

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Thomas Kibbie

Opinion No. 04-19WC

v.

By: Stephen W. Brown
Administrative Law Judge

Killington Ltd.

For: Lindsay H. Kurrle
Commissioner

State File No. Z-58225

OPINION AND ORDER

Hearing held in Montpelier on November 2, 2018
Record closed on December 24, 2018

APPEARANCES:

Thomas C. Bixby, Esq., for Claimant
Erin J. Gilmore, Esq., for Defendant

ISSUES PRESENTED:

- 1) Are Claimant's prescriptions for Cialis and Paxil causally related to his 2008 worker's compensation injury, and if so, are they reasonable and necessary treatment therefor?
- 2) Is Defendant obligated to pay the charges of Vernon Family Dentists, LLC that exceed the amounts allowed by the Vermont Workers' Compensation Fee Schedule?

EXHIBITS:

Joint Exhibit	Medical Records
Claimant's Exhibit 1	Cost Tabulation prepared by Nicole Damiano
Claimant's Exhibit 2	Report prepared by April Pettengill, RN
Claimant's Exhibit 3	List of Medications produced by MEMIC Indemnity Company
Claimant's Exhibit 4	Reimbursement Worksheet prepared by IWP Pharmacy, dated October 25, 2018
Claimant's Exhibit 5	Medical Exhibits from Vernon Family Dentists, LLC
Claimant's Exhibit 6	Bill from Vernon Family Dentists, LLC
Claimant's Exhibit 7	Receipt from Manchester Pharmacy
Claimant's Exhibit 8	Redacted adjuster notes

CLAIMANT'S MOTION FOR A DIRECTED VERDICT

Claimant has moved for a directed verdict as to Defendant's obligation to pay for paroxetine, *i.e.*, Paxil.¹ Because the opinion below resolves this issue in Claimant's favor independently of the Motion, I decline to issue a directed verdict.

Claimant also requests sanctions for Defendant's violation of the Department's February 23, 2016 order and its unfounded denial of his prescription for Paxil. Defendant has presented no reason for denying Claimant's prescription for Paxil, particularly given that the Department previously ordered Defendant to pay for that medication. Within thirty days after the date of this order, Claimant may file a separate motion for interest and penalties for any specified instances of Defendant's failure to timely pay for Paxil since February 23, 2016. Defendant may file any opposition to such motion in the regular course.

FINDINGS OF FACT:

1. I take judicial notice of all relevant forms and correspondence contained in the Department's file relating to this claim.

Background Concerning Claimant's Workplace Injury and Subsequent Treatment

2. Claimant is a 57-year-old man residing in Vernon, Connecticut. He served as a ski ambassador for Defendant for approximately ten years until the 2008 winter ski season. His duties included helping other skiers, putting their equipment back on if they fell, and being pleasant to paying customers. He was Defendant's employee under the Vermont's Workers' Compensation Act.
3. Near the end of the day on January 12, 2008, Claimant fell on Defendant's ski slopes while performing his work duties. He hit his head so hard that he cracked his ski helmet and lost consciousness. His son, who was with him on the ski slope, called for emergency aid, and Claimant was transported to Dartmouth-Hitchcock Medical Center, where he was admitted.
4. Claimant suffered significant physical injuries in the fall, including injuries to his ankle and elbow, multiple tooth fractures, and a traumatic brain injury. He lost his ability to taste and smell, developed vision and balance problems, and began experiencing severe headaches.

¹ Paxil is a trade name for paroxetine. I use these two terms interchangeably in this decision.

5. He also experienced significant cognitive and psychological changes after this injury, including depression and anxiety. He suffers from panic attacks that make him breathe heavily, pace, and fidget. He is less able to filter his words and is snappier and grumpier than he was before his workplace injury. He now sleeps less, speaks less, and has more difficulty multi-tasking. He also cries more often. He experiences mood swings from calm to anxious and often feels trapped and claustrophobic. His medical records also reflect instances of suicidal ideation. *E.g.*, Joint Medical Exhibit, Tab 6, note dated February 20, 2014.
6. Because of his psychological symptoms, Claimant has had to adapt his schedule to reduce interaction with other people, such as by shopping late at night to avoid crowds. It is easy for him to spend entire days on the couch without going outside, which in turn brings about more feelings of depression. He almost never goes anywhere out of his home without his girlfriend, Ms. Nicole Damiano.
7. By contrast, Claimant was very physically active before his injury. He frequently went snowboarding, exercised regularly at the gym, and enjoyed outdoor activities with his son and Ms. Damiano.

Prior Proceedings

8. On September 2, 2010, the Department approved a partial settlement agreement under which Claimant accepted \$50,000 as full and final settlement for his claims of certain physical injuries. However, Defendant expressly agreed in that settlement to “continue to furnish all reasonable and related future medical treatment pursuant to the Rules necessary for the treatment of his cognitive or other head injury, including neurological, psychological, ophthalmological, TBI care and treatment[.]” See Modified Form 15, approved by the Department on September 2, 2010.
9. On December 29, 2014, the Department held a formal hearing concerning Defendant’s obligation to provide Claimant with multiple disputed medical benefits. That hearing resulted in a decision dated February 23, 2016 (Opinion No. 05-16) (“*Kibbie I*”). All Findings of Fact and Conclusions of Law in *Kibbie I* are established for the purposes of this decision.
10. In *Kibbie I*, the Department ordered Defendant to provide, *inter alia*, reimbursement for the drug “paroxetine, or other medications prescribed for pain control, sleep disturbance and/or depression, as causally related to Claimant’s cognitive or other head injury.” *Id.* That order was based in material part on credible testimony from Claimant’s treating physician, Thomas Miller, M.D., that he prescribed paroxetine for depression, which was causally related to his work-related head injury. *Kibbie I*, Conclusion of Law No. 24. The Department noted that Defendant had “proffered no explanation to account for its continued denial of coverage for Claimant’s antidepressant medications and other psychological treatment.” *Kibbie I*, Conclusion of Law No. 32. It noted further that “the record does not clearly establish any basis for [Defendant’s] denials.” See *Kibbie I*, Finding of Fact No. 37.

11. In *Kibbie I*, the Department also ordered Defendant to pay for full coverage crowns and other dental treatment necessary to repair accident-related damage to tooth numbers 7,8, 9, 10, and 30. *Kibbie I*, Order.

Claimant's Depression and Prescription for Paxil

12. Defendant has accepted Claimant's depression as causally related to his 2008 workplace injury. *See* Modified Form 15 approved September 2, 2010.²
13. Paxil, or paroxetine, is a selective serotonin reuptake inhibitor (SSRI), an antidepressant medication.
14. Claimant took certain antidepressant medications including Wellbutrin and Cymbalta prior to his 2008 workplace injury. However, he was not taking any antidepressant medications at the time of his 2008 workplace injury.
15. As he did in *Kibbie I*, Dr. Miller testified as an expert witness for Claimant at the November 2, 2018 formal hearing in this case. Dr. Miller is a physician licensed in Connecticut who is board certified in physical medicine and rehabilitation. He also has a subspecialty certification in brain injury medicine. He has been a licensed physician for approximately 23 years, and currently works out of Mount Sinai Rehabilitation Hospital in Hartford, Connecticut. He first began treating Claimant in March 2008, shortly after his workplace injury. Medical records show that he continued to treat Claimant through at least 2017. *See Joint Medical Exhibit*, Tab 6.
16. Dr. Miller's first impression of Claimant was that he had suffered a traumatic brain injury of at least moderate severity, based on symptoms such as headaches, neck pain, and Claimant's losses of smell, concentration, attention, memory, and emotional stability. His plan of treatment included outpatient therapy, neck injections, muscle relaxants, and a recommendation for psychological services. *See Joint Medical Exhibit*, Tab 6, record dated March 14, 2008.
17. Dr. Miller prescribed Paxil as treatment for Claimant's depression. He testified credibly and persuasively that Claimant needs Paxil to treat the depression that resulted from his work-related head injury.
18. Records from the Injured Workers' Pharmacy show that Defendant paid for Claimant's paroxetine multiple times, with the earliest payment to that pharmacy occurring on June 9, 2014, and the latest recorded payment occurring on October 5, 2018. *See Claimant's Exhibit 4*. There is credible evidence that Claimant paid out of pocket for this medication as early as December 17, 2011. *See Claimant's Exhibit 7*.

² Additionally, Defendant's counsel stated on the record that Claimant's depression is an accepted condition. I find this statement binding on Defendant.

19. Defendant has presented no evidence that Claimant no longer needs Paxil, or that his current need for Paxil is no longer causally related to his 2008 workplace accident. Defendant's only expert witness, Mark Friedman, M.D., was not asked to provide any opinion concerning Claimant's Paxil prescription. *See* Preservation Deposition of Mark Friedman, M.D., taken on November 16, 2018, p. 22.

Claimant's Complaints of Decreased Libido and Erectile Dysfunction; Prescription for Cialis

20. Immediately after his workplace injury, Claimant noticed a loss of sexual desire. He later regained his sexual desire but found himself unable to perform sexually. Ms. Damiano credibly corroborated Claimant's testimony to this effect, and credibly testified that he did not have any problems with sexual performance before his injury.
21. Claimant complained to Dr. Miller of low libido in June 2008, for which Dr. Miller recommended an endocrinology evaluation. *See* Joint Medical Exhibit, Tab 6, Note dated June 13, 2008.
22. Claimant visited endocrinologist Socorro Vargas, M.D., on July 22, 2008. Dr. Vargas noted Claimant's complaints of decreased libido but indicated that he was able to achieve and maintain an erection during at least three sexual encounters with his girlfriend. *See* Joint Medical Exhibit, Tab 9, Note dated July 22, 2008. He noted that Claimant had early morning erections and nocturnal tumescence, showing that his neurogenic reflexes and corpora cavernosa blood flow were intact. He indicated that Claimant's lack of libido was likely due to psychosocial issues, but also acknowledged that his brain injury, depression, and SSRI usage may have contributed.
23. Claimant saw Dr. Miller again on August 11, 2008. Dr. Miller noted that Claimant's blood work from his endocrine consultation was normal, but that he still complained of decreased libido. Dr. Miller also noted that Claimant was "able to obtain and maintain an erection." *See* Joint Medical Exhibit, Tab 6, note dated August 11, 2008.
24. In addition to decreased libido, Claimant also complained to Dr. Miller of erectile dysfunction, which Dr. Miller credibly distinguished from decreased libido. Erectile dysfunction refers to difficulty achieving or maintaining an erection, while loss of libido refers to loss of sexual desire.
25. On or about September 21, 2015, Dr. Miller provided Claimant with samples of Cialis for erectile dysfunction. Importantly, he did not prescribe this medication for low libido, and credibly testified that Cialis is only effective as treatment for erectile dysfunction and not for libido; if a patient lacks adequate libido, Cialis will not help.

A. Dr. Miller's Causation Testimony Relating to Cialis

26. Dr. Miller credibly testified that there could have been multiple factors contributing to Claimant's low libido, including his head injury itself, medication side effects, or endocrine imbalance resulting from his head injury. However, he also testified that "sometimes it's hard to say exactly why," and that it could be "multiple things that were all contributing and resulted from the injury or its subsequent treatments."
27. Dr. Miller also testified that in his opinion, Claimant's erectile dysfunction resulted from either his brain injury itself or his prescription medications. He testified that SSRI medications like Paxil can have a side effect of erectile dysfunction. He also noted, however, that it is difficult to isolate a single cause of erectile dysfunction. Thus, he was unable to tell whether Claimant's erectile dysfunction was caused by his brain injury itself or the medications prescribed as treatment for the brain injury. However, he believed that in either case it was related to Claimant's 2008 workplace injury. His reasoning was largely based on Claimant's lack of sexual problems before his workplace injury and the presence of those problems afterward.
28. I find Dr. Miller's testimony that it is difficult to isolate a single cause of erectile dysfunction, and that Cialis is only effective treatment for erectile dysfunction but not for decreased libido, credible and persuasive.
29. However, Dr. Miller did not persuasively articulate a causal path leading from Claimant's injury to his need for Cialis. I find that he leapt conclusorily from the fact that Claimant did not have sexual performance problems before his accident to the conclusion that Claimant now needs Cialis because of the accident. This leap is especially problematic because of Dr. Miller's credible testimony that Cialis is only effective for erectile dysfunction and not for loss of libido, combined with Dr. Miller's medical record reflecting Claimant's ability to achieve and maintain an erection less than a year after his workplace injury. Dr. Miller never adequately explained how these facts harmonized with his causation opinion. He also never reconciled his causation opinion with the fact that he never prescribed or recommended Cialis until 2015, seven years after Claimant's complaints of decreased libido.³ These aspects of Dr. Miller's testimony raise significant questions about causation that remain unanswered.

³ Claimant testified that Dr. Miller provided samples of Cialis to him for the first five or six years after his workplace accident and that he only sought that drug from pharmacies after Cialis became generic. Dr. Miller, however, did not testify on that subject matter. His medical records do not mention Cialis before September 21, 2015. They do, however, reflect provision of samples on that date and thereafter. *E.g.*, Joint Medical Exhibit, Tab 6, Notes dated September 21, 2015; January 4, 2016; March 17, 2016; July 22, 2016. Dr. Miller's records show that he first gave Claimant a prescription for Cialis, rather than samples, on September 23, 2016. Therefore, I find Claimant's recollection that Dr. Miller initially provided him with samples of Cialis credible, but I find that his recollection is mistaken as to the time frame in which Dr. Miller provided these samples.

B. Dr. Mark Friedman's Causation Testimony Relating to Cialis

30. Defendant presented Mark Friedman, M.D., as an expert witness. Dr. Friedman is board certified in internal medicine and has been licensed to practice medicine in Massachusetts since 1980. He currently practices with Cambridge Medical Associates in Cambridge, Massachusetts. *See* Deposition of Mark Friedman, M.D. at pp. 1-2. He has treated patients complaining of erectile dysfunction and testified that it is a common complaint. *Id.*, p. 6. He does not specialize in traumatic brain injury patients and has treated relatively few patients with traumatic brain injuries. *Id.*, p. 22.
31. Dr. Friedman credibly testified that Cialis works by affecting the vascular supply of blood to the penis, but that it does nothing to affect a person's hormones, libido, or desires. It is simply a mechanical aid to opening the valve that allows an erection to happen. *See id.*, pp. 14-16. This testimony is consistent with Dr. Miller's testimony that Cialis is only beneficial for erectile dysfunction and not for decreased libido.
32. In Dr. Friedman's opinion, Claimant's current prescription for Cialis is "probably not" related to his 2008 workplace injury. *Id.*, p. 10. He based this conclusion on one to two hours of medical records review, followed by about four to six hours of time spent writing a report. *Id.*, pp. 20-21. He has never examined or even spoken with Claimant. *Id.*, pp. 28-29. He did not have Claimant's medical records in front of him during his preservation deposition, and he appeared unfamiliar with several aspects of Claimant's post-injury treatment history.
33. Based on his limited medical records review, Dr. Friedman found it "questionable" whether Claimant's primary issue was loss of libido or erectile dysfunction. He noted that erectile dysfunction is common among men of Claimant's age, and that Claimant was taking medications unrelated to his traumatic brain injury that could have led to erectile dysfunction. *Id.*, p. 12-13. He also testified, without significant analysis, that it was not plausible for a head injury that caused a seizure, headaches, cognitive symptoms, and depression, to lead to erectile dysfunction. *Id.*, p. 10.
34. Dr. Friedman acknowledged the possibility of a causal relationship between Claimant's depression and his erectile dysfunction. *Id.*, pp. 31-32. He noted that Claimant likely had depression that had worsened after his injury, and that "there's a possible causal relationship and contributory issues of the depression with regard to subsequent erectile dysfunction." *Id.*, pp. 42-43. He never adequately reconciled this statement with his primary opinion that Claimant's prescription for Cialis was "probably not" related to his 2008 workplace injury.
35. I find Dr. Friedman's opinions relating to causation unpersuasive. His testimony was hampered by the fact that he never examined or even interviewed the Claimant and only spent one to two hours reviewing medical records in a case involving over a decade of treatment. His causation analysis overall was conclusory and did nothing to create doubts about causation that were not already present after Dr. Miller's testimony.

Bills for Dental Care Exceeding the Workers' Compensation Fee Schedule

36. As a result of his 2008 workplace injury, Claimant cracked multiple teeth, all of which have now been repaired. His dental treatments included multiple root canals, porcelain crowns, build ups, and related services. Michael Shlafstein, DDS of Vernon Family Dentists, LLC in Vernon, Connecticut performed these dental services. At issue here is an outstanding balance of \$1,504.50 for services Dr. Shlafstein performed on August 23, 2017.
37. On or about March 3, 2017, the parties held a mediation which resulted in an agreement concerning multiple issues, including the following:
- Plaintiffø [sic] shall pursue any necessary dental consultation regarding dental work previously estimated to cost \$10,400.00. Plaintiff shall secure any preauthorization documentation to allow for the consultation and resulting work to go forward. MEMIC will sign any required preauthorization request and will pay for the resulting treatment once treatment has been completed.
- Claimantø Exhibit 5, p. 13.
38. There is no evidence of what specific dental work was øpreviously estimated to cost \$10,400.00.ö Cf. id.
39. On or about March 29, 2017, Vernon Family Dentists, LLC provided Claimant with a proposed treatment plan for multiple crowns, root canals, and related services for a total proposed cost of \$13,800. See Claimantø Exhibit 5, p. 10.
40. There is no credible evidence that Defendant ever approved the proposed total cost or the cost for each item described in that proposal.
41. On or about March 31, 2017, an adjuster for Defendantø insurer signed a Medical Providerø Preauthorization Request for Claimant to receive, *inter alia*,⁴ four crowns, one build-up, and one root canal. That Preauthorization did not specify any cost for those services. See Claimantø Exhibit 5, p. 9. There is no evidence that Defendant ever agreed to pay any specific price for the preauthorized services.
42. On August 23, 2017, Dr. Shlafstein provided a subset of the services described in the March 29, 2017 proposal. Specifically, he provided Claimant with four crowns, one post and core, and one build-up. His charges for these services matched the amounts in his proposed treatment plan. The total amount billed for that dayø services was \$8,850.00. See Claimantø Exhibit 5, p. 4. His office billed that amount to Defendantø insurer MEMIC using billing codes D2740 (crown), D2950 (build-up), and D2954 (post and core). See Claimantø Exhibit 5, p. 6.

⁴ Portions of this document are not clearly legible.

43. A vendor for MEMIC known as CorVel audited that bill for compliance with the Vermont Workers' Compensation Medical Fee Schedule. *See* Claimant's Exhibit 5, pp. 15-16. Based on its audit, CorVel reduced each of the billed amounts by 17 percent. Thus, it reduced the total allowed amount by \$1,504.50.
44. Dr. Shlafstein sought payment from Claimant of an outstanding balance of \$1,504.50. *See* Claimant's Exhibit 6. Claimant now seeks payment of this amount by Defendant.
45. Dr. Shlafstein credibly testified that he was not "super clear" on whether Defendant's insurer MEMIC agreed to pay that entire amount billed. He knew that Claimant's need for these dental services resulted from a workplace injury and that he was a Vermont workers' compensation claimant. He also understood that Defendant's insurance carrier would pay for Claimant's treatment.
46. Claimant contends that Dr. Shlafstein was the only dentist willing provide the needed services in connection with a workers' compensation claim. Claimant called "a couple" of other dentists "out of the yellow pages." He also asked his girlfriend's dentist about the possibility of treatment. However, there was no evidence of how many dentists practice in Claimant's geographical area, what percentage of those dentists he contacted, or any efforts he made to find other dentists beyond public advertisements and personal connections. Nor is there any evidence that Claimant explored the possibility of treatment from any dentists from other geographic areas.

CONCLUSIONS OF LAW:

1. Claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He must establish by sufficient credible evidence the character and extent of the injury, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton, supra*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

Defendant Must Pay for Claimant's Prescription for Paxil

2. For reasons that remain unclear, Defendant has persistently contested its obligation to pay for Claimant's prescription for Paxil, despite having accepted his depression as causally related to his workplace injury. Defendant contested its obligation to pay for this medication in *Kibbie I*, and the Department rejected that denial as unsupported by any explanation. *Kibbie I*, Conclusion of Law No. 32.

3. Under Workers' Compensation Rule 12.1710, an employer who seeks to discontinue payments for medical benefits must show grounds for discontinuance. Such grounds may include, but are not limited to, proof that the specified service or supply is no longer medically necessary and/or causally related to the compensable injury. In appropriate circumstances, an injured worker's documented pattern of noncompliance with prescribed medical treatment may also provide sufficient grounds for discontinuance. *Id.*
4. Billing records show that Defendant has paid for Paxil after the Department ordered it to do so in *Kibbie I*. See Finding of Fact No. 18, *supra*. Defendant must therefore show grounds for terminating such payments, such as by showing that Paxil is no longer medically necessary or causally related to Claimant's workplace injury. Workers' Compensation Rule 12.1710.
5. Defendant has supplied absolutely no evidence that Claimant's need for Paxil is no longer medically necessary. Nor has it supplied any evidence that undermines the causal relationship between Claimant's 2008 workplace injury and his current need for Paxil. Its only expert witness did not testify about Paxil. See Finding of Fact No. 19. Defendant provided no evidence of Claimant's noncompliance with any medical treatment.
6. Defendant argues that Claimant's pre-injury use of antidepressants makes it impossible for him to prove a causal connection between his injury and his current need for Paxil. This argument is unpersuasive, particularly given that Defendant has accepted depression as causally related to Claimant's workplace injury and Defendant has offered no expert opinion relating to Paxil.
7. Equally unpersuasive is Defendant's argument that Claimant cannot prove a causal relationship between his workplace injury and his current need for Paxil because he did not take Paxil between 2009 and 2015. First, I do not find it persuasive whether Claimant took Paxil during that period because that entire period elapsed before the Department ordered Defendant to pay for Paxil in *Kibbie I*. Second, I find Defendant's statement that Claimant did not take Paxil during that period factually incorrect given the pharmacy records discussed *supra* at Finding of Fact No. 18.
8. Given the Department's prior order for payment of Paxil in *Kibbie I*, combined with Defendant's acceptance of depression as a covered condition, Dr. Miller's unrefuted opinion testimony, and the lack of evidence that anything has changed since the *Kibbie I* decision, I find that Claimant's present need for Paxil is causally related to his 2008 workplace injury and that Paxil is reasonable and necessary treatment for his depression. Therefore, Defendant must pay for Claimant's Paxil.

Defendant Need Not Pay for Claimant's Prescription for Cialis

9. The parties have offered competing expert opinions concerning the asserted causal relationship between Claimant's 2008 workplace injury and his prescription for Cialis.

10. When presented with competing expert testimony, the Commissioner has often used five-factor analysis to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *See Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).
11. However, the Department has also held because a claimant bears the burden of proof on issues of causation, in the final analysis it is [his] expert's credibility that matters most. More to the point, merely stating a conclusion to a reasonable degree of medical certainty does not necessarily make it so, even if no more credible opinion is offered. *Meau v. The Howard Center*, Opinion No. 01-14WC (January 24, 2014). In *Meau*, both parties presented causation experts, but the Department found neither expert's opinion compelling. Thus, despite the weaknesses in [the defendant's expert's] analysis, the Department concluded that the claimant's expert's causation opinion was not strong enough to persuade it. The claimant in that case therefore did not sustain her burden to prove causation. *See id.*
12. Here, as in *Meau*, I find that neither party has advanced a persuasive expert opinion concerning the causal origin of Claimant's asserted need for Cialis. *See Findings of Fact Nos. 26-35.* Claimant therefore has not sustained his burden of establishing a causal connection between his 2008 workplace injury and his asserted need for Cialis. As such, Defendant need not pay for this medication.

Defendant Need Not Pay Claimant's Outstanding Dental Balance

13. Vermont law limits an employer's liability for medical treatment to the amounts specified for particular services, drugs, devices, and equipment pursuant to a schedule of fees and rates. *See* 21 V.S.A. § 640(d); Workers' Compensation Rule 40.011.
14. Generally, the maximum allowable for individual services is the maximum amounts specified in Appendix I to Workers' Compensation Rule 40, unless a health care facility's charge is less than the amount in the Appendix. *See* Workers' Compensation Rule 40.021(A). For procedures having no code listed in that Appendix, the maximum allowable payment shall not exceed 83% of the charge for the service. *Id.*
15. The Department's rules expressly prohibit the practice of requiring an injured worker to pay medical providers for treatment of compensable work-related injuries. *See* Workers' Compensation Rule 40.021(B).
16. The Department may make exceptions to the maximum allowable fees "[i]f an employee or medical provider demonstrates to the satisfaction of the Commissioner that reasonable and necessary treatment, or a related medical service, is not reasonably available at a fee consistent with this fee schedule[.]" *See* Workers' Compensation Rule 40.080.

17. Appendix I to Rule 40 does not provide maximum fee amounts for the codes appearing on Vernon Family Dentists, LLC's bill (D2470, D2950, D2954). *Cf.* Finding of Fact No. 42. Therefore, the maximum allowable payment for the services corresponding to those codes is 83 percent of the amount charged for those services. *See* Workers' Compensation Rule 40.021(A).
18. Thus, CorVel, acting as an agent for Defendant's insurer, properly reduced the allowable charges for those services to a maximum of 83 percent of their billed amount. *See* Finding of Fact No. 43.
19. There is no evidence which would support a finding that no other dentist was reasonably available to provide the services Dr. Shlafstein performed on August 23, 2017 for fees consistent with the provisions of the rules set forth above. *See* Finding of Fact No. 46. As such, there is no basis on which to grant an exception under Workers' Compensation Rule 40.080. Nor is there any evidence that Defendant agreed to pay a higher price for Dr. Shlafstein's services as might justify an exception from the Workers' Compensation Rules' provisions.
20. Therefore, Defendant need not pay any remaining balance for the dental services Dr. Shlafstein performed on August 23, 2017.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is **ORDERED** to pay for Claimant's prescription for Paxil. Defendant is not required to pay for Claimant's prescription for Cialis. Defendant is not required to pay any additional funds to Vernon Family Dentists, LLC for services rendered on August 23, 2017. Claimant shall be entitled to costs and attorneys' fees associated with his claim for Paxil, in amounts to be determined in accordance with 21 V.S.A. § 678.

DATED at Montpelier, Vermont this 1st day of March 2019.

Lindsay H. Kurrle
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.