

MEDICAL CONTESTED CASE HEARING NO. 10169  
M4-0704069-01

**DECISION AND ORDER**

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and Rules of the Division of Workers' Compensation adopted thereunder.

**ISSUE**

A contested case hearing was held on March 25, 2010, to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of Medical Fee Dispute Resolution (MFDR) that Respondent is entitled to additional reimbursement of \$72.25 for the compensable injury of \_\_\_\_\_?

**PARTIES PRESENT**

Petitioner appeared and was represented by TR, attorney. Respondent appeared and was represented by ML, attorney. Claimant and Employer did not appear, and their appearances were waived.

**DOCUMENTARY EVIDENCE**

The following exhibits were admitted into evidence:

Hearing Officer's Exhibits 1 through 3.

Petitioner's Exhibits A through I.

Respondent's Exhibits 1 through 4.

**BACKGROUND INFORMATION**

Respondent provided five prescriptions for sixty pills each of Hydrocodone / APAP 5/500 to Claimant for which it billed Petitioner \$45.99 per prescription. Petitioner paid Respondent \$24.42 per prescription based on establishment of a proxy for Respondent's usual and customary charge to customers because it was lower than the formula amount in Rule 134.503(a). Respondent appealed to MFDR and received a decision that it was entitled to an additional \$14.45 per prescription, and Petitioner was ordered to pay an additional \$72.25 for the five prescriptions filled. Petitioner timely filed this appeal.

Rule 134.503(a) provides:

(a) The maximum allowable reimbursement (MAR) for prescription drugs shall be the lesser of:

(1) The provider's usual and customary charge for the same or similar service;

(2) The fees established by the following formulas based on the average wholesale price (AWP) determined by utilizing a nationally recognized pharmaceutical reimbursement system (e.g. Redbook, First Data Bank Services) in effect on the day the prescription drug is dispensed.

(A) Generic drugs:  $((\text{AWP per unit}) \times (\text{number of units}) \times 1.25) + \$4.00 \text{ dispensing fee} = \text{MAR}$ ;

(B) Brand name drugs:  $((\text{AWP per unit}) \times (\text{number of units}) \times 1.09) + \$4.00 \text{ dispensing fee} = \text{MAR}$ ;

(C) A compounding fee of \$15 per compound shall be added for compound drugs; or

(3) A negotiated or contract amount.

Petitioner asserts that the \$24.42 which it paid is the correct amount because it is based upon what is paid to (name). for sixty pills of Hydrocodone / APAP 5/500 under a negotiated contract and asserts that (name) is a good proxy for determining Respondent's usual and customary charges.

Respondent is a sole proprietorship which was recently incorporated and whose sole stockholder is PS who testified at this contested case hearing. In addition to (Healthcare Provider), PS owns and operates (Healthcare Provider). She is shown in records of the Texas State Board of Pharmacy to be the Pharmacist-in-Charge and owner of both entities. Neither pharmacy provides prescriptions to non-workers' compensation customers except what Respondent's attorney characterized as one or two instances of deviance. The formula by which both entities calculate their prices are 138 per cent of the AWP plus a \$7.50 dispensing fee. Hence, as "provider" both entities' "usual and customary charge" is based on the above formula which is \$45.99 for dispensing 60 units of Hydrocodone / APAP 5/500. Although PS testified that she had originally calculated the 38 per cent add-on, the formula for generic prescriptions is the same computation used in the Medical Fee Guideline adopted by the Texas Workers' Compensation Commission which was effective April 1, 1996. And Although PS testified that the AWP was based on a per pill basis, billing by Respondent varies between a prescription for 30 pills of Hydrocodone / APAP 5/500 and 60 pills of Hydrocodone / APAP 5/500. PS explained that the difference was due to a discount for a greater number of pills and is calculated by her computer program.

Since Respondent's fees are higher than what Petitioner pays other providers, Petitioner argues that Respondent is not entitled to any additional reimbursement because Respondent has failed to

properly establish usual and customary charges for non-workers' compensation prescriptions. Petitioner relies upon Medical Review Decision Nos. (MDR Tracking No. 1) and (MDR Tracking No. 2) issued on December 19, 2002, in which reimbursement was denied because the provider did not establish the usual and customary charge for the subject prescriptions filled for customers outside of the workers' compensation system.

The decision of MFDR which Petitioner seeks to overturn herein followed Rule 134.503 (a)(2)(A) as the lesser amount in ordering Petitioner to pay the additional \$14.45 or total \$72.25 for five prescriptions. MFDR found that the usual and customary charge of Respondent was \$45.99 per prescription, and MFDR found that under the formula of Rule 134.503(a)(2)(A) the MAR is \$38.87. The difference of \$38.87 and \$24.42 which Petitioner paid is \$14.45 per prescription.

Under the Act and Rules, there is no provision requiring the provider to establish the usual and customary charge for the subject prescriptions filled for customers outside of the workers' compensation system if the provider does not do so. Likewise, under the Act and Rules, there is no provision allowing Petitioner to substitute a proxy's charge as the usual and customary charge. The only requirement under Rule 134.503(a)(2)(A) is that the provider establish its own usual and customary charge. Therefore, the amount found by MFDR of \$38.87 as the MAR by virtue of its being the lesser amount is correct, and Petitioner is liable for the difference of \$14.45 per prescription or a total of \$72.25 for the five prescriptions under consideration.

Even though all the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

### **FINDINGS OF FACT**

1. The parties stipulated to the following facts:
  - A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
  - B. On \_\_\_\_\_, Claimant was the employee of (Employer) when he sustained a compensable injury.
2. Carrier delivered to Claimant a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
3. Respondent's usual and customary charge for the same or similar service of dispensing 60 units of Hydrocodone / APAP 5/500 is \$45.99.
4. Respondent did not fill prescriptions for customers outside of the workers' compensation system.

5. Using the formula of Rule 134.503(a)(2)(A), the MAR is \$38.87 per prescription for the prescriptions provided by Respondent to Claimant on March 22, 2006; April 17, 2006; July 9, 2006; August 8, 2006; and November 27, 2006, in that \$38.87 is the lesser of the provider's usual and customary charge and the (AWP per unit) x (number of units) x 1.25) +\$4.00 dispensing fee.
6. There was no negotiated or contract amount between Petitioner and Respondent.
7. For the prescriptions dates of March 22, 2006; April 17, 2006; July 9, 2006; August 8, 2006; and November 27, 2006, Petitioner paid Respondent \$24.42 per prescription leaving a balance due and owing of \$14.45 per prescription or a total of \$72.25 for the five prescriptions.
8. Respondent is entitled to additional reimbursement of \$72.25 for the compensable injury of \_\_\_\_\_.

### **CONCLUSIONS OF LAW**

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.
2. Venue is proper in the (City) Field Office.
3. The preponderance of the evidence is not contrary to the decision of Medical Fee Dispute Resolution (MFDR) that Respondent is entitled to additional reimbursement of \$72.25 for the compensable injury of \_\_\_\_\_.

### **DECISION**

Petitioner is liable to Respondent for the additional reimbursement of \$74.25 for the compensable injury of \_\_\_\_\_.

### **ORDER**

Carrier is ordered to pay benefits in accordance with this decision, the Texas Workers' Compensation Act, and the Commissioner's Rules.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RON WRIGHT, PRESIDENT  
TEXAS MUTUAL INSURANCE COMPANY  
6210 EAST HIGHWAY 290  
AUSTIN, TEXAS 78723**

Signed this 3rd day of May, 2010.

Charles T. Cole  
Hearing Officer