

# WELCOME



## **Don't Fear the Fee Review**

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2024 PA DEPT OF LABOR & INDUSTRY  
BUREAU OF WORKERS' COMPENSATION  
23<sup>RD</sup> ANNUAL CONFERENCE

# Panel

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## **Moderator:**

- Elizabeth Crum, HP Law

## **Panelists:**

- Barry Keller, Medical Fee Review Hearing Officer, BWC
- Daniel J. Siegel, Law Offices of Daniel J. Siegel, LLC
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# Medical Fee Reviews: The Basics

## Medical Cost Containment 1993 Amendments

Act 44 of 1993, §306(f.1)(1) –  
(10), 77 P.S. §531

- Created fee caps on treatment / services based on Medicare reimbursement rates
- Required medical billing to follow Medicare coding and bundling rules
- Created fee caps on prescription drugs based on 110% of average wholesale price
- Prohibited balance billing by providers
- Prohibited a provider from self-referrals

# Medical Fee Reviews: The Basics

## Medical Cost Containment 2014 Amendments

Act 184 of 2014, §306(f.1)(3)(vi)(A)-(I), 77 P.S.  
§531(vi)(A)-(I)

- Prohibited “physician dispensing” of prescription drugs
- Required prescription bills to include the original manufacturer’s National Drug Code (NDC)
- Prohibited billing repackaged NDC numbers, and if repackaged codes are billed, reimbursement shall be limited to 110% of the average wholesale price of the least expensive clinically equivalent drug

# Medical Fee Reviews: The Basics

## Medical Fee Reviews

Act 44 of 1993, §306(f.1)(5),  
77 P.S. §531(5)

- Created medical fee review process as part of the amendments
- For the first time in history of PA Workers' Compensation, health care providers were given direct standing to challenge the amount and / or timeliness of payment received

# Medical Fee Reviews: The Basics

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## Medical Fee Review Process

- The Act is silent on specifics of the fee review process. The Act states:

“... A provider who has submitted the reports and bills required by this section and who disputes the amount or timeliness of the payment from the employer or insurer shall file an application for fee review with the department no more than thirty (30) days following notification of a disputed treatment or ninety (90) days following the original billing date of treatment....Within thirty (30) days of the filing of such an Application, the department shall render an administrative decision”

§306(f.1)(5), 77 P.S. §531(5)

**\*Must refer to Regulations at 34 PA Code Chapter 127, §127.251 – 127.261 to understand the process**

# Medical Fee Reviews: The Basics

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## Medical Fee Review Process (Level 1)

Regulations established a two-level medical bill dispute resolution process

➤ Administrative level of review

- Provider initiates by filing an Application for Fee Review with the BWC, Medical Fee Review Section
- Application must be filed within 30 days of notice of the dispute (EOB) or within 90 days of the original billing date, whichever is later
- The BWC contacts the Employer's insurer / TPA and obtains a response to the Application for Fee Review.
- The administrative level is a paper review! Attorneys are not involved at the administrative level
- The BWC's nurses and administrative staff review the Application and documents, and within 30 days of filing, an Administrative Decision is circulated with findings on the correct reimbursement

# Medical Fee Reviews: The Basics

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## Medical Fee Review Process (Level 2)

Regulations established a two-level medical bill dispute resolution process

➤ Adjudication level of review (34 Pa.Code §127.257)

- Either Provider or Employer may contest the BWC's Administrative Decision and request a *de novo* hearing
- Challenge must be filed within 30 days of the BWC's Administrative Decision
- BWC will assign to a Medical Fee Review Hearing Officer (MFRHO, sometimes referred to as FRHO)
- Filing a request for hearing acts as a supersedeas (temporary stopping) of the BWC's Administrative Decision
- **NOTE:** This step in the MFR process is not found in the WC statute but is based on Administrative Agency Law that provides any and all agency decisions are subject to challenge and are to be heard by a hearing officer assigned by the agency



# Medical Fee Reviews: The Basics

## Medical Fee Review Process

### Hearings before an MFRHO

- Hearing conducted as a *de novo* proceeding
- MFRHO is **not** bound by the BWC's administrative decision
- MFHRO is **not** bound by strict rules of evidence
- Parties may be represented by an attorney at the hearing, but an attorney is not required
- Employer / Insurer has the burden of proof to show provider was paid properly
- Provider has the burden of proof to show application for fee review and / or the request for a *de novo* hearing was filed timely
- Evidence depends on type of dispute. For example, a coding issue may require documentary evidence that Employer / insurer sent a downcoding letter, as well as require expert testimony by a forensic coder to testify to proper coding of the treatment performed
- The General Rules of Administrative Practice and Procedure (GRAPP) applies to proceedings before the MFRHO – **not** the WCJ rules.
- MFRHO issues written decision and order within 90 days following the close of the record

### Further appeal rights:

- Any party may file an appeal (Petition for Review) with the Commonwealth Court within 30 days of an MFRHO's decision

# Medical Fee Reviews: Deep Dive into Self-Referrals

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**Act 44 of 1993, §306(f.1)(3)(iii), 77 P.S. §531(3)(iii)**

➤ Prohibited self-referrals:

“.... [I]t is unlawful for a provider to refer a person for laboratory, physical therapy, rehabilitation, chiropractic, radiation oncology, psychometric, home infusion therapy or diagnostic imaging, goods or services pursuant to this section **if the provider has a financial interest with the person or in the entity that receives the referral.** It is unlawful for a provider to enter into an arrangement or scheme such as a cross-referral arrangement, which the provider knows or should know has a principal purpose of assuring referrals by the provider to a particular entity which, if the provider directly made referrals to such entity, would be in violation of this section. **No claim for payment shall be presented by an entity to any individual, third-party payer or other entity for a service furnished pursuant to a referral prohibited under this section.**”

*emphasis added*

# Medical Fee Reviews: Deep Dive into Self-Referrals

Self-referrals regulation: 34 PA Code Chapter 127,  
§127.301

The Statutory wording prohibiting self-referrals is very broad, but the BWC regulations adopt federal exceptions:

- Provider referrals that are allowed under Federal promulgated Safe Harbor exceptions to the Medicare & Medicaid Patient and Program Protection Act, and provider referrals that are allowed under Federal promulgated exceptions to the Stark Law amendments, are not considered prohibited self-referrals under the PA WC Act.
  - Patient and Program Protection Act Safe Harbor exceptions: 42 U.S.C. §1320a-7b(1), 7(b)(3)(L)
  - Stark Law exceptions: 42 U.S.C. §1395nn

# Medical Fee Reviews: Deep Dive into Self-Referrals

Medical Fee Review Process when self-referral is alleged

34 PA Code Chapter 127, §127.302

- A provider who has been denied payment of a bill based on an alleged prohibited self-referral may file an Application for Fee Review with the BWC
- The BWC will NOT issue an administrative decision on a self-referral dispute
- The BWC will assign a medical dispute based on an alleged self-referral to an MFRHO for an adjudication

# Medical Fee Reviews: Deep Dive into Self-Referrals

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## Case law on self-referrals:

### *Eighty-Four Mining Co. v. Three Rivers Rehabilitation, Inc.*, 721 A.2d 1061 (Pa 1998)

- Employer denied payment of bills based on an alleged prohibited self-referral for physical therapy prescribed by physician and performed by therapist where both the physician and therapist were employed by Three Rivers Rehabilitation, Inc., the physician's solely-owned professional corporation
- MFRHO ordered payment of the medical bills, finding that Three Rivers did not violate the Act because the physician and therapist were not separate entities, and therefore there wasn't an unlawful self-referral
- Commonwealth Court reversed the MFRHO, holding that the physician made a self-referral that was expressly prohibited by the WC Act
- The PA Supreme Court reversed the Commonwealth Court, holding that in-office physical therapy did not violate the ban on physician self-referrals. The Supreme Court found the physical therapy prescribed by the physician (a physiatrist) and performed at Three Rivers fell within the "In-Office Ancillary Services" exception to the Stark Amendments and was not a prohibited self-referral.

# Medical Fee Reviews: Deep Dive into Self-Referrals

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## Case law on self-referrals:

### *Bernice Bennett v. Jeld Wen, Inc.*, (WCAB) 306 A.3d 949 (Pa.Cmwlt. 2023)

- BWC Administrative Decisions ordered payment in Applications for Fee Review filed by Omni Pharmacy. Employer did NOT challenge the BWC decisions and did NOT pay the BWC decisions. IW filed penalty petition for Employer's failure to pay the Administrative Decisions. Employer argued the bills weren't payable because of an alleged self-referral violation. The WCJ ordered payment of the bills with interest to Omni, and awarded penalties to the IW
- While the penalty petition was pending, a companion case was being decided by an MFRHO involving the same Employer, IW, treating doctor, and pharmacy, but different dates of service. Evidence submitted before the MFRHO confirmed there was a financial relationship between the prescribing doctor and the pharmacy, AND that no Safe Harbor or Stark exceptions applied. The MFRHO held the bills were not payable because the Act's self-referral provision was violated
- On appeal, and after conducting a very rare *de novo* hearing, the WCAB vacated the WCJ decision awarding payment of the bills and penalties. The WCAB reviewed the "after-discovered" evidence including the MFRHO decision, and concluded Employer was not liable to pay the pharmacy bills or penalties because of a prohibited self-referral

# Medical Fee Reviews: Deep Dive into Self-Referrals

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## Case law on self-referrals:

*Bernice Bennett v. Jeld Wen, Inc., (WCAB) 306 A.3d 949 (Pa.Cmwlt. 2023) ~ continued ~*

- Commonwealth Court upheld the WCAB's decision
  - The WCAB properly exercised its discretion in granting a *de novo* hearing “in the interest of justice”, noting the improper conduct by the treating doctor and pharmacy in ignoring Employer's requests (and a WCJ subpoena) for financial information needed to investigate the suspected self-referral, and
  - The WCAB properly found the evidence supported a decision that the bills should not have been presented for payment because of the prohibited self-referral, and therefore Employer had no liability to make payments of these bills.

# Medical Fee Reviews: Deep Dive into Self-Referrals

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**What's next?**

**A separate appeal on self-referrals was decided by Commonwealth Court on May 16, 2024.**

**See, 700 Pharmacy v. BWC Fee Review Hearing Office (SWIF), No. 560 C.D. 2020, \_\_\_A.3d \_\_\_ (Pa. Cmwlth. 5/16/2024) *and* SWIF v. BWC Fee Review Hearing Office (700 Pharmacy), No. 617 C.D. 2020, \_\_\_A.3d \_\_\_ (Pa. Cmwlth. 5/16/2024) .**



# Medical Fee Reviews: Deep Dive into Pharmacy Pricing

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## §306(f.1)(3)(vi)(A), 77 P.S. §531(3)(vi)(A)-(I)

### Pharmacy Fee Schedule:

“The reimbursement for drugs and professional pharmaceutical services **shall be limited to one hundred ten per centum of the average wholesale price (AWP) of the product**, calculated on a per unit basis, as of the date of dispensing”

*emphasis added*

- Neither Act 44 of 1993 nor Act 184 of 2014 defines “average wholesale price”
- Neither Act 44 of 1993 nor Act 184 of 2014 directs use of a specific pharmacy schedule / database to calculate “average wholesale price”

# Medical Fee Reviews: Deep Dive into Pharmacy Pricing

## Pharmacy Pricing regulations:

### 34 PA Code Chapter 127, §127.131- §127.135

- Payments for prescription drugs and professional pharmaceutical services shall be limited to 110% of the average wholesale price (AWP) of the product
- In resolving payment disputes, the BWC
  - “may use any of the Nationally recognized schedules to determine the AWP of prescription drugs. The Bureau will provide information by an annual notice in the Pennsylvania Bulletin as to which of the Nationally recognized schedule it is using to determine AWP of prescription drugs”
- The regulations do not define “average wholesale price”

# Medical Fee Reviews: Deep Dive into Pharmacy Pricing

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## Case law on pharmacy pricing:

*Indemnity Insurance Co. of North America v. BWC (Insight Pharmacy), 245 A.3d 1158(Pa.Cmwlt. 2021)*

- Employer repriced Insight Pharmacy's bill for compound cream reducing the bill by 95.5%. The EOB stated charges were reduced as they exceed the guidelines set forth in the PA WC Act.
- Insight filed an application for fee review and the BWC issued an Administrative Decision finding additional money was owed. Employer filed a request for a *de novo* hearing to challenge the Administrative Decision
- Evidence submitted to the MFRHO included an affidavit from a medical invoice processor, which the MFRHO found erroneously addressed pricing of only one ingredient listed in the compound cream. Employer also argued RedBook was not reflective of AWP. The MFRHO denied the Employer's challenge, finding it did not meet its burden of proof that the pharmacy was properly reimbursed.
- The Commonwealth Court affirmed the MFRHO, rejecting Employer's argument that the bill was repriced using a fictitious AWP set forth in a trade publication and not the "actual" AWP. The Court held that Employer did not offer evidence to support its allegation that RedBook presented "fictitious" AWP, nor did it offer evidence of a different nationally recognized pharmacy schedule to establish a different repricing result

# Medical Fee Reviews: Deep Dive into Pharmacy Pricing

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## Case law on pharmacy pricing:

### *Federated Insurance Co. v. Summit Pharmacy (BWC), -- A.3d -- (Pa.Cmwlt. 2024)*

- Employer repriced numerous pharmacy bills calculating reimbursements using values reported in the National Average Drug Acquisition Cost (NADAC) pharmacy pricing index. Summit filed an Application for Fee Review, and the BWC issued an Administrative Decision finding money due based on pharmaceutical values in RedBook.
- Before the MFRHO, Employer argued against use of the BWC adopted RedBook because it doesn't reflect the actual average wholesale price charged by a wholesaler, and therefore its use in payment disputes is inconsistent with the plain language of the WC Act. Employer advocated use of an alternative repricing database, NADAC, arguing that its values are calculated by monthly surveys of pharmacies' actual acquisition / invoice prices paid for drugs. The MFRHO ordered payments using RedBook values to calculate the reimbursement. Employer appealed to Commonwealth Court.

# Medical Fee Reviews: Deep Dive into Pharmacy Pricing

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## Case law on pharmacy pricing:

*Federated Insurance Co. v. Summit Pharmacy (BWC)*, -- A.3d -- (Pa.Cmwlt. 2024) ~ *continued* ~

- Commonwealth Court found
  - RedBook values do not reflect the actual average wholesale price as required by the plain language of the Act
  - Disagreed with the Pharmacy's argument that AWP is a "term of art" and does not refer to a mathematical average of actual prices paid
  - Held that AWP is the average of the amounts that all purchasers pay to buy the drug from a wholesaler
    - This finding is based on interpretation guidance in the Statutory Construction Act: words and phrases shall be construed according to their common usage
  - BWC's use of RedBook to determine reimbursement values is inconsistent with the Act
- Commonwealth Court directed the BWC to promptly identify and publish a different schedule to determine prescription drugs AWP
- Commonwealth Court declined to decide the constitutional argument that repricing with the privately published RedBook was an improper delegation of legislative authority.

# Medical Fee Reviews: Deep Dive into Pharmacy Pricing

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## What's next?

- Provider in the *Federated Insurance* case has sought allocatur before the PA Supreme Court. This petition is currently pending a decision.
  - *Summit Pharmacy v. Federated Insurance Co.*
  - As of this writing, the BWC has not yet adopted a new nationally recognized pricing schedule to replace use of RedBook.

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**Thank You For  
Attending!**