

**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 4, 2011, to decide the following disputed issue:

Is (Healthcare Provider) entitled to additional reimbursement for 90 units of Gabapentin 800 mg tablets dispensed to Claimant on November 17, 2009, December 22, 2009, and/or January 19, 2010, and 180 units of Hydrocod/AP 10/500 tablets dispensed to Claimant on November 17, 2009, December 22, 2009, and/or January 19, 2010?

**PARTIES PRESENT**

Petitioner/Subclaimant appeared and was represented by HK, attorney. Respondent/Carrier appeared and was represented by BJ, attorney. Claimant did not appear.

**BACKGROUND INFORMATION**

Petitioner/Subclaimant, (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. (Healthcare Provider) does have a very limited number of customers who pay cash for their prescription medications, but it is not clear from the evidence whether they are customers who have sustained compensable injuries but whose medications are not, for whatever reason, paid for by a workers' compensation insurance carrier or they are patients of the clinic who are not entitled to workers' compensation benefits.

On November 17, 2009, (Healthcare Provider) dispensed 90 Gabapentin 800 mg tablets and 180 Hydrocod/APAP 10/500 tablets to Claimant. It then billed Carrier \$345.00 for the Gabapentin tablets and \$117.90 for the Hydrocod/APAP tablets. TH, (Healthcare Provider)'s pharmacist-in-charge, testified that Hydrocod/APAP is the same as Hydrocodone/Acetaminophen. Carrier rejected the price charged by (Healthcare Provider), estimated that \$208.09 was a reasonable cost for the Gabapentin, estimated that \$71.82 was a reasonable cost for the Hydrocodone/Acetaminophen, and tendered payments in those amounts to (Healthcare Provider). Identical scenarios played out after (Healthcare Provider) dispensed Gabapentin and Hydrocodone/Acetaminophen to Claimant again on December 22, 2009, and January 19, 2010. (Healthcare Provider) invoked the Division's Medical Dispute Resolution system in an attempt to secure what it considered to be full payment for the medications dispensed to Claimant.

On December 14, 2010, the Division's Medical Fee Dispute Resolution Officer issued a decision that (Healthcare Provider) was not entitled to additional reimbursement for the Gabapentin and Hydrocod/APAP dispensed to Claimant on November 17, 2009, December 22, 2009, and January 19, 2010, because (Healthcare Provider) had failed to provide sufficient evidence to

allow the Division to determine its usual and customary charge for those medications and the maximum allowable reimbursement (MAR) could not be determined for them. (Healthcare Provider) appealed that finding to a 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)). 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  $((\text{AWP per unit}) \times (\text{number of units}) \times 1.25)$  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 stipulated that they have not entered into a negotiated fee contract.

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 "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.

(Healthcare Provider) asserts that its U&C charge is the same as the amount calculated using a billing and pricing program called RX-30. (Healthcare Provider), by and through its attorney, asked the billing and pricing program's vendor to explain how the program accumulates data to calculate the price for a particular medication when (Healthcare Provider) enters the name of a medication and the amount dispensed. The vendor responded that it receives a daily update of current AWP's from First Databank which it then passes on to its customers and updates their systems. The vendor acknowledged that the system updates could be delayed "by a day or so" under certain circumstances. (Healthcare Provider) relies upon the RX-30 system to determine all prices charged to workers' compensation carriers, but Mr. H testified that the price used to determine the base charge for cash customers, the price before the 15% discount is applied, is not derived from the RX-30 system. It is unclear where Mr. H obtains the price used to determine a cash price; he testified that he decides on a figure to be used, then deducts 15% from that figure. It appears that the figure used to determine the price for a cash customer is arrived at arbitrarily.

(Healthcare Provider) tendered an exhibit that purported to establish the AWP for Gabapentin and Hydrocodone/Acetaminophen, but the date for the AWP for Gabapentin was December 4, 2004, and the date for the AWP for Hydrocodone/Acetaminophen was November 30, 2001. Mr. H testified that he could not determine the AWP for either medication on November 17, 2009, based upon the exhibits. Because the AWP for Gabapentin and Hydrocod/APAP in effect on the date the drugs were dispensed cannot be determined from the evidence presented, a price for the drugs using the formula set forth in Rule 134.503 cannot be determined. Additionally, since the base price for similar drugs dispensed to a cash customer is determined arbitrarily by (Healthcare Provider), then discounted by 15%, the fee charged for similar drugs sold to an injured individual of an equivalent standard of living and paid by that individual or by someone acting on that individual's behalf cannot be determined.

The Division's Medical Fee Dispute Resolution Officer determined that (Healthcare Provider) was not entitled to additional reimbursement for the Gabapentin and Hydrocod/APAP dispensed to Claimant on November 17, 2009, December 22, 2009, and January 19, 2010, because it had failed to provide sufficient evidence to allow the Division to determine its usual and customary charge for the drugs on the date they were dispensed. The preponderance of the evidence is not contrary to the decision of the Medical Fee Dispute Resolution Officer. (Healthcare Provider) has failed to establish that either its U&C charge or the fee schedule charge computed in accordance with Rule 134.503(a)(2) for the drugs that are the subject of this hearing on the date they were dispensed is greater than the reimbursement tendered by Carrier for those drugs and (Healthcare Provider) is not entitled to additional reimbursement.

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).

- C. Claimant sustained a compensable injury on \_\_\_\_\_.
  - D. The medications at issue herein were dispensed to Claimant for the compensable injury of \_\_\_\_\_.
  - E. No negotiated price or contract exists between (Healthcare Provider) and Texas Mutual Insurance Company for the medications at issue herein.
  - F. The medications at issue herein are generic medications.
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. There is insufficient evidence to determine the average wholesale price for Gabapentin 800 mg tablets and Hydrocod/APAP 10/500 tablets on November 17, 2009, December 22, 2009, and January 19, 2010, utilizing a nationally recognized pharmaceutical reimbursement system such as Redbook or First Data Bank Services in effect on each of the days the prescription drugs were dispensed.
  4. Because the average wholesale price for Gabapentin 800 mg tablets and Hydrocod/APAP 10/500 tablets on November 17, 2009, December 22, 2009, and January 19, 2010, cannot be determined in accordance with Rule 134.503, the lesser of (Healthcare Provider)' claimed usual and customary charge or the fee determined under Rule 134.503(a)(2) cannot be calculated.
  5. (Healthcare Provider) charges individuals who pay cash for prescription medications an arbitrary amount, less 15%, and there is insufficient evidence to show that the fee charged such customers is equal to or greater than the fee that (Healthcare Provider) charged Carrier for the Gabapentin 800 mg tablets and Hydrocod/APAP 10/500 tablets dispensed to Claimant on November 17, 2009, December 22, 2009, and January 19, 2010.
  6. There is insufficient evidence to show that the reimbursement tendered by Carrier to (Healthcare Provider) for the Gabapentin 800 mg tablets and Hydrocod/APAP 10/500 tablets dispensed to Claimant on November 17, 2009, December 22, 2009, and January 19, 2010, is less than the maximum allowable reimbursement for those drugs 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. (Healthcare Provider) is not entitled to additional reimbursement for 90 units of Gabapentin 800 mg tablets dispensed to Claimant on November 17, 2009, December 22, 2009, and January 19, 2010, and 180 units of Hydrocod/AP 10/500 tablets dispensed to Claimant on November 17, 2009, December 22, 2009, and January 19, 2010.

## DECISION

(Healthcare Provider) is not entitled to additional reimbursement for 90 units of Gabapentin 800 mg tablets dispensed to Claimant on November 17, 2009, December 22, 2009, and January 19, 2010, and 180 units of Hydrocod/AP 10/500 tablets dispensed to Claimant on November 17, 2009, December 22, 2009, and January 19, 2010.

## 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 6th day of April, 2011.

KENNETH A. HUCTION  
Hearing Officer