IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, Petitioner	:	
v.	:	No. 1817 C.D. 2007
	:	SUBMITTED: February 8, 2008
Workers' Compensation Appeal Board (Calderazzo), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** April 15, 2008

Employer City of Philadelphia petitions for review of the August 27, 2007 order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) granting the petition to review medical treatment of claimant Joanne Calderazzo. The sole issue on review is whether claimant, in her 2004 petition, was estopped from challenging employer's failure to pay for prescriptions that employer argued were addressed in a prior 2000 utilization review (UR) determination.[1] We affirm.

In December 1995, claimant injured her shoulder, neck, arm, hand, leg and buttocks in the course of her employment with the Philadelphia Police Department. Notwithstanding the absence of a notice of compensation payable,

[1] In light of the purely legal issue presented, our appellate review is plenary. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

employer acknowledged the injury and claimant received workers' compensation benefits.

In July 2000, employer filed a UR request regarding William J. Artz, D.O.'s treatment of claimant from May 22, 1996 to July 5, 2000. Joseph Pongonis, D.O. conducted the review and noted that claimant was going to Dr. Artz's office once per month and receiving renewals of her prescriptions for Motrin, Neurontin, Percocet, and Trazodone. Dr. Pongonis concluded that it was "necessary and reasonable to have [claimant] re-evaluated every 6-12 weeks and for medication renewals for a period of one year."[2] UR Determination at 3; R.R. 99a. He further opined that, if claimant's symptoms persisted, it would be reasonable and necessary to have a neurosurgical evaluation in order to assess the need for surgery. Neither party appealed from the August 2000 UR determination.

After employer stopped paying for claimant's prescriptions in July 2003, claimant filed the January 2004 petition to review medical treatment therein requesting that employer be forced to reinstate payment of those bills. In support of her petition, claimant submitted the deposition of Diana L. Jamison, the accounts receiving and billing supervisor for mail-order pharmacy Workers' Comp RX. Ms. Jamison indicated that the company continued to bill employer for several months after July 2003, but received no payment. She received employer's last actual payment on July 30, 2003, and indicated that claimant had an outstanding balance of $15,828.74 for prescription bills incurred prior to January 6, 2004. Subsequently, claimant personally paid all such bills.

[2] Dr. Pongonis stated that appropriate medications would include Neurontin, an anti-depressant such as Trazodone and an anti-inflammatory such as Ibuprofen. He further determined that it was unreasonable and unnecessary for claimant to use Percocet on a regular basis, opining that it should be used on an acute basis.

In opposition to the petition, employer relied upon the August 2000 UR determination. Employer maintained that the determination limited the reasonableness and necessity of the medications at issue to a period of one year from August 2000, the date of the UR determination. It further argued that the petition to review medical treatment constituted an improper collateral attack on the underlying UR determination from which neither party appealed.[3]

The WCJ granted claimant's petition, concluding that she was not estopped from challenging employer's failure to pay prescriptions as of July 2003. Noting employer's position that prescriptions were medically unreasonable after August 2001, the WCJ pointed out that employer failed to explain why it nevertheless paid for them for eighteen months after the UR determination. Further, the WCJ found that Dr. Pongonis exceeded his authority under the Workers' Compensation Act[4] in that his opinions regarding the necessity of prescriptions twelve months into the future was improperly speculative and

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[3] In *Jacquelin v. Zoning Hearing Bd. of Hatboro Borough*, 620 A.2d 554, 556 (Pa. Cmwlth. 1993), we stated as follows with regard to res judicata and collateral estoppel:

> The doctrine of res judicata, or claim preclusion, will bar a claim if four conditions are met; identity of things sued for; identity of cause of action; identity of parties; and identity of capacity of parties suing or being sued. . . . (Citation omitted).
>
> The doctrine of collateral estoppel, or issue preclusion, will preclude review of an issue if the following four factors are present: (1) the issue decided in the earlier case is identical to the one presented in the later action; (2) there was a final judgment on the merits in the earlier action; (3) the party against whom the plea is asserted was a party, or in privity with a party to the earlier adjudication; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action. (Citation omitted).

[4] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4, 2501-2626.

constituted an advisory opinion in contravention of 34 Pa. Code § 127.471(a)[5] and this court's holding in *Snyder v. Workers' Comp. Appeal Bd. (Int'l Staple & Mach.)*, 857 A.2d 202 (Pa. Cmwlth. 2004).

Moreover, citing the advisory nature of Dr. Pongonis's opinion and the limited evidentiary and procedural rights attendant to a UR proceeding, the WCJ noted that claimant would have been unable to fully and fairly litigate the medical propriety of prescriptions twelve months into the future. Finally, noting that the scope of Dr. Pongonis's inquiry was treatment rendered to claimant from May 1996 through July 2000, the WCJ determined that employer's failure to file a UR request for prescription bills tendered after July 2003 merited their payment.

The Board affirmed, concluding in pertinent part that claimant in her petition was not precluded from challenging employer's failure to pay for the prescriptions because the identity of subject matter at issue in the UR proceeding and the petition was not identical in that the former involved the reasonableness and necessity of medical treatment and prescriptions as of July 2000 and the latter involved the nonpayment of medical bills after July 2003. In addition, the Board noted that the opinion of Dr. Pongonis regarding the renewal of medications for a period of one year was ambiguous and easily subject to an alternate interpretation.

On appeal, employer argues that the WCJ had no authority to alter an unappealed UR determination as it was final and binding as to whether treatment was reasonable and necessary and that, accordingly, claimant waived her right to ongoing prescription medications from Dr. Artz due to her failure to appeal from that determination. *Florence Mining Co. v. Workmen's Comp. Appeal Bd.*

[5] In pertinent part, this regulation provides that "[r]eviewers may not render advisory opinions as to whether additional tests are needed." 34 Pa. Code § 127.471(a).

(McGinnis), 691 A.2d 984 (Pa. Cmwlth. 1997). Further, characterizing its payment of prescriptions until July 2003 as "incidental," employer dismisses claimant's argument that it was estopped from denying payment of prescriptions due to the fact that it continued to pay for them beyond the one-year period specified in the determination. Employer emphasizes claimant's failure to appeal from the 2000 determination.

In response, claimant maintains that her situation is analogous to that in *Snyder* where this court, in relevant part, also considered the effect of a prior UR determination from which neither party appealed and which addressed future treatment. We held that

> a [UR] may properly limit the prospective number of office visits per month but may not speculate that chiropractic care six months or more in the future would no longer be needed because a claimant's condition will improve by the end of the projected period. If such speculation is countenanced, the need for [UR] is reduced because Employer, and any employer in a similar situation, would not have to petition for [UR] at some future time.

Snyder, 857 A.2d at 207.

In addition, claimant emphasizes the WCJ's acknowledgement that employer's payment of prescription medications beyond the one-year period was significant. To wit, she contends that by paying for the prescriptions beyond the one-year period, employer like the employer in *Snyder* acknowledged that a claimant's condition warranted ongoing treatment.

Moreover, claimant notes the WCJ's determination that she did not have a chance to fully and fairly litigate the medical propriety of prescriptions twelve months into the future in the UR determination in that her rights in such a

proceeding were limited. In addition, citing *Snyder*, she maintains that the burden is not on her to file a UR request for *prospective* treatment. Finally, she notes the WCJ's reliance upon Section 306(f.1)(5) of the Act as support for the proposition that employer's failure to file a UR request as to medication bills tendered after July 2003 warranted payment of the same.[6]

We begin by pointing out that *neither* party appealed from the UR determination. Thus, just as we held in *Snyder*, all parties and decision makers were bound by it and the WCJ had no authority to alter it. That leaves us to determine whether the decision makers erred in interpreting the UR determination and in concluding that claimant was not estopped from challenging anything that was arguably addressed therein.

The WCJ interpreted the opinions of Dr. Pongonis regarding the prescriptions to mean that he found them to be medically reasonable and necessary only for a finite one-year period following the August 2000 UR determination. The Board, on the other hand, opined that the passage containing Dr. Pongonis's opinion could be interpreted more liberally:

> In our view, Dr. Pongonis'[s] report on page 3 where he states: "In summary, I have stated in my report that it is necessary and reasonable to have the patient re-evaluated every 6-12 weeks and for medication renewals for a period of one year," could easily be interpreted to mean that if Dr. Artz, upon re-evaluation of Claimant, would re-prescribe the medications for another time period of one year, such a prescription would be medically appropriate.

[6] In pertinent part, this section provides that "[a]ll payments to providers for treatment provided pursuant to this act shall be made within thirty (30) days of receipt of such bills and records unless the employer or insurer disputes the reasonableness or necessity of the treatment provided. . . ." 77 P.S. § 531(5).

Board's Decision at 3-4.

Whatever interpretation should be attributed to the UR determination, we agree with the Board that claimant was not estopped from litigating the issue of nonpayment of the prescription bills after July 2003 because the identity of subject matter at issue in the UR proceeding and claimant's petition was not identical. To reiterate, the former involved the reasonableness and necessity of medical treatment and prescriptions as of July 2000 and the latter involved the nonpayment of medical bills after July 2003.

Moreover, it is arguably apparent from employer's payment of the prescription medications for eighteen months that it did not interpret the determination to mean that those medications *automatically* became medically unnecessary and unreasonable exactly one year from the date of the decision.[7] Finally, we find it significant that employer failed to file a UR request for prescription bills tendered after July 2003 in compliance with Section 306(f.1)(5) of the Act.

Accordingly, for the above reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

[7] Notwithstanding the somewhat ambiguous language of the UR determination regarding the prescriptions, we note that a reasonable claimant probably would have had no reason to appeal. Even though claimant subsequently incurred significant bills for prescription medications, this was not a UR determination where either party was a big winner or loser. Employer successfully decreased the frequency of claimant's visits with Dr. Artz and limited claimant's use of Percocet, but Dr. Pongonis alluded to the possibility that claimant's condition could worsen such that she would need a neurosurgical evaluation.

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O R D E R

AND NOW, this 15th day of April, 2008, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge