

**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 for Butalbital-APAP Caffeine Tab dispensed on May 27, 2008, and Celebrex 200 MG capsules dispensed on May 27, 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 May 27, 2008, (Healthcare Provider) dispensed 60 units of Butalbital/APAP/Caffeine tabs and 30 units of Celebrex 200 MG capsules to Claimant. It then billed Respondent, hereinafter referred to as Carrier, \$48.16 for the Butalbital/APAP/Caffeine tabs and \$140.89 for the Celebrex. Carrier rejected the prices charged by (Healthcare Provider), estimated that \$30.01 was a reasonable cost for the Butalbital/APAP/Caffeine and \$116.53 was a reasonable cost for the Celebrex, and tendered payment in those amounts to (Healthcare Provider). (Healthcare Provider) then invoked the Division's Medical Dispute Resolution system in an attempt to secure full payment for the medications dispensed to Claimant.

On May 25, 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 Butalbital/APAP/Caffeine and Celebrex, that the lesser of the U&C charge or MAR (Maximum Allowable Reimbursement) formula amount for those prescriptions 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.

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

The parties stipulated that (Reimbursement Manager), (Healthcare Provider)'s reimbursement manager, would have testified that (Healthcare Provider)'s U&C price for prescription drugs is 178% of the drugs' AWP plus a \$4.50 dispensing fee for each prescription. (Reimbursement Manager) affidavit was also offered into evidence. In his affidavit, (Reimbursement Manager) stated that (Healthcare Provider) uses the 178% formula in "every state where it is permitted to

bill its U&C”, but in Missouri, New Jersey and Maryland (all which were identified as jurisdictions where (Healthcare Provider) is permitted to charge its U&C), its rate is lower due to competitive factors. He also stated that a very small portion (“less than 1%”) of (Healthcare Provider)’s business involves private pay individuals who have settled their workers’ compensation claim and pre-pay for prescriptions. (Healthcare Provider) charges those individuals 90% of the AWP.

In response to discovery requests, (Healthcare Provider) stated that it also charges customers who have no-fault auto insurance claims and pre-pay their prescriptions 90% of the AWP for prescriptions. (Healthcare Provider)’s no-fault auto claim customers account for approximately 9% of its business.

(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. The prices alleged to be (Healthcare Provider)’s U&C price in Maryland and New Jersey, 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. However, the price tendered by Carrier is approximately the same as the price (Healthcare Provider) charges in several states.

(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 pre-pay 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.

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 \_\_\_\_\_.
  - D. (Reimbursement Manager) would have testified that he is the reimbursement manager for Petitioner and that Petitioner’s U&C fee for medications is determined by multiplying the AWP of a drug by 1.78, then adding a dispensing fee to the resulting cost and that Petitioner’s resulting U&C fee is greater than the reimbursement for prescription drugs in Texas computed with the statutory

formulas as set forth in the Division's rules. (Reimbursement Manager) would also have testified that \$140.89 is the amount billed for 30 units of Celebrex calculated in accordance with the Texas formula and is less than (Healthcare Provider)'s U&C charge for that prescription drug. (Reimbursement Manager) would also have testified that \$48.18 is the amount billed for 60 units of Butalbital-APAP Caffeine Tab calculated in accordance with the Texas formula and is less than (Healthcare Provider)'s U&C charge for that prescription drug.

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 Butalbital-APAP Caffeine Tab and Celebrex using a nationally recognized pharmaceutical reimbursement system on May 27, 2008.
4. Petitioner charges some customers less than the price charged for the prescription drugs dispensed to Claimant on May 27, 2008.
5. Petitioner failed to prove that its U&C charge on May 27, 2008, for Butalbital-APAP Caffeine Tab and Celebrex, or either of them, was greater than or equal to the reimbursement for those prescription drugs as calculated using the MAR formulas in Rule 134.503.

### **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 IRO that (Healthcare Provider), Petitioner, is not entitled to additional reimbursement for Butalbital-APAP Caffeine Tab dispensed on May 27, 2008, and Celebrex 200 MG capsules dispensed on May 27, 2008.

### **DECISION**

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement for Butalbital-APAP Caffeine Tab and Celebrex 200 MG capsules dispensed to Claimant on May 27, 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