

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUPITER OUTPATIENT SURGERY
CENTER,

Petitioner,

vs.

Case No. 17-5741

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings ("DOAH") for final hearing by video teleconference on January 3, 2018, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Lucia Alcira, pro se
Jupiter Outpatient Surgery Center, LLC
2055 North Military Trail, Suite 100
Jupiter, Florida 33458

For Respondent: Thomas Nemecek, Esquire
Taylor Anderson, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Petitioner, Jupiter Outpatient Surgery Center ("Petitioner"), is entitled to additional reimbursement from the carrier in the amount of \$4,210.50 for Rotation Medical surgical implants pursuant to section 440.13, Florida Statutes (2017).

PRELIMINARY STATEMENT

On July 14, 2017, Petitioner filed a Petition for Resolution of Reimbursement Dispute with Respondent, Department of Financial Services, Division of Workers' Compensation ("Department"), challenging Ace American Insurance Company's and Sedgwick Claims Management Services' ("carrier") denial of Petitioner's request for reimbursement for implants. On July 26, 2017, the Department issued its Reimbursement Dispute Determination, concluding that Petitioner is entitled to additional reimbursement in the amount of \$2,379.00 for surgical implants.

Dissatisfied with the Department's determination, Petitioner filed a request for an administrative hearing on August 23, 2017, contending it is entitled to additional reimbursement for the cost of the Rotation Medical surgical implants. On October 16, 2017, the Department referred the matter to DOAH to assign an administrative law judge to conduct the final hearing.

On October 19, 2017, the undersigned entered an Order setting this matter for final hearing on January 3, 2018. The final hearing was held on January 3, 2018, with both parties

present. Petitioner presented the testimony of its corporate representative, Lucia Alcira. Petitioner did not offer any exhibits into evidence. The Department presented the testimony of Lynne Metz, nurse consultant. The Department's Composite Exhibit 1 and Exhibits 2 through 6 were received into evidence upon stipulation of the parties.

The one-volume final hearing Transcript was filed at DOAH on January 31, 2018. The parties timely submitted proposed recommended orders, which were considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes are to the 2017 version.

FINDINGS OF FACT

1. Petitioner is a Florida ambulatory surgical center ("ASC") with its principal office located at 2055 North Military Trail, Suite 100, Jupiter, Florida 33458. Lucia Alcira is Petitioner's business office manager.

2. Petitioner is a health care provider as defined in section 440.13(1).

3. Sedgwick Claims Management Services and Ace American Insurance Company are carriers as defined in section 440.13(1).

4. On May 25, 2017, a representative of Rotation Medical, Inc. ("Rotation Medical"), arrived at Petitioner's surgical facility and delivered to Petitioner the Rotation Medical

implants that are the subject of this dispute. The implants are described on a Rotation Medical acquisition form (inventory slip) (Dep't Composite Ex. 1, p. 13), provided by the manufacturer representative to Petitioner on the date of surgery. The form describes the Rotation Medical implants in pertinent part, as follows:

Rotation Medical Implant Set REF 2516-1,
\$1,000.00

Rotation Medical Reconstituted Collagan
Scaffold-Arthroscopic, Medium, REF 2169-2,
\$2,600[.]

5. The acquisition form, which is not an invoice, identifies Dr. Ryan Simovitch as the physician, and a service date of May 25, 2017.^{1/}

6. On May 25, 2017, a patient presented to Dr. Simovitch at Petitioner's facility for a right shoulder rotator cuff arthroscopic surgical repair.

7. Dr. Simovitch performed the surgical repair of the patient's right shoulder on May 25, 2017. Dr. Simovitch's operative report reflects the insertion of "a single 5-5 Cayenne anchor double loaded" into the patient. In addition, an "additional 4.5 mm titanium tipped cayene knot-less anchor" was utilized.

8. The report further reflects that Dr. Simovitch subsequently "assembled the guide and nitinol wire for the

Rotation Medical graft insert." (Emphasis added). According to Dr. Simovitch, "[w]e did this in order to augment the tendon because of the tendinopathy." Dr. Simovitch's report goes on to state, in pertinent part:

We inserted the pin. We then inserted the gun device in order to deploy the graft. Passing through a 10x3 passport cannula, we deployed the graft. Once we held it, we _____ it with soft tissue staples and accessory superior portal. Multiple soft tissues samples were placed stapling the graft back down to the supraspinatus tendon. Once that was completed, the lateral edge of the graft tensioned over the greater tuberosity and was secured with two PEEK anchors one anterior and one posterior into the bone. The graft showed good tension. We then debrided all soft tissue and bony debris in the subacromial space. We then closed the arthroscopic portals with 3-0 Monocryl inverted subcutaneous followed by Mastisol and Steri-Strips. A sterile compressive dressing was applied. The patient was awakened from anesthesia and transferred to PACU in stable condition.

9. On June 9, 2017, Petitioner submitted its bill charges to the carrier for reimbursement for the Rotation Medical implants, Cayenne implants, disposable items, and services provided to the patient.

10. However, Rotation Medical did not invoice Petitioner for the Rotation Medical implants until June 24, 2017. (Dep't Composite Ex. 1, p. 10). The invoice identifies the Rotation Medical implants by the same item numbers and prices as those in

the acquisition form. The invoice required payment by Petitioner within 30 days.

11. On July 5, 2017, the carrier initially denied payment to Petitioner for all of the items requested.

12. On July 14, 2017, Petitioner filed the petition disputing the carrier's denial for reimbursement of the implants. Petitioner timely provided the Rotation Medical invoice and Cayenne implants invoices to the Department in response to a Notice of Deficiency, which the Department considered in making its Reimbursement Dispute Determination.

13. The Department issued its Reimbursement Dispute Determination on August 1, 2017. Out of the total of \$6,589.00 that was requested by Petitioner for reimbursement, the Department awarded Petitioner an additional \$2,379.00 for the Cayenne implants. The Department awarded Petitioner this amount because it determined Petitioner had provided invoices showing it purchased the Cayenne implants and the operative report specifically referenced them.

14. At hearing, Petitioner acknowledged it is not seeking reimbursement for the disposable items in the amount of \$266.76. These disposable items are not reimbursable under the reimbursement manual because they were not on the same invoice as the implants. Consequently, the total amount Petitioner seeks to

recover as reimbursement in this proceeding is \$4,210.50, for the Rotation Medical implants.^{2/}

15. The Department contends that reimbursement should be disallowed for the Rotation Medical implants because "there was no substantiation that documented the Rotation Medical implants were, in fact, used" during the surgery of the patient on May 25, 2017. In support of its position, the Department contends the operative report does not specifically note the use of bioinductive implants or an implant set.

16. Although the operative report makes no specific mention of the phrases "bioinductive implants" or "implant set," no specific language in the operative report is required to allow for reimbursement. Page two of the report specifically notes the use of the "the Rotation Medical graft insert" during the surgery. On page one, the graft is specifically described as a "rotational medical allograft."

17. Moreover, Petitioner's Implant Charge Sheet, prepared by a nurse in the operating room at the time of the patient's surgery, specifically identifies the use of the Rotation Medical Implant Set, Ref 2516-1, and Rotation Medical/Reconstituted Collagan Scaffold-Arthroscopic, Medium, Ref 2169-2, during the patient's surgery. (Dep't Composite Ex. 1, p. 6).

18. The persuasive and credible evidence adduced at hearing demonstrates that the Rotation Medical implants were inserted

into the patient's body during the May 25, 2017, surgery, with the intent to remain in the patient's body.^{3/}

19. The Department also contends that reimbursement for the Rotation Medical implants should not be allowed because the billing was not done in accordance with the reimbursement manual. Specifically, the Department argues that the implants were not "purchased" before they were billed to the carrier because Petitioner did not pay for them before the items were billed to the carrier.

20. Petitioner purchased the Rotation Medical implants prior to billing the carrier.

21. In sum, the persuasive and credible evidence adduced at hearing demonstrates that Petitioner is entitled to additional reimbursement in the amount of \$4,210.50 for the Rotation Medical surgical implants.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569, 120.57(1), and 440.13, Fla. Stat.

23. The Department is the state agency charged with administering the Workers' Compensation Law, chapter 440, which directs the Department to resolve reimbursement disputes when they arise between a health care provider and the employer or carrier responsible for the provision of workers' compensation

benefits to an injured employee/claimant. The Department's determination in such disputes constitutes proposed final agency action. § 440.13(7), Fla. Stat.

24. As the party claiming it was not properly reimbursed, Petitioner has the burden of proving its position in this proceeding by a preponderance of the evidence.

25. "Surgical Implant(s)," for the purpose of determining reimbursement, are defined in the Workers' Compensation Reimbursement Manual for Ambulatory Surgical Centers, page 36, incorporated by reference in Florida Administrative Code Rule 69L-7.100 as:

[A]ny single-use that is surgically inserted and deemed to be medically necessary by an authorized physician and which the physician does not specify to be removed in less than six weeks such as bone, cartilage, tendon, or other anatomical material obtained from a source other than the patient; plates; screws; pins; internal fixators; joint replacements; anchors; permanent neurostimulators; and permanent pain pumps.

26. To be reimbursed for implants, the implants must be "purchased" by the ASC, billed only by the ASC, and reimbursed to the ASC according to the policies for surgical implants in the reimbursement manual. (Dep't Ex. 4, p. 41 (p. 14 of 38 of the manual)).

27. "Purchase" is defined as:

- 1 **a** *archaic*: GAIN, ACQUIRE
 - b** : to acquire (real estate) by means other than descent
 - c** : to obtain by paying money or its equivalent: BUY
 - d** : to obtain by labor, danger, or sacrifice
- 2 : to constitute the means of buying · our dollars purchase less each year[.]

Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/purchase> (last visited Feb. 18, 2018).

28. In the instant case, the Department does not dispute that Rotation Medical was paid by Petitioner for the implants. Rather, the Department's position is that Petitioner is not entitled to reimbursement because payment for the items was not made prior the submission of the bill to the carrier.

29. The Department's position is not supported by the reimbursement manual. Contrary to the Department's position, the manual does not require payment of a manufacturer's invoice prior to the submission of the bill to the carrier. The manual does not include the word "payment." Rather, the manual requires that the item be "purchased."

30. An item can be purchased even though payment has not been made. An item is purchased when payment is expected. No evidence was presented at hearing that Rotation Medical gratuitously gave the implants to Petitioner without any

expectation of payment. In fact, the Department does not dispute that Petitioner paid for the items. The Department's position centers on the timeliness of payment, which is not a requirement for reimbursement under the manual. Had the Department intended to require payment before billing as a condition of reimbursement, it should have said so in the reimbursement manual. The Department did not.^{4/}

31. The Department also contends that there was no substantiation that documented the Rotation Medical implants' use during the surgery of the patient on May 25, 2017. The reimbursement manual requires that a provider: "Submit copies of the Implant Log or Tracking Sheet from the operating room to the carrier along with the acquisition invoice(s) that substantiate the utilization and cost of the item(s) billed." As detailed above, the Implant Charge Sheet, prepared by a nurse in the operating room, along with the operative report, substantiate the utilization of the Rotation Medical implants.

32. In support of its position, the Department relies on rule 69L-7.710(1)(s), which provides that:

"Disallow" or "Disallowed" means payment for a compensable injury or illness is not made because the service rendered has not been substantiated for reasons of medical necessity, insufficient documentation, lack of authorization or billing error. (Emphasis added).

This provision applies to disallowance of reimbursement for medical services, not items such as implants. Even if this rule applies, however, it does not require that the physician describe the exact terminology of the items in the operative report in order to allow for reimbursement.

33. Accordingly, the Department's contention that there was no substantiation that documented the Rotation Medical implants' use during the surgery on the patient on May 25, 2017, is rejected for the reasons detailed above.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order granting Petitioner's request for additional reimbursement from the carrier in the amount of \$4,210.50 for the Rotation Medical surgical implants pursuant to section 440.13, Florida Statutes.

DONE AND ENTERED this 2nd day of March, 2018, in
Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of March, 2018.

ENDNOTES

^{1/} A manufacturer's representative often delivers items to Petitioner for use in patients on the same date of the surgeries. In such situations, the representative may attend the surgical case and, on the same day of the surgery, identify the type and quantity of items used during the surgery in an acquisition form.

^{2/} The \$6,589.50 figure represents the sum of the amount of the Rotation Medical and Cayenne implants, including the allowable mark-up for profit under the reimbursement manual. Subtracting \$2,379.00 for the reimbursement allowed for the Cayenne implants results in the disputed balance of \$4,210.50 for the Rotation Medical implants.

^{3/} The Rotation Medical implants are not disposable items. The implants remain with the patient.

^{4/} Notably, the Department's Proposed Recommended Order references a provision of the reimbursement manual which provides that the manufacturer's invoice reflecting the actual cost for the implants "shall" accompany the bill for reimbursement of each component. (Dep't Ex. 4, p. 59 (p. 32 of 38 of the manual)). In the instant case, the Department accepted the late-filed invoices for the Cayenne and Rotation Medical implants, even though they

were not submitted with the bill because they were timely filed by Petitioner in response to the Department's Notice of Deficiency.

In this proceeding, the Department does not take issue with any late-filed invoices. In fact, the Department paid the Cayenne invoices. Rather, the instant dispute centers on the fact that payment was not made by Petitioner before Petitioner billed the carrier for the Rotation Medical implants and whether there was sufficient documentation to evidence the use of the Rotation Medical implants during the patient's surgery.

To the extent the Department may contend reimbursement should be disallowed because the invoice for the Rotation Medical implants did not accompany the bill, that argument has been waived based on the Department's acceptance of the Rotation Medical and Cayenne invoices timely submitted in response to the Notice of Deficiency, and the Department's subsequent approval of payment of the Cayenne invoices.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.