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In the

Supreme Court of Pennsylvania

No. 27 EAP 2020

KEYSTONE RX LLC,

vs.

BUREAU OF WORKERS' COMPENSATION FEE REVIEW HEARING OFFICE (COMPSERVICES INC./AMERIHEALTH CASUALTY SERVICES),

Appeal of Compuservices Inc./AmeriHealth Casualty Services

BRIEF FOR AMICUS CURIAE THE COALITION AGAINST INSURANCE FRAUD

Appeal from the December 12, 2019 Order Of the Pennsylvania Commonwealth Court entered at 1369 C.D. 2018 which affirmed the September 12, 2018 adjudication of the Bureau of Workers' Compensation Fee Review Hearing Office, Dispute No. 7388753-4, vacating the Decision of the Workers' Compensation Medical Fee Review Section

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

INTEREST OF AMICUS CURIAE

Established more that twenty-five years ago, the Coalition Against Insurance Fraud (the "Coalition") is a national organization that draws upon the combined energy and resources of consumers, government organization, and insurers.[1] The membership of the Coalition encompasses a broad array of consumer groups, governmental organizations (including insurance regulatory agencies and the offices of state Attorneys General), insurance providers and related organizations. The Coalition's aims are to: (1) combat all forms of insurance fraud, (2) reduce costs for consumers, and (3) promote fairness and integrity in the insurance system. To this end, the Coalition has played an active role in advocating for laws, regulations, and policies that help detect, prevent, deter, and prosecute insurance fraud.

This case implicates the Coalition's core interests as it involves the issue of overcharging for medicine and medical goods and services in workers' compensation matters in Pennsylvania. The Commonwealth Court's decision improperly amends the Pennsylvania Workers' Compensation Act to prospectively

[1] The Coalition is authorized to file this brief supporting Appellants in accordance with Pa.R.A.P. 531(b)(1). *See* Pa.R.A.P. 531. Pursuant to Pa.R.A.P. 531, Audrey J. Copeland, Esq., counsel for the Coalition represents that neither the parties nor their counsel, nor any other person or entity other than the Coalition and its counsel, made a monetary contribution to fund the preparation or submission of this brief. Likewise, neither the parties nor their counsel, nor any other person or entity other than the Coalition and its counsel, participated in drafting this brief.

require that a non-treating entity like a pharmacy, whose interest is purely financial, be given notice and an opportunity to intervene in Utilization Review proceedings where the issue is limited to whether the medical health care provider's treatment of the work injury was reasonable and necessary. *See* 77 P.S. § 531(6)(i). This decision has wide-ranging implications for members of the Coalition and their interests in the oversight and regulation of pharmacies and other non-health care providers who dispense medicines, goods and services prescribed for the treatment of injured employees, and the fraudulent billing often associated with these already high costs.

INTRODUCTION

The Commonwealth Court grossly exceeded its judicial authority and substituted its own policy decisions for the legislature regarding the Utilization Review ("UR") process in the Pennsylvania Workers' Compensation Act. *Keystone Rx LLC v. Bureau of Workers' Comp. Fee Review Hearing Office*, 223 A.3d 295 (Pa. Cmwlth. 2019), *reargument denied* (Jan. 30, 2020), *appeal granted in part*, 93 EAL 2020, 2020 WL 5200852, *appeal granted*, 94 EAL 94 (Pa. Sept. 1, 2020). The court erroneously amended the Act to enable entities that merely dispense medicine without exercising medical judgment to intervene in Utilization Review (UR) proceedings, which concern only the propriety of the health care provider's treatment.

The purpose of the UR process is only to determine whether the health care provider's treatment of the work injury was "reasonable and necessary," not to ensure payment of non-medical providers. 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). The legislature specified that only the employer, its insurer, the claimant and the healthcare provider are entitled to participate in the UR process. 77 P.S. § 531(6)(i). As the Act states, "[t]he reasonableness or necessity of all treatment provided by a health care provider under this act may be subject to prospective,

concurrent or retrospective utilization review at the request of an employe, employer or insurer." 77 P.S. § 531(6)(i). To appeal a UR determination, "[a] party, including a health care provider, aggrieved by the UR determination," is entitled to file a petition for review which is heard and decided by a workers' compensation judge. 34 Pa.Code § 127.401(c) & (d); *see also* 77 P.S. § 531(6)(i). As designed by the legislature, the non-health care provider cannot participate in the UR addressing the propriety of the healthcare provider's treatment. Rather, the Act limits such non-health care providers to fee review challenges to the amount and timeliness of payment for the prescriptions they dispensed, through the process under Section 306(f.1)(5). 77 P.S. 531(5). A UR determination is binding in a fee review proceeding.

The Commonwealth Court's decision stands in stark contrast to the legislated purpose of Utilization Review. The court's "new rule" allows pharmacies and other non health care providers to promote their purely monetary interests during a UR proceeding, and to effectively invalidate a UR determination. The business of supplying medicines, medical goods and other services to workers' compensation claimants is already plagued by fraud and abuses such as extreme mark-ups, charging for name-brand prescriptions but substituting generics, over-prescription of medication, billing for equipment or supplies which are not utilized, never delivered or upcharged, and other fraudulent billing practices. Workers'

compensation claimants should receive medicine and supplies that are needed for their treatment, not overpriced pharmaceuticals and therapies that do not improve their condition or provide relief. The Commonwealth Court's decision will result in the pointless potential of expanded review procedures involving unqualified parties. The ruling will tremendously increase the volume of UR's and appeals, opening the floodgates of litigation. This undeniably affects Pennsylvania consumers as they will ultimately bear the brunt of the increased cost of workers' compensation claims. Since the court itself "legislated" this expansion of the Act, there was no opportunity for Pennsylvania citizens to voice their opinions.

STATEMENT OF THE CASE

This controversy arises out of treatment provided to the workers' composition claimant, Thomas Shaw who sustained a work injury to his left knee in August 2014. His physician ("Physician") provided medical care and prescribed medications, which were dispended by the Pharmacy on May 5 and 11, 2017, and billed by Compservices Inc./AmeriHealth Casualty Services ("Insurer"), the insurer for his employer the Roman Catholic Archdiocese of Philadelphia ("Archdiocese"). The Insurer filed a UR request in June 2017, and by UR determination of August 2017 all of the Physician's treatment from November 2, 2016 forward was adjudicated to be unreasonable and unnecessary. Two petitions for review of the UR determination were filed but withdrawn in accordance with a Compromise and Release ("C&R") entered by the parties. The Pharmacy filed fee review applications in July 2017 which the Medical Fee Review Section granted by administrative determinations in September 2017, awarding payment of $3,616.46 (compound cream) and $887.66 (Naprelan tablets). The Insurer contested the decisions by filing a hearing request and on September 12, 2018 the Hearing Office vacated the administrative determinations and dismissed the two applications, which the Pharmacy appealed to the Commonwealth Court.

The Commonwealth Court affirmed the Hearing Officer's decision based upon the binding UR determination that the medications dispensed were

unreasonable and unnecessary, and as the Hearing Office had correctly determined that question of the "facial validity of the UR process" was "beyond its purview." 223 A.3d at 299. However, the court created a new prospective right for non-health care providers and "new rule" going forward, stating:

> Accordingly, we hold that for UR procedures occurring after the date of this opinion where an employer, insurer, or an employee requests 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...

Keystone Rx LLC, 223 A.3d at 299.

By Orders entered September 1, 2020, this Court granted allocatur to address a total of three issues. At 93 EAL 2020 (now 27 EAP 2020) this Court granted Insurer, Compservices/AmeriHealth's petition for allowance of appeal as to the following two issues:

> 1. Did the Commonwealth Court exceed the scope of its authority and substitute 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?
>
> 2. Did the Commonwealth Court err when it gave non-healthcare providers via the right to void at any time, 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?

At 94 EAL 2020 (now 28 EAP 2020), the petition for allowance of appeal of the Bureau (Bureau of Workers' Compensation Fee Review Hearing Office) was granted as to the following:

> 3. 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?

SUMMARY OF ARGUMENT

The Commonwealth Court improperly engaged in judicial lawmaking by substituting its own policy decisions for those of the legislature, effectively amending the Act to provide non-health care providers, which dispense the prescribed medicine, goods or services, with standing and the right to participate in the UR process. This decision opens the door to further abuse of a system already plagued by outrageous mark-ups of medicines and medical supplies, over-prescription, and fraudulent billing practices, all of which affect Pennsylvania consumers.

The purpose of the Act is to ensure that injured employees in Pennsylvania receive indemnity benefits and medical treatment for injuries sustained in their employment, not to guarantee payment to a non-treating entity that merely dispenses prescriptions without exercising medical judgment. The legislature designed the UR process to determine whether the health care provider's proscribed treatment was "reasonable or necessary" to treat the work injury, not to resolve payment disputes. The legislature specifically identified the parties entitled to participate as only the employer, its insurer, the claimant and the health care provider. 77 P.S. § 531; Section 306(f.1)(6). A UR determination that the treatment was or was not reasonable and necessary is binding in a fee review proceeding. 77 P.S. § 531. The Act limits non-medical providers to challenges to

the amount and timeliness of payment for the prescriptions they dispensed, through the fee review process under Section 306(f.1)(5). These policy choices were made by the Pennsylvania Legislature.

The Commonwealth Court erroneously expanded the UR provision to prospectively provide non-health care providers "such as a pharmacy, testing facility or provider of medical supplies" with a right and standing not intended by the Act. Under the court's "new rule," such providers must "be afforded notice and an opportunity to establish a right to intervene under the usual standards for allowing intervention." Non-health care providers can now interject their purely financial interest into a UR process which is designed to assess only propriety of the health care provider's treatment, and potentially void a UR determination. At the same time, the dispensing entity is insulated from review as it cannot be the subject of a direct UR request by an employer or insurer who can only challenge the health care provider's treatment. Had the legislature intended to allow a non-health care provider to participate in a UR of the health care provider's treatment, it would have included that language rather than limiting payment disputes by a non-health care provider to the fee review process.

The Commonwealth Court also erred as its decision creates a climate of uncertainty as to how this "new rule" must be implemented, which impedes the UR process, impacts the finality of UR decisions, and otherwise complicates and

increases the costs of the workers' compensation claim process and the already high charges for treatment of injured workers. The court's vague language provides no guidance as to practical considerations such as which entities must be given notice beyond the three examples provided, how they can be identified absent timely bills, who must provide notice, or how the right to intervention is established. This prejudices employers and insurers and creates the opportunity for inadvertent error which may lead to many UR determinations being voided.

Under the plain language of the Act, non-health care providers have no right or standing to participate in UR proceedings and their payment disputes must be decided under the fee review process. The Commonwealth Court has not simply interpreted the Act, as the court insists, but has amended the statute by creating new rights and a new rule for non-health care providers in the UR process, intruding on the legislature's role and violating the separation of powers doctrine.

ARGUMENT

I. 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-HEALTH CARE PROVIDERS ARE ENTITIES WITH STANDING AND THE RIGHT TO INTERVENE IN THE WORKERS' COMPENSATION ACT'S UTILIZATION REVIEW PROCESS

The Commonwealth Court improperly engaged in judicial lawmaking by substituting its own policy decisions for those of the legislature, and by amending the Act to provide non-health care providers the right to participate in the UR process in contravention of clear statutory language.

The Workers Compensation Act is a "comprehensive system of substantive, procedural, and remedial laws comprising the workers' compensation system" enacted by the General Assembly for redress of injuries related to the workplace. *Kuney v. PMA Ins. Co.*, 578 A.2d 1285, 1287 (Pa. 1990). The Act "creates a highly structured balancing of competing interests." *Bowman v. Sunoco, Inc.,* 65 A.3d 901, 906 (Pa. 2013). A workers' compensation claimant is only entitled to medical treatment that is reasonable and necessary to treat the work injury. *See Miller v. W.C.A.B. (Pavex, Inc.)*, 918 A.2d 809, 813 (Pa. Cmwlth. 2007). The UR process "is the exclusive way for an employer or insurer to challenge the reasonableness or necessity of medical treatment provided to a claimant." *Allison*

v. Workers' Comp. Appeal Bd. (Fisher Auto Parts, Inc.), 177 A.3d 448, 453 (Pa. Cmwlth. 2018).

The purpose of the utilization review procedures in Section 306(f.1)(6) of the Act, 77 P.S. § 531(6) "is to determine the reasonableness and necessity of treatment in relation to a specified work injury." *Davis v. W.C.A.B. (Woolworth Corp.),* 928 A.2d 429, 431 n. 2 (Pa.Cmwlth. 2007); *see also* 34 Pa. Code § 127.401(a) (stating that 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."). At issue in the UR is the reasonableness and necessity of the treatment provided by a "health care provider," which is defined by the Act as "any person, corporation, facility or institution licensed or otherwise authorized by the Commonwealth to provide health care services, including, but not limited to, any physician, coordinated care organization, hospital, health care facility, dentist, nurse, optometrist, podiatrist, physical therapist, psychologist, chiropractor or pharmacist and an officer, employe[e] or agent of such person acting in the course and scope of employment or agency related to health care services." 77 P.S. § 29.[2] The actual process of utilization review is then governed by regulations promulgated by the Department of Labor and Industry: the matter is

[2] The Acts utilizes the term "employe" instead of "employee." It is undisputed that pharmacies are not included in the Act's definition of "health care" provider.

assigned to a Utilization Review Organization (URO) which then selects a health care provider in the same or similar specialty as the provider of the treatment under review to conduct a peer review. *Allison*, 177 A.3d at 453. The URO is required to "give the provider under review written notice of the opportunity to discuss treatment decisions with the reviewer," and to "initiate discussion with the provider under review when such a discussion will assist the reviewer in reaching a determination." 34 Pa. Code § 127.469.

In enacting Section 306(f.1)(6) of the Act, the legislature explicitly chose to limit the participants in a UR proceeding to the employer and its insurer, the injured employee, and the health care provider whose treatment is disputed. Section 306(f.1)(6) states that "an ***employe[e], employer or insurer***" can request Utilization Review of "[t]he reasonableness or necessity of all treatment provided by a health care provider." 77 P.S. § 531 (emphasis added); *see also* 34 Pa. Code § 127.401. The Act specifies that only "[t]he ***health care provider, employer, employee or the insurer*** can seek review if they disagree with the determination of the URO." *Geisler,* 875 A.2d at 1227 (emphasis added), citing 77 P.S. 531(6)(iv), § 306(f.1)(6)(iv)("If the provider, employer, employe or insurer disagrees with the finding of the utilization review organization, a petition for review by the department must be filed..."). The participants are specifically limited by statute and do not include a non-health care provider like a pharmacy. The legislature also

did not include a right for the employer or its insurer to file a UR request directly challenging the reasonableness and necessity of the goods or services delivered by a non-health care provider. Rather, when review is requested of "anesthesia, incident to surgical procedures, diagnostic tests, ***prescriptions*** or durable medical equipment," the request for UR must identify "***the provider*** who made the referral, ordered or prescribed the treatment or service as the provider under review." 34 Pa. Code § 127.452 (e) (emphasis added).

Although a UR determination that the treatment was or was not reasonable or necessary is binding on a non-health care provider in a fee review proceeding, the legislature chose to not include a non-health care provider as one of the participants described in § 306(f.1)(6) entitled to seek UR, participate in the UR process, or challenge a UR determination. The Commonwealth Court's decision which now provides ***non-health care providers*** like pharmacies with the right and standing to participate in the UR process and new rule requiring "notice and an opportunity to establish a right to intervene," contradicts the clear and unambiguous language of the Act. The Commonwealth Court grossly exceeded its authority and imposed its own policy beliefs on this established statutory scheme. The legislature has already determined how a challenge to the reasonableness and necessity of a claimant's treatment is to be decided under the Act, who can participate and the limited extent to which a non-health care provider can challenge

and resolve payment disputes. *See Estate of Rothberg*, 166 A.3d 378, 386 (Pa. Super. Ct. 2017), *appeal denied*, 176 A.3d 840 (Pa. 2017)(noting General Assembly had already provided for children born after execution of a parent's will (but not before) to share that estate: "[i]t is not the function of the trial court, or this court for that matter, to enunciate new precepts of law or to expand existing legal doctrines."). By judicially amending the Act, the Commonwealth Court also circumvented any debate and deprived concerned Pennsylvania citizens of the ability to voice their opinions.

As this Court has admonished, "it is for the legislature to formulate the public policies of the Commonwealth." *Weaver v. Harpster*, 975 A.2d 555, 563 (Pa. 2009). "[T]he power of judicial review must not be used as a means by which the courts might substitute its judgment as to public policy for that of the legislature." *Parker v. Children's Hosp. of Philadelphia*, 394 A.2d 932, 937 (Pa. 1978). As a policy matter, the legislature did not provide for and did not intend for a non-health care provider to have a right to participate in the UR process. Regardless of whether the Commonwealth Court may have perceived an inequity to non-health care providers in the UR process, this is not an area into which it could intervene, but rather a matter of discretion for the legislature. *See Fullerton v. W.C.A.B. (Gettysburg Foundry Specialties Co.)*, 761 A.2d 201, 203 (Pa. Cmwlth. 2000); *Glancey v. Casey*, 288 A.2d 812, 816 (Pa. 1972) (noting its

"dismay" at legislative inaction, but stating "[t]ime and again, we have taken the position that the judiciary does not question the Wisdom of the action of a legislative body."). The Commonwealth Court was not free to revise the Act because of its belief that "it does not perfectly carry out a policy." *Stafford v. W.C.A.B. (Advanced Placement Servs.),* 933 A.2d 139, 142 (Pa. Cmwlth. 2007), citing *Gustine Uniontown Associates v. Anthony Crane Rental, Inc.*, 842 A.2d 334, 347 (Pa. 2004) (noting "the courts of this Commonwealth may not refuse to enforce on grounds of public policy that which the legislature has prescribed.") (quoting *Pantuso Motors, Inc. v. CoreStates Bank, N.A.*, 798 A.2d 1277, 1283 (Pa. 2002)).

The Commonwealth Court subverted the legislature's policy limiting participation in UR proceedings to the health care provider, employer, insurer, and claimant by imposing its own policy and revising § 306(f.1)(6) to create a new rule and rights never intended to be part of the workers' compensation statute. The court shifted the legislature's intended policy focus from a determination as to the propriety of the medical treatment, to a device for payment. The Commonwealth Court's decision cannot stand because it exceeded the scope of its authority and substituted its own policy judgment for that of the Pennsylvania Legislature.

II. THE COMMONWEALTH COURT ERRED WHEN IT GAVE NON-HEALTH CARE PROVIDERS THE RIGHT TO VOID AT ANY TIME, A UTILIZATION REVIEW DETERMINATION REGARDING THE REASONABLENESS AND NECESSITY OF

THE CARE OF THE PHYSICIAN WHO WROTE THE PRESCRIPTION WHICH LED TO THE NON-HEALTH CARE PROVIDER PROVIDING A GOOD OR SERVICE TO THE INJURED WORKER

A. The Commonwealth Court erroneously provided non-health care providers with a right to notice and to intervene in a UR proceeding

The Commonwealth Court erred by holding that non-health care providers prospectively have a right to notice and to intervene in a UR proceeding. This error affects all Pennsylvania workers' compensation employers and insurers. The result of the Commonwealth Court's new rule is to allow a non-health care provider, whose role was limited to merely dispensing medicines, goods or services, to interject its purely ***financial interest*** into the UR process. At the same time, the non-treating entity is insulated from being the subject of a direct UR because an employer or insurer is limited to filing a UR request against the prescribing health care provider.

The legislature chose not to provide a right to a non-health care provider to participate in a UR dispute over whether the treatment was reasonable and necessary. This is logical as the health care provider's treatment is under review and that provider's interest is to assure the proper medical care for the injured worker. A non-health care provider does not examine, evaluate, test, diagnose or

treat a workers' compensation claimant, and its purely monetary interest is not at issue in the UR process, as the legislature intended. [3]

By legislative design, a non-treating entity can only challenge the amount and timeliness of payment for the prescriptions it dispensed through the fee review process in accordance with Section 306(f.1)(5), not in a UR where the issue is whether the treatment was reasonable or necessary (Section 306(f.1)(6). The payment of non-health care entities is governed solely by the medical cost containment regulations set forth in 34 Pa.Code Chapter 127. These regulations "were enacted to implement those sections of the Act that relate to payments made by insurers "for medical treatment ...provided to employees with work-related injuries and illnesses." *Catholic Health Initiatives v. Heath Family Chiropractic*, 720 A.2d 509, 511 (Pa.Cmwlth. 1998)(quoting 34 Pa.Code § 127.1). Section 306(f.1)(5) provides in relevant part 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...". 77 P.S. § 531. [4] The fee review sections of the Act "were

[3] For instance, the Pennsylvania Pharmacy Act defines a Pharmacy as having been "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. § 390-2(12). The terms "dispense" or "dispensing" are defined as "the preparation of a prescription or non-prescription drug in a suitable container appropriately labeled for subsequent administration to or use by a patient or other individual entitled to receive the drug." 63 P.S. § 390-2(2.1).

[4] In addition to the protections in Section 306(f.1)(5) for a non-health care provider's interest in reimbursement for prescriptions or goods or services dispensed, the right to payment is also

not intended, and will not now be held to permit, the determination of liability as to a particular injury treatment under the Act." *Allen v. Proto Home Improvements*, 847 A.2d 225, 228 (Pa.Cmwlth. 2004).

Participation in a UR by a non-health care provider also would be pointless, and would not advance the UR determination. The ***only*** input such an entity could provide was that the prescription was filled as ordered. The mere act of dispensing the prescribed medicine does not make that medicine reasonable or necessary. If the health care provider's medical judgment is incorrect, he or she is not entitled to payment for that treatment. The dispensing pharmacy is not entitled to a protected payment if the prescribing physician's treatment was not reasonable and necessary. The involvement of dispensing entities who are not qualified health care providers would override the function of Utilization Review process as specified by the legislature.

The Act specifically limits the resolution of payment disputes by non-medical providers to a fee review challenging the amount and timeliness of payment for the prescriptions they dispensed. Reimbursement to the non-health care provider is unavailable when there is a UR determination that the health care provider's treatment is not reasonable or necessary. The Commonwealth Court

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protected under the penalty provisons of the Act, Section 435, 77 P.S. § 991. In all instances, however, the employer or insurer from which payment is sought must first be financially liable for that treatment or medicine.

erred by amending the Act to create a new right for non-health care providers which was not intended when the UR scheme was enacted by the legislature. Remuneration of non-health care providers for medicines, supplies and services which are not reasonable or necessary to treat claimants' work injuries directly impacts Pennsylvania consumers, who will inevitably bear these increased costs.

B. The Commonwealth Court's determination is erroneous because it provides no guidance as to how its prospective "new rule" is to be implemented

In addition to erring by amending the Act, the Commonwealth Court failed to provide direction as to how its prospective "new rule" is to be implemented. The court did not identify or define the non-treating providers who are now entitled to intervene in a UR, referring only to "a provider which is not a 'health care provider' as defined in the Act" and giving only three examples of "a pharmacy, testing facility, or provider of medical supplies." 223 A. 3d at 299. The court's present definition is likely to be expanded, creating uncertainty as to what entities must be provided with "notice and an opportunity to establish a right to intervene" in any given UR proceeding. The court also did not identify who must provide notice to the non-health care provider. Employers and insurers - who have only 30 days to initiate a UR after receiving a health care provider's bill - will be unfairly burdened to identify the dispensing pharmacy in sufficient time to participate in the UR regarding the health care provider's treatment. The bills for prescriptions,

from which a pharmacy or other entity's identity could be obtained, may be submitted in a different timeframe than the physican's bill or even after the UR determination is made. The court's opinion also provides no guidance as to how, precisely, a non-health care provider would establish a right to intervene, or what standard would apply. The ambiguous language of this "new rule" will have to be interpreted by a series of court decisions and all of this "lawmaking" will occur without the legislature's involvement.

The Commonwealth Court's vague language leaves the door open for a non-health care provider to void future UR determinations even if the failure to provide notice is unintended, or if the definition of non-medical providers in *Keystone RX LLC* decision is later expanded. Employers and insurers will be unreasonably prejudiced and penalized for involuntary missteps, as they bear the burden in the UR process of proving that the disputed medical treatment is not reasonable or necessary. *See Topps Chewing Gum v. W.C.A.B. (Wickizer),* 710 A.2d 1256, 1260–61 (Pa. Cmwlth. 1998). The costlier claims process will be reflected in increased premiums and the higher cost of doing business which ultimately impacts consumers.

The legislature designed the statutory scheme for utilization review to facilitate a determination of the reasonableness and necessity of a health care provider's medical treatment and the medicines prescribed. In the instant case the

UR process worked exactly as envisioned by the legislature; the medical treatment/prescriptions were found not to be reasonable and necessary for the claimant's treatment in a UR, thus payment to the Pharmacy was denied by the Hearing Office. That portion of the Commonwealth Court's decision affirming the Hearing Officer's decision was correct. However, the Commonwealth Court's ill-conceived "new rule" has now made that process unworkable, and will greatly complicate workers' compensation litigation, create uncertainty as to the process and finality of future UR determinations, and increase the already high costs for the treatment of injured workers. By changing the focus of a UR from the treatment itself to monetary reimbursement of the prescribed medicines, goods or services, the Commonwealth Court's decision also incentivizes the prescription and dispensing of unnecessary medicine, goods and services. Allowing this ruling to stand pointlessly expands UR proceedings, and will enormously increase the volume of UR's and appeals, opening the proverbial floodgates to litigation. The eventual costs, will, of course, will ultimately fall upon the consumer.

III. 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

As this Court has recently reiterated, "the separation of powers doctrine is essential to our triparte governmental framework and is the cornerstone of judicial independence." *Renner v. Court of Common Pleas of Lehigh Cty*., 234 A.3d 411, 419 (Pa. 2020).[5] This doctrine "is inherent in the Pennsylvania Constitution and makes manifest that the three branches of government are co-equal and independent, and divides power accordingly." *Id.* In order "to 'avert the danger inherent in the concentration of power in any single branch or body,' no branch may exercise the functions delegated to another branch." *Id*., at 419–20 (quoting *Jefferson County Court Appointed Employees Association v. Pennsylvania Labor Relations Board*, 985 A.2d 697, 706-07 (Pa. 2009)). This "prohibition on one branch of government encroaching upon a sister branch's powers is, in turn, related to the system of checks and balances, which prevents one branch from acting unchecked." *Renner*, 234 A.3d at 420, citing *Jefferson County*, 985 A.2d at 706. In order for the "checks and balances" to operate properly "each branch must be kept from controlling or coercing the other." *Renner*, 234 A.3d at 420. "Insuring that each branch is co-equal and independent is the foundation of the separation of

[5] This Court has explained that like the federal government, the "governing structure of our Commonwealth... is divided into three equal branches, the legislative, see Pa. Const. art II, § 1 ('The legislative power of this Commonwealth shall be vested in a General Assembly ....'); the executive, see Pa. Const. art. IV, § 2 ('The supreme executive power shall be vested in the Governor ....'); and the judicial, see Pa. Const. art. V, § 1 ('The judicial power of the Commonwealth shall be vested in a unified judicial system ....')." *Renner,* 234 A.3d at 419.

powers doctrine, and the avoidance of the concentration of governmental powers in one branch is essential to our freedom and liberty." *Id.*

In accordance with Article II, § 1 "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." Pa. Const. art. II, § 1. The function of the courts "is to interpret the law; that function does not embrace the right to make law or to legislate." *Glancey*, 288 A.2d at 818 (noting that even if it struck down as invalid legislation concerning salary scale for municipal court judges "we lack the power and authority to substitute...a clause making the salaries retroactive"). Even if frustrated, a court cannot be allowed to "bypass the constitutional processes in our system of government" and violate the separation of powers doctrine under the Pennsylvania Constitution. *Commonwealth v. Hill*, 2020 PA Super. 219,__ A.3d __, 2020 WL 5405428 (Pa. Super. Ct. Sept. 9, 2020). Significantly, the Workers' Compensation Act is remedial legislation. *Wagner v. Nat'l Indem. Co*., 422 A.2d 1061, 1065 (Pa. 1980). "The nature and extent of the remedy provided by the General Assembly in a remedial statute is within the sound judgment of the legislature," and **"*[t]hat discretion should not be intruded upon by the judicial branch*."** *Kline v. Arden H. Verner Co.,* 469 A.2d 158, 161 (Pa. 1983), Nix, J. concurring (emphasis added). The legislature here declined to allow

participation of a non-health care provider in a utilization review, thus limited its payment remedy to a fee review hearing.

The Commonwealth Court did not elaborate on its due process analysis or explain the source of its authority to exercise the law-making function delegated to the legislature. Rather, the court suggests that it is merely construing the Act consistent with due process:

> Accordingly, we hold that for UR procedures occurring after the date of this opinion where an employer, insurer, or an employee requests 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. Although this Court may not usurp the powers of the General Assembly and exceed the parameters of legislation pertaining to medical cost containment, it bears repeating that the polestar of Armour I is that the Act must be construed in accordance with due process of law. Armour II, 206 A.3d at 667.

Keystone Rx LLC, 223 A.3d at 299. The Commonwealth Court did not simply build upon its prior decision in *Armour Pharmacy v. Bureau of Workers' Comp. Fee Review Hearing Office*, 206 A.3d 660, 667 (Pa .Cmwlth. 2019) (*Armour II*) (finding that Fee Review Hearing Office had jurisdiction to determine whether pharmacy was a "provider").[6] *Armour II* did not authorize the Commonwealth

[6] In *Armour Pharmacy v. Bureau of Workers' Comp. Fee Review Hearing Office*, 192 A.3d 304, 310 (Pa.Cmwlth. 2018) (*Armour I*) the question was whether a C&R agreement could be used to set aside a fee review determination that an employer owes reimbursement to a provider for a particular course of treatment and avoid payment to the pharmacy which was not a party to the

Court to amend and expand the Act to provide for additional rights not statutorily granted in the first instance. These issues are before this Court as matters of first impression.

The essence of the Commonwealth Court's decision is not merely an interpretation of § 306(f.1)(6) or a direction to the Bureau to issue new regulations for the UR process in conformity with due process. Rather, the Commonwealth Court revised the Act by creating an entirely new right not included by the legislature, allowing non-health care providers standing to intervene and participate in UR proceedings. The Commonwealth Court thus clearly violated the Pennsylvania Constitution by "legislating" an amendment to the Workers' Compensation Act in violation of the separation of powers doctrine.

C&R. The court vacated the Hearing Office's adjudication that the 2016 C & R Agreement eliminated employer's liability to the pharmacy. In doing so, the Commonwealth Court acknowledged in *Armour* that "[t]he Act's utilization review and fee review procedures have been designed to comport with due process" and "give both the employer and provider an opportunity to be heard on the factual question of whether a provider's treatment was reasonable and necessary and, thus, required to be paid for by the employer." 192 A. 3d at 312.

CONCLUSION

For the foregoing reasons, Amicus Curiae, the Coalition Against Insurance Fraud respectfully requests that this Honorable Court reverse the Commonwealth Court's decision insofar as it prospectively requires, for UR procedures occurring after the date of the opinion, that 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.

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CERTIFICATE OF WORD COUNT COMPLIANCE
PER PA.R.A.P. 531(B)(3)

I hereby certify that this brief complies with the word limitation of Pa.R.A.P. Pa.R.A.P. 531(b)(3). Excluding the cover page, tables, and certifications, but including its footnotes, this brief contains 6116 words as calculated by Microsoft Word.

BY: s/s Audrey J. Copeland
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DATE: November 18, 2020

CERTIFICATE OF COMPLIANCE WITH CASE RECORDS PUBLIC ACCESS POLICY

I hereby certify that this Brief complies with the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.

BY: s/s Audrey J. Copeland
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Date: November 18, 2020

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the *Brief for Amicus Curiae*, *The Coalition Against Insurance Fraud* was electronically filed with the Court and copies delivered to the below on the date indicated:

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