

**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 September 27, 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 \$17.36 for a 20 day supply of Baclofen 10MG Tablet and \$31.23 for a 20 day supply of Tramadol HCL-Acetaminophen Tab 73.5-325 dispensed to Claimant on June 27, 2008?

**PARTIES PRESENT**

Petitioner (HCP) appeared by telephone and was represented by JB, attorney. Respondent (Carrier) appeared and was represented by TR, attorney. Claimant's appearance was excused, as his participation was unnecessary to the resolution of the disputed issue.

**BACKGROUND INFORMATION**

On June 27, 2008 (Healthcare Provider) (HCP) dispensed a 20 day supply (60 tablets) of Baclofen 10 MG Tablet and a 20 day supply (60 tablets) of Tramadol HCL-Acetaminophen Tab 37.5-325 Tablet to Claimant. It then billed Respondent (Carrier) \$126.73 for these prescription. Carrier disagreed with the price charged by HCP, estimated that \$78.74 was a reasonable cost for the medication, and tendered that payment to HCP. HCP then invoked the Division's Medical Dispute Resolution (MFDR) system in an attempt to secure what it considered to be full payment for the medications dispensed to Claimant.

On May 25, 2010, the Division's MFDR Officer issued a decision that HCP failed to provide sufficient evidence to determine HCP's usual and customary (U&C) charge for the dispensed prescriptions, the MAR (Maximum Allowable Reimbursement - the lesser of the U&C or formula amount pursuant to Division Rule 134.503) could not be determined, and HCP was not entitled to any additional reimbursement. HCP appealed that decision to a contested case hearing.

Because HCP has no pharmacy fee schedule contract with Carrier, this dispute arises from the requirement that HCP prove the average wholesale price (AWP) on the date the drug was dispensed and its U&C charges in order that those charges may be compared using the mathematical formula described in Division Rule 134.503(a)(2). HCP contended that its U&C charge was more than Texas' pharmacy fee schedule, thus requiring usage of said fee schedule in

accordance with Rule 134.503. Carrier contended that HCP had not submitted sufficient evidence to calculate its U&C charge, and therefore was entitled to no additional reimbursement.

DT, HCP's reimbursement manager, testified that HCP is a mail order pharmacy whose primary business involves filling prescriptions for patients who have suffered a work related injury. HCP has customers in and is licensed to dispense prescription medications in all fifty states. HCP also has customers whose cases arise outside the workers' compensation arena, including a small percentage of customers who pre-pay their prescriptions at a discounted rate.

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 U&C charge for the same or similar service or a fee established by formulas based on the 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 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.”

HCP, as Petitioner, has the burden to demonstrate its entitlement to the additional reimbursement it seeks. The medications at issue in this case are generic drugs. HCP introduced into evidence the AWP determined by utilizing a nationally recognized pharmaceutical reimbursement system (First Data Bank Services) as required by Rule 134.503 in calculating the MAR. The print-out, dated September 16, 2010, includes a price history for Baclofen 10MG Tablet indicating that the AWP for each unit was \$.55860, effective September 15, 2002. For the drug Tramadol HCL-Acetaminophen Tab 37.5-325 Tablet the price history indicates that the AWP for each unit was 1.02436, effective March 13, 2006. Although the print-out does not specifically note the AWP's on the particular date the drugs were dispensed to Claimant, it appears that the current amounts are the current listed AWP with no changes through the present (encompassing June 27, 2008, the date the medications were dispensed).

Mr. DT testified that HCP's U&C charge for generic drugs is the AWP x 1.78 x the number of units + a dispensing fee of \$4.50. HCP provided figures for the prices it charged workers' compensation carriers for Baclofen 10MG Tablet, 60 units, and Tramadol HCL-Acetaminophen Tab 37.5-325 Tablet, 60 units, on June 27, 2008 in each of the fifty states and for pre-pay customers. The prices for Baclofen 10MG Tablet varied from \$28.14 to \$64.16. Applying the formula calculations to this drug,  $0.55860 \text{ (AWP)} \times 1.78 \times 60 \text{ (units)} + \$4.50 \text{ (dispensing fee)}$  comes to \$64.16. The calculations for the U&C charge for the Texas Pharmaceutical Fee Guidelines is  $.55860 \text{ (AWP)} \times 1.25 \times 60 \text{ (units)} + 4.00 \text{ (dispensing fee)}$  comes to \$45.90. The prices for Tramadol HCL-Acetaminophen Tab 37.5-325 Tablet varied from \$49.10 to \$113.91. Applying the formula calculations to this drug,  $1.02436 \text{ (AWP)} \times 1.78 \times 60 \text{ (units)} + \$4.50 \text{ (dispensing fee)}$  comes to \$113.91. The calculations for the U&C charge for the Texas Pharmaceutical Fee Guidelines is  $1.02436 \text{ (AWP)} \times 1.25 \times 60 \text{ (units)} + 4.00 \text{ (dispensing fee)}$  comes to \$80.83. Mr. DT testified that since HCP's U & C charges in this case, for both prescriptions, exceed the prices established by the formula pursuant to Rule 134.503, HCP bills at the Texas formula rate.

Although Mr. DT testified that 95% of HCP's business is workers' compensation claimants, he also testified that 4-5% of its customers are no-fault auto claims and less than 1% are cash/direct pay customers. Mr. DT testified that the direct pay program, which allows customers to pre-pay at a discounted preset rate, is available in all states, including Texas. HCP presented a significant amount of documents into evidence; however these materials fail to establish its U&C charge for the prescription drugs in question. HCP presented evidence of its charges outside the workers' compensation system, but the payment sought from Carrier exceeds the fee charged for similar prescriptions dispensed to pre-pay customers. In a number of jurisdictions, HCP receives less than it does in Texas, even using the guideline amount. HCP contended that those lower fees are due to mandated fee schedules; however, there was no substantive evidence offered of the statutory provisions for the alleged mandated fees. Carrier argued that, pursuant to Texas Labor Code Ann. §413.043, 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. HCP must show that the payment sought 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. In the case of customers who pre-pay by cash or credit card, the evidence presented by HCP establishes that the prescription prices at issue are

substantially more than the same prices that would be charged to a pre-pay customer in Texas. Based on the evidence presented, HCP failed to provide probative evidence of the U&C charge of the prescription drugs in question; therefore, HCP did not meet its burden of proof and is not entitled to additional reimbursement in the amount of \$17.36 for a 20 day supply of Baclofen 10MG Tablet and \$31.23 for a 20 day supply of Tramadol HCL-Acetaminophen Tab 73.5-325 Tablet dispensed to Claimant on June 27, 2008.

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 \_\_\_\_\_.
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. HCP has no negotiated or contractual pharmacy fee agreement with Texas Mutual Insurance Company payable pursuant to Rule 134.503(a)(3).
4. HCP billed Carrier \$126.73, the formula amount computed in accordance with Rule 134.503(a)(2)(A), and Carrier reimbursed HCP \$78.74.
5. The AWP on June 27, 2008 for a unit of Baclofen 10MG Tablet was \$0.55860, using information from a nationally recognized pharmaceutical reimbursement system (First Data Bank, Inc.).
6. The AWP on June 27, 2008 for a unit of Tramadol HCL-Acetaminophen Tab 37.5-325 Tablet 1.02436, using information from a nationally recognized pharmaceutical reimbursement system (First Data Bank, Inc.).
7. As a routine business practice, HCP charged some customers less than the prices charged for the prescription drugs dispensed to Claimant on June 27, 2008 and the discounted rates were not mandated or negotiated charges.
8. HCP failed to prove that its U&C charge on June 27, 2008 for a 20 day supply of Baclofen 10MG Tablet and for a 20 day supply of Tramadol HCL-Acetaminophen Tab

73.5-325, was greater than or equal to the reimbursement for the prescription drug as calculated using the MAR formulas in 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 \$17.36 for a 20 day supply of Baclofen 10MG Tablet and \$31.23 for a 20 day supply of Tramadol HCL-Acetaminophen Tab 73.5-325 dispensed to Claimant on June 27, 2008.

### **DECISION**

(Healthcare Provider), Petitioner, is not entitled to additional reimbursement of \$17.36 for a 20 day supply of Baclofen 10MG Tablet and \$31.23 for a 20 day supply of Tramadol HCL-Acetaminophen Tab 73.5-325 Tablet dispensed to Claimant on June 27, 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 11th day of October, 2010.

Judy L. Ney  
Hearing Officer