

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Russell King, :
 :
 : Petitioner :
 :
 : v. : No. 2169 C.D. 2009
 : SUBMITTED: February 12, 2010
 :
 Workers' Compensation Appeal :
 Board (Lord Corporation), :
 : Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: June 22, 2010

Russell King (Claimant) petitions this court for review of the order of the Workers' Compensation Appeal Board (Board) which affirmed the decision of the Workers' Compensation Judge (WCJ) denying his penalty petition filed against Lord Corporation (Employer). After review, we reverse and remand.

In July 2004, Claimant suffered a work-related injury to his right shoulder and back, for which Employer issued a Medical-Only Notice of Compensation Payable. Subsequently, Employer filed a Petition to Terminate Benefits, alleging that Claimant had fully recovered from his work-related injury as of October 25, 2005. In a May 3, 2006 decision, the WCJ granted Employer's

termination petition as to Claimant's shoulder injury and denied it as to Claimant's back injury. The WCJ ordered Employer to pay Claimant's unpaid Nautilus bill of \$660 and any and all of Claimant's medical expenses which were reasonable and necessary and causally related to Claimant's back injury sustained on July 14, 2004. Employer did not appeal this decision.

Thereafter, Employer submitted a request for Utilization Review (UR) to "determine the reasonableness and necessity of 'Health club membership for PT' prospectively (from 10/26/07 and ongoing) provided to Russell King by Ernest Marsolais MD." Utilization Determination; Reproduced Record (R.R.) at 18a. Dr. William Spellman, an orthopedic surgeon, reviewed Claimant's medical records, including the prescription written by Dr. Marsolais, Claimant's treating physician. Dr. Marsolais recommended that Claimant participate in a specific set of exercises for his injury at Nautilus, to be supervised by Rick Cole, a licensed physical therapist. In his Determination issued December 28, 2007, Dr. Spellman made the following findings:

The diagnoses of painful degenerative thoracic disc disease and degenerative lumbar disc disease are documented in the medical records. The usual and customary treatment for these conditions includes, but is not limited to activity modification, active and passive modalities, physical therapy, oral and injectable medications including but not limited to analgesics, anti-inflammatory, and anti-spasmodics, and deep injection therapy, as referenced below.

. . . .
The submitted documentation does support the reasonableness and necessity of "Health club membership for PT" prospectively (from 10/26/07 and ongoing) provided to Russell King by Ernest Marsolais MD . . . The gym regimen recommended by Dr. Marsolais was one of active modalities of physical

therapy, *i.e.* exercise. Submitted documentation does support the reasonableness and necessity of health club membership for physical therapy

Id. at 20a. Employer did not appeal the utilization review decision.

After Employer failed to pay Claimant's health club membership to Nautilus for 2007 or 2008, Claimant filed a Petition for Penalties, asserting that Employer violated the Workers' Compensation Act (Act)¹ by failing to pay for Claimant's Nautilus health club membership which was not only necessary for completion of his physical therapy, but had previously been found reasonable and necessary. Employer filed an answer denying the allegations. The petition was assigned to a WCJ, who held a hearing at which Claimant testified and presented documentary evidence.

Claimant testified that Dr. Marsolais prescribed physical therapy at Nautilus health club because the facility had all the equipment necessary to perform the exercise program prescribed by Dr. Marsolais. Claimant testified that he initially met with Rick Cole, a licensed physical therapist, three times a week at Nautilus, and that Mr. Cole showed him the proper mechanics for exercising, which exercise equipment to use, and the exercises for deep water jogging in the pool.² Claimant stated that he last saw Mr. Cole six to eight months ago, and that he only sees him at Nautilus when he needs a refresher, or when Dr. Marsolais modifies the treatment. Claimant further testified that when he sees Dr. Marsolais, the doctor reviews how the exercise program is progressing, the time he spends in the pool, the weight levels he uses, and whether he has any continuing complaints

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

² Dr. Marsolais specifically recommended Mr. Cole as the physical therapist and Nautilus as the recommended facility. Records of Dr. Marsolais; Claimant's Exhibit 5, R.R. at 108a.

of pain. Dr. Marsolais occasionally adjusts the exercise program for Claimant. Claimant testified that from the beginning, Dr. Marsolais intended him to learn to do the program on his own and then maintain it. Claimant stated that he has been to Mr. Cole's office, but that Mr. Cole lacks the facilities necessary for him to perform the same exercises he does at Nautilus. Claimant also testified that the physical therapy regimen he follows at Nautilus is very helpful to him and that "without it, [he] would have a difficult time getting to work every day." Hearing of July 17, 2008, Notes of Testimony (N.T.) at 18; R.R. at 44a. Claimant testified that he did not know nor did he ask Dr. Marsolais if there was another facility nearby where he could receive this physical therapy treatment outside his normal work hours. Claimant further testified that he did not ask Mr. Cole if another physical therapist in the area had the necessary facilities where he could participate in the prescribed physical therapy program. Finally, Claimant submitted into evidence his attendance records from Nautilus, as well as the medical records from Dr. Marsolais and reports from Mr. Cole.

Without presenting any evidence at the hearing, Employer argued that it was contesting the health club payment on the grounds that Nautilus is not a "health care provider" defined by Section 109 of the Act, *as amended*, added by Section 3 of the Act of July 2, 1993, P.L. 190, 77 P.S. § 29,³ and because the

³ Section 109 defines "health care provider" as:

[A]ny person, corporation, facility or institution licensed or otherwise authorized by the Commonwealth to provide health care services, including, but not limited to, any physician, coordinated care organization, hospital, health care facility, dentist, nurse, optometrist, podiatrist, physical therapist, psychologist, chiropractor or pharmacist and an officer, employe or agent of such person acting in the course and scope of employment or agency related to health care services.

77 P.S. § 29.

physical therapy treatment was not directly supervised by a health care provider, citing *Boleratz v. Workers' Comp. Appeal Bd. (Airgas, Inc.)*, 932 A.2d 1014 (Pa. Cmwlth. 2007), in support of its position. Employer agreed, however, that the utilization review determined that the physical therapy program performed at Nautilus was reasonable and necessary and was causally related to Claimant's work injury.

In his decision, the WCJ stated:

a. The December 28, 2007 Utilization Review determination that the "health club membership for physical therapy" was reasonable and necessary is not res judicata in the instant litigation. The issue before this Court is not whether the treatment is reasonable and necessary, but rather is said treatment compensable under the [Act] inasmuch as the provider, and the treatment (exercise, physical therapy) was not supervised by a licensed health care provider.

b. Nautilus is not a health care provider. It is not a hospital or out patient physical rehabilitation facility. It is a private health club.

c. The exercises the Claimant does under the direction of Dr. Marsolais and the training of physical therapist, Rick Cole, is not supervised. Although the exercises are set up by Dr. Marsolais and the Claimant is briefly instructed directly by the physical therapist, who meets the Claimant at Nautilus, the Claimant is not regularly supervised as he performs the exercises. A health care provider or someone under the supervision of a licensed health care provider is not monitoring the Claimant each time that he goes in to the Nautilus facility to exercise. A health care provider or someone under a licensed health care provider supervisor is not documenting the Claimant's progress as he does the exercises recommended by Dr. Marsolais. There is no way to track the Claimant's attendance, compliance, or progress while at the Nautilus facility. The facility,

Nautilus, does not generate medical records regarding the Claimant's use of their facility and his performance of the exercise for review by Dr. Marsolais or the physical therapist, Rick Cole.

WCJ's Decision of February 23, 2009, at 3-4; R.R. at 150a-151a. The WCJ concluded that Claimant did not establish that Employer violated the Act by failing to pay for the Nautilus membership as the facility was not a licensed health care provider and because a licensed health care provider or someone under the supervision of a licensed health care provider did not monitor Claimant each time he went to Nautilus to exercise. The WCJ therefore denied Claimant's penalty petition.

Claimant appealed this determination to the Board, which agreed with the WCJ that this case was controlled by *Boleratz*, wherein this court held that an employer was not responsible for paying the claimant's bills from his massage therapist, even though the claimant's physician had prescribed the treatment, because the massage therapist was not a licensed health care provider. The Board therefore concluded that dismissal of the penalty petition was proper because "Mr. Cole is not a health care provider and he did not provide his services under the supervision of a health care provider." Board's Opinion, dated October 8, 2009, at 4; R.R. at 157a. This appeal followed.

Claimant raises the following issues for our review: (1) whether he met his burden of proving that Employer violated the Act by failing to pay for his health club membership for physical therapy treatment; (2) whether the Board erred when it concluded that Rick Cole was not a licensed health care provider under Section 109 of the Act; and (3) whether the Board erred in failing to give the unappealed utilization review determination that the prescription for health club

membership for physical therapy to be reasonable and necessary preclusive effect in the penalty petition.

A claimant who files a penalty petition has the burden of proving an employer's violation of the Act. *Shuster v. Workers' Comp. Appeal Bd. (Pa. Human Rels. Comm'n)*, 745 A.2d 1282 (Pa. Cmwlth. 2000). Once the claimant has established a violation, the burden then shifts to the employer to prove that a violation of the Act did not occur. *Id.* at 1288. It is well-settled that, "[i]t is a clear and unacceptable violation of the Act for an employer to unilaterally refuse to pay a claimant's medical bills." *Moats v. Workmen's Comp. Appeal Bd. (Emerald Mines Corp.)*, 588 A.2d 116, 118 (Pa. Cmwlth. 1991). More recently, we held that "an employer's unjustified and unilateral cessation of a claimant's medical benefits, without prior authorization, triggers Section 435's penalty provision." *Schenck v. Workers' Comp. Appeal Bd. (Ford Elecs.)*, 937 A.2d 1156, 1160 (Pa. Cmwlth. 2007) [citing *McLaughlin v. Workers' Comp. Appeal Bd. (St. Francis Country House)*, 808 A.2d 285 (Pa. Cmwlth. 2002)].

Claimant contends that Employer remained responsible for paying any and all reasonable and necessary medical expenses related to his work injury. Claimant maintains that Employer is bound by an unappealed decision and that if Employer disagreed with the utilization review determination, then it should have appealed, raising any factual or legal grounds in support of its position. Furthermore, Claimant argues that the Board erred in finding that Rick Cole was not a licensed health care provider, because Section 109 of the Act defines a "health care provider" to include a licensed physical therapist. Finally, Claimant argues that the physical therapy program is supervised and points out that not only is the exercise program set-up by Dr. Marsolais, who is himself a health care

provider, and directed by him through another health care provider, Rick Cole, Dr. Marsolais monitors Claimant's progress in the program every 6 to 8 weeks during scheduled appointments. At these appointments, Dr. Marsolais examines Claimant and gives him injections in his lower back as needed and discusses Claimant's progress in performing the exercises and pool therapy at Nautilus. Claimant asserts that both the WCJ and the Board misapprehended the requirements that a treatment be "supervised" and also applied an inappropriate standard. Claimant submits that Dr. Marsolais or Mr. Cole should not be required to monitor and supervise him at each piece of equipment every time he visited the facility.

Employer argues that Nautilus is not a health care provider under the Act and that Claimant failed to prove that the physical therapy treatment was properly supervised. Employer also asserts that the mere fact that Claimant's treating physician wrote a prescription for the health club membership for physical therapy is not enough to bring the service into the definition of a medical service, citing *Boleratz*.⁴ Employer further argues that under both the Act and the regulations, the issue to be decided in a utilization review is a narrow one – limited to a determination of whether the treatment under review is reasonable or necessary. *See* Section 306 (f.1)(6) of the Act, 77 P.S. § 531(6) and 34 Pa. Code § 127.406. Employer asserts that the issue in this penalty petition is whether it violated the Act by refusing to pay for the health club membership, which it alleges was not compensable under the Act. According to Employer, because the WCJ

⁴ While we agree that *Boleratz* stands for the proposition that services rendered by someone who is not a licensed health care provider are not reimbursable under the Act even if the services are prescribed by a health care provider, we do not believe *Boleratz's* holding bars Claimant's right to be reimbursed for these medical expenses. Unlike *Boleratz*, here, the physical therapy prescribed by Dr. Marsolais was supervised by another health care provider, licensed physical therapist Rick Cole.

found that the membership was not compensable, it met its burden of proving that there was no violation of the Act.

In the matter *sub judice*, the record establishes that Claimant met his burden of proving that Employer's unilateral decision to cease payment of the health club membership for physical therapy violated the Act. The exclusive and mandatory procedures set forth in Section 306(f.1)(6) of the Act, 77 P.S. § 531(6), require an employer, who questions its obligation to pay for a claimant's medical bills, to submit a request for a UR determination of the reasonableness and necessity of the treatment in question. *Haynes v. Workers' Comp. Appeal Bd. (City of Chester)*, 833 A.2d 1186 (Pa. Cmwlth. 2003); *McLaughlin v. Workers' Comp. Appeal Bd. (St. Francis Country House)*, 808 A.2d 285 (Pa. Cmwlth. 2002). "In a UR proceeding, an employer seeking to avoid payment for medical services has a never-shifting burden of establishing that the treatment in question is unreasonable or unnecessary." *Haynes*, 833 A.2d at 1189 (citation omitted). An employer remains obligated to pay a claimant's medical expenses until they are found unreasonable or unnecessary, *Wertz v. Workmen's Comp. Appeal Bd. (Dep't. of Corrections)*, 683 A.2d 1287 (Pa. Cmwlth. 1996), or until it can secure an order terminating its liability to do so. *See Stonebraker v. Workmen's Comp. Appeal Bd. (Seven Springs Farm, Inc.)*, 641 A.2d 655 (Pa. Cmwlth. 1994). In addition, we have held that:

[an] [e]mployer's conduct of unilaterally ceasing medical benefit payment pending its petitions, without obtaining a supersedeas or any other prior authority to do so, or challenging the reasonableness or necessity of the [treatment] in a properly filed UR determination petition, constitutes a clear violation of its ongoing obligation to provide reasonable and necessary surgical and medical

services imposed by Section 306(f.1)(1) of the Act and the WCJ's . . . decision.

McLaughlin, 808 A.2d at 290.

After being ordered by the WCJ to pay the Claimant's Nautilus bill in his 2004 order granting in part and denying in part Employer's termination petition, Employer submitted to UR the reasonableness and necessity of Dr. Marsolais' prescription for the health club membership at Nautilus for physical therapy. Employer did not appeal the UR determination that the membership for physical therapy was reasonable and necessary. In addition, at the hearing on the penalty petition, Employer stated that it was not disputing the reasonableness or necessity of the physical therapy treatment, nor was it disputing the causal connection between the treatment and Claimant's work injury. Finally, Employer presented no evidence that another physical therapist or health care provider in the area had the pool and equipment necessary for Claimant to complete the exercises and program prescribed by Dr. Marsolais, at a facility licensed to provide health care under the Act. Instead, Employer attempts to avoid its obligation to pay for the membership fee on the grounds that Nautilus is not a health care provider under the Act by raising it for the first time in this penalty petition. In *Westinghouse Electric Corp. v. Workers' Comp. Appeal Bd. (Weaver)*, 823 A.2d 209, 214-15 (Pa. Cmwlth. 2003), we held that because employer did not appeal the WCJ's 1996 decision awarding certain medical expenses as reasonable and necessary, it could not later assert, in its appeal from the WCJ's grant of claimant's penalty petition, that it was not required to pay those bills because they were not submitted on the proper forms. Employer's obligation to pay for the health club membership was

established when Employer failed to appeal from the order directing its payment and again when the UR determination became final.⁵

Accordingly, the Board erred in not granting Claimant's penalty petition as Employer was and remains obligated to pay for Claimant's membership to Nautilus. However, because the imposition of a penalty, even where a violation is proven, as well as the amount of any penalty, is discretionary with the WCJ, we will remand this matter to the WCJ for a determination of whether a penalty should be imposed.⁶

BONNIE BRIGANCE LEADBETTER,
President Judge

⁵ See *Krouse v. Workers' Comp. Appeal Bd. (Barrier Enterpr., Inc.)*, 837 A.2d 671 (Pa. Cmwlth. 2003) (claimant who had not appealed a utilization review determination that her chiropractic care was not reasonable or necessary was barred from pursuing payment for the same medical treatment in her review petition where she was suing for the same relief in both proceedings, the cost of her chiropractic care.)

⁶ Even when a violation of the Act occurs, "it is within the discretion of the WCJ to impose penalties. The assessment of penalties as well as the amount of the penalties imposed is discretionary." *Jordan v. Workers' Comp. Appeal Bd. (Philadelphia Newspapers, Inc.)*, 921 A.2d 27, 41 (Pa. Cmwlth. 2007).

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ORDER

AND NOW, this 22nd day of June, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby REVERSED and the matter REMANDED for a determination of whether penalties should be imposed pursuant to Section 435(d)(1) of the Act, 77 P.S. § 991(d)(1).

Jurisdiction relinquished.

BONNIE BRIGANCE LEADBETTER,
President Judge