IN THE COMMONWEALTH COURT OF PENNSYLVANIA

St. Luke's Hospital,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2333 C.D. 2011
	:	
Workers' Compensation Appeal Board (Kopy),	:	Submitted: May 25, 2012
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: August 2, 2012**

St. Luke's Hospital (Employer) petitions for review of an Order of the Workers' Compensation Appeal Board (Board) that reversed the Workers' Compensation Judge's (WCJ) Decision and Order dismissing Frances Kopy's (Claimant) Petition for Review of Utilization Review (UR) Determination (Petition for Review). The Board determined that the provider named in Employer's UR Request did not render the treatment or services to Claimant, which was the subject of the UR Request. On appeal, Employer argues that: (1) the Board erred by reversing the WCJ's Order and concluding that Employer did not name the proper

provider for purposes of the UR Determination at issue where the medical reports and bills received by Employer seeking payment identified only the named provider as the medical practitioner who provided treatment to Claimant; and (2) if the named provider was not the appropriate provider under review, Employer is not liable for payment of the medical bills at issue.

Claimant suffered a work-related injury on October 9, 2001, while employed as a nurse for Employer. Prolonged litigation ensued; however, by WCJ Decision issued August 31, 2006, it was determined that: (1) Claimant's work injury was a herniated disc at C5-C6 with associated radiculopathy; and (2) Claimant was totally disabled as of May 3, 2004, as a result of her work injury. The August 31, 2006 WCJ Decision was affirmed by the Board as well as this Court. (WCJ Decision, November 16, 2009 (WCJ Decision) Findings of Fact (Final FOF) ¶¶ 4-5.); See Kopy v. Workers' Compensation Appeal Board (St. Luke's Hospital), (Pa. Cmwlth., No. 511 C.D. 2007, filed April 14, 2008).

Claimant began treating at the Lehigh Valley Oriental Medical Center (Lehigh) in June 2007.[1] (Final FOF ¶ 10.) David Molony, D.O.M., and Ming Ming Molony, D.O.M., who are husband and wife, own Lehigh and they both provide treatment to patients.[2] (Final FOF ¶¶ 11, 12.) Employer first filed a UR Request on or about

[1] "An [O]riental medicine practice provides medical services such as exercise, electro[-]stimulation, muscle retraining and herbal medicines." (Board Op. at 3.)

[2] Although David Molony and Ming Ming Molony are designated as being an "O.M.D." in these proceedings, the correct designation is "D.O.M.," which stands for "Doctor of Oriental Medicine." (David Molony Dep. at 26, R.R. at 156a.) However, David Molony and Ming Ming *(Continued…)*

March 3, 2008, which named David Molony as the provider under review, seeking review of the treatment provided to Claimant by David Molony from December 21, 2007 and ongoing. (R.R. at 121a-29a.) The first UR was conducted by Debbie Smith, D.O.M., who determined that the treatment at issue was reasonable and necessary. (R.R. at 127a.) Employer did not appeal the first UR Determination.

On or about November 17, 2008, Employer filed a second UR Request seeking review of all treatment rendered to Claimant by David Molony from July 15, 2008 and ongoing. (R.R. at 14a-15a.) The second UR was conducted by Dennis W. Ivill, M.D., a medical doctor and licensed acupuncturist, who determined that the treatment at issue was not reasonable and necessary. (R.R. at 28a.) Thereafter, Claimant filed the Petition for Review seeking review by a WCJ of the UR Determination issued by Dr. Ivill. Hearings before a WCJ ensued on March 23, 2009 and September 9, 2009. In support of the Petition for Review, Claimant testified in person and by deposition, presented the deposition testimony of David Molony and Ming Ming Molony, and submitted documentary evidence. In opposition, Employer presented only documentary evidence, which included Claimant's medical/insurance records and bills that pertained to Claimant's treatment at Lehigh.

After the WCJ held the initial March 23, 2009 hearing, at which Claimant testified in person and submitted into evidence the first UR Determination, the WCJ issued an Interim/Interlocutory Decision and Order on May 12, 2009. Therein, the WCJ rejected Claimant's testimony that she never received any kind of treatment

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Molony are not medical doctors, but have been licensed by the Commonwealth of Pennsylvania as practitioners of Oriental medicine since 2007. (Final FOF ¶¶ 11, 12.)

from David Molony as not credible.[3] (WCJ Interim/Interlocutory Decision, May 12, 2009, Interim Findings of Fact (Interim FOF) ¶ 5.) The WCJ further found that Employer filed the second UR Request against the proper provider based upon the medical records and bills that all contained the name and signature of David Molony and not Ming Ming Molony. (Interim FOF ¶ 4.) Therefore, the WCJ ordered that the matter be listed for hearings on the merits of Claimant's appeal of the second UR Determination. (WCJ May 12, 2009 Interim/Interlocutory Order.) On the merits, Claimant argued before the WCJ that: (1) the second UR Determination should be reversed because the UR was filed against David Molony, as the provider, and Claimant's treatment was actually provided by Ming Ming Molony; (2) Dr. Ivill was not a proper provider to perform the UR because he did not have the same specialty as David Molony, who is a practitioner of Oriental medicine and not a licensed acupuncturist; and (3) Dr. Ivill incorrectly reviewed Claimant's treatment for low back pain and referred to studies related thereto. (Final FOF ¶¶ 6-8.)

Based on the evidence presented, the WCJ rejected as meritless Claimant's argument that the UR was filed against an incorrect provider. The WCJ found that David Molony "created all of the records, and used his own name and 'mark' on the [Health Insurance Claim Forms] [that] led the [insurance] carrier and the [UR] Organization to believe that he was the provider under review." (Final FOF ¶ 6.) The UR report prepared by Dr. Ivill states that he spoke with the provider under review, David Molony, on January 9, 2009, regarding Claimant's treatment. (January

[3] It is beyond question that credibility determinations are within the exclusive province of the WCJ. Lahr Mechanical v. Workers' Compensation Appeal Board (Floyd), 933 A.2d 1095, 1101 (Pa. Cmwlth. 2007).

9, 2009 UR Report, R.R. at 24a; Final FOF ¶ 9.) Thus, at the time Employer filed its UR Request, the WCJ found that "[t]here was not a shred of evidence indicating that Ming Ming Molony was the actual provider." (Final FOF ¶ 6.) The WCJ determined that "it would be patently unfair," given the circumstances presented, to find that the incorrect provider was reviewed and reverse the second UR Determination. (Final FOF ¶ 6.)

The WCJ also rejected Claimant's assertion that Dr. Ivill was not a proper provider to conduct the UR. Based on David Molony's testimony, the WCJ found that a Commonwealth-licensed acupuncturist may practice acupuncture and include other techniques, but not herbal therapy. However, both acupuncture and herbal treatments may be provided by a practitioner of Oriental medicine. The WCJ found that, if David Molony's billing submissions would not have misled the UR Organization into believing that he was an acupuncturist, the UR could have been assigned to a Doctor of Oriental Medicine. While recognizing that Claimant's actual medical records indicate that David Molony is a practitioner of Oriental medicine, the WCJ found that it was unclear whether the UR Organization, at the time of the assignment, had access to Claimant's medical records. Thus, the WCJ determined that the most equitable course of action would be to limit her Decision to all treatment except herbal therapy, rather than reverse the UR Determination. (Final FOF ¶¶ 7, 11.)

The WCJ rejected Claimant's contention that Dr. Ivill incorrectly reviewed Claimant's treatment for low back pain and referred to studies related thereto. The WCJ found that: (1) Claimant's medical records show that Claimant was repeatedly

diagnosed by David Molony as having low back pain; (2) the records specifically reference low back pain; (3) there was no evidence that Dr. Ivill was aware that Claimant's work injury was limited to a herniated disc at C5-6 with associated radiculopathy; (4) Dr. Ivill cites studies that pertained to cervical spine studies as well as the studies pertaining to low back pain; and (5) the scope of Dr. Ivill's review was sufficiently broad to support the determination as to Claimant's work-related cervical injury. (Final FOF ¶¶ 8, 13.)

Finally, the WCJ accepted Dr. Ivill's opinion as credible and persuasive that the treatment rendered to Claimant by David Molony from July 15, 2008 and ongoing was neither reasonable nor necessary. The WCJ rejected, as not credible or persuasive, the testimony of Claimant, Ming Ming Molony, and David Molony that the treatment rendered to Claimant relieved her pain and was reasonable and necessary. (Final FOF ¶¶ 13-16.) Based on the findings, the WCJ concluded that Employer sustained its burden of proving that the treatment at issue, including office visits, acupuncture, heat, massage, and electrical simulation, from July 15, 2008 and ongoing, was not reasonable or necessary. (Final Conclusions of Law ¶ 2.) Accordingly, the WCJ dismissed Claimant's Petition for Review.

Claimant appealed the WCJ's decision to the Board. Upon review, the Board determined, without discussion, that the WCJ's acceptance of Dr. Ivill's opinion as credible "could be substantial evidence to support the WCJ's finding [that] the [O]riental medical treatment [provided to Claimant] was not reasonable and necessary." (Board Op. at 4.) However, the Board determined that Ming Ming Molony was the actual provider of Claimant's Oriental medical treatment and not

David Molony, the named provider on Employer's UR Request. Therefore, the Board reversed the WCJ's Decision based on its regulation that specifies that the provider under review in UR proceedings "shall be the provider who rendered the treatment" at issue in the UR request and this Court's strict interpretation thereof in MV Transportation v. Workers' Compensation Appeal Board (Harrington), 990 A.2d 118 (Pa. Cmwlth. 2010), 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). (Board Op. at 4 (quoting 34 Pa. Code § 127.452(d).)[4] Due to its reversal of the WCJ's Decision on this basis, the Board further determined that Claimant's argument that Dr. Ivill was not in the same specialty as David Molony was moot. (Board Op. at 4.) Employer now petitions this Court for review of the Board's Order.[5]

In support of its appeal, Employer argues that the WCJ properly concluded that the UR Request and Determination at issue in this matter were valid and that the subject treatment was not reasonable or necessary. Employer contends that the Board ignored the factual dispute created by the evidence and the WCJ's credibility findings. Employer argues further that reversing the WCJ's Decision and Order on

[4] We note that the Board did "query whether the medical bills are payable because they were not properly signed by the actual provider." (Board Op. at 5 n.1.)

[5] "This Court's review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, whether constitutional rights were violated or an error of law was committed." MV Transportation v. Workers' Compensation Appeal Board (Harrington), 990 A.2d 118, 120 n.3 (Pa. Cmwlth. 2010).

the procedural basis that Employer failed to name the correct provider begs the question that was never answered by Claimant or the Board: How was Employer supposed to know that Ming Ming Molony was providing treatment to Claimant when every medical record and bill created during the review period and provided to Employer referenced David Molony as the provider and did not mention Ming Ming Molony? Finally, Employer argues that the cases relied upon by the Board should not be controlling where the medical reports and bills received by an employer seeking payment identify the named provider as the medical practitioner who provided treatment to the claimant.

In response, Claimant argues that regardless of how the medical records and billings were prepared in this case, the law is clear that the provider being reviewed must be the same provider who actually treated the claimant. Claimant argues that all of the witnesses testified that Ming Ming Molony provided the treatment and David Molony only consulted with her. Claimant contends that there is no evidence that David Molony ever treated Claimant; therefore, regardless of the WCJ's credibility determinations, there was virtually no evidence that supports the WCJ's finding that David Molony was the correct provider under review.

Section 306(f.1)(6) of the Workers' Compensation Act (Act),[6] 77 P.S. § 531(6), dictates a multi-step process for resolving disputes regarding the reasonableness or necessity of treatment from a health care provider. First, an employer, employee or insurer may request a UR "of all treatment provided by a health care provider." 77 P.S. § 531(6)(i). The UR request form advises the

[6] Act of June 2, 1915, P.L. 736, as amended.

requestor seeking a review of treatment that the provider under review "[m]ust be an individual, not a hospital, corporation or group." (UR Request, R.R. at 14a.); Harrington, 990 A.2d at 120. Pursuant to 34 Pa. Code § 127.452(d), "the provider under review shall be the provider who rendered the treatment or service which is the subject of the UR request." Next, the UR request is assigned, for performance of the UR review, to a "provider licensed in the same profession and having the same or similar specialty as that of the provider of the treatment under review." 77 P.S. § 531(6)(i). A UR report is then issued within thirty days of the request and any party aggrieved thereby may appeal to the Department of Labor and Industry. 77 P.S. §§ 531(6)(ii), (iv). The appeal is then assigned to a WCJ to conduct a *de novo* hearing where the employer always has the burden of proving that the challenged treatment is not reasonable or necessary. 77 P.S. § 531(6)(iv); Bucks County, 918 A.2d at 152.

Here, we agree with Employer that there was a factual dispute before the WCJ as to whether Employer named the correct provider under review in its second UR Request. The WCJ found that Employer filed the UR Request against the proper provider based upon the medical records and bills, which all contained the name and signature/mark of David Molony and not Ming Ming Molony. (Interim FOF ¶ 4.) After the September 2, 2009 hearing on the merits and the submission of additional deposition testimony and documentary evidence, the WCJ again rejected Claimant's contention that the UR Request was filed against the incorrect provider. (Final FOF ¶ 6.) The WCJ found that Employer was led to believe that David Molony was the provider under review because it was David Molony who created and signed all of the records pertaining to Claimant. (Final FOF ¶ 6.) As a result, at the time Employer filed its second UR Request, "[t]here was not one shred of evidence

indicating that Ming Ming Molony was the actual provider." (Final FOF ¶ 6.) These findings are supported by the record in this matter.

The Workers' Compensation Medical Report Form filed with Employer by Lehigh lists the provider as Lehigh and the contact person as David Molony. (R.R. at 41a.) All of the Health Insurance Claim Forms/bills submitted to Employer's insurance carrier pertaining to Claimant's treatment names David Molony, along with his license number, in the block designated for the physician's signature. (R.R. at 42a-48a.) The patient records detailing Claimant's treatment at Lehigh from July 2, 2008 through October 24, 2008, *only* name David Molony as the Oriental medical practitioner. (R.R. at 49a-119a.) The first UR Report states that the reviewer, Debbie Smith, was asked to determine the reasonableness and necessity of the treatment provided to Claimant by David Molony. (R.R. at 123a.) This UR Report states further that Ms. Smith discussed Claimant's treatment with David Molony for approximately 15 minutes and sets forth a summary of that discussion. (R.R. at 125a.) David Molony admitted during his testimony that he did not mention, during his 15 minute conversation with Ms. Smith, that Ming Ming Molony treated Claimant. (David Molony Dep. at 30, R.R. at 160a.) Finally, David Molony is the provider who prepared a medical report summarizing Claimant's diagnoses and treatment. (R.R. at 130a.) David Molony acknowledged that none of this documentary evidence contains the name of Ming Ming Molony. (David Molony Dep. at 26-27, R.R. at 156a-57a.) In addition, Employer was not informed by Claimant after the first UR Determination was issued, finding Claimant's treatment reasonable and necessary, that David Molony was not the correct provider under review. Accordingly, at the time Employer submitted its second UR Request on or

about November 17, 2008, Employer reasonably believed that David Molony was the correct provider under review and had no reason to think Claimant was being treated by Ming Ming Molony. Moreover, as with the first UR, David Molony spoke with the reviewer of Employer's second UR Request, Dr. Ivill, regarding the reasonableness and necessity of Claimant's treatment. However, once again, David Molony failed to inform the reviewer that he was not the actual provider of the treatment rendered to Claimant. Therefore, Employer had no indication that there was a question as to who the actual provider was until Claimant filed her Petition for Review seeking review of the second UR Determination issued by Dr. Ivill.

The Board is correct that our decisions in Bucks County,[7] Schenck,[8] and MV Transportation[9] hold that, pursuant to Section 306(f.1)(6) of the Act and 34 Pa. Code

[7] In Bucks County, the employer filed a UR request seeking review of treatment rendered by Daniel Files, D.O., "and all other providers under the same license & specialty." Id. at 151. However, the UR reviewer stated in his report that he reviewed the treatment provided to the claimant by Dr. Thomas Mercora, who was a physician associated with the same medical practice as Dr. Files. Because the UR sought review of Dr. Files' treatment and no evidence was submitted regarding such treatment, the WCJ found that the UR report was invalid and the Board agreed. On appeal to this Court, the employer argued that Section 306(f.1)(6) of the Act should not be so narrowly construed as to prohibit the UR of a physician, other than the named provider, who is associated with the same medical practice. The employer requested that we hold that an employer/carrier is permitted to request a UR of multiple health care providers in one request form. Thus, the issue before this Court was whether a UR report is valid where the report discusses the treatment provided by another physician associated with the same medical practice as the provider identified in the employer's UR request form. After holding that the language of 34 Pa. Code § 127.452(d), stating that "*the provider under review* shall be the provider who rendered the treatment," was unambiguous and that legislative amendment was necessary to permit a UR review of all of a claimant's providers "regardless of which provider was identified by [the] [e]mployer," we affirmed the Board's order. Id. at 154 (emphasis in original).

[8] In Schenck, the claimant originally received treatment for a work-related injury from Dr. Dennis Zaslow, an orthopedic surgeon, from 1994 to 1997. Dr. Zaslow's treatment of the claimant was later deemed to be unreasonable and unnecessary. Seven years later, the claimant intended to

(Continued…)

§ 127.452(d), a UR request is provider-specific and that, if an employer names a provider who did not render the treatment or services at issue in the UR request, the UR report or determination is invalid. However, given the specific facts of this case, these decisions are distinguishable because there was no evidence in those cases that the employers or the reviewers were misled by the claimants' providers as to who rendered the treatment at issue. For example, in Bucks County, the claimant's

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treat again with Dr. Zaslow but, instead, received pain medication from Dr. Lance Yarus because Dr. Zaslow was no longer located in that same office. The employer refused to pay the claimant's medical bills incurred as a result of her treatment with Dr. Yarus because a prior UR determined that similar treatment rendered by Dr. Zaslow was unreasonable and unnecessary. Based on our decision in Bucks County, we agreed with the claimant that a UR determination is specific to the provider whose treatment was reviewed and held that "an employer may not rely [upon] a UR determination [regarding] the reasonableness and necessity of treatment rendered by a specific provider to justify nonpayment of medical bills for similar treatment rendered by a different provider." Schenck, 937 A.2d at 1157.

[9] In MV Transportation, the employer filed a UR request seeking review of the claimant's physical therapy treatment specifically rendered by Frank Shenko, LPT, and all passive and active physical therapy rendered by all providers at the same or different locations than Mr. Shenko. The UR reviewer determined that the physical therapy treatment provided by Mr. Shenko was not reasonable and necessary, that the UR was limited to the treatment provided by Mr. Shenko, and that any other provider's treatment would not be considered because the employer did not properly request UR of any other provider. The WCJ upheld the UR determination and the Board affirmed. On appeal to this Court, the employer argued that it should not have to file a separate UR request for each physical therapist operating under the supervision of one physician. Upon review, we determined that the Board erred by relying upon Bucks County and Schenck in affirming the WCJ's decision because those cases dealt with treatment rendered by physicians, not physical therapists. We concluded that, unlike physicians, physical therapists do not have the power to act independently, but must act under a physician's supervision. Thus, in order to seek UR of a claimant's entire course of physical therapy that is prescribed by a physician, we held that an employer must name the physician "prescribing physical therapy and the facility where the claimant receives that therapy." MV Transportation, 990 A.2d at 122. Because the employer did not complete the UR request in such a fashion in order to obtain a UR of the claimant's entire course of physical therapy, we affirmed the Board's order upholding: (1) the WCJ's finding that the physical therapy rendered to the claimant by Mr. Shenko was not reasonable and necessary; and (2) that the UR determination could not be applied to other physical therapists who treated the claimant. Id.

medical records reviewed during the UR process included records prepared by Dr. Thomas Mercora, who was not the named provider under review, and the reviewer noted that he confirmed with Dr. Mercora that he provided treatment to the claimant. Bucks County, 918 A.2d at 152.

> We have previously found that one purpose of the UR process is:
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> to encourage payment of medical bills . . . . Were insurers unable to avail themselves of the UR process, they might well be less inclined to pay, voluntarily, for medical treatment, thus, resulting in more litigation. The present system encourages payment of medical bills by providing insurers with a method to limit payments where they believe treatment becomes unnecessary and unreasonable.

Armstrong v. Workers' Compensation Appeal Board (Haines & Kibblehouse, Inc.), 931 A.2d 827, 831 (Pa. Cmwlth. 2007) (quoting Krouse v. Workers' Compensation Appeal Board (Barrier Enterprises, Inc.), 837 A.2d 671, 675 (Pa. Cmwlth. 2003)). Our decisions in Bucks County, Schenck, and MV Transportation are consistent with this purpose; however, the incentive for employers to pay medical bills based on the availability of the UR process would be lessened if this Court sanctioned the invalidation of a UR report based on the naming of an incorrect provider where, as here: (1) all of the medical reports and bills provided to the employer were signed by the named provider; (2) all of the foregoing documentation showed that the named provider "rendered the treatment or service which is the subject of the UR request," 34 Pa. Code § 127.452(d); and (3) the named provider personally conferred with the reviewer and failed to alert the reviewer that another practitioner actually rendered the treatment.

Accordingly, as stated by the WCJ, under the circumstances of this case, "it would be patently unfair to reverse the [UR] Determination on the basis that the incorrect provider was reviewed." (Final FOF ¶ 6.) Therefore, for the foregoing reasons, we must reverse the Board's Order. This matter is remanded to the Board for consideration of the remaining issues raised by Claimant in her appeal to the Board: (1) whether the WCJ erred in finding that the treatment provided to Claimant at Lehigh from July 15, 2008 and ongoing was not reasonable or necessary;[10] and (2) whether the WCJ erred in finding that Claimant's treatment was properly reviewed by Dr. Ivill, a licensed acupuncturist, rather than a Doctor of Oriental Medicine.[11]

RENÉE COHN JUBELIRER, Judge

[10] While the Board stated that the WCJ's acceptance of Dr. Ivill's opinion as credible "*could* be substantial evidence to support the WCJ's finding [that] the [O]riental medical treatment [provided to Claimant] was not reasonable and necessary," it is unclear, without more, whether the Board's statement is an actual disposition of this issue. (Board Op. at 4) (emphasis added).

[11] Due to our disposition of the first issue, we need not address the second issue raised by Employer in this appeal.

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	:	
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	:	
Respondent	:	

O R D E R

NOW, August 2, 2012, the Order of the Workers' Compensation Appeal Board entered in the above-captioned matter is **REVERSED** and this matter is **REMANDED** to the Board for proceedings as directed in the foregoing opinion.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge