IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Ryndycz,	:	
Petitioner	:	
	:	
v.	:	No. 4 C.D. 2010
	:	Submitted: April 30, 2010
Workers' Compensation Appeal	:	
Board (White Engineering),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: May 26, 2010

Richard Ryndycz (Claimant) petitions for review from the Workers' Compensation Appeal Board's (Board) decision affirming the Workers' Compensation Judge's (WCJ) decision that allowed White Engineering (Employer) to reprice medical bills and affirmed the Utilization Review Determination that the chiropractic care was no longer palliative as of June 17, 2003. Finding no error in the Board's decision, we affirm.

On June 18, 2001, Claimant suffered a low back injury while working for Employer. Employer referred Claimant to a panel physician, Barry J. Burton, D.O. (Dr. Burton), and Claimant began receiving chiropractic services for his

resulting lower back and leg pain from Peter J. Szakacs, D.C. (Dr. Szakacs) and Darryl K. Warner, D.C. (Dr. Warner). Dr. Szakacs imposed restrictions on Claimant's lifting and carrying activities and recommended he be placed on light-duty. Employer paid Claimant's medical expenses and transferred him to a light-duty position. However, Dr. Burton examined Claimant on October 10, 2001, determined that he had recovered, and released him back to full, unrestricted job duties, despite the fact that his treating chiropractor, Dr. Szakacs, still only permitted light-duty work.

When Employer laid him off in October 2001, Claimant filed a claim petition alleging a disability as of his termination date, which Employer denied. Employer failed to file a notice of compensation payable, temporary notice of compensation payable or notice of compensation denial; therefore, Claimant also filed a penalty petition in May 2002. In a decision issued on June 19, 2003, WCJ McManus granted Claimant's claim and penalty petitions. He accepted the testimony of Claimant and Dr. Szakacs as credible in their entirety and rejected the testimony of Dr. Burton and Employer's fact witness. He determined that the chiropractic services of Dr. Szakacs and Dr. Warner, which amounted to $7,747, were provided for treatment of Claimant's work-related injury and that Employer was liable for payment under the Workers' Compensation Act (Act).[1] The WCJ ordered Employer to pay, *inter alia*, "for chiropractic services provided the Claimant for treatment of the June 18, 2001 injury . . . consistent with the provisions of [the] Act." No specific amount of medical fees was ordered.

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1 – 1041.4, 2501 – 2708.

Employer appealed to the Board, which affirmed, and this Court then affirmed on review. *White Engineering v. Workers' Compensation Appeal Board (Ryndycz)*, (Pa. Cmwlth., Nos. 862 and 2133 C.D. 2004, filed June 20, 2005).

While these appeals were pending, Employer also requested utilization review of the treatment provided to Claimant by Dr. Warner from July 31, 2002 onward. The reviewer, Mark Cavallo, D.C. (Dr. Cavallo), analyzed Claimant's treatment records, his personal statement and attempted to contact Dr. Warner, who did not return any of his phone messages. Based upon this information, Dr. Cavallo and the utilization review organization determined that Claimant's treatment was reasonable and necessary for the 44 visits from July 31, 2002, through December 2, 2002. However, the 70 chiropractic services provided from December 2, 2002, onward were deemed unreasonable and unnecessary because Claimant did not exhibit any clinical gains after that point.

Claimant petitioned for review of Dr. Cavallo's Utilization Review Determination. He testified before WCJ Desimone that he had been treating with Dr. Warner approximately twice a week since his initial visit on July 31, 2002; that the treatment relieved his back stiffness; and that his pain worsened if he did not go to his treatments. Dr. Warner testified that his treatment of Claimant was limited to spinal manipulation and electrical stimulation and that these treatments reduced Claimant's pain but did not result in overall improvement. WCJ Desimone agreed with Dr. Cavallo's determination that Dr. Warner's chiropractic treatment was not providing any benefit to Claimant and was not accomplishing the stated objectives of reducing pain and restoring function. He did not find Dr. Warner's testimony

credible because he failed to consider and address the ineffectiveness of his treatment. Therefore, WCJ Desimone affirmed the Utilization Review Determination and ordered that Employer was relieved of its obligation to pay for Dr. Warner's treatments provided after December 2, 2002.

Claimant appealed to the Board, which noted that WCJ Desimone's decision did not reconcile the differences between it and the prior decision of WCJ McManus issued on June 19, 2003. Therefore, the Board vacated and remanded for WCJ Desimone to address what impact, if any, WCJ McManus' decision had on the present litigation. WCJ Desimone issued another decision on December 7, 2005, in which he noted that WCJ McManus' decision did not refer to specific dates of treatment nor did it order payment of any specific amount in medical fees. While WCJ McManus stated that Dr. Warner's bills totaled $7,747, he ordered Employer to pay for chiropractic services "consistent with the Act." Even though WCJ McManus determined that the underlying action was a termination case, WCJ Desimone concluded that Employer's request for utilization review was filed in the context of Claimant's claim petition, which would render the utilization review request retroactive to all treatments. Claimant again appealed to the Board, which affirmed, and then filed an appeal with this Court.

We reversed the Board, holding that the time period for utilization review:

> permitted challenges only to the bills submitted after June 17, 2003, that is, no more than thirty days before the filing of the utilization review request, under 34 Pa. Code §127.404(b). The charges totaling $7747 were for

> services rendered through March 10, 2003, as indicated by Dr. Warner's Affidavit, Employee Ex. 8. Because those charges are for services rendered well before June 17, 2003, they became final and are not now subject to utilization review. The same applies to charges between March 10, 2003 and June 17, 2003. The Court shall remand for entry of an order calculating the amount of such charges and directing payment.

Ryndycz v. Workers' Compensation Appeal Board (White Engineering), 936 A.2d 146, 151-52 (Pa. Cmwlth. 2007). Specifically regarding the Board's Order, we reversed "to the extent that it affirmed the decision of Workers' Compensation Judge Desimone allowing [Employer] to challenge the award of $7747 in medical expenses of Dr. Darryl K. Warner." *Id.* at 152.

We also noted that both Claimant and Dr. Warner testified that the chiropractic treatments reduced Claimant's pain and stiffness and improved his ability to function. Because WCJ Desimone failed to address Claimant's evidence of the palliative effect of the chiropractic treatments, we remanded "for the WCJ to consider evidence of the palliative effect of the treatments rendered after June 17, 2003 and to weigh that evidence in determining whether to affirm the utilization review." *Id.*

Before the case was heard by the WCJ on remand, Employer's insurer repriced, in accordance with Section 306(f.1)(3)(i) of the Act[2], Dr. Warner's

[2] 77 P.S. §531(3)(i). That Section provides as follows:

> For purposes of this clause, a provider shall not require, request or accept payment for the treatment, accommodations, products or

(Footnote continued on next page…)

$7,747 charges for his chiropractic treatments before March 10, 2003, and the $1,620 owed between that date and June 17, 2003, to $6,811.17 and issued checks payable for the repriced amount plus interest.[3] Employer then filed a petition to review medical treatment seeking a determination as to whether it accurately paid the medical bills of Dr. Warner and, therefore, satisfied its obligations under the

(continued…)

> services in excess of one hundred thirteen per centum of the prevailing charge at the seventy-fifth percentile; one hundred thirteen per centum of the applicable fee schedule, the recommended fee or the inflation index charge; one hundred thirteen per centum of the DRG payment plus pass-through costs and applicable cost or day outliers; or one hundred thirteen per centum of any other Medicare reimbursement mechanism, as determined by the Medicare carrier or intermediary, whichever pertains to the specialty service involved, determined to be applicable in this Commonwealth under the Medicare program for comparable services rendered. If the commissioner determines that an allowance for a particular provider group or service under the Medicare program is not reasonable, it may adopt, by regulation, a new allowance. If the prevailing charge, fee schedule, recommended fee, inflation index charge, DRG payment or any other reimbursement has not been calculated under the Medicare program for a particular treatment, accommodation, product or service, the amount of the payment may not exceed eighty per centum of the charge most often made by providers of similar training, experience and licensure for a specific treatment, accommodation, product or service in the geographic area where the treatment, accommodation, product or service is provided.

[3] Both parties agreed that Dr. Warner's medical bills submitted for the period of July 31, 2002, to March 10, 2003, totaled $7,747; and those for the period of March 10, 2003, to June 17, 2003, totaled $1,620. The amount actually paid by Employer was the repriced amount for both of these time periods combined.

Act. Employer's petition was consolidated with the remand from this Court and both were assigned to WCJ Desimone.

The WCJ concluded that Employer could not challenge the reasonableness of treatment prior to June 17, 2003, but that the previous decisions of WCJ McManus, the Board and this Court did not impact Employer's right under Section 306(f.1)(3)(i) of the Act to reprice Dr. Warner's charges. Therefore, he granted Employer's petition to review medical treatment and held that Employer had paid for all of the charges for treatment of Claimant's work-related injury.

The WCJ again affirmed Dr. Cavallo's Utilization Review Determination as to Dr. Warner's treatments provided after June 17, 2003. He reasoned that, according to Claimant's records, he treated with Dr. Warner on March 8, 9, 10 and 11, 2004, but when a neurologist attempted to examine him on March 9, 2004, he had difficulty walking just 10 feet and could not sit or lie down on the examination table. The WCJ, therefore, concluded:

> Treatment which left the Employee with difficulty walking 10 feet and unable to sit no later than the day after treatment is not palliative treatment. It is not meeting its objective of reducing pain and restoring function, nor is it relieving back stiffness and pain. The Employee's testimony is not credible evidence of any significant benefit provided by Dr. Warner's treatment. Dr. Warner's testimony is again found to be not credible.

(WCJ Decision of March 18, 2009, at 2.) The WCJ also incorporated his previous findings and conclusions, as well as the report of Dr. Cavallo which held that

Claimant did not show any clinical gains after December 2, 2002. Claimant appealed to the Board which affirmed, and this appeal followed.[4]

On appeal, Claimant argues that the June 19, 2003 decision and order of WCJ McManus ordered that Employer was to pay $7,747 in medical bills submitted by Dr. Warner and that the decision of this Court affirmed the total amount to be paid. According to Claimant, Employer failed in its appeal as to these charges, the amount of the award is final, and Employer's collateral attacks upon the award by means of utilization review and a petition to review medical treatment should be disallowed. However, as Employer correctly points out, WCJ McManus' original decision held that Dr. Warner's services were provided for treatment of Claimant's work-related injury and ordered payment "consistent with the provisions of the Act."

Section 306(f.1)(3)(i) of the Act specifically provides for fee caps and directs that a provider shall not require or request payment of medical expenses in excess of 113 percent of the applicable Medicare reimbursement mechanism or 80 percent of the amount charged for this service by similar medical providers within the given geographic area. While our 2007 order stated that Employer could not challenge the award of $7,747 in medical expenses, that order was referring to Judge McManus' award which stated that they were "to be paid consistent with the Act." The phrase "not subject to challenge" contained in the 2007 order simply

[4] Our review of a decision of the Board is limited to determining whether errors of law were made, constitutional rights were violated and whether the necessary findings of fact are supported by substantial evidence. *Ward v. Workers' Compensation Appeal Board (City of Philadelphia),* 966 A.2d 1159 (Pa. Cmwlth. 2009).

meant that Employer could not continue to question the reasonableness of Dr. Warner's treatments provided prior to June 17, 2003. Employer's petition to review medical treatment did not question the reasonableness of the chiropractic services and was not a collateral attack upon the prior rulings. It served merely to determine whether Employer was entitled to reprice the submitted medical bills. Indeed, Employer has paid all of Dr. Warner's medical bills submitted for services rendered through June 17, 2003 – it simply paid these bills at the fee cap instead of the fully billed amount. Because no specific amount was ever ordered and payment was to be made consistent with the provisions of the Act, the Board correctly determined that Employer was entitled to reprice the medical bills submitted by Dr. Warner under Section 306(f.1)(3)(i) of the Act.

Claimant also argues on appeal that his testimony and that of Dr. Warner regarding the need and positive value of the chiropractic services rendered after June 17, 2003, was more than sufficient justification for a finding of reasonableness and necessity. According to Claimant, the Board's determination that these services were not palliative was arbitrary and not supported by substantial evidence. We disagree.

It is true that we have held treatment to be reasonable and necessary even though it is merely palliative in nature and does not produce any lasting benefit, *Trafalgar House v. Workers' Compensation Appeal Board (Green)*, 784 A.2d 232, 235 (Pa. Cmwlth. 2001); *Glick v. Workers' Compensation Appeal Board (Green)*, 750 A.2d 919 (Pa. Cmwlth. 2000); and even when it is designed only to manage a claimant's symptoms rather than permanently improve or cure the

condition, *Cruz v. Workmen's Compensation Appeal Board (Philadelphia Club)*, 728 A.2d 413 (Pa. Cmwlth. 1999). However, the standard we announced in *Trafalgar House* indicated that the treatment must at least alleviate the claimant's pain and treat the symptomatology in order to be considered palliative. 784 A.2d at 235.

In this case, the WCJ noted that Claimant was experiencing pain and restricted movement a day after receiving chiropractic treatment from Dr. Warner, so much so that he could not walk 10 feet without difficulty and could not sit or lie down on the examination table. In addition, Claimant testified to his day-to-day difficulties, severe pain and severe functional limitations, and the utilization reviewer concluded that he did not show any clinical gains. The WCJ found that all of this undercut the claims of both Dr. Warner and Claimant that continuing treatments reduced his pain and increased his functioning, and he, therefore, did not find their testimony credible. It is well established that the WCJ, as the finder of fact, maintains complete authority over questions of credibility and conflicting evidence, and he or she may accept or reject the testimony of a witness in whole or in part. *See Reyes v. Workers' Compensation Appeal Board (AMTEC)*, 967 A.2d 1071 (Pa. Cmwlth. 2009) (citing *Davis v. Workers' Compensation Appeal Board (City of Philadelphia)*, 753 A.2d 905 (Pa. Cmwlth. 2000)). The WCJ followed our order and considered Claimant's evidence of the palliative nature of the treatments – he merely determined that the testimony was not credible evidence. Given the lack of evidence of any palliative effect of the chiropractic treatments after June 17, 2003, the Board properly affirmed the utilization review determination that these treatments were not reasonable and necessary.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, Judge

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O R D E R

AND NOW, this 26th day of May, 2010, the December 3, 2009 order of the Workers' Compensation Appeal Board at No. A09-0636 is affirmed.

DAN PELLEGRINI, Judge