IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, Petitioner	:	
v.	:	No. 254 C.D. 2008
Workers' Compensation Appeal Board (Williams), Respondent	:	Submitted: June 6, 2008

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: July 25, 2008**

In this appeal, the City of Philadelphia (Employer) contends the Workers' Compensation Appeal Board (Board) erred by affirming a decision of a Workers' Compensation Judge (WCJ) that denied its petition to review utilization review and granted Denise Williams' (Claimant) penalty petition. A primary issue on appeal is whether Employer may refuse payment for medical equipment based on a prior utilization review (UR) determination that similar equipment prescribed by a different provider was unreasonable and unnecessary. Based on our recent decisions in 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), we affirm.

I.

A. First WCJ

The present proceedings involve a prior UR determination. Therefore, a detailed case history is helpful. In September 1998, Claimant, a police officer, sustained a work injury when a civilian vehicle struck her police cruiser from behind. Employer issued a notice of compensation payable acknowledging injuries to the head, neck and back. Claimant received benefits until October 1998, after which she returned to limited duty at her pre-injury wages. She suffered a second work injury in June 1999. A non-work related injury prevented Claimant from full duty until March 2000.

In late 1999, a designated physician conducted a review of medical treatment that Dr. Jerry Murphy provided to Claimant (1999 UR). Significant here, the reviewing physician found Dr. Murphy's prescriptions for diagnostic imaging and unspecified durable medical equipment after July 31, 1999 unreasonable and unnecessary. Dr. Murphy then filed a petition to review the 1999 UR determination.

In early 2000, Claimant filed three petitions. The first petition sought a reinstatement of benefits alleging Claimant's 1998 work injury impacted her ability to earn overtime wages. The second petition sought penalties against Employer alleging it failed to reinstate benefits. The third petition, a claim petition, sought benefits for a June 1999 hand injury. Dr. Murphy's petition and Claimant's three petitions were consolidated for disposition.

In December 2003, WCJ Joseph Hagan (first WCJ) granted Claimant's reinstatement petition concluding she proved an indeterminate wage loss resulting from the 1998 work injury. Because Claimant received injury-on-duty benefits, first WCJ also granted Employer a credit for any wages paid.

Significantly, first WCJ dismissed Dr. Murphy's petition to review the 1999 UR determination and, thus, upheld the reviewing physician's conclusions that Dr. Murphy's prescription of unspecified durable medical equipment was unreasonable and unnecessary. Dr. Murphy did not appeal.[1]

B. Second WCJ

In mid-2004, Claimant filed a penalty petition. She alleged Employer failed to pay for medical equipment related to the 1998 work injury ordered by Dr. Daphne Golding (Claimant's treating physician).[2] Employer raised numerous defenses to the penalty petition.

[1] First WCJ also granted Claimant's claim petition for a 1999 hand injury, denied Claimant's penalty petition, and awarded unreasonable contest fees related to the claim, reinstatement, and penalty petitions. Employer appealed to the Board, which affirmed first WCJ's order. On further appeal, we reversed the Board's order, concluding Claimant failed to prove a specific loss of wages. See City of Phila. v. Workers' Comp. Appeal Bd. (Williams), (Pa. Cmwlth., 1654 C.D. 2005, filed April 17, 2006). Our prior decision is not implicated in this appeal.

[2] Claimant alleged Employer failed to pay for an interferential unit, a back knobber, supplies, a bed, and a treadmill. Reproduced Record "R.R." at 2a. Employer's insurer denied each expense, indicating the bill and treatment were not related to the work injury. Id. at 28a-32a.

Employer subsequently filed a second UR request (2004 UR), which identified Dr. Michael Buchakjian (Claimant's chiropractor) as the provider under review. The reviewing chiropractor found Claimant's chiropractor's treatment reasonable and necessary. Nevertheless, Employer filed a petition to review the 2004 UR determination.

WCJ Ollie Arrington, Jr. (second WCJ) heard the consolidated penalty petition for unpaid medical equipment and petition to review UR (chiropractic treatment). In support of her penalty petition for unpaid medical equipment, Claimant submitted unpaid bills for medical equipment ordered by her treating physician and Dr. Michael McCoy. In response to the petition to review UR (chiropractic treatment), Claimant introduced the 2004 UR determination, which found her chiropractor's services reasonable and necessary.

Regarding the penalty petition for unpaid medical equipment, Employer submitted the 1999 UR determination and first WCJ's 2003 decision. Also in opposition to penalty petition and in support of its petition to review UR (chiropractic treatment), Employer introduced a 2005 report from a neurologist, Dr. I. Howard Levin (Employer's physician). Employer's physician's report stated Claimant needs no further treatment and her care has been excessive and inappropriate. Importantly, the physician's report did not refer to Claimant's chiropractor's treatment.

Second WCJ resolved the penalty petition for unpaid medical equipment by determining Employer violated the Workers' Compensation Act[3] in failing to pay expenses related to medical equipment prescribed by Claimant's treating physician and Dr. McCoy. Concomitantly, second WCJ awarded Claimant unreasonable contest attorneys' fees and a 50% penalty for excessive and unreasonable delay. Regarding the petition to review UR (chiropractic treatment), second WCJ determined Employer failed to prove Claimant's chiropractor's treatment was unreasonable and unnecessary. Accordingly, second WCJ denied Employer's petition to review UR. On appeal, the Board affirmed.

II.

A. Present Appeal

Employer raises four challenges to second WCJ's decision.[4] In the first of two combined arguments, Employer asserts second WCJ's decision is neither supported by substantial evidence nor reasoned. In the latter argument, Employer contests second WCJ's award of penalties and unreasonable contest attorneys' fees.

B. Liability: Substantial Evidence/Reasoned Decision

Employer asserts it sustained its burden on the petition to review UR (chiropractic treatment). An employer has the burden throughout the UR process

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

[4] Our review is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. 2 Pa. C.S. §704; Pryor v. Workers' Comp. Appeal Bd. (Colin Serv. Sys.), 923 A.2d 1197 (Pa. Cmwlth. 2006).

of proving the challenged medical treatment is not reasonable or necessary regardless of which party prevailed at the UR level. City of Phila. v. Workers' Comp. Appeal Bd. (Smith), 946 A.2d 130 (Pa. Cmwlth. 2008).

Employer contends its physician's 2005 report proved Claimant's chiropractor's treatment was unreasonable and unnecessary. It also claims collateral estoppel and res judicata bar Claimant from seeking similar treatment found to be unreasonable and unnecessary by the 1999 UR determination.

1. Petition to Review UR (chiropractic treatment)

Initially, second WCJ rejected Employer's physician's 2005 report. Second WCJ articulated two reasons for rejecting the physician's report: the physician did not examine Claimant and he did not dispute the medical expenses addressed by the penalty petition for unpaid medical equipment. It is beyond question that credibility determinations are within the exclusive province of the WCJ. Lahr Mech. v. Workers' Comp. Appeal Bd. (Floyd), 933 A.2d 1095 (Pa. Cmwlth. 2007).

In addition, the 2004 UR challenged Claimant's chiropractor's service from October 12, 2004 forward. Our review of Employer's physician's 2005 report, however, shows the physician did not review any of Claimant's medical records after September 2004. The 2005 report, issued after the services under review, made no mention of Claimant's chiropractor's treatment and does not contradict the 2004 UR determination. Thus, the report cannot support Employer's challenge to the 2004 UR determination.

2. Penalty Petition for Unpaid Medical Equipment

As to the penalty petition for unpaid medical equipment, Employer maintains the 1999 UR determination precludes Claimant from seeking payment of durable medical equipment which her treating physician and Dr. McCoy prescribed. As noted above, first WCJ's 2003 decision upheld the 1999 UR determination that Dr. Murphy's treatment of Claimant was unreasonable and unnecessary, including durable medical equipment.

To resolve this issue, we find the Board's regulations and recent case law instructive. First, Board regulation 127.452(e), 34 Pa. Code §127.452(e), addresses UR requests where the treatment under review is durable medical equipment. In such cases, "the request for UR shall identify the provider who made the referral, ordered or prescribed the treatment or service as the provider under review." Id.

In Bucks County Community College, we agreed with the Board's narrow interpretation of Section 306(f.1)(6)(i)[5] of the Act and regulation

[5] Section 306(f.1)(6)(i), 77 P.S. §531(6)(i), provides:

> (6) Except in those cases in which a [WCJ] asks for an opinion from peer review under [Section 420, 77 P.S. 831 and 832], disputes as to reasonableness or necessity of treatment by a health care provider shall be resolved in accordance with the following provisions:
>
> (i) The reasonableness or necessity of all treatment provided by a health care provider under this act may be subject to prospective, concurrent or retrospective utilization review at the request of an employe, employer or insurer. The [Department of Labor and Industry] shall authorize utilization review

(Footnote continued on next page…)

127.407(a)[6] to conclude a UR request filed against a named provider does not include a review of treatment rendered by all of a claimant's providers regardless of which provider the employer identified in its UR form. Relying on Bucks County Community College, we held in Schenck that an employer may not rely on a prior UR determination concerning 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.[7]

Reviewing 34 Pa. Code §127.452(e) in conjunction with Bucks County Community College and Schenck, Employer here must file a UR request identifying Claimant's treating physician and Dr. McCoy as the providers under review in order to challenge payment of the durable medical equipment at issue. This is especially true where the 1999 UR determination did not identify the

(continued…)

> organizations to perform utilization review under this act. Utilization review of all treatment rendered by a health care provider shall be performed by a provider licensed in the same profession and having the same or similar specialty as that of the provider of the treatment under review. Organizations not authorized by the department may not engage in such utilization review.

[6] In relevant part, regulation 127.407(a), 34 Pa. Code §127.407(a) provides:

> the UR determination shall be limited to the treatment that is subject to review by the request.

[7] In Schenck, we vacated the Board's order affirming a WCJ's denial of a claimant's penalty petition and remanded for further proceedings to allow the WCJ an opportunity to determine penalties, if any, in light of Bucks County Community College.

durable medical equipment found to be unreasonable and unnecessary. See R.R. at 47a-51a.

Finally, Employer, in its statement of issues, asserts second WCJ failed to render a reasoned decision. Pursuant to Section 422 of the Act, 77 P.S. §834, parties in a workers' compensation proceeding are entitled to a "reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions." However, Employer failed to raise or develop this issue in its brief and, therefore, it is waived. Pa. Sch. Bds. Ass'n, Inc. v. Pub. Sch. Employees' Ret. Sys., 751 A.2d 1237 (Pa. Cmwlth. 2000), aff'd 580 Pa. 610, 863 A.2d 432 (2004).[8]

B. Remedy: Penalties/Unreasonable Contest Attorneys' Fees

Penalties are provided in Sections 435 of the Act,[9] and are appropriate where a violation of the Act or the Board's rules and regulations occurs. The assessment of penalties and the amount of penalties imposed, if any, are matters within the WCJ's discretion. Gumm v. Workers' Comp. Appeal Bd. (Steel), 942 A.2d 222 (Pa. Cmwlth. 2008). "[A] violation of the Act or its regulations must appear in the record for a penalty to be appropriate." Shuster v. Workers' Comp.

[8] Nonetheless, second WCJ's decision allows for adequate appellate review. Daniels v. Workers' Comp. Appeal Bd. (Tristate Transp.), 574 Pa. 61, 828 A.2d 1043 (2003). We easily discern from second WCJ's decision why he rejected Employer's evidence in support of its petition to review the 2004 UR determination (chiropractic treatment) and found Employer failed to rebut Claimant's evidence that it refused payment of the medical expenses at issue.

[9] Added by the Act of February 8, 1972, P.L. 25, 77 P.S. §991.

Appeal Bd. (Pa. Human Relations Comm'n), 745 A.2d 1282, 1288 (Pa. Cmwlth. 2000). Further, a claimant who files a penalty petition bears the burden of proving a violation of the Act occurred. Id. If the claimant meets her initial burden of proving a violation, the burden then shifts to the employer to prove it did not violate the Act. Id.

Similarly, if a claimant is successful in whole or in part in a litigated claim, reasonable costs are awarded unless the employer proves a reasonable basis for its contest. Section 440 of the Act, 77 P.S. §996. The reasonableness of a contest is a legal conclusion predicated on the WCJ's findings of fact. Lemon v. Workers' Comp. Appeal Bd. (Mercy Nursing Connections), 742 A.2d 223 (Pa. Cmwlth. 1999).

Employer here asserts penalties and unreasonable contest attorneys' fees are not warranted because the 1999 UR determination previously concluded durable medical equipment was not reasonable or necessary for treatment of Claimant's 1998 work injury. We disagree.

As to penalties, Claimant introduced evidence proving Employer failed to pay for medical equipment prescribed by a health care provider for her work injuries. Claimant's Ex. C-1. Thus, Claimant proved a violation of the Act.

The burden then shifted to Employer to prove it did not violate the Act. As explained above with regard to the penalty petition for unpaid medical equipment, where different providers prescribed the durable medical equipment for

which Claimant sought payment, Employer needed to name the current prescribing provider. Employer could not rely on a prior UR decision which involved a different provider of unspecified durable medical equipment. Moreover, Employer's physician's 2005 report failed to address the medical expenses subject to the penalty petition. As a result, Employer failed to rebut Claimant's evidence of a violation of the Act.

In addition, second WCJ did not err in awarding Claimant attorneys' fees for Employer's unreasonable contest of the penalty petition for unpaid medical equipment. As second WCJ explained, Employer's physician's report did not even address the medical bills at issue. Second WCJ's Op. at 2, Finding of Fact No. 8. Under such circumstances, second WCJ could conclude Employer failed to present a reasonable contest of the penalty petition for unpaid medical equipment.

Accordingly, we affirm.

ROBERT SIMPSON, Judge

President Judge Leadbetter concurs in the result only.

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O R D E R

AND NOW, this 25th day of July, 2008, the order of the Workers' Compensation Appeal Board is **AFFIRMED.**

ROBERT SIMPSON, Judge