



## JUGE NAPOLITANO

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The Louisiana Supreme Court issued the attached opinion in *Burgess v. Sewerage & Water Board of New Orleans*, and specifically held that **employer gets choice of pharmacy**. This certainly is great news for employers in Louisiana.

Unfortunately, their analysis did not stop there. It appears that even unauthorized pharmacies/providers may still dispense prescription medication to claimants, but they will be limited to reimbursement of the \$750 cap provided under Section 1142(B). We would have hoped that awarding choice of pharmacy to the employer would have given them the absolute right to deny all payments to those outside of their approved network, especially those who were forewarned not to dispense. However, the Supreme Court stated that resolution of this issue was not dispositive of the \$750 cap issue.

The following is a summary of the findings of the Court, along with its implications for employers for handling similar and related issues.

### **SUMMARY OF CASE**

Employer instituted a prescription card program and advised its employees to use the card only at authorized pharmacies. Use at unauthorized pharmacies may result in nonpayment. After instituting the program, the employer also put IWP on notice that they were not authorized to dispense medication to their employees and any subsequent bills of theirs would be denied. Despite the warning, IWP continued to dispense medication to Burgess and ran up a bill for \$13,110.82. Burgess filed suit in part to demand payment of the bill along with penalties and attorney fees.

Burgess argued the following points: (1) the medication was necessary medical treatment under Section 1203; (2) the billing charges of IWP was in compliance with the provisions of the Fee Schedule (Section 1034.2) and 1203(B); (3) Louisiana is an employee choice state; and (4) prescription medication is not “nonemergency diagnostic testing or treatment” and therefore not subject to the \$750 cap under Section 1142(B) for failure to obtain prior consent of the payor.

Employer opposed Burgess on these points and also raised the issue that IWP was an out-of-state provider and therefore not a permissible pharmacy under Section 1203(A).

The OWC judge ruled in favor of claimant and the matter was appealed to the 4<sup>th</sup> circuit. The 4<sup>th</sup> circuit held that the employee gets the choice of pharmacy, ordered payment of the full bill of \$13,110.82 and awarded penalties and attorney fees. The employer took writs to the Supreme Court. The Supreme Court remanded the case back to the 4<sup>th</sup> Circuit for reconsideration in light of the *LBJ Clinic v. LUBA* decision recently released by the Supreme Court in which they capped reimbursement at \$750 for pharmacy charges incurred without the consent of the payor.

The 4<sup>th</sup> circuit distinguished the facts of *Burgess* from the facts of *LBJ* and reaffirmed their original opinion. The Supreme Court granted writs a second time and overturned the ruling of the 4<sup>th</sup> Circuit and remanded it back to the trial court for further findings.

## **DISCUSSION AND RULING OF THE COURT**

The Supreme Court began its analysis by finding that employer may exercise choice of pharmacy under the LA WC Act. Section 1203(A) obligates the employer to “*furnish* all necessary drugs.” Citing its previous decision in the *LBJ* case, the Court noted “there is no explicit workers’ compensation law directing that one party has the exclusive right to choose a prescription medication provider.” Section 1121(B)(1) dealing with choice limits the employee to choice of *physician*, and does not grant employee the more expansive choice of *health care provider*. The rationale for allowing choice of physician, which is the importance of the patient’s trust and confidence in the doctor-patient relationship, does not apply to a pharmacist, who dispenses the identical medication regardless of any individual skill level and without any effect on the comfort level of the patient.

The Court held that since the statute does not specifically give choice of pharmacy to the employee, neither should the Court. There should be no liberal interpretation given to the statute to create a right not delineated by the legislature.

Nonetheless, the Court noted that resolution of the choice-of-pharmacy issue does not fully resolve the issue of whether the S&WB is responsible for payment of the outstanding IWP bill. Sections 1203(A) and (B) and Section 1142 also come into play.

Section 1203(A) requires the employer to furnish medical treatment and to use in-state facilities. Out-of-state facilities are permitted only when: (1) the services are not available in-state; or (2) when the services can be provided at comparable costs. The Court ruled that further evidence would be necessary in order to determine whether IWP is a permissible out-of-state pharmacy under these provisions and remanded the case back to the trial court.

The Court also gave further instruction regarding the application of Section 1142 should the lower courts find that IWP is a permissible out-of-state pharmacy. First, the Court held that even if IWP was a permissible out-of-state pharmacy, their charges cannot exceed the Fee Schedule.

Moreover, this court recognized in *Lafayette Bone & Joint* that La. R.S. 23:1034.2(D) leaves open “the possibility that medical fees, even though falling within the amounts set forth in the reimbursement schedule, may be deemed unreasonable, unnecessary, or not ‘usual and customary,’ and therefore not subject to compensation under certain circumstances.” 194 So. 3d at 1121-22. This court further noted “the expression of legislative intent set forth in LSA-R.S. 23:1020.1 makes it clear that the reasonableness of medical costs is an important consideration.” *Id.* at 1122.

Finally, the Court held that dispensing of medication falls within the purview of “treatment” under this Section and thus would be subject to the \$750 reimbursement cap for any medication dispensed without the consent of the payor.

The Court concluded by stating that the penalties and attorney fees issue was not appealed originally and therefore this issue was not properly before the Supreme Court.

## APPLICATIONS AND IMPLICATIONS

Applying these cases going forward, employers/insurers should advise their claimants upon issuance of the prescription card that they are restricted to using only the pharmacies listed within the approved network, and warn all physicians in the state licensed to dispense prescription medication that they are not authorized to dispense medication to their claimants. They should also notify pharmacies that they will not authorize the dispensing of prepackaged medication.

If the physicians or pharmacies do so anyway, the payor should reimburse them up to the cap of \$750. The notice should not state that they are authorized for up to \$750 in medication. It should be clear that they are not authorized at all. Application of Section 1142 simply requires the payor to reimburse for up to \$750 of unauthorized treatment.

It appears that application of this case will suspend the operations of IWP or any other out-of-state pharmacies from dispensing prepackaged medications in the state of Louisiana. It will be nearly impossible for them to prove that these medications are not available in-state or that their prepackaged medication is comparable in price to the medications bottled and dispensed at the in-state retail pharmacies.

This should also provide payors with great bargaining power when it comes to authorizing compound medications. Payors should be able to negotiate and contract with pharmaceutical companies to provide any compound medications that a physician may prescribe at a reasonable cost. Since “reasonableness of medical costs is an important consideration,” the payor may be able to withhold consent to a pharmacy under Section 1142(B) if their costs for compound pharmaceuticals are unreasonable as compared to the lower costs negotiated by the payors with other pharmaceutical companies. Once the obscene profits are removed from this endeavor, there should be little incentive for the physicians to prescribe these compounds. It is likely that the use of compound pharmaceuticals will drop drastically.

Finally, employers may be able to expand the ruling in this case to apply to the costs for outpatient surgery centers. Some of these surgery centers are charging workers’ compensation insurers up to 5 times what they are accepting from group health insurers for the same procedures. Employers could argue that using the same logic set forth in this decision, application of Sections 1203, 1121 and 1142(B) dictate a similar ruling.

The employer’s duty under the LWCA to furnish hospital care and services is also set forth in La. R.S. 23:1203 which provides, in pertinent part:

In every case coming under this Chapter, the employer shall furnish all necessary drugs, supplies, **hospital care and services, medical and surgical treatment**, and any nonmedical treatment recognized by the laws of this state as legal, and shall utilize such state, federal, public, or private facilities as will provide the injured employee with such necessary services.

Choice of physician is provided by Section 1121. It does not provide choice of hospital.

The Court emphasized in its ruling that:

Moreover, this court recognized in *Lafayette Bone & Joint* that La. R.S. 23:1034.2(D) leaves open “the possibility that medical fees, even though falling within the amounts set forth in the reimbursement schedule, may be deemed unreasonable, unnecessary, or not ‘usual and customary,’ and therefore not subject to compensation under certain circumstances.” 194 So. 3d at 1121-22. This court further noted “the expression of legislative intent set forth in LSA-R.S. 23:1020.1 makes it clear that the reasonableness of medical costs is an important consideration.” *Id.* at 1122.

The entire argument of surgery centers is that 90% of billed charges “falls within the amounts set forth in the reimbursement schedule” and therefore the employer has no option but to pay it. Using the paragraphs above, and pointing out the gross abuses in billing by the surgery centers, payors may argue that surgery centers should not be subject to compensation under these circumstances, and withhold consent under Section 1142(B) unless and until they are willing to negotiate a reasonable charge.

Denis Juge in our office has had much success opposing the outlandish charges of the surgery centers. The Supreme Court decision in *Burgess* should only buttress the position that we have been taking in opposing these bills. If you are interested in employing these tactics to reduce your exposure to the high costs of the surgery centers, please give Denis a call.