STATE BOARD OF WORKERS' COMPENSATION

7 East Congress Street, Suite 601
Savannah, Georgia 31401
(912) 651-6223
www.sbwc.georgia.gov

At the Employee's request, a hearing was held in Waycross, Ware County, Georgia on August 7, 2009 to determine

1) whether the Employer/Insurer, under Board Rule 205, is liable to authorize and pay for psychological treatment;
2) whether the referral for psychiatric care was authorized;
3) whether the psychological condition is related to the compensable injury;
4) which party has the burden of proof on these issues; and
5) whether the Employee is entitled to assessed attorney's fees.

The hearing record of evidence was held open for receipt of additional evidence, namely updated hospital records. The hearing record closed on August 28, 2009 when the records were received and filed as Claimant's Exhibit 8.

The Board's file record shows and the parties agree that this is an accepted claim for which weekly income benefits have been paid. The hearing transcript was filed on August 28, 2009, and post-hearing briefs were received by September 21, 2009.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon carefully weighing and considering all admissible evidence, including my observations of the witness at the hearing (See Georgia Forestry Comm'n v. Wilson, 119 Ga. App. 795, 168 S.E.2d 790 (1969); Abbercrombie v. Maryland Cas. Co., 41 Ga. App. 729, 154 S.E. 459 (1930)), and after review of the parties' argument in briefs, I find and conclude as follows:

1. At the parties' request, and pursuant to O.C.G.A. §34-9-102(e)(1), I take judicial notice of the following things from the Board's file:

--a WC-3 dated and filed February 13, 2009; and
--a WC-14, the one asking for the change of doctors, dated and filed March 4, 2009.

2. Based on the parties' stipulations, I find that Dr. Shutack is an authorized treating physician; that Dr. Tillinger closed his regular practice two years ago but that, since then, he has done part-time and temporary assignments as well as independent medical examinations; that Ms. C. has been the insurer's claims adjuster at the time of the filing of the Form WC-205; and that her fax number is correct.

3. On February 4, 2008, the Employee was driving a route on his truck driving job when a tire blew out, which caused his truck to swerve off the road and plow into a grove of trees. The Employee testified that his neck, lower back, and left leg were injured. He testified that he believed he hit his head, too. He testified that he does not know

if he was knocked unconscious but that he felt confused after the accident. The medical evidence indicates that the Employee consistently reported having been secured by his seat belt in the accident.

4. The EMS report shows only a lower back complaint and that the Employee denied any loss of consciousness. There was a report of superficial lacerations to the face, arms, and hands, though it was reported that the Employee's truck was in the woods and that he had walked out and up to the roadway. The medical evidence from the hospital the day of the accident shows that the Employee reported lower back pain but no head injury or pain or loss of consciousness. The evidence from Waycross Family Practice right afterward shows that Employee reported injuries to--and was treated only for--his neck and lower back. The records show that the Employee reported no head trauma or loss of consciousness. On April 9, the Employee reported on Dr. John Shutack's new patient questionnaire that he had hit his head and lost consciousness in the accident, that he had headaches, and that he also had dizziness, change in vision, and ringing in the ear. However, Dr. Shutack's records from then on show treatment only for neck and lower back conditions. At that same first visit, though, Dr. Shutack did document that the pain in the neck and lower back was quite severe. Dr. Shutack stated that the Employee's pre-existing degenerative lumbar and cervical conditions had been aggravated by the accident. On November 3, 2008, Dr. Shutack referred the Employee to treatment for depression. (C-5, p. 13.)

5. The Employee testified that he has been out of work since the accident and he is still having constant pain in the neck, lower back, and left leg. He testified that he suffers every day from depression. He acknowledged that he has had some family stress.

6. The Employee contends that psychological treatment should be the Employer/Insurer's responsibility. In particular, the Employee states that the Employer/Insurer did not follow the requirements of Board Rule 205(b)(3), and so they are liable automatically for the treatment. In response, the Employer/Insurer contend that the treatment is for a condition not related to the compensable injury and that they should not be foreclosed from that defense just because the rule's procedure was not strictly followed.

7. To start with, an employer is liable for medical treatment if three categories are met. The treatment must be authorized. O.C.G.A. §34-9-201(b)(1). It must also be reasonable and necessary. O.C.G.A. §34-9-200(a). And it must, obviously, also be related to the compensable injury. Board Rule Board Rule 205(b)(3)(c)(1). All three requirements must exist for an employer's liability to be established. For example, proving a doctor is authorized does not necessarily mean that the condition he is treating came from the work accident. Nor would proving the condition is related make for compensability if, in further example, the treatment was not reasonable and necessary. And so on. If the injured worker is contending that medical services for which she is seeking compensation are connected to her injury, then she has the burden of proving this before the condition in question can be considered related to employment. Board Rule 205(b)(3)(c)(1); Jarallah v. Pickett Suite Hotel, 204 Ga. App. 684, 420 S.E.2d 366 (1992); Samples v. Roadway Express, Inc., 113 Ga. App. 391, 148 S.E.2d 198 (1966); Smith v. Mr. Sweeper Stores, Inc., 247 Ga. App. 726, 544 S.E.2d 758 (2001). If the injured worker is contending that certain treatment is authorized even though it has been controverted as unauthorized, then the worker has the burden of proving it is authorized. Board Rule 205(b)(3)(c)(1). If, however, the medical expenses are denied because the employer contends that the treatment is not reasonable or necessary, then the burden of proof is on the employer. Id.

8. In the present case, the question of burden of proof depends on the basis for the controvert. The Employer/Insurer contend that the psychological treatment is for a condition that is not related to the compensable injury and that, as well, it is not medically necessary. Their February 13, 2009 controvert states these defenses. Therefore, the burden of proof is mixed: the Employee has the burden of proving that the treatment is related to the accident, and the Employer/Insurer have the burden of proving that it is not medically necessary. See Board Rule 205(b)(3)(c)(1).

9. On the question of the Employer/Insurer's liability under Board Rule 205, I find that on January 29, 2009, the Employer/Insurer were sent a Form WC-205 by counsel for the Employee on the request for authorization for treatment in question. The WC-205 was signed by both Dr. Shutack and Dr. Mark Gold, who also had treated the Employee. Board Rule 205(b)(3)(a) requires an employer to respond within five business days of receipt of the request. I find no evidence that the Employer/Insurer ever responded within five days. Indeed, the only evidence of a response is the controvert filed on February 13, 2009, which itself was well outside the required time. Board Rule 205(b)(3)(a) states that failure to timely respond to a WC-205 request results in "the treatment or testing stand[ing] pre-approved." Board Rule 205(b)(4) adds the clincher: if an employer "fails to comply with Rule 205(b)(3), the employer shall pay, in accordance with this Chapter, for the treatment/test requested."

10. If there is a question of authorization--and the Employer/Insurer's WC-3 did not raise this as a defense, I would find that the Employee has proven this. In the present case, I find that the psychological treatment was prescribed by an authorized physician, when Dr. Shutack did so on November 3, 2008, and I have found that Dr. Shutack is still an authorized treating physician and for all intents and purposes the authorized treating physician.

11. The next questions are whether the treatment is related to the compensable injury and whether it is medically necessary. First of all, in his testimony, the Employee made mention of a head injury, but I find that his head was not injured in the accident. I base this on the medical evidence. That being said, I do find that there are questions about whether the treatment is for a condition connected to the accident and whether it is even necessary. Beyond a bare mention of the referral for depression, Dr. Shutack gave no explanation. From this, if there was no other evidence, it might be inferred at the very least that the treatment was necessary, but there would be no persuasive indication that it was related to the accident. By contrast, Dr. Arnold Tillinger examined the Employee, addressing several points about the accident, past and current unrelated problems, and so on. Furthermore, he came to the conclusion that the Employee probably did not suffer from depression and that he did not need any psychiatric treatment. From this, I could find 1) that the Employee cannot prove that the condition is related and 2) that the Employer/Insurer have proven that the treatment is not necessary.

12. Be that as it may, however, I have found that the Employer/Insurer did not comply with Board Rule 205. Based on this, the Board Rule constrains me to hold that the Employer/Insurer's defenses have all been waived. For these reasons, I find that the psychological evaluation is related to the compensable injury. I find that it is also medically necessary and likely to effect a cure, bring relief, or restore the Employee to suitable employment. I conclude that the Employer/Insurer are liable to authorize and pay for this treatment. O.C.G.A. §34-9-200(a).

13. Moving next to the question of assessed attorney's fees, the Employee contends that the Employer/Insurer should be liable because they failed to file the form required by Board Rule 205. The statute provides for assessed attorney's fees for unreasonable defense. O.C.G.A. §34-9-108(b)(1). It also provides for assessed attorney's fees for failure to comply with O.C.G.A. §34-9-221. There is no specific provision in that code section for assessed attorney's fees for violation of a Board rule. The punishment for Board rule violations is indeed set out in the code, but this is under the provision for civil penalties. O.C.G.A. §34-9-18. The issue of civil penalties was not raised, so I cannot address that here. See Chem Lawn Services v. Stephens, 220 Ga. App. 239, 469 S.E.2d 375 (1996) and Holliday v. Jacky Jones Lincoln Mercury, 251 Ga. App. 493, 554 S.E.2d 286 (2001). So, can a violation of a Board rule--specifically, failing to file a form-- come under either the unreasonable defense section or the O.C.G.A. §34-9-221 violation section?

14. I hold that it can come under either code section. In this case, I find that the Employer/Insurer in effect violated the untimely payment statute by violating Board Rule 205. I therefore conclude that they are liable for assessed attorney's fees. O.C.G.A. §34-9-108(b)(2).

15. I further find that the Employee was required to engage the services of an attorney to enforce his rights. I find that the fair and reasonable fee for the services of the Employee's attorney, is $1,250.00. The Employee's attorney testified to a greater value, but I find that the amount I am awarding constitutes the reasonable value of services in this instance. Hardee's v. Bailey, 180 Ga. App. 332, 349 S.E.2d 211 (1986). A Board decision that denied assessed fees was upheld where, in reversing the ALJ, the Board had reviewed the record and found that the lump sum fee assessed was "excessive in light of the facts of this claim." See Minter v. Tyson Foods, 271 Ga. App. 185, 609 S.E.2d 137 (2004).

AWARD

WHEREFORE, based on the above findings and conclusions, the Employer/Insurer are directed to pay the medical expenses as found above--including the psychiatric/psychological treatment referred by Dr. Shutack--and any other medical expenses which the parties agree are reasonable in amount and reasonably required to bring about a cure or give relief, subject to a hearing at the request of any party to resolve a dispute. This paragraph alone is interlocutory in nature.

The Employer/Insurer are also directed to pay the Employee's attorneyassessed attorney's fees in the amount of $1,250.00, without deducting this amount from any income benefits paid to the Employee.

IT IS SO ORDERED, this the 01st day of October, 2009.

STATE BOARD OF WORKERS' COMPENSATION

This order is electronically signed and approved.
Jerome J. Stenger
ADMINISTRATIVE LAW JUDGE