

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WAUWATOSA

and

WAUWATOSA PROFESSIONAL FIREFIGHTER'S ASSOCIATION LOCAL 1923

Case 128

No. 66089

MA-13421

Appearances:

Beth Thorson Aldana, Assistant City Attorney, 7725 W. North Avenue, Wauwatosa, Wisconsin, appearing on behalf of the City of Wauwatosa.

Scot Fridrick, Vice President/Grievance Chairman, P.O. Box 26214, Wauwatosa, Wisconsin appearing on behalf of the Wauwatosa Professional Firefighter's Association Local 1923.

ARBITRATION AWARD

The City of Wauwatosa, hereinafter City or Employer, and the Wauwatosa Professional Firefighter's Association Local 1923, IAFF-CLC, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a Commissioner or member of the Commission staff to hear and decide the instant grievance. The undersigned was so appointed. A hearing was held on September 6, 2006 in Wauwatosa, Wisconsin. The hearing was not transcribed. The record was closed on October 10, 2006, upon receipt of all post-hearing written arguments.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

There are no procedural issues to be decided. The parties stipulated as to the substantive issues to be determined in this case:

Did the City violate the collective bargaining agreement (Article VIII Section 1 sub H) when the City's drug plan administrator denied filling the full amount of a prescription medication as prescribed by a doctor? If so, what is the appropriate remedy?¹

¹ Although not the same words utilized by the Union at hearing or the Employer or Union in written argument, this is the essence of the dispute to be resolved.

FACTS

The Grievant² herein has a history of prostate cancer. Post-surgical removal of the prostate, his physician prescribed Cialis, one pill every other day. The initial prescription was for one month's supply of 15 pills, with three (3) refills. Grievant was surprised when the pharmacist failed to fill the complete prescription, initially denying any pills at all and subsequent to contact between his physician and RESTAT, the City's pharmaceutical benefit manager, he was given eight (8) pills rather than the prescribed 15. Each time Grievant has sought to fill the prescription for 15 pills, he has been given 8. Grievant's physician has given Grievant Cialis samples to augment the amount of Cialis received through the City's health plan. Grievant has had no indication from his physician as to how long Cialis therapy would be prescribed.

The Employer, through Carol Thomas, payroll and benefits manager, and Rae Ann Beaudry, Vice President of Health Care Consultants, Inc., have denied Grievant 15 Cialis tablets per month based on their contention that Cialis is a "lifestyle" drug that is not medically necessary and, therefore, not covered by the City of Wauwatosa's employee benefit plan with the Union. However, the Employer has authorized 8 Cialis pills per prescription co-payment based on its contention that the industry standard for Cialis is 6 to 8 pills per month.

Additional facts will be presented and discussed in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

Article VIII – Insurance

Section 1: Health Insurance.

Effective January 1, 2005 and continuing for the term of this Agreement and its extensions, the health insurance coverage, at the City's expense, shall be identical to those provided to the employees on December 31, 2004 with the following modification:

...

H. Retail Prescription. Effective January 1, 2005, employees shall pay \$12 for each generic prescription, \$20 for each formulary prescription, and \$31 or 20% (whichever is greater) not to exceed \$65 per prescription for each non-formulary prescription. Effective January 1, 2007, employees shall pay \$15 for generic prescriptions, \$24 for

² Although the Grievant waived his HIPAA rights on the record so that his medical condition could be discussed, in the interests of preserving his privacy, neither his name nor his initials are being used.

formulary prescriptions, and \$40 or 20% (whichever is greater) not to exceed \$80 per prescription for non-formulary prescriptions. Effective November 1, 1994, the quantity of prescribed drugs available each time a prescription is filled under the RESTAT drug card program shall be the greater of 100 units or a 34 day supply.

RELEVANT PROVISIONS OF GROUP HEALTH CARE BENEFITS
SUMMARY PLAN DESCRIPTION

INTRODUCTION

This booklet is the primary source of information about your benefit program. It includes information you need to know about how to qualify for benefits, available benefits and how to file a claim for benefits. Although this Summary Plan Description should be read in its entirety, some sections will be of greater interest to you than others. Read those first. Then proceed to the other sections.

. . .

COVERED EXPENSES

Covered expenses are the actual cost to you of the Reasonable Charges for the services and supplies listed below. The service or supply must be:

Medically necessary,

Required for treatment, and

Recommended and approved by the attending Physician unless noted otherwise in the services listed below.

Covered Expenses also includes the actual cost to you of the Reasonable Charges for certain routine or preventive services and supplies, but only if specifically described in the Plan. These services and supplies must be recommended and approved by the attending Physician.

Covered Expenses are limited as described in the Plan.

COVERED SERVICES

	Payment Percentage	
	<u>Network</u>	<u>Non-Network</u>
Prescription Drug Card		
Rx Copays:		
Generic		\$10.00
Brand Formulary		\$14.00
Non Formulary		\$20.00
Mail Order Copays:		
Generic		\$ 8.00
Brand		\$13.00

PRESCRIPTION DRUG BENEFITS

Benefits are payable for all charges for prescription legend drugs as described in this section. The coinsurance and annual out-of-pocket limits of the Plan do not apply to this section.

a. Definitions: The following definitions apply to this section only:

Brand Name Drug: a prescription legend drug which meets the following requirements: (1) it complies with the Food and Drug Administration (FDA) standards; (2) it is an innovator drug; and (3) it is or was at one time under patent protection.

Mail Order and Retail Co-Payment: the amount to be paid by the participant toward the total cost of a covered drug or covered supply. It applies to each separate prescription order or refill of a covered drug or covered supply. The Retail co-payment amounts are \$20 for Non-Preferred Brand, \$14 for Preferred Brand, and \$10 for Generic. The Mail Order copay amounts are \$13 for Brand and \$8.00 for Generic.

Covered Drugs: the following medically necessary drugs when dispensed by a provider: (1) any prescription legend drug; (2) any medicine the provider compounds which contains a prescription legend drug and is not excluded under the Plan; (3) oral contraceptives for birth control; and

(4) allergens; (5) prescriptions for infertility; and (6) injectable insulin. This includes refills of covered drugs. In addition, the following conditions must be met:

- (1) a prescription order by a physician is always made for it;
- (2) a separate charge equal to, or more than the co-payment is usually made for it; and
- (3) it's not completely consumed at the time and place of the provider dispensing it under the prescription order.

Covered Supplies: the following medically necessary supplies when dispensed by a provider: (1) needles; and (2) syringes. A prescription order by a physician must be made for the covered supply.

Generic Drug: a prescription legend drug which meets the following requirements: (1) it complies with the Food and Drug Administration (FDA) standards; and (2) it is a multi-source drug which has never been under patent protection.

Participating Provider: a provider who has contracted to be a participating pharmacy with Restat.

Prescription Legend Drug: any medicine for which the Federal Food, Drug and Cosmetic Act, as amended, requires its label to contain the warning "Caution: Federal Law prohibits dispensing without prescription" or similar wording.

Prescription Order: the lawful written request made by a physician for dispensing a covered drug to a participant.

Provider: a pharmacy, pharmacist, physician, hospital or other entity with a license or registration to lawfully dispense prescription legend drugs.

b. Benefits

- (1) **Covered Drugs and Covered Supplies Dispensed by a Participating Provider.** Subject to the co-payment shown above, the Plan will pay to a participating provider the benefit amount agreed to in that provider's participation agreement for each covered drug or covered supply purchased by or for a

participant while his/her coverage is in force under the Plan. The Participant is liable to the provider for each co-payment for each covered drug or covered supply. The participating provider has agreed to accept the sum of the co-payment and the Plan benefit payment as payment in full for the covered drug or covered supply.

. . .

c. **EXCLUSIONS AND LIKE BENEFIT LIMITATIONS:** This prescription drug program does not provide benefits for the following:

- (1) Administration of a covered drug by injection or other means.
- (2) Devices, appliance or durable medical equipment.
- (3) Refills or covered drugs which exceed the number the prescription order calls for;, [sic] or refills of covered drugs after 1 year from the date of such order.
- (4) Covered drugs usually not charged for by the provider, or a covered drug for which the provider's actual charge billed for the covered drug is less than the co-payment.
- (5) Covered drug for which benefits are paid elsewhere under the policy, including but not limited to drugs used in connection with covered transplants.
- (6) Covered drugs completely consumed at the time and place of the provider's dispensing the covered drugs under the prescription orders.
- (7) Drugs or medicines not covered under the Plan. (See General Exclusions Section).

Limitations. Benefits are limited to: (1) the greater of 100 units or a 34-day supply of each drug, other than oral contraceptives; (2) no more than a 90-day supply of each covered [sic] dispensed by the mail order pharmacy; or (3) no more than a three month supply of oral contraceptives at one time.

EXCLUSIONS UNDER ALL PHASES OF COVERAGE

The following are not covered by your Benefit Plan:

[Treatment, services and supplies covered by Worker's Compensation, Veterans Administration, federal or state agency, Medicare, or military action. Cosmetic surgery, exams requested by third parties, eyeglasses, contact lenses or hearing aids, nursing facility or convalescent care unless specifically covered, treatment services, etc. provided by participant's immediate family or anyone living with participant, custodial or rest care, experimental or investigative treatments, supplies and equipment for a participant's comfort. Treatment, services and supplies for, or leading to, sex transformation surgery, including hormones. Therapy services except as specifically provided, dental services except as specifically provided, etc.]

25. Retin-A, Minoxidil, Rogaine or their medical equivalent in the topical form, unless medically necessary as determined by the Claim Administrator.

[Motor vehicles, treatment used in connection with treatment, services, etc. not covered by the plan; treatment, etc. for which the participant has no obligation to pay; treatment for which proof of claim isn't provided to the Claim Administrator in accordance with the Plan.]

POSITIONS OF THE PARTIES

The position of the Union is straight forward: The Grievant was prescribed Cialis as treatment subsequent to prostate surgery. Grievant's physician has directed him to take one Cialis pill every other day to promote re-generation of nerves and blood vessels. After RESTAT initially denied coverage for Cialis, Grievant's physician established that the drug was medically necessary for Grievant and, thereafter, the prescriptions were filled, but only eight tablets, rather than the fifteen the physician prescribed, were furnished. No where in the collective bargaining agreement between the parties or in the Summary Plan Description listing of medical/health benefits is there any statement with regard to "lifestyle drugs." The language of the collective bargaining agreement requires that the City pay for the "quantity of prescribed drugs available each time a prescription is filled under the RESTAT drug card program . . . the greater of 100 units or a 34 day supply." Grievant's physician prescribed 15 units per month, and that is the amount for which the City is obligated to pay.

The Employer contends that the City's health plan only requires the City to pay for prescriptions that are medically necessary. Cialis is not considered medically necessary because it is not medically necessary to have an erection. The practice of the City, however, is to pay for some "lifestyle" drugs when the consultants determine that the City should pay for some coverage. In such cases, the City pays for the "industry standard" which in the case of Cialis is 6 to 8 pills per month. The City has chosen to pay for the high end of the standard, thus Grievant received 8 pills per month, per co-pay.

The Employer also argues that the language of the collective bargaining agreement cited by the Union, “Effective November 1, 1994, the quantity of prescribed drugs available each time a prescription is filled under the RESTAT drug card program shall be the greater of 100 units or a 34 day supply” is misplaced. This is because the language must be read in conjunction with the requirement that the prescription must be “medically necessary” in order to qualify for any benefit. The City acknowledges that neither the collective bargaining agreement nor the Plan documents that are made available to employees in the bargaining unit reference any limits on lifestyle drugs and that the City has unilaterally decided to provide coverage for such drugs, but that such coverage is limited to industry standards.

The City also contends that the “100 units or 34 day supply” language was included in the collective bargaining agreement after a specific discussion regarding coverage for insulin for diabetics. It points to examples, such as inhalers, where the City has never paid for 100 inhalers per co-pay. Based on this, the City contends that the exceptions establish a past practice that the language requiring 100 units or a 34 day supply has not been applied to all prescriptions, relieving the City of the obligation to abide by that language in this matter.

DISCUSSION

There are no undisputed facts in this case. At issue is the question of whether the City violated the collective bargaining agreement by paying for only 8 Cialis pills per co-pay, rather than the 15 that Grievant’s physician prescribed for him each month (one pill every other day). The Employer’s argument, as succinctly stated in its reply brief, is that it was not obligated to pay for 15 pills because:

- (1) Cialis is not medically necessary because an erection is not medically necessary;
- (2) Cialis is a lifestyle drug;
- (3) The contract does not require payment of any amount of lifestyle drugs such as Cialis or Viagra which are not specifically mentioned;
- (4) The contract language cited by the Union applies only to medications that are medically necessary;
- (5) Even for medically necessary medications, past practice is that all medications are not paid at a level of the greater of 34 day supplies or 100 units;
- (6) The City unilaterally has paid for 8 pills per co-pay of Cialis or Viagra based on industry standard and is not contractually obligated to pay.

The City’s argument fails in numerous ways. Initially I note that except in the specific cases of Retin-A, Minoxidil, Rogaine and their medical equivalents, the determination of what is or is not medically necessary is a determination to be made by a medical provider. With respect to these particular substances, the City has, in its Group Health Care Benefits Summary Plan Description (SPD), reserved to the Claim Administrator the right to determine medical necessity. Because the SPD is silent as to who determines medical necessity as to other drugs and medications, general rules of contract interpretation require a finding that it is not the Claim

Administrator that makes the determination of medical necessity. Logically, then, with respect to any other drugs, it is the medical provider that determines medical necessity.

Grievant's medical provider determined that Cialis was medically necessary and prescribed it, one pill every other day. He wrote prescriptions for 15 pills per month. Initially, when Grievant presented his prescription, RESTAT denied any coverage. Subsequent to Grievant's medical provider being in contact with RESTAT, Grievant was given eight pills per co-pay. Given the language of the SPD, one can only assume that the medical provider told RESTAT that the Cialis was medically necessary, or RESTAT would not have provided coverage for any Cialis pills, not 15 and not 8. In addition, in a letter dated August 18, 2006, Grievant's medical provider has stated that ". . . and therefore Cialis is medically necessary."

By its own actions, or that of its agent, RESTAT, the Employer has constructively conceded that Cialis is medically necessary, leaving only the question of whether the City should pay for 8 or 15 pills each month, subject to the co-pay that is not at issue here. The City makes a number of arguments in support of its position that it need not provide coverage for the 15 pills sought by the Union on behalf of the Grievant herein.

The City contends that Cialis is a lifestyle drug, not medically necessary, and therefore no coverage is afforded by the City's health plan. In this case, Cialis is medically necessary. Neither the collective bargaining agreement nor the SPD make reference to lifestyle drugs, nor does either of these documents distinguish in any way between medications such that the Employer may determine the number of pills properly in the prescription, rather than the medical provider making such a determination. The SPD defines covered drugs as follows:

Covered Drugs: the following medically necessary drugs when dispensed by a provider: (1) any prescription legend drug; (2) any medicine the provider compounds which contains a prescription drug and is not excluded under the Plan; (3) oral contraceptives for birth control; and (4) allergens; (5) prescriptions for infertility; and (6) injectable insulin. This includes refills of covered drugs.

The conditions that must be met to receive the benefits of the plan, i.e., for the City to pay all but the co-pay for a prescription are as follows:

- (1) a prescription order by a physician is always made for it;
- (2) a separate charge equal to, or more than the co-payment is usually made for it; and
- (3) it's not completely consumed at the time and place of the provider dispensing it under the prescription order.

Nothing contained in this language precludes Grievant's claim that the City pay for the number of pills contained in the physician's prescription order. Nothing in this language states that the City can limit the number of pills to an "industry standard" for Cialis or any other drug.

The City contends that it is not obligated to pay for lifestyle drugs, but that it has unilaterally determined that it would make such payment, but only for the number of pills that constitute the industry standard. The City relies on such unilateral past practice as a basis for not paying for the full amount of the prescription at issue here, less the co-pay. Even if the record in this matter had established such a past practice on the part of the City, it is axiomatic that a past practice is not binding on the parties to a collective bargaining agreement unless the practice is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time and accepted by the parties. A past practice has clarity, consistency, and acceptability, and there is an implied mutuality.³ None of these conditions are met here.

The Union relies on the language of Article VIII, Section 1.H.:

Effective November 1, 1994, the quantity of prescribed drugs available each time a prescription is filled under the RESTAT drug card program shall be the greater of 100 units or a 34 day supply.

The Employer again relies on past practice and contends that that it often does not pay the greater of 100 units or a 34 day supply. It points to the bargaining history of this language which was developed to address the insulin needs of diabetic employees and beneficiaries. The City argues that this language cannot be read literally, and that it has never filled a prescription for, by way of example, more than one inhaler at a time. Providing 100 inhalers would make no sense. While that is probably true, there was no testimony or discussion as to the number of "puffs" or "units" contained within an inhaler, which might very well be 100 units. The City also points to multiple sclerosis injectibles and states that it has never paid for the greater of 34 days or 100 units of this medication for one co-pay.⁴ The City contends that this past practice relieves it of the obligation to pay for 15 Cialis pills. Again, the City's reliance on such past practice is misplaced.

Unfortunately, the contract language that is key to this dispute is repeated, almost verbatim in the SPD:

Limitations. Benefits are limited to: (1) the greater of 100 units or a 34-day supply of each drug, other than oral contraceptives; (2) no more than a 90-day supply of each covered [sic] dispensed by the mail order pharmacy; or (3) no more than a three month supply of oral contraceptives at one time.

³ See, *Elkouri & Elkouri, How Arbitration Works*, pp. 607-609 (6th ed., 2003)

⁴ There was no testimony regarding the frequency of use of such injections and, therefore, the fact that the City does not pay for 100 units or a 34 day supply of multiple sclerosis injections does not provide any insight as to the meaning of the contract clause or practice of the City.

Because the language is susceptible to requiring the City to pay for 100 units of Cialis, rather than the 15 pills that constitute a 30 day supply for the Grievant, it is necessary to construe the language in the most reasonable manner possible that addresses the issue, while not adding to or deleting any language from the collective bargaining agreement. While the Employer appears to argue that it meets its obligation by paying for only 8 Cialis pills, such a reading of the language would render the language meaningless, as the number of pills could be reduced to one (1) and require the employee to pay an additional co-pay for each pill received.

Record testimony established that the language at issue was included to ensure that diabetics had coverage for one co-payment of 100 units, or if they were taking several injections a day, a 34 day supply. Without the benefit of the language in the predecessor contract regarding the limitations on the drug benefit, it is impossible to fully establish the nature of the change, and there is no evidence as to which party drafted the language at issue which is, at the very least, somewhat confusing, if not ambiguous. However, the contention that the reference to 100 units was specifically intended to relate to units of insulin is uncontested on this record, with the result that portion of the contract clause can be ignored for purposes of deciding this case. That leaves, with great clarity, the fact that the benefit is to be a 34 day supply of a drug, provided that the co-payment is made.

Having determined that a 34 day supply is the benefit to be provided, there is no question that the City and RESTAT must honor the medical provider's prescription and pay for 15 Cialis pills, with one co-payment by the Grievant.

Based on the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The grievance is sustained and the Employer is ordered to provide the number of Cialis pills per month prescribed by the Grievant's physician, provided the Grievant makes the proper co-payment.
2. The Employer is to make the Grievant whole for any and all out-of-pocket costs he has incurred in order to take one Cialis pill every other day when the Employer only paid for 8 pills per month.

The Undersigned will retain jurisdiction for 60 days following the issuance of this award for purposes of resolving issues of remedy.

Dated at Madison, Wisconsin, this 17th day of November, 2006.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

