

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harburg Medical Sales Co.,	:	
Petitioner	:	
	:	
v.	:	No. 635 C.D. 2020
	:	SUBMITTED: June 7, 2021
PMA Management Corp. (Bureau	:	
of Workers' Compensation, Fee Review	:	
Hearing Office),	:	
Respondent	:	

BEFORE: HONORABLE P. KEVIN BROBSON, President Judge
HONORABLE J. ANDREW CROMPTON, Judge (P.)
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE LEADBETTER**

FILED: August 30, 2021

Petitioner, Harburg Medical Sales Co., petitions for review of two adjudications of the Bureau of Workers' Compensation, Fee Review Hearing Office,¹ denying Harburg's requests for *de novo* hearings to contest the Bureau's administrative denial of fee review applications relative to an injured worker, Walter Maximo, on the ground that Harburg was not a provider within the meaning of

¹ The two adjudications, captioned Dispute Nos. DSP-2417595-12 and DSP-2417595-16, respectively, pertain to merged Dispute Nos. DSP-2417595-12 through 19. Bearing the same circulation date, the adjudications are identical but for the cover pages and order captions. For citation purposes, we refer to them together as the June 15, 2020 Adjudication.

Section 109 of the Workers' Compensation Act (Act)² and, therefore, lacked standing to invoke the fee review process. We affirm.

The pertinent background of this matter is as follows. In July 2002, Maximo sustained a work injury in the course of his employment with Case Paper Company. (June 15, 2020 Adjud., Finding of Fact “F.F.” No. 2.) After he developed chronic pain, his doctor sent orders for certain pain treatment modalities to Harburg. (*Id.*, No. 3.) Upon receiving the orders, “Ms. Harburg [] communicate[d] with various distributors (never identified, except—at one point—as Amazon, in these proceedings),” advanced payment for the items, and directed them to be delivered to Maximo’s residence via UPS or FedEx.³ (*Id.*) Thereafter, Harburg billed PMA Management Corporation, Case Paper Company’s third-party administrator. (*Id.*)

Following a dispute between Harburg and PMA as to the amount properly payable for the items, Harburg filed fee review applications with the Bureau. Upon the Bureau’s denial of the applications, Harburg sought further review by requesting *de novo* hearings. (*Id.*, Nos. 4-6.) In the interim, PMA moved to dismiss the applications on the grounds that Harburg was not a provider and that the Hearing Office lacked jurisdiction to address the issue of whether an entity was a provider. The Hearing Office denied the motion to dismiss based on the then-controlling case law.⁴

² Act of June 2, 1915, P.L. 736, *as amended*, added by the Act of July 2, 1993, P.L. 190, 77 P.S. § 29. In the context of fee reviews, “[p]rovider” means a health care provider.” *Id.* Hence, we use the terms health care provider and provider interchangeably in the present case.

³ Stating that it would not be cost effective to examine the items before shipment, Ms. Harburg acknowledged that she was unfamiliar with many of their features. (F.F. Nos. 12-14.)

⁴ The Hearing Office relied on *Selective Insurance Co. of America v. Bureau of Workers’ Compensation Fee Review Hearing Office (The Physical Therapy Institute)*, 86 A.3d 300 (Pa. Cmwlth. 2014), which this Court subsequently overruled to the extent that it was inconsistent with **(Footnote continued on next page...)**

Subsequently, this Court issued two decisions impacting the instant case. In *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) (*Armour I*), we held that the Hearing Office had jurisdiction to determine whether a supplier was a provider. Thereafter, we directed the Hearing Office in a related series of cases to adjudicate the threshold issue of whether Harburg was a provider. *PMA Mgmt. Corp. v. Bureau of Workers' Comp. Fee Rev. Hearing Off. (Harburg Med. Sales, Co., Inc.)* (Pa. Cmwlth., No. 1757 C.D. 2017, filed Apr. 12, 2019). Pursuant to that directive, Hearing Officer David Torrey conducted a hearing and concluded that Harburg was not a provider. Harburg's petition for review followed.

Section 306(f.1)(5) of the Act provides that a health care provider that “disputes the amount and timeliness of the payment from the employer or insurer shall file an application for fee review” 77 P.S. § 531(5). Section 109 of the Act defines a “health care provider” as follows:

[A]ny 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, employee or agent of such person acting in the course and scope of employment or agency related to health care services.

77 P.S. § 29.

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

In determining that Harburg does not meet the definition of provider, we first note that it is neither licensed nor authorized by the Commonwealth to provide health care services. Ms. Harburg acknowledged that she had no relevant degrees or certifications as a health care provider. (Jan. 20, 2015 Harburg Dep., Notes of Test. “N.T.” at 52; Reproduced R. “R.R.” at 118a.) Additionally, as she opined and to our understanding, there are no government agencies specifically authorizing Harburg to distribute medical supplies, no state or federal quality standards for suppliers of such items, and no continuing education requirements for operating a medical supply company. (Aug. 21, 2019 Harburg Dep., N.T. at 12-13; R.R. at 448a-49a.) Further, she acknowledged that Harburg is not accredited by Medicare as a Durable Medical Equipment, Prosthetics, Orthotics, and Supplies supplier.⁵ (*Id.* at 11-12; R.R. at 447a-48a.)

Moreover, the limited certificate of registration from the Pennsylvania Department of Health that Harburg submitted does not establish that it is a provider under the Act or otherwise authorized to provide health care services. The certificate indicates that Harburg is registered to conduct and maintain a facility in accordance with The Controlled Substance, Drug, Device and Cosmetic Act (Drug Act)⁶ and that the category for which it is registered is “devices,” which does not permit the possession or sale of controlled substances or prescription drugs. (Aug. 21, 2019 Harburg Dep., Harburg Ex. 1; R.R. at 468a.) In pertinent part, the Drug Act defines “device” as “instruments, apparatus and contrivances, including their components, parts and accessories” Section 102 of the Drug Act, 35 P.S. § 780-102.

⁵ Ms. Harburg testified that Harburg is not a Medicare provider, instead primarily billing workers’ compensation carriers and third-party administrators. (Jan. 20, 2015 Harburg Dep., N.T. at 14; R.R. at 450a; and Aug. 21, 2019 Harburg Dep., N.T. at 6; R.R. at 361a.)

⁶ Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. §§ 780-101-780-144.

However, even if such a certificate did indicate that Harburg was a provider, the applications at issue do not include devices under the Drug Act. As the parties stipulated:

(1) in the pending Medical Fee Review (MFR) matters, Harburg arranged for disposable and/or durable medical supplies to be delivered to the injured worker (IW) in the underlying [w]orkers' [c]ompensation case. Supplies included but were not limited to, heat wraps, cold wraps, and supplies for use with a Tens Unit[;] (2) in each MFR, there is a licensed health care provider who treats the IW, and who recommended, ordered, prescribed, or authored a letter of medical necessity for the disposable and/or durable medical supplies for the IW's use.

(F.F. No. 11.) In addition, the certificate bears an issuance date of March 28, 2015, with an expiration date of April 30, 2020, which is outside of the periods at issue in the instant fee review applications. Consequently, the limited certificate is irrelevant.

As additional support for the determination that Harburg is not a provider, we turn to the relevant findings of fact indicating how the approximately thirty-year-old company operates. Co-owned by a husband and wife, Harburg "maintains an enterprise [run from home with no warehouse or inventory] that facilitates the home delivery, via mail order, of certain medical supplies." (F.F. No. 12.) As extrapolated from that part of Ms. Harburg's testimony that the Hearing Officer credited,⁷ he found as follows. "Patients do not come to [Ms. Harburg's]

⁷ The Hearing Officer acknowledged that some segments of Ms. Harburg's rejected testimony do not bear directly on Harburg's standing as a provider. Nonetheless, he observed that the omissions and irregularities in Ms. Harburg's testimony "cast grave question upon the integrity of the medical billing which has unfolded in these fee reviews." (F.F. No. 18.) In pertinent part, he rejected Ms. Harburg's testimony that Harburg is not a middleman; that Ms. Harburg personally
(Footnote continued on next page...)

office; instead, . . . she undertakes mail orders from doctor referrals or when the patient contacts her directly.” (*Id.*, No. 12.) Ms. Harburg instructs the “vendor to ship out whatever the doctor ordered.” (*Id.*) Additionally, someone on behalf of Harburg calls the “patient” before dispensing, asking whether he or she wants to “cut down from what the doctor ordered[.]” (*Id.*) Someone also calls the patient to ascertain whether “he or she needs ongoing deliveries of the pain management items.” (*Id.*)

Further, the facts do not warrant a legal determination that Harburg is an agent of a licensed health care provider. In that respect, the Hearing Officer properly rejected “Harburg’s assertion that it is a health care provider for fee review purposes [based on] the theory that it is an agent of certain physicians who FAX over . . . slips for pain treatment items like hot and cold wraps.” (Conclusion of Law “C.L.” No. 2.) Instead, the evidence reflects that Harburg “is operating what is, in effect, a service directly to injured workers.” (*Id.*) As Ms. Harburg stated: “[T]he patient—when they call, I mean, I had one just call two weeks ago. And she [had] settled [and hence the insurance company was out of the picture]. And she said please help me. You were great and I want to buy it from you” (*Id.*) In other words, Harburg “is a mail-order facilitator of injured workers’/claimants’ desire for therapeutic pain management items like hot wraps.” (*Id.*, No. 17(a).) Accordingly, Harburg is not an agent within the meaning of Section 109 of the Act.

dispenses items; that injured workers cannot go to retail outlets to buy certain items; and that the types of products that Harburg deals in are not directly available for purchase. Additionally, he rejected Ms. Harburg’s testimony justifying use of durable medical equipment codes for items such as disposable heat and cold wraps. (*Id.*, No. 12) Instead, he credited the testimony of Michael Miscoe, a certified coder, that Harburg is providing medical items that are readily available for purchase at retail outlets such as Rite Aid and that it is improper to use durable medical codes for disposable items like hot and cold wraps. (*Id.*, Nos. 16 and 20.)

In addition, we reject Harburg’s argument that the Hearing Officer’s decision violated Harburg’s due process rights by depriving it of a forum to contest the amount or timeliness of the payments received from the employer or the insurer. Even though Harburg may have rendered convenient services or assisted injured workers to obtain equipment or supplies that were part of his or her treatment plan, the pertinent legislation does not dictate that any person or entity which does so be afforded an opportunity to invoke the fee review process. Pursuant to the clear language of Section 306(f.1)(5) of the Act, only providers have standing to do so. “In the absence of ambiguity in the statutory language, we will not embark on a statutory construction exercise; rather, we will apply the plain language of the statute.” *Barringer v. State Emps.’ Ret. Bd.*, 987 A.2d 163, 165-66 (Pa. Cmwlth. 2009). If the General Assembly wishes to expand the definition of provider in legislation pertaining to medical cost containment and the fee review process, then it needs to enact appropriate laws.

In any case, we conclude that Harburg was not deprived of its due process rights. In *Armour I*, this Court held that “[i]t offend[ed] due process . . . as well as the Act’s careful scheme for resolving fee disputes to place the question of whether a putative provider is actually a ‘provider’ beyond the reach of judicial review.” *Armour I*, 206 A.3d 670. Hence, we determined that the Hearing Office has jurisdiction to determine whether a supplier is a provider. *Id.* at 671. Harburg was given a full hearing on this issue and afforded due process; it simply did not agree with either the result or the consequences necessarily following therefrom—its inability to invoke the fee review process. Determining the legal status of Harburg ends our inquiry. As Hearing Officer Torrey concluded: “It may well be that some medical supply houses are, somehow, providers under the Act, and have

standing to file Requests in this forum. However, on the evidence presented in this case, Harburg is not one of them.” (C.L. No. 5.)

Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge Emerita

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ORDER

AND NOW, this 30th day of August, 2021, the orders of the Bureau of Workers' Compensation, Fee Review Hearing Office, are hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge Emerita