

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Valerie Loch,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 393 C.D. 2008
	:	Submitted: July 3, 2008
Workers' Compensation Appeal	:	
Board (Good Shepherd Home	:	
and Rehab and Consolidated	:	
Risk Services),	:	
	:	
Respondents	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE McCLOSKEY

FILED: August 25, 2008

Valerie Loch (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which partially reversed the decision of the Workers' Compensation Judge (WCJ), denying her petition to review a utilization review determination. The utilization review had been triggered by the request of Good Shepherd Home and Rehab and Consolidated Risk Services (collectively Employer), which questioned the reasonableness and necessity of medications prescribed by Don Ko, M.D., one of Claimant's treating physicians. We now affirm.<sup>1</sup>

Claimant was employed as a nursing assistant at Employer's place of business located in Allentown, Lehigh County, Pennsylvania. In the course and scope

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<sup>1</sup> At the same time, the WCJ denied Employer's termination petition and granted Claimant's review petition. Employer has not challenged those determinations.

of her employment on September 26, 1991, Claimant suffered an injury to her right hand when a patient that she was assisting in the bathroom threw himself forward and pushed his chest into her right thumb. Pursuant to a notice of compensation payable issued on October 9, 1991, Claimant received total disability benefits for the injury, initially described as a right hand sprain.

The pertinent procedural history and facts as found by the WCJ can be summarized as follows. Following a Supplemental Agreement between Employer and Claimant dated June 9, 1992, that reinstated total disability benefits for Claimant as of June 1, 2002, the parties entered into a Stipulation of Facts, approved by WCJ Geoffrey Dlin, that provided for the grant of an earlier utilization review petition filed by Employer. The agreement as to the utilization review petition required that Employer pay for the pharmaceutical Neurontin as long as a physician certified that the drug was necessary and reasonable for treatment of Claimant's work-related injury.

In January 2006, Employer filed a petition to terminate compensation benefits, asserting that Claimant had fully recovered from her work-related injuries. Employer also filed a second utilization review request, seeking review of the medications prescribed by Dr. Ko, and other similarly licensed providers. The review request, however, did not list the specific medications prescribed by Dr. Ko. Claimant then filed a petition to review compensation benefits through which she sought to expand the description of her work-related injuries to include complex regional pain syndrome, also referred to as reflex sympathetic dystrophy (RSD). The reviewer assigned to the utilization review request, Dr. Richard S. Kaplan, M.D., indicated in his report that the prescriptions under review were: Daypro (two daily doses), MSIR (30 milligrams every four to six hours as needed), MS-Contin (100 milligrams every eight hours) and Zonegran (100 milligrams four times per day). Dr. Kaplan concluded in his

report that the subject medications were not reasonable or necessary. Claimant then filed her petition for review of utilization review challenging the reviewer's conclusions. Significant to the Board and this Court's review below is the fact that the utilization review request now subject to our review did not specifically seek review of the prescriptive treatment of another of Claimant's treating physicians, Yasin Kahn, M.D., who is associated with Dr. Ko's practice.

At the hearing before the WCJ, Claimant presented the deposition testimony of Dr. Ko, who began treating Claimant in September, 2002. Dr. Ko, who has examined Claimant between thirty and forty times, diagnosed her condition as complex regional pain syndrome or RSD. In his deposition, Dr. Ko, in reference to a letter written by his colleague, Dr. Kahn, that identified the subject prescription medications, testified regarding the purposes of those prescriptions. Dr. Ko's testimony does not specifically establish that he prescribed the subject medications; however, his testimony does demonstrate that he regarded the decision to prescribe those medications as his decision as well as any other member of his practice. For example, in response to a question from Claimant's counsel regarding the reasonableness and necessity of the medications, Dr. Ko responded as follows:

Obviously the morphine medications are not specific for RSD, but despite what we have done and what we have shown so far in terms of what we have provided for [Claimant], including numerous injections, as well as [sic] spinal cord stimulator, we are still having persistent pain. Therefore, in addition to those[,] we have to provide her with pain medications, and that's what we are doing here. But we are not just masking her pain by writing opioid pain medication, but in addition to Daypro, which is an anti-inflammatory, it has been shown not only to help with the anti-inflammation action, but also it has action on the nerves itself, as well as I stated the Zonegran, which is for neuropathic or nerve

related pain. So these medications are definitely used and appropriate for this diagnosis.

(Notes of Testimony, p. 52).

Dr. Ko testified to similar effect with regard to Paxil, an anti-depressant. Thus, Dr. Ko's own testimony indicates that he prescribed these medications or approved the prescriptions for Claimant in conjunction with his treatment of her.

Employer submitted the deposition testimony of Wilhelmina Korevaar, M.D., a physician who is Board-certified in anesthesiology and who examined Claimant on January 24, 2006. Dr. Korevaar opined that she did not believe that Claimant developed complex reflex sympathetic dystrophy or RSD following her work-related injury, based upon her observations and beliefs that Claimant's symptoms did not correlate to the particular conditions Claimant said she had as well as her conclusion that many of the symptoms could be explained by other causes not related to Claimant's work injury.

Additionally, Claimant testified regarding the history of her injury and her symptoms. The WCJ, while noting certain inconsistencies in Claimant's testimony, accepted her statements as "generally credible." The WCJ rejected Dr. Korevaar's testimony, but accepted as credible Dr. Ko's testimony regarding the causal relationship between Claimant's work injury and her complex pain syndrome or RSD. The WCJ rejected Dr. Ko's testimony regarding the reasonableness and necessity of the prescriptive medicines.

Based upon his factual findings, the WCJ concluded that Claimant had sustained her burden of proof with regard to her review petition and therefore expanded the description of her injuries to include the complex regional pain syndrome or RSD. Consequently, as Claimant had not fully recovered from her work-related injuries, the WCJ denied Employer's termination petition. However, the WCJ concluded that

Employer had established that the medications prescribed by Drs. Ko and Kahn were not reasonable or necessary for the treatment of Claimant's work-related injuries, and, thus, denied Claimant's petition to review the subject utilization review determination.

Claimant appealed the WCJ's decision regarding the reasonableness and necessity of those doctors' prescriptions to the Board, which, as noted above, reversed the WCJ's decision with regard to Dr. Kahn's prescriptions because the only provider specifically named in Employer's utilization review petition was Dr. Ko. Claimant also argued before the Board that the WCJ, by not considering the palliative aspect of the medications prescribed, erred in his conclusions regarding the reasonableness of the prescriptions.

The Board reversed the WCJ's decision regarding Dr. Kahn's prescriptions, relying upon this Court's decision in Bucks County Community College v. Workers' Compensation Appeal Board (Nemes), 918 A.2d 150 (Pa. Cmwlth. 2007). The precise issue presented in that case was whether a WCJ had erred in dismissing a Claimant's petition for review of a utilization review determination "when the utilization review report discussed the treatment provided by another physician associated with the same medical practice as the provider identified in [the employer's] 'utilization review request form.'" Bucks County, 918 A.2d at 151.

The Board reasoned that Dr. Kaplan reviewed only the records of Dr. Ko, and did not review the records of Dr. Kahn.<sup>2</sup> The Board concluded that the failure to review those records resulted in factual findings unsupported by substantial evidence. With regard to Claimant's argument that the WCJ erred in concluding that Dr. Ko's

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<sup>2</sup> While the Court agrees that Bucks County stands for the proposition that a reviewer may only consider the reasonableness of the treatment provided by the specific physician named in the review request, and thus believes that the Board did not err in reversing the WCJ on the basis of that opinion, Dr. Kaplan's report indicates that he reviewed the treatment records of both Dr. Ko and Dr. Kahn.

prescriptions were not reasonable or necessary, the Board concluded that, given the WCJ's credibility determinations regarding Dr. Ko's testimony concerning the prescriptions and the report of Dr. Kaplan, substantial evidence supported the WCJ's factual findings regarding Dr. Ko's prescriptions.

In this appeal, Claimant raises the following issues: (1) whether substantial evidence supports Dr. Kaplan's opinion that the medications prescribed by Dr. Ko are not reasonable or necessary; (2) whether the Board erred in failing to conclude that Dr. Kaplan's utilization review determination is invalid as a matter of law; and (3) whether the WCJ erred in determining that, in order to be reasonable and necessary, the prescriptive treatments must improve Claimant's condition.

We will begin by addressing Claimant's assertion that substantial evidence does not support the WCJ's determinations that the medicines prescribed by Dr. Ko are not reasonable or necessary. In a utilization review dispute presented to a WCJ, the employer seeking a determination regarding its obligation to pay for certain treatment bears the burden of proving that the treatment is not reasonable or necessary, even if the employer prevailed at the initial stage of the utilization review process. AT&T v. Workers' Compensation Appeal Board (DiNapoli), 816 A.2d 355 (Pa. Cmwlth.), petition for allowance of appeal denied, 574 Pa. 744, 829 A.2d 311 (2003).

With regard to the first issue Claimant raises, the Court must point out that, contrary to considering whether substantial evidence supports Dr. Kaplan's opinion, our inquiry is confined to considering whether substantial evidence supports the WCJ's finding that the medications prescribed by Dr. Ko are not reasonable or necessary.

Claimant's argument focuses on her contention that Dr. Kaplan's conclusions were based upon treatment notes supplied by Dr. Kahn, whose prescriptions the Board concluded could not be challenged. However, as we indicated above, Dr.

Ko's own testimony indicates that he was aware of and approved the medications prescribed for Claimant's treatment, and that he regarded the judgments to treat Claimant with the subject medications as ones that he, as part of his practice, approved. Claimant asserts that the Board erred in affirming the WCJ in this regard because Dr. Kaplan relied upon the notes from practice that were entered by Dr. Kahn. However, Dr. Kaplan's report indicates that he reviewed the treatment notes supplied by Dr. Ko. Further, the report indicates that Dr. Kaplan twice attempted to contact Dr. Ko to discuss his prescriptive treatments for Claimant; however, Dr. Ko never responded to those contacts.

Claimant also relies upon this Court's decision in Bucks County. In that case, similar to this one, the employer's request mentioned one physician in particular, but also sought review of "all other providers under the same license and specialty." The reviewer had consulted treatment notes of another physician in the practice of the provider whose treatment was placed in question, but no records of the specific physician identified in the review request. Based upon that observation, the WCJ in Bucks County concluded that the utilization review report was "invalid." The Board agreed, noting that the form developed by the Bureau of Workers' Compensation for review requests specifically indicates that reviews will apply only to individual physicians named in the requests.

This Court affirmed the Board's conclusion, summarizing that "[b]ecause the WCJ found no evidence presented as to the treatment rendered by [the provider identified in the review request], nor any opinion by the reviewer as to the reasonableness or necessity of [that provider's] treatment, the WCJ did not err in finding the reviewer's report to be invalid." Bucks County, 918 A.2d at 154.

In the present case, in contrast to Bucks County, the reviewer, Dr. Kaplan, did express an opinion as to the necessity and reasonableness of Dr. Ko's treatment of Claimant. Further, the report indicates that Dr. Kaplan reviewed the records that Dr. Ko presumably sent to him for preparation of the report. Finally, we note that Dr. Ko never returned the phone calls from Dr. Kaplan to aid in the preparation of the report. Based upon these distinctions, our previous opinion in Bucks County is distinguishable and we cannot agree with Claimant that Dr. Kaplan's report is invalid on the basis of the records he reviewed, as there is no foundation for concluding that his opinion is incompetent.<sup>3</sup>

The WCJ held that Dr. Kaplan's opinion was more credible than Dr. Ko's with regard to the medical necessity of his prescriptive treatments. In reaching this conclusion, the WCJ determined that Dr. Ko's treatment focused solely on medication of pain, rather than the goal of improving Claimant's physical condition to help her return to a capacity that would permit her to function. The WCJ explained that, under Dr. Ko's treatment, Claimant had made no progress in any regard. The WCJ noted that while Dr. Ko had discussed the possibility of reducing Claimant's pain medication, he had taken no specific steps in that regard. The WCJ also noted her impression that "claimant [was] directing her medical treatment, not the physician." Thus, based upon review of the testimony and Dr. Kaplan's report, the WCJ determined that, although Dr.

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<sup>3</sup> In Seamon v. Workers' Compensation Appeal Board (Sarno & Son Formals), 761 A.2d 1258 (Pa. Cmwlth. 2000), appeal dismissed, 572 Pa. 410, 816 A.2d 1096 (2003), this Court stated that a reviewer's failure to obtain a provider's entire medical file and failure to discuss a claimant's condition with the provider did not render incompetent the reviewer's testimony regarding the reasonableness and necessity of medical treatment. Further, a WCJ, in evaluating the evidence the parties present, may decide the weight and credibility to be accorded such evidence. Solomon v. Workers' Compensation Appeal Board (City of Philadelphia), 821 A.2d 215 (Pa. Cmwlth. 2003).



Ko's testimony regarding a diagnosis was credible, his testimony regarding Claimant's prescriptive treatment was not credible.

However, Claimant also argues that the WCJ erred in ignoring Dr. Ko's testimony regarding the need for the treatments to deal with Claimant's neuropathic pain. Dr. Ko's testimony does strongly indicate that the prescribed medicines were needed to address the pain associated with Claimant's work-related injuries. In Trafalgar House v. Workers' Compensation Appeal Board (Green), 784 A.2d 232 (Pa. Cmwlth. 2001), this Court held that "[m]edical treatment may be reasonable and necessary even if the treatment does not cure the underlying injury, so long as it acts to relieve pain and treats the symptomatology, i.e., if it is palliative in nature. When the treatment is not intended to cure the injury, the adjudicatory entity, and this Court on appeal, must consider whether the claimant continues to suffer from pain due to the work-related injury and whether the treatment relieves the pain." Id. at 235.

In this case, Dr. Ko testified that, even with regard to the anti-depressant Paxil, the purpose of the prescriptive treatments was to address the pain Claimant experienced as a result of her work-related injuries. However, Dr. Ko testified that Claimant told him that the medicine was not working. On the other hand, in her own testimony, Claimant indicated that the medications did provide some relief. Dr. Kaplan's report indicates that he made two attempts to try to contact Dr. Ko, but Dr. Ko never returned his phone calls. Dr. Kaplan's report indicates that Claimant expressed her opinion that the medications help her pain and that she would be functioning at a level below her present abilities without the medications. Dr. Kaplan opined as follows:

The treatment for this diagnosis can be quite varied and may involve a combination of active or passive rehabilitation intervention and/or medications. Sympathetic nerve blocks, followed by

physical/occupational therapy, in conjunction with medications may be prescribed with the main focus being promotion of function.

(R.R. at 226a).

Thus, Dr. Kaplan, while recognizing that medications may be used in treating Claimant's symptomatic condition and not solely for the improvement of the work-related injury, noted that other methods of treatment may also be used to help improve function. Although that aspect of his report suggests that he did not address the palliative aspects of the prescriptions, he also made the following comment regarding Dr. Ko's prescription of medicines to address pain:

These treatments should be titrated based upon physical examination findings and specifically based on analog visual scales and documented functional goals or patient functional abilities. The standard documentation is not met in this case. During treatment period under review, 1/12/06 and ongoing, there is no documentation per the standard of care regarding this patient's physical examination, nor are there records to document that treatment has been correlated with an analog visual pain scale or the patient's functional status. For that reason, it is my professional opinion that the prescription medications subject to this review are not reasonable and medically necessary.

(R.R. at 227a).

Dr. Kaplan, by referring to the analog pain scale, apparently recognized the potential palliative purpose of the medications, but, after reviewing the records Dr. Ko submitted to him, concluded that there was no medical information in the records to support a conclusion that the prescribing physician had properly examined Claimant to determine whether the medications actually performed the purported palliative function.

The WCJ found Dr. Kaplan's opinion credible, accepted his reasoning and consequently determined that Dr. Ko was not credible with regard to his opinion

regarding the medical need for the medications he prescribed. The opinion Dr. Kaplan expressed is not incompetent and his report constitutes substantial evidence that supports the WCJ's factual findings regarding the reasonableness and necessity of Dr. Ko's prescribed medications.

Accordingly, the order of the Board is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge

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Risk Services),	:	
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**ORDER**

AND NOW, this 25<sup>th</sup> day of August, 2008, the order of the Workers' Compensation Appeal Board is hereby affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge