

MEDICAL CONTESTED CASE HEARING NO. 13040

**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 March 22, 2011, to decide the following disputed issues under the respective docket numbers:

In (SEQUENCE 16):

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 \$234.70 for 90 units of Cyclobenzaprine 10 MG tablets; \$68.05 for 90 units of Ibuprofen 800 MG tablets; \$60.60 for 10 units of Duragesic 75 MCG/HR patches; \$806.48 for Fentanyl 75 MCG/HR patches; \$11.51 for 30 units of Clonazepam 1 MG tablets; \$31.51 for 30 units of Ambien CR 12.5 MG tablets; \$199.48 for 180 units of Hydrocod/APAP 10/500 tablets; and \$33.74 for 30 units of Lunesta 3 MG tablets, all for the dates of service as referenced in the Medical Fee Dispute Resolution Findings and Decision of December 16, 2010?

In (SEQUENCE 17):

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 \$234.77 for 90 units of Cyclobenzaprine 10 MG tablets; \$306.20 for 180 units of Hydrocod/APAP 10/325 tablets; and 30 units of Temazepam 30 MG capsules, for the referenced dates of service in the Medical Fee Dispute Resolution Findings and Decision dated January 12, 2011?

In (SEQUENCE 18):

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 \$25.45 for 30 units of Ambien DR 12.5 MG tablets; \$1,008.75 for 10 units of Fentanyl 75 MDG/HR patches; \$306.20 for 180 units of Hydrocod/APAP 10/325 tablets; and \$199.53 for 90 units of Tizanidine HCL 4 MG tablets, for the referenced dates of service in the Medical Fee Dispute Resolution Findings and Decision dated January 12, 2011?

### **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: None

The following exhibits were admitted into evidence:

In Docket No. (SEQUENCE 16):

Hearing Officer's Exhibits HO-1 and HO-2.

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

Respondent's Exhibits R-1 through R-8 and R-10.

In Docket No. (SEQUENCE 17):

Hearing Officer's Exhibits HO-1 and HO-2.

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

Respondent's Exhibits R-1 through R-8 and R-10.

In Docket No. (SEQUENCE 18):

Hearing Officer's Exhibits HO-1 and HO-2.

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

Respondent's Exhibits R-1 through R-8 and R-10.

## **BACKGROUND INFORMATION**

Medical Contested Case Hearings, Docket Nos. (SEQUENCE 16), (SEQUENCE 17), and (SEQUENCE 18) were consolidated and were heard by KB, a hearing officer with the Texas Department of Insurance, Division of Workers' Compensation, on March 22, 2011. Judge B 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 B on March 22, 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 29<sup>th</sup>, 2011, TH, (Healthcare Provider)'s 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."

Carrier offered a transcript of TH's sworn testimony given during another hearing, held on March 21, 2011. The transcript of Mr. H's testimony was admitted in this hearing, On March 21, 2011, Mr. H testified that he is the pharmacist in charge of (Healthcare Provider) and, in that capacity he has filled prescriptions for customers other than those whose prescriptions are paid by workers' compensation carriers. He testified that he gives those customers "a little bit discount" and sometimes he would "wing it" in determining the price that the cash customer is charged. He did not testify to the amount actually paid by cash customers for a particular prescription, but the practice of giving a discount to cash customers was a routine business practice.

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 maximum allowable reimbursement (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)). 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.), (Docket No. (SEQUENCE 16) 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 from November 1, 2008, through February 21, 2009, at issue in that matter. The medications and drugs dispensed, the date they were

dispensed, the fees claimed and the amounts paid by Carrier in that matter are as follows:

**Table 1**

Dispensing Date	Medication/Drug	Amount Claimed	Amount Paid
November 1, 2008	Cyclobenzaprine 10 Mg Tab (90 units)	120.00	73.06
	Ibuprofen 800 Mg Tablet (90 units)	36.70	23.09
	Duragesic 75 Mcg/hr Patch (10 units)	587.00	526.00
December 1, 2008	Cyclobenzaprine 10 Mg Tab (90 units)	120.00	73.06
	Ibuprofen 800 Mg Tablet (90 units)	36.70	23.09
	Fentanyl 75 Mcg/hr Patch (10 units)	506.70	305.08
	Clonazepam 1 Mg Tablet (30 units)	31.50	19.99
	Ambien CR 12.5 Mg Tablet (30 units)	178.80	147.65
	Hydrocod/APAP 10/500 Tablet (180 units)	117.90	71.82
December 27, 2008	Cyclobenzaprine 10 Mg Tab (90 units)	120.00	73.06
	Ibuprofen 800 Mg Tablet (90 units)	39.70	23.09
	Fentanyl 75 Mcg/hr Patch (10 units)	506.70	305.08
	Hydrocod/APAP 10/500 Tablet (180 units)	117.90	71.82
January 23, 2009	Cyclobenzaprine 10 Mg Tab (90 units)	120.00	73.06
	Ibuprofen 800 Mg Tablet (90 units)	39.70	23.09
	Fentanyl 75 Mcg/hr Patch (10 units)	506.70	305.08
	Hydrocod/APAP 10/500 Tablet (180 units)	117.90	71.82
February 19, 2009	Lunesta 3 Mg Tablet (30 units)	193.50	159.76
February 21, 2009	Cyclobenzaprine 10 Mg Tab (90 units)	120.00	73.06
	Ibuprofen 800 Mg Tablet (90 units)	39.70	23.09
	Fentanyl 75 Mcg/hr Patch (10 units)	506.70	305.08
	Hydrocod/APAP 10/500 Tablet (180 units)	117.90	71.82

In the Medical Fee Dispute Resolution Findings and Decision in MFDR Tracking No. (MFDR TRACKING NO.) (Docket No. (SEQUENCE 17), the Medical Fee Dispute Resolution Officer determined that (Healthcare Provider) had failed to prove its usual and customary charge for certain medications and drugs dispensed to Claimant from March 20, 2009, through August 6, 2009. The medications and drugs dispensed, the date they were dispensed, the fee claimed and the amounts paid by Carrier towards charges that remain in dispute from that matter are as follows:

**Table 2**

Dispensing Date	Medication/Drug	Amount Claimed	Amount Paid
March 20, 2009	Cyclobenzaprine 10 Mg Tab (90 units)	120.00	73.06
	Ibuprofen 800 Mg Tablet (90 units)	155.80	94.56
April 16, 2009	Cyclobenzaprine 10 Mg Tab (90 units)	120.00	73.06
	Ibuprofen 800 Mg Tablet (90 units)	155.80	94.56
May 15, 2009	Cyclobenzaprine 10 Mg Tab (90 units)	120.00	73.06
	Ibuprofen 800 Mg Tablet (90 units)	155.80	94.56
June 11, 2009	Cyclobenzaprine 10 Mg Tab (90 units)	120.00	73.06
	Ibuprofen 800 Mg Tablet (90 units)	155.80	94.56
	Temazepam 30 Mg Capsule (30 units)	37.20	23.40
July 9, 2009	Cyclobenzaprine 10 Mg Tab (90 units)	120.00	73.06
August 6, 2009	Cyclobenzaprine 10 Mg Tab (90 units)	120.00	73.06
	Ibuprofen 800 Mg Tablet (90 units)	155.80	94.56

In the Medical Fee Dispute Resolution Findings and Decision in MFDR Tracking No. (MFDR TRACKING NO.) (Docket No. (SEQUENCE 18), the Medical Fee Dispute Resolution Officer determined that (Healthcare Provider) had failed to prove its usual and customary charge for certain medications and drugs dispensed to Claimant from October 1, 2009, through January 23, 2010. The medications and drugs dispensed, the date they were dispensed, the fee claimed and the amounts paid by Carrier toward charges that remain in dispute from that matter are as follows:

**Table 3**

Dispensing Date	Medication/Drug	Amount Claimed	Amount Paid
October 1, 2009	Fentanyl 75 Mcg/hr Patch (10 units)	507.10	305.35
	Hydrocod/APAP 10/325 Tab (180 units)	155.80	94.56
October 31, 2009	Ambien DR 12.5 Mg Tablet (30 units)	206.70	170.65
	Fentanyl 75 Mcg/hr Patch (10 units)	507.10	305.35
	Hydrocod/APAP 10/325 Tab (180 units)	155.80	94.56
November 24, 2009	Tizanidine HCL 4 Mg Tablet (90 units)	168.90	102.39
November 28, 2009	Fentanyl 75 Mcg/hr Patch (10 units)	507.10	305.35
	Hydrocod/APAP 10/325 Tab (180 units)	155.80	94.56
December 26, 2009	Fentanyl 75 Mcg/hr Patch (10 units)	507.10	305.35
	Hydrocod/APAP 10/325 Tab (180 units)	155.80	94.56
	Tizanidine HCL 4 Mg Tablet (90 units)	168.90	102.39
January 23, 2010	Fentanyl 75 Mcg/hr Patch (10 units)	507.10	305.35
	Hydrocod/APAP 10/325 Tab (180 units)	155.80	94.56
	Tizanidine HCL 4 Mg Tablet (90 units)	168.90	102.39

In the instant case, (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. The RX-30 system used by (Healthcare Provider) obtains the AWP from a nationally recognized pharmaceutical reimbursement system (First Data Bank Services). 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 less than or equal to 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), Employer.
  - C. Claimant sustained a compensable injury on (Date of Injury).
  - D. Employer carried workers' compensation insurance with Texas Mutual Insurance Company, Carrier.
  - E. The preponderance of the evidence is not contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider), Petitioner is entitled to additional reimbursement in the following amounts for the Lunesta 3 mg tablets dispensed on March 20, 2009, April 16, 2009, May 15, 2009, July 9, 2009, and August 6, 2009, in the amount of \$147.57; the Fentanyl 75 Mcg/hr patches dispensed on March 20, 2009, April 16, 2009, May 15, 2009, June 12, 2009, July 9, 2009, and August 6, 2009, in the amount of \$205.90; the Ibuprofen 800 mg tablets dispensed on March 20, 2009, April 16, 2009, May 15, 2009, June 12, 2009, July 9, 2009, and August 6, 2009, in the amount of \$81.36; the Ambien DR 12.5 mg tablets dispensed on October 1, 2009, November 28, 2009, December 26, 2009, and January 23, 2010, in the amount of \$124.88; and the

Cyclobenzaprine 10 mg tablets dispensed on October 1, 2009, and October 31, 2009, in the amount of \$93.74, and which amounts have been paid by Carrier.

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 an arbitrary 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. 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. 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 \$234.70 for 90 units of Cyclobenzaprine 10 MG tablets; \$68.05 for 90 units of Ibuprofen 800 MG tablets; \$60.60 for 10 units of Duragesic 75 MCG/HR patches; \$806.48 for Fentanyl 75 MCG/HR patches; \$11.51 for 30 units of Clonazepam 1 MG tablets; \$31.51 for 30 units of Ambien CR 12.5 MG tablets; \$199.48 for 180 units of Hydrocod/APAP 10/500 tablets; and \$33.74 for 30 units of Lunesta 3 MG tablets, all for the dates of service as referenced in the Medical Fee Dispute Resolution Findings and Decision of December 16, 2010.

### **DECISION**

Carrier is not entitled to additional reimbursement in the amount of \$234.70 for 90 units of Cyclobenzaprine 10 MG tablets; \$68.05 for 90 units of Ibuprofen 800 MG tablets; \$60.60 for 10 units of Duragesic 75 MCG/HR patches; \$806.48 for Fentanyl 75 MCG/HR patches; \$11.51 for 30 units of Clonazepam 1 MG tablets; \$31.51 for 30 units of Ambien CR 12.5 MG tablets; \$199.48 for 180 units of Hydrocod/APAP 10/500 tablets; and \$33.74 for 30 units of Lunesta 3 MG tablets, all for the dates of service as referenced in the Medical Fee Dispute Resolution Findings and Decisions (MFDR TRACKING NO.), (MFDR TRACKING NO.), and (MFDR TRACKING NO.).

**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 3<sup>rd</sup> day of January, 2013.

KENNETH A. HUCTION  
Hearing Officer