

**19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA**

30-MAR-2017

TO: JOSEPH ARTHUR SMITH III
ATTORNEY AT LAW
830 NORTH ST
BATON ROUGE, LA 70802

JANICE H BARBER ETAL VS LA STATE WRKFRCE COMM ETAL

CASE NUMBER: C621071

JUDGE: DONALD R JOHNSON

DIVISION: SECTION 26

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION FOR THE

AFOREMENTIONED CASE: Enclosed is a copy of the Written Reasons for Judgment

Cheryl Wyatt
JUDICIAL ASSISTANT TO JUDGE
DONALD R JOHNSON

NOTIFIED:

RECEIVED

APR 3 2017

SMITH LAW FIRM

JANICE HEBERT BARBER,
JOHN H. FAIRBANKS, M.D.,
PIERCE D. NUNLEY, M.D., JOHN
LOGAN, M.D., JOHN FAULKNER,
DARRELL CORMIER, PEGGY
EDWARDS, JOAN SAVOY,
KARIN FRIERSON, AND
VANESSA ARNOLD

NUMBER: 621, 071 SEC. "26"

19TH JUDICIAL DISTRICT COURT

VERSUS

PARISH OF EAST BATON ROUGE

LOUISIANA WORKFORCE
COMMISSION, LOUISIANA
OFFICE OF WORKERS'
COMPENSATION, CHRISTOPHER
RICH, M.D., WES HATAWAY, AND
CURT EYSINK

STATE OF LOUISIANA

WRITTEN REASONS FOR JUDGMENT

This matter came before the court for trial on February 7, 2017.

Present in Court were:

J. Arthur Smith, III, for the Plaintiffs.

Harry J. Philips, Jr., Erin Sayes and Meredith Trahan for the Defendants.

Pursuant to the defendant's request for the Court's written reasons and La. C.C.P. Art. 1917, this Court hereby gives the following written reasons for judgment rendered on March 2, 2017 in the matter of JANICE HEBERT BARBER, JOHN H. FAIRBANKS, M.D., PIERCE D. NUNLEY, M.D., JOHN LOGAN, M.D., JOHN FAULKNER, DARRELL CORMIER, PEGGY EDWARDS, JOAN SAVOY, KARIN FRIERSON, AND VANESSA ARNOLD VERSUS LOUISIANA WORKFORCE COMMISSION, LOUISIANA OFFICE OF WORKERS' COMPENSATION, CHRISTOPHER RICH, M.D., WES HATAWAY, AND CURT EYSINK, under Docket Number C 621,071.

After reviewing the Petition for Declaratory and Injunctive Relief, memoranda in support, pleadings and attachments, and listening to oral arguments presented at the hearings held on March 17, 2015, March 18, 2015, and June 22, 2015 and the bench trial on Feb. 7, 2017, considering the evidence submitted by the parties at trial, together with the post-trial arguments submitted by the parties and the parties proposed findings of facts and conclusions of law, this Court concludes as follows:

AUTOMATIC "TACIT DENIAL" OF MEDICAL TREATMENT

La. R.S. 23:1203.1(J)(1) requires that "(a)fter a medical provider has submitted to the payor the request for authorization and the information required by the Louisiana Administrative Code,

Title 40, Chapter 27, payor shall notify the provider of the action within five business days” of receipt of the request. The language of the statute clearly requires an evaluation and a decision, whether it be approval or denial, being made within the five (5) day time-period.

However, the regulation promulgated by the OWC provides for a purported “automatic tacit denial.” It provides that if a carrier or self-insured employer fails to return a form 1010 within five (5) business days, “it is deemed to have denied such request for authorization.” 40 LAC 2715(E)(1)(e)(2)(a) and 40 LAC 2715(H). The regulation mandates the denial of a medical treatment request simply because of employer/carrier inaction irrespective of whether the medical care is within the guidelines. The legislature did not authorize the OWC to create a new rule creating a “tacit-denial” when the provider simply ignores a request for treatment.

The defendants argue that 40 LAC 2715(E)(1)(e)(2)(a) and 40 LAC 2715(H) bear a rational relationship to the legislature’s clearly articulated interest that “treatment be delivered in an efficient and timely manner to injured employees.” Further, defendant asserts that if all submitted claims were assessed in five days, or deemed accepted after five days, this could lead to unnecessary surgeries or recommendations for treatment which could be overturned later and could complicate payment of physicians.

This Court finds that the OWCA’s inclusion of tacit denial in 40 L.A.C. 2715(E2) and (H) exceeds its legislative authority as the OWCA lacks the authority to create and implement procedural regulations that authorize the “tacit denial” of requested medical treatment which is statutorily obligated to the injured worker by the employer pursuant to La. R.S. 23:1203(A).

VARIANCES FROM THE MEDICAL TREATMENT GUIDELINES

La. R.S. 23:1203.1(I) provides that medical treatment that varies from the medical treatment schedule is due by the employer to the employee when it is demonstrated to the Medical Director by a preponderance of the scientific medical evidence, that a variance from the medical treatment schedule is reasonably required to cure or relieve the injured worker from the effects of the injury or occupational disease given the circumstances.

The OWCA promulgated 40 L.A.C. 2715(L) requiring that injured workers meet a higher burden than the statute, La. R.S. 23:1203.1(I), requires. Under the OWCA rule a variance can only be obtained if the injured worker or his doctor submits “scientific medical literature that is higher ranking and more current than the medical literature that forms the basis of the current medical treatment schedule.” Under the statute, the Medical Director determines whether the variance

request meets the burden under 40 L.A.C. 2715(L) and the statutory burden of preponderance of the scientific evidence under R.S. 23:1203.1(I).

Defendant's argued that the legislature's intent was to ensure that all treatment provided through the workers' compensation system be supported by medical literature and evidence.

The Court finds that in regards to injured workers' ability to receive or request medical treatment that varies from the Louisiana Medical Treatment Guidelines, the statute is vague and the regulations are arbitrary, denying injured workers' medical treatment that Louisiana employers are statutorily obligated to provide pursuant to La. R.S. 23:1203(A).

TREATMENT NOT COVERED BY THE MEDICAL TREATMENT GUIDELINES

The plaintiffs contend that, for an injured worker to obtain medical treatment recommended by his or her physician that is outside of the treatment within the Medical Treatment Guidelines (MTG), the injured worker must meet the criteria of R.S. 23:1203.1(M)(1) and (2). Section "M" of the statute refers the injured worker to section "D"—including that the guideline has been adopted by rule or law for use in another state's workers' compensation system. Plaintiffs argue that to meet this requirement, injured workers or their treating physicians or attorneys must conduct "an exhaustive search of all other states' medical treatment guidelines."

The defendants argue that the criteria set forth are not vague. OWCA Director Kellar testified that there has been no change, either statutory or regulatory, as to how requests for medical treatment outside of the Louisiana MTG are processed since the Court's previous hearing and preliminary injunction in this matter.

The Court finds that the statute and regulatory scheme for determining whether an injured worker can receive medical treatment that is outside of the Louisiana MTG is unduly burdensome and arbitrarily denies injured workers' medical treatment that Louisiana employers are statutorily obligated to provide pursuant to La. R.S. 23:1203(A).1.

LACK OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS

Procedural Due Process

Regarding Procedural Due Process, at the Medical Director level, a workers' compensation carrier can submit any information it desires for the Medical Director's consideration and the Medical Director can accept anything the carrier decides to submit. There is no adequate procedural mechanism for the injured worker to be notified of the "evidence" submitted by the carrier or to object to its consideration by the Medical Director before the Medical Director denies

the treating physician's recommendation for treatment of an injured worker. There is no adequate procedural mechanism or safeguards for the compilation of an administrative record.

Director Kellar testified that there has been no change to the MTG statute, La. R.S. 23:1203.1, or the regulations implementing the MTG process, found in 40 L.A.C. 2715, since this Court issued the preliminary injunction. She also testified that the OWCA does not have a rule, regulation, policy or guideline that allows a party to submit additional evidence at the OWC Judge "Appeal Hearing" of a Medical Director's 1009 decision. She admitted that several courts of appeal across the State of Louisiana have indicated that parties may be allowed to submit additional evidence at the OWC Judge "Appeal Hearing" of a Medical Director's 1009 decision.

Director Kellar further testified that currently injured workers in some appellate districts of Louisiana, but not others, may be allowed to present evidence at the OWC Judge "Appeal Hearing" of the Medical director 1009 decision. No explanation was given as to why the OWCA is continuing to deny injured workers in some Louisiana appellate districts the right to present evidence at their 1009 appeal hearings. She confirmed that a 1010 Request for Medical Treatment has to be completed by a physician; meaning an injured worker or his/her representative cannot file a request for medical treatment, and therefore cannot even get before an OWC Judge without a physician being willing to file the 1010 request for treatment.

This Court concludes that the statute and regulations comprising the Medical Director review process and subsequent appeal to an OWCA administrative judge under a clear and convincing evidence standard violates the procedural Due Process clauses of the Fourteenth Amendment to the United States Constitution and La. Const. Art. I, § 2. Due Process of law under the Fourteenth Amendment and La. Const. Art. I, § 2 requires both a "meaningful" pre-deprivation opportunity to be heard and a "meaningful" post-deprivation hearing.

Substantive Due Process

Regarding Substantive Due Process, there is no right to a post-deprivation hearing in the challenged Medical Director's system. The injured workers' right to appeal the Medical Director's determination to an OWCA judge is not a "meaningful" opportunity for a post-deprivation hearing. Such an appeal is confined to whatever administrative record the Medical Director chooses to provide; there is no opportunity to submit evidence to the OWCA judge; the OWCA judge cannot reverse or even modify a decision of the Medical Director unless the injured worker can somehow

satisfy the unrealistic burden of showing by "clear and convincing evidence" that the Medical Director's decision is erroneous.

The defendants argue that the provisions detail the procedures for an injured worker to appeal a denial of medical treatment by employer or workers' compensation carrier. The statute and regulations address steps for employer or worker's compensation carrier to respond with its own evidence and this info must be exchanged with all parties. Further they argue that the appeal procedure and standard for review in the worker's compensation scheme is no different than that for a decision by any other administrative agency.

This Court finds that the manner in which the Medical Director review process is administered is arbitrary and capricious. For example, the evidence shows that the Medical Director, Dr. Jason Picard, an internist, does not know the standard of proof for requests of medical treatment that vary from the MTG, even though he is the person responsible for deciding these claims. Further, the Medical Director does not have the training to decide whether someone is entitled to a surgery that varies from those listed in the MTG or is outside of the treatment listed in the MTG, as Dr. Picard, unlike the previous Medical Director, Dr. Chris Rich, is not a surgeon. The 1009 review process is more arbitrary now under the guidance of a non-surgeon Medical Director than it was at the time this Court issued the preliminary injunction.

The defendants are also permanently enjoined, restrained, and prohibited from allowing anyone to attempt to communicate with judges of the Office of Workers' Compensation regarding pending workers' compensation claims by using any employee of the Louisiana Workforce Commission or the Louisiana Office of Workers' Compensation as an intermediary for the following reasons:

JUDICIAL INDEPENDENCE: SEPARATION OF POWERS

In 2011, the OWCA appointed Carey Holliday as Special Assistant to the Director to create a system of metrics to measure judicial performance. Holliday implemented judicial performance evaluations conducted by OWC Chief Judge Kellar and regulated by Louisiana's Civil Service system. Holliday's evaluations contained reference to specific decisions rendered in specific cases. The plaintiffs argue that these evaluations criticized administrative judges for favoring employees requesting workers' compensation benefits.

In 2011, the change created by R.S. 23:1203.1 removed the decision-making power of OWCA judges on issues of medical necessity and placed the power in the hands of the Medical director. Holliday testified that he was hired to help bring the judges into conformity with the new

rule. He stated that when he first started in his current position, there were judges who were way out there in terms of ruling for plaintiffs on a consistent basis and penalizing employers with attorney fees and penalties. He also admitted that during meetings with judges, he informed judges of the agency's position. Plaintiff's argue that this was to pressure judges into denying employee claims.

Holliday testified that the OWCA produced a report that showed the amount of penalties each of the OWCA judges awarded in a particular year. He also testified that part of the conformity the OWCA sought among the judges related to awards of penalties and attorney's fees in favor of injured workers and against employers. Prior to his appointment as judge evaluator, there were judges who ruled in Plaintiffs' favor at a high rate. Holliday referred to this as "punishing employers" and testified that his personal preference as a judge, prior to being Special Assistant to the Director, was to avoid awarding penalty and attorney's fees.

The defendants argue that the Plaintiff's argument mischaracterizes the OWC's supervision of its judges and ignores the express statutory authorization granted to the OWC to attend judicial meetings, and appoint personnel as necessary for efficient administration and operation of the office.

OWCA Director, Sheral Kellar testified that a hearing rule was added addressing grievances against judges. Defendants provided no citation of the Judicial Grievance Hearing rule and no copy of the contents of the Rule during the trial of this matter. Director Kellar testified that the new rule requires the complaint go to the OWCA Director.

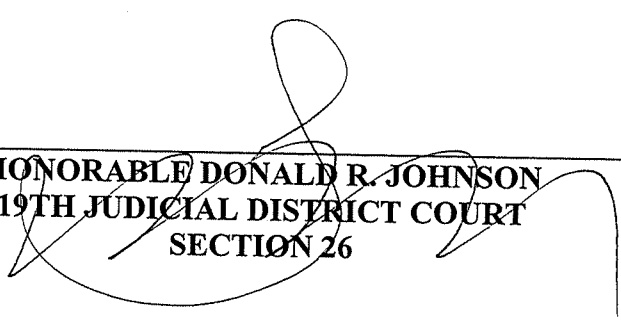
The Court finds that these new rules do not address the concerns which formed the basis for the Court's preliminary injunction as to the lack of judicial independence. The OWCA has violated the separation of powers doctrine by compromising judicial independence.

Further, this Court finds that the Plaintiffs may seek reasonable attorneys' fees, costs and expenses through a post-trial motion because this Court finds in favor of the Plaintiffs.

Further, this Court finds that the Defendants are cast with the cost of filing this judgment because this Court finds in favor of the Plaintiffs.

For these written reasons set forth above, the Court rendered the judgment dated, March 2, 2017.

THUS, DONE AND SIGNED in chambers in Baton Rouge, Louisiana this 30th day of
March 2017.


HONORABLE DONALD R. JOHNSON
19TH JUDICIAL DISTRICT COURT
SECTION 26

I hereby certify that on this day a notice of the
above ~~reasons~~ was mailed by me, with sufficient
postage affixed to:

*J. Arthur Smith, Harry J P Phillips,
Erin Boyes*

Done and signed on March 30, 2017

Cheryl Wyatt
Deputy Clerk of Court