

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 October 7, 2010 to decide the following disputed issue:

Regarding Docket Number (Sequence 02):

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 amount of \$36.78 for Lexapro 10 mg tablet (60 day supply) and \$25.59 for Tramadol-HCL 60 mg tablet (60 day supply) dispensed to Claimant on October 8, 2008?

Regarding Docket Number (Sequence 03):

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 amount of \$36.78 for Lexapro 10 mg tablet (60 day supply) and \$25.59 for Tramadol-HCL 60 mg tablet (60 day supply) dispensed to Claimant on December 3, 2008?

PARTIES PRESENT

Petitioner appeared by telephone, and was represented by JB, attorney.
Carrier appeared and was represented by BJ, attorney.
Claimant did not appear and his appearance was excused.

BACKGROUND INFORMATION

The Claimant sustained a compensable injury on _____ and the medications for which additional reimbursement is sought were dispensed as part of the medical care for the compensable injury. Petitioner, (Healthcare Provider) (HCP), dispensed 60-day supplies of Lexapro 10 mg tablet and Tramadol-HCL 50 mg tablet to the Claimant on October 8, 2008 and billed Respondent (Carrier) \$278.88 for this service. HCP dispensed 60-day supplies of Lexapro 10 mg tablet and Tramadol-HCL 50 mg tablet to the Claimant on December 3, 2008 and billed Carrier \$278.88 for this service. Respondent rejected the price charged by HCP, estimated that \$216.51 was a reasonable cost for the medications on each date of service and tendered that payment to HCP. HCP 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 25, 2010, the Division's Medical Fee Dispute Resolution Officer (MFDR) issued a decision that HCP had failed to provide sufficient evidence to determine HCP's U&C charge for the Lexapro and Tramadol-HCL dispensed to Claimant, that the lesser of the 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 HCP was not entitled to any additional reimbursement. HCP appealed that decision to a contested case hearing.

HCP 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 HCP has failed to produce sufficient evidence to establish its U&C charge and, alternatively, that HCP's alleged U&C charge and the statutory calculation both exceed the price HCP charges some customers and it is not entitled to reimbursement in excess of that lower price.

At a prior contested case hearing (transcript admitted into evidence), DT, HCP's reimbursement manager, testified that HCP is a mail-order pharmacy, licensed to dispense prescription medications in all 50 states, that specializes in providing prescription medication to workers' compensation claimants. 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. The pre-pay customers pay up front for their medications as opposed to having an invoice submitted to an insurance carrier. Mr. DT stated that non-pre-pay customers outside the workers' compensation system are charged the same rates that are charged in workers' compensation cases, but pre-pay customers pay the discounted rate (AWP-10%). At this contested case hearing, the parties stipulated that Mr. DT testified that HCP's worker's compensation customers account for 99.9876% of HCP's business. Based on this testimony, less than 1% (.01235%) of its customers are outside of the workers' compensation arena.

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)). There is no contract between HCP and Carrier applicable to the issue in dispute at this hearing.

Pursuant to Rule 134.503, MAR for prescription drugs is the lesser of the provider's U&C charge for the same or similar service or a price 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 is $((AWP \text{ per unit}) \times (\text{number of units}) \times 1.25) + \$4.00 \text{ dispensing fee}$ 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.

HCP has the burden to demonstrate its entitlement to the additional reimbursement it seeks. Mr. DT testified that, although reimbursement varies per state, HCP calculates the U&C charge for brand name drugs at $AWP \times 1.78 \times \text{number of units} + \4.50 dispensing fee and for generic drugs $AWP \times 1.25 \times \text{number of units} + \4.50 dispensing fee. The medications at issue in this case are generic and name brand drugs. Mr. DT's affidavit in evidence indicates that the U&C charge for generic name medication is calculated at the $AWP \times 1.25 + \$4.00$ dispensing fee. In evidence are print outs dated September 28, 2010 of price histories for Lexapro and Tramadol HCL indicating the AWP for each of these medications as of the current date. The print out is copyrighted by First DataBank, Inc. The document indicates that the effective dates for the AWP prices are the current prices as of the date they are accessed, in this case September 28, 2010, and the price history indicates the effective dates that the prices are updated. Although it does not specifically note the AWP on the specific date the drugs were dispensed to the Claimant, it appears from the document that the AWP listed is the current amount as of the effective date to the present since there are prior and post effective dates that are updated to represent the current effective date. The heading over the effective date is "Current" and the document is dated September 28, 2010. Based on this data obtained from First DataBank, Inc., the AWP in effect on the date the Lexapro was dispensed to the Claimant on October 8, 2008 and December 3, 2008 was 3.18260 and Tramadol, dispensed on October 8, 2008 and December 3, 2008, was 0.83660.

HCP's request for additional reimbursement was denied by MDRF because it did not provide sufficient information to support the claimed U&C charge. At this hearing, HCP introduced into evidence the AWP determined by utilizing a nationally recognized pharmaceutical reimbursement system (First DataBank Inc.) in effect on the day the prescription drugs were dispensed as required by Rule 134.503 in calculating the MAR and the testimony of Mr. DT regarding HCP's U&C charges. Mr. DT testified that, since HCP's U&C charges exceed the price established by the formula pursuant to Rule 134.503, HCP bills at the formula rate. HCP calculated the charges for the prescriptions at issue in this case as follows: Lexapro 10 MG tablet, on the dates the medications were dispensed, was $AWP (3.18260) \times 1.09 \times \text{number of units} (60) + \4.00 dispensing fee = \$212.14 for each date of service and; for the Tramadol-HCL

60 MG tablet was AWP (0.83660) x 1.25 x number of units (60) + \$4.00 dispensing fee = \$66.74 for each date of service.

Although the parties stipulated that Mr. DT testified that 99.9876% of HCP's business is workers' compensation claimants, HCP's business also includes customers with no-fault auto claims as well as 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, albeit a small amount of HCP's business. 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 in the amount of \$62.37 in docket number (Sequence 02) and \$62.37 in docket number (Sequence 03).

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. 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 sustained a compensable injury 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. There was no negotiated or contracted amount payable pursuant to Rule 134.503(a)(3).

- E. It was the testimony of HCP's reimbursement manager, DT, that 99.98765% of HCP's business in Texas is dispensing medications to workers' compensation claimants.
 - F. HCP is not trying to prove, in the alternative, that its cash price is its U&C charge in Texas.
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 billed Carrier \$278.88 for Lexapro and Tramadol-HCL dispensed to Claimant on October 8, 2008 and \$278.88 for Lexapro and Tramadol-HCL dispensed to Claimant on December 3, 2008.
 4. The formula amounts were computed in accordance with Rule 134.503(a)(2)(A), and Carrier reimbursed HCP \$216.51 for each date of service.
 5. HCP provided the AWP of the prescription drugs at issue using information from a nationally recognized pharmaceutical reimbursement system (First DataBank, Inc.) effective on October 8, 2008 and December 3, 2008 for the Lexapro and Tramadol-HCL dispensed to the Claimant.
 6. The AWP on October 8, 2008 and December 3, 2008, the dates the prescription was dispensed for Lexapro, was 3.18260 pursuant to the data provided by First DataBank, Inc.
 7. The AWP on October 8, 2008 and December 3, 2008, the dates the prescription was dispensed for Tramadol-HCL, was 0.83660 pursuant to the data provided by First DataBank, Inc.
 8. As a routine business practice, HCP charged some customers less than the price charged for the prescription drugs dispensed to Claimant on October 8, 2008 and December 3, 2008 and the discounted rates were not mandated or negotiated charges.
 9. HCP failed to prove that its U&C charge for 60-day supplies of Lexapro 10 mg tablet and Tramadol-HCL 60 mg tablet 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. The preponderance of the evidence is not contrary to the Medical Fee Dispute Resolution Findings and Decision that Petitioner, (Healthcare Provider), is not entitled to additional reimbursement in the amount of \$36.78 for Lexapro 10 mg tablet (60 day supply) and

\$25.59 for Tramadol-HCL 60 mg tablet (60 day supply) dispensed to Claimant on October 8, 2008. ((Sequence 02))

4. The preponderance of the evidence is not contrary to the Medical Fee Dispute Resolution Findings and Decision that Petitioner, (Healthcare Provider), is not entitled to additional reimbursement in the amount of \$36.78 for Lexapro 10 mg tablet (60 day supply) and \$25.59 for Tramadol-HCL 60 mg tablet (60 day supply) dispensed to Claimant on December 3, 2008. ((Sequence 03))

DECISION

Petitioner is not entitled to additional reimbursement for the Lexapro 10 mg tablet and Tramadol-HCL 50 mg tablet dispensed to Claimant on October 13, 2008 and December 3, 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
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723**

Signed this 11th day of October, 2010.

Carol A. Fougerat
Hearing Officer