respectfully submitted,

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Certificate of Compliance

I certify that Pages Version 5.6.2 reports that this Brief contains 2,954 words, excluding portions that are exempt from the Texas Rule of Appellate Procedure 9.

Date September 13, 2019

/s/ *Andrea I Schwab*
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Certificate of Service

I certify that on the 16th day of September, 2019, a true and correct copy of the foregoing document was sent to the following:

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