



**Written Testimony of Gerald Mullery
Deputy Secretary, Compensation and Insurance
Department of Labor & Industry**

Good morning, Chairman Dawkins, Chairman Mackenzie, and distinguished members of the House Labor & Industry Committee.

I am Gerald Mullery, the Deputy Secretary for Compensation and Insurance at the Department of Labor and Industry (L&I). Joining me today is Marianne Saylor, Director of the Bureau of Workers' Compensation (Bureau), and Michelle Matz, Chief of the Bureau's Medical Cost Containment Division. I appreciate the opportunity to testify at this informational hearing concerning the Commonwealth Court's recent decision in *Federated Insurance Company v. Summit Pharmacy (Bureau of Workers' Compensation Fee Review Hearing Office)* and its impact on Pennsylvania's workers' compensation system. We appreciate the legislature's desire to learn more about this issue and believe the legislature is in the best position to provide long term clarity and stability for workers' compensation drug reimbursements in Pennsylvania.

Section 306(f.1)(3)(vi)(A) of the Pennsylvania Workers' Compensation Act (the Act) sets forth the statutory basis for the reimbursement of drugs and professional pharmaceutical services. The statute states that 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. ***AWP is not defined in the Act or regulations.***

Section 127.131(b) of the Workers' Compensation regulations directs the Bureau to utilize any of the "Nationally recognized schedules" to determine the AWP of prescription drugs for payment dispute resolution. Further, the Bureau annually publishes notice of the selected schedule in the Pennsylvania Bulletin. Since 1995, the Bureau has designated Red Book as the "Nationally recognized schedule" used to resolve payment disputes. Red Book's selection in 1995 was based, in part, on stakeholder input. ***"Nationally recognized schedule" is not defined in the Act or regulations.***

On January 2, 2024, in *Federated Insurance Company v. Summit Pharmacy (Bureau of Workers' Compensation Fee Review Hearing Office)*, 308 A.2d 329, 332 (Pa. Cmwlth. 2024), the Commonwealth Court directed the Bureau "to promptly identify and publish in the *Pennsylvania Bulletin* a different nationally recognized schedule to be used to determine the AWP for purposes of resolving payment disputes for pharmaceuticals."

The Court conducted a statutory construction analysis of the meaning of AWP, as well as an analysis of its prior decision in *Indemnity Ins. Co. of North America v. Bureau of Workers' Compensation Fee Review Hearing Office (Insight Pharm.)*, 245 A.3d 1158 (Pa. Cmwlth.

2021). Construing the plain meaning of AWP in the absence of a statutory definition, the Court held that (1) AWP must be based on a schedule that reflects actual acquisition costs of pharmacies and (2) Red Book pricing is based on inflated manufacturer-suggested retail pricing and therefore cannot be used to determine AWP.

The Bureau immediately researched what “nationally recognized schedules” existed in the marketplace besides Red Book. The Bureau reviewed the Workers’ Compensation Research Institute’s National Inventory of Workers’ Compensation Medical Cost Containment (2024). We also surveyed members of the Southern Association of Workers’ Compensation Administrators, a partner organization consisting of 21 jurisdictions across the nation. Several states provided information on their cost containment procedures. Additionally, we met with several stakeholders intimate with this issue. Finally, this issue was discussed consistently with Pennsylvania’s Workers’ Compensation Advisory Council.

The Bureau identified three additional schedules utilized by other states. Medi-Span is being utilized in eight states. The National Average Drug Acquisition Cost (NADAC) is being utilized in two states. First Databank is being utilized in one state. The Bureau then analyzed each of the additional schedules to determine whether they comply with our Act AND comply with the Commonwealth Court’s decision.

Of note, several states do not utilize a “nationally recognized schedule.” Many follow a usual and customary fee model. In this approach, the reimbursement amount is the pharmacy’s cash price which reflects what’s most commonly charged when a consumer at the retail level is not using insurance. Additionally, one state utilized a drug formulary. In the simplest of terms, a drug formulary is a list of drugs for which an insurer agrees to pay (sometimes partially) for a predefined or specific health condition or disease.

Medi-Span publishes an AWP schedule that is calculated in a near identical fashion as that of Red Book. As such, the AWP price per unit for Medi-Span is near identical to Red Book. The Bureau surveyed the AWP calculated by Medi-Span with the AWP calculated by Red Book for the top six most commonly fee disputed drugs. As you can see in the below chart, the Medi-Span and Red Book per unit prices were the same:

Drug Name	Example NDC	Red Book AWP Per Unit	Medi-Span AWP Per Unit
Lidocaine Patch 5%	00603188016	10.27567	10.27567
Meloxicam 15mg	68382005105	4.8449	4.8449
Duloxetine HCL DR 60 mg	51991074890	7.541	7.541
Oxycodone/APAP 10-325	00406052301	3.5508	3.5508
Morphine Sulfate ER 30mg	00406833001	3.1719	3.1719

Tramadol 50mg	60219234805	0.8338	0.8338
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Clearly, Medi-Span, like Red Book, does not provide a schedule that calculates AWP based upon actual acquisition costs and reports pricing the Court found to be based on “inflated manufacturer suggested retail pricing.” Therefore, the Bureau could only conclude Medi-Span was not a viable option because it does not comply with our Act or the Commonwealth Court’s decision.

First Databank does not publish an AWP schedule like that of Red Book or Medi-Span; instead, they publish several other cost schedules with varying names and formulas. Since our Act explicitly states “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” and First Databank does not publish an AWP or comparable schedule, the Bureau has been unable to identify a First Databank schedule that satisfies the Commonwealth Court’s plain language reading of the Act.

The final “Nationally recognized schedule” is NADAC. NADAC does not publish an AWP schedule like that of Red Book or Medi-Span; instead, they provide the results of an independently conducted survey of retail pharmacies to determine the cost actually paid to acquire a drug. Given the significantly lesser costs generated from such a calculation, NADAC recognizes the need for a professional dispensing fee to cover the pharmacy’s professional services to furnish prescriptions. The Bureau believes that all jurisdictions utilizing NADAC for reimbursement include an additional professional dispensing fee.

Neither our Act, nor our regulations, provide the Bureau with authority to add a dispensing fee to the acquisition cost calculated by NADAC. Therefore, if the Bureau designated NADAC, pharmacies would potentially not be compensated for the cost of dispensing drugs to injured workers, which could result in greater difficulty for injured workers to fill prescriptions.

Without the ability to include a dispensing fee to account for the dramatic differences in pricing, it is not clear if NADAC would satisfy the Commonwealth Court’s plain language reading of the Act while creating a risk of reducing injured workers’ access to medications.

Since the Commonwealth Court issued its decision on January 2, the Bureau has been stayed from resolving any fee disputes involving pharmacies until a new schedule has been selected. Currently, there are nearly 5,000 fee disputes in limbo. Insurance carriers and self-insured employers are frequently contacting the Bureau seeking guidance regarding payment of pharmacy bills. Pharmacies willing to fill injured workers prescriptions remain uncertain if they will be compensated for the drug allocated, at what amount, and whether they will receive a reimbursement sizable enough to cover their cost of doing business.

On March 22, 2024, the Commonwealth Court denied a request for stay pending a Petition for Allowance of Appeal filed with the Supreme Court. On August 27, 2024, the Supreme Court denied a request for supersedeas/stay pending the allowance of appeal. In that same order, the Supreme Court granted the Petition for Allowance of Appeal, citing three

questions to be addressed, as well as whether the Commonwealth Court's order was appealable given it remanded the matter back to the hearing officer.

To date, the Bureau has been unable to identify a "Nationally recognized schedule" which clearly complies with our Act and the Commonwealth Court's order, and which does not jeopardize the availability of prescription medications for injured workers.

Because there is no clear solution available that will avoid additional litigation challenges going forward, the Bureau believes the best course of action is a legislative fix that resolves the reimbursement question while balancing the needs of all parties involved. The legislature is uniquely positioned to answer the policy questions posed by the Commonwealth Court decision while also greatly reducing the risk of ongoing or new litigation arising out of a selection made by the Bureau.

To conclude, I would again like to thank the Chairs and members of this committee for the opportunity to testify today. I look forward to answering any questions you may have.