

**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 closing arguments, 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 \$31.36 for Hydrocodone-APAP 10/500 dispensed to Claimant on June 3, 2008, and August 8, 2008, and \$65.98 for Cyclobenzaprine 10 MG dispensed to Claimant on August 20, 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 June 3, 2008, (Healthcare Provider) dispensed 60 units of Hydrocodone Bitartrate/AP Tabs to Claimant. It then billed Respondent \$41.95. Respondent rejected the price charged by (Healthcare Provider), estimated that \$26.27 was a reasonable cost for the medication, and tendered that payment to (Healthcare Provider). On August 8, 2008, (Healthcare Provider) dispensed 60 more units of Hydrocodone Bitartrate/AP Tabs to Claimant and again billed Respondent \$41.95. Respondent rejected the price charged by (Healthcare Provider), estimated that \$26.27 was a reasonable cost for the medication, and tendered that amount to (Healthcare Provider). On August 20, 2008, (Healthcare Provider) dispensed 120 units of Cyclobenzaprine HCL Tabs to Claimant. It billed Respondent \$167.69. Respondent rejected the price charged by (Healthcare Provider) and tendered what it deemed to be appropriate reimbursement in the amount of \$101.71. (Healthcare Provider) then invoked the Division's Medical Dispute Resolution system in an attempt to secure what it considered to be full payment for the prescription drugs dispensed to Claimant.

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 the Hydrocodone Bitartrate/AP Tabs and Cyclobenzaprine HCL Tabs dispensed to Claimant, that the lesser of the usual and customary (U&C) charge or MAR (Maximum Allowable Reimbursement) as calculated using the formula set forth in Division Rule 134.503 could not be determined, and that (Healthcare Provider) was not entitled to any additional reimbursement. (Healthcare Provider) appealed that decision to a contested case hearing.

(Healthcare Provider) contends that it is entitled to reimbursement at the rate calculated using the formula set forth in Division Rule 134.503 (the statutory calculation) because its U&C rate exceeds the MAR derived with the statutory calculation. Respondent contends that (Healthcare Provider) has failed to produce sufficient evidence to establish its U&C charge and, alternatively, that (Healthcare Provider)'s alleged U&C charge and the statutory calculation both exceed the price (Healthcare Provider) charges some customers and it is not entitled to reimbursement in excess of that lower price.

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 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  $((AWP \text{ per unit}) \times (\text{number of units}) \times 1.25) + \$4.00$  dispensing fee) and for brand name drugs the formula was  $((AWP \text{ per unit}) \times (\text{number of units}) \times 1.09) + \$4.00$  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.

In an affidavit dated July 14, 2010, (Healthcare Provider)'s reimbursement manager, stated that 95% of (Healthcare Provider)'s business involves filling prescriptions for injured workers. He stated that (Healthcare Provider)'s U&C is  $AWP \times 1.78 + a \$4.50$  dispensing fee. He avers that (Healthcare Provider) charges this rate where ever it is not subject to state mandated workers' compensation fee schedules, but then goes on to state that it does not charge that amount in Missouri, New Jersey or Maryland, states where (Healthcare Provider) is allowed to charge its U&C. (Healthcare Provider) lowered its rate in those states to stay competitive. Additionally, (Healthcare Provider) charges pre-pay customers  $AWP$  minus 10% (for generic medications) or  $AWP$  (for brand name medications) plus a \$3.00 dispensing fee. (Healthcare Provider) stated that it charges these customers less because the administrative cost for the segment is minimal and there are no collection costs. Pre-pay customers with no-fault auto claims and settled workers' compensation claims account for approximately 10% of (Healthcare Provider)'s business.

The proponent of additional payment has the burden to prove the U&C charge and the fee established by the Rule 134.503 formulas using 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; (Healthcare Provider) did not offer evidence of the AWP on June 3, 2008, August 8, 2008, or August 20, 2008. (Healthcare Provider) argues that the AWP can be derived by working the statutory fee guideline formula backwards. The hearing officer finds that any determination of the AWP by this method would be speculative.

(Healthcare Provider) must also show that the payment sought does not exceed 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. In the case of customers who prepay by cash or credit card, the evidence presented by (Healthcare Provider) establishes that the prescription prices at issue are substantially more than the same prices that would be charged to a prepay customer in Texas.

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 employed by (Employer).
  - C. The medications for which additional reimbursement is sought were dispensed as part of the medical care for the compensable injury of \_\_\_\_\_.
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. Petitioner failed to prove the AWP for the prescription drugs Hydrocodone-APAP 10/500 on June 3, 2008, and August 8, 2008, and Cyclobenzaprine 10 MG on August 20, 2008, as 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.
  4. Petitioner failed to prove that its U&C charges for Hydrocodone-APAP 10/500 and Cyclobenzaprine 10 MG are more than the price for each of those prescription drugs derived by the formula for generic drugs set forth in Division Rule 134.503.
  5. As a routine business practice, Petitioner charges some customers less than the price charged for the prescription drugs dispensed to Claimant on August 20, 2008, and those lower charges are not pursuant to a contractual agreement or mandated by law.

### **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 Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$31.36 for Hydrocodone-APAP 10/500 dispensed to Claimant on June 3, 2008, and August 8, 2008, and \$65.98 for Cyclobenzaprine 10 MG dispensed to Claimant on August 20, 2008

### **DECISION**

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement for the Hydrocodone-APAP 10/500 dispensed to Claimant on June 3, 2008, and August 8, 2008, or the Cyclobenzaprine 10 MG dispensed to Claimant on August 20, 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 9th day of August, 2010.

KENNETH A. HUCHTON  
Hearing Officer