IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Procacci Brothers Sales and Highmark Casualty Insurance Company,	:	No. 1239 C.D. 2012
	:	Submitted: October 26, 2012
Petitioners	:	
v.	:	
Workers' Compensation Appeal Board (Garrett),	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: January 28, 2013

Procacci Brothers Sales and Highmark Casualty Insurance Company (together, Employer) petition for review of the June 6, 2012, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) granting Walter Garrett's (Claimant) petition for penalties and directing Employer to pay all medical bills that Claimant incurred while treating his work injury prior to April 3, 2007, absent those of Dr. Gary Kaufmann, D.O., that were the subject of a prior utilization review (UR) determination. We affirm and remand.

On March 1, 2004, Claimant was injured during the course and scope of his employment with Employer. Claimant suffered a partial thickness supraspinatus tendon tear in his left shoulder with left shoulder bursitis and impingement syndrome and left cervical radiculopathy with aggravation of underlying degenerative disc disease. (WCAB Op., 6/6/01, at 2.)

In June 2006, Employer filed a UR request to review treatment including, but not limited to, office visits, physical therapy, percutaneous electric nerve stimulation (PENS), fluori-methane spray and stretch, and fluori-methane spray/vapor coolant spray from May 16, 2006, and ongoing. (*Id.*) The UR request listed Dr. Kaufmann as the provider. (R.R. Appendix C.) Dr. Kaufmann is one of the physicians in the practice of William J. O'Brien, III, WJO Inc., Bustleton Family Practice & Medical Center (WJO). On August 18, 2006, the UR determination found the challenged treatments provided by Dr. Kaufmann to be unreasonable and unnecessary as of May 16, 2006. (WCJ's Findings of Fact, No. 4.)

Claimant filed a petition for review challenging the UR determination and requesting review of the reasonableness and necessity of the treatment. (WCJ's Findings of Fact, No. 5.) Employer filed a petition to modify and/or terminate Claimant's compensation benefits. (WCJ's Findings of Fact, No. 6.)

The parties subsequently entered into a compromise and release agreement (Agreement). Thereafter, all petitions were subsequently modified to a petition to seek approval of the Agreement. On March 12, 2007, the WCJ denied the petition seeking approval of the Agreement determining that Claimant did not fully

understand the legal significance of the Agreement. (WCJ's Findings of Fact, No. 7.) On April 4, 2007, the WCJ, satisfied that Claimant understood the provisions of the Agreement, approved the Agreement. The Agreement, in pertinent part, states:

> Employer agrees to be responsible for all reasonable, necessary and related medical treatment incurred before the date of the hearing on this Compromise and Release agreement before a Workers' Compensation Judge. Such liability is subject to the rights and restrictions of the Pennsylvania Workers' Compensation Act.[1]

(WCJ's Findings of Fact, No. 9.)

On May 5, 2009, Claimant filed a penalty petition, alleging that Employer failed to pay medical bills pursuant to the Agreement. Specifically, Claimant maintained that Employer failed to pay bills issued by the offices of WJO. Those bills included treatment provided by Dr. Kaufmann and other physicians in WJO's practice. Employer denied the allegation. (WCJ's Findings of Fact, Nos. 1, 15.)

After a hearing, the WCJ found that:

> Employer is subject to unreasonable contest and penalties for failing to pay medical bills incurred by physicians at Dr. O'Brien's office prior to the date of the granting of the Compromise and Release Agreement. An employer cannot rely on a UR determination that found treatments by a specific provider to be unreasonable and unnecessary to deny similar treatments by a different provider. (Citation omitted.)

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

(WCJ's Findings of Fact, No. 22.) The WCJ concluded that Employer was not liable for payment of the medical bills incurred after May 16, 2006, for treatment by Dr. Kaufmann because they were determined to be neither reasonable nor necessary in the prior UR determination. (WCJ's Conclusions of Law, No. 4.) However, Employer was liable for medical bills generated by other doctors in WJO's practice. The WCJ granted Claimant's penalty petition and ordered Employer to pay all medical bills, absent those of Dr. Kaufmann, that Claimant incurred in treating his work injury prior to April 3, 2007, and imposed a penalty of 30% of the unpaid medical bills. Employer appealed to the WCAB, which affirmed. Employer now petitions this court for review.[2]

Initially, Employer contends that the UR determination applied not only to the named individual, Dr. Kaufmann, but to all doctors in the WJO practice. Employer further argues, pursuant to *MV Transportation v. Workers' Compensation Appeal Board (Harrington)*, 990 A.2d 118 (Pa. Cmwlth. 2010), that it would not make sense to file separate UR requests for different physicians in the same office that were administering the same treatment/therapy.[3]

[2] Our review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

[3] Employer states that the UR determination identified Dr. Kaufmann and WJO as the provider under review. We note, however, that "WJO, Inc., Bustleton Family Practice & Medical Center, 9601 Bustleton Ave, Suite C, Philadelphia," is the address listed in the UR review request and the UR determination. Only Dr. Gary Kaufmann is listed as the provider in both instances. (UR Review Request at 1; UR Determination at 1.)

MV provides that a UR request may be made using the name of the doctor prescribing physical therapy and the facility where the claimant receives that therapy, and does not have to be made against each treating physical therapist. *Id.* at 122. However, *MV* also provides that when the UR request or determination specifically states a certain physical therapist to be reviewed, that UR determination only applies to that certain therapist and does not apply to any other therapists in that facility. *Id.* Further, *MV* cites to *Schenck v. Workers' Compensation Appeal Board (Ford Electronics)*, 937 A.2d 1156 (Pa. Cmwlth. 2007), and *Bucks County Community College v. Workers' Compensation Appeal Board (Nemes, Jr.)*, 918 A.2d 150 (Pa. Cmwlth. 2007), for the proposition that a UR determination of one provider's treatment could not be expanded to include a review of another provider's treatment. *MV*, 990 A.2d at 121. A physician with the power to act independently cannot be lumped into a UR determination with another physician in the same practice. *Id.*; *see also Bucks County*, 918 A.2d at 154*; Schenck*, 937 A.2d at 1162.

Here, the UR determination states that it was conducted "to address whether all treatment including but not limited to office visits, physical therapy, percutaneous electric nerve stimulation, fluori-methane spray and stretch technique, fluori-methane spray/vapor coolant spray, provided by Gary Kaufmann, D.O., from 5/16/06, to ongoing, is reasonable and/or necessary for the medical condition of the employee." (UR Determination at 2.) The review specifically addressed Dr. Kaufmann, not WJO. The WCAB correctly determined that other physicians, who

act independently, cannot be added to the UR determination which requested review of only Dr. Kaufmann.[4]

Next, we must address Claimant's request for a remand to the WCJ to assess additional counsel fees and costs pursuant to Pa. R.A.P. 2744 against Employer for pursuing a frivolous appeal to this court. Under Pa. R.A.P. 2744, an appellate court may, in its discretion, award reasonable counsel fees and damages for delay against a party:

> if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious. The appellate court may remand the case to the [WCAB] to determine the amount of damages authorized by this rule.

We are guided by the principle that "'an appeal is not frivolous simply because it lacks merit. Rather, it must be found that the appeal has no basis in law or fact.'" *Canal Side Care Manor, LLC v. Pennsylvania Human Relations Commission*, 30 A.3d 568, 576 (Pa. Cmwlth. 2011) (citation omitted).[5] We remain "mindful of the

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[4] Employer also contends that the purpose of the Act and the UR process would be impermissibly frustrated by allowing a health care provider to remove an individually named member from the rotation of physicians in a group practice where doing so would undermine the clear intent of the UR and require an employer to engage in the absurd practice of obtaining a UR for each and every physician who works, or might come to work, for a particular group practice. This question, however, is for the legislature and not this court. *See Bucks County*, 918 A.2d at 154.

[5] We note that Pa. R.A.P. 2751 establishes a procedure for requesting reimbursement for costs recognized in Pa. R.A.P. 2744 after a final decision is entered. When counsel fees are requested based on frivolity in a party's appellate brief on the merits, this court has previously treated such a request as if it were an application. *Canal Side*, 30 A.3d at 576 n.12; *see also Watkins v. Unemployment Compensation Board of Review*, 689 A.2d 1019, 1022 n.4 (Pa. Cmwlth.
(Footnote continued on next page…)

need to avoid unjustly penalizing an appellant for exercising her right to fully exhaust her legal remedies." *Id*. at 579. Further, "[a]n award of counsel fees and delay damages is warranted where an appeal is based solely on facts contrary to those found by the trier of fact." *Id.* at 577.

Here, Employer bases its appeal on the alleged fact that the UR request and determination requested review of not only Dr. Kaufmann, but of WJO, so as to include all physicians working under that practice. The WCJ correctly determined that the UR request and determination only requested review of Dr. Kaufmann. Further, the law is clear that a UR determination of one provider's treatment cannot be expanded to include a review of another provider's treatment and that a physician with the power to act independently cannot be lumped into a UR determination with another physician in the same practice. *See MV*, *supra*; *Bucks County*, *supra;* and *Schenck, supra*.

The existence of a reasonable contest is a question of law. *Crouse v. Workers' Compensation Appeal Board (NPS Energy SVC)*, 801 A.2d 655, 657 (Pa. Cmwlth. 2002). Although a reasonable contest can be established where there is no case law on point, *see Zuback v. Workers' Compensation Appeal Board (Paradise Valley Enterprise Lumber Co.)*, 892 A.2d 41, 48 (Pa. Cmwlth. 2006), such is not the case here. In this case, the UR determination indicates that it was mailed to the parties on August 18, 2006. On February 12, 2007, this court issued its decision in

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1997). Therefore, we will dispose of Claimant's request for counsel fees as part of the disposition of the merits in this case.

Bucks County, which held that a UR determination regarding one provider's treatment cannot be expanded to include review of another provider's treatment. The Agreement was approved by the WCJ on April 4, 2007. Therefore, because Employer had the benefit of the *Bucks County* decision while negotiating the Agreement, we conclude that Employer engaged in an unreasonable contest in pursuing this case.

Because Employer's argument has no basis in law and relies solely on assertions of fact that the WCJ rejected, Employer's appeal is frivolous.

Accordingly, we affirm the WCAB and remand to the WCAB to remand to the WCJ for assessment of additional counsel fees and costs incurred in having to answer this frivolous appeal.

Jurisdiction relinquished.

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ROCHELLE S. FRIEDMAN, Senior Judge

Judge Leadbetter Dissents

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O R D E R

AND NOW, this 28th day of January, 2013, the Workers' Compensation Appeal Board order, dated June 6, 2012, is hereby affirmed and the petition for review filed by Procacci Brothers Sales and Highmark Casualty Insurance Company to this Court is deemed frivolous. We hereby remand this matter to the Workers' Compensation Appeal Board to remand to the workers' compensation judge for assessment of additional counsel fees and costs.

Jurisdiction relinquished.

ROCHELLE S. FRIEDMAN, Senior Judge