IN THE
SUPREME COURT OF PENNSYLVANIA

No 27 EAP 2020

Keystone RX, LLC.,

v.

Bureau of Workers' Compensation Fee Review Hearing Office
(Compservices, Inc./AmeriHealth Casualty Services)

BRIEF OF *AMICUS CURIAE*
Laundry Owners Mutual Liability Insurance Association
United Parcel Service
Pennsylvania Chamber of Business and Industry

Petition for Allowance of Appeal granted
relative to order of Commonwealth Court entered
on December 12, 2019 at No. 1369 CD 2018

/s/ Shawn C. Gooden
Shawn C. Gooden, Esquire
Pa. Atty. ID # 89121
Lori A. Tunstall, Esquire
Pa. Atty. ID # 67747
WEBER GALLAGHER SIMPSON STAPLETON FIRES & NEWBY, LLP.
Fulton Bank Building, Suite 9A
200 N. Third Street
Harrisburg, PA 17101-1585
(717) 237-6948

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Statutory Provisions

Regulatory Provisions

I. STATEMENT OF THE QUESTIONS INVOLVED:

A. Whether the Commonwealth Court exceeded the scope of its authority and substituted its judgment for that of the Pennsylvania Legislature when it promulgated a new rule which mandates non-healthcare providers are entities with standing and the right to intervene in the Workers' Compensation Act's Utilization Review process?

Suggested Answer: *Yes.*

B. Whether the Commonwealth Court erred as a matter of law when it gave non-healthcare providers the right to void a Utilization Review Determination regarding the reasonableness and necessity of the care of the physician who wrote the prescription which led to the non-healthcare provider providing a good or service to the injured worker?

Suggested Answer: *Yes.*

C. Whether the Commonwealth Court violated the separation of powers doctrine by engrafting a new requirement onto the Pennsylvania Workers' Compensation Act's process for conducting utilization review of treatment by a health care provider by prospectively directing that non-treating entities be given notice and an opportunity to intervene in utilization reviews?

Suggested Answer: *Yes.*

II. INTEREST OF AMICUS CURIAE

The amicus curiae consist of Laundry Owner's Mutual Liability Insurance Association, United Parcel Service, and the Pennsylvania Chamber of Business and Industry (collectively referred to herein as "Amicus"); entities which are not parties to this case but are unquestionably affected by the decision.

In this regard, Laundry Owners' has written Pennsylvania workers' compensation insurance policies for more than one hundred (100) years and is the oldest continuously operative mutual liability insurer in the Commonwealth. United Parcel Service is an American multinational package delivery and supply chain management company which employs thousands of workers in Pennsylvania and is self-insured for purposes of workers' compensation benefits. And the Pennsylvania Chamber is the largest broad-based business association in Pennsylvania with more than 9,700 member businesses of all sizes and industry sectors throughout the state.

Understanding the costs and risks associated with doing business in Pennsylvania is critical to each of these entities. And the Commonwealth Court's expansion of the Act to add non-medical providers into the well-established Utilization Review process crafted by the legislature creates uncertainty and invites needless collateral litigation.

Thus, Amicus respectfully submits the following brief in support of its position that the Commonwealth Court exceeded the scope of its authority, erred as a matter of law, and violated the separation of powers doctrine when it engrafted a new requirement onto the Act's process for conducting utilization review.

No party to this appeal has paid in whole or in part for the preparation of the brief and no attorney representing any party has participated in the drafting of this brief.

III. SUMMARY OF ARGUMENT:

When an employee suffers a work-related injury, employers and insurers are required to pay for medical treatment that is both causally related to the work injury and that is reasonable and necessary. Section 306(f.1) of the Pennsylvania Workers' Compensation Act[1], ("Act"), 77 P.S. § 531. To determine whether certain medical treatment is reasonable or necessary, the Act provides for a system of utilization review ("UR"). Section 306(f.1)(6) of the Act, 77 P.S. § 531(6).

In the matter *sub judice*, while affirming a Hearing Officer's denial of a Application for Fee Review, the Commonwealth Court engrafted a new requirement into the UR process by requiring that a "provider which is not a "health care provider" as defined by the Act, such as a pharmacy, testing facility or provider of medical supplies, be provided notice and an opportunity to intervene under the usual standards for allowing intervention." Keystone Rx LLC v. Bureau of Workers' Compensation Fee Review Hearing Office (Compservices Inc,/Amerihealth Casualty Services), 223 A.3d 295, 299 (Pa. Cmwlth. 2019).

As the following reflects, the Commonwealth Court's actions in this case cannot be considered an interpretation of the Act. Instead, Amicus respectfully submits that the Court re-wrote the Act, inserting a category of participants not statutorily involved in the UR process. Thus, the Court erred as a matter of law,

[1] Act of June 2, 1915, P.L. 736, *as amended,* 77 P.S. §§ 1 *et seq.*

violated the separation of powers doctrine, and usurped the General Assembly's constitutional authority to enact laws related to the payment of compensation for injuries to employees.

IV. ARGUMENT:

A. THE COMMONWEALTH COURT EXCEED THE SCOPE OF ITS AUTHORITY AND SUBSTITUTED ITS JUDGMENT FOR THAT OF THE PENNSYLVANIA LEGISLATURE WHEN IT PROMULGATED A NEW RULE WHICH MANDATES NON-HEALTHCARE PROVIDERS ARE ENTITIES WITH STANDING AND THE RIGHT TO INTERVENE IN THE WORKERS' COMPENSATION ACT'S UTILIZATION REVIEW PROCESS.

The Act creates a system of no-fault liability for work-related injuries and makes employers' liability under this system "exclusive . . . of any and all other liability." American Manufacturers Mutual Insurance Company v. Sullivan, 526 U.S. 40, 44 (1999) citing 77 P.S. § 481.

The legislative authority to enact workers' compensation laws in this Commonwealth rests upon Article III, Section 18 of the Pennsylvania Constitution. In this regard, the Legislature is empowered to create proceedings and to limit recoveries in the context of workplace injuries. Pa. Const. Art. III, § 18. Specifically, the Pennsylvania Constitution provides that:

> The General Assembly may enact laws requiring the payment by employers, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment, and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of employer or employee, and fixing the basis of ascertainment of such compensation and the

> maximum and minimum limits thereof, and providing special or general remedies for the collection thereof . . .

Pa. Const. Art. III, § 18.

Through the Act, the Legislature replaced what was previously a civil action with a "statutorily prescribed comprehensive administrative system of substantive, procedural, and remedial laws, which provide the exclusive forum for redress of injuries in any way related to the work-place." East v. WCAB (USX Corp./Clairton), 828 A.2d 1016, 1020 (Pa. 2003). Furthermore, this Honorable Court's "basic premise in workmen's compensation matters is that the Act is remedial in nature and intended to benefit the worker. . . ." Kramer v. WCAB (Rite Aid Corp.), 883 A.2d 518, 525 (Pa. 2005).

Under the statutory scheme created by the Legislature, the compensation payable to the injured worker includes payment of medical expenses. 77 P.S. §531. For many years medical benefits were paid on what amounted to a "no questions asked" basis. Eventually, employers faced with rising costs and rising workers' compensation premiums demanded reform. Thus, in 1993 a lengthy set of medical cost containing provisions known as "Act 44" was enacted. These amendments represented a total revision of the medical benefit payment regime associated with work related injuries. 77 §531. Correspondingly, the Department of Labor, Bureau

of Workers' Compensation, promulgated numerous "Medical Cost Containment Regulations" to implement the new legislation. 34 Pa. Code, Chapter 127.

As a review of the record reflects, litigation in the present case began with a Petition for Fee Review filed by Pharmacy. In this regard, Section 306(f.1)(5) of the Act provides that:

> A provider who has submitted the reports and bills required by this section and who disputes the amount or timeliness of the payment from the employer or insurer shall file an application for fee review with the department no more than thirty (30) days following notification of a disputed treatment or ninety (90) days following the original billing date of treatment.

77 P.S. § 531(5).

Consistent with the foregoing statutory language, this Honorable Court has explained that a "fee review is designed to be a 'simple process' with a 'very narrow scope' limited to determining the 'relatively simple matters' of 'amount or timeliness' of payment for medical treatment." Crozer Chester Med. Ctr. v. Dep't of Labor and Indus., Bureau of Workers' Comp., Health Care Servs. Review Div., 22 A.3d 189, 195 (Pa. 2011). The fee review sections of the Act were not intended and do not permit a "determination of liability as to a particular injury treatment under the Act." Nickel v. WCAB (Agway Agronomy), 959 A.2d 498, 503 (Pa. Cmwlth. 2008).

In the present case, the Bureau's Medical Fee Review Section addressed this matter in accordance with the above noted Legislative directive, concluding that the bills, for which the insurance carrier had denied liability, were not timely paid. Thus, the Bureau further concluded that the carrier owed Pharmacy *inter alia*, more than $3500.00 for one tube of a topical pain cream.

On *de novo* review before a Hearing Officer, the carrier submitted into evidence two Utilization Review determinations which confirmed that all of the prescribing provider's treatment, including the prescriptions at issue, was unreasonable and unnecessary. And on that basis the Hearing Office vacated the administrative decision and dismissed the Petitions for Fee Review.

On further review, the Commonwealth Court agreed that the UR determination which found the treatment of the prescribing physician to be unreasonable and unnecessary was binding on the Hearing Officer. Thus, the Court affirmed the decision below. Keystone Rx LLC v. Bureau of Workers' Comp. Fee Review Hearing Office (Compservices Inc.), 223 A.3d 295 (Pa. Cmwlth. 2019).

Amicus notes that in Selective Ins. Co. of Am. v. Bureau of Workers' Comp. Fee Review Hearing Office (Physical Therapy Inst.), 86 A.3d 300 (Pa. Cmwlth. 2014) the Commonwealth Court explicitly held that:

> The absence of a direct statutory remedy for providers does not mean that the Court may expand the scope of a

> fee review to create a remedy. *The matter is one for the legislature*, assuming there is a need for a provider to have another remedy.

Selective Ins., 86 A.3d 300, 305 fn 9 (Pa. Cmwlth. 2014)(emphasis added).

In this case, however, despite the Court's determination that the Hearing Officer *correctly* dismissed the Fee Review Petition in accordance with the terms of the Act as drafted by the Legislature, the Court went on to expand the scope of the UR system to create a remedy for future non-healthcare providers seeking fee review. According to the Court, there were "due process issues" for non-healthcare providers such as Pharmacy that are precluded from participating in the UR process but are nonetheless are bound by the results. Keystone Rx LLC, 223 A.3d at 299. Amicus respectfully disagrees.

As this Honorable Court is well aware, a plaintiff's first obligation in maintaining a due process challenge is to prove that there has been a deprivation of a protected property or liberty interest. Miller v. WCAB (Pavex, Inc.), 918 A.2d 809 (Pa. Cmwlth. 2007). Only then can the Court consider whether the deprivation occurred with due process of law. Miller.

In American Manufactures Mutual Insurance Company v. Sullivan, 526 U.S. 40 (1999), the question before the Supreme Court was whether the Due Process Clause required workers' compensation insurers to pay disputed medical bills prior to a determination that the medical treatment was reasonable and necessary. In this

regard, the plaintiff/employees asserted that under the Act they had a protected property interest in the payment of workers' compensation medical benefits. Specifically, the employees argued that once the employer's liability was established for the work injury, the employer was obligated to pay the medical benefits because the benefits constituted a property interest that could not be withheld without providing due process. Sullivan.

Notably, the Supreme Court rejected the employees' argument, concluding that Pennsylvania law did not entitle employees to payment for all medical treatment once liability attached, but only "necessary" and "reasonable" medical treatment. Sullivan. And ultimately, the Supreme Court held *the employees did not have a protected property interest* because they had not yet established that the particular medical treatment was reasonable and necessary. Sullivan.

In Miller v. WCAB (Pavex, Inc.), 918 A.2d 809 (Pa. Cmwlth. 2007), the Commonwealth Court was faced with a similar issue. Therein, the claimant asserted that a URO's obligation to find treatment unreasonable and unnecessary where the medical provider has failed to supply his/her medical records for review violated the claimant's fundamental right to procedural due process because it deprived him of a protected property interest without providing administrative or judicial review of the determination. The Commonwealth Court disagreed.

Citing Sullivan, the Commonwealth Court noted that an entitlement exists only when there is an unqualified right to receive the benefit or when all qualifications necessary to its receipt are satisfied; the mere expectation of a benefit is not sufficient. Miller v. WCAB (Pavex, Inc.), 918 A.2d 809 (Pa. Cmwlth. 2007).

Returning to the present case, Pharmacy may have had an *expectation* of payment under the Act for the prescriptions it dispensed but it is clear that it had no entitlement to payment.

Furthermore, there is no reason to conclude that the UR provisions of the Act should be treated any differently from the Fee Review provisions of the Act. As noted earlier, the Commonwealth Court previously held that the absence of a direct statutory remedy for providers does not mean that the Court may expand the scope of a fee review to create a remedy. Selective Ins. Co. of Am. v. Bureau of Workers' Comp. Fee Review Hearing Office (Physical Therapy Inst.), 86 A.3d 300 (Pa. Cmwlth. 2014). The same principles apply herein.

Both the Fee Review and UR procedures are medical cost containment provisions that were created by the General Assembly pursuant to authority expressly and exclusively granted to it by the Pennsylvania Constitution to enact laws requiring the payment by employers of reasonable compensation for injuries to employees arising in the course of their employment. Pa. Const. Art. III, § 18.

Thus, to the extent that the Commonwealth Court promulgated a new rule which mandates non-healthcare providers are entities with standing and the right to intervene in the Act's UR process, the Commonwealth Court exceeded the scope of its authority and substituted its judgment for that of the Pennsylvania legislature.

B. THE COMMONWEALTH COURT ERRED AS A MATTER OF LAW WHEN IT GAVE NON-HEALTHCARE PROVIDERS THE RIGHT TO VOID A UTILIZATION REVIEW DETERMINATION REGARDING THE REASONABLENESS AND NECESSITY OF THE CARE OF THE PHYSICIAN WHO WROTE THE PRESCRIPTION WHICH LED TO THE NON-HEALTHCARE PROVIDER PROVIDING A GOOD OR SERVICE TO THE INJURED WORKER.

A non-health care provider is not permitted to participate in the UR process.

Utilization Review Process:

According to the Act and the Medical Cost Containment Regulations, employers and insurers are only required to pay for medical treatment that is reasonable and necessary and causally related to the work injury. Section 306(f.1) of the Act, 77 P.S. § 531. The Act contains provisions to determine what medical treatment is reasonable and necessary through the filing of a Request for Utilization Review. Section 306(f.1)(6), 77 P.S. § 531(6). Only employees, employers or insurers may file a Request for Utilization Review. 77 P.S. 531 § 531(6)(i). The UR process is "intended as an impartial review of the

reasonableness or necessity of medical treatment rendered to, or proposed for, work related injuries and illnesses." 34 Pa. Code §127.401(a). A party, including a health care provider, aggrieved by the UR determination, may file a petition for review of UR, to be heard and decided by a workers' compensation judge. 34 Pa. Code § 127.401(d). The Bureau of Workers Compensation ("Bureau") will randomly assign a request for UR to authorized UROs. The obligation to pay for the medical treatment at issue is tolled when a proper UR has been filed with the Bureau. 34 Pa. Code § 127.403. The URO is permitted to decide *only* the reasonableness or necessity of the treatment under review. 34 Pa. Code §127.406 (emphasis added). The URO shall complete its review and render its determination within 30 days of a completed request for UR. 34 Pa. Code § 127.465. If the UR determination finds that the treatment reviewed was reasonable or necessary, the insurer shall pay the bills submitted for the treatment at issue. 34 Pa. Code § 127.479. If the provider under review, the employee, or the employer or insurer disagrees with the determination rendered by the URO, a request for review by the Bureau may be filed. 34 Pa. Code § 127.551. The Bureau will assign the petition for review to a workers compensation judge for disposition and the Bureau will serve notice of assignment and the petition for review upon the URO, the employee, the employer or insurer, and the health care provider under review, and the attorneys for the parties, if known. 34 Pa. Code § 127.553.

The Act and the Medical Cost Containment Regulations specifically outline which entities are parties to the UR process. A health care provider is a party to the UR process. A health care provider is defined as:

> A person, corporation, facility or institution, licensed, or otherwise authorized, by the Commonwealth to provide health care services, including physicians, coordinated care organizations, hospitals, health care facilities, dentists, nurses, optometrists, podiatrists, physical therapists, psychologists, chiropractors, or pharmacists, and officers, employees or agents of the person acting the course and scope of employment or agency related to health care services.

34. Pa. Code § 127.3

A non-health care provider such as a pharmacy is not a party to the UR process. The use of the word "pharmacist," rather than "pharmacy," is significant and consistent with the Pennsylvania Pharmacy Act which defines "pharmacist," "pharmacies," and "practice of pharmacy" separately. A "pharmacist" is defined as an individual duly licensed by the State Board of Pharmacy to engage in the practice of pharmacy. "Practice of pharmacy" means the provision of health care services by a pharmacist. "Pharmacy" means every place properly issued a permit by the Board of Pharmacy where drugs, devices and diagnostic agents for human or animal consumption are stored, dispensed or compounded . . ." 63 P.S. § 309-2.

A "pharmacist" acts as a "health care provider" when the "pharmacist" performs certain aspects of the "practice of pharmacy," such as drug

administration. A "pharmacy" is not a "health care provider" and is therefore not a party to the UR process. In addition, an employer or insurer may not seek UR of medication but must instead seek UR of the health care provider who prescribed the medication.

It seems obvious that if a non-health care provider such as a pharmacy is not a party to the UR, the non-health care provider should not be able void at any time the determination of the UR. And it is not for the Court to create additional rights for non-health care providers beyond those granted by the legislature. The reason the General Assembly did not provide non-health care providers with any role in the UR process is quite clear: UR is limited to health care providers who ***actually render and prescribe the treatment to the injured worker*.** The goods and services provided by an entity based on a referral, order or prescription are to be treated as part of the treatment of the provider under review, not the entity that dispensed the good or service. See 34 Pa. Code § 127.452(d)-(e).

Non health-care providers exercise no judgment or decision making in providing goods and services. They simply follow the orders of the medical provider. Keystone Rx confirmed in the brief it submitted to the Commonwealth Court stating, "the [UR] process was not designed to address whether a pharmacy, or MRI facility or durable equipment provider, acted unreasonably when it received and followed the prescription of the physician. It is, in fact, impossible to

conclude that the ***dispensing*** of the medication was unreasonable or unnecessary, and the UR system was not created to make this assessment." (Brief of Petitioner, Keystone Rx, at 8; 2019 PA CW. CT. BRIEFS LEXIS 3227(emphasis added)).

Since a non-health care provider is not a party to the UR process and was not intended to be a party to the UR process, and because the UR process was not created to assess the reasonableness and necessity of the goods and services provided by the non-health care provider, a non-health care provider should not, under any circumstance, be given the right to void a UR determination addressing the reasonableness and necessity of the care provided by the physician who actually provided the medical treatment to the employee.

To the contrary, the UR determination regarding the treatment rendered by the physician, including orders for prescriptions or other goods and services should and must apply to the bills for the prescriptions, goods or services also. The treatment provided by the health care provider and the goods and services ordered by the health care provider cannot be separated. It stands to reason that if the UR finds that the prescription of a medication was not reasonable, that the actual dispensing of the medication was not reasonable either.

The Act provides for a separate process to determine the amount or timeliness of payment from the employer or the insurer which does include non-health care providers such as a pharmacy.

Fee Review Process

According to Section 306(f.1)(5) of the Act:

> The employer or insurer shall make payment and providers shall submit bills and records in accordance with the provisions of this section. All payments to provider 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. . . . A provider who has submitted the reports and bills required by this section and who disputes the amount or timeliness of the payment from the employer or insurer shall file an application for fee review with the department no more than thirty (30) days following notification of a disputed treatment or ninety (90) days following the original billing date of treatment.

77 P.S. § 531(5). The department is to render a decision on the fee review application within 30 days. Id. The provider or insurer has the right to contest an adverse administrative determination by filing a request for a hearing with the Bureau within 30 days of the date of the administrative determination on the fee review. 34 Pa. Code §127.257(b). The filing of a request for a hearing acts as a supersedeas of the administrative determination. 34 Pa. Code §127.257(e). The Bureau will assign the request for a hearing to a hearing officer who will schedule a de novo proceeding. All parties will receive reasonable notice of the hearing date, time and place. 34 Pa. Code 127.259. The hearing is conducted in a manner that allows all parties the opportunity to be heard including the submission of relevant evidence, examination and cross examination of witnesses, representation

by counsel, transcription of the proceedings, and submission of briefs. Id. The hearing officer will then issue a written decision containing relevant findings and conclusions which is to be served upon the parties, intervenors and counsel of record. 34 Pa. Code § 127.260. A party aggrieved by the decision may appeal to the Commonwealth Court. 34 Pa. Code § 127.261.

The fee review process presupposes that liability for the treatment at issue has already been established. And thus, as noted in the previous argument section, the fee review process is a "simple process with a "very narrow scope" limited to determining "relatively simple matters" of "amount and timeliness" of payment for medical treatment. Armour Pharmacy v. Bureau of Workers Compensation, 206 A.3d 660 (Pa.Cmwlth. 2019), citing Crozer Chester Medical Center v. Department of Labor and Industry, Bureau of Workers' Compensation, Health Care Services Review Division, 22 A.3d 190, 196-97 (Pa. 2011).

In addition, a request for fee review also presupposes that the treatment at issue is reasonable and necessary. The Bureau is to return as prematurely filed an application for fee review if the insurer has filed a request for UR. 34 Pa. Code §127.255. This is precisely what the Fee Review Hearing Officer did in the case *sub judice*.

Following his work-related injury Thomas Shaw (Claimant) sought medical treatment with Dr. Ferrera (Physician) who rendered medical care and prescribed

medications. Keystone Rx (Pharmacy) filled the prescribed medications and billed Amerihealth Casualty Services (Insurer). Insurer filed a timely UR request which found that all treatment rendered by Physician from November 2, 2016 an ongoing was unreasonable and unnecessary. Claimant then filed an appeal through a Petition for Review of Utilization Determination. But in the interim, the Claimant and the Insurer entered into Compromise and Release Agreement. The claimant's appeal of the UR Determination was then marked withdrawn by the Workers' Compensation Judge.

Pharmacy filed Applications for Fee Review for the May dates of service. The Medical Fee Review Section determined that the bills were payable. Insurer filed a Request for Hearing to Contest Fee Review Determination, asserting that the bills were unrelated and/or unreasonable and unnecessary. The Fee Review Hearing Officer dismissed the Applications for Fee Review and vacated the Medical Fee Review Section's determinations based on the UR Determination. Pharmacy then appealed to the Commonwealth Court.

The Commonwealth Court relied upon its reasoning in *Armour II*[2] where it concluded that:

> In no way does this holding expand the scope of the fee review proceeding beyond the timeliness and amount

[2] Armour Pharmacy v. Bureau of Workers' Compensation Fee Review Hearing Office (Wegman's Food Markets, Inc.), 206 A.3d 660, 671 (Pa. Cmwlth. 2019) (en banc).

> owed to a provider that has treated a claimant for his work injury. This holding does not allow the Hearing Office to determine the reasonableness of the medical care or service; the claimant's injury as work-related; or the employer's liability for a work injury. Where [UR] is sought, a fee determination is premature.

Keystone Rx, LLC., 223 A.3d at 299. The Court further added, "it necessarily follows that a UR determination is binding on the Hearing Office." And, "Pharmacy is attacking the facial validity of the UR process, and the Hearing Office correctly held that such a question was beyond its purview." Keystone Rx LLC, 223 A.3d at 301.

Although the Commonwealth Court raises questions regarding the due process rights of the Pharmacy in the context of the UR, the Court was clear that a non-provider, such as the Pharmacy in this case, cannot seek to overturn a valid UR through the filing of a Fee Review.

However, the decision of the Court, and three recent decisions by the Commonwealth Court leave lingering questions as the relationship between the UR process and the Fee Review process which demand clarification.

In Workers' First Pharmacy Services, LLC. v. Bureau of Workers' Compensation Fee Review Hearing Office (Gallagher Bassett Services), 255 A.3d 613 (Pa. Cmwlth. 2020), Workers' First ("pharmacy") dispensed a compound cream to the claimant which her employer refused to pay. The accepted work injury in that case as indicated on the Notice of Temporary Compensation Payable

(NTCP) was a right shoulder strain. The employer denied payment of the bill stating that "the diagnosis is inconsistent with the procedure." Workers' First Pharmacy, 255 A.3d at 615. The pharmacy filed an application for fee review and at the same time, the claimant filed a penalty petition alleging that the employer violated the Act by unilaterally stopping claimant's benefits. The claimant also filed a review petition seeking to expand the description of injury to include an acromioclavicular joint separation and a clavicular avulsion fracture. However, before the WCJ could rule on the merits of the review petition, the parties reached a settlement. Consistent with the previous Bureau documents, the description of injury as indicated in the C&R Agreement was right shoulder strain.

The Medical Fee Review Section concluded that the employer was obligated to pay the bill and the employer requested a *de novo* hearing to contest the fee review determination, arguing that the compound cream dispensed by the pharmacy had never been adjudicated as related to the work injury, making the application for fee review premature. Pharmacy argued that employer should have sought utilization review if it believed the compound cream was not related to the work injury. The Fee Review Hearing Officer denied payment based on employer's argument that the compound cream was not related to the work injury and citing claimant's testimony from the C&R hearing that it was her understanding that the C&R Agreement only obligated the employer to pay for

medical bills related to the work injury. The Hearing Officer also concluded that "liability for the compound cream had to be established either by employer's acceptance or a determination by a WCJ." And since neither had occurred, the fee review determination was premature. Workers' First Pharmacy.

On further appeal the Commonwealth Court analyzed the relevant portions of the Act and the Cost Containment Regulations which include a specific prohibition against a URO determining or reviewing issues of causal relationship between the treatment under review and the employee's work-related injury. 34 Pa. Code § 127.406(b)(1). But the Court concluded that "liability for the claimant's work-related injury has been established" and suggested that "employer could have filed a modification petition to change the scope of the accepted work injury or sought utilization review of the treatment. Employer did neither." Workers First Pharmacy, 255 A.3d at 620. The Court, surprisingly, goes on to say "Claimant may be under treatment for an array of medical problems, only some of which relate to the work injury. It is for the Utilization Review Organization to sort this out." Workers First Pharmacy, 255 A.3d at 620-621.[3]

[3] In a footnote, the Court suggests that there is ambiguity between 34 Pa. Code § 127.406(b)(1) which expressly prohibits the URO from deciding the issue of the causal relationship between the treatment under review and the employee's work injury, and 34 Pa. Code § 127.406(a) which says that the URO must decide the "reasonableness and necessity of the treatment." Workers First Pharmacy, 255 A.3d at 621, FN 8. *Amicus* suggests that there is, in fact, no ambiguity between these two regulations. The URO is to (1) determine whether treatment **already either accepted as work related or judicially determined as work related**, is reasonable or necessary, and (2) not decide whether treatment under review is causally related

Amicus respectfully submits that this suggestion is directly contrary to the role and purpose of Utilization Review and suggests that the URO engage in action that is beyond that granted to it by the Medical Cost Containment Regulations.

This suggestion seems to stem from differing interpretations of the phrase "denies liability for the alleged work injury" found in 34 Pa. Code §127.255. This regulation states that the Bureau will return an application for fee review as prematurely filed if:

> (1) The insurer denies liability for the alleged work injury.
> (2) The insurer has filed a request for utilization review of the treatment . . . .
> (3) The 30-day period allowed for payment has not yet elapsed . . .

The court states that the filing of the fee review was not premature because the non-payment did not fit any of the exceptions to the rule that an employer must pay an invoice within 30 days. Workers First Pharmacy, 255 A.3d at 621. And further, "Employer expressly accepted liability for [c]laimant's work injury in the nature of a right shoulder strain both in the NTCP and in the C&R Agreement." "The work injury has been accepted, and the sole question is whether the compound cream was reasonable and necessary for treatment of the accepted work

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to the accepted work injury. If the treatment at issue has not already been accepted as related to the work injury or judicially determined to be related to the work injury, then the UR request should be rejected and no UR performed.

injury. This is an issue for utilization review." Workers First Pharmacy, 255 A.3d at 621.

Amicus respectfully submits that the mere acceptance of a work-related injury does *NOT* mean that any and all treatment that the employee receives is causally related to the work injury and should *NOT* create a presumption that medical treatment received by the employee is related to the work injury nor shift the burden of proving relatedness of the medical treatment to the employer. These are issues to be decided by a workers' compensation judge after the filing of an appropriate petition.

In Bond Medical Services v. Bureau of Workers' Compensation Fee Review Hearing Office (Travelers Casualty Company of America), 233 C.D. 2019, Pa. Cmwlth. unpublished filed July 31, 2020) the injured worker sought medical treatment with a chiropractor who prescribed durable medical equipment and supplies and billed the insurer. The insurer denied the bill for a variety of reasons but did not seek Utilization Review. The Medical Fee Review Section concluded that the Insurer did not owe Provider anything on the basis that "a valid prescription or certificate of medical necessity for this service was not submitted by the [Provider], and because "the Chiropractic Practice Act does not include the prescription of durable medical equipment within the scope of chiropractic practice . . ." Bond Medical Services, Slip Opinion at 3-4. The provider requested a

hearing before a Fee Review Hearing Officer who determined that the Hearing Office lacks jurisdiction since "the medical equipment was prescribed for a body part not covered by the notice of compensation payable . . ." Provider appealed to the Commonwealth Court which concluded that "[e]mployer is obligated to pay [p]rovider, absent a showing that the medical treatment was not reasonable and necessary to treat the work injury." Bond Medical Services, Slip Opinion at 5. The court went on to say "if [e]mployer questioned its liability for the supplies dispensed to [c]laimant, it should have sought utilization review within 30 days of receipt of [p]rovider's invoice." Bond Medical Services, Slip Opinion at 8-9.

This holding shifts the burden of proving that medical treatment is causally related to the work injury from the employee to the employer and ignores the employers' right to deny payment of medical expenses if the medical expenses are for treatment not causally related to the work injury. See Cittrich v. WCAB (Laurel Living Ctr.), 688 A.2d 1258 (Pa. Cmwlth. 1997). The employer has no obligation to file a petition with the WCJ in order to deny bills on the basis that the bills are not causally related. See McDonnell Douglas Truck Servs., Inc. v WCAB (Feldman), 655 A.2d 655 (Pa. Cmwlth. 1995).

Most recently, in the case of Omni Pharmacy Services, LLC. v. Bureau of Workers' Compensation Fee Review Hearing Office (American Interstate Insurance Co.) 1333 C.D. 2019 (Pa. Cmwlth. filed October 30, 2020), the Court

again opined that employer must pay for medical treatment that was denied on the basis that it was not causally related to the work injury because the employer did not seek utilization review. The facts of the Omni Pharmacy case are similar to the Workers' First Pharmacy case, *sub judice*. The employee suffered an injury in the nature of a left ankle fracture. The medical provider prescribed a compound cream. The employee was instructed to apply the cream to the "affected area" two to four times a day as needed. Omni Pharmacy (pharmacy) dispensed the compound cream and billed the employer. The employer denied payment of the invoices stating that it was not liable for the treatments. Pharmacy then filed fee review applications with the Medical Fee Review Section. The Fee Review Section issued determinations in favor of the pharmacy. Employer requested hearings to contest the fee review determinations asking the Hearing Office to "divest itself of jurisdiction" on the basis that "causation must be determined by a Workers' Compensation Judge." Pharmacy argued that employer asserted the causation issue without presenting any evidence that the compound cream was not prescribed for treatment of employee's work injury. The Hearing Officer concluded that because there was an issue regarding the causal relationship of the prescribed compound cream and the accepted work injury, the Hearing Office lacked jurisdiction and the fee review determinations were vacated. Pharmacy appealed. Omni Pharmacy Services, Slip Opinion at 5.

Utilizing the same reasoning and rationale is it did in the Workers' First Pharmacy case, the Court again concluded that "once liability for a work injury has been established, the employer may file a modification petition to change the scope of the accepted injury or it can seek utilization review" and if the treatment is not related to the work injury, then it is "*a fortiori* not reasonable and necessary for the treatment of the accepted work injury." Omni Pharmacy Services, Slip Opinion at 7.

Amicus respectfully contends that the Court has again, misapplied the principle of "accepted injury" to extend to any and all treatment that the injured worker may undergo. Simply because the employer has accepted that a work injury occurred does NOT mean that the employer has accepted liability for whatever treatment the injured worker may receive, regardless of purpose or body part.

Thus, Amicus asks that this Honorable Court address what it perceives as a misapplication of the Medical Cost Containment Regulations as part of its review of the case before it.

C. THE COMMONWEALTH COURT VIOLATED THE SEPARATION OF POWERS DOCTRINE BY ENGRAFTING A NEW REQUIREMENT ONTO THE PENNSYLVANIA WORKERS' COMPENSATION ACT'S PROCESS FOR CONDUCTING UTILIZATION REVIEW OF TREATMENT BY A HEALTH CARE PROVIDER BY PROSPECTIVELY DIRECTING THAT NON-TREATING ENTITIES BE GIVEN NOTICE AND AN OPPORTUNITY TO INTERVENE IN UTILIZATION REVIEWS.

The Pennsylvania Constitution created the framework for our government vesting legislative, judicial, and executive powers in three separate branches. This tripartite structure is designed to prevent a concentration of power in any one branch and to prevent one branch from exercising the core functions of another. Markham v. Wolf, 190 A.3d 1175 (Pa. 2018). Specifically, the General Assembly creates the laws. Pa. Const. art. II, § 1. The judiciary interprets the laws. Pa. Const. art. V, § 1. And the executive branch implements the laws. Pa. Const. art. IV, § 2.

The separation of powers doctrine provides that no branch of the government (executive, legislative, or judicial) may exercise functions exclusively committed to another branch. Commonwealth v. Mockaitis, 834 A.2d 488 (Pa. 2003). In this regard, it is not the province of the judiciary to augment the legislative scheme. Burke v. Independence Blue Cross, 103 A.3d 1267 (Pa. 2014). A court may not rewrite a statutory provision or act as an editor for the General Assembly even where doing so would create an improved statute. Discovery

Charter School v. School District of Philadelphia., 166 A.3d 304 (Pa. 2017). Moreover, the hardship or equity of a case cannot override the plain words of a statute; "the Legislature, not the Court, must correct the evil" Frost v. Metropolitan Life Ins. Co., 12 A.2d 309, 310 (Pa. 1940).

Amicus respectfully submits that the Commonwealth Court has violated the separation of powers doctrine and exceeded the scope of its powers.

As noted at the outset of this brief, pursuant to Article III, Section 18 of the Pennsylvania Constitution, the authority to enact laws related to the payment of compensation for injuries to employees lies solely with the General Assembly. Pa. Const. Art. III, § 18. And in Armour Pharm. v. Bureau of Workers' (Wegman's Food Markets, Inc.)(*Armour II*), 206 A.3d 660 (Pa. Cmwlth. 2019), the Commonwealth Court reiterated that the polestar of case law in this area is that the Act must be construed in accordance with due process of law. The roles are thus, clearly and properly defined; the General Assembly enacts the law and the judiciary interprets the law.

Yet in this case the Commonwealth Court, through its opinion, unilaterally amended the Act and expanded the statutorily defined UR procedure to accommodate concerns about the purported property rights of non-treating entities that distribute medical supplies or fulfill orders but do not render treatment to injured employees.

That being the case, to the extent that the Commonwealth Court's opinion and order compels any action beyond affirming the opinion of the Bureau of Workers' Compensation Fee Review Hearing Office, it must be reversed by this Honorable Court.

V. RELIEF REQUESTED:

Based upon the foregoing, Amicus respectfully requests that this Honorable Court affirm the opinion and order of the Commonwealth Court to the extent that it affirmed the Order of the Bureau of Workers' Compensation Fee Review Hearing Office, and reverse the opinion and order to the extent that the Court went further, engrafting a new requirement onto the Act's process for conducting utilization review of treatment by a health care provider by directing that non-treating entities be given notice and an opportunity to intervene.

Respectfully submitted,

WEBER GALLAGHER SIMPSON STAPLETON FIRES & NEWBY, LLP.

By: /s/ Shawn C. Gooden

Shawn C. Gooden, Esquire
Pa Atty ID #89121
Lori A. Tunstall, Esquire
Pa. Atty. ID # 67747
Attorneys for Amicus Curiae,
Laundry Owners Mutual Insurance Company
United Parcel Service
Pennsylvania Chamber of Business & Industry

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the accompanying Amicus Curiae brief filed pursuant to Pa. R.A.P. 531(b)(1) complies with the word count limit set forth in Pa. R.A.P. 531 and Pa. R.A.P. 2135(b). Based on the word count function of the Word processing system, the accompanying brief, excluding the cover of the brief and pages containing the table of contents, tables of citations, is 6770 words.

WEBER GALLAGHER SIMPSON
STAPLETON FIRES & NEWBY LLP.

By: /s/ Lori A. Tunstall
_____
Lori A. Tunstall, Esquire
Pa. Atty. I.D. No: 67747

Attorneys for Amicus Curiae,
Laundry Owners Mutual Insurance Company
United Parcel Service
Pennsylvania Chamber of Business & Industry