

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 12, 2010, 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 \$7.71 for Ibuprofen 600 MG tablets dispensed to Claimant on September 10, 2008, \$42.28 for Lidoderm 5% Patch 5 MG dispensed to Claimant on September 10, 2008, \$14.21 for Ibuprofen 800 MG tablets dispensed to Claimant on August 10, 2009, and \$87.80 for Lidoderm 5% Patch 5 MG dispensed to Claimant on August 17, 2009?

PARTIES PRESENT

Petitioner/Subclaimant appeared by telephone and was represented by JB, attorney. Respondent/Carrier appeared and was represented by BJ, attorney. Claimant did not appear.

BACKGROUND INFORMATION

Petitioner/Subclaimant, (Healthcare Provider), hereinafter referred to as HCP, is a mail order pharmacy whose primary business involves filling prescriptions for patients who have suffered a work related injury. HCP is licensed to dispense prescription medications in all 50 states.

On September 10, 2008, HCP dispensed 60 (sixty) 600 MG tablets of Ibuprofen to Claimant. It then billed Carrier \$22.02. Carrier rejected the price charged by HCP, estimated that \$14.31 was a reasonable cost for the medication, and tendered that payment to HCP. HCP also dispensed 30 (thirty) 5MG Lidoderm 5% patches to Claimant on September 10, 2008, and billed Carrier \$243.64 for them. Carrier rejected the price charged by HCP for the Lidoderm patches, estimated that \$201.36 was a reasonable cost, and tendered payment to HCP in that amount. On August 10, 2009, HCP dispensed 90 (ninety) 800 MG tablets of Ibuprofen to Claimant and billed Carrier \$38.28 for those pills. Carrier tendered payment of \$24.07. On August 17, 2009, HCP dispensed 60 (sixty) more Lidoderm patches to Claimant, billing Carrier \$504.83. Carrier paid \$417.03.

HCP invoked the Division's Medical Dispute Resolution system in an attempt to secure what it considered to be full payment for the foregoing medications dispensed to Claimant on September 10, 2008, August 10, 2009, and August 17, 2009.

On June 10, 2010, the Division's Medical Fee Dispute Resolution Officer issued a decision that because HCP had failed to provide sufficient evidence to determine HCP's usual and customary charge (U&C) for the 30-day supply of Ibuprofen 600MG tablets, the 30-day supplies of Lidoderm patches, or the 45-day supply of Ibuprofen 800MG tablets, the MAR (Maximum Allowable Reimbursement) for those medications could not be determined and HCP was not entitled to any additional reimbursement. HCP appealed that finding 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 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 usual and customary 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 $((\text{AWP per unit}) \times (\text{number of units}) \times 1.25) + \4.00 dispensing fee) and for brand name drugs the formula was $((\text{AWP per unit}) \times (\text{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 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 offered evidence that the AWP for Ibuprofen 600MG tablets on September 10, 2008, was \$0.24030 per unit and that the AWP for Ibuprofen 800MG tablets on August 10, 2009, was \$0.30472 per unit. The AWP for Lidoderm 5% 5MG patches on September 10, 2008, was \$7.32833 per unit and on August 17, 2009, it was \$7.65800 per unit. The AWP for each of the foregoing drugs was determined using information from First DataBank for the respective dates that the prescriptions were dispensed.

Although HCP asserts that its U&C for all prescription drugs is 178% of the AWP plus a \$4.50 dispensing fee, there is no evidence that it has ever charged that amount to any customer in Texas. The only business that HCP maintains in Texas other than the prescriptions that are charged to workers' compensation carriers is the pre-pay business that it makes available to any and all customers in every state. HCP's pre-pay charge for generic drugs is 90% of the drugs AWP, plus a \$3.00 dispensing fee and its pre-pay charge for brand name drugs is the AWP for the drug plus the \$3.00 dispensing fee. HCP uses the 1.78 multiplier in some states, but does not use it in other jurisdictions because of competitive pressure and asserts that it can not use it in others because the price it is allowed to charge is legislatively mandated. HCP did not provide evidence of the legislative provisions that it asserts mandate prices in those jurisdictions.

The only consistent pricing method utilized by HCP throughout its service area is its pre-pay schedule. Because the pre-pay schedule is available to any customer and in every state in which HCP does business, the hearing officer finds that HCP's U&C for the products it sells is the charge levied on its pre-pay customers. In the instant case, HCP's U&C for the prescriptions at issue are:

September 10, 2008	
Ibuprofen 600MG Tablets	$(\$0.24030 \times .9) \times 60 + \$3.00 = \$ 15.97$
Lidoderm 5% 5MG	$(\$7.32833 \times 30) + \$3.00 = \$222.85$
August 10, 2009	
Ibuprofen 800MG Tablets	$(\$0.30472 \times .9) \times 90 + \$3.00 = \$ 27.68$
August 17, 2009	
Lidoderm 5% 5MG	$(\$7.65800 \times 60) + \$3.00 = \$462.48$

Carrier tendered only \$14.31 to HCP for the Ibuprofen 600MG tablets dispensed on September 10, 2008, and HCP is entitled to additional reimbursement in the amount of \$1.66 for that prescription. Carrier tendered only \$201.36 for the Lidoderm patches dispensed to Claimant on September 10, 2008, and HCP is entitled to additional reimbursement for that prescription in the amount of \$21.49. Carrier tendered only \$24.07 for the Ibuprofen 800MG tablets dispensed on August 10, 2009, and HCP is entitled to additional reimbursement for that prescription in the amount of \$3.61. Carrier paid only \$417.03 to HCP for the 60 Lidoderm patches dispensed to Claimant on August 17, 2009. HCP is entitled to additional reimbursement of \$45.45 for that prescription. In the aggregate, HCP is entitled to additional reimbursement of \$72.21 for the prescriptions for Ibuprofen 600MG and 800MG and Lidoderm 5% 5MG patches filled by HCP for Claimant on September 10, 2008, August 10, 2009, and August 17, 2009.

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 medication for which additional reimbursement is sought was dispensed as part of the medical care for the compensable injury of _____.
 - E. Petitioner, (Healthcare Provider), has no negotiated or contractual pharmacy fee agreement with Carrier, Texas Mutual Insurance Company, 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. Petitioner's usual and customary charge for Ibuprofen 600MG tablets on September 10, 2008, was \$0.216270 per unit dispensed plus a \$3.00 dispensing fee.
4. Petitioner's usual and customary charge for Ibuprofen 800MG tablets on August 10, 2009, was \$0.274248 per unit plus a \$3.00 dispensing fee.
5. Petitioner's usual and customary charge for Lidoderm 5% 5MG patches on September 10, 2008, was \$7.32833 per unit plus a \$3.00 dispensing fee.
6. Petitioner's usual and customary charge for Lidoderm 5% 5MG patches on August 17, 2009, was \$7.65800 per unit plus a \$3.00 dispensing fee.
7. The average wholesale price for Ibuprofen 600MG tablets on September 10, 2008, determined by using First DataBank Services, a recognized pharmaceutical reimbursement system, was \$0.24030 per unit.
8. The average wholesale price for Ibuprofen 800MG tablets on August 10, 2009, determined by using First DataBank Services, a recognized pharmaceutical reimbursement system, was \$0.30472 per unit.
9. The average wholesale price for Lidoderm 5% 5MG patches was \$7.32833 on September 10, 2008, and was \$7.65800 on August 17, 2008.
10. Petitioner's usual and customary charge for Ibuprofen 600MG tablets is less than the charge computed by using the formula for generic drugs in Division Rule 134.503(a)(2).

11. Petitioner's usual and customary charge for Ibuprofen 800MG tablets is less than the charge computed by using the formula for generic drugs in Division Rule 134.503(a)(2).
12. Petitioner's usual and customary charge for Lidoderm 5% 5MG patches is less than the charge computed by using the formula for brand name drugs in Division Rule 134.503.(a)(2).
13. Carrier tendered \$14.31 to Petitioner for the 60 Ibuprofen 600MG tablets dispensed on September 10, 2008, \$1.66 less than the maximum allowable reimbursement of \$15.97 for that prescription pursuant to Division Rule 134.503.
14. Carrier tendered \$201.36 to Petitioner for the 30 Lidoderm patches dispensed to Claimant on September 10, 2008, \$21.49 less than the maximum allowable reimbursement of \$222.85 for that prescription pursuant to Division Rule 134.503.
15. Carrier tendered \$24.07 to Petitioner for the 90 Ibuprofen 800MG tablets dispensed on August 10, 2009, \$3.61 less than the maximum allowable reimbursement of \$27.68 for that prescription pursuant to Division Rule 134.503.
16. Carrier tendered \$417.03 to Petitioner for the 60 Lidoderm patches dispensed to Claimant on August 17, 2009, \$45.45 less than the maximum allowable reimbursement for that prescription pursuant to 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 contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider), Petitioner, is not entitled to additional reimbursement for the prescriptions for Ibuprofen 600MG tablets dispensed to Claimant on September 10, 2008, Lidoderm 5% 5MG patches dispensed to Claimant on September 10, 2008, Ibuprofen 800 MG tablets dispensed to Claimant on August 10, 2009, and Lidoderm 5% Patch 5 MG dispensed to Claimant on August 17, 2009.
4. Petitioner is entitled to additional reimbursement in the amount of \$1.66 for the 60 Ibuprofen 600MG tablets dispensed on September 10, 2008.
5. Petitioner is entitled to additional reimbursement in the amount of \$21.49 for the 30 Lidoderm 5% 5MG patches dispensed to Claimant on September 10, 2008.
6. Petitioner is entitled to additional reimbursement in the amount of \$3.61 for the 90 Ibuprofen 800MG tablets dispensed on August 10, 2009.
7. Petitioner is entitled to additional reimbursement in the amount of \$45.45 for the 60 Lidoderm 5% 5MG patches dispensed to Claimant on August 17, 2009.

DECISION

The preponderance of the evidence is contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider), Petitioner, is not entitled to additional reimbursement for the prescriptions for Ibuprofen 600MG tablets dispensed to Claimant on September 10, 2008, Lidoderm 5% 5MG patches dispensed to Claimant on September 10, 2008, Ibuprofen 800 MG tablets dispensed to Claimant on August 10, 2009, and Lidoderm 5% Patch 5 MG dispensed to Claimant on August 17, 2009. Petitioner is entitled to additional reimbursement in the amount of \$1.66 for the 60 Ibuprofen 600MG tablets dispensed on September 10, 2008. Petitioner is entitled to additional reimbursement in the amount of \$21.49 for the 30 Lidoderm 5% 5MG patches dispensed to Claimant on September 10, 2008. Petitioner is entitled to additional reimbursement in the amount of \$3.61 for the 90 Ibuprofen 800MG tablets dispensed on August 10, 2009. Petitioner is entitled to additional reimbursement in the amount of \$45.45 for the 60 Lidoderm 5% 5MG patches dispensed to Claimant on August 17, 2009.

ORDER

Carrier is ordered to pay benefits in accordance with this decision, the Texas Workers' Compensation Act, and the Commissioner's Rules.

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 14th day of October, 2010.

KENNETH A. HUCHTON
Hearing Officer