

**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 August 13, 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) LLC, Petitioner, is not entitled to additional reimbursement in the amount of \$66.22 for Naproxen 500 MG Tablet-500 MG, Tizanidine HCL 5 MG Tablet-4 MG, and Hydroxycodone-APAP 5-500 Tablet – 5-500 dispensed on August 12, 2008?

**PARTIES PRESENT**

Petitioner/Sub-Claimant appeared and was represented by PR, attorney. Respondent/Carrier appeared and was represented by BJ, attorney. Claimant did not appear.

**BACKGROUND INFORMATION**

(Healthcare Provider) (HCP) is a mail order pharmacy whose primary business involves filling prescriptions for patients who have suffered a work related injury. (HCP) does business in all 50 states.

On August 12, 2008 (HCP) dispensed a 30 day supply of Naproxen 500 MG Tablet-500 MG, a 30 day supply of Tizanidine HCL 5 MG Tablet-4 MG, and a 30 day supply of Hydroxycodone-APAP 5-500 Tablet – 5-500 to Claimant. (HCP) billed Carrier \$173.83. Carrier reimbursed (HCP) \$107.61. (HCP) then invoked the Division's Medical Dispute Resolution system in an attempt to secure full payment for the medication dispensed to Claimant.

On May 24, 2010, the Division's Medical Fee Dispute Resolution Officer issued a Findings and Decision that (HCP) failed to provide sufficient evidence to determine (HCP)'s usual and customary (U&C) charge for the prescriptions in question, that the lesser of the U&C charge or MAR (Maximum Allowable Reimbursement) formula amount for those prescriptions could not be determined, and that (HCP) was not entitled to any additional reimbursement. (HCP) appealed that decision 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 Section 408.021. The term "health care" includes a prescription drug, medicine, or other remedy. Section 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. Section 408.028(f)). Insurance carriers must reimburse for pharmacy benefits and services using the fee schedule or at rates negotiated by contract. Section 408.028(g). The Commissioner has adopted reimbursement methodology to establish the maximum allowable reimbursement (MAR) for prescription drugs in Division Rule 134.503.

Rule 134.503(a) provides:

- (a) The maximum allowable reimbursement (MAR) for prescription drugs shall be the lesser of:
  - (1) The provider's usual and customary charge for the same or similar service;
  - (2) The fees established by the following formulas based on the average wholesale price (AWP) determined by utilizing a nationally recognized pharmaceutical reimbursement system (e.g. Redbook, First Data Bank Services) in effect on the day the prescription drug is dispensed.
    - (A) Generic drugs:  $((\text{AWP per unit}) \times (\text{number of units}) \times 1.25) + \$4.00$  dispensing fee = MAR;
    - (B) Brand name drugs:  $((\text{AWP per unit}) \times (\text{number of units}) \times 1.09) + \$4.00$  dispensing fee = MAR;
    - (C) A compounding fee of \$15 per compound shall be added for compound drugs; or
  - (3) A negotiated or contract amount.

There is no contract between (HCP) and Carrier applicable to the issue in dispute at this hearing.

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.

MDR will consider information and documentation on "same or similar services" as specified in (Division) Rule 134.503(a)(1) to include workers' compensation and non workers' compensation prescriptions for same or similar number of units dispenses for the same or similar prescription (with recommended adjustments to reflect the U&C charges for the number of units dispensed for the prescription involved in the dispute).

What (HCP) contended is its U&C price is 178% of the drug's AWP plus a \$4.00 dispensing fee. (HCP) actually gets paid this price in 15 states. In the other 35 states (HCP) bills according to a fee guideline or formula and receives less money than its U&C charge. A small portion of (HCP)'s business does not involve billing carriers in workers' compensation cases. (HCP) has some "pre-pay" customers who pay up front out of pocket. (HCP) charges them 90% of AWP for generics and AWP for name brand drugs.

(HCP) provided figures for the prices it charged workers' compensation carriers for Naproxen 500 MG Tablet-500 MG, Tizanidine HCL 5 MG Tablet-4 MG, and Hydroxycodone-APAP 5-500 Tablet – 5-500 on August 12, 2008 in each of the 50 states and for pre-pay customers. For the Naproxen the workers' compensation price varied from \$30.20 to \$68.20, and the pre-pay price was \$38.78. For the Tizanidine the workers' compensation price varied from \$36.41 to \$82.74, and the pre-pay price was \$46.96. For the Hydroxycodone the workers' compensation price varied from \$13.60 to \$29.33, and the pre-pay price was \$16.95. There was no explanation showing why 178% was used for the alleged U&C price rather than some different percentage. It appeared (HCP) simply charged the most it could get in the different states for workers' compensation and chose to call the highest price its U&C price.

(HCP) lost its case at the Medical Fee Dispute Resolution level because it did not provide sufficient information to support the claimed usual and customary charge. At this hearing more information was provided. Based on the evidence presented (HCP)'s U&C charge for the Naproxen prescription in question on the date dispensed was \$38.78, its U&C charge for the Tizanidine prescription in question on the date dispensed was \$46.96, and its U&C charge for the Hydroxycodone prescription in question on the date dispensed was \$16.95.  $\$38.78 + \$46.96 + \$16.95 = \$102.69$ . Carrier paid \$107.61.

(HCP) 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. Claimant sustained a compensable injury on \_\_\_\_\_, while employed by (Employer).
2. Carrier delivered to Sub-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. On August 12, 2008 (HCP) dispensed a 30 day supply of Naproxen 500 MG Tablet-500 MG, a 30 day supply of Tizanidine HCL 5 MG Tablet-4 MG, and a 30 day supply of Hydroxycodone-APAP 5-500 Tablet – 5-500 Naproxen 500 MG to Claimant; (HCP) billed Carrier \$48.73 for the Naproxen, \$58.95 for the Tizanidine, and \$21.43 for the Hydroxycodone, the formula amounts computed in accordance with Rule 134.503(a)(2)(A), total \$173.83, and Carrier reimbursed (HCP) \$107.61.
  4. (HCP)'s U&C charge for the Naproxen prescription in question on the date it was dispensed was \$38.78, its U&C charge for the Tizanidine prescription in question on the date it was dispensed was \$46.96, and its U&C charge for the Hydroxycodone prescription in question on the date it was dispensed was \$16.95.
  5. There is no contract between (HCP) and Carrier applicable to the issue in dispute at this hearing.

### **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 \$66.22 for Naproxen 500 MG Tablet-500 MG, Tizanidine HCL 5 MG Tablet-4 MG, and Hydroxycodone-APAP 5-500 Tablet – 5-500 dispensed to Claimant on August 12, 2008; Petitioner is not entitled to any additional reimbursement.

### **DECISION**

(Healthcare Provider) LLC is not entitled to additional reimbursement for Naproxen 500 MG Tablet-500 MG, Tizanidine HCL 5 MG Tablet-4 MG, and Hydroxycodone-APAP 5-500 Tablet – 5-500 dispensed to Claimant on August 12, 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 Section 408.021 of the Act.

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 23rd day of August, 2010.

Thomas Hight  
Hearing Officer