

MEDICAL CONTESTED CASE HEARING NO 12036
M4-10-3803-01

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 May 24, 2011 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 for the compensable injury of (Date of Injury) in the amount of \$230.82 for 150 units of Hydrocod/APAP Tablet dispensed to Claimant on September 24, 2009, October 22, 2009, November 19, 2009, December 17, 2009, January 14, 2010, and February 11, 2010; \$97.27 for 5 units of Viagra 100 MG Tablet dispensed to Claimant on November 19, 2009, November 27, 2009, December 17, 2009, January 14, 2010, and February 11, 2010; \$40.83 for 90 units of Ibuprofen 800 MG Tablet dispensed to Claimant on December 17, 2009, January 14, 2010, and February 11, 2010?

PARTIES PRESENT

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

BACKGROUND INFORMATION

HCP is an in-house pharmacy, providing medication to injured parties under workers' compensation law for the rehabilitation facility, Functional Restoration Services. The following table serves to outline the overall dispute between HCP and Carrier in this case:

Table 1

| Date(s) of Service (DOS) | Medication / No. of Units | HCP Charge to Carrier | Carrier Reimbursement to HCP | Amount in Dispute |
|--|--|----------------------------|------------------------------|---------------------------|
| 09/24/09 10/22/09 11/19/09 12/17/09 01/14/10 02/11/10 | Hydrocod/APAP 10/500 Tablet/150 units | \$593.40 (\$98.90 x 6) | \$362.58 (\$60.43 x 6) | \$230.82 (\$38.47 x 6) |
| 11/19/09 11/27/09 12/17/09 | Viagra 100 MG Tablet/ 5 units | \$310.80 (\$103.60 x 3) | \$246.63 (\$82.21 x 3) | \$64.17 (\$21.39 x 3) |
| 01/14/10 | Viagra 100 MG Tablet/ 5 units | \$103.60 | \$89.30 | \$14.30 |
| 02/11/10 | Viagra 100 MG Tablet/5 units | \$108.10 | \$89.30 | \$18.80 |
| 12/17/09 01/14/10 02/11/10 | Ibuprofen 800 MG Tablet/90 units | \$110.10 (\$36.70 x 3) | \$69.27 (\$23.09 x 3) | \$40.83 (\$13.61 x 3) |

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

After its request for reconsideration was denied by Carrier, HCP requested relief through the Division's Medical Fee Dispute Resolution (MFDR) section in order to obtain the remaining reimbursement totaling \$373.42 from Carrier.

On January 13, 2011, the Division's MFDR Officer issued a decision ("Medical Fee Dispute Resolution Findings and Decision" or MFDRFD) holding that HCP was not entitled to additional reimbursement at issue from Carrier. The rationale behind the decision was that the Division was not provided with sufficient evidence to substantiate HCP's usual and customary (U&C) charge for the medications at issue. Following the adverse decision from MFDR, HCP requested a medical contested case hearing to resolve the fee question in this case.

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 maximum allowable reimbursement (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 generic drugs, the formula is AWP per unit multiplied by the number of units multiplied by 1.25, plus a \$4.00 dispensing fee. For brand name drugs, the formula is AWP per unit multiplied by the number of units multiplied by 1.09, plus a \$4.00 dispensing fee. See Rule 134.503(a)(2). The evidence presented in the hearing revealed that the prescription medications at issue in this case are generic drugs except for Viagra that is a brand name drug. There is no contract between HCP and Carrier, so Rule 134.503(a)(3) does not apply to the facts of this case.

On December 11, 2003, RFR, 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 has the burden to establish its entitlement to the additional reimbursement it seeks. HCP's pharmacy manager, TH, provided an affidavit that was admitted into evidence. Mr. H's April 29, 2011 affidavit indicates that HCP makes no distinction between AWP and its U&C charges to avoid any discrepancy. HCP also furnished literature and pricing information from RX30, a

professional billing and pricing hardware and software program that HCP utilizes. The evidence included an e-mail from MP, an employee of RX30, who indicated that RX30 does not calculate AWP itself, but, rather, it obtains current average wholesale pricing information for medications from First DataBank, Inc., a nationally recognized pharmaceutical reimbursement system. Ms. P's e-mail indicated that AWP's may vary if sources other than First DataBank, Inc. are used.

With regard to Hydrocod/APAP 10/500 Tablet HCP presented evidence from the RX30 computer program that the AWP for this medication on the dates at issue was 0.5065. As illustrated in the table on page 2, above, the amount HCP charged Carrier for 150 units of the medication was \$98.90.

The following indicates the calculation of MAR pursuant to Rule 134.503(a)(2)(A) for this medication for 30 units:

$$\begin{aligned} & \$0.5065 \text{ (AWP)} \times 150 \text{ (# of Units)} \times 1.25 + \$4.00 \text{ (dispensing fee)} = \$98.96875 \\ & \text{(rounded to \$98.97)} \end{aligned}$$

The dispensing records from HCP for this medication for the period from September 1, 2009 through February 20, 2010 were persuasive in establishing that its U&C charge for 150 units of the drug was \$98.90 during the period at issue. The evidence showed that HCP's U&C charge for this medication is \$0.07 less than the amount elicited from the Rule 134.503(a)(2)(A) MAR formula calculations. Therefore, as the evidence indicated, HCP is found to be entitled to additional reimbursement in the amount of \$230.82 (\$38.47 x 6) for the amount billed for Hydrod/APAP 10/500 Tablet (150 units), dispensed on September 24, 2009, October 22, 2009, November 19, 2009, December 17, 2009, January 14, 2010, and February 11, 2010.

With regard to Viagra 100 MG Tablet, dispensed on November 19, 2009, November 27, 2009 and December 17, 2009 HCP presented from the RX30 computer program that the AWP for this medication was 18.2752. As illustrated in the table on page 2, above, the amount HCP charged Carrier for 100 units of the medication was \$103.60 for the above three dates.

The following indicates the calculation of MAR pursuant to Rule 134.503(a)(2)(B) for this medication for 30 units:

$$\begin{aligned} & \$18.2752 \text{ (AWP)} \times 5 \text{ (# of Units)} \times 1.09 + \$4.00 \text{ (dispensing fee)} = \$103.59984 \\ & \text{(rounded to \$103.60)} \end{aligned}$$

The evidence, particularly the HCP dispensing records for the period from October 1, 2009 through Janurayr 14, 2010 for this medication, was persuasive in showing that HCP's U&C charge for this medication is the same as the amount elicited from Rule 134.503(a)(2)(B) formula calculation. Therefore, the evidence indicated that HCP is found to be entitled to additional reimbursement in the amount of \$64.17 for the amount billed for Viagra 100 MG

Tablet 10 (5 units) dispensed on November 19, 2009, November 27, 2009 and December 17, 2009.

With regard to Viagra 100 MG Tablet, dispensed on January 14, 2010 and February 11, 2010, HCP presented evidence from the RX30 computer program that the AWP for this medication on the dispensed dates was 19.101. But, HCP, for the date of service of January 14, 2010 only charged Carrier \$103.60. The amount HCP charged Carrier for 5 units of the medication on February 11, 2010 was \$108.80.

The following indicates the calculation of MAR pursuant to Rule 134.503(a)(2)(B) for this medication for 5 units:

$$\begin{aligned} & \$19.101 \text{ (AWP)} \times 5 \text{ (# of Units)} \times 1.09 + \$4.00 \text{ (dispensing fee)} = \$108.10045 \\ & \text{(rounded to \$108.10)} \end{aligned}$$

The evidence, particularly the HCP dispensing records for February 11, 2010 for this medication, was persuasive in showing that HCP' U&C charge for this medication is the same as the amount elicited from Rule 134.503(a)(2)(B) formula calculation. Therefore, the evidence indicated that HCP is found to be entitled to additional reimbursement in the amount of \$18.80 for the amount billed for Viagra 100 MG Tablet (5 units) dispensed on February 11, 2010. But only for \$14.30 for the service date of January 14, 2010 since HCP billed Carrier at the older rate of \$103.60. HCP is entitled to a total reimbursement amount for the service dates of January 4, 2010 and February 11, 2010 for Viagra 100 MG Table (5 units) in the amount of \$33.10 (\$14.30 + \$18.80).

With regard to Ibuprofen 800 MG Tablet (Healthcare Provider) presented evidence from the RX30 computer program that the AWP for this medication on the dates dispensed for December 17, 2009, January 14, 2010 and February 11, 2010 was 0.2907. As illustrated in the table on page. 2, above, the amount HCP charged Carrier for 90 units of the medication was \$36.70.

The following indicates the calculation of MAR pursuant to Rule 134.503(a)(2)(A) for this medication for 90 units:

$$\begin{aligned} & \$0.2907 \text{ (AWP)} \times 90 \text{ (# of Units)} \times 1.25 + \$4.00 \text{ (dispensing fee)} = \$36.70375 \\ & \text{(rounded to \$36.70)} \end{aligned}$$

It appears that (Healthcare Provider) actually charged Carrier a U&C amount (\$36.70) that was equal to the product of the Rule 134.503(a)(2)(A) MAR calculation. The dispensing records from HCP for this medication for the period from December 1, 2009 through March 31, 2010 were persuasive in establishing that its U&C charge for 90 units of the drug was \$36.70 during the period at issue. Therefore, the evidence indicated that HCP is found to be entitled to

additional reimbursement in the amount of \$40.83 for the amount billed for Ibuprofen 800 MG Tablet (90 units), dispensed on December 17, 2009, January 14, 2010 and February 11, 2010.

Though the evidence indicated that HCP did offer a discount to a very limited number of customers who pay for their medications in cash, the affidavit from Mr. Huang, dated April 1, 2011, persuasively explained that this amount was statistically insignificant (less than 0.0025%).

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) Office of the Texas Department of Insurance, Division of Workers' Compensation.
 - B. On (Date of Injury), Claimant was the employee of Delphi Guard Service Inc., Employer, and sustained a compensable injury.
 - C. On (Date of Injury), Employer subscribed to a policy of workers' compensation insurance through Texas Mutual Insurance Company.
 - D. The medications for which additional reimbursement was sought in this case were dispensed as part of the medical care for the compensable injury of (Date of Injury).
 - E. (Healthcare Provider) has no negotiated or contractual pharmacy fee agreement with Texas Mutual Insurance Company payable pursuant to Rule 134.503(a)(3).
 - F. The preponderance of the evidence is not contrary to the Medical Fee Dispute Resolution Findings and Decision that HCP is entitled to reimbursement for the compensable injury of (Date of Injury) in the amount of \$155.51 for 30 units of Celebrex 200 MG Capsule, dispensed on September 24, 2009, October 22, 2009, November 19, 2009, December 17, 2009, January 14, 2010, and February 11, 2010, which has been paid by the Carrier.
 - G. The preponderance of the evidence is not contrary to the Medical Fee Dispute Resolution Findings and Decision that HCP is entitled to reimbursement for the compensable injury of (Date of Injury) in the amount of \$361.98 for 90 units of Gabapentin 300 MG Capsule, dispensed on September 24, 2009, October 22, 2009, November 19, 2009, December 17, 2009, January 14, 2010, and February 11, 2010, which has been paid by the Carrier.

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. The medications for which additional reimbursement was sought in this case were generic, except for Viagra that was brand name.
4. On September 24, 2009, October 22, 2009, November 19, 2009, December 17, 2009, January 14, 2010, and February 11, 2010, HCP dispensed 150 units of Hydrocod/APAP 10/500 Tablet to Claimant for his compensable injury of (Date of Injury); HCP billed Carrier a total of \$593.40 ($\98.90×6) for this medication.
5. On November 19, 2009, November 27, 2009, and December 17, 2009 HCP dispensed 5 units of Viagra 100 MG Tablet to Claimant for his compensable injury of (Date of Injury); HCP billed Carrier a total of \$310.80 ($\103.60×3) for this medication.
6. On January 14, 2010 HCP dispensed 5 units of Viagra 100 MG Tablet to Claimant for his compensable injury of (Date of Injury); HCP billed Carrier a total of \$103.60 for this medication.
7. On February 11, 2010 HCP dispensed 5 units of Viagra 100 MG Table to Claimant for his compensable injury of (Date of Injury); HCP billed Carrier a total of \$108.10 for this medication.
8. On December 17, 2009, January 14, 2010 and February 11, 2010 HCP dispensed 90 units of Ibuprofen 800 MG Tablet to Claimant for his compensable injury of (Date of Injury); HCP billed Carrier a total of \$110.10 ($\36.70×3) for this medication.
9. HCP 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.).
10. For the Hydrocod/APAP 10/500 Tablet, the AWP on September 24, 2009, October 22, 2009, November 19, 2009, December 17, 2009, January 14, 2010, and February 11, 2010, was 0.5065 pursuant to the data furnished by RX30.
11. For the Viagra 100 MG Tablet, the AWP on the dates of service in dispute (November 19, 2009, November 27, 2009 and December 17, 2009) was 18.2752 pursuant to the data furnished by RX30.
12. For the Viagra 100 MG Tablet, the AWP on the dates of service in dispute (January 14, 2010 and February 11, 2010) was 19.101 pursuant to the data furnished by RX30.

13. For the Ibuprofen 800 MG Tablet, the AWP on the dates of service in dispute (December 17, 2009, January 14, 2010 and February 11, 2010) was 0.2907 pursuant to the data furnished by RX30.
14. HCP' U&C charge for 150 units of Hydrod/APAP 10/500 Tablet for September 24, 2009, October 22, 2009, November 19, 2009, December 17, 2009, January 14, 2010, and February 11, 2010 was \$98.90.
15. HCP' U&C charge for 5 units of Viagra 100 MG Tablet on the dates of service in dispute (November 19, 2009, November 27, 2009 and December 17, 2009) was \$103.60.
16. HCP' U&C charge for 5 units of Viagra 100 MG Tablet on the dates of service in dispute (January 14, 2010 and February 11, 2010) was \$108.10.
17. HCP' U&C charge for 90 units of Ibuprofen 800 Tablet, on the dates of service in dispute (December 17, 2009, January 14, 2010 and February 11, 2010) was \$36.70.
18. For the Hydrocod/APAP 10/500 Tablet, dispensed on September 24, 2009, October 22, 2009, November 19, 2009, December 17, 2009, January 14, 2010, and February 11, 2010, Carrier reimbursed HCP a total of \$362.58 ($\60.43×6).
19. For the Viagra 100 MG Tablet 10 MG Capsule, dispensed on November 19, 2009, November 27, 2009 and December 17, 2009 Carrier reimbursed HCP a total of \$246.63 ($\82.21×3).
20. For the Viagra 100 MG Tablet 10 MG Capsule, dispensed on January 14, 2010 and February 11, 2010 Carrier reimbursed HCP a total of \$178.60 ($\89.30×2).
21. For the Ibuprofen 800 Tablet, dispensed on December 17, 2009, January 14, 2010 and February 11, 2010 Carrier reimbursed HCP a total of \$69.27 ($\23.09×3).
22. The MAR for 150 units of Hydrocod/APAP 10/500Tablet, dispensed on September 24, 2009, October 22, 2009, November 19, 2009, December 17, 2009, January 14, 2010, and February 11, 2010 was \$98.90 which is \$0.07 less than the amount elicited from the Rule 134.503(a)(2)(A) formula calculation.
23. The MAR for 5 units of Viagra 100 MG Tablet, dispensed on November 19, 2009, November 27, 2009 and December 17, 2009 was \$103.60 which is equal to the amount elicited from the Rule 134.503(a)(2)(B) formula calculation.

24. The MAR for 5 units of Viagra 100 MG Tablet, dispensed on January 14, 2010 was \$103.60 which is less than the amount elicited from the Rule 134.503(a)(2)(B) formula calculation.
25. The MAR for 5 units of Viagra 100 MG Tablet, dispensed on February 11, 2010 was \$108.10 which is equal to the amount elicited from the Rule 134.503(a)(2)(B) formula calculation.
26. The MAR for 90 units of Ibuprofen 800 MG Tablet, dispensed on December 17, 2009, January 14, 2010 and February 11, 2010 was \$36.70 which is equal to the amount elicited from the Rule 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)Office.
3. The preponderance of the evidence is contrary to the Medical Fee Dispute Resolution Findings and Decision that (Healthcare Provider) is not entitled to additional reimbursement in the amount of \$230.82 for 150 units of Hydrocod/APAP Tablet dispensed to Claimant on September 24, 2009, October 22, 2009, November 19, 2009, December 17, 2009, January 14, 2010, and February 11, 2010; \$64.17 for 5 units of Viagra 100 MG Tablet dispensed to Claimant on November 19, 2009, November 27, 2009 and December 17, 2009; \$37.60 for 5 units of Viagra 100 MG Tablet dispensed to Claimant on January 14, 2010, and February 11, 2010; and \$40.83 for 90 units of Ibuprofen 800 MG Tablet dispensed to Claimant on December 17, 2009, January 14, 2010, and February 11, 2010.

DECISION

(Healthcare Provider) is entitled to additional reimbursement in the amount of \$230.82 for 150 units of Hydrocod/APAP Tablet dispensed to Claimant on September 24, 2009, October 22, 2009, November 19, 2009, December 17, 2009, January 14, 2010, and February 11, 2010; \$64.17 for 5 units of Viagra 100 MG Tablet dispensed to Claimant on November 19, 2009, November 27, 2009 and December 17, 2009; \$14.30 for 5 units of Viagra 100 MG Tablet dispensed to Claimant on January 14, 2010; \$18.80 for 5 units of Viagra 100 MG Tablet dispensed to Claimant on February 11, 2010; and \$40.83 for 90 units of Ibuprofen 800 MG Tablet dispensed to Claimant on December 17, 2009, January 14, 2010, and February 11, 2010.

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 1st day of July, 2011.

Judy L. Ney
Hearing Officer