BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

BERTHA POLK,	)	
	)	
Employee	)	
	)	Hearing No. 1253843
v.	)	
	)	
GREEN ACRES PAVILION,	)	
	)	
Employer.	)	

ORDER

Pursuant to due notice of time and place of hearing served on all parties in interest, on December 2, 2009, the Board heard a Motion filed by Employer, Green Acres Pavilion, against Claimant, Bertha Polk, seeking dismissal of several alleged medical expenses underlying Claimant's current pending Petition to Determine Additional Compensation Due, scheduled to be heard March 1, 2010.[1] Employer alleges that Claimant failed to comply with title 19, Delaware Code section 2322D inasmuch as she received medical treatment from out of state, non-certified providers (non-certified in the context of Delaware's Worker's Compensation statutory scheme) without obtaining pre-authorization from the insurance carrier. Employer maintains that these unauthorized treatments are not compensable and are not properly before the Board. Furthermore, the Employer argues that to allow Claimant to pursue out of state treatment conducted by

[1] By letter dated November 9, 2009, Claimant provided a list of nine (9) separate outstanding expenses allegedly owing to Claimant by the carrier. Item one (1) on this list references unpaid bills for prescription medications, prescribed by Delaware physicians, Dr.'s Rowe or Villabona, during a period from August 2007 through September 2008 while items two (2) through nine (9) all relate to treatment that Claimant received out of state by non-certified providers without prior authorization. Employer seeks dismissal of all claims related to prescriptions issued after May 2008 when the Health Care Guidelines were instituted as well as all out of state, unauthorized medical treatment.

non-certified medical providers deprives the insurance carrier of the ability to utilize the Utilization Review ("UR") process.

Claimant argues that UR is an option that Employer has available to use if claims are going to be denied. It is not a required precursor to litigation. Claimant further argues that the currently pending Petition to Determine Additional Compensation Due seeks authorization as well as payment for the treatments that Claimant has received from her out of state providers. Claimant argues that she has relocated from the State of Delaware to North Carolina wherein there are no Delaware certified providers and no incentive for providers to become so certified. She maintains that it is an inconsistent reading of the statutes to suggest that an individual in her circumstances could be forced to go without treatment because she is no longer a resident of the State of Delaware and can't find a doctor inclined to indulge Delaware's Worker's Compensation certification process. Claimant further argues that authorization, if granted by the Board in the upcoming hearing on the merits, would relate back to the treatment that she has already received.

Both Claimant and Employer acknowledge that neither is factually certain what procedure the North Carolina medical providers used to try and get pre-authorization for the treatments rendered Claimant or if they even made such an attempt. Employer further acknowledges that, at present, there is no evidence one way or the other regarding whether or not Claimant's treating physicians or pharmacy provided the medical bills to the carrier prior to the filing of the underlying petition.

After hearing the arguments of the parties and considering the relevant statutes and regulations, the Board agrees with Claimant that dismissal is inappropriate.

The Board is satisfied that title 19, section 2322D(a)(1), as referenced by Employer, does not preclude the potential payment of expenses related to medical treatment provided by non-certified providers for whom no prior authorization was sought or obtained. Specifically, where out of state medical providers are concerned, the Board and the State of Delaware can only compel compliance with the Delaware Workers' Compensation Health Care Payment System (HCPS) if the provider chooses to become a certified provider in our system. If a provider becomes Delaware certified, the provider agrees to comply with the law(s) and regulations of the Delaware HCPS.

In this same vein, insurance carriers or other payors can avail themselves of the UR process for all in-state and out-of-state certified health care providers, if they want to deny payment because they believe the certified health care provider's treatment did not adhere to one of the six (6) practice guidelines now in effect.

However, if the treatment at issue does not apply to a practice guideline or the out-of-state provider is not certified, then the payor would follow the previous practice of denying payment and the injured worker (or non-certified health care provider as an "assignee") would have to file an appropriate petition with the Board seeking payment for the services rendered. Specifically, in circumstances like those found in the instant case, in order for the non-certified provider to get payment for disputed treatments that were not pre-authorized by the relevant insurance carrier, a petition would have to be filed with the Board and the treatment would have to be found reasonable and necessary.

This reading of the statutes is further supported by the language of title 19, Delaware Code section 2322C(6) which provides in relevant part that ,"[s]ervices provided by health care providers that are not certified *shall not be presumed reasonable*

and necessary unless such services are preauthorized by the employer or insurance carrier, subject to the exception set forth in § 2322D(b) of this title." DEL. CODE ANN. tit. 19, § 2322C(6) (emphasis added). This does not state that such services are ineligible for payment—merely that they will not be "presumed reasonable." However, if they are subsequently found to be reasonable, they are subject to being paid by the employer or carrier pursuant to the requirements of title 19, section 2322 of the Delaware Code.

As such, the Board is satisfied that neither preauthorization nor Delaware certification are requirements to have treatment paid by an employer or carrier. Instead, the Board finds that certification of a provider creates a presumption that the treatments rendered by that provider are reasonable if they are within the Health Care Practice Guidelines. *See* DEL. CODE ANN. tit. 19, § 2322C(6) (treatment by a certified health care provider that conforms with the Health Care Practice Guidelines is "presumed, in the absence of contrary evidence, to be reasonable and necessary"). If an Employer or insurance carrier wants to deny payment for or dispute the reasonableness of a medical procedure administered by a certified provider, the UR process is an appropriate avenue to pursue. Otherwise, the employer can deny the unauthorized treatments provided by a non-certified provider and the burden shifts to the Claimant and/or physicians both to file a petition seeking payment and to prove the reasonableness of the treatments.

In the instant case, Claimant sought and obtained care from non-certified providers without prior authorization from the insurance carrier. As such, at the time of Claimant's hearing on the merits of her claim to have these expenses compensated by Employer, Claimant will not have the benefit of a presumption that the treatments were reasonable but will instead have the burden of demonstrating that the treatments were

reasonable, necessary and causally related to her compensable work injury.[2] She is not foreclosed, however, from the opportunity to make that showing.

Accordingly, the Board finds that Employer's Motion to Dismiss all or part of Claimant's underlying Petition to Determine Additional Compensation Due must be DENIED.

IT IS SO ORDERED THIS 4th DAY OF DECEMBER, 2009.

INDUSTRIAL ACCIDENT BOARD

VICTOR EPOLITO JR

MARY DANTZLER

I, Angela M. Fowler, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Mailed Date: 12/4/09

OWC Staff

Walt Schmittinger, Esquire, for Claimant

Natalie Palladino, Esquire, for Employer

[2] This is different than what had previously been the case. Prior to the adoption of the Health Care Practice Guidelines, case law had indicated that, when causation was not in issue, a claimant could succeed on the merits of the petition just by producing evidence concerning the medical services rendered and the amounts charged for such services. If claimant did this, the burden then shifted to the employer to show that the treatment and/or charges were unreasonable. *General Motors Corp. v. English*, Del. Super., C.A. No. 90A-10-2, Goldstein, J., 1991 WL 89812 at *2 (May 10, 1991), *aff'd*, 608 A.2d 727 (Del. 1992). *See also Guy J. Johnson Transportation Co. v. Dunkle*, 541 A.2d 551, 553 (Del. 1988)(to prevail, claimant "must present evidence that (a) he has incurred medical expenses, (b) such expenses are attributable to a work-related injury and (c) the employer has not paid such expenses as required by 19 *Del. C.* § 2322"). In short, under the old law, there had always been a presumption that medical treatment received by a claimant was reasonable unless proven otherwise. That presumption no longer applies unless the treatment is by a certified provider and within the Health Care Practice Guidelines.