

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 August 11, 2010, with the record closing on August 20, 2010, to decide the following disputed issue:

Is the preponderance of the evidence contrary to the Medical Fee Dispute Resolution Findings and Decision that Petitioner, (Healthcare Provider), is not entitled to additional reimbursement in the total amount of \$109.21, divided as follows: thirty 100 mg tablets of propoxyphen, sixty 600 mg tablets of ibuprofen, sixty 800 tablets of Skelaxin, and sixty 30 mg tablets of Cymbalta.¹

PARTIES PRESENT

Petitioner appeared by telephone, and was represented by Attorney PR; Carrier appeared, and was represented by Attorney BJ. Claimant's appearance was excused, as his participation was unnecessary to the resolution of the disputed issue.

BACKGROUND INFORMATION

DT, Petitioner's reimbursement manager, described Petitioner as a mail-order pharmacy which specializes in providing prescription medication to workers' compensation claimants. However, Petitioner also has customers whose cases arise outside the workers' compensation arena, including a minute percentage of customers who pay cash for their medications as opposed to having an invoice submitted to an insurance carrier. He stated that non-cash customers outside the workers' compensation system are charged the same rates that are charged in workers' compensation cases, but that cash customers are not.

The witness set forth Petitioner's workers' compensation fee structure, indicating that it bills according to the fee guideline in states where such a guideline exists, and in other states bills the average wholesale price (AWP), times the number of units, times 1.78, plus a \$4.50 dispensing fee. In Texas, Petitioner bills insurance carriers according to the formula mandated by Division Rule 134.503(a)(2), which is its AWP, times the number of units, times 1.09, plus a \$4.00 dispensing fee for brand-name medications, and the AWP, times the number of units, times 1.25, plus a \$4.00 dispensing fee for generic medications. In the case of cash customers, Petitioner charges the AWP, times the number of units, plus a \$3.00 dispensing fee for brand-name medications, and the AWP, times the number of units, times 0.9 plus a \$3.00 dispensing fee for generic medications; the witness noted, however, that in such cases, payment must be made before the medication is shipped to the customer.

¹ All medications were dispensed on August 11, 2008, and represent a thirty-day supply of the prescribed dosages.

The dispute between Petitioner and Carrier arises from the requirement that Petitioner prove its usual and customary charges in order that those charges may be compared with the mathematical formula described in Division Rule 134.503(a)(2), since Petitioner is entitled to be reimbursed only the lesser of those two amounts. Petitioner contended that its usual and customary charge was the same amount as that derived by applying the formula, and Carrier contended that Petitioner had not submitted sufficient evidence to calculate its usual and customary charge, and therefore was entitled to no additional reimbursement.

DISCUSSION

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 employers 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 maximum allowable reimbursement (MAR) for prescription drugs in Division Rule 134.503. At the time Petitioner dispensed the prescription drugs that are the subject of this decision, Rule 134.503 provided that the MAR for prescription drugs would be the lesser of the provider’s usual and customary charge for the same or similar service or a fee established by formulas based on the AWP determined by utilizing a nationally recognized pharmaceutical reimbursement system in effect on the day the prescription drug was dispensed; Petitioner’s usual and customary charge, as described above, complies with the formula set forth in the cited Rule.

On December 11, 2003, (Executive Director), then Executive Director of the Texas Workers’ Compensation Commission, issued Advisory 2003-21 to address the determination of a pharmacy’s usual and customary charge for prescription drugs. A portion of 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 Advisory then lists several factors to consider when determining usual and customary charges for non-workers' compensation prescriptions *in Texas* (emphasis added), noting that these factors are important, while not describing them as mandatory.

Applicable authority, including the above-referenced Advisory, places the burden on Petitioner to demonstrate its entitlement to the additional reimbursement it seeks. In its attempt to do so, Petitioner has presented evidence of its charges outside the workers' compensation system, some of which are equal those inside the system, and has made a cogent argument regarding its decision to offer a discount to cash customers, considering the certainty of payment and the reduced administrative costs inherent in cash transactions. Petitioner has not, however, provided evidence of the AWP of the four medications at issue in this decision, an omission that renders it impossible to apply Rule 130.503 to the facts of this case in order to calculate the MAR. Petitioner's argument that the AWP can be found by reversing the formula in Rule 130.503 fails to comport with the apparent intent of this Rule, which is that the formula be applied to the raw data, as opposed to the other way around. In light of the absence of probative evidence of the AWP of the prescription medications in question, it must be determined that Petitioner has failed to meet its burden of proof, and that a decision in Carrier's favor must therefore be entered as to the sole issue presented for resolution herein.

Even though all the evidence presented may not have been discussed in detail, it was considered; the Findings of Fact and Conclusions of Law are based on all of the evidence presented.

FINDINGS OF FACT

1. On _____, Claimant was employed by the (Employer).
2. On _____, Employer subscribed to a policy of workers' compensation insurance issued by the Texas Mutual Insurance Company.
3. On _____, Claimant's residence was located within seventy-five miles of the (City) office of the Texas Department of Insurance, Division of Workers' Compensation.
4. Carrier delivered to Petitioner 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.
5. On _____, Claimant sustained damage or harm to the physical structure of his body while he was within the course and scope of his employment with Employer.
6. The injury referenced in the previous Finding of Fact arose out of Claimant's employment with Employer.
7. Petitioner failed to prove the average wholesale price of the prescription drugs at issue in this decision using information from a nationally recognized pharmaceutical reimbursement system on August 11, 2008.

8. Petitioner charges some of its non-workers' compensation customers less than the price charged for the prescription drugs dispensed to Claimant on August 11, 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. The preponderance of the evidence is not contrary to the Medical Fee Dispute Resolution Findings and Decision that Petitioner is not entitled to additional reimbursement in the total amount of \$109.21.

DECISION

Petitioner is not entitled to additional reimbursement for the Cymbalta, Skelaxin, ibuprofen, and propoxyphen dispensed to Claimant on August 11, 2008.

ORDER

Carrier is not liable for the medical 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 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 24th day of August, 2010.

Ellen Vannah
Hearing Officer