

MEDICAL CONTESTED CASE HEARING NO. 11034  
M4-09-4816-01(MDR TRACKING NO. 1)  
and M4-09-9296-01 (MDR TRACKING NO. 2)

**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 September 27, 2010 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 two disputes.

In Docket No. (SEQUENCE 07)/(MDR TRACKING NO. 1) 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 \$99.22 for a 30 day supply of Cyclobenzaprine 10MG Tablet-10MG dispensed to Claimant on May 31, 2008 and August 28, 2008; \$84.09 for a 30 day supply of Hydrocodone-APAP 10-660 Tablet-10-660 dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008; \$127.53 for a 30 day supply of Lyrica 100MG Capsule-100MG dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008; and \$33.80 for a 30 day supply of Temazepam 15MG Capsule-15 MG dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008?

In Docket No. (SEQUENCE 08)/(MDR TRACKING NO. 2) 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 \$10.58 for a 30 day supply of Temazepam 15MG Capsule-15MG dispensed to Claimant on March 13, 2009 and \$51.81 for a 30 day supply of Xodol 10-300 Tablet-10-300 dispensed to Claimant on March 13, 2009?

**PARTIES PRESENT**

Petitioner (HCP) appeared by telephone and was represented by JB, attorney. Respondent (Carrier) appeared and was represented by BJ, attorney. Claimant's appearance was excused, as his participation was unnecessary to the resolution of the disputed issues.

## **BACKGROUND INFORMATION**

Petitioner, (Healthcare Provider) (HCP), is a mail order pharmacy whose primary business involves filling prescriptions for patients who have suffered a work related injury. Mr. DT, HCP's reimbursement manager, testified that HCP has customers in all 50 states and is licensed to dispense prescription medications in all fifty states. HCP also has customers whose cases arise outside the workers' compensation arena, including a small percentage of customers who pre-pay their prescriptions at a discounted rate.

On May 31, 2008 and August 28, 2008, HCP dispensed 30-day supplies of Cyclobenzaprine 10 MG Tablet-10MG to Claimant. On May 31, 2008, July 28, 2008 and August 28, 2008 HCP dispensed 30 day supplies of Hydrocodone-APAP 10-660 Tablet-10-660, Lyrica 100MG Capsule-100MG, and Temazepam 15MG Capsule-15MG to Claimant. It then billed Respondent (Carrier) \$1,299.62 for these prescriptions. Carrier disagreed with the price charged by HCP, estimated that \$611.96 was a reasonable cost for the medication, and tendered that payment to HCP. HCP then invoked the Division's Medical Dispute Resolution (MFDR) in an attempt to secure an additional \$344.64 for the foregoing prescriptions.

On March 13, 2009 HCP dispensed a 30-day supply of Temazepam 15MG Capsule-15MG and Xodol 10-300 Tablet-10-300 to Claimant. It then billed Carrier \$327.55 for these prescriptions. Carrier disagreed with the price charged by HCP, estimated that \$265.16 was a reasonable cost for the medication, and tendered that payment to HCP. HCP then invoked MFDR in an attempt to secure an additional \$62.39 for the foregoing prescriptions.

On May 25, 2010 and June 3, 2010, the Division's MFDR Officers issued decisions that HCP had failed to provide sufficient evidence to determine HCP's usual and customary (U&C) charge, the MAR (Maximum Allowable Reimbursement – the lesser of the U&C or formula amount pursuant to Division Rule 134.503) could not be determined, and HCP was not entitled to any additional reimbursement. HCP appealed those findings.

Because HCP has no pharmacy fee schedule contract with Carrier, this dispute arises from the requirement that HCP prove the average wholesale price (AWP) on the dates the drugs were dispensed and its usual and customary (U&C) charges in order that those charges may be compared with the mathematical formula described in Division Rule 134.503(a)(2). HCP contended that its U&C charge was more than Texas' pharmacy fee schedule, thus requiring usage of said fee schedule per Rule 134.503. Carrier contended that HCP had not submitted sufficient evidence to calculate its U&C charge, and therefore was entitled to no additional reimbursement.

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

HCP, as Petitioner, has the burden to demonstrate its entitlement to the additional reimbursement it seeks. The medications at issue in this case are generic drugs. HCP introduced into evidence, for each medication, the AWP determined by utilizing a nationally recognized pharmaceutical reimbursement system (First Data Bank Services) as required by Rule 134.503 in calculating the MAR. The print-outs, dated August 26, 2010 indicate:

Cyclobenzaprine 10MG Tablet: AWP of \$1.09127 per unit, as of March 14, 2003. There was no price change through the dispensing dates of May 31, 2008 and August 28, 2008. Since this is a generic drug the formula under Rule 134.503, for determining the Texas Pharmaceutical Fee Guideline charge is \$1.09127  $\times$  1.25  $\times$  the number of units (180) + a \$4.00 dispensing fee. Those calculations total \$249.54, the amount billed by HCP for each date.

Hydrocodone-APAP 10-660 Tablet: AWP of \$0.61170 per unit, as of April 15, 1998. There was no price change through the dispensing dates of May 31, 2008, July 28, 2008 and August 28, 2008. Since this is a generic drug the formula under Rule 134.503, for determining

the Texas Pharmaceutical Fee Guideline charge is  $\$0.61170 \times 1.25 \times$  the number of units (90) + a \$4.00 dispensing fee. Those calculations total \$72.82, the amount billed by HCP for each date.

Lyrica 100MG Capsule: AWP of \$2.67733 per unit, as of January 3, 2009.

There was no price change through the dispensing dates of May 31, 2008, July 28, 2008 and August 28, 2008. Since this is a generic drug the formula under Rule 134.503, for determining the Texas Pharmaceutical Fee Guideline charge is  $\$2.67733 \times 1.25 \times$  the number of units (90) + a \$4.00 dispensing fee. Those calculations total \$305.20, but based on the evidence, the amount actually billed Carrier for each date was \$244.96.

Temazepam 15MG Capsule: AWP of \$0.67200 per unit, as of March 10, 2007.

There was no price change through the dispensing dates of May 31, 2008, July 28, 2008, August 28, 2008, and March 13, 2009. Since this is a generic drug the formula under Rule 134.503, for determining the Texas Pharmaceutical Fee Guideline charge is  $\$0.67200 \times 1.25 \times$  the number of units (30) + a \$4.00 dispensing fee. Those calculations total \$29.20, the amount billed by HCP for each date.

No price history showing the AWP for the medication Xodol 10-300 Tablet was in evidence.

Mr. DT testified that HCP's U&C charge for generic drugs is the AWP  $\times 1.78 \times$  the number of units + a dispensing fee of \$4.50. The formula to determine the U&C charge for the Texas Pharmaceutical Fee Guidelines is AWP  $\times 1.25 \times$  the number of units + a dispensing fee of \$4.00. Mr. DT also testified that since HCP's U & C charges for the prescriptions in these cases exceed the prices established by the formula pursuant to Rule 134.503, HCP bills at the Texas formula rate. No rates were listed for Xodol 10-300 Tablet.

Although Mr. DT testified that 95% of HCP's business is workers' compensation claimants, he also testified that 4-5% of its customers are no-fault auto claims and less than 1% is cash/direct pay customers. Mr. DT testified that the direct pay program, which allows customers to pre-pay at a discounted preset rate, is available in all states, including Texas. HCP presented a significant amount of documents into evidence; however these materials fail to establish its U&C charge for the prescription drugs in question. HCP presented evidence of its charges outside the workers' compensation system, but the payment sought from Carrier exceeds the fee charged for similar prescriptions dispensed to pre-pay customers. In a number of jurisdictions, HCP receives less than it does in Texas, even using the guideline amount. HCP contended that those lower fees are alleged to be due to mandated fee schedules; however, there was no substantive evidence offered of the statutory provisions for the alleged mandated fees. Carrier argued that, pursuant to Texas Labor Code Ann. §413.043, 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. HCP must 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 pre-pay by cash or credit card, the evidence presented by HCP establishes that the prescription prices at issue are substantially more than the same prices that would be charged to a pre-pay customer in Texas. Based on the evidence presented, HCP failed to provide probative evidence of the U&C charge of the prescription drugs in question; therefore, HCP did not meet its burden of proof and is not entitled to additional reimbursement.

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. On \_\_\_\_\_ Claimant was employed by (Employer).
  - C. Claimant sustained a compensable injury on \_\_\_\_\_.
  - D. 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. HCP has no negotiated or contractual pharmacy fee agreement with Texas Mutual Insurance Company payable pursuant to Rule 134.503(a)(3).

In Docket No.: (SEQUENCE 07)/(MDR TRACKING NO. 1):

4. HCP billed Carrier \$1299.62, the formula amount computed in accordance with Rule 134.503(a)(2)(A), and Carrier reimbursed HCP \$611.96.
5. HCP's AWP on May 31, 2008 and August 28, 2008 for a unit of Cyclobenzaprine 10MG Tablet was \$1.09127, using information from a nationally recognized pharmaceutical reimbursement system (First Data Bank, Inc.).
6. HCP's AWP on May 31, 2008, July 28, 2009, and August 28, 2008 for a unit of Hydrocodone-APAP 10-660 Tablet was \$0.61170., using information from a nationally recognized pharmaceutical reimbursement system (First Data Bank, Inc.).
7. HCP's AWP on May 31, 2008, July 28, 2009, and August 28, 2008 for a unit of Lyrica 100 MG Capsule was \$2.67733, using information from a nationally recognized pharmaceutical reimbursement system (First Data Bank, Inc.).
8. HCP's AWP on May 31, 2008, July 28, 2009, and August 28, 2008 for a unit of Temazepam 15 MG Capsule was \$0.67200, using information from a nationally recognized pharmaceutical reimbursement system (First Data Bank, Inc.).
9. As a routine business practice, HCP charged some customers less than the price charged for the prescription drugs dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008 and the discounted rates were not mandated or negotiated charges.

10. HCP failed to prove that its U&C charge for a 30 day supply of Cyclobenzaprine 10MG Tablet-10MG dispensed to Claimant on May 31, 2008 and August 28, 2008; for a 30 day supply of Hydrocodone-APAP 10-660 Tablet-10-660 dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008; for a 30 day supply of Lyrica 100MG Capsule-100MG dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008; and for a 30 day supply of Temazepam 15MG Capsule-15 MG dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008 was greater than or equal to the reimbursement for the prescription drugs as calculated using the MAR formulas in Rule 134.503.

In Docket No. (SEQUENCE 08)/(MDR TRACKING NO. 2):

11. HCP billed Carrier \$327.55, the formula amount computed in accordance with Rule 134.503(a)(2)(A), and Carrier reimbursed HCP \$265.16.
12. HCP's AWP on March 13, 2009 for a unit of Temazepam 15MG Capsule was \$0.67200, using information from a nationally recognized pharmaceutical reimbursement system (First Data Bank, Inc.).
13. HCP did not prove the AWP for the prescription drug, Xodol, using information from a nationally recognized pharmaceutical reimbursement system on March 13, 2009.
14. HCP charged some customers less than the price charged for the prescription drugs dispensed to Claimant on March 13, 2009.
15. HCP did not prove that its U&C charge for a 30 day supply of Temazepam 15MG Capsule-15MG dispensed to Claimant on March 13, 2009 and for a 30 day supply of Xodol 10-300 Tablet-10-300 dispensed to Claimant on March 13, 2009 was greater than or equal to the reimbursement for the 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. In Docket No. (SEQUENCE 07)/(MDR TRACKING NO. 1):

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 \$99.22 for Cyclobenzaprine 10MG Tablet-10 MG (30 day supply) dispensed to Claimant on May 31, 2008, and August 28, 2008; \$84.09 for Hydrocodone-APAP 10-660 Tablet-10-660 (30 day supply) dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008; \$127.53 for Lyrica 100 MG Capsule-100MG (30 day supply) dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008; and \$33.80 for Temazepam 15MG Capsule-15MG (30 day supply) dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008 .

4. In Docket No. (SEQUENCE 08)/(MDR TRACKING NO. 2):

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 \$10.58 for Temazepam 15MG capsule-15MG dispensed to Claimant on March 13, 2009 and \$51.81 for Xodol 10-300 Tablet-10-300 dispensed to Claimant on March 13, 2009.

## **DECISION**

In Docket No. (SEQUENCE 07)/(MDR TRACKING NO. 1):

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$99.22 for Cyclobenzaprine 10MG Tablet-10 MG (30 day supply) dispensed to Claimant on May 31, 2008, and August 28, 2008; \$84.09 for Hydrocodone-APAP 10-660 Tablet-10-660 (30 day supply) dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008; \$127.53 for Lyrica 100 MG Capsule-100MG (30 day supply) dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008; and \$33.80 for Temazepam 15MG Capsule-15MG (30 day supply) dispensed to Claimant on May 31, 2008, July 28, 2008, and August 28, 2008.

In Docket No.:(SEQUENCE 08)/(MDR TRACKING NO. 2):

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$10.58 for Temazepam 15MG capsule-15MG dispensed to Claimant on March 13, 2009 and \$51.81 for Xodol 10-300 Tablet-10-300 dispensed to Claimant on March 13, 2009.

## **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 7<sup>th</sup> day of October, 2010.

Judy L. Ney  
Hearing Officer