

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 March 23, 2011 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 for the compensable injury of _____ in the amount of \$16.65 for 60 units of Diazepam 5 MG Tablet, \$170.16 for 30 units of Zaleplon 10 MG Capsule, and \$156.39 for 60 units of Morphine Sulf 60 MG Tab dispensed to Claimant on December 17, 2008, January 13, 2009, and February 11, 2009?

PARTIES PRESENT

Petitioner, (Healthcare Provider), appeared and was represented by HK, attorney. Respondent/Carrier, Texas Mutual Insurance Company, appeared and was represented by BJ, attorney. Claimant did not appear and his attendance was excused.

BACKGROUND INFORMATION

(Healthcare Provider) is an in-house pharmacy, providing medication to injured parties under workers' compensation law for the rehabilitation facility, (Name). On December 17, 2008, January 13, 2009, and February 11, 2009 (Healthcare Provider) dispensed 60 units of Diazepam 5 MG Tablet, 30 units of Zaleplon 10 MG Capsule, and 60 units of Morphine Sulf 60 MG Tab to Claimant. For each date of service, (Healthcare Provider) billed Carrier: \$16.60 for the Diazepam, of which Carrier paid \$11.05, leaving a difference of \$5.55 (for a total of \$16.65 for the three dates of service) in dispute; \$144.50 for the Zaleplon, of which Carrier paid \$87.78, leaving a difference of \$56.72 (for a total of \$170.16 for the three dates of service) in dispute; and \$204.40 for the Morphine, of which Carrier paid \$152.27, leaving a difference of \$52.13 (for a total of \$156.39 for the three dates of service) in dispute.

After its request for reconsideration was denied by Carrier, (Healthcare Provider) requested relief through the Division's Medical Fee Dispute Resolution (MFDR) section in order to obtain the remaining reimbursement in the total amount of \$343.20 (\$16.65 for the Diazepam tablets, plus \$170.16 for the Zaleplon capsules, plus \$156.39 for the Morphine tabs) from Carrier. On December 8, 2010, the Division's MFDR Officer issued a decision ("Medical Fee Dispute Resolution Findings and Decision") holding that (Healthcare Provider) was not entitled to additional reimbursement from Carrier. The rationale behind the decision was that the Division was not provided with sufficient evidence to determine (Healthcare Provider)' usual and

customary (U&C) charge for the drugs at issue. Following the adverse decision from MFDR, (Healthcare Provider) appealed to a medical 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 maximum allowable reimbursement (MAR) for prescription drugs in Rule 134.503.

Pursuant to Rule 134.503, the 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 DataBank Inc. in effect on the day the prescription drug was dispensed. For generic drugs, the formula is AWP per unit multiplied by the number of units multiplied by 1.25, plus a \$4.00 dispensing fee (Rule 134.503(a)(2)).

On December 11, 2003, 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.

(Healthcare Provider) has the burden to demonstrate its entitlement to the additional reimbursement it seeks. (Healthcare Provider)'s pharmacy manager, TH, testified that (Healthcare Provider) uses the RX30 computer module, wherein the AWP is supplied from First DataBank, Inc, and the computer program then calculates the appropriate charge for the drug at

issue in accordance with the formula guidelines in Rule 134.503. Mr. H emphasized that because their AWP rate is equal to the U&C rate (as referred to in the MFDR decision), the issue of MAR does not come into play. In evidence was an advertisement describing the capabilities of the RX30 program and an email from MP stating that the AWP was based on a nationally recognized pharmaceutical reimbursement system (First DataBank, Inc.) that was updated, daily.

Petitioner's request for additional reimbursement was denied by MDFR because it did not provide sufficient information to support the claimed U&C charge. Though the evidence indicated that (Healthcare Provider) had some business (0.00005%) involving the dispensing of medication to cash patients, the evidence presented in the hearing indicated that the bulk of (Healthcare Provider)' business is to currently provide medications to injured employees in the workers' compensation system, in-house. But, even though Mr. H's testimony was credible as to the operations of (Healthcare Provider), he did not provide reliable information on how (Healthcare Provider) determined the AWP or U&C for the medications in issue. No details were provided, other than an email, answering a question from Petitioner's attorney, and a brochure type advertisement, as to the reliability and authenticity of the RX30 computer module, and its source of AWP's. Petitioner has failed to meet its burden of proof.

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 the employee of (Employer), and sustained a compensable injury.
 - C. The medications for which additional reimbursement was sought in this case were dispensed as part of the medical care for the compensable injury of _____.
 - D. (Healthcare Provider) has no negotiated or contractual pharmacy fee agreement with Texas Mutual Insurance Company payable pursuant to Rule 134.503(a)(3).
2. Respondent 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.
3. The medications for which additional reimbursement was sought in this case were all generic.
4. (Healthcare Provider) billed Carrier \$16.60 for 60 units of Diazepam 5 MG Tablet and Carrier reimbursed (Healthcare Provider) \$11.05 on dates of service December 17, 2008, January 13, 2009, and February 11, 2009.

5. (Healthcare Provider) billed Carrier \$144.50 for 30 units of Zaleplon 10 MG Capsule and Carrier reimbursed (Healthcare Provider) \$87.78 on dates of service December 17, 2008, January 13, 2009, and February 11, 2009.
6. (Healthcare Provider) billed Carrier \$204.40 for 60 units of Morphine Sulf 60 MG TAB SA and Carrier reimbursed (Healthcare Provider) \$152.27 on dates of service December 17, 2008, January 13, 2009, and February 11, 2009.
7. (Healthcare Provider) did not provide a usual and customary charge for the medications at issue on the dispensing dates in accordance with Rule 134.503 (a)(1).
8. (Healthcare Provider) did not provide the average wholesale price, per unit of the medications at issue in accordance with Rule 134.503(a)(2).

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 \$16.65 for 60 units of Diazepam 5 MG Tablet, \$170.16 for 30 units of Zaleplon 10 MG Capsule, and \$156.39 for 60 units of Morphine Sulf 60 MG Tab dispensed to Claimant on December 17, 2008, January 13, 2009, and February 11, 2009.

DECISION

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement in the amount of \$16.65 for 60 units of Diazepam 5 MG Tablet, \$170.16 for 30 units of Zaleplon 10 MG Capsule, and \$156.39 for 60 units of Morphine Sulf 60 MG Tab dispensed to Claimant on December 17, 2008, January 13, 2009, and February 11, 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 28th day of March, 2011.

Judy L. Ney
Hearing Officer