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CAUSE NO. 471-00077-2020

LEONARD BEASLEY,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	
v.	§	**471ST JUDICIAL DISTRICT**
	§	
GOVERNMENT EMPLOYEES	§	
INSURANCE COMPANY dba GEICO,	§	
Defendant.	§	**COLLIN COUNTY, TEXAS**

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE CONTROVERTING AFFIDAVITS OF ROBERT NOCERINI, MD, EDWARD LE CARA, D.C. AND JANA SCHIEBER, RN

TO THE HONORABLE COURT:

Defendant Government Employees Insurance Company (hereinafter "Defendant" or "GEICO"), files its Response to *Plaintiff's Motion to Strike the Controverting Affidavits of Robert Nocerini, MD, Edward Le Cara, D.C. and Jana Schieber, RN*, and in support thereof would respectfully show as follows:

I. BACKGROUND AND SUMMARY

This suit arises from an automobile accident that occurred on May 10, 2018 between Plaintiff Leonard Beasley ("Plaintiff") and nonparty Alicia Acevedo ("Acevedo"). Plaintiff sued GEICO alleging he is entitled to recover uninsured/underinsured motorist ("UM/UIM") benefits under his GEICO policy. Pursuant to Section 18.001, Plaintiff filed the medical and billing affidavits reflecting medical care received after the accident. In response, GEICO filed the controverting affidavits of Robert Nocerini, MD, Edward Le Cara, D.C. and Jana Schieber, R.N. (attached to Plaintiff's Motion as Exhibits A, B and C), controverting *some* of Plaintiff's treatment and charges. Plaintiff moved to strike all three affidavits alleging none of them provided reasonable notice and Dr. Le Cara fails to show how he is qualified to controvert the reasonableness of the amounts of the charges.

In his motion, Plaintiff selectively cites to the affidavits, ignoring the full content of the affidavits. In actuality, the affidavits of Nocerini, Le Cara and Schieber set forth a foundation and basis for their conclusions and Le Cara is clearly qualified by his years of experience. Accordingly, Plaintiff's motion should be denied in its entirety.

II. ARGUMENTS AND AUTHORITIES

A. STANDARD FOR CHAPTER 18 COUNTER AFFIDAVITS.

Texas Civil Practice and Remedies Code section 18.001 is an evidentiary statute that accomplishes three things: (1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges that would otherwise be inadmissible hearsay; (2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and (3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed counter-affidavit. TEX. CIV. PRAC. & REM. CODE ANN. § 18.001(b), (e)–(f); *Castillo v. Am. Garment Finishers Corp.,* 965 S.W.2d 646, 654 (Tex. App.—El Paso 1998, no pet.); *Beauchamp v. Hambrick,* 901 S.W.2d 747, 749 (Tex. App.—Eastland 1995, no writ).

Plaintiff is attempting to place a much larger burden on Defendant than exists. Section 18.001(f) sets forth the requirements of a counter-affidavit, which are relatively simple:

> The counteraffidavit must give reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

TEX. CIV. PRAC. & REM. CODE ANN. §18.001(f).

The opposing party can force the offering party to prove reasonableness and necessity by expert testimony at trial by filing a proper controverting affidavit. *Castillo,* 965 S.W.2d at 654. In

other words, the only effect of a valid counteraffidavit is that it prevents the plaintiff from relying solely on his own Chapter 18 affidavits at trial as to the specific care and expenses properly challenged by counteraffidavit.

Plaintiff does not challenge the qualifications of Dr. Nocerini or Ms. Schieber, he only complains that their counter affidavits do not give reasonable notice of the basis on which Defendant intends to controvert Plaintiff's claims at trial. Plaintiff challenges Dr. Le Cara's qualifications as well as stating that he does not provide reasonable notice for his conclusions. As set out below, Plaintiff's Motion should be denied.

B. JANA SCHIEBER'S AFFIDAVIT MEETS THE REQUIREMENTS OF SECTION 18.001(F).

1. Jana Schieber is Qualified Pursuant to Section 18.001(f).

While Plaintiff does not explicitly attack Schieber's qualifications, he undermines her qualifications by arguing her counter affidavit is not reliable because she relies on databases. *See* Plaintiff's Motion, 3-4. However, as Ms. Schieber's affidavit establishes, and as noted in Plaintiff's Motion as to Ms. Schieber's qualifications, Ms. Schieber is a Registered Nurse and a medical billing consultant. *See* Plaintiff's Motion, P. 3; Plaintiff's Exhibit A (Curriculum Vitae, P. 1) (Exhibit A to Ms. Schieber's affidavit). She has been a consultant "responsible for reviewing medical bills for accurate coding, reasonableness of charges and validation of medical care provider." (Curriculum Vitae, P. 1). She has expertise gained through clinical training and experience, utilization management training and experience with managed care approval/denial processes according to national standards per diagnosis, treatment, and client medical benefits." *Id*. She utilizes "national database to obtain median costs for diagnosis, treatment, and future treatment in the geographic area of the medical provider." *Id*. She is certified in Utilization Review and a licensed Registered Nurse. *Id*.

In addition, Ms. Schieber has been a nurse auditor for more than five years. *Id*. She has used nationally recognized and accepted databases to verify line-item charges are within usual, customary, and reasonable price ranges for the geographical area where the service was provided, is knowledgeable in the proper use of industry standard programs and codes and is knowledgeable in the use of Medicare Compliance Manuals. *Id*. She has applied her nursing education and experience along with her knowledge of the appropriate codes for medication and procedures to line-item billing to determine the reasonableness of the charges in specific geographic areas. *Id*. In fact, her skill and experience in analyzing and reviewing coding and determining customary and usual charges goes back almost 20 years. *Id.* Her experience as a registered nurse and claim analysis goes back even farther. *Id*. In sum, Ms. Schieber is qualified "by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit" as required by section 18.001(f).

In the Tyler decision, *In re Brown*, the court outlined Ms. Schieber's qualifications as to case management and claim analysis going back to 1999. "As part of that experience, she maintained and worked with databases for medical costs. In addition, she is familiar with medical coding and billing practices." *In re Brown*, No. 12-18-00295-CV, 2019 WL 1032458, at *3 (Tex. App.—Tyler Mar. 5, 2019, orig. proceeding). As in this matter, she reviewed the billing records and compared the rates to those contained in her databases, opining that several of the billed amounts were "not reasonable as they are not within the amount which is considered to be the prevailing usual and customary charge for the same service for providers in the geographic area" of the provider. *Id*.

The Tyler Court of Appeals then reviewed the Supreme Court's decision in *Gunn v. McCoy*, specifically noting that the Supreme Court held that "insurance subrogation agents are

qualified to use their databases to create affidavits regarding the reasonableness and necessity of a plaintiff's medical expenses" and that section 18.001(c)(2)(B) "does not require that the affidavits be made by a records custodian *for a medical provider*." *Id*., *citing Gunn v. McCoy*, 554 S.W.3d 645, 674-75 (Tex. 2018) (emphasis in original). The Supreme Court further emphasized that "insurance companies keep records and databases of both the list prices and the actual prices of specific treatments and procedures" and as a result, "insurance agents are generally well-suited to determine the reasonableness of medical expenses." *Id*.

The Tyler court determined that Ms. Schieber's experience and knowledge qualified her to make a section 18.001(f) counteraffidavit (similar to the axiom that a person need not be educated or trained in the same field to opine as to the standards of a different field if the fields of expertise overlap). *Id*.; *see also Perez v. Boecken*, No. SA-19-CV-00375-XR, 2020 WL 3074420, at *10-11 (W.D. Tex. June 10, 2020) (finding an expert witness on medical charges who was a nurse and owner of a medical bill auditing business trained in medical coding and medical bill auditing was qualified to testify as an expert on the plaintiff's medical charges).

In sum, Ms. Schieber has years of training and experience in reviewing and analyzing billing to determine whether such billing falls within the range of what is considered reasonable and customary in a specific geographic area.

2. Jana Schieber Provides Reasonable Notice Under Section 18.001(f).

Plaintiff also challenges Jana Schieber's opinions as not providing reasonable notice, claiming her opinions not reliable, seemingly triggering the Rule 702 requirements as to reliability of opinions. However, Ms. Schieber is not required to meet the requirements of expert witness testimony under Rule 702, but merely meet the requirements of section 18.001(f), contrary to Plaintiff's argument. Section 18.001(f) incorporates from Texas Rule of Evidence 702 only the

portion that defines when a person is qualified to give an expert opinion. Section 18.001(f) did not incorporate the remainder of Rule 702 about whether the expert's knowledge will assist the jury to understand the evidence or determine a fact in issue. But the omitted portion—that the witness's specialized knowledge will assist the jury—is the foundation for the *Robinson/Gammill* reliability factors. *See* Harvey Brown & Melissa Davis, *Eight Gates for Expert Witnesses: Fifteen Years Later*, 52 Hous. L. Rev., 1, 3-8, 39-42 (Fall 2014).

Instead of incorporating the relevancy, reliability, and foundation requirements of Rules 402 and 702, the Legislature chose "reasonable notice of the basis on which the party serving it intends at trial to controvert the claim . . . ." TEX. CIV. PRAC. & REM. CODE § 18.001(f). "Reasonable notice" is a far less rigorous standard than the *Robinson/Gamill/*Rule 702 factors. The Legislature could have required counter affidavits to establish the affiant's opinions meet such factors, but it did not. There is no purpose in requiring the counteraffidavit to satisfy the expert testimony requirements of Rule 702 because if the counteraffidavit is proper, then neither the original affidavit nor the counteraffidavit are admissible at trial, meaning the Rule 702 factors would not matter. Accordingly, Plaintiff's argument that the counteraffidavit must meet the Rule 702/*Robinson/Gammill* requirements would greatly expand the burden on counter affidavits well beyond the scope of the requirements of the statute, something the Legislature clearly did not intend.

Plaintiff also specifically complains that Schieber's determination of a "reasonable allowance" does not match what his recoverable medical expenses are, however, he fails to account for the fact that the medical providers he cites to accepted his Medicare insurance as payment for the services rendered. Schieber's task was to provide a *reasonable allowance* for the amount of the treatment rendered and it is well known that Medicare's reimbursement rate is a fraction of

what is typically considered reasonable. Plaintiff fails to include Schieber's analysis from providers whose charges were not submitted to Medicare. Schieber's reasonable allowance analysis of the charges of those providers determined the reasonable allowance was only slightly less. *See* Plaintiff's Motion Exhibit A, Exhibit B.

Ms. Schieber expressly stated that the reasonable amounts charged for the procedures are "derived from other like providers rendering the same type of service in the same geographical region of each provider or facility" and "the geographical region is determined by the zip code of where the services are rendered." *See* Plaintiff's Exhibit A, P. 2. Thus, Ms. Schieber derived the amount of usual and customary charges in the geographic area based on the zip codes of the Plaintiff's providers. She then set forth these opinions and the bases for them in her affidavit and the accompanying attachments (e.g., the charge exceeds the reasonable amount when compared to other charges in the same geographic area" or "the service billed would not typically be performed with other procedures on the same date"). *See In re Brown*, 2019 WL 1032458 ("When the amount 'allowed' is less than the amount included in the affidavit, Schieber controverted the affidavit. As a result, Schieber's affidavit gave reasonable notice of the claims she controverts and why." *See* TEX. CIV. PRAC. & REM. CODE § 18.001(f).) Schieber's counter-affidavit provided an item-by-item, day-by-day, to-the-penny breakdown for each provider. Plaintiff's claim that a counter affidavit with such an extreme level of detail is not sufficient notice is mind boggling.

Ms. Schieber's counteraffidavit complies with section 18.001(f). The Plaintiff has reasonable notice of the basis on which GEICO will challenge any charges at trial.

C. DR. NOCERINI'S AFFIDAVIT GIVES REASONABLE NOTICE OF THE BASIS ON WHICH DEFENDANT INTENDS TO CONTROVERT PLAINTIFF'S MEDICAL CARE AT TRIAL.

Plaintiff challenges Dr. Nocerini's counter-affidavit as failing to show a reliable foundation or providing reasonable notice of the basis for challenging the treatment and expenses. First, a

reliable foundation is not required in a counter-affidavit. *See* Section II.B above. Also, Dr. Nocerini's counter-affidavit provided ample and reasonable notice of the basis for his opinions.

Dr. Nocerini states that he reviewed published CPT codes corresponding to the services provided, provided the percentiles commonly accepted as reasonable, and based his opinions on his own extensive experience. *See* Dr. Nocerini's counter-affidavit attached to Plaintiff's Motion as Plaintiff's Exhibit B, pp. 1-2. Dr. Nocerini's opines that while the initial cervical and lumbar epidural steroid injections were necessary, the subsequent injections were not. Plaintiff claims Dr. Nocerini fails to indicate why the subsequent injections were not necessary, however Dr. Nocerini clearly states that since the initial cervical and lumbar epidural steroid injections had no significant lasting effect (providing relief for only a few days) and "[i]t is unlikely that further cervical and lumbar epidural steroid injections performed months later would have any significantly different effect." *See* Exhibit B to Plaintiff's Motion, Report, page 4 of 5.

Thus, Exhibit B to Plaintiff's own motion shows that Dr. Nocerini provided a reasonable basis for his opinion, i.e., that additional injections are not necessary when the first round of injections failed to have any lasting effect. Dr. Nocerini's counter-affidavit follows the statutory requirements: it establishes that Dr. Nocerini is qualified to render the opinion and provides reasonable notice of the basis for the challenge. Again, nothing more is required. As Dr. Nocerini's affidavit complies with section 18.001, the Plaintiff's motion should be denied.

D. DR. LE CARA IS QUALIFIED AND PROVIDES REASONABLE NOTICE OF THE BASIS OF GEICO'S CHALLENGE.

1. Dr. Le Cara is Qualified Pursuant to Section 18.001(f).

Plaintiff claims Dr. Le Cara is not qualified to render an opinion in this matter because he has only been operating **his own** clinic in the DFW area for two years. Plaintiff's attempts to minimize Dr. Le Cara's accomplishments are futile. As set forth in his counter-affidavit, Dr. Le

Cara has been a practicing chiropractor, athletic trainer and strength and conditioning specialist for over 19 years. *See* Dr. Le Cara's Counter-Affidavit attached to Plaintiff's Motion as Plaintiff's Exhibit C, p. 2. He has over 19 years' experience in integrated physical medicine/rehabilitation practice providing chiropractic treatment, medical management, and active rehabilitation to injuries to the spine, shoulder, hip, knee, and ankle, including persons injured in car accidents. *Id*. He has become familiar with billing and documentation requirements for chiropractic and physical therapy modalities as used in this case and has provided the basis for his familiarity with customary charges for such treatment, having his own clinic and treating similar patients. *Id*. He also teaches a Master's level soft tissue rehabilitation course, is board certified, and has published research regarding rehabilitation of injuries to the lower spine. *Id*. He has run his own clinic in the DFW area since 2018 and is well versed in the appropriate charges for the services rendered by a chiropractor in the area. *See* Exhibit C to Plaintiff's Motion, Exhibit A (Curriculum Vitae), 1. Clearly, Dr. Le Cara is qualified to render an opinion as to chiropractic treatment and cost.

2. Dr. LeCara's Affidavit Meets the Requirements of Section 18.001(f).

As shown above, there are two requirements that a controverting affidavit must meet: (1) it must give reasonable notice of the basis on which the party serving it intends to controvert the claim; and (2) it must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the original affidavit. TEX. CIV. PRAC. & REM. CODE ANN. §18.001(f). Plaintiff's own motion (and the attached exhibits) establish reasonable notice of the basis for Dr. Le Cara's opinions.

Dr. Le Cara must merely provide "reasonable notice." This is not a high standard. *See Hong v. Bennett*, 209 S.W.3d 795, (Tex. App.—Fort Worth 2006, no pet.) (appellate court held

the counteraffidavit was sufficient to provide reasonable notice where it stated none of the services were reasonable and necessary because the plaintiff was not seriously injured, the prognosis for the injuries was excellent with or without treatment due to the body's natural healing abilities, and the plaintiff waited five weeks after the accident).

Plaintiff's complaint that there is no reasonable notice of the basis of Dr. Le Cara's opinions is nonsensical. Specifically, Plaintiff complains that Dr. Le Cara fails to identify specific modalities and procedures, however the procedure as well as the corresponding CPT codes are listed for review right above the number of units in Dr. Le Cara's report which is incorporated into the affidavit by reference. *See* Exhibit C, Report of Dr. Le Cara, page 3 of 6. Moreover, Dr. Le Cara's reference to standards for documentation clearly relates to the standards required by the federal government, CPT Coding Manual and American Physical Therapy Association. If Plaintiff's counsel wants to question Dr. Le Cara further about the need (or requirements) for proper documentation, he will be given that opportunity at a deposition and/or trial.

Further, although Plaintiff leaves out much of Dr. Le Cara's affidavit, it sets forth detailed factual support for his conclusions: (1) the Plaintiff's additional treatment was not necessary "based on the available medical records;" (2) the medical records "did not substantiate" the treatment listed; and (3) "The patient's neck range of motion was normal without pain. Normal range of motion of the right shoulder was noted." *Id.* Thus, Dr. Le Cara's opinions are based on the Plaintiff's own records, his experience, and the standards involving chiropractic care, providing support for his opinions and reasonable notice of the basis for his opinions.

Dr. Le Cara's opinions are based on the factual details set forth above as contained in his counteraffidavit. Therefore, Dr. Le Cara provided reasonable notice of the basis for his opinion in accordance with Civil Practice and Remedies Code section 18.001(f). *See, e.g., Posada,* 2007 WL

1228668, at *4-5; *Ozlat v. Priddy*, 1997 WL 33798173, at *3-4 (Tex. App.—Eastland May 29, 1997, writ denied) (counteraffidavit stated that, based on the noncompliance with treatment and reaggravation of the plaintiff's condition, the treatment was not reasonable or necessary, thus providing reasonable notice of the basis on which the defendant intended to controvert the claimed medical expenses).

As evidenced by the counteraffidavit, Plaintiff has been given reasonable notice of Dr. Le Cara's basis to controvert which is all that is required. Plaintiff is apparently seeking or expecting information more appropriate for a deposition rather than a simple counteraffidavit. If Plaintiff's counsel wishes to ask Dr. Le Cara about his thought process, he is more than welcome to ask him at trial or a deposition if desired, but any further detail is not required in a counteraffidavit. Therefore, Plaintiff's motion should be denied.

III. CONCLUSION

TEXAS CIVIL PRACTICE & REMEDIES CODE §18.001(f) provides a method for Defendant to controvert the claims made by Plaintiff through the filing of a counter affidavit. Section 18.001 does not require that Defendant marshal all of its evidence, but instead, requires that Defendant set forth reasonable notice as to what it intends to controvert with regard to the claims being made by Plaintiff's medical providers. Defendant undeniably complied with section 18.001(f). The counter affidavits should not be struck due to any alleged lack of providing reasonable notice of the basis for Defendant's challenge to the reasonableness and necessity of treatment, as Dr. Nocerini, Dr. Le Cara and Ms. Schieber set forth reasonable notice of the grounds on which they challenge Plaintiff's treatment and cost. The counter affidavits give detailed background and factual support for the basis on which Defendant will challenge Plaintiff's treatment and cost at time of trial. Moreover, Dr. Le Cara is qualified by years of training and experience to make his

counteraffidavit. No more than that is required under section 18.001(f). Therefore, Plaintiff's Motion to Strike should be overruled and denied.

IV. PRAYER

Defendant respectfully prays that *Plaintiff's Motion to Strike the Controverting Affidavits of Robert Nocerini, MD, Edward LeCara, D.C. and Jana Schieber, RN* be denied and for all other relief to which Defendant show itself entitled in law or in equity.

Respectfully submitted,

By: */s/ Stacy Thompson*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on the following counsel of record on this the 31st day of December 2020 in accordance with the TEXAS RULES OF CIVIL PROCEDURE:

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