

MEDICAL CONTESTED CASE HEARING NO. 13039

**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 April 5, 2011, to decide the following disputed issues under the respective docket numbers:

In (SEQUENCE 19):

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:

\$15.45 for 30 units of Ambien CR 12.5 Mg tablets for date of service of October 4, 2008;

\$92.16 for 180 units of Hydrocod/APAP 10/500 tablets for dates of service of October 4, 2008, and November 1, 2008;

\$46.94 for 90 units of Cyclobenzaprine 10 Mg tablets for date of service of October 4, 2008; and

\$13.61 for 90 units of Ibuprofen 800 Mg tablets for date of service of October 4, 2008?

In (SEQUENCE 20):

Is the preponderance of the evidence contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider) is not entitled to additional reimbursement in the amount of:

\$138.24 for 180 units of Hydrocod/APAP 10/500 tablets for dates of service of June 13, 2008, July 10, 2008, and September 6, 2008;

\$140.82 for 90 units of Cyclobenzaprine 10 Mg tablets for dates of service of June 13, 2008, July 10, 2008, and September 6, 2008;

\$40.83 for 90 units of Ibuprofen 800 Mg tablets for dates of service of June 13, 2008, July 10, 2008, and September 6, 2008; and

\$85.29 for 30 units of Ambien for dates of service of June 13, 2008, July 10, 2008, and September 6, 2008?

### **PARTIES PRESENT**

Petitioner/Provider appeared and was represented by HK, attorney.

Respondent/Carrier appeared and was represented by BJ, attorney.

### **EVIDENCE PRESENTED**

The following witnesses testified: TH

The following exhibits were admitted into evidence:

In Docket No. (SEQUENCE 19):

Hearing Officer's Exhibits HO-1 through HO-3.

Petitioner's Exhibits P-A through P-K.

Respondent's Exhibits R-1 through R-7, R-10, R-11, and R-14 through R-16.

In Docket No. (SEQUENCE 20):

Hearing Officer's Exhibits HO-1 through HO-3.

Petitioner's Exhibits P-A through P-K.

Respondent's Exhibits R-1 through R-7, R-10, R-11, and R-14 through R-16.

### **BACKGROUND INFORMATION**

Medical Contested Case Hearings, Docket Nos. (SEQUENCE 19) and (SEQUENCE 20) were consolidated and were heard by KB, a hearing officer with the Texas Department of Insurance, Division of Workers' Compensation, on April 5, 2011. Judge KB left the Division before the decisions in the consolidated cases were written. The matters were thereafter referred to Kenneth Huchton, another hearing officer with the Texas Department of Insurance, Division of Workers' Compensation. The decisions on the consolidated appeals of the respective Medical Fee Dispute Resolution Officer's decisions as set forth herein are based upon the record made by Judge KB on April 5, 2011.

Petitioner/Provider, (Healthcare Provider), hereinafter referred to as (Healthcare Provider), is an in-house pharmacy whose primary business involves filling prescriptions for the workers' compensation patients of a particular clinic. In an affidavit dated April 1, 2011, TH, (Healthcare Provider)' pharmacist in charge, stated that (Healthcare Provider) uses a hardware/software program called RX-30 to determine its prices, that RX-30 uses downloads from First Data Bank to calculate the Average Wholesale Price, and that (Healthcare Provider) makes no distinction between the Average Wholesale Price and its Usual and Customary Charges, stating "our usual and customary charges are the same as average whole price time the number of units, times 1.25% for generic medication or 1.09% for name brand medication plus \$4.00 dispensing fee as specified by the Fee Guidelines." Mr. H also stated that (Healthcare Provider)' customers are almost exclusively workers' compensation patients and quarterly sales to cash and non-workers' compensation customers is statistically insignificant.

In another hearing, held on March 21, 2011, Mr. H testified that he has filled prescriptions for customers other than those whose prescriptions are paid by workers' compensation carriers. A transcript of Mr. H's sworn testimony was offered and admitted into evidence. During that proceeding, Mr. H testified that non-workers' compensation customers willing to pay cash are given "a little bit discount" and sometimes he would "wing it" in determining the price that the cash customer would be charged. Petitioner's Exhibit P-1, the exhibit list tendered into evidence, indicates that (Healthcare Provider) provides cash customers with a 15% discount. In providing records to establish its usual and customary charge for medications, (Healthcare Provider) offered records of transactions that were tailored to exclude cash customers. The amount actually paid by cash customers for the same or similar prescription medications as those billed to Carrier was not established by the evidence in the 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)). The commissioner adopted reimbursement methodology to establish the MAR for prescription drugs in Division Rule 134.503.

At the time (Healthcare Provider) 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) for the prescription drug, determined by utilizing a nationally recognized pharmaceutical reimbursement system such as Redbook or First Data Bank Services, in effect on the day the drug was dispensed. For generic drugs, the formula was ((AWP

per unit) × (number of units) × 1.25) plus a \$4.00 dispensing fee (Division Rule 134.503(a)(2)). 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)). Mr. H alternately stated that there is no difference between the AWP and his usual and customary charge, but that assertion appears to be in error since he also testified that the amounts charged to Carrier were determined in accordance with the foregoing formulas. The parties to this dispute advised the Medical Fee Dispute Resolution Officer that they had not negotiated a fee contract.

On December 11, 2003, RR, the Executive Director of the Texas Workers' Compensation Commission, issued Advisory 2003-21 to address the determination of a pharmacy's "usual and customary" (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.

In the Medical Fee Dispute Resolution Findings and Decision in MFDR Tracking No. : (MFDR TRACKING NO.), the Medical Fee Dispute Resolution Officer determined that (Healthcare Provider) had failed to prove its usual and customary charge for the medications and drugs dispensed to Claimant at issue in this hearing. Since there is insufficient evidence to determine what (Healthcare Provider) would charge a cash customer, preponderance of the evidence is not contrary to the Medical Fee Dispute Resolution Officer's determinations.

(Healthcare Provider) provided evidence that it routinely charges workers' compensation insurance carriers a fee for medications established under the formulas in Rule 134.503 using the average wholesale price (AWP) for the prescription drug in effect on the day the drug was dispensed and Mr. H testified that the RX-30 system used by (Healthcare Provider) obtains the

AWP from a nationally recognized pharmaceutical reimbursement system (First Data Bank Services). That assertion is consistent with sales literature from the purveyors of the RX-30 system, but there is no corroboration that the AWP for the drugs in question, on the date they were dispensed, was the AWP provided from First Data Bank Services on those dates. The assurances of accuracy found in the sales literature, although believed to be true by Mr. H, are not persuasive.

Print outs showing a copyright mark from (Healthcare Provider 2) were offered for the drugs in question and Mr. H testified that he believed that (Healthcare Provider 2) obtained the data from an entity called Price Alert and that the AWP from Price Alert would be the same as the AWP from First Data Bank Services and that Price Alert is a nationally recognized pharmaceutical reimbursement system. The hearing officer does not find that testimony to be persuasive.

It is also clear from the evidence that (Healthcare Provider) would charge some individuals a fee for the same medication without reference to the formulas in Rule 134.503. Because (Healthcare Provider) failed to establish that the fee calculated with the RX-30 system is equal to or less than the fee charged to an individual outside of the workers' compensation system, it failed to establish that the requested reimbursement in this matter 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. The preponderance of the evidence in this matter is not contrary to the determination of the Medical Fee Dispute Resolution Officer that (Healthcare Provider) had failed to prove its usual and customary charge for the medications and drugs dispensed to Claimant at issue in this hearing.

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 to the following facts:
  - A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
  - B. On (Date of Injury), Claimant was the employee of (Employer), and sustained a compensable injury on that date.
  - C. The medications for which reimbursement is sought were dispensed as part of the medical care for the compensable injury of (Date of Injury).
  - D. (Healthcare Provider) has no negotiated contractual pharmacy agreement with Texas Mutual Insurance Company pursuant to Rule 134. 503(a).

- E. The preponderance of the evidence is not contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider) is entitled to additional reimbursement in the of:

\$267.57 for Fentanyl 100 Mcg/hr patch (10 units) for October 4, 2008;

\$22.98 for Clonazepam 1 Mg tablet (30 units) for October 4, 2008, and November 1, 2008;

\$30.94 for Ambien CR 12.5 Mg tablet (30 units) for October 4, 2008;

\$802.71 for Fentanyl 100 Mcg/hr path (10 units) for June 13, 2008, July 10, 2008, and September 6, 2008; and

\$34.47 for Clonazepam 1 Mg tablet (30 units) for June 13, 2008, July 10, 2008, and September 6, 2008; for which Carrier has made payment as ordered by the Division for all of those.

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 charges a discounted amount for prescription medications to individuals who pay cash for the same or similar medications as those at issue in this matter and the evidence failed to establish that the fee charged to those individuals is equal to or greater than the fees charged for the medications at issue herein on the dates those medications were dispensed.
4. Petitioner failed to establish the AWP for the prescription drugs at issue by utilizing a nationally recognized pharmaceutical reimbursement system, such as Redbook or First Data Bank Services, in effect on the day each of the drugs at issue was dispensed.
5. There is insufficient evidence to show that the reimbursement tendered by Carrier to Petitioner for the medications at issue herein is less than the maximum allowable reimbursement for those medications 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. In (SEQUENCE 19):

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:

\$15.45 for 30 units of Ambien CR 12.5 Mg tablets for date of service of October 4, 2008;

\$92.16 for 180 units of Hydrocod/APAP 10/500 tablets for dates of service of October 4, 2008, and November 1, 2008;

\$46.94 for 90 units of Cyclobenzaprine 10 Mg tablets for date of service of October 4, 2008; and

\$13.61 for 90 units of Ibuprofen 800 Mg tablets for date of service of October 4, 2008.

4. In (SEQUENCE 20):

The preponderance of the evidence contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider) is not entitled to additional reimbursement in the amount of:

\$138.24 for 180 units of Hydrocod/APAP 10/500 tablets for dates of service of June 13, 2008, July 10, 2008, and September 6, 2008;

\$140.82 for 90 units of Cyclobenzaprine 10 Mg tablets for dates of service of June 13, 2008, July 10, 2008, and September 6, 2008;

\$40.83 for 90 units of Ibuprofen 800 Mg tablets for dates of service of June 13, 2008, July 10, 2008, and September 6, 2008; and

\$85.29 for 30 units of Ambien for dates of service of June 13, 2008, July 10, 2008, and September 6, 2008.

### **DECISION**

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement in (SEQUENCE 19) in the amount of:

\$15.45 for 30 units of Ambien CR 12.5 Mg tablets for date of service of October 4, 2008;

\$92.16 for 180 units of Hydrocod/APAP 10/500 tablets for dates of service of October 4, 2008, and November 1, 2008;

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\$13.61 for 90 units of Ibuprofen 800 Mg tablets for date of service of October 4, 2008.

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement in (SEQUENCE 20) in the amount of:

\$138.24 for 180 units of Hydrocod/APAP 10/500 tablets for dates of service of June 13, 2008, July 10, 2008, and September 6, 2008;

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\$40.83 for 90 units of Ibuprofen 800 Mg tablets for dates of service of June 13, 2008, July 10, 2008, and September 6, 2008; and

\$85.29 for 30 units of Ambien for dates of service of June 13, 2008, July 10, 2008, and September 6, 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 7<sup>th</sup> day of January, 2013.

KENNETH A. HUCTION  
Hearing Officer