COMMOMWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 017148-99

Steven Santos	Employee
Town of Dennis	Employer
MIIA	Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Horan)

APPEARANCES

Robert J. Deubel, Jr. Esq., for the employee
Donald E. Wallace, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision in which an administrative judge denied his claim for medical benefits under §§ 13 and 30, based on the failure of the medical provider to follow the procedures for utilization review ("UR"), pursuant to 452 Code Mass. Regs. § 6.04. Because we conclude that the evidence was insufficient, as a matter of law, to deny the claim on that basis, we recommit the case for further findings addressing the issues of causation and the reasonableness and necessity of the disputed treatments.

The employee fell off a crane while working for the employer on February 2, 1999, resulting in severe back, neck and arm pain. He rejected surgery, opting instead for conservative treatment, including a series of epidural steroid injections. The employee began receiving accidental disability retirement benefits in 2000. (Dec. 773.)

The employee moved to Ohio, and commenced treatment there with Dr. Jorge Martinez. Dr. Martinez's treatment consisted of a series of injections, which the employee claimed alleviated his pain for five or six days per shot. After Dr. Martinez's bills were rejected by the insurer, the employee claimed benefits pursuant to §§ 13 and 30. (Dec. 772-774.)

Kristin Burke, the adjuster who handled the employee's claim, testified for the insurer that she explained the UR process to Dr. Martinez's office on several occasions. Dr.

Martinez, however, never submitted his treatment requests for utilization review, and, as a result, the insurer did not pay for the treatment. (Dec. 774.)

The parties waived the impartial medical examination and submitted their own medical evidence. (Dec. 773.) The employee's medical evidence, consisting of the reports and notes of Dr. Martinez (Ex. 4 and 5), supported his claim that the treatments were causally related, reasonable and necessary. (Dec. 774-775.) The insurer's medical experts reached the opposite conclusion. (Dec. 775-776; Ex. 6.)

The judge ultimately denied the employee's claim on the basis of the medical provider's failure to adhere to the UR procedures. (Dec. 778-779.) We disagree with the judge's reasoning and conclusion, and therefore recommit the case.

In Davidson v. Southern Redi Mix Corp., 14 Mass. Workers' Comp. Rep. 134 (2000), we addressed the relationship between the utilization review process and the employee's right to claim medical benefits in dispute resolution. Without reaching the question of UR exhaustion, we concluded that, because the insurer there had not issued the employee a UR card pursuant to 452 Code Mass. Regs. § 6.04(4)(e), the insurer could not raise UR as a defense to the employee's medical claim. Id. at 134-135. Necessary to the reasoning in Davidson is the imposition upon the insurer of the burden of proving its primary compliance with the UR procedure. The UR card, we decided, was necessary as "an essential tool needed to navigate within the UR system." Id. at 135, n. 2. Citing to the applicable regulation, we pointed out that the UR card supplies the employee with the name and telephone number of the UR agent assigned to his case. See 452 Code Mass. Regs. § 6.04(4)(e).

Applying the Davidson reasoning to the present case, we conclude that the insurer must carry the burden of proving that it properly instituted the UR process, which proof necessarily must include the identity of the UR agent assigned to the employee's case. Here the record is silent as to that fact. Moreover, the testimony of the insurance adjuster is inconclusive as to whether she ever notified the employee or medical provider of the name, address and telephone number of the insurer's UR agent. Indeed, all that is revealed on this record is that the insurer used a third party provider, Concentra, to provide UR services. The record is devoid of any reference to a specific person, department or contact number at Concentra identified either to the employee or his medical provider, and does not establish any foundation for the insurer's underlying defense that a real live UR agent at Concentra was sitting by the telephone during

business hours ready to handle the provider's requests for approval.[1] Without proof of such notice, the insurer may not now hold up the UR procedure as an affirmative defense to the employee's medical claim. See Davidson, supra.

In consideration of the evidence proffered by the insurer, the judge concluded:

> I find that the insurer is not liable for the $59,279.93 in medical treatment claimed by the employee. I take note of the fact that the figure presented for reimbursement was not calculated at board rates. For this reason I have no authority to approve this claim.[2] The evidence on the issue of causation is mixed. . . . I decide this case on the requirement of reasonableness. The employee's medical providers did not take *reasonable* steps, required by Massachusetts law, to gain approval for the treatments at issue here. Kristin Burke, a representative of the insurer, spoke with representatives of the medical providers many times, including speaking with a representative named "Terry" at least twelve times, each time explaining the pre-approval process of Utilization Review. Despite these many contacts, and despite having the process for reimbursement explained more than a dozen times, the medical provider did not follow the required process. Given these facts, the medical provider cannot *reasonably* expect to be reimbursed for the treatment provided and the insurer cannot *reasonably* be required to pay for such treatment. If this case involved just a few instances where Utilization Review was not undertaken, then a review of the expenditures by a judge might be appropriate. But when the number of medical treatments is in the neighborhood of 148, and the treatment was offered on 41 different dates, and the medical provider makes no

[1] "(d) Utilization review agents shall make staff available by toll-free telephone at least 40 hours per week between the hours of 9:00AM and 5:00 PM, EST; (e) Utilization review agents shall have a telephone system capable of accepting or recording incoming telephone calls during other than normal business hours and shall respond to these calls within two business days of its [sic] receipt." 452 Code Mass. Regs. § 6.04(4).

[2] There is no requirement that the bills presented to a judge in a § 30 claim be computed at board rates, so reliance on this non-issue as another reason for denying the claim is error. See 452 Code Mass. Regs. § 1.07(2)(c).

> effort to comply with the *reasonable* requirements of the insurer and Massachusetts law, despite more than a dozen attempts of the insurer to explain the process, then the medical provider cannot *reasonably* be expected to be paid and the insurer cannot *reasonably* be expected to pay such a bill.

(Dec. 778-779; footnote and emphases added.) There is an illusory appeal to the judge's attempted analysis of the perceived reasonableness of the insurer's conduct. Ultimately, however, the insurer's failure to proffer evidence that it issued the employee a UR card, or otherwise complied with 452 Code Mass. Regs. § 6.04(4)(e), is fatal to its attempt to defend the claim on that basis. See Davidson, supra.

Having disposed of the insurer's argument for affirming the decision, we conclude that recommittal is appropriate. The only issues on recommittal are whether the employee's disputed medical treatments were reasonable, necessary and causally related pursuant to § 30. See, e.g., Gajda v. Specialty Minerals, Inc., 18 Mass. Workers' Comp. Rep. 68, 75-76 (2004); Tenerowicz v. Francis Harvey & Sons, 10 Mass. Workers' Comp. Rep. 76, 77 (1996). The insurer's defense of the claim based on UR exhaustion shall not be entertained.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: November 16, 2005