

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

ADCO BILLING SOLUTIONS, LP,

Petitioner,

vs.

Case No. 20-4061

DEPARTMENT OF FINANCIAL SERVICES,
DIVISION OF WORKERS' COMPENSATION,

Respondent.

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RECOMMENDED ORDER

On December 22, 2020, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (Division), conducted an evidentiary hearing pursuant to section 120.57(1), Florida Statutes (2020), in Tallahassee, Florida, via Zoom web-conference.

APPEARANCES

For Petitioner: Marc J. Semago, Esquire
 FL Legal Group
 Suite 400
 2700 West Dr. Martin Luther King, Jr., Boulevard
 Tampa, Florida 33607

For Respondent: Keith C. Humphrey, Esquire
 Department of Financial Services
 200 East Gaines Street
 Tallahassee, Florida 32399-4229

STATEMENT OF THE ISSUE

Whether Petitioner ADCO Billing Solutions, L.P.'s (ADCO), Petition for Resolution of Reimbursement Dispute is entitled to be considered on the merits, or whether it should be dismissed.

PRELIMINARY STATEMENT

On June 19, 2020, ADCO submitted a Petition for Resolution of Reimbursement Dispute with Respondent Department of Financial Services, Division of Workers' Compensation (Department). On July 10, 2020, the Department issued a Reimbursement Dispute Dismissal, dismissing the Petition for Resolution of Reimbursement Dispute as untimely.

On August 26, 2020, ADCO filed a Petition for Administrative Hearing Following Reimbursement Dispute Dismissal with the Department. On September 10, 2020, the Department referred this matter to the Division. The undersigned initially noticed this matter for a final hearing for November 12, 2020. ADCO filed an unopposed Motion to Continue Final Hearing, which the undersigned granted.

The undersigned conducted the final hearing on December 22, 2020, by Zoom web-conference. ADCO presented the testimony of Ryan Chenchick, its Collections Manager. The undersigned admitted Petitioner's Exhibit P1 into evidence. Marcia Paulk, R.N., a nurse case manager for the Department, testified on behalf of the Department. The undersigned admitted Respondent's Exhibits R1 and R2 into evidence.¹

The one-volume Transcript of the final hearing was filed with the Division on January 11, 2021. The parties timely submitted proposed recommended orders on January 21, 2021, which the undersigned has considered in the preparation of this Recommended Order.

¹ The parties filed a Joint Pre-hearing Stipulation on November 3, 2020. At the final hearing, the parties jointly requested that the undersigned strike paragraphs 17 and 18 from the parties' stipulated facts, which the undersigned granted. The undersigned has considered the parties' Joint Pre-hearing Stipulation—and has not considered these stricken paragraphs—in the preparation of this Recommended Order.

All statutory references are to the 2020 codification of the Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

1. The Department is the state agency with jurisdiction to resolve reimbursement disputes between health care providers and carriers, pursuant to section 440.13(7), Florida Statutes. Chapter 440 is known as the Florida's Workers' Compensation Law. *See* § 440.01, Fla. Stat.

2. Michael S. Schurdell, M.D., a physician (Dr. Schurdell), is a "health care provider" as defined in section 440.13(1)(g).

3. ADCO is an agent for Dr. Schurdell, responsible for preparing, processing, and submitting workers' compensation bills for repackaged prescription medication to insurers and carriers on Dr. Schurdell's behalf.

4. Zenith Insurance Company (Zenith), a nonparty to this proceeding, is considered a "carrier" as defined in section 440.13(1)(c).

5. The Florida's Workers' Compensation Law, and its implementing rules, govern the process through which health care providers and carriers review and make determinations on health care provider bills.

6. A carrier's bill review, under section 440.13(6), and implementing rules, culminates in a reimbursement decision to either pay the bill, or to disallow, adjust, or deny payment. An Explanation of Bill Review (EOBR) is "the document used to provide notice of payment or notice of adjustment, disallowance or denial by a claim administrator or any entity acting on behalf of an insurer to a health care provider[.]" Fla. Admin. Code R. 69L-7.710(y).

7. Pursuant to Florida Administrative Law Rule 69L-7.740(14), a carrier (or its claim administrator) must use an EOBR that details the reasons for a reimbursement decision for each line item. The EOBR must reflect EOBR codes (up to three for each line item billed), which are reasons for the reimbursement decision.

8. The EOBR is what triggers a health care provider's option to submit a petition for resolution of reimbursement dispute with the Department, pursuant to section 440.13(7).

9. Section 440.13(7) provides, in pertinent part:

(7) UTILIZATION AND REIMBURSEMENT DISPUTES.—

(a) Any health care provider who elects to contest the disallowance or adjustment of payment by a carrier under subsection (6) must, within 45 days after receipt of notice of disallowance or adjustment of payment, petition the department to resolve the dispute. The petitioner must serve a copy of the petition on the carrier and on all affected parties by certified mail. The petition must be accompanied by all documents and records that support the allegations contained in the petition. Failure of a petition to submit such documentation to the department results in dismissal of the petition.

10. Melissa Malarae, a nonparty to this proceeding, sought medical treatment from Dr. Schurdell, as a result of a workplace injury that occurred on August 31, 1998.

11. Ms. Malarae subsequently filed a Petition for Workers' Compensation Benefits on August 29, 2002, with the Office of the Judges of Compensation Claims (OJCC), in a matter styled *Melissa Malarae v. TLC Child Care Center of Sarasota and Zenith Insurance Company*, OJCC Case Number 02-034031RLD.

12. Dr. Schurdell provided medical care related to the 1998 workplace injury and dispensed prescription medications to Ms. Malarae on August 8, 2019. Notably, two of the prescription medications that Dr. Schurdell prescribed and dispensed were "Lidocaine Ointment 5%" and "Diclofenac Sodium Solution 1.5%."

13. On August 8, 2019, ADCO, on behalf of Dr. Schurdell, submitted a “Health Insurance Claim Form” for prescription medications he had prescribed and dispensed, to Zenith, Ms. Malarae’s employer’s workers’ compensation carrier, for payment.

14. As Zenith had not paid for those prescription medications, on February 18, 2020, Ms. Malarae (through her attorney, Ronald S. Fanaro, Esquire) filed another Petition for Workers’ Compensation Benefits, in OJCC Case No. 02-034031RLD, seeking payment for prescription medications that ADCO, on behalf of Dr. Schurdell, submitted to Zenith.

15. On March 11, 2020, Zenith filed a Response to Petition for Benefits in OJCC Case No. 02-034031RLD. In the portion of the Response to Petition for Benefits entitled “Response to Each Benefit Requested,” Zenith stated:

Petition(s) 02/18/2020(9) are covered by this response.

Payment in the amount of \$29,942.34 to ADCO Billing Solutions.

Attorney Fees and Costs.

Response:

The EC denies entitlement to attorney fees as the requested benefits are being paid within 30 days of the Petition. The EC agrees to reimburse taxable costs associated with obtaining benefits in the Petition.

16. However, also on March 11, 2020, Zenith issued an EOBR that adjusted the August 8, 2019, payment for medications listed on the Health Insurance Claim Form. The March 11, 2020, EOBR indicated a significant downward adjustment of payment for the “Lidocaine Ointment 5%” and “Diclofenac Sodium Solution 1.5%” that ADCO requested.

17. Mr. Chenchick, the collections manager for ADCO that sought reimbursement for the multiple medications Dr. Schurdell dispensed to Ms. Malarae (including the Lidocaine Ointment and Diclofenac Sodium Solution), testified that he worked with Mr. Fanaro in the filing of the February 18, 2020, Petition for Workers' Compensation Benefits, to seek reimbursement in the amount of \$29,942.34. Mr. Chenchick testified that, following receipt of Ms. Malarae's Petition for Workers' Compensation Benefits:

[T]hey [Zenith] rescinded their denial. That was the response from Zenith. It was from the adjuster, Katy Lamb. It was another document that said we rescind, and, you know, there was a guarantee of payment of that [\$]29,942.34.

18. Mr. Chenchick testified that he considered Zenith's March 11, 2020, response to the February 18, 2020, Petition for Workers' Compensation Benefits a "guarantee of payment[.]" and that he believed that Zenith would make full payment for the multiple medications at issue.

19. Mr. Chenchick testified that on March 17, 2020—after he received Zenith's March 11, 2020, response to the Petition for Workers' Compensation Benefits—he received the EOBR, dated March 11, 2020, and payment from Zenith. Mr. Chenchick testified:

So the other dates of service were reimbursed properly. This was the only date of service that was – that we were taking issue with, this date of service of 8/8/2019, and the billed amount was, yeah, \$13,536.43, and for that date of service, we were only reimbursed \$349.67.

20. After receiving the March 11, 2020, EOBR, which Mr. Chenchick considered a "short pay," Mr. Chenchick contacted Zenith's bill review department on March 27, 2020, to discuss this discrepancy. Mr. Chenchick testified that a "short pay" error was common, and that ADCO regularly

addressed such an error with carriers directly, as opposed to utilizing the dispute resolution process with the Department, pursuant to section 440.13(7).

21. Mr. Chenchick further testified concerning the alleged “short pay” of the two prescription medications:

What we had in this one, which typically we don't, was the – a guarantee of payment is what I considered it where they rescinded and said they would be paying the bills. So when I had that in my hand saying we are rescinding the denial, we will pay this amount, and then an amount comes in that's lower than that. . . .

I didn't feel at that time that I needed to submit anything to the State because it was still under review. It had not hit a hard denial.

22. ADCO did not contest the March 11, 2020, EOBR, pursuant to the procedure set forth in section 440.13(7), and, therefore, did not petition the Department within the 45-day requirement contained in this provision. Nor did ADCO and Zenith submit a Joint Stipulation of the Parties to the Department, pursuant to rule 69L-31.012, which would have allowed the parties to “mutually stipulat[e] in writing that the reimbursement dispute be held in abeyance for a specified time period, not to exceed sixty (60) calendar days, for the parties to seek a resolution of the reimbursement dispute without the need for a determination by the Department.”

23. Instead, Mr. Chenchick testified that he continued to negotiate with Zenith concerning the payment discrepancy through May 2020. On May 20, 2020, Mr. Chenchick, on behalf of ADCO, sent Zenith an “Appeal for Reconsideration,” that explained ADCO's position that Zenith had short-paid the two prescription medications.

24. On May 27, 2020, Zenith issued a second, separate EOBR, that ADCO received on June 3, 2020 (Second EOBR). The Second EOBR differed from the

March 11, 2020, EOBR, in that it only concerned the two prescription medications at issue here, and that Zenith completely disallowed payment (\$13,536.43) for them.

25. ADCO filed a Petition for Resolution of Reimbursement Dispute with the Department on June 19, 2020, which the Department received on June 30, 2020, 27 days after ADCO received the Second EOBR.

26. At the time Zenith issued the Second EOBR, the August 8, 2019, billing remained at issue in OJCC Case No. 02-034031RLD. A June 10, 2020, mediation agreement, signed by Ms. Malarae, Mr. Fanaro, and a representative from Zenith, states, in part:

Parties agree as follows:

Regarding PFB of 2/18/20, the outstanding bills submitted by ADCO Billing Solutions have been paid and accepted by E/C, with the exception of prescriptions for Date of Service 8/8/19 for Diclofenac and Lidocaine ointment. E/C made a payment for the 8/8/19 prescriptions, but the provider is disputing the amount paid. This dispute between the E/C and the billing provider is not within the purview of the JCC, who is without jurisdiction to address such billing disputes, and must be handled administratively.

27. The Department assigned Ms. Paulk, a registered nurse consultant with the Department's Bureau of Monitoring and Audit within its Medical Services Section, to review ADCO's Petition for Resolution of Reimbursement Dispute. Her job duties include reviewing petitions for resolution reimbursement disputes for deficiencies, under section 440.13(7) and rules 69L-31 and 69L-7.

28. Ms. Paulk reviewed ADCO's Petition for Resolution of Reimbursement Dispute, dated June 19, 2020, and compared it to the date ADCO received an EOBR that would trigger section 440.13(7)'s 45-day deadline for this process. Ms. Paulk testified that she reviewed the two EOBRs, and noted that both

indicated a “disallowance or adjustment of payment” for the two prescription medications. Under this circumstance, Ms. Paulk testified that the Department used the earlier, March 11, 2020, EOBR for purposes of calculating the deadline for a petition for resolution of reimbursement dispute. As ADCO’s Petition for Resolution of Reimbursement Dispute was filed more than 45 days after the March 11, 2020, EOBR, the Department dismissed it as untimely served on the Department, pursuant to section 440.13(7).

29. Ms. Paulk admitted, on cross-examination, that when she made the decision to dismiss ADCO’s Petition for Resolution of Reimbursement Dispute, she was unaware of OJCC Case No. 02-034031RLD, had no contact with either ADCO or Zenith, and that the March 11, 2020, EOBR and the Second EOBR were not identical, as the March 11, 2020, EOBR actually reflected an adjustment of the amounts for reimbursement for the two prescription medications (*i.e.*, Zenith would pay an amount for the two prescriptions totaling \$349.67), while the Second EOBR reflected that Zenith completely disallowed payment in full for the two prescriptions.

30. The undersigned finds that the March 11, 2020, EOBR differs from the Second EOBR. The March 11, 2020, EOBR reflected a downward adjustment for the two prescription medications. The Second EOBR reflects that Zenith completely disallowed payment for these two prescriptions. Additionally, the March 11, 2020, EOBR considered additional dates of service, which were not at issue in the Second EOBR.

31. With respect to the payment for the two prescription medications at issue between ADCO and Zenith, the March 11, 2020, EOBR also conflicts with Zenith’s Response to Petition for Benefits in OJCC Case No. 02-034031RLD, in which Zenith admitted that it would pay for all of the medications (including the two prescription medications at issue) listed in ADCO’s August 8, 2019, Health Insurance Claim Form. The OJCC was the wrong forum for Ms. Malarae to seek payment for these two medications. *See*

§ 440.13(7), Fla. Stat. However, Zenith’s response, and Mr. Chenchick’s testimony that ADCO considered it a “guarantee of payment,” establishes that ADCO had been lulled or misled into inaction, as ADCO relied on Zenith’s response, and reasonably believed that the adjustment reflected in the March 11, 2020, EOBR was erroneous.

32. Mr. Chenchick’s additional testimony concerning ADCO’s attempt to reconcile what he believed to be a common error known as “short pay,” reflected in the March 11, 2020, EOBR (which he received after Zenith filed its Response to Petition for Benefits), is further evidence that ADCO reasonably believed that Zenith intended to pay, in full, the amount of the two prescription medications at issue.

CONCLUSIONS OF LAW

33. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569, 120.57(1) and 440.13, Florida Statutes.

34. At issue in this case is whether ADCO’s June 19, 2020, Petition for Resolution of Reimbursement Dispute, filed pursuant to section 440.13(7), was untimely, as the Department initially determined. If untimely filed, ADCO raises the defense of equitable tolling to excuse the untimeliness.²

35. As the party raising the affirmative of the issue, ADCO has the burden of proving, by a preponderance of the evidence, that it is entitled to the relief

² ADCO has also raised the defense of equitable estoppel. However—with the exception of equitable tolling—the undersigned does not have jurisdiction to award or recommend equitable relief. Rather, in Florida, circuit courts have exclusive jurisdiction in all cases in equity, and only circuit courts can resolve matters involving equitable relief. *See* § 26.012(2)(c), Fla. Stat. (“Circuit courts shall have ... exclusive original jurisdiction [i]n all cases in equity including all cases relating to juveniles except traffic offenses as provided in chapters 316 and 985[.]”). “While an administrative agency may exercise quasi-judicial power when authorized by statute, it may not exercise power which is basically and fundamentally judicial such as the grant of an equitable remedy.” *Biltmore Constr. Co. v. Fla. Dep’t of Gen. Servs.*, 363 So. 2d 851, 854 (Fla. 1st DCA 1978).

it seeks. *See Balino v. Dep't of HRS*, 348 So. 2d 349, 250 (Fla. 1st DCA 1977); § 120.57(1)(j), Fla. Stat.

36. Section 440.13(7)(a) requires that a health care provider who elects to contest the disallowance or adjustment of payment by a carrier must, within 45 days after receipt of the notice or disallowance or adjustment of payment, petition the department to resolve the dispute.

37. The Department contends that the March 11, 2020, EOBR, which adjusted the payments for the two prescription medications at issue downward, triggered the 45-day deadline for ADCO to submit its Petition for Resolution of Reimbursement Dispute. ADCO contends that the Second EOBR (which ADCO received on June 3, 2020), which disallowed the payments for the two prescription medications at issue, was the proper starting point for calculating the timeframe for submitting its petition, and having filed its Petition for Resolution Dispute on June 19, 2020, that it was timely.

38. ADCO contends, and the undersigned agrees, that the Second EOBR was a separate, different decision than what is reflected in Zenith's March 11, 2020, EOBR. The March 11, 2020, EOBR adjusted the payment for the two prescription medications downward, and considered other dates of service. The Second EOBR, in contrast, simply disallowed payment for the two prescription medications at issue. *See Fla. Admin. Code R. 69L-7.740(14)* ("An EOBR shall specifically state that the EOBR constitutes notice of disallowance or adjustment of payment within the meaning of subsection 440.13(7), F.S."). The plain language of section 440.13(7)(a) states that a health care provider must, "within 45 days after receipt of notice of disallowance *or* adjustment of payment, petition the department to resolve the dispute." (emphasis added). As the Second EOBR reflected a disallowance of payment, the undersigned concludes, in accordance with section 440.13(7)(a), that it was separate from the March 11, 2020, EOBR.

39. The undersigned concludes that ADCO timely submitted a Petition for Resolution of Reimbursement Dispute based on the Second EOBR's disallowance of payment for the two prescription medications. Accordingly, the Department erred in dismissing it as untimely.

40. Although the Petition for Resolution of Reimbursement Dispute was timely submitted to the Department, the undersigned also concludes that equitable tolling would excuse ADCO's untimely filing of the petition even if the March 11, 2020, EOBR was considered the trigger for section 440.13(7)'s 45-day deadline.

41. Section 120.569(2)(c) requires agencies to dismiss untimely petitions, but further provides that this direction "does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition." *Madison Highlands, LLC v. Fla. Housing Fin. Corp.*, 220 So. 3d 467, 471-72 (Fla. 5th DCA 2017).

42. The Florida Supreme Court first applied the doctrine of equitable tolling in administrative proceedings in *Machules v. Department of Administration*, which it described as follows:

The tolling doctrine is used in the interests of justice to accommodate both a defendant's right not be called to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which focuses on the plaintiff's excusable ignorance of the limitations period and on the lack of prejudice to the defendant.

523 So. 2d 1132, 1134 (Fla. 1988)(internal quotations and citations omitted).

43. The *Machules* court described the type of equitable circumstances that might justify equitable tolling when they prevent a timely filing in the proper forum:

Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into action, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.

Id.

44. The undersigned concludes that equitable tolling would be applicable in this case because ADCO was misled or lulled into inaction by Zenith.

Mr. Chenchick testified that ADCO relied on Zenith's March 11, 2020, Response to Petition for Benefits in OJCC Case Number 02-034031RLD, as a "guarantee of payment," and after later receiving the March 11, 2020, EOBR, considered it an erroneous, but common, "short pay" that he diligently attempted to resolve with Zenith. ADCO was not aware that Zenith would disallow payment on the two prescription medications until it received the Second EOBR.

45. The undersigned further concludes that neither the Department nor Zenith will be prejudiced by allowing ADCO's Petition for Resolution for Reimbursement Dispute to go forward. ADCO, however, will be prejudiced if the Department's dismissal of its Petition for Resolution for Reimbursement Dispute is allowed to stand, as it will be required to write off the cost for the two prescription drugs at issue without an opportunity to contest Zenith's decision, and would have no other recourse under chapter 440.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that the Department of Financial Services, Division of Workers' Compensation, enter an Order that reinstates the Petition for Resolution of Reimbursement Dispute filed by ADCO Billing Solutions.

DONE AND ENTERED this 2nd day of February, 2021, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of February, 2021.

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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.