

MEDICAL CONTESTED CASE HEARING NO. 10210

M4-09-3313-01

M4-09-9292-01

M4-09-4858-01

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.

ISSUES

A contested case hearing was held on July 22, 2010, with the record closing on July 30, 2010, after the receipt of written arguments in the above-entitled and numbered cases. The cases in this matter involved the same parties and issues, but for different dates of service and for different prescription medications. The hearings were, therefore, consolidated and this Decision and Order will constitute the sole Decision and Order for the three disputes.

In (Docket Number 02) /; the hearing was held to decide the following disputed issue:

Is the preponderance of the evidence contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$108.79 for Xodol 10-300 tablets dispensed to Claimant on April 8, 2008, and May 6, 2008; \$339.79 for Topomax 100 MG tablets dispensed to Claimant on April 8, 2008, May 9, 2008, and June 4, 2008; \$150.55 for Provigil 200 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, and August 8, 2008; \$96.72 for Nexium 40 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, and June 4, 2008; \$111.34 for Lunesta 2 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, June 4, 2008, and August 8, 2008; \$684.26 for Imitrex 25 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, and August 8, 2008; and \$87.48 for Cymbalta 60 MG tablets dispensed to Claimant on April 8, 2008, and May 6, 2008?

In (Docket Number 03) /, the hearing was held to decide the following disputed issue:

Is the preponderance of the evidence contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$24.29 for Avinza 30 MG tablets dispensed to Claimant on March 4, 2009?

And in (Docket Number 04) / the hearing was held to decide the following disputed issue:

Is the preponderance of the evidence contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$182.25 for Imitrex 25 MG tablets dispensed to Claimant on September 2, 2008;

\$107.20 for Cymbalta 60 MG tablets dispensed to Claimant on September 9, 2008; \$33.49 for Lunesta 2 MG tablets dispensed to Claimant on September 9, 2008; \$69.14 for Nexium 40 MG tablets dispensed to Claimant on September 9, 2008; \$103.42 for Provigil 200 MG tablets dispensed to Claimant on September 9, 2008; and \$71.10 for Xodol 10-300 tablets dispensed to Claimant on September 9, 2008?

PARTIES PRESENT

Petitioner appeared and was represented by PR, attorney. Respondent appeared and was represented by BJ, attorney. Claimant did not appear.

BACKGROUND INFORMATION

Petitioner, (Healthcare Provider), hereinafter referred to as (Healthcare Provider), is a mail order pharmacy whose primary business involves filling prescriptions for patients who have suffered a work related injury. (Healthcare Provider) has customers in and is licensed to dispense prescription medications in all 50 states.

On April 8, 2008, and May 6, 2008, (Healthcare Provider) dispensed 22-day supplies of Xodol 10-300 tablets to Claimant. It then billed Respondent, hereinafter referred to as Carrier, an undisclosed amount that Carrier rejected. Carrier estimated a reasonable cost for the medication, deemed that amount appropriate and tendered that payment to (Healthcare Provider)pursuant to Division Rule 42.115(c)(2). (Healthcare Provider) then invoked Medical Dispute Resolution in an attempt to secure an additional \$108.79 for the foregoing prescriptions.

On April 8, 2008, May 9, 2008, and June 4, 2008, (Healthcare Provider) dispensed 30-day supplies of Topamax 100 MG tablets to Claimant. Carrier rejected the amount billed by (Healthcare Provider) and in accordance with Division Rule 42.115(c)(2) tendered an amount it deemed appropriate for the prescriptions. (Healthcare Provider) invoked Medical Dispute Resolution, seeking an additional \$339.72 for the foregoing prescriptions.

On April 8, 2008, May 6, 2008, and August 8, 2008, (Healthcare Provider) dispensed 30-day supplies of Provigil 200 MG tablets to Claimant. Carrier rejected the amount billed by (Healthcare Provider) and in accordance with Division Rule 42.115(c)(2) tendered an amount it deemed appropriate for the prescriptions. (Healthcare Provider) invoked Medical Dispute Resolution, seeking an additional \$150.55 for the foregoing prescriptions.

On April 8, 2008, May 6, 2008, and June 4, 2008, (Healthcare Provider) dispensed 30-day supplies of Nexium 40 MG tablets to Claimant. Carrier rejected the amount billed by (Healthcare Provider) and in accordance with Division Rule 42.115(c)(2) tendered an amount it deemed appropriate for the prescriptions. (Healthcare Provider) invoked Medical Dispute Resolution, seeking an additional \$96.72 for the foregoing prescriptions.

On April 8, 2008, May 6, 2008, June 4, 2008, and August 8, 2008 (Healthcare Provider) dispensed 30-day supplies of Lunesta 2 MG tablets to Claimant. Carrier rejected the amount billed by (Healthcare Provider) and in accordance with Division Rule 42.115(c)(2) tendered an amount it deemed appropriate for the prescriptions. (Healthcare Provider) invoked Medical Dispute Resolution, seeking an additional \$111.34 for the foregoing prescriptions.

On April 8, 2008, May 6, 2008, and August 8, 2008, (Healthcare Provider) dispensed 30-day supplies of Imitrex 25 MG tablets to Claimant. Carrier rejected the amount billed by (Healthcare Provider) and in accordance with Division Rule 42.115(c)(2) tendered an amount it deemed appropriate for the prescriptions. (Healthcare Provider) invoked Medical Dispute Resolution, seeking an additional \$684.26 for the foregoing prescriptions.

On April 8, 2008, and May 6, 2008, (Healthcare Provider) dispensed 30-day supplies of Cymbalta 60 MG tablets to Claimant. Carrier rejected the amount billed by (Healthcare Provider) and in accordance with Division Rule 42.115(c)(2) tendered an amount it deemed appropriate for the prescriptions. (Healthcare Provider) invoked Medical Dispute Resolution, seeking an additional \$87.48 for the foregoing prescriptions.

On May 24, 2010, the Division's Medical Fee Dispute Resolution Officer issued a decision that (Healthcare Provider) had failed to provide sufficient evidence to determine (Healthcare Provider)'s U&C charge for each of the foregoing medications, and that the lesser of the U&C charge or formula amount for the MAR (Maximum Allowable Reimbursement), as set forth in Division Rule 134.503, could not be determined. The Medical Fee Dispute Resolution Officer found that (Healthcare Provider) was not entitled to any additional reimbursement. (Healthcare Provider) appealed that finding to a contested case hearing in (Docket Number 02).

On March 4, 2009, (Healthcare Provider) dispensed a 30-day supply of Avinza 30 MG tablets to Claimant and billed Carrier \$140.46. Carrier rejected the amount billed by (Healthcare Provider) and in accordance with Division Rule 42.115(c)(2) tendered payment of \$116.17, an amount it deemed appropriate for the prescription. (Healthcare Provider) invoked Medical Dispute Resolution, seeking the additional \$24.29.

On May 27, 2010, the Division's Medical Fee Dispute Resolution Officer issued a decision that (Healthcare Provider) had failed to provide sufficient evidence to determine (Healthcare Provider)'s U&C charge for the foregoing medications, and that the lesser of the U&C charge or formula amount for the MAR, as set forth in Division Rule 134.503, could not be determined. The Medical Fee Dispute Resolution Officer found that (Healthcare Provider) was not entitled to any additional reimbursement. (Healthcare Provider) appealed that finding to a contested case hearing in (Docket Number 03).

On September 2, 2008, (Healthcare Provider) dispensed Imitrex 25 MG tablets to Claimant. Carrier rejected the amount billed by (Healthcare Provider) and in accordance with Division Rule 42.115(c)(2) tendered an amount it deemed appropriate for the prescriptions. (Healthcare Provider) invoked Medical Dispute Resolution, seeking an additional \$182.25 for the foregoing prescription.

On September 9, 2008, (Healthcare Provider) dispensed Cymbalta 60 MG capsules, Lunesta 2 MG tablets, Nexium 40 MG capsules, Provigil 200 MG tablets, and Xodol 10-300 tablets to Claimant. Carrier rejected the amount billed by (Healthcare Provider) and in accordance with Division Rule 42.115(c) (2) tendered an amount it deemed appropriate for the prescriptions. (Healthcare Provider) invoked Medical Dispute Resolution, seeking an additional \$107.20 for the Cymbalta, \$33.49 for the Lunesta, \$69.14 for the Nexium, \$103.42 for the Provigil, and \$71.10 for the Xodol.

On June 10, 2010, the Division's Medical Fee Dispute Resolution Officer issued a decision that (Healthcare Provider) had failed to provide sufficient evidence to determine (Healthcare Provider)'s U&C charge for the foregoing medications, and that the lesser of the U&C charge or formula amount for the MAR, as set forth in Division Rule 134.503, could not be determined. The Medical Fee Dispute Resolution Officer found that (Healthcare Provider) was not entitled to any additional reimbursement. (Healthcare Provider) appealed that finding to a contested case hearing in (Docket No. 04).

An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. (Texas Labor Code §408.021). The term "health care" includes a prescription drug, medicine, or other remedy. (Texas Labor Code §401.011(19)(E)). The commissioner of the Division of Workers' Compensation is directed by statute to adopt a fee schedule for pharmacy and pharmaceutical services that will provide reimbursement rates that are fair and reasonable; assure adequate access to medications and services for injured workers; and minimize costs to employees and insurance carriers. (Texas Labor Code §408.028(f)). Insurance carriers must reimburse for pharmacy benefits and services using the fee schedule or at rates negotiated by contract. (Texas Labor Code §408.028(g)). The commissioner has adopted reimbursement methodology to establish the MAR for prescription drugs in Division Rule 134.503. At the time (Healthcare Provider) dispensed the prescription drugs the subject of this hearing, Rule 134.503 provided that the MAR for prescription drugs would be the lesser of the provider's U&C charge (U&C) for the same or similar service or a fee established by formulas based on the average wholesale price (AWP) determined by utilizing a nationally recognized pharmaceutical reimbursement system such as Redbook or First Data Bank Services in effect on the day the prescription drug was dispensed. For generic drugs, the formula was ((AWP per unit) × (number of units) × 1.25) + \$4.00 dispensing fee and for brand name drugs the formula was ((AWP per unit) × (number of units) × 1.09) + \$4.00 dispensing fee. (Division Rule 134.503(a) (2)).

On December 11, 2003, (Executive Director), the Executive Director of the Texas Workers' Compensation Commission, issued Advisory 2003-21 to address the determination of a pharmacy's U&C charge for prescription drugs. In part, the Advisory states:

The Commission's pharmacy prescription pricing rule is based, in part, on several important provisions concerning health care provider charges. First, fee guidelines are based, in part, on a provision that payment may not be in excess of the fee charged for similar treatment of an injured individual of an equivalent standard of living and paid by that individual or by someone acting on that individual's behalf (Texas Labor Code Section 413.011(d)). Also, "[a] health care provider commits an offense if the person knowingly charges an insurance carrier an amount greater than that normally charged for similar treatment to a payor outside the workers' compensation system, except for mandated or negotiated charges" (Texas Labor Code §413.043(a)).

Parties requesting medical dispute resolution should ensure that they abide by the statute and rule references outlined above. The Commission's Medical Dispute Resolution Section has indicated that parties filing a dispute have the burden of proof to support their position for advocating additional reimbursement. The burden of proof includes production of sufficient evidence to support that the

reimbursement requested is in accordance with the factors listed in §413.011(b) of the Texas Workers' Compensation Act.

(Healthcare Provider) presented testimony that its U&C charge for prescriptions unless otherwise mandated by statute or rule is $((AWP \times 1.78) + \text{a dispensing fee})$. However, (Healthcare Provider) also presented testimony that it has a “cash payment” program for customers that are willing to pre-pay for prescriptions and the formula used to determine the charge for those customers is $((AWP \times .9) + \text{a dispensing fee})$. (Healthcare Provider) contends that the formula used in billing Carrier for the prescriptions at issue in this matter was the formula for generic prescription drugs set forth in Rule 134.503.

(Healthcare Provider)'s reimbursement manager, (Reimbursement Manager), testified that it bills for prescriptions in Texas using the relevant fee guideline computation (referred to as the guideline amount) because that amount is less than its U&C amount using the $((AWP \text{ per unit} \times \text{number of units}) \times 1.78) + \text{dispensing fee}$). He also testified that cash customers in Texas would be billed at the $(AWP \times .9)$ formula and that (Healthcare Provider) reduces prices in some areas to remain competitive. In an affidavit, he stated that the guideline amount is (Healthcare Provider)'s U&C fee in Texas. In response to discovery tendered to (Healthcare Provider) by Carrier, (Reimbursement Manager) stated that (Healthcare Provider) limits its business to workers' compensation claims, individual pre-pays, and auto injury claimants in no fault claims who must also pre-pay (Healthcare Provider). As with workers' compensation prepay customers, (Healthcare Provider)'s auto injury prepay customers pay AWP less 10% for prescription drugs. (Reimbursement Manager) testified that auto injury no fault claims account for approximately 9% of (Healthcare Provider)'s business and workers' compensation cash pre-pay customers account for less than 1% of its business.

(Reimbursement Manager) testified that at the time the prescription drugs were dispensed, (Healthcare Provider) used information from First Data Bank to determine the AWP of prescription drugs, but (Healthcare Provider) failed to offer evidence of the AWP of any of the prescription drugs on the date they were dispensed. (Healthcare Provider) argues that the AWP for the prescriptions at issue can be derived by subtracting the dispensing fee from the amount billed, then working the formula for brand name prescription drugs to arrive at the AWP. The hearing officer finds that utilizing the method suggested by Carrier would derive a speculative figure for the AWP and fails to show that the AWP used by Carrier complied with the directive contained in Rule 134.503.

(Healthcare Provider) provided figures that it asserts represent the prices for prescription drugs as charged by (Healthcare Provider) in each of the states where it does business. Some of the prices alleged to be (Healthcare Provider)'s U&C price, as reflected in a spreadsheet of prices for particular drugs in each state, are approximately the same as the price charged at the guideline amount in Texas, but most of the prices alleged to be (Healthcare Provider)'s U&C rate are higher than the rate shown as being charged in Texas.

(Healthcare Provider) has presented a significant amount of material into evidence, but that material fails to establish the AWP for the prescription drugs in question. The payment sought from Carrier exceeds the fee charged for similar prescriptions dispensed to prepay customers. In a number of jurisdictions, (Healthcare Provider) receives less than it does in Texas, even using the guideline amount, but those lower fees are alleged to be due to mandated fee schedules.

There was no substantive evidence offered of the statutory provisions for the alleged mandated fees.

After considering all of the evidence offered, the hearing officer concludes that there is insufficient evidence to show the amount initially billed for the relevant prescription drugs by (Healthcare Provider), (Healthcare Provider)'s U&C charge for the relevant prescription drugs on the dates they were dispensed, that the fee charged by (Healthcare Provider) for each of the relevant prescription drugs was computed in conformity with the reimbursement formulas of Rule 134.503 using a nationally recognized pharmaceutical reimbursement system, or that (Healthcare Provider)'s U&C charge for the relevant prescription drugs was greater than the price calculated under the reimbursement formulae in Rule 134.503.

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 as follows:
 - A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
 - B. Claimant sustained a compensable injury on _____, while his employer had workers' compensation coverage
2. Carrier delivered to Subclaimant 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. Petitioner failed to prove the AWP for the prescription drugs at issue using information from a nationally recognized pharmaceutical reimbursement system on April 8, 2008, May 6, 2008, May 9, 2008, June 4, 2008, August 8, 2008, September 2, 2008, September 9, 2008, and March 4, 2009.
4. Petitioner charges some customers less than the price charged for the prescription drugs dispensed to Claimant on April 8, 2008, May 6, 2008, May 9, 2008, June 4, 2008, August 8, 2008, September 2, 2008, September 9, 2008, and March 4, 2009.
5. Petitioner failed to prove the amount of reimbursement received from Carrier for the prescription medications dispensed to Claimant on April 8, 2008, May 6, 2008, May 9, 2008, June 4, 2008, August 8, 2008, September 2, 2008, and September 9, 2008.

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. In (Docket Number 02) / the preponderance of the evidence is not contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$108.79 for Xodol 10-300 tablets dispensed to Claimant on April 8, 2008, and May 6, 2008; \$339.79 for Topomax 100 MG tablets dispensed to Claimant on April 8, 2008, May 9, 2008, and June 4, 2008; \$150.55 for Provigil 200 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, and August 8, 2008; \$96.72 for Nexium 40 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, and June 4, 2008; \$111.34 for Lunesta 2 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, and August 8, 2008; \$684.26 for Imitrex 25 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, and August 8, 2008; and \$87.48 for Cymbalta 60 MG tablets dispensed to Claimant on April 8, 2008, and May 6, 2008.
4. In (Docket Number 03) / the preponderance of the evidence is not contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$24.29 for Avinza 30 MG tablets dispensed to Claimant on March 4, 2009.
5. In (Docket Number 04) / the preponderance of the evidence is not contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$182.25 for Imitrex 25 MG tablets dispensed to Claimant on September 2, 2008; \$107.20 for Cymbalta 60 MG tablets dispensed to Claimant on September 9, 2008; \$33.49 for Lunesta 2 MG tablets dispensed to Claimant on September 9, 2008; \$69.14 for Nexium 40 MG tablets dispensed to Claimant on September 9, 2008; \$103.42 for Provigil 200 MG tablets dispensed to Claimant on September 9, 2008; and \$71.10 for Xodol 10-300 tablets dispensed to Claimant on September 9, 2008.

DECISION

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement for the Xodol 10-300 tablets dispensed to Claimant on April 8, 2008, and May 6, 2008; for the Topomax 100 MG tablets dispensed to Claimant on April 8, 2008, May 9, 2008, and June 4, 2008; for the Provigil 200 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, and August 8, 2008; \$96.72 for Nexium 40 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, and June 4, 2008; \$111.34 for Lunesta 2 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, and August 8, 2008; for the Imitrex 25 MG tablets dispensed to Claimant on April 8, 2008, May 6, 2008, and August 8, 2008; or for the Cymbalta 60 MG tablets dispensed to Claimant on April 8, 2008, and May 6, 2008.

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement for the Avinza 30 MG tablets dispensed to Claimant on March 4, 2009.

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement for the Imitrex 25 MG tablets dispensed to Claimant on September 2, 2008; for the Cymbalta 60 MG tablets dispensed to Claimant on September 9, 2008; for the Lunesta 2 MG tablets dispensed to Claimant on September 9, 2008; for the Nexium 40 MG tablets dispensed to Claimant on September 9, 2008; for the Provigil 200 MG tablets dispensed to Claimant on September 9, 2008; or for the Xodol 10-300 tablets dispensed to Claimant on September 9, 2008

ORDER

Carrier is not liable for the benefits at issue in this hearing. Claimant remains entitled to medical benefits for the compensable injury in accordance with §408.021.

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 6th day of August, 2010.

KENNETH A. HUCHTON
Hearing Officer