

MEDICAL CONTESTED CASE HEARING NO 11164
M4-10-1886-01

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 June 6, 2011 to decide the following disputed issue:

Is the preponderance of the evidence contrary to the Medical Fee Dispute Resolution Findings and Decision (MFDRFD) that (Healthcare Provider), Petitioner, is not entitled to reimbursement for the Claimant's compensable injury of (Date of Injury) in the amount of \$130.88 for 90 units of Hydrocodone/APAP 10/660 TAB dispensed on June 4, 2008, July 3, 2008, July 31, 2008 and August 27, 2008; in the amount of \$107.10 for 90 units of Hydrocodone/APAP 5/500 TAB dispensed on September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009; in the amount of \$56.86 for 30 units of Ambien CR 12.5 mg TAB dispensed on June 4, 2008 and July 3, 2008; and in the amount of \$859.50 for 60 units of Meloxicam 7.5 mg TAB dispensed on June 4, 2008, July 3, 2008, July 31, 2008, August 27, 2008, September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009?

PARTIES PRESENT

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

BACKGROUND INFORMATION

The parties stipulated that the medications for which additional reimbursement was sought in this case were dispensed as part of the medical care reasonably required for Claimant's compensable (Date of Injury) injury. The sole issue in dispute at this hearing concerns whether (Healthcare Provider) is entitled to additional reimbursement in the total amount of \$1,154.34 for the dispensed medications at issue. At the heart of this dispute is the question of whether (Healthcare Provider) has met its burden to establish its usual and customary (U&C) charges for the medications at issue.

The following table serves to outline the overall dispute between (Healthcare Provider) and Carrier in this case:

Table 1

| Date(s) of Service (DOS) | Medication / No. of Units for each DOS | (Healthcare Provider) Charge to Carrier for each DOS | Carrier Reimbursement to (Healthcare Provider) for each DOS | Amount in Dispute |
|--|--|--|---|---------------------------|
| 6/4/08, 7/3/08, 7/31/08, 8/27/08 | Hydrocodone/APAP 10/660 TAB / 90 Units | \$84.50 | \$51.78 | \$130.88 (\$32.72 x 4) |
| 9/25/08, 10/21/08, 11/25/08, 12/23/08, 1/22/09 | Hydrocodone/APAP 5/500 TAB / 90 Units | \$56.30 | \$34.88 | \$107.10 (\$21.42 x 5) |
| 6/4/08, 7/3/08 | Ambien CR 12.5 Mg TAB / 30 Units | \$163.10 | \$134.67 | \$56.86 (\$28.43 x 2) |
| 6/4/08, 7/3/08, 7/31/08, 8/27/08, 9/25/08, 10/21/08, 11/25/08, 12/23/08, 1/22/09 | Meloxicam 7.5 Mg TAB / 60 Units | \$241.40 | \$145.90 | \$859.50 (\$95.50 x 9) |

The evidence presented in the hearing indicated that the reimbursement that the Carrier provided to (Healthcare Provider) was based on Carrier's calculation of a reasonable and customary fee for the medications.

After its request for reconsideration of the reimbursement amounts was denied by Carrier, (Healthcare Provider) sought relief through the Division's Medical Fee Dispute Resolution (MFDR) section in order to obtain additional reimbursement totaling \$1,154.34 from the Carrier for the dispensed medications outlined above. On January 14, 2011, the Division's MFDR Officer issued a decision, an MFDRFD, holding that (Healthcare Provider) was not entitled to the additional reimbursement at issue herein from Carrier. The MFDRFD indicates that the Division was not provided with sufficient evidence to substantiate (Healthcare Provider)'s U&C

charges for the medications in question. On that basis, the MFDR Officer concluded that the maximum allowable reimbursement (MAR) defined in Division Rule 134.503(a) cannot be established for any of the medications in question. Following the adverse decision from MFDR, (Healthcare Provider) requested a medical contested case hearing (MCCH) to resolve this fee dispute.

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 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 brand name drugs, the formula is AWP per unit multiplied by 1.09, plus a \$4.00 dispensing fee, and 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. *See* Rule 134.503(a)(2)(A) and (B). The evidence presented at the hearing revealed that the Ambien CR medication is a brand name drug, and the Hydrocodone and Meloxicam medications are generic drugs. The parties also stipulated that there is no contract between (Healthcare Provider) and Carrier, so Rule 134.503(a)(3) does not apply to the facts of this case.

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.

(Healthcare Provider) has the burden to establish its entitlement to the additional reimbursement it seeks. In support of its argument that it is entitled to the reimbursement at issue, (Healthcare Provider)'s Pharmacist in Charge, TH, provided an affidavit that was admitted into evidence in the hearing. Mr. TH's April 29, 2011 affidavit indicates that (Healthcare Provider) makes no distinction between AWP and its U&C charges to avoid any discrepancy. (Healthcare Provider) also furnished literature and pricing information from Rx30, a professional billing and pricing hardware and software program that (Healthcare Provider) utilizes. The evidence presented in the hearing included an e-mail from MP, an employee of Rx30, who indicated that Rx30 does not calculate AWP itself, but, rather, it frequently obtains average wholesale pricing information for medications from First DataBank Inc., a nationally recognized pharmaceutical reimbursement system. Ms. MP's e-mail indicated that AWP's may vary if sources other than First DataBank Inc. are used.

Concerning Hydrocodone/APAP 10/660 TAB, (Healthcare Provider) presented a document with Rx30 letterhead indicating that the AWP for this medication on the dates at issue was 0.7156. As illustrated in the table above, the amount that (Healthcare Provider) charged the Carrier for 90 units of the medication was \$84.50.

The following indicates the calculation of MAR pursuant to Rule 134.503(a)(2)(A) for the Hydrocodone/APAP 10/660 TAB for 90 units:

$$\$0.7156 \text{ (AWP)} \times 90 \text{ (\# of units)} = \$64.404 \text{ (rounded down to } \$64.40); \$64.40 \times 1.25 = \$80.50$$

$$\$80.50 + \$4.00 \text{ (dispensing fee)} = \$84.50$$

The dispensing records from (Healthcare Provider) for this medication for the period of June 4, 2008 through August 27, 2008 were persuasive in establishing that its U&C charge for 90 units of the drug was \$84.50 during this period. As the evidence was sufficient for (Healthcare Provider) to establish its U&C charge for the Hydrocodone/APAP 10/660 TAB, and that such

U&C was equal to the Rule 134.503(a)(2)(A) formula, (Healthcare Provider) is found to be entitled to additional reimbursement in the amount of \$130.88 for this medication.

Regarding the Hydrocodone/APAP 5/500 TAB, (Healthcare Provider) presented a document with Rx30 letterhead showing that the AWP for this medication on the dates in question was 0.4649. As shown in the table above, the amount that (Healthcare Provider) charged the Carrier for 90 units of the medication was \$56.30.

The following indicates the calculation of MAR pursuant to Rule 134.503(a)(2)(A) for Hydrocodone/APAP 5/500 TAB for 90 units:

$$\$0.4649 \text{ (AWP)} \times 90 \text{ (\# of units)} = \$41.841 \text{ (rounded down to } \$41.84); \$41.84 \times 1.25 = \$52.30$$

$$\$52.30 + \$4.00 \text{ (dispensing fee)} = \$56.30$$

The dispensing records from (Healthcare Provider) for this medication for the period of September 25, 2008 through January 22, 2009 were persuasive in establishing that its U&C charge for 90 units of the drug was \$56.30 during this period. As the evidence was sufficient for (Healthcare Provider) to establish its U&C charge for the Hydrocodone/APAP 5/500 TAB, and that such U&C was equal to the Rule 134.503(a)(2)(A) formula, (Healthcare Provider) is found to be entitled to additional reimbursement in the amount of \$107.10 for this medication.

With regard to the Ambien CR 12.5 mg TAB, (Healthcare Provider) presented a document with Rx30 letterhead showing that the AWP for this medication on the dates in question was 4.8655. As shown in the table above, the amount that (Healthcare Provider) charged the Carrier for 30 units of the medication was \$163.10.

The following indicates the calculation of MAR pursuant to Rule 134.503(a)(2)(B) for Ambien CR 12.5 mg TAB for 30 units:

$$\$4.8655 \text{ (AWP)} \times 30 \text{ (\# of units)} = \$145.965 \text{ (rounded up to } \$145.97); \$145.97 \times 1.09 = \$159.1073 \text{ (rounded up to } \$159.11)$$

$$\$159.11 + \$4.00 \text{ (dispensing fee)} = \$163.11$$

$$\text{MAR} = \$163.10$$

The dispensing records from (Healthcare Provider) for this medication for the period of June 4, 2008 through July 3, 2008 were persuasive in establishing that its U&C charge for 30 units of the drug was \$163.10 during this period. As the evidence was sufficient for (Healthcare Provider) to establish its U&C charge for the Ambien CR 12.5 mg TAB, and that such U&C was less than the

Rule 134.503(a)(2)(B) formula (\$163.11), (Healthcare Provider) is found to be entitled to additional reimbursement in the amount of \$56.86 for this medication.

Finally, as it concerns the Meloxicam 7.5 mg TAB, (Healthcare Provider) presented a document with Rx30 letterhead showing that the AWP for this medication on the dates in question was 3.1653. As shown in the table above, the amount that (Healthcare Provider) charged the Carrier for 60 units of the medication was \$241.40.

The following indicates the calculation of MAR pursuant to Rule 134.503(a)(2)(A) for Meloxicam 7.5 mg TAB for 60 units:

$$\begin{aligned} \$3.1653 \text{ (AWP)} \times 60 \text{ (\# of units)} &= \$189.918 \text{ (rounded up to} \\ &\$189.92); \$189.92 \times 1.25 = \$237.40 \end{aligned}$$

$$\$237.40 + \$4.00 \text{ (dispensing fee)} = \$241.40$$

The dispensing records from (Healthcare Provider) for this medication for the period of June 4, 2008 through January 22, 2009 were persuasive in establishing that its U&C charge for 60 units of the drug was \$241.40 during this period. As the evidence was sufficient for (Healthcare Provider) to establish its U&C charge for the Meloxicam 7.5 mg TAB, and that such U&C was equal to the Rule 134.503(a)(2)(A) formula, (Healthcare Provider) is found to be entitled to additional reimbursement in the amount of \$859.50 for this medication.

The Division's Medical Fee Dispute Resolution Officer determined that (Healthcare Provider) was not entitled to additional reimbursement for the medications at issue that were dispensed to Claimant on the dates listed above. The preponderance of the evidence is contrary to the decision of the Medical Fee Dispute Resolution Officer. (Healthcare Provider) provided sufficient evidence to establish that its U&C charges for the medications in dispute were in accordance with the fee schedule charge computed in accordance with Rule 134.503(a)(2) on the dates they were dispensed, and (Healthcare Provider) is entitled to additional reimbursement in the total amount of \$1,154.34.

The evidence showed that (Healthcare Provider)'s customers are almost exclusively workers' compensation patients, although it does have a very few customers who are not workers' compensation patients. In addition, while the evidence revealed that (Healthcare Provider) does offer a discount to customers who pay for their medications in cash, the evidence also showed that the percentage of such customers is an extremely small one, significantly less than 1% of (Healthcare Provider)'s business.

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 present stipulated as follows:
 - A. The Texas Department of Insurance, Division of Workers' Compensation has jurisdiction over this matter, and venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
 - B. Claimant sustained a compensable injury on (Date of Injury).
 - C. The medications for which reimbursement was sought in this case were dispensed as part of the medical care for the compensable injury of (Date of Injury).
 - D. (Healthcare Provider) has no negotiated or contractual pharmacy fee agreement with Texas Mutual Insurance Co. 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. On (Date of Injury), Claimant was the employee of (Employer), Employer.
4. On June 4, 2008, July 3, 2008, July 31, 2008 and August 27, 2008, (Healthcare Provider) dispensed 90 units of Hydrocodone/APAP 10/660 TAB to Claimant for his compensable injury of (Date of Injury); (Healthcare Provider) billed Carrier a total of \$338.00 for this medication for these dates of service.
5. Hydrocodone/APAP 10/660 TAB is a generic drug.
6. On September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009, (Healthcare Provider) dispensed 90 units of Hydrocodone/APAP 5/500 TAB to Claimant for his compensable injury of (Date of Injury); (Healthcare Provider) billed Carrier a total of \$281.50 for this medication for these dates of service.
7. Hydrocodone/APAP 5/500 TAB is a generic drug.
8. On June 4, 2008 and July 3, 2008, (Healthcare Provider) dispensed 30 units of Ambien CR 12.5 mg TAB to Claimant for his compensable injury of (Date of Injury); (Healthcare Provider) billed Carrier a total of \$326.20 for this medication for these dates of service.
9. Ambien CR 12.5 mg TAB is a brand name drug.

10. On June 4, 2008, July 3, 2008, July 31, 2008, August 27, 2008, September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009, (Healthcare Provider) dispensed 60 units of Meloxicam 7.5 mg TAB to Claimant for his compensable injury of (Date of Injury); (Healthcare Provider) billed Carrier a total of \$2,172.60 for this medication for these dates of service.
11. Meloxicam 7.5 TAB is a generic drug.
12. (Healthcare Provider) established the AWP of the prescription drugs at issue in this case on the dispensing dates in dispute by providing information from Rx30, a professional billing and pricing hardware and software program. Rx30 obtained this data from a nationally recognized pharmaceutical reimbursement system (First DataBank Inc.).
13. For the Hydrocodone/APAP 10/660 TAB, the AWP on the dates of service in dispute (June 4, 2008, July 3, 2008, July 31, 2008 and August 27, 2008) was 0.7156 pursuant to the data furnished by Rx30.
14. (Healthcare Provider)'s U&C charge for 90 units of Hydrocodone/APAP 10/660 TAB on June 4, 2008, July 3, 2008, July 31, 2008 and August 27, 2008 was \$84.50.
15. For the 90 units of Hydrocodone/APAP 10/660 TAB dispensed on June 4, 2008, July 3, 2008, July 31, 2008 and August 27, 2008, Carrier reimbursed (Healthcare Provider) a total of \$207.12 ($\51.78×4).
16. The MAR for 90 units of Hydrocodone/APAP 10/660 TAB dispensed on June 4, 2008, July 3, 2008, July 31, 2008 and August 27, 2008 was \$84.50, which is equal to the amount elicited from the 134.503(a)(2)(A) formula calculation.
17. For the Hydrocodone/APAP 5/500 TAB, the AWP on the dates of service in dispute (September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009) was 0.4649 pursuant to the data furnished by Rx30.
18. (Healthcare Provider)'s U&C charge for 90 units of Hydrocodone/APAP 5/500 TAB on September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009 was \$56.30.
19. For the 90 units of Hydrocodone/APAP 5/500 TAB dispensed on September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009, Carrier reimbursed (Healthcare Provider) a total of \$174.40 ($\34.88×5).
20. The MAR for 90 units of Hydrocodone/APAP 5/500 TAB dispensed on September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009 was \$56.30, which is equal to the amount elicited from the 134.503(a)(2)(A) formula calculation.

21. For the Ambien CR 12.5 mg TAB, the AWP on the dates of service in dispute (June 4, 2008 and July 3, 2008) was 4.8655 pursuant to the data furnished by Rx30.
22. (Healthcare Provider)'s U&C charge for 30 units of Ambien CR 7.5 mg TAB on June 4, 2008 and July 3, 2008 was \$163.10.
23. For the 30 units of Ambien CR 7.5 mg TAB dispensed on June 4, 2008 and July 3, 2008, Carrier reimbursed (Healthcare Provider) a total of \$269.34 ($\134.67×2).
24. The MAR for 30 units of Ambien CR 7.5 mg TAB dispensed on June 4, 2008 and July 3, 2008 was \$163.10, which is less than to the amount elicited from the 134.503(a)(2)(B) formula calculation.
25. For the Meloxicam 7.5 mg TAB, the AWP on the dates of service in dispute (June 4, 2008, July 3, 2008, July 31, 2008, August 27, 2008, September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009) was 3.1653 pursuant to the data furnished by Rx30.
26. (Healthcare Provider)'s U&C charge for 60 units of Meloxicam 7.5 mg TAB on June 4, 2008, July 3, 2008, July 31, 2008, August 27, 2008, September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009 was \$241.40.
27. For the 60 units of Meloxicam 7.5 mg TAB dispensed on June 4, 2008, July 3, 2008, July 31, 2008, August 27, 2008, September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009, Carrier reimbursed (Healthcare Provider) a total of \$1,313.10 ($\145.90×9).
28. The MAR for 60 units of Meloxicam 7.5 mg TAB dispensed on June 4, 2008, July 3, 2008, July 31, 2008, August 27, 2008, September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009 was \$241.40, which is equal to the amount elicited from the 134.503(a)(2)(A) formula calculation.

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 MFDRFD that (Healthcare Provider) is not entitled to reimbursement in the total amount of \$1,154.34 for 90 units of Hydrocodone/APAP 10/660 TAB dispensed on June 4, 2008, July 3, 2008, July 31, 2008 and August 27, 2008; for 90 units of Hydrocodone/APAP 5/500 TAB dispensed on September

25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009; for 30 units of Ambien CR 12.5 mg TAB dispensed on June 4, 2008 and July 3, 2008; and for 60 units of Meloxicam 7.5 mg TAB dispensed on June 4, 2008, July 3, 2008, July 31, 2008, August 27, 2008, September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009 for the compensable injury of (Date of Injury).

DECISION

(Healthcare Provider) is entitled to additional reimbursement in the total amount of \$1,154.34 for 90 units of Hydrocodone/APAP 10/660 TAB dispensed on June 4, 2008, July 3, 2008, July 31, 2008 and August 27, 2008; for 90 units of Hydrocodone/APAP 5/500 TAB dispensed on September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009; for 30 units of Ambien CR 12.5 mg TAB dispensed on June 4, 2008 and July 3, 2008; and for 60 units of Meloxicam 7.5 mg TAB dispensed on June 4, 2008, July 3, 2008, July 31, 2008, August 27, 2008, September 25, 2008, October 21, 2008, November 25, 2008, December 23, 2008 and January 22, 2009 for the compensable injury of (Date of Injury).

ORDER

Carrier is liable for the additional reimbursement 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 7th day of July, 2011.

Patrice Fleming-Squirewell
Hearing Officer