

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 October 7, 2010 to decide the following disputed issue:

Docket Number (Sequence 04):

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 \$28.19 for Ambien CR 12.5 MG Tablet – 12.5MG (30-day supply) dispensed to Claimant on August 13, 2008, \$82.37 for Vesicare 10 MG Tablet – 10MG (90-day supply) dispensed to Claimant on August 8, 2008, \$34.51 for Nortriptyline HCL 25 MG Cap – 25MG (90-day supply) dispensed to Claimant on August 11, 2008 and \$42.51 for Lyrica 75 MG Capsule – 75MG (30-day supply) dispensed to Claimant on August 6, 2008?

Docket Number (Sequence 05):

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 \$58.21 for Amrix ER 15 MG Capsule – 15MG (30-day supply), \$5.63 for Flurazepam 30 MG Capsule – 30MG (30-day supply), \$19.73 for Lexapro 10 MG Tablet – 10MG (30-day supply) and \$33.72 for Propoxyphen-APAP 100-650 MG Tablet – 100-650 (30-day supply) dispensed to Claimant on August 21, 2009?

Docket Number (Sequence 06):

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 \$42.51 for Lyrica 75 MG Capsule – 75MG (30-day supply) dispensed to Claimant on August 5, 2008?

PARTIES PRESENT

Petitioner (HCP) appeared, by telephone, and was represented by JB, attorney.
Respondent (Carrier) appeared and was represented by BJ, attorney.
Claimant appeared and was assisted by LB, ombudsman.

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. HCP, dispensed a 30-day supply of Ambien CR 12.5 MG Tablet to the Claimant on August 13, 2008, a 90-day supply of Vesicare 10 MG tablet to the Claimant on August 8, 2008, a 90-day supply of Nortriptyline HCL 25 MG capsule to the Claimant on August 11, 2008 and a 30-day supply of Lyrica 75 MG capsule to the Claimant on August 6, 2008. HCP billed Respondent (Carrier) \$970.50 for this medication. Carrier rejected the price charged by HCP, estimated that \$782.92 was a reasonable cost for the medication, and tendered that payment to HCP.

On August 21, 2009, Petitioner, HCP, dispensed to the Claimant 30-day supplies of Amrix ER 15 MG Capsule, Flurazepam 20 MG Capsule, Lexapro 10 MG Tablet and Propoxyphen-APAP 100-650 MG Tablet. HCP billed Respondent \$553.31 for this medication. Carrier rejected the price charged by HCP, estimated that \$436.02 was a reasonable cost for the medications, and tendered that payment to HCP.

On August 5, 2008, HCP dispensed to the Claimant a 30-day supply of Lyrica 75 MG Capsule and HCP billed Respondent \$244.96 for this medication. Carrier rejected the price charged by HCP, estimated that \$202.45 was a reasonable cost for the medication, 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.

In decisions dated May 24, 2010, May 27, 2010 and June 3, 2010, the Division's Medical Fee Dispute Resolution (MFDR) Officer determined that HCP had failed to provide sufficient evidence to determine HCP's U&C (usual and customary) charge for the medications at issue that were 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.

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, Mr. DT testified that HCP's worker's compensation customers account for 99.9876% of HCP's business and that less than 1% of its customers lie 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 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 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. It was Mr. DT's testimony that, although reimbursement varies per state, HCP calculates the U&C charge for brand name drugs at $AWP \times 1.78 \times \text{number of units} + \$4.50 \text{ dispensing fee}$ and for generic drugs $AWP \times 1.25 \times \text{number of units} + \$4.50 \text{ dispensing fee}$. The medications of Vesicare, Lyrica, Ambien, and Amrix are brand name drugs and Nortriptyline, Flurazepam and Propoxyphen-APAP are generic drugs. Mr. DT's affidavit in evidence indicates that the formula HCP uses to calculate the charge for generic name medication is the $AWP \times 1.25 + \$4.00 \text{ dispensing fee}$ and for brand name medication the formula was $AWP \times 1.09 + \$4.00 \text{ dispensing fee}$. In evidence are print outs dated September 28, 2010 of price histories for all the medications at issue in this case 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 Lyrica was dispensed to the Claimant on August 6, 2008 and September 5, 2008 was 2.45622, the Vesicare dispensed on August 8, 2008 was 4.78755, the Nortriptyline HCL dispensed on August 11, 2008 was .7557, the Ambien CR dispensed on August 13, 2008 was 4.85800, the Amrix dispensed on August 21, 2009 was 10.125, the Flurazepam dispensed on August 21, 2009 was .34250, the Lexapro dispensed on August 21, 2009 was 3.3760 and the Propoxyphen dispensed on August 21, 2009 was .55373.

HCP's request for additional reimbursement was denied by MDFR 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: Ambien CR 12.5 MG tablet - AWP (4.85800) x 1.09 x number of units (30) + \$4.00 dispensing fee = \$162.86; Vesicare 10 MG Tablet - AWP (4.78755) x 1.09 x number of units (90) + \$4.00 dispensing fee = \$473.66, Nortriptyline HCL 25 MG Capsule - AWP (.7557) x 1.25 x number of units (90) + \$4.00 dispensing fee = \$89.02; Lyrica 75 MG Capsule - AWP (2.45622) x 1.09 x number of units (90) + \$4.00 dispensing fee for both dates of service, Amrix 15 MG Capsule - AWP (10.125) x 1.09 x number of units (90) + \$4.00 dispensing fee = \$666.18; Flurazepam 30 MG Capsule - AWP (.34250) x 1.25 x number of units (30) + \$4.00 dispensing fee = \$16.84, Lexapro 10 MG Tablet - AWP (3.37360) x 1.09 x number of units (30) + \$4.00 dispensing fee = \$114.32 and Propoxyphen-APAP 100-650 MG Tablet - AWP (.55373) x 1.25 x number of units (120) + \$4.00 dispensing fee = \$87.06.

Although Mr. DT testified that 99.9876% of HCP's business is workers' compensation claimants, he also testified that less than 1% of its customers are no-fault auto claims and 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 \$187.58 in docket number (Sequence 04), \$117.29 in (Sequence 05) and \$42.51 in (Sequence 06).

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 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).
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 \$162.86 for Ambien CR dispensed to Claimant on August 13, 2008, \$473.66 for Vesicare dispensed to Claimant on August 8, 2008, \$89.02 for Nortriptyline HCL dispensed to Claimant on August 11, 2008 and \$244.96 for Lyrica dispensed to Claimant on August 6, 2008.
4. HCP billed the Carrier \$355.09 for Amrix, \$16.84 for Flurazepam, \$114.32 for Lexapro and \$87.06 for Propoxyphen-APAP dispensed to Claimant on August 21, 2009.
5. HCP billed the Carrier \$244.96 for the Lyrica dispensed to Claimant on September 5, 2008.
6. The formula amounts were computed in accordance with Rule 134.503(a)(2)(A) and Carrier reimbursed HCP \$782.92 for the August 6, 2008, August 8, 2008, August 11, 2008 and August 13, 2008 dates of service.
7. Carrier reimbursed HCP \$436.02 for the August 21, 2009 date of service.

8. Carrier reimbursed HCP \$202.45 for the September 5, 2008 date of service.
9. HCP provided the AWP of the prescription drugs at issue using information from a nationally recognized pharmaceutical reimbursement system (First DataBank, Inc.) effective on August 6, 2008 and September 5, 2008 for the Lyrica, on August 8, 2008 for the Vesicare, on August 11, 2008 for the Nortriptyline HCL, on August 13, 2008 for the Ambien, and on August 21, 2009 for the Amrix ER, Flurazepam, Lexapro and Propoxyphen-APAP dispensed to the Claimant.
10. The AWP on August 6, 2008 and September 5, 2008, the date the prescriptions for Lyrica were dispensed, was 2.45622 pursuant to the data provided by First DataBank, Inc.
11. The AWP on August 8, 2008, the date the prescription for Vesicare was dispensed, was 4.78755 pursuant to the data provided by First DataBank, Inc.
12. The AWP on August 11, 2008, the date the prescription for Nortriptyline was dispensed, was .7557 pursuant to the data provided by First DataBank, Inc.
13. The AWP on August 12, 2008, the date the prescription for Ambien CR was dispensed, was 4.85800.
14. On August 21, 2009, the date the prescriptions were dispensed, the AWP for Amrix was 10.125, Flurazepam was .34250, Lexapro was 3.37360 and Propoxyphen-APAP was .55373.
15. As a routine business practice, HCP charged some customers less than the price billed to Carrier for the prescription drugs dispensed to Claimant on August 6, 2008, August 8, 2008, August 11, 2008, August 13, 2008, August 21, 2009 and September 5, 2008 and the discounted rates were not mandated or negotiated charges.
16. HCP failed to prove that its U&C charge for a 30-day supply of Ambien CR 12.5 MG Tablet dispensed to the Claimant on August 13, 2008, a 90-day supply of Vesicare 10 MG Tablet dispensed to the Claimant on August 8, 2008, a 90-day supply of Nortriptyline HCL 25 MG Capsule dispensed to the Claimant on August 11, 2008, a 30-day supply of Lyrica 75 MG Capsule to the Claimant on August 6, 2008 and September 5, 2008 and 30-day supplies of Amrix ER 15 MG Capsule, Flurazepam 20 MG Capsule, Lexapro 10 MG Tablet and Propoxyphen-APAP 100-650 MG Tablet dispensed to the Claimant on August 21, 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. 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 \$28.19 for Ambien CR 12.5 MG Tablet – 12.5MG (30-day supply) dispensed to Claimant on August 13, 2008, \$82.37 for Vesicare 10 MG Tablet – 10MG (90-day supply) dispensed to Claimant on August 8, 2008, \$34.51 for Nortriptyline HCL 25 MG Cap – 25MG (90-day supply) dispensed to Claimant on August 11, 2008 and \$42.51 for Lyrica 75 MG Capsule – 75MG (30-day supply) dispensed to Claimant on August 6, 2008.

4. 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 \$58.21 for Amrix ER 15 MG Capsule – 15MG (30-day supply), \$5.63 for Flurazepam 30 MG Capsule – 30MG (30-day supply), \$19.73 for Lexapro 10 MG Tablet – 10MG (30-day supply) and \$33.72 for Propoxyphen-APAP 100-650 MG Tablet – 100-650(30-day supply) dispensed to Claimant on August 21, 2009.
5. 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 \$42.51 for Lyrica 75 MG Capsule – 75MG (30-day supply) dispensed to Claimant on August 5, 2008.

DECISION

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$28.19 for Ambien CR 12.5 MG Tablet – 12.5MG (30-day supply) dispensed to Claimant on August 13, 2008, \$82.37 for Vesicare 10 MG Tablet – 10MG (90-day supply) dispensed to Claimant on August 8, 2008, \$34.51 for Nortriptyline HCL 25 MG Cap – 25MG (90-day supply) dispensed to Claimant on August 11, 2008 and \$42.51 for Lyrica 75 MG Capsule – 75MG (30-day supply) dispensed to Claimant on August 6, 2008.

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$58.21 for Amrix ER 15 MG Capsule – 15MG (30-day supply), \$5.63 for Flurazepam 30 MG Capsule – 30MG (30-day supply), \$19.73 for Lexapro 10 MG Tablet – 10MG (30-day supply) and \$33.72 for Propoxyphen-APAP 100-650 MG Tablet – 100-650(30-day supply) dispensed to Claimant on August 21, 2009.

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$42.51 for Lyrica 75 MG Capsule – 75MG (30-day supply) dispensed to Claimant on August 5, 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 11th day of October, 2010.

CAROL A. FOUGERAT
Hearing Officer