12.16.19

Weber Gallagher

New Rule for Utilization Review Requests

The Commonwealth Court has imposed a new requirement that pharmacies, testing labs and suppliers of medical equipment must receive notice when a Utilization Review Request (UR) is filed and must be allowed to seek intervention to protect their rights. In Keystone Rx LLC v. Bureau of Workers' Compensation Fee Review Hearing Office (CompServices Inc. /AmeriHealth Casualty Services), No. 1369 C.D. 2018, Filed: December 12, 2019, the insurer filed a UR Request regarding unreasonable and unnecessary treatments provided by Dr. Bradley Ferrara. Keystone Rx LLC dispensed medications ordered by the doctor and insurer denied payment to the pharmacy based on the UR Determination.

The injured worker filed two Petitions for Review of UR Determination, which was withdrawn when the C&R Agreement settled the case. This left open liability for future reasonable and necessary medical expenses. The pharmacy then filed two Medical Fee Review Applications for payment of compound cream and naprelan tablets. The Fee Review Section of the Bureau rendered the Administrative Determinations finding payments were due for those medications. The insurer then filed requests for de novo hearings concerning the Fee Review Determinations. The Hearing Officer vacated the Determinations to pay the pharmacy and dismissed the two applications based on the prior UR Determinations that the medications prescribed were neither reasonable nor necessary. The pharmacy appealed from this ruling, and the Commonwealth Court eventually addressed the matter.

On appeal, the pharmacy argued that the due process of law mandated by the courts holding in Armour Pharmacy v. Bureau of Workers' Compensation Fee Review Hearing Office (Wegman's Food Markets, Inc.)., 206 A.3d 660 (Pa. Cmwlth. 2019)(Armour I), requires that the pharmacy be paid for the prescriptions filled since it was unable to participate in the UR process. Armour I involved a C&R that provided that bills for certain prescriptions were not the liability of the employer despite a prior fee review determination that pharmacy was entitled to payment. The court held that the terms of the C&R did not bind the pharmacy since it was not a party to the same and was entitled to the payment.

In Keystone RX, the Hearing Officer determined that it was beyond its purview to rule on the pharmacy's argument that the UR process is not valid. The court affirmed that decision but announced a new rule to protect the due process rights of entities such as the pharmacy, which could not participate in the UR process. It stated:

"Accordingly, we hold that for UR procedures occurring after the date of this opinion where an employer, insurer or employee requests a UR, a provider which is not a 'health care provider' as defined in the Act, such as a pharmacy, testing facility or provider of medical supplies, must be afforded notice and an opportunity to establish a right to intervene under the usual standards for allowing intervention."

Comment: How this new notice requirement is to be fulfilled and the consequences if it is not, were not explained, and may be the subject of future legislation or regulation. Until there is clarification, we suggest consideration of these issues. Identification of pharmacy, testing facility or provider of medical supplies must

be determined. In the case of a pharmacy, this can be seen by reviewing the pharmacy's billing statements. However, to identify other "providers," an insurer may have to contact an unrepresented claimant, treating physician or claimant's counsel for that information.

Service of the UR Request on the "provider" in time for their intervention in the proceeding is the next step. The Bureau may do that, but if not, then the insurer may still have the obligation. Documentation of such attempts, including USPS proof of mailing forms, should be considered. What happens next is uncertain. Pharmacists are health care providers under the Medical Cost Containment Regulations. They can file a Petition for Review of UR Determination, but a testing lab or supplier of medical equipment may not be, and the Bureau may have to amend the definition of the health care provider in the Medical Cost Containment Regulations to allow that level of participation.