SHARK TANK:
ROUND TABLE WITH THE JUDGES

PANEL:
JUDGE TIM KELLEY, JUDGE BONNIE JACKSON,
JUDGE BEAU HIGGINBOTHAM, JUDGE TONI HIGGINBOTHAM,
JUDGE PAMELA MOSES-LARAMORE,
JUDGE KELLI TERRELL TEMPLE,
JUDGE DUKE WELCH AND JUDGE KIRK WILLIAMS

FRIDAY, JULY 28, 2017 • 9 - 10 AM

Issues in Civil Law and Procedure

Judge Timothy Kelley
July 28, 2017

COLLATERAL SOURCE RULE

- *Royer v. State of Louisiana, DOTD*, 210 So.3d 910 (La. App. 3 Cir. 1/11/17)
  - DOTD was found 100% at fault for plaintiff's injuries arising out of a motor-vehicle accident. Prior to trial, the court denied DOTD's motion in limine, seeking credits for payments made by the worker's compensation insurer of plaintiff's employer. The Third Circuit affirmed.
  - **HELD**: "If the primary goal of the collateral source rule is tort deterrence, the [rule] applies to a tortfeasor, even if consideration, in the form of policy payments, is non-existent, as will always be the case when a worker's compensation carrier is the collateral source."
- *Hoffman v. 21st Century N. Am. Ins. Co.*, 209 So.3d 702 (La. 10/2/15)
  - **HELD:** The Collateral Source Rule does not apply to attorney-negotiated write-offs or discounts for medical expenses obtained as a product of the litigation process.
  - Thus, the injured motorist was only entitled to reimbursement of the *actual amount paid* to the medical provider for his MRI scans rather the initial amount charged, but later discounted pursuant to an arrangement in place between the medical provider and attorney.
- *Lockett v. UV Ins. Risk Retention Group, Inc.*, 180 So.3d 557 (La. App. 5 Cir. 2015)
  - The Fifth Circuit distinguished *Hoffman*, finding that the collateral source rule only applies to a reduction in medical expenses negotiated by the plaintiff rather than plaintiff's attorney.

MEDICAL MALPRACTICE

- *Daniel v. Minnard*, 196 So. 3d 160 (La. App. 5 Cir. 6/14/16)
  - **HELD**: Claims against hospital for administrative negligence were claims of medical malpractice.
  - Plaintiffs brought a medical malpractice action against the hospital, alleging that it was negligent in failing to supervise the Dr. Minnard.
- *Billeaudeau v. Opelousas General Hospital Authority*, 2016 WL 6123862 (La. 10/19/16)
  - **HELD:** "Negligent credentialing" of a physician by a hospital does not constitute medical malpractice under the Medical Malpractice Act (MMA).
  - Plaintiff suffered severe brain damage after a misdiagnosed stroke. Relying on the *Coleman* factors, the Supreme Court found that negligent credentialing was administrative, not medical, in nature.

MEDICAL MALPRACTICE

- *Dupuy v. NMC Operating Co.*, 187 So.3d 436 (La. 3/15/16)
  - **HELD**: Plaintiff's claim against the hospital for failing to properly service and maintain equipment utilized in sterilization of surgical instruments falls within the scope of the MMA.
  - Thus, plaintiff was first required to present his claims before a medical review panel.
- *White v. The Glen Retirement System d/b/a Village Health Care at the Glen*, 195 So. 3d 485 (La. App. 2 Cir. 4/27/16)
  - Plaintiff brought an action against nursing home after falling from her bed that had been placed in the highest position. Plaintiff alleged that the nursing home committed an intentional tort by failing to properly position his bed, thus placing the claim outside of the MMA.
  - **HELD**: Plaintiff's claim primarily related to the negligent rending of care and assessment of the patient's condition and was not merely a custodial act claim.

"OPEN AND OBVIOUS" DOCTRINE

- *Melancon v. Perkins Rowe Assoc. LLC and Aspen Specialty Ins. Co.*, 208 So. 3d 925 (La. App. 1 Cir. 12/14/16)
  - Plaintiff tripped on a sidewalk curb created by a ramp that crossed over the sidewalk at an outdoor shopping mall. On summary judgment, the burden shifted to plaintiff to show that the alleged defect was not open and obvious. Plaintiff submitted affidavits from her daughter and husband, stating that they had been told that accidents have occurred at the same spot.
  - **HELD**: "The mere fact that the affidavits of the plaintiff's husband and daughter allege that some unknown number of other pedestrians have also tripped in the same area as the plaintiff is insufficient to show that the risk posed by the ramp is not open and obvious to pedestrians expected to encounter the ramp. Thus, the plaintiff failed to carry her burden of proving that the alleged defective condition was not open and obvious to all."
- *Trahan v. Acadiana Mall of Delaware, LLC et al.*, 209 So.3d 820 (La. App. 3 Cir. 12/7/16)
  - Plaintiff slipped on an algae-covered sidewalk on mall property.
  - **HELD**: "The Focus on whether an alleged defect is open and obvious is on the global knowledge of everyone who encounters the defective thing or dangerous condition, not the victim's actual or potentially ascertainable knowledge."

"OPEN AND OBVIOUS" DOCTRINE

- *McCoy v. Town of Rosepine*, 187 So. 3d 562 (La. App. 3 Cir. 3/9/16)
  - Employee was injured when he stepped into an uncovered water meter.
  - **HELD**: Defendants failed to present evidence on summary judgment that the uncovered water meter would have been open and obvious to all who encountered it. Thus, the Court found that a genuine issue of material remained and precluded grant of summary judgment.

SPOLIATION OF EVIDENCE

- *Reynolds v. Bordelon,* 172 So. 3d 589 (La. 2015)
  - **HELD:** The Louisiana Supreme Court does not recognize a cause of action for negligent spoliation of evidence.
- *Sayre v. PNK (Lake Charles), LLC,* 188 So.3d 428 (La. App. 3 Cir. 3/23/16)
  - Plaintiff tripped and fell at defendant's place of business. Plaintiff claimed that defendant violated its own policies by neither preserving the videotape of its inspection of the area, nor obtaining witness statements. On appeal, plaintiff argued that the trial court should have charged the jury with an "adverse presumption" that defendant's failure to preserve a piece of evidence within its control raised a presumption that the evidence would have been detrimental to his case.
  - On appeal, the Third Circuit noted that the Louisiana Supreme Court in *Reynolds v. Bordelon* rejected the tort of negligent spoliation, but recognized an adverse presumption against litigants who had access to evidence and did not make it available or destroyed it.
  - **HELD**: Plaintiff was entitled to the adverse presumption that the missing evidence would have been unfavorable to defendant. Defendant had a system in place to collect evidence and therefore had a duty to gather and control evidence. Moreover, defendant had knowledge of the potential litigation and managed to preserve four minutes of the surveillance tape showing the fall and the immediate time thereafter, but deleted thirty minutes before and most of the thirty minutes after the fall.

NEGLIGENCE: Causation

- *Vince v. Koontz and State Farm Automobile Ins. Co.*, 213 So. 3d 448 (La. 5 Cir. 2/8/17)
  - "The 'proximate cause' inquiry asks whether the enunciated rule or principle of law extends to or is intended to protect this plaintiff from this type of harm arising in this manner."
  - "Cause-in-fact is generally a 'but for' inquiry; if the plaintiff probably would not have sustained the injuries but for the defendant's substandard conduct."

PRESUMPTIONS

- *Bush v. Mid-South Baking Co. LLC*, 194 So. 3d 1170 (La. App. 5 Cir. 5/26/16)
  - **HELD**: The *Housley* presumption is only appropriate when:
    - (1) Plaintiff establishes that he was healthy before the accident and unhealthy afterwards, and
    - (2) There is a reasonable possibility of a causal connection between the accident and the injury.

ALLOCATION OF FAULT

- *Moore v. Iasis Glenwood Regional Medical Center, Inc. et al*, 216 So.3d 187 (La. App. 2 Cir. 2/15/17)
  - In a medical malpractice action, the Second Circuit noted that La. C.C. art. 2323 does not address whether the percentage reduction for comparative fault should be applied before or after the $100,000 settlement credit is reduced from the total award of damages.
  - **HELD**: "Comparative fault percentages shall be allocated **before** the imposition of the settlement credit."
- *Solomon v. Am. Nat. Prop. & Cas. Co.*, 175 So. 3d 1024 (La. App. 2 Cir. 9/4/15)
  - Trial court allocated 20% fault to plaintiff and 80% fault to defendant in an action arising out of a motor-vehicle accident.
  - **HELD**: Plaintiff was not a fault for colliding with defendant's vehicle. "When an intersection is blind or partially obstructed, the duty to determine that the way is clear before proceeding is heavy and requires a great degree of care. In contrast to the relatively heavy duty on a motorist at a stop sign, the motorist with the right of way has a minimal duty; it is a duty of ordinary care."

ALLOCATION OF FAULT

- *Justiss Oil Co. Inc. v. Oil Country Tubular Corp.*, 216 So. 3d 346 (La. App. 3 Cir. 4/5/17).
  - **ISSUE**: Does the assessment of comparative fault set forth in La. C.C. art. 2323 apply only in tort cases, or does it also apply in cases involving the relationship and obligations of contracting parties?
  - **HELD**: Recognizing a circuit split on this issue, the Third Circuit held that comparative fault does not apply to actions in redhibition.
  - The Court reasoned that this conclusion is "especially clear in redhibitory actions against a manufacturer given that under Louisiana law they are 'conclusively presumed' to know of the defect."
  - *See also* First Circuit decision in *Petroleum Rental Tools v. Hal Oil & Gas Co., Inc.*, 701 So.2d 213 (La. App. 1 Cir. 8/22/97), which held that La. C.C. art. 2323 is applicable to actions in redhibition (Citing *Keith v. U.S. Fidelity & Guaranty Co.*, 694 So.2d 180 (La. 5/9/97); La. C.C. art. 2323).

EVIDENCE

- *Lapuyade v. Rawbar, Inc. d/b/a Acme Oyster House*, 190 So. 3d 1214 (La. App. 5 Cir. 4/13/16)
  - **HELD**: "While certain documents are self-authenticating, there is no statutory provision providing for the self-authentication of the results of a Google search."

ACT 96

- Amends La. C.C.P. arts. 3421 and 3422.
- **Prior Law**
  - A decedent's property must have a gross value of $75,000 or less to qualify as a small succession.
  - Defined a small succession as one involving property of any value if the filing of the small succession affidavit occurred at least 25 years after the date of decedent's death.
  - Provided for court costs and commissions in small succession judicial proceedings.
- **New Law**
  - Increases gross value of a decedent's property from $75,000 to $125,000 to qualify as a small succession.
  - Defines a small succession as property of any value if the filing of the small succession affidavit occurs at least 20 years after the date of the decedent's death.

ACT 294

- New Law
  - Addresses the ambiguity of electronically filed requests identified by the Louisiana Supreme Court in the case of *In re Tillman*, 187 So.3d 445 (La. 2016).
  - Retains existing law and specifies that the request for a medical review panel shall be deemed filed on the date:
    - (1) Sent, if the request is electronically sent by facsimile transmission or other authorized means;
    - (2) Mailed, if the request is delivered by certified or registered mail; and
    - (3) Received, if the request is delivered by any other means.

ACT 186

- **Prior Law** (La. R.S. 9:5821-5825)
  - Provided rules and exceptions for prescription by law and for legal extensions due to the hardships caused by Hurricanes Katrina and Rita.
- **New Law** (La. R.S. 9:5826-5827)
  - Provides for the suspension or extension of peremption, prescription, and certain legal deadlines due to the hardships caused by the floods of 2016.
  - Provides for the suspension or extensions of prescriptive periods and peremptive periods for the period of time between August 12, 2016 and September 30, 2016.

City Court

Baton Rouge Government Website

233 Saint Louis Street
Room 208
Baton Rouge, LA 70802
(225) 389-5279 Office
(225) 389-7656 Fax
8:00 a.m. - 5:00 p.m. M-F

Elzie Alford, Jr
Clerk of Court/Judicial Administrator
citycourt@brgov.com

Online Traffic Ticket Payments

Strategic Plan 2011-2015
Destination: Next Generation

Sobriety Court

Emergency Court Closure Orders

Cell Phone/Security Policy

2017 Holiday Schedule

Appearance Bond Schedule

Civil Court Cost Schedule

Civil Suit Forms

Civil Fax Filing Information

Criminal/Traffic Forms

Departments

Delinquent Parking Tickets

Duty Court Schedule

Hours of Operation

Interpreter / ADA Accommodation

Interpreter Appointment Procedure

Judicial Divisions

Judicial Interest Rate Calculator

Welcome to Baton Rouge City Court

New! Mediation Program is now available for Small Claims suits and Eviction matters. Click here to find out more.

Baton Rouge City Court is a municipal court of record created in 1900 by La. R.S. 13:2071, and extended by the Plan of Government. This court processes civil, criminal, and traffic matters. Civil claims include, but are not limited to, personal injury, contract, and landlord-tenant cases up to $35,000, as well as small claims cases of $5,000. or less. It also has criminal jurisdiction over misdemeanors that are offenses generally punishable by a fine of not more than $1,000. and/or a jail term of not more than six months. All fines, costs, and forfeitures levied by the judges are collected by the Clerk's Office and deposited into the City-Parish general fund.

The mission of this Court is to fairly and impartially facilitate the administration of justice and to promote public confidence and trust by protecting and safeguarding individual rights and liberties.

We pledge to develop, institute, and maintain policies and practices which support this mission and furnish access to this Court by all persons.

Pursuant to Court Order all electronic devices, including cell phones, cameras, tape recorders, and computer laptops are prohibited from entering the City Court facility. Attorneys presenting a current Louisiana Bar Card are allowed to enter with such devices in accordance with said Order.

Frequently Asked Questions

Can I check the status of a case online?

The following reports are available online for you to check various civil and criminal cases. You can access these online reports by going to our Case & Docket Information.

- Civil Docket
- Civil Case Status Sorted by Attorney
- Civil Answers Filed Per Case
- Civil Summons Return List
- Criminal Dockets
- Civil New Suits Filings
- Delinquent Parking Tickets

Links

Property Location City Limits Verification

City Court Location

Online Reports
- Case & Docket Information
- Delinquent Parking Tickets
- Warrants

Penalties / Miscellaneous Fees

Rules of Court

Security Order

Traffic Fines Schedule

Judges Court Calendar 2017

Records Custodian

Contact Us

Your Opinion Please

Disclaimer

Email Public Information for questions on the City Parish Government.

Email the Webmaster to submit problems, suggestions or comments about this web site.

- City Court Warrants

Does your court handle divorce matters?

No. Divorce matters are handled through Family Court. They can be reached at 225-389-5118.

What payment methods do you accept for payment of fines, fees and court costs?

City Court accepts cash, checks made payable to the City of Baton Rouge (no temporary checks), Visa, MasterCard, American Express and Discover Card. A 5% processing fee is charged to credit card payments. A $50. NSF fee is charged on all checks returned unpaid for criminal/traffic payments. Payments by check can be made in person at 233 St. Louis Street, Baton Rouge, LA or mailed to Baton Rouge City Court, Accounting Division, P.O. Box 3438, Baton Rouge, LA. 70821. A payment by mail postmarked AFTER your court appearance date must include and additional $50. penalty fee. Credit card payments can be made in person or by telephone by calling 225-389-5289. Please have your ticket number and credit card number available when you call.

Credit card payments can also be made through the City Court Online Payment Center or through the City Court automated phone payment system, which can be reached by dialing 225-344-4636 and pressing extension 5050. Only Visa and MasterCard are accepted through these automated payment systems.

What if I can't pay my fine? Can I do community service work in lieu of my fine or make partial payments?

Community Service Work and Partial Payment plans are available in some cases. If you cannot pay your fine by the scheduled court date, you must appear in person in Room 145 to have your case file pulled and reviewed. Failure to appear timely will result in the issuance of a bench warrant for your arrest, withdrawal of your driving privileges, and the assessment of additional penalty fees. All City Court Warrants for arrest are posted on the City Court website Warrant Page.

Do I have to provide proof of insurance for a vehicle that is not mine?

If you do not have proof of insurance, regardless if the vehicle is yours, you will be required to appear in court on the scheduled court appearance date.

How do I get a case disposition or copy of court minutes?

You will need to appear in person in Room 145. The following costs will apply:

- Court Minutes at $.50 per page
- Certified Court Minutes at $1. per page

Where can I get a Criminal Background check for my job?

Background checks for the City are performed in the Criminal Records Division at the Baton Rouge Police Department located at 9000 Airline Highway or at Parish Prison.

What kind of classes do you offer?

Baton Rouge City Court offers various Educational and Rehabilitative Courses designed to:

- Address problems associated with alcohol and substance abuse

- Encourage behavior modification in anger management and domestic violence situations
- Foster an awareness of appropriate and effective decision making
- Provide literacy enhancement
- Promote safe driving in an effort to reduce accidents, deaths, and injuries that result from impaired or careless driving

Classes are currently held on Tuesdays and Thursdays from 5 p.m.–7 p.m. and Saturdays from 7:45 a.m.–3 p.m. The cost varies by class and ranges from $30. to $105. depending on the class taken. You may contact our Court Services Division at 225-389-5124 for more information.

more...

2017 Judges' Court Calendar

January - December 2017 (weekends included)

Div. A ….. Prosser
Div. B ….. Temple
Div. C ….. Smith
Div. D ….. Alexander
Div. E ….. Judge Pro Tempore

		Room 128 Arraignment/ Traffic Trials	Room 305 Civil Trials	Room 321 Criminal/ DWI Trials	Room 338 2nd Criminal	Room 309 Duty
JAN.	Dec. 26 - Jan. 1	Div. E	Div. D	Div. C	Div. B	Div. A
	2-8	Div. A	Div. E	Div. D	Div. C	Div. B
	9-15	Div. B	Div. A	Div. E	Div. D	Div. C
	16-22	Div. C	Div. B	Div. A	Div. E	Div. D
	23-29	Div. D	Div. C	Div. B	Div. A	Div. E
FEB.	Jan. 30 - Feb. 5	Div. E	Div. D	Div. C	Div. B	Div. A
	6-12	Div. A	Div. E	Div. D	Div. C	Div. B
	13-19	Div. B	Div. A	Div. E	Div. D	Div. C
	20-26	Div. C	Div. B	Div. A	Div. E	Div. D
MAR.	Feb. 27 - Mar. 5	Div. D	Div. C	Div. B	Div. A	Div. E
	6-12	Div. E	Div. D	Div. C	Div. B	Div. A
	13-19	Div. A	Div. E	Div. D	Div. C	Div. B
	20-26	Div. B	Div. A	Div. E	Div. D	Div. C
APR.	Mar. 27 - Apr. 2	Div. C	Div. B	Div. A	Div. E	Div. D
	3-9	Div. D	Div. C	Div. B	Div. A	Div. E
	10-16	Div. E	Div. D	Div. C	Div. B	Div. A
	17-23	Div. A	Div. E	Div. D	Div. C	Div. B
	24-30	Div. B	Div. A	Div. E	Div. D	Div. C
MAY	May 1 - May 7	Div. C	Div. B	Div. A	Div. E	Div. D
	8-14	Div. D	Div. C	Div. B	Div. A	Div. E
	15-21	Div. E	Div. D	Div. C	Div. B	Div. A
	22-28	Div. A	Div. E	Div. D	Div. C	Div. B
JUN.	May 29 - Jun. 4	Div. B	Div. A	Div. E	Div. D	Div. C
	5-11	Div. C	Div. B	Div. A	Div. E	Div. D
	12-18	Div. D	Div. C	Div. B	Div. A	Div. E
	19-25	Div. E	Div. D	Div. C	Div. B	Div. A
JUL.	June 26 - July 2	Div. A	Div. E	Div. D	Div. C	Div. B
	3-9	Div. B	Div. A	Div. E	Div. D	Div. C
	10-16	Div. C	Div. B	Div. A	Div. E	Div. D
	17-23	Div. D	Div. C	Div. B	Div. A	Div. E
	24-30	Div. E	Div. D	Div. C	Div. B	Div. A
AUG.	July 31 - Aug. 6	Div. A	Div. E	Div. D	Div. C	Div. B
	7-13	Div. B	Div. A	Div. E	Div. D	Div. C
	14-20	Div. C	Div. B	Div. A	Div. E	Div. D
	21-27	Div. D	Div. C	Div. B	Div. A	Div. E
SEP.	Aug. 28 - Sept. 3	Div. E	Div. D	Div. C	Div. B	Div. A
	4-10	Div. A	Div. E	Div. D	Div. C	Div. B
	11-17	Div. B	Div. A	Div. E	Div. D	Div. C
	18-24	Div. C	Div. B	Div. A	Div. E	Div. D
OCT.	Sept. 25 - Oct. 1	Div. D	Div. C	Div. B	Div. A	Div. E
	2-8	Div. E	Div. D	Div. C	Div. B	Div. A
	9-15	Div. A	Div. E	Div. D	Div. C	Div. B
	16-22	Div. B	Div. A	Div. E	Div. D	Div. C
	23-29	Div. C	Div. B	Div. A	Div. E	Div. D
NOV.	Oct. 30 - Nov. 5	Div. D	Div. C	Div. B	Div. A	Div. E
	6-12	Div. E	Div. D	Div. C	Div. B	Div. A
	13-19	Div. A	Div. E	Div. D	Div. C	Div. B
	20-26	Div. B	Div. A	Div. E	Div. D	Div. C
DEC.	Nov. 27 - Dec. 3	Div. C	Div. B	Div. A	Div. E	Div. D
	4-10	Div. D	Div. C	Div. B	Div. A	Div. E
	11-17	Div. E	Div. D	Div. C	Div. B	Div. A
	18-24	Div. A	Div. E	Div. D	Div. C	Div. B
	25-31	Div. B	Div. A	Div. E	Div. D	Div. C

Trends in Workers' Compensation-District 5

Judge Pam Laramore

1. Medical Treatment Guideline/1009 Appeal Process:
   a. Filings in D5 are WAY down – Medical Director/Dr. Jason Picard
   b. Recap of process if necessary
   c. Arrant case, LSC.2016- 15 day period to file 1009 appeal with WC Court NOT prescriptive.

      Me: Probably dilatory/premature, but definitely not prescriptive.

2. Scarring cases: Seriously & permanently disfigured under 1221 (4)(p) provides for a cap of 100 weeks

   Dupard Case, 1st Circuit.2015 – First time trial judge reversed on decision of number of weeks to designate for scar! Female w/knee scar; trial judge awarded 25 weeks reduced to 10 weeks by App. Ct.; based on smallest number of weeks provided by statute. (loss of toe)

   Me: Scarring award greater than 10 weeks, will require greater visibility and/or more traumatic appearance.

3. Safe Harbor Act - Preliminary Determination Process:
   a. Has resulted in unnecessarily lengthening the entire process when defendants do not follow through; i.e. file for Motion for PDH and then withdraw it right before the hearing because they discern they're not entitled to it!
   b. Has resulted in almost 100% settlement or consent judgment of the entire case when PDH is utilized; it's a chance to pre-try your case to the judge.
   c. Recap of process if necessary for timeline information

4. Choice of Pharmacy: Employer v. Employee – split in circuits

   Burgess case, LSC.2017 – Employer has the right to choose pharmacy, since the legislature did not specifically state employee choice; only that under 1203(A) "the employer shall furnish all necessary drugs". Also, the legislature did not use the term

"healthcare provider" with regard to employee choice of physician in 1121(B)(1) which would've allowed for a broader interpretation.

5. Healthcare Provider billing 1008s: Fairpay Solutions used to calculate pay rate – District Court Suit
   a. Class action filed in 27th JDC, St. Landry Parish, Opelousas General, et al v. Fairpay Solutions, Inc. – Settlement reached between the hospitals and Fairpay on a formula to be used to set rates. Failure to properly apply the formula can result in employer/insurer being sued in Workers' Comp Court.
   b. Motion to Enforce Settlement alleging improper application of formula filed in JDC suit – judgment rendered in HCP favor, appealed, affirmed on appeal last month, writs pending.
   c. Several suits were filed in D5 after trial held on JDC motion – Exceptions of Res Judicata, Lis Pendens, Nonjoinder of Indispensable Party and Lack of Subject Matter Jurisdiction were heard; Court found improper jurisdiction and transferred to JDC under CCP 932(B), since the plaintiffs chose to return to JDC for enforcement instead of utilizing the procedure in the settlement. No appeal filed.

6. Repetitive Injury/Hearing Loss 1008s: 1221(4)(p)
   a. These were filed after the LSC determined jurisdiction only proper in W.C. Court; Arrant, LSC,2015.
   b. D5 is utilizing the intent of 1221(4)(p), although it states loss of hearing from a single, traumatic event, and requiring plaintiff to secure a percentage of hearing loss from a physician/auditory professional and applying it to 100 weeks; 100 weeks represents total hearing loss.

7. Prescription & Res Judicata:
   Borja case, LSC.2016 – Plaintiff sued for injuries to knee, thumb and occupational disease/Heart & Lung Act. Parties agreed to back payment and commence indemnity; claim was dismissed. Indemnity terminated after 520 weeks; 1008 filed for P&T for knees, heart and lung. Exceptions of Res Judicata and Prescription were granted by the W.C. court and affirmed. LSC reversed. Without judgment/settlement indicating injuries associated with benefits, prescription for all injuries was interrupted with each indemnity payment and no "final judgment" for Res Judicata.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0019

TA'SHANTA DUPARD

VERSUS

MMR CONSTRUCTORS, INC.

Judgment Rendered: SEP 1 8 2015

* * * * * *

On Appeal from the Office of Workers' Compensation
In and for the Parish of East Baton Rouge
State of Louisiana
District 5
No. 14-00987

Honorable Jason Ourso, Judge Presiding

* * * * * *

William R. Mustian
Donaldsonville, Louisiana

Counsel for Plaintiff/Appellee
Ta'Shanta Dupard

Phillip E. Foco
Scott Ledet
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
MMR Constructors, Inc.

* * * * * *

BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McCLENDON, J.

An employer seeks review of an Office of Workers' Compensation ruling that awarded its employee twenty-five weeks of compensation benefits for a scar on her right knee, as well as statutory penalties and attorney's fees. For the following reasons, we amend the ruling to reduce the award from twenty-five weeks of compensation benefits to ten weeks of compensation benefits and reverse the award of statutory penalties and attorney's fees.

FACTS AND PROCEDURAL HISTORY

On November 20, 2013, Ta'Shanta Dupard, an employee of MMR Construction, Inc., was involved in a work-related accident when she was struck on her right knee by a four pound hammer that fell from above.[1] Ms. Dupard was taken to Prime Occupational Medicine Clinic, where she was evaluated and diagnosed with a knee contusion and a laceration, which later developed into a permanent scar.

On February 14, 2014, Ms. Dupard filed a disputed claim for compensation, contending that a "[h]ammer fell onto [her] right knee causing pain and injury" and naming MMR as a defendant. On August 25, 2014, Ms. Dupard filed a supplemental claim, asserting that she was entitled to benefits due to "a seriously and permanently disfiguring scar on her right knee."

Trial of this matter was held on September 23, 2014. At trial, the parties stipulated that the scar on Ms. Dupard's knee is permanent. The parties also stipulated that at the time of the incident, Ms. Dupard's average weekly wage was $1,058.62, yielding a maximum compensation rate of $619.00, and that MMR tendered $3,025.00 (or approximately 5 weeks of indemnity benefits) to Ms. Dupard on September 16, 2014. As such, the only issues before the Office of Workers' Compensation (OWC) were: (1) whether the scar was "serious" within the meaning of LSA-R.S. 23:1221, and thus compensable; (2) if so, the amount of

[1] It appears that the hammer was improperly fastened to the tool belt of another worker.

benefits due; and (3) whether Ms. Dupard was entitled to penalties and attorneys' fees.

At trial, a photograph of the scarring along with medical records from Ms. Dupard's treating physician were admitted into evidence. Additionally, the OWC judge was able to view Ms. Dupard's scarring.

Following trial, the OWC, in open court, ruled that Ms. Dupard was entitled to permanent partial disability benefits for her scarring claim and awarded her twenty-five weeks of compensation benefits. The OWC also awarded $2,000.00 in penalties and $2,500.00 in attorney fees. On October 6, 2014, the OWC signed a written judgment reflecting its oral rulings.

MMR has appealed, assigning the following as error:

1. The [OWC] committed reversible error by ruling that Claimant's scar on her knee, which was approximately one inch in length, was sufficiently serious and materially disfiguring so as to be compensable under La. R.S. 23:1221.

2. The [OWC] committed reversible error by ruling that Claimant's scar on her knee, which was approximately one inch in length, merited an award of 25 weeks of compensation benefits.

3. The [OWC] committed reversible error by awarding penalties and attorney's fees as there was no medical evidence establishing that the scar was permanent and the issue of compensability was reasonably controverted.

4. The [OWC] committed reversible error in awarding a maximum penalty of $2,000 considering that a good faith tender was made 36 days after MMR was first put on notice that Claimant was seeking PPD benefits in relation to the scar on her knee and only 43 days had passed between the date that MMR was first put on notice and the trial date.

Ms. Dupard has answered the appeal, seeking additional attorney's fees for work performed on this appeal.

DISCUSSION

The Louisiana Workers' Compensation Act allows recovery for employees who sustain a permanent partial disability in the course and scope of their employment, and provides a schedule of specific benefits (defined in terms of number of weeks of compensation) for the loss of use or amputation of specific body parts. See LSA-R.S. 23:1224(4)(a)-(o). Other permanent partial disabilities

not falling within that statutory schedule are covered by a more general provision, which provides, as follows:

> In cases not falling within any of the provisions already made, **where the employee is seriously and permanently disfigured** or suffers a permanent hearing loss solely due to a single traumatic accident, or where the usefulness of the physical function of the respiratory system, gastrointestinal system, or genito-urinary system, as contained within the thoracic or abdominal cavities, is seriously and permanently impaired, **compensation not to exceed sixty-six and two-thirds percent of wages for a period not to exceed one hundred weeks may be awarded**. In cases where compensation is so awarded, when the disability is susceptible to percentage determination, compensation shall be established in the proportions set forth in Subparagraph (o) of this Paragraph. **In cases where compensation is so awarded, when the disability is not susceptible to percentage determination, compensation as is reasonable shall be established in proportion to the compensation hereinabove specifically provided in the cases of specific disability.**

LSA-R.S. 23:1221(4)(p)(Emphasis added.)

Therefore, in order to be a compensable permanent partial disability, a scar must render the employee "seriously and permanently disfigured." The parties do not dispute that the scar is permanent. Rather, MMR asserts that the scar was not sufficiently serious so as to be compensable under LSA-R.S. 23:1221(4)(p).

We note that the Louisiana Workers' Compensation Act does not define the term "disfigurement." See **Broadway v. Cade Wood, Inc.**, 583 So.2d 153, 154 (La.App. 3 Cir. 1991), writ denied, 588 So.2d 106 (La. 1991). Although the Act does not define disfigurement, our colleagues on the third circuit have defined disfigurement as "that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner[.]" **Broadway**, 583 So.2d at 154 (quoting **Superior Mining Co. v. Industrial Comm'n**, 309 Ill. 339, 141 N.E. 165 (Ill. 1923)). A serious disfigurement is a disfigurement "of such a character that it substantially detracts from the appearance of the person disfigured[.]" **Broadway**, 583 So.2d at 154-55 (quoting **Dombrowski v. Fafnir Bearing Co.**, 148 Conn. 87, 167 A.2d 458 (Conn.Sup.Ct.Err. 1961)).

The OWC is afforded great discretion in determining whether a scar is seriously and permanently disfiguring. See **Creel v. Concordia Electric Co.**, 95-

914 (La.App. 3 Cir. 1/31/96), 670 So.2d 406, 412, writ denied, 96-0577 (La. 4/19/96), 671 So.2d 923. Although a photograph of the scar is included in the record on appeal,[2] the OWC, in making its ruling, indicated that "based upon the Court's viewing of the keloid scar at trial which appears worse in a courtroom viewing than the photo in evidence.... claimant sustained a scar that is a serious and permanent disfigurement." Given the discretion afforded the OWC and its firsthand view of Ms. Dupard's scar, we cannot conclude that the OWC abused its discretion in finding that the scar was seriously and permanently disfiguring. Therefore, assignment of error number one is without merit.

In its second assignment of error, MMR asserts that the award is excessive and clearly erroneous. MMR notes that the scar is clearly a disability not susceptible to a percentage of disability determination. Thus, MMR avers that the reasonableness of the award should be based on comparison to the specific disabilities and corresponding compensation schedule set forth in LSA-R.S. 23:1221(4). MMR contends that, considering the statutory schedule, Ms. Dupard received more than she would have had she lost any finger, other than the thumb or index finger, and two and half times as much compensation as would be merited for the loss of a toe (other than the big toe). MMR avers that the scar did not result in any loss of functionality, such that it should be worth less than ten weeks of compensation. MMR asserts that its tender of $3,025.00, which represents roughly five weeks of compensation, was more than adequate to compensate Ms. Dupard for the scar.

In opposition, Ms. Dupard contends that the award of twenty-five weeks of compensation was well within the OWC's discretion and should not be disturbed on appeal. Ms. Dupard urges that it is difficult to understand how reference to the scheduled awards for amputations of fingers and toes in any way relates to the value of a disfiguring scar. Ms. Dupard avers that while there are no recorded decisions regarding knee scars, an award of 15 percent of an employee's total

[2] This court has been provided a black and white photocopy of the photograph that was introduced at the OWC hearing.

wages for 100 weeks was made for a wrist scar in **Brooks v. Avondale Shipyards, Inc.**, 553 So.2d 960 (La.App. 4 Cir. 1989), writ denied, 558 So.2d 1129 (La. 1990). Ms. Dupard asserts that her knee scar is more significant than a wrist scar, especially in view of the fact that a woman would tend to wear dresses that would expose the scar on the knee to the general public.[3] As such, Ms. Dupard concludes that the OWC did not abuse its discretion in making its award.

We note that the compensation award for serious and permanent disfiguring injuries "shall be established in proportion to the compensation ... specifically provided in the cases of specific disability [as set forth in LSA-R.S. 23:1221(4)(a)-(o)]." LSA-R.S. 23:1221(4)(p). Although we recognize the difficulty in applying the statutory mandate, after considering the statutory schedule, we agree with MMR that the OWC abused its discretion in awarding twenty-five weeks of permanent partial disability benefits for Ms. Dupard's knee scar. For instance, the schedule awards twenty weeks of compensation for the loss of the middle finger, ring finger, pinky finger, or big toe. See LSA-R.S. 23:1221(4)(c). Further, for the loss of any other toe (other than the big toe), the schedule awards ten weeks of compensation. See LSA-R.S. 23:1221(4)(d). Clearly, the foregoing awards for loss of a specific digit includes both disfigurement and a loss of functionality, to varying degrees. Considering the severity of Ms. Dupard's scar and the fact that Ms. Dupard sustained no loss of functionality, we conclude that the highest award that the OWC could have made under these circumstances was an award of ten weeks for permanent partial disability benefits. Accordingly, we reduce the OWC's award from twenty-five weeks of permanent partial disability benefits to ten weeks of permanent partial disability benefits.

In its third and fourth assignments of error, MMR contends that the OWC erred in awarding penalties and attorney's fees arising from MMR's failure to pay

[3] Although the OWC was able to view Ms. Dupard's scar, Ms. Dupard offered no testimony regarding how the scar has otherwise affected her.

benefits promptly. See LSA-R.S. 23:1201D.[4] MMR asserts that there was no medical report from any physician that established the permanency of the scar in question. MMR avers that the "permanence" of the scar was not established until the day of trial when MMR agreed to stipulate thereto. Further, MMR contends that the penalties and attorney's fees were also inappropriate because Ms. Dupard's entitlement to benefits was reasonably controverted considering the minimal nature of the scar at issue and the fact that it is located on Ms. Dupard's knee. On appeal, Ms. Dupard concedes that the OWC erred in awarding penalties and attorney's fees for the reasons sets forth by MMR.

Considering the foregoing, we reverse the award of penalties and attorney's fees. Further, we find no merit in Ms. Dupard's answer to the appeal seeking additional attorney's fees.

CONCLUSION

For the foregoing reasons, we amend the OWC's October 6, 2014 judgment to reduce the award of permanent partial disability benefits from twenty-five weeks of compensation benefits to ten weeks of compensation benefits.[5] We also reverse the judgment to the extent that it awarded statutory penalties and attorney fees. The judgment is affirmed in all other respects. Additionally, we deny Ms. Dupard's answer to the appeal. Costs of this appeal are to be split between the parties.

JUDGMENT REVERSED IN PART, AMENDED IN PART, AND AFFIRMED AS AMENDED; ANSWER TO APPEAL DENIED.

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[4] Louisiana Revised Statutes 23:1201D provides:

> Installment benefits payable pursuant to R.S. 23:1221(4) shall become due on the thirtieth day after the employer or insurer receives a medical report giving notice of the permanent partial disability on which date all such compensation then due shall be paid.

[5] Based on our calculations, ten weeks of benefits equals $6,190.00, with a credit tender due MMR of $3,025.00.

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

17-42

OPELOUSAS GENERAL HOSPITAL AUTHORITY, A PUBLIC TRUST, D/B/A OPELOUSAS GENERAL HEALTH SYSTEM AND ARKLAMISS SURGERY CENTER, L.L.C.

VERSUS

FAIRPAY SOLUTIONS, INC.

****

APPEAL FROM THE
TWENTY-SEVENTH JUDICIAL DISTRICT COURT
PARISH OF ST. LANDRY, DOCKET NO. 12-C-1599-C
HONORABLE ALONZO HARRIS, DISTRICT JUDGE

****

SYLVIA R. COOKS
JUDGE

****

Court composed of Sylvia R. Cooks, Billy Howard Ezell and Van H. Kyzar, Judges.

AFFIRMED.

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COOKS, Judge.

The Defendant in this matter is Mitchell International, Inc. who was the successor by merger to FairPay Solutions, Inc. FairPay is a company that provides a service to insurance providers, essentially processing the bills received by insurance providers from medical providers. FairPay uses computer coding to review all bills for the insurance providers to ensure that everything is paid properly. FairPay contends its process "ensures that its customers avoid making overpayments, or paying duplicative, or double charges included in the bills."

It was asserted by the Plaintiffs, Opelousas General Hospital Authority and a class of numerous Louisiana hospitals and ambulatory surgery centers, that FairPay's recommendations to its insurance providers were too low in cases of workers' compensation claims. The Plaintiffs sued FairPay under the Louisiana Racketeering Act, alleging FairPay had recommended fraudulent reductions to the Plaintiffs outpatient workers' compensation medical bills. FairPay denied that assertion, but did eventually execute a Settlement Agreement between the parties on August 17, 2012. Included in the Settlement Agreement was a reference to the Future FairPay Pricing Methodology (hereafter FFPM), which specifically detailed how FairPay would review bills submitted by Plaintiffs' medical providers in workers' compensation claims. A fairness hearing was held at which the parties agreed the Settlement Agreement was both fair and an accurate depiction of the intent of all parties involved. The trial court approved the Settlement Agreement, and after a competitor appealed, this court affirmed the trial court's final approval. *Opelousas Gen. Hosp. Auth. v. Fairpay Solutions, Inc.*, 13-17 (La.App. 3 Cir. 7/3/13), 118 So.3d 1269.

FairPay asserts the FFPM is intended to govern how it recommends payment to its insurance providers. Plaintiffs maintained the FFPM was non-mandatory, and *could* be utilized prospectively by FairPay and their clients. Plaintiffs

contended the Settlement Agreement did not require FairPay or its clients to use the FFPM, but noted Paragraph 11.5 of the Settlement Agreement clearly provided if FairPay or its clients did not correctly utilize the FFPM, then neither would be provided the protections of the Settlement Agreement.

FairPay maintained it complied with the FFPM in all respects, but in 2013, counsel for Plaintiffs brought to FairPay's attention numerous complaints from class members that FairPay repriced bills were being reimbursed at an amount below the target 72% of billed charges, which was the goal in utilizing the FFPM. In accordance with the Settlement Agreement, Plaintiffs' counsel forwarded the disputed bills to FairPay and waited the requisite thirty days before filing any workers' compensation claims for underpayment.

At the request of Plaintiffs' counsel, FairPay ran yearly reimbursements for Louisiana and discovered the average reimbursements were at 69% of billed charges, rather than the 72% set forth in the Settlement Agreement. FairPay agreed to adjust the 95% multiplier in the FFPM to 98%, thereby increasing the reimbursements due to the Settlement Class.

To attempt to determine how FairPay was repricing its bills, the Plaintiffs sent fifty-three (53) bills to FairPay requesting a full analysis. FairPay complied with this request. The results indicated seventeen (17) of the bills were repriced in accordance with the FFPM, but thirty-six (36) were not. According to Plaintiffs, the thirty-six (36) bills in question contained items that were not paid at all. These non-paid items were primarily comprised of drug and radiology charges.

The Plaintiffs filed a Motion to Enforce Settlement Agreement based on its belief that FairPay had consistently misapplied the agreed upon FFPM, which resulted in improperly reduced payments and/or non-payments for specific billed items. In response, FairPay filed a Motion to Enforce Settlement Agreement for Contempt Citation, Injunctive Relief and Attorneys' Fees. Specifically, Fairpay

sought to stay over eighty claims being filed by Plaintiffs in workers' compensation courts in Louisiana. Fairpay contends these claims should have been barred by the Settlement Agreement. The matter proceeded to trial on September 26, 2016.

At trial, FairPay's representative, Amelia Vaughn, acknowledged FairPay was recommending zero payment on the charges in question because they had a "N" status indicator (which was a Medicare edit), and the FFPM was not being applied to these zero payment charges because Fairpay classified them as non-payable under Paragraph 1 of FFPM. Ms. Vaughn testified Medicare had increased the number of its "N" edits. Plaintiffs' counsel countered that the Settlement Class had added language to Paragraph 1 which stated Paragraph 1 was intended to identify improperly coded bills. Ms. Vaughn admitted they made no changes in the computer program to reflect the addition of that language.

Plaintiffs argued at trial that the effect of improperly implementing the "N" status indicator eliminated payment altogether for payable items and resulted in an increasing number of zero payments. Plaintiffs maintained this was a primary reason why the overall reimbursements under the FFPM continued to decline.

Following trial, the trial court took the matter under advisement. In its written reasons for judgment, the trial court noted the purpose of the Settlement Agreement was to benefit both the Settlement Class and FairPay by preventing future disputes or litigation. The trial court noted it was admitted by FairPay that Medicare edits and rules are being performed when the FFPM is applied. The trial court specifically found "the interpretation of how the FFPM is understood to be applied by FairPay is actually not the true intent of what the Plaintiff Class expected in its application to actual bills." The trial court found there was "an error occurring in the performance of the FFPM . . ., regardless of how minor the amount in actual payments that are not being made, and when looked at in totality

of what is, there still remains the fact there are improper payments being made by the Defendant." The trial court specifically noted he found nothing to indicate there was any "ill-intent" on FairPay's part for the improper payments, but found the continual decline in reimbursement payments thwarts the true intent of the Settlement Agreement. The trial court concluded these "Medicare edits" were not contemplated by the FFPM or Settlement Agreement, and the inclusion of these edits continuously lowered reimbursements to the Settlement Class despite the Settlement Agreement's stated intent to keep payments static. Therefore, the trial court rendered judgment granting Plaintiff's Motion to Enforce Settlement Agreement. FairPay's Motion to Enforce Settlement Agreement for Contempt Citation, Injunctive Relief and Attorneys Fees was denied.

Acknowledging that the Settlement Agreement does not require FairPay or its clients to use the FFPM for any bills, the trial court entered Judgment tracking the language of the FFPM and Paragraph 11.5 of the Settlement Agreement and ordered that FairPay either:

> 1. Discontinue applying edits under Paragraph 1 of the Future FairPay Pricing Methodology for correctly coded bills and apply the formula contained in Paragraph 3 for all services where CMS mean cost data is available (and return to utilizing the .95 multiplier contained in the formula), or, in the alternative,
>
> 2. Indicate on the explanation of review (EOR's) that the bill is not being repriced utilizing the Future FairPay Pricing Methodology.

This judgment requires FairPay to follow the FFPM or state clearly on the EOR's that they are not using the FFPM.

This appeal followed. FairPay asserts the following assignments of error:

> 1. The trial court legally erred by altering and amending entire provisions of the Settlement Agreement when: (i) the court made no finding that the Settlement Agreement was ambiguous; (ii) all parties averred that the Settlement Agreement was unambiguous at the hearing; (iii) the court sustained an objection to the parol evidence rule agreeing to stay within the four corners of the Settlement

Agreement; and (iv) neither the law nor the evidence support the trial court's actions;

2. The trial court legally erred by entering a Judgment altering, modifying and completely disregarding material terms of the FFPM of the Settlement Agreement when the appellee had a clear remedy for dispute resolution under the existing terms of the Settlement Agreement, thereby making any need to modify the Settlement Agreement a nullity;

3. The trial court legally erred by interpreting provisions of the Settlement Agreement in favor of the drafter and against the obligor, in violation of La.Civ.Code art. 2056 and La.Civ.Code art. 2057;

4. The trial court legally erred by entering Judgment against FairPay when it is impossible for FairPay to perform said Judgment and still comply with the unmodified provisions of the Settlement Agreement;

5. The trial court legally erred when, after determining that the Settlement Agreement was clear and unambiguous, construed the terms of the Settlement Agreement in a manner that leads to absurd consequences, namely, the elimination of entire contractual provisions contrary to La.Civ.Code art. 2046;

6. The trial court legally erred by entering Judgment when Plaintiffs failed to offer any evidence to support the relief obtained in the Judgment; or

7. Alternatively, to assignment of error 6, the trial court manifestly erred when entering Judgment modifying the Settlement Agreement when Plaintiffs failed to meet their burden of proof and failed to offer any evidence regarding the application of the relevant provisions of the Settlement Agreement, specifically the FFPM and Section 11.7 of the Settlement Agreement (dispute resolution procedures) and failed to offer any evidence that the modifications to the Settlement Agreement made by the trial court in its Judgment would actually cure and alleged defects in the FFPM.

ANALYSIS

I. Standard of Review.

In this case, the trial court was tasked with interpreting a Settlement Agreement the parties had agreed upon and the trial court had approved. Specifically, the trial court evaluated whether FairPay's payment of bills complied with the provisions of the Settlement Agreement.

Whether the language of a contract is ambiguous is a question of law that subjects the judgment to a de novo standard of review on appeal. *Cluse v. H & E Equip. Servs., Inc.*, 09-574 (La.App. 3 Cir. 3/31/10), 34 So.3d 959, *writ denied*, 10-994 (La. 9/17/10), 45 So.3d 1043. In the interpretation of contracts, the trial court's interpretation of the contract is a finding of fact subject to the manifest error rule. *Dore Energy Corp. v. Carter-Langham, Inc.*, 08-645 (La.App. 3 Cir. 11/5/08), 997 So.2d 826, *writs denied*, 08-2863, 08-2938 (La. 3/13/09), 5 So.3d 118, 119; *Grabert v. Greco*, 95-1781, (La.App. 4 Cir. 2/29/96), 670 So.2d 571. In applying the manifest error rule to the trial court's interpretation, an appellate court may not simply substitute its own view of the evidence for the trial court's view, nor may it disturb the trial court's finding of fact so long as it is reasonable. *Syrie v. Schilhab*, 96-1027 (La. 5/20/97), 693 So.2d 1173. The trial court did not find the Settlement Agreement or the FFPM ambiguous, therefore the manifest error standard of review is applicable to the trial court's interpretation of FairPay's compliance with the Settlement Agreement and the FFPM.

II. Assignments of Error.

In its first assignment of error, FairPay asserts the trial court erred in altering the provisions of the Settlement Agreement. We disagree with the contention that the trial court altered or modified the Settlement Agreement. The trial court in its judgment used the precise wording found in the FFPM and Settlement Agreement. Thus, we find the trial court enforced the Settlement Agreement as written and did not alter in any way what was written by the parties, agreed to by the parties, and approved by the trial court in 2012. The judgment requires FairPay to either follow the FFPM as written, or refrain from claiming on the EOR's that they are following the FFPM.

FairPay also alleges the trial court incorrectly determined the intent of the parties as it relates to Paragraph 1 of the FFPM. However, Paragraph 1 clearly

provides the intention of the parties is to identify "improperly coded bills." Thus, the trial court's judgment which orders FairPay to "[d]iscontinue applying edits under Paragraph 1 of the Future FairPay Pricing Methodology for correctly coded bills" enforces the stated intent of the parties. As the Settlement Class notes, where the parties' intent is stated in the contract, courts are bound to uphold this stated intent under La.Civ.Code art. 1971. *Waller Oil Co. v. Brown*, 528 So.2d 584 (La.App. 2 Cir. 1988). This assignment of error lacks merit.

In its second assignment of error, FairPay appears to argue the dispute resolution procedure set forth in Section 11 of the Settlement Agreement precludes the motion filed herein by the Settlement Class. Paragraph 11 requires that on any disputes the Class or Class member send the bill or EOR in question to FairPay for resolution prior to the filing of a 1008 claim form.

Chelle Rankin testified that thirty days prior to the filing of any 1008 claims with the Office of Workers' Compensation, the bills and EOR's in question were sent to FairPay. This testimony was uncontroverted. The trial court accepted this testimony and found there was no violation or breach of the Settlement Agreement by the Settlement Class. Thus, the trial court denied FairPay's motion. We find no error in that ruling.

FairPay's third assignment of error asserts the trial court erred "by interpreting provisions of the Settlement Agreement in favor of the drafter and against the obligor." However, the Settlement Agreement specifically provides in Paragraph 14.7 as follows:

> None of the Parties shall be considered to be the drafter of the Settlement Agreement or any provision hereof for the purpose of any statute, jurisprudential rule, or rule of contractual interpretation or construction that might cause any provision to be construed against the drafter.

Therefore, it is clear both parties agreed that neither party will be deemed the drafter of any provision found in the Settlement Agreement. Thus, this assignment of error lacks merit.

In its next assignment of error, FairPay maintains it is "impossible for [FairPay] to perform said Judgment and still comply with the unmodified provisions of the Settlement Agreement." We disagree.

The judgment allows FairPay, if it continues to take discounts not contemplated by the FFPM, to simply '[i]ndicate on the explanation of review (EOR's) that the bill is not being repriced utilizing the [FFPM].' Moreover, the testimony by Angela Vaughn, indicates it was not impossible for FairPay to comply with the judgment rendered by the trial court:

> Q. If these edits are intended to identify improperly coded bills, you can certainly write in a software program – I know you could write it yourself probably, couldn't you? To have it where Paragraph 1 only applies to bills that are improperly coded just like we put in here.
>
> A. So if it's that straight forward, from your perspective –
>
> Q. You could do it.
>
> A. It could be done. . . .

This assignment of error lacks merit.

In its fifth assignment of error, FairPay contends the trial court's interpretation of the FFPM would lead to absurd consequences. We do not agree, and find FairPay's proposed reading of the FFPM would allow it to make no payment whatsoever for properly coded charges. We find this result would lead to absurd results not contemplated or intended by the parties when confecting the Settlement Agreement. The trial court specifically noted at trial, to allow FairPay to interpret the Settlement Agreement as it desires, would result in reimbursements to the Settlement Class below the 72% average which was contemplated by the Settlement Agreement and approved by all parties.

FairPay also argues to restrict Paragraph 1 to improperly coded bills would result in certain footnotes to Paragraph 1 being rendered meaningless. As the Settlement Class notes, the footnotes to Paragraph 1 deal with items that are not payable and should not be billed. Thus, if any of these charges were to appear on any bill, it would be improperly coded and subject to being rejected by FairPay. Thus, the footnotes to Paragraph 1 are not rendered meaningless, but simply do not apply to bills that are properly coded and billed. We find no merit in this assignment of error.

In its last two assignments of error, FairPay argues the trial court's granting of the Plaintiffs' Motion to Enforce the Settlement Agreement is based solely on "an equity argument" and Plaintiffs "failed to offer any evidence to support the relief obtained in the Judgment." We disagree.

FairPay argues the testimony of Chelle Rankin, who was an employee in the firm of Plaintiffs' counsel, indicated she was not familiar with how FairPay was repricing its bills. Plaintiffs acknowledged Ms. Rankin was not aware of how FairPay was repricing its bills, because she had no access to FairPay's computer system or code. Plaintiffs maintained Ms. Rankin was called simply to document that the Plaintiffs complied with their obligations under the Settlement Agreement, not necessarily what FairPay did or did not do. This was why Plaintiffs relied on the testimony of FairPay's corporate representative, Amelia Vaughn, who Plaintiffs called to the stand. Ms. Vaughn acknowledged when questioned that the bills in question were not improperly coded, but were instead properly coded bills. She also admitted, even though the wording of Paragraph 1 of the FFPM was changed to add the reference to improperly coded bills, there was no corresponding change made to the computer program to put that charge into effect. The trial court specifically noted this in its reasons for judgment, stating "the formula/code that is embedded in the Methodology pre-existed the document which represents

the FFPM, indicative of the fact that any additions made to the FFPM through actual language is nonetheless not reflected in a code change."

Contrary to FairPay's assertion, the Plaintiffs introduced numerous exhibits to establish FairPay was not following the agreed-upon FFPM. In one exhibit involving a FairPay analysis of a bill from Iberia Medical Center, despite three x-rays which totaled $263.21 in costs, FairPay paid only $119.26, which was the mean cost for the emergency room visit. FairPay disallowed the costs of the x-rays by giving it a "N" status indicator and arguing the x-rays were already included in the visit, which it billed for $119.26. Plaintiffs argued, and the trial court agreed, that such absurd repricing was never the agreed upon intent of the FFPM.

We find the Plaintiffs submitted ample evidence to support its position that FairPay's practice of disallowing payments for certain items that were properly billed, coded and payable was not contemplated anywhere in the Settlement Agreement or FFPM, and has resulted in continuously declining reimbursements.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed. All costs of this appeal are assessed against appellant.

AFFIRMED.

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE #036

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **29th day of June, 2017**, are as follows:

BY JOHNSON, C.J.:

2016-C-2267 DARVEL BURGESS v. SEWERAGE & WATER BOARD OF NEW ORLEANS (Office of Workers' Compensation, District 8)

We remand this matter to the OWC for a determination of whether IWP is a permissible out-of-state provider under La. R.S. 23:1203(A). If so, the OWC judge must then determine the amount of reimbursement due after application of La. R.S. 23:1203(B), Lafayette Bone & Joint, and La. R.S. 23:1142.
REVERSED AND REMANDED TO THE OFFICE OF WORKERS' COMPENSATION FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JOHNSON, C.J., additionally concurs and assigns reasons.
HUGHES, J., dissents and will assign reasons.
GENOVESE, J., dissents and assigns reasons.

06/29/2017

SUPREME COURT OF LOUISIANA

No. 2016-C-2267

DARVEL BURGESS

VERSUS
SEWERAGE & WATER BOARD OF NEW ORLEANS

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, OFFICE OF WORKERS' COMPENSATION DISTRICT 8

JOHNSON, Chief Justice

In this workers' compensation case, the claimant, Darvel Burgess, filed a Disputed Claim for Compensation after his employer, Sewerage & Water Board of New Orleans ("S&WB"), refused to pay a $13,110.02 outstanding bill for prescription medications from Injured Workers Pharmacy ("IWP"). The underlying legal issue is whether the injured employee is entitled to his choice of pharmacy, or whether that right belongs to the employer under the Louisiana Workers Compensation Act ("LWCA"). We granted this writ application to resolve a split in our circuit courts of appeal on this issue. After review, we hold the choice of pharmacy in a workers' compensation case belongs to the employer.

FACTS AND PROCEDURAL HISTORY

Darvel Burgess sustained a work-related injury on October 13, 2008. On September 18, 2012, Mr. Burgess filed a Disputed Claim for Compensation against his employer, S&WB, asserting in part a dispute over unpaid medical bills and entitlement to penalties and attorney fees. The matter was submitted to the Louisiana Office of Workers' Compensation ("OWC") solely on briefs and exhibits. The only disputed issues presented to the OWC judge were unpaid bills from IWP and Advanced Neurodiagnostic Center, as well as Mr. Burgess' entitlement to penalties

and attorney fees as a result of S&WB's failure to timely pay these bills.[1]

In his brief submitted to the OWC, Mr. Burgess asserted he is entitled to have all necessary and related medical treatment and prescriptions paid by his employer pursuant to La. R.S. 23:1203(A).[2] He argued the unpaid bills were related to treatment for his work-related injury, including medications prescribed by his treating physician, and as such were reasonable and necessary. Mr. Burgess further requested an award for penalties and attorney fees. S&WB argued it is not responsible for the outstanding IWP bill pursuant to La. R.S. 23:1142(B) because it notified all injured workers on October 10, 2011, that henceforth Corvel Caremark Pharmacy program was the approved provider for prescription services and failure of the injured worker to use the pharmacy card provided may result in non-payment of medications. Additionally, S&WB noted IWP was notified on April 12, 2012, that it was not an approved pharmacy provider for S&WB's workers' compensation claims and bills submitted by IWP would be denied.

On June 18, 2015, the OWC judge issued a judgment ordering S&WB to pay the outstanding $13,110.82 bill from IWP and all outstanding medical expenses owed to Advanced Neurodiagnostic Center "via the fee schedule." The OWC judge awarded Mr. Burgess a $2,000 penalty and $2,000 in attorney fees due to S&WB's failure to timely pay these bills. S&WB suspensively appealed the judgment, but only as to the IWP bill.

The court of appeal affirmed in a 2-1 decision. *Burgess v. Sewerage & Water Board of New Orleans*, 15-0918 (La. App. 4 Cir. 2/3/16), 187 So. 3d 49 ("*Burgess I*."). In so doing, the Fourth Circuit concluded the choice of pharmacy belongs to the employee, not the employer. 187 So. 3d at 57. The court noted La. R.S. 23:1203(A)

[1] The Advanced Neurodiagnostic Center bill is not at issue in this court.

[2] For the full text of the statutes referred to in this section, see **DISCUSSION**, *infra*.

requires the employer to provide the employee with all necessary prescription medication. *Id.* at 51. The court of appeal referenced an Alabama case, *Davis Plumbing, Inc. v. Burns*, 967 So. 2d 94 (Ala. Civ. App. 2007), which held the choice of pharmacy under a similar Alabama statute belonged to the employee. *Id.* at 52. In addition, the court analyzed each Louisiana appellate court case on the subject and the differing outcomes. The court of appeal concluded that Louisiana is overwhelmingly a patient's choice state, observing that twenty-three other states expressly provide for employer choice of treating physician and three limit the employee's choice to a list provided by the state agency. *Id.* at 57. In addition, the court noted the LWCA contains no provision granting the employer the right to select the pharmacy that the employee must use. To the contrary, the LWCA obligates the employer to pay for the employee's reasonably necessary prescription medication and contains no exception for situations in which the employer objects to the pharmacy the employee selects. *Id.* The court also rejected S&WB's reliance on La. R.S. 23:1142(B) in an attempt to obtain the benefit of the choice of pharmacy, finding prescription medication is not part of "nonemergency diagnostic testing or treatment" under the statute, and further noting the purpose of the statute is to allow the employer to contest unnecessary or unreasonable medical care, not to allow employers to bargain shop. *Id*. at 57-58.

Judge Lobrano dissented, finding a determination of whether the employee is entitled to his choice of pharmacy did not end the inquiry of whether payment of the disputed pharmacy expenses is due or in what amount. *Id.* at 58. (Lobrano, J., dissenting). She noted IWP is an out-of-state provider, and La. R.S. 23:1203(A) provides in pertinent part, "[m]edical care, services, and treatment may be provided by out-of-state providers or at out-of-state facilities when such care, services, and

treatment are not reasonably available within the state or when it can be provided for comparable costs." Further, La. R.S. 23:1203(B) limits the employer's obligation to "reimbursement...as determined under the reimbursement schedule...pursuant to R.S. 23:1034.2, or the actual charge made for the service, whichever is less." *Id.* at 58-59. Judge Lobrano found the record lacked any evidence of whether IWP fit the criteria for a permissible out-of-state provider under La. R.S. 23:1203(A) or any evidence of the reimbursement schedule set forth in La. R.S. 23:1034.2, and the OWC judge erred by failing to consider these issues. *Id.* at 59. Judge Lobrano opined the case should be remanded to the OWC to determine whether pharmacy expenses are due to IWP as an out-of-state provider, and if so, the amount of expenses due pursuant to the reimbursement schedule. *Id.*

S&WB sought supervisory review in this court. While the application was pending, this court rendered its opinion in *Lafayette Bone & Joint Clinic v. Louisiana United Business SIF*, 15-2137 (La. 6/29/16), 194 So. 3d 1112, which addressed, but did not decide, the choice of pharmacy issue. In that case, the claimants, who were injured in the course of their employment, were treated by physicians at the Lafayette Bone & Joint Clinic ("LB&J"). During the course of treatment, the physicians prescribed medications which were dispensed directly to claimants by LB&J employees. 194 So. 3d at 1115. On June 5, 2008, the workers' compensation payor, Louisiana United Business SIF ("LUBA"), sent letters to LB&J and its physicians, stating that LUBA would no longer pay for prescription medications directly dispensed by LB&J and directing LB&J physicians to issue future prescriptions to be filled by local retail pharmacies. Despite these notices, LB&J continued to dispense prescription medications directly to claimants throughout 2008 and to submit requests for reimbursement to LUBA. LUBA declined payment, citing its June 5, 2008 notice.

LB&J filed a disputed claim with the OWC, seeking to recover the costs of the medications dispensed, along with penalties and attorney fees. *Id.* After a trial on the merits, the OWC issued judgment in favor of LB&J, but ordered that recovery for medications dispensed after June 5, 2008, was limited by La. R.S. 23:1142(B) to $750 for each claimant. The OWC refused to award attorney fees and penalties in light of LUBA's notice to LB&J. The court of appeal reversed, awarded attorney fees and penalties, and removed the $750 cap. *Id*. at 1116.

The majority of this court reversed the court of appeal's modification of the $750 cap and otherwise affirmed. As a threshold matter, this court noted the split in the circuits on the choice-of-pharmacy issue, including *Burgess I*, but found the evidence presented did not raise a tenable employee choice issue because the evidence and testimony did not establish that the injured employees in these cases made an affirmative choice of LB&J as their prescription medication provider. *Id*. at 1117-18. However, this court further found the choice-of-pharmacy issue was not dispositive of the $750 cap issue:

> Nor would resolution of the choice-of-pharmacy issue be dispositive of the matters before the court. As we have stated, these cases hinge on LSA-R.S. 23:1142(B)'s admonition that a "health care provider may not incur more than a total of seven hundred fifty dollars in nonemergency diagnostic testing or treatment without the mutual consent of the payor and the employee." In these cases, we conclude hereinafter that the plaintiff/health care providers did not have the consent of the payor, LUBA, even if they had obtained the consent of the injured employees, to dispense prescription medications after June 5, 2008.

Id. at 1118.

This court found LUBA's authorization for the employees to obtain medical treatment from LB&J physicians did not encompass the dispensing of prescription medications by LB&J. Specifically, this court reasoned:

> Even though, prior to June 5, 2008, LUBA may have obligated itself to reimburse the plaintiff/health care providers for prescription medications

> dispensed to injured employee patients during in-office medical treatment by LB & J physicians, LUBA's June 5, 2008 letter notified LB & J and its physicians that it would no longer pay for LB & J dispensed prescription medications; therefore, any ongoing consent to, or authorization of, in-office dispensing of prescription medications by LB & J physicians was terminated.

Id. at 1119. This court limited LB&J's recovery to $750 of medication costs after it was notified that it would not be reimbursed for medications it dispensed. *Id*.

In light of our decision in *Lafayette Bone & Joint*, this court granted S&WB's writ application and remanded the case to the court of appeal for reconsideration:

> Writ granted. The case is remanded to the Court of Appeal for re-briefing and reconsideration in accord with this Court's decision in *Lafayette Bone & Joint Clinic v. Louisiana United Business SIF, et al c/w Lafayette Bone and Joint Clinic v. Guy Hopkins Construction Co., Inc.*, *et al.*, 15-2137 c/w 15-2138 (La. 6/29/16), __ So.3d __.

Burgess v. Sewerage & Water Board of New Orleans, 16-0416 (La. 9/16/16), 206 So. 3d 199.

On remand from this court, the court of appeal reaffirmed its original decision. *Burgess v. Sewerage & Water Board of New Orleans*, 15-0918 (La. App. 4 Cir. 11/23/16), 204 So. 3d 1014 ("*Burgess II*"). In particular, the court of appeal found *Lafayette Bone & Joint* was factually distinguishable from the instant case and thus inapposite. 204 So. 3d at 1016. As it did in *Burgess I*, the court found in favor of the employee on the choice-of-pharmacy issue. The court noted *Lafayette Bone & Joint* involved physician-dispensed medication, a factual situation within the scope of La. R.S. 23:1142(B), whereas this case involved an outside pharmacy dispensing medication. As such, the *Burgess II* court held that the dispensing of prescription medication does not constitute "nonemergency diagnostic testing or treatment" and thus does not trigger the application of La. R.S. 23:1142(B). *Id*. at 1016-18.

Judge Lobrano again dissented based on reasons similar to those in her original dissent regarding out-of-state providers. *Id*. at 1018. (Lobrano, J., dissenting).

Further, because IWP is an out-of-state provider, she also found the instant case distinguishable from *Lafayette Bone & Joint*, which addressed the applicability of La. R.S. 23:1142(B) to instances in which an in-state provider of pharmaceuticals incurred expenses without the consent of the employer. *Id.* at 1019.

S&WB filed a second writ application with this court, which we granted. *Burgess v. Sewerage & Water Bd. of New Orleans*, 16-2267 (La. 2/24/17), --- So. 3d ----.

DISCUSSION

In this case we are initially called upon to determine whether, under the LWCA, it is the injured employee or the employer who is entitled to choose the pharmacy to furnish prescription medications to the claimant. Our decision is premised on the proper interpretation of parts of the LWCA. Such considerations are questions of law and reviewed by this court under a *de novo* standard of review. *Catahoula Par. Sch. Bd. v. Louisiana Mach. Rentals, LLC*, 12-2504 (La. 10/15/13), 124 So. 3d 1065, 1071. After our review, we "render judgment on the record, without deference to the legal conclusions of the tribunals below. This court is the ultimate arbiter of the meaning of the laws of this state." *Id*.

The employer's duty under the LWCA to furnish prescription medication is set forth in La. R.S. 23:1203 which provides, in pertinent part:

> A. **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. Medical care, services, and treatment may be provided by out-of-state providers or at out-of-state facilities when such care, services, and treatment are not reasonably available within the state or when it can be provided for comparable costs. (Emphasis added)
>
> B. The obligation of the employer to furnish such care, services, treatment, drugs, and supplies, whether in state or out of state, is limited

> to the reimbursement determined to be the mean of the usual and customary charges for such care, services, treatment, drugs, and supplies, as determined under the reimbursement schedule annually published pursuant to R.S. 23:1034.2 or the actual charge made for the service, whichever is less. Any out-of-state provider is also to be subject to the procedures established under the office of workers' compensation administration utilization review rules.

While this statute obligates an employer "to furnish all necessary drugs" to the injured employee, it does not directly address who has the right to choose the pharmacy to dispense these drugs. Although this court did not reach the choice-of-pharmacy issue in *Lafayette Bone & Joint*, we did recognize "there is no explicit workers' compensation law directing that one party has the exclusive right to choose a prescription medication provider." 194 So. 3d at 1117.

Our courts of appeal have reached differing opinions on the choice-of-pharmacy issue. In addition to the Fourth Circuit's ruling in this case, the Second Circuit has also held the choice of pharmacy belongs to the employee. *See Naron v. LIGA*, 49,996 (La. App. 2 Cir. 9/9/15), 175 So. 3d 475. The *Naron* court reasoned that because La. R.S. 23:1203 does not address which party can choose a vendor, but does set forth the employer's obligation to reimburse a claimant for the lesser amount in the fee schedule or the actual cost for medication, the employee was free to choose the pharmacy from which he obtained his medication. *Id.* at 477-78.[3] By contrast, the Third and Fifth Circuits have held the choice of pharmacy belongs to the employer. *See Downs v. Chateau Living Center*, 14-0672 (La. App. 5 Cir. 1/28/15), 167 So. 3d 875; *Bordelon v. Lafayette Consolidated Government*, 14-0304 (La. App. 3 Cir. 10/1/14), 149 So. 3d 421, *writ denied*, 14-2296 (La. 2/6/15), 158 So. 3d 816; *Sigler*

[3] However, the *Naron* court also recognized the employee's choice of pharmacy is not boundless, noting that La. R.S. 23:1203(A) provides that services can be provided by out-of-state providers when the services are not reasonably available within the state or when it can be provided for comparable costs. The court held that regardless of whether an employer is found to have violated its duty under La. R.S. 23:1203(A), the employee is still bound by the constraints of that statute in regard to out-of-state providers. 175 So. 3d at 478.

v. Rand, 04-1138 (La. App. 3 Cir. 12/29/04), 896 So. 2d 189. In *Sigler*, the Third Circuit found that the employer did not violate its obligation to the injured employee under La. R.S. 23:1203(A) to furnish necessary drugs simply because it chose to have the employee's prescriptions filled by a different pharmaceutical company. 896 So. 2d at 198.[4] Relying on *Sigler*, the *Bordelon* court held that the employer met his obligation under the LWCA to pay for medication by specifying the pharmacy the employee could use. 149 So. 3d at 423. The Fifth Circuit in *Downs* relied upon the Third Circuit's opinion in *Bordelon* to hold that an employer does not violate its duty under La. R.S. 23:1203(A) by choosing the pharmacy to be used by an injured employee. 167 So. 3d at 881.

After review of the law and the above jurisprudence, and considering the arguments of the parties, we hold the Third and Fifth Circuits have correctly determined the employer has the right to choose the pharmacy to furnish necessary prescription drugs to an injured employee in a workers' compensation case. Our analysis begins with the applicable statutory law.

> The function of statutory interpretation and the construction given to legislative acts rests with the judicial branch of the government. The rules of statutory construction are designed to ascertain and enforce the intent of the Legislature. Legislation is the solemn expression of legislative will, and, thus, the interpretation of legislation is primarily the search for the legislative intent. We have often noted the paramount consideration in statutory interpretation is ascertainment of the legislative intent and the reason or reasons which prompted the Legislature to enact the law. The starting point in the interpretation of any statute is the language of the statute itself. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be

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[4] Although the court in *Sigler* found the employer had the right to choose the pharmacy, the court also found the employer violated its duties to the employee because the employer's choice of pharmacy was unable to provide the medication to the employee in a timely fashion. The court explained: "Implicit within the requirement of La. R.S. 23:1203(A) that the employer 'furnish all necessary drugs' is that those necessary drugs be provided timely. ... [The employer] effectively denied [the employee] the drugs needed for his compensable injury by denying the timely availability of those prescription drugs. In doing so, [the employer] violated its duty under La. R.S. 23:1203(A)." 896 So. 2d at 198-99.

> made in search of the intent of the Legislature. However, when the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. Moreover, when the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur, and the text of the law as a whole. Further, the Legislature is presumed to act with full knowledge of well-settled principles of statutory construction.

Catahoula Par. Sch. Bd., 124 So. 3d at 1073. With these principles in mind, we examine the relevant statutes.

As stated earlier, La. R.S. 23:1203(A) provides that "the employer shall furnish all necessary drugs." Nowhere in the statute does the legislature provide the employee with the right to choose a pharmaceutical provider from which to obtain the necessary prescription drugs. By contrast, the legislature has specifically delegated to the employee the choice of *physician* in La. R.S. 23:1121(B)(1), which provides "**the employee shall have the right** to select one treating **physician** in any field or specialty." (Emphasis added). Had the legislature intended the employee to have the choice of pharmaceutical provider in La. R.S. 23:1203(A), the legislature could have easily provided for that choice as it provided for the choice of physician in La. R.S. 23:1121. Moreover, the statutory entitlement in La. R.S. 23:1121(B)(1) to choose a physician cannot be read broadly to include an entitlement to choose a pharmacy. Notably, the legislature utilized the very specific term "physician," rather than the more expansive term "health care provider" which is defined in the LWCA to include pharmacies.[5]

In *Burgess I*, the court of appeal found it instructive "to consider the

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[5] La. R.S. 23:1021(6) provides: "**'Health care provider' means a** hospital, a person, corporation, facility, or institution licensed by the state to provide health care or professional services as a physician, hospital, dentist, registered or licensed practical nurse, **pharmacist**, optometrist, podiatrist, chiropractor, physical therapist, occupational therapist, psychologist, graduate social worker or licensed clinical social worker, psychiatrist, or licensed professional counselor, and any officer, employee, or agent thereby acting in the course and scope of his employment." (Emphasis added).

jurisprudence addressing the related issue of choice of physician before the Louisiana Legislature enacted La. R.S. 23:1121" in reaching its decision that the choice of pharmacy belongs to the employee. 187 So. 3d at 54. The court referenced a First Circuit case wherein the court "concluded that the choice of physician belonged to the employee because '[t]he trust and confidence needed in a patient-doctor relationship is important to successful treatment which can be best obtained if the injured employee has the choice of physician for treatment purposes.'" *Id*. (citing *Kinsey v. Travelers Ins. Co., Inc*., 402 So. 2d 226, 228 (La. App. 1st Cir.1981)). The *Burgess I* court noted this same rationale-the patient's trust and confidence-has been applied in the context of determining whether the choice of pharmacy belongs to the employee, although the court did recognize appellate jurisprudence, such as *Sigler,* which found such rationale did not apply to a pharmacist. *Id*. The court of appeal affirmed its position in *Burgess II.*

Reliance on jurisprudence concerning choice of physician is misguided. Unlike La. R.S. 23:1121(B) governing choice of physician, the legislature has not afforded the employee an absolute right to select a pharmacy under La. R.S. 23:1203(A). This distinction is logical considering the importance of the doctor-patient relationship. Unlike a patient's personal relationship with his doctor, there is no meaningful difference relative to which pharmacy is used to dispense a prescription drug that would mandate employee choice under the LWCA. This distinction was recognized by the Third Circuit in *Sigler*, *supra*. The *Sigler* court distinguished its prior decision in *Louisiana Clinic v. Patin's Tire Service*, 98-1973 (La. App. 3 Cir. 5/5/99), 731 So. 2d 525, which concerned whether the employer had the right to choose the diagnostic facility to conduct the injured employee's MRI scan. In *Patin's*, the OWC judge found that an employee has no cause of action under the LWCA to choose the

diagnostic facility, relying on La. R.S. 23:1121(B) which only allows the employee the right to choose a treating physician. The Third Circuit reversed, finding the judge's reliance on La. R.S. 23:1121(B) to be misplaced. 731 So. 2d at 528. The court noted it was the treating physician, not the employee, who ordered the MRI and the employee was "not attempting to change treating physicians but to obtain a diagnostic test at his physician's instruction." *Id.* The court found no authority that allows the employer or insurer to dictate the place and physician to perform diagnostic testing ordered by a treating physician. Rather, the court found the check on the employee's testing is through La. R.S. 23:1034.2 and 23:1142(B), which place a monetary limit on the diagnostic testing. *Id*.

The *Sigler* court declined to apply the same reasoning to the choice of pharmacy. 869 So. 2d at 198. "Because the administration of medical diagnostic testing, the type of equipment used, and the interpretation of the results obtained from the testing involve individual skill levels and perhaps comfort levels for patients, we find that *Patin's* does not apply to the circumstances of this case. Unlike in the *Patin's* case, the medication Sigler obtained was the same regardless of which pharmaceutical company provided it." *Id.* We agree with the analysis of the *Sigler* court and reach the same conclusion in this case.

Additionally, the legislature has specifically directed that the laws contained in the LWCA be construed as follows:

> (1) The provisions of this Chapter are based on the mutual renunciation of legal rights and defenses by employers and employees alike; therefore, it is the specific intent of the legislature that workers' compensation cases shall be decided on their merits.
>
> (2) Disputes concerning the facts in workers' compensation cases shall not be given a broad, liberal construction in favor of either employees or employers; **the laws pertaining to workers' compensation shall be construed in accordance with the basic principles of statutory construction and not in favor of either employer or employee**.

> (3) According to Article III, Section 1 of the Constitution of Louisiana, the legislative powers of the state are vested solely in the legislature; therefore, when the workers' compensation statutes of this state are to be amended, the legislature acknowledges its responsibility to do so. **If the workers' compensation statutes are to be liberalized, broadened, or narrowed, such actions shall be the exclusive purview of the legislature**.

La. R.S. 23:1020.1(D) (Emphasis added). To extend the legislatively-granted employee choice of treating physician to include the choice of pharmacy can only be accomplished by giving an impermissibly expansive reading to the provisions of La. R.S. 23:1203(A) and La. R.S. 23:1121, thus broadening the employee's rights in contravention of La. R.S. 23:1020.1(D).

Thus, while the injured employee is entitled to choose his treating physician under the LWCA, we hold the law does not provide the employee a right to choose a specific pharmaceutical provider. We therefore reverse the ruling of the court of appeal on this issue.

It is important to recognize that the LWCA gives the employee protections to ensure the employer satisfies its obligations under La. R.S. 23:1023. If an injured employee experiences any delays or other discernable deficiencies in filling his prescriptions through the employer-chosen pharmacy, constituting a violation of the employer's duty under La. R.S. 23:1203(A), the employee has a remedy for penalties pursuant to La. R.S. 23:1201(E).[6] *See Sigler*, 896 So. 2d at 198-99. In this case, there is no evidence S&WB violated its duty under La. R.S. 23:1203(A) by requiring Mr. Burgess to use a pharmacy included in the Corvel Caremark Pharmacy program.

We now turn to the $13,110.82 IWP bill for prescription medications it

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[6] La. R.S. 23:1201(E) provides: "(1) Medical benefits payable under this Chapter shall be paid within sixty days after the employer or insurer receives written notice thereof, if the provider of medical services is not utilizing the electronic billing rules and regulations provided for in R.S. 23:1203.2; (2) For those providers of medical services who utilize the electronic billing rules and regulations provided for in R.S. 23:1203.2, medical benefits payable under this Chapter shall be paid within thirty days after the employer or insurer receives a complete electronic medical bill, as defined by rules promulgated by the Louisiana Workforce Commission."

dispensed to Mr. Burgess from September 1, 2010, to December 7, 2012. Our resolution of the choice-of-pharmacy issue does not fully resolve the issue of whether S&WB is responsible for payment of the outstanding IWP bill. Based on the particular facts of this case, that determination also requires consideration of La. R.S. 23:1203(A) and (B), as well as La. R.S. 23:1142.

Notwithstanding who chooses the health care provider, La. R.S. 23:1203(A) allows for "medical care, services, and treatment" to be provided by out-of-state providers only "when such care, services, and treatment are not reasonably available within the state or when it can be provided for comparable costs." It appears undisputed by the parties that IWP is an out-of-state pharmacy. Additionally, the IWP bill in the record provides a Massachusetts address. Thus, to be a permissible provider under the LWCA, there must be a showing that the services IWP provides are not reasonably available in Louisiana *or* that IWP's services are provided for comparable costs to Louisiana providers. According to the record before us, this issue was not raised before nor considered by the OWC judge. The record contains no evidence whether IWP fits the statutory criteria in La. R.S. 23:1203(A). Because IWP, as an out-of-state provider, is bound by the constraints of La. R.S. 23:1203(A), we must remand this matter to the OWC for a determination of this issue.

Additionally, if IWP is found to be a permissible out-of-state pharmacy, the charges for medications it dispensed to Mr. Burgess would still be subject to the provisions of La. R.S. 23:1203(B), which limits reimbursement to "the mean of the usual and customary charges for such care, services as determined under the reimbursement schedule annually published pursuant to R.S. 23:1034.2 or the actual charge made for the service, whichever is less." Fees in excess of the reimbursement schedule are not recoverable against the employee, employer, or workers'

compensation insurer. La. R.S. 23:1034.2(D). 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. Thus, on remand, the OWC judge must consider whether IWP is a permissible out-of-state provider and, if so, whether the charges incurred were reasonable and within the guidelines referenced in La. R.S. 23:1203(B).

In the interest of judicial economy, and to fully instruct the OWC on remand should IWP be determined to be a permissible out-of-state provider, we also address the applicability of La. R.S. 23:1142(B), which provides:

> Except as provided herein, **each health care provider may not incur more than a total of seven hundred fifty dollars in nonemergency diagnostic testing or treatment without the mutual consent of the payor and the employee** as provided by regulation. Except as provided herein, **that portion of the fees for nonemergency services of each health care provider in excess of seven hundred fifty dollars shall not be an enforceable obligation against** the employee or **the employer** or the employer's workers' compensation insurer unless the employee and the payor have agreed upon the diagnostic testing or treatment by the health care provider. (Emphasis added).

In *Lafayette Bone & Joint*, this court applied the provisions of La. R.S. 23:1142(B) to limit reimbursement to $750 for prescription medications dispensed directly by the treating physician's office without the employer/payor's consent. 194 So. 3d at 1118. In *Burgess II*, the court of appeal distinguished that factual situation and held the dispensing of prescription medications by a pharmacist, as opposed to a claimant's treating physician, did not constitute "nonemergency diagnostic testing and

treatment" under the statute. 204 So. 3d at 1017. We recognize dispensing medication is distinguishable from prescribing or administering medication. However, we find no logical reason to factually differentiate this case from *Lafayette Bone & Joint*. In both cases the healthcare provider sought reimbursement for the cost of prescription medications issued to the injured employee. The act of dispensing prescription medications is the same, regardless of whether the medications were provided by a pharmacy or a physician's office.

Although we did not fully analyze application of La. R.S. 23:1142(B) in *Lafayette Bone & Joint*, implicit in our ruling was an acknowledgment that the dispensing of prescription medications is encompassed in "nonemergency diagnostic testing or treatment" under the statute. While the statutory language does not expressly include a reference to prescription medication, we find the word "treatment" in the statute is broad enough to encompass a pharmacy dispensing prescription medication ordered by the claimant's treating physician as part of the claimant's treatment. Thus, we now explicitly hold La. R.S. 23:1142(B) is properly implicated in considering an employer/payor's obligation to pay prescription medication expenses in workers' compensations cases.

La. R.S. 23:1142(B) requires a health care provider to have the consent of the employee *and* the payor[7] in order to receive payment in excess of $750 for nonemergency care. The statutory requirement of "mutual consent" necessarily imputes some obligation on the part of the provider to obtain the consent of the employer/payor. La. R.S. 23:1142(B) does not supply a specific formula by which the payor is to signify his consent, and the issue of consent is necessarily determined based on the facts of each case. On remand, should IWP be determined to be a

[7] "Payor" is defined in R.S. 23:1142 as the entity responsible for the payment of an injured employee's medical treatment.

permissible out-of-state provider, the OWC judge must address the issue of consent considering the evidence in the record and applying the rationale of *Lafayette Bone & Joint*, to determine whether IWP is entitled to recover expenses in excess of $750.

Finally, we find the issue of penalties and attorney fees is not properly before this court. In its appeal to the Fourth Circuit, S&WB failed to assign as error or brief this issue.[8] Although the court of appeal affirmed the judgment of the OWC, the court did not directly address the penalties and attorney fees award. Therefore, we pretermit discussion of this issue. *See* Rule 2–12.4 of the Uniform Rules–Courts of Appeal; *State in Interest of J.M.*, 13-2573 (La. 12/9/14), 156 So. 3d 1161, 1164. *See also Boudreaux v. State*, 01-1329 (La. 2/26/02), 815 So. 2d 7.

CONCLUSION

For the above reasons, we resolve the split in our circuit courts of appeal on the choice-of-pharmacy issue in favor of the employer. Relative to whether S&WB is responsible for payment of the outstanding IWP bill in this case, we remand this matter to the OWC for a determination of whether IWP is a permissible out-of-state provider under La. R.S. 23:1203(A). If so, the OWC judge must then determine the amount of reimbursement due after application of La. R.S. 23:1203(B), *Lafayette Bone & Joint*, and La. R.S. 23:1142.

DECREE

REVERSED AND REMANDED TO THE OFFICE OF WORKERS' COMPENSATION FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

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[8] S&WB did raise the issue in its second brief to the court of appeal following remand from this court. However, this was not an appeal from the OWC judgment. The parties were merely ordered by the court of appeal to submit briefs addressing this court's order relative to *Lafayette Bone & Joint*.

06/29/2017

SUPREME COURT OF LOUISIANA

No. 2016-C-2267

DARVEL BURGESS

VERSUS
SEWERAGE & WATER BOARD OF NEW ORLEANS

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, OFFICE OF WORKERS' COMPENSATION DISTRICT 8

JOHNSON, Chief Justice, additionally concurs and assigns reasons.

I write separately to express my opinion on this issue of consent pursuant to La. R.S. 23:1142(B). As pointed out in the majority opinion, La. R.S. 23:1142(B) does not supply a specific formula by which the payor is to signify his consent, and the issue of consent is necessarily determined based on the facts of each case.

The record in this case is extremely limited, and the evidence relating to this issue consists of four items:

1) the outstanding bill from IWP in the amount of $13,110.82 for prescription medications dispensed to Mr. Burgess from September 1, 2010, to December 7, 2012;

2) a letter from S&WB dated October 10, 2011, sent to "All Injured Workers" stating:

> Sewerage and Water Board has partnered with Corvel Caremark Pharmacy Program for all Injured Employees. This Pharmacy card will replace any pharmacy program that you may be currently using. It is your responsibility to purchase all medications related to your injury with the attached pharmacy card.
>
> Failure to adhere to this practice may result in non-payment of your Worker's Compensation medications.
>
> By your signature below you acknowledge that you will adhere to the Sewerage and Water Board's Workers' Compensation Pharmacy Program.

Mr. Burgess signed the letter on October 18, 2011.

3) a letter from S&WB to IWP dated April 12, 2012, stating:

> Please be advised that your company is not an approved pharmacy provider for the Sewerage and Water Board of New Orleans ("Board") prescription claims. In October 2011, the Board provided each claimant with a prescription card and the employee is required to use the card for any and all prescription drugs. Therefore, your pharmacy should not accept prescriptions from the Board's injured workers. If any prescription bills are submitted by your company payment will be denied.

4) a letter from S&WB to IWP dated August 22, 2012, referencing two dates of service for Mr. Burgess, July 10, 2012, and August 2, 2012:

> On October 10, 2011 all injured employees were notified and signed [an] agreement to adhere to [the] pharmacy program. On February 13, 2012 a letter was sent to Attorneys and your company was copied on this memo. Also, on April 12, 2012 a letter was issue[d] directly to your company informing you not to accept prescriptions from Sewerage and Water Board of New Orleans.
>
> Sewerage and Water Board is no longer paying bills submitted from Injured Workers Pharmacy because we have a pharmacy program provide[d] for our injured workers, and your company is not an approved pharmacy provider. Therefore, your request for payment for Darvel Burgess is denied.

It is also relevant that, by S&WB's own admission, it paid approximately $12,000 to IWP for prescription expenses incurred by Mr. Burgess over a period of time prior to selecting the Corvel Caremark Pharmacy program.[1]

Considering the record, and applying the same rationale this court applied in *Lafayette Bone & Joint*, I would find IWP's recovery of expenses for medications dispensed to Mr. Burgess after April 12, 2012, is limited by La. R.S. 23:1142(B) to $750 because the medications were clearly dispensed by IWP without the consent of the payor, S&WB. Based on the particular facts of this case, I do not find the October 10, 2011, letter to Mr. Burgess relevant to the consent issue. It is undisputed that S&WB initially paid IWP's bill, thereby providing tacit consent to Mr. Burgess' use

[1] At oral argument before this court, counsel for S&WB affirmatively stated S&WB paid over $12,000 to IWP relative to Mr. Burgess' prescription expenses.

of IWP as a pharmacy provider. Based on the record, there is no evidence IWP was notified or otherwise aware of the withdrawal of that consent prior to the April 12, 2012 letter from S&WB. Thus, I find that until it received this notice, IWP had the consent of S&WB to dispense prescription medications to Mr. Burgess for purposes of La. R.S. 23:1142(B).

Furthermore, although IWP is entitled to reimbursement for prescriptions dispensed to Mr. Burgess prior to April 12, 2012, I note the charges for these medications are still subject to the reasonableness and cost limitations in La. R.S. 23:1203(B). Because there is no evidence in the record on this issue, the OWC must determine the amount of reimbursement due to IWP for charges incurred prior to April 12, 2012.

06/29/2017

SUPREME COURT OF LOUISIANA

No. 2016-C-2267

DARVEL BURGESS

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, OFFICE OF WORKERS' COMPENSATION DISTRICT 8

GENOVESE, Justice, dissenting.

I respectfully dissent from the majority decision. Of particular concern is the judicial edict, without specific legislative authority, that the choice of pharmacy in a workers' compensation case belongs to the employer, disregarding the legislature's directive in La.R.S. 23:1020.1(D)(2) that the Louisiana Workers' Compensation Law shall not be construed "in favor of either employer or employee."

Louisiana Revised Statutes 23:1203(A) delineates the obligation of an employer to "furnish" an injured worker "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 . . . ." It does not necessarily give the employer the right to choose the pharmacy. The key word in La.R.S. 23:1203 is "furnish." The dictionary definition of furnish is "to provide" or "to supply." It could be literally interpreted to mean the employer itself would have to provide/supply the necessary drugs, etcetera, to the employee. I seriously doubt that was the intent of the legislature. Employers cannot be deemed pharmacies. I view and interpret the word "furnish" to mean "to be responsible for," not be able to control, dictate, or choose the employee's drug provider.

Lafayette Bone & Joint Clinic v. Louisiana United Business SIF, 15-2137 (La. 6/29/16), 194 So.3d 1112, dealt with whether reimbursement was warranted for medications prescribed by physicians and dispensed by employees of the Lafayette

Bone & Joint Clinic, an issue which tested the applicability of La.R.S. 23:1142(B). Finding that the evidence did "not raise a tenable employee choice issue," this Court declined to address the choice-of-pharmacy question. *Id*. at 1117. There is no dispute in the instant matter that Injured Workers' Pharmacy is an out-of-state provider. Louisiana Revised Statutes La.R.S. 23:1203(B) specifies the employer's obligation under the reimbursement schedule.

Ready and quick access to medication is essential, and the employee should be able to choose his/her pharmacy. It is not inconceivable that the employer's pharmacist or the employer may insist upon the use of generic drugs or insist upon one form of medication over another. The majority decision in this case will subject the employee to the whim of the employer's pharmacy, and the law does not state such. Further, the law as written contemplates disputes over reasonableness and cost when the choice is made by the employee, it does not contemplate a scenario such as when the obligations of the employer imposed under La.R.S. 23:1203 are tested by a reasonableness and cost dispute with a pharmacy chosen by the employer. This is a matter for the legislature, whose duty it is to make the law—not the courts. It is injudicious to read the law in order to achieve a desired result. The law, as it stands today does not give the employer any preference over the employee to choose a pharmacy.

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SUPREME COURT OF LOUISIANA

JAN 27 2016

NO. 2015-C-0905

CALVIN ARRANT

VERSUS

WAYNE ACREE PLS, INC. & LOUISIANA WORKERS' COMPENSATION CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, OFFICE OF WORKERS' COMPENSATION, DISTRICT 1E

KNOLL, J.

This writ concerns whether a statutory prescriptive period can be shortened by an administrative rule. This issue arises in a workers' compensation case where the hearing officer refused to consider the worker's request to have medically recommended magnetic resonance imaging ("MRI") of his lumbar spine because the worker failed to appeal the Office of Workers' Compensation Administration medical director's decision denying his request for medical treatment within the 15-day time period required by an administrative rule.[1] In so doing, the hearing officer sustained defendants' peremptory exception of prescription. We find the hearing officer erred as a matter of law. We reverse and vacate in part that portion of the judgment sustaining the defendants' peremptory exception of prescription, and we remand for the Office of Workers' Compensation ("OWC") to consider the merits of the worker's claim that the medical director failed to appropriately apply the medical treatment guidelines in denying the lumbar spine MRI requested by the

[1] Because the medical director denied the worker's request for medical treatment, the worker's lawyer advanced the funds for the MRI, and the worker's claim evolved from a request for medical treatment to a request for reimbursement.

Crichton, J., dissents and assigns reasons.
Gundry, J., dissents for reasons assigned by Justice Crichton

worker's orthopedic surgeon. In all other respects, we affirm the judgment.[2]

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 30, 2012, Calvin Arrant[3] suffered injuries from an accident when an eighteen-wheeler ran a red light and struck the work vehicle he was driving in the course and scope of his employment with Wayne Acree PLS, Inc. ("Acree, Inc.").[4] After meeting with an attorney, Arrant consulted with Dr. Douglas Brown, an orthopedic surgeon, concerning pain in his back that had begun radiating into his legs. To help diagnose the problem, Dr. Brown recommended a lumbar MRI. Arrant's attorney contacted Louisiana Workers' Compensation Corporation ("LWCC"), the workers' compensation carrier for Acree, Inc., to ascertain whether LWCC would agree to provide the recommended MRI. According to the trial testimony of Arrant's former attorney, LWCC responded that "it would have to be approved by the workers' comp people."

On two occasions, Arrant submitted requests to the medical director seeking approval for the recommended MRI, as required by La. Rev. Stat. 23:1203.1(J). The medical director denied both of these requests, issuing these decisions via facsimile on September 18, 2012, and on October 19, 2012, respectively. On May 1, 2013, Arrant filed a "Disputed Claim for Compensation"—LWC Form 1008—with the OWC seeking judicial review of the medical director's decision to deny the recommended MRI.[5] Thereafter, LWCC and Acree, Inc. ("defendants,"

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[2] We granted writ in this case only to review that portion of the judgment granting defendants' exception of prescription. We decline to exercise our supervisory jurisdiction to address the applicants' remaining assignments of error.

[3] Following trial, Arrant passed away from natural causes unrelated to the injuries alleged in his petition. Thereafter, the OWC granted a motion to substitute his surviving spouse, Michele Arrant, and his children, Allison Michele Arrant and Staci Ranae Arrant Greene, as parties plaintiff in this matter.

[4] At trial, the parties stipulated to Arrant's employment with Acree, Inc., that he was involved in an accident within the course and scope of his employment, and that, at the time of trial, he was receiving temporary, total disability benefits.

[5] Arrant amended and supplemented his Form 1008 on two occasions prior to trial to add various other claims which we decline to address in this opinion.

collectively) filed, among other things, an ***exception of prescription***,[6] grounded in Arrant's failure to appeal the medical director's decision within "15 calendar days of the date said determination is mailed to the parties," as required by La. Admin. Code Title 40, Part I, Chapter 27, Section 2715.

Following a trial on the merits, the OWC issued a judgment which, among other things, granted defendants' exception of prescription because "[c]laimaint failed to timely file his appeal of the Office of Workers' Compensation Medical Director's decision affirming LWCC's denial to provide authorization for the lumbar MRI requested by Dr. Brown." The Court of Appeal for the Second Circuit affirmed, finding:

> As stated in La. R.S. 23:1291(B) and La. R.S. 23:1203.1(B), the legislature provided the director of the OWC with the power to promulgate rules and regulations to expedite the process of workers' compensation claims in order to further its intent of providing services to injured employees in an "efficient and timely manner." La. R.S. 23:1203.1(L). The director of the OWC acted within its authority when promulgating the 15–day appeal period set forth in Title 40, Part 1, Chapter 27, Section 2715B(3)(f). The 15–day period comports with the legislature's intent. Further, this time period is not unreasonable, notably in light of the fact that a claimant may file subsequent requests for review of the medical director's decision. . . . Because Mr. Arrant failed to file a 1008 form challenging the medical director's determination within 15 days of the decision, the trial court did not err in granting Defendants' peremptory exception of prescription.[7]

We granted certiorari to determine whether the Court of Appeal erred in affirming this judgment granting defendants' exception of prescription premised on Arrant's failure to abide by the time period the director of the Office of Workers' Compensation Administration set out in Title 40, Part I, Chapter 27, Section 2715(B)(3)(f) of the Louisiana Administrative Code.[8]

DISCUSSION

La. Rev. Stat. 23:1203.1 empowers the director of the Office of Workers'

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[6] Specifically, defendants' styled this pleading as a "Peremptory Exception of Preemption [sic] or, Alternatively, Prescription."
[7] *Arrant v. Wayne Acree PLS, Inc.*, 49, 698, p. 10 (La. App. 2 Cir. 4/15/15), 164 So.3d 321, 328.
[8] *Arrant v. Wayne Acree PLS, Inc.*, 15-0905, p. 1 (La. 6/30/15), 172 So.3d 1095.

Compensation Administration to "promulgate rules…to establish a medical treatment schedule"[9] and provides that this medical treatment schedule will set the standard for all medical treatment due by the employer to injured workers.[10] An injured worker can obtain from his employer medical treatment that varies from the schedule

> when it is demonstrated to the medical director of the office 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.[11]

When the employer or its insurer refuses to pay for requested medical care, the injured worker may file an appeal with the medical director. Under La. Rev. Stat. 23:1203.1(J), as relevant here,

> If any dispute arises after January 1, 2011, as to whether the recommended care, services, or treatment is in accordance with the medical treatment schedule, or whether a variance from the medical treatment schedule is reasonably required as contemplated in Subsection I of this Section, any aggrieved party shall file, ***within fifteen calendar days***, an appeal with the office of workers' compensation administration medical director on a form promulgated by the director. The medical director shall render a decision as soon as is practicable, but in no event, not more than thirty calendar days from the date of filing.[12]

La. Rev. Stat. 23:1203.1(K) provides a process by which any party who disagrees with the medical director's decision may seek review of that decision, first by a hearing officer with the OWC, then by the Court of Appeal, and finally by writ application to this Court. Notably, although the Legislature explicitly provided a 15-day period during which an injured worker ***may appeal*** an employer's refusal to

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[9] La. Rev. Stat. 23:1203.1(B).

[10] La. Rev. Stat. 23:1203.1(I). Note this part of the statute was amended and reenacted in 2014 to correct an error in punctuation. 2014 La. Acts No. 791. This change did not affect the substance of the statute.

[11] *Id.*

[12] La. Rev. Stat. 23:1203.1(J) (emphasis added). As the Court of Appeal acknowledged, La. Rev. Stat. 23:1203.1 was amended in 2012, 2013, and 2014. The 2013 amendments added provisions for an assistant medical director in Sections (J) and (K). 2013 La. Acts No. 317. These amendments did not change the substance of the statute. Note also that Act 317 reenumerated part (J), placing the substance of the quoted text in La. Rev. Stat. 23:1203.1(J)(1) and adding part (J)(2) which provides the procedure to be followed in the event a potential conflict of interest arises.

provide medical care ***to the medical director***, La. Rev. Stat. 23:1203.1(K) is ***silent*** concerning a corresponding period during which a party ***must file*** his claim ***with the OWC***:

> After the issuance of the decision by the medical director of the office, any party who disagrees with the medical director's decision, may then appeal by filing a "Disputed Claim for Compensation", which is LWC Form 1008. The decision of the medical director may be overturned when it is shown, by clear and convincing evidence, the decision of the medical director was not in accordance with the provisions of this Section.[13]

By promulgating Title 40, Part I, Chapter 27, Section 2715(B)(3)(f) of the Louisiana Administrative Code, the director of the Office of Workers' Compensation Administration sought to fill this gap:

> In accordance with LAC 40:I.5507.C, any party feeling aggrieved by the R.S. 23:1203.1(J) determination of the medical director shall seek a judicial review by filing a Form LWC-WC-1008 in a workers' compensation district office ***within 15 calendar days of the date said determination is mailed to the parties***. A party filing such appeal must simultaneously notify the other party that an appeal of the medical director's decision has been filed. Upon receipt of the appeal, the workers' compensation judge shall immediately set the matter for an expedited hearing to be held not less than 15 days nor more than 30 calendar days after the receipt of the appeal by the office. The workers' compensation judge shall provide notice of the hearing date to the parties at the same time and in the same manner.[14]

On the basis of Arrant's failure to file his appeal with the OWC within this 15-day period, the OWC granted defendant's exception of prescription, and the Court of Appeal affirmed this judgment.

Indeed, we cannot stress enough that this case requires us to review a ***judgment*** affirming an ***exception of prescription***. Liberative prescription is a mode of barring actions as a result of inaction for a period of time.[15] As our Civil Code explicitly recognizes, the Legislature has the authority to set time limitations on legal actions.[16] Because prescription triggers the extinction of a claim,[17]

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[13] La. Rev. Stat. 23:1203.1(K).
[14] La. Admin. Code tit. 40, pt. I, ch. 27, § 2715(B)(3)(f) (emphasis added).
[15] La. Civ. Code art. 3447.
[16] La. Civ. Code art. 3457 ("There is no prescription other than that established by legislation.");

prescription statutes are strictly construed against prescription and in favor of the claim sought to be extinguished by it.[18] As, in accordance with La. Civ. Code art. 3457, "[t]here is no prescription other than that established by legislation," we must determine whether or not the Legislature has provided for prescription in this instance.

It is well established that the Legislature, after fixing a primary standard, may confer upon administrative officers in the executive branch the power to "fill up the details" by prescribing administrative rules and regulations.[19] As we have recognized, "even when the Legislature has properly delegated to an agency certain administrative or ministerial authority, *the regulations promulgated by the agency may not exceed the authorization delegated by the Legislature.*"[20] Leaving aside whether or not it *would be* proper for the Legislature to delegate to an administrative agency the power to designate a prescriptive period, we first look to the statute to determine whether the Legislature delegated this power at all or whether the director promulgated the regulations at issue in this case absent legislative empowerment.[21] Thus, the straightforward question before us is whether the director exceeded the authority delegated by the Legislature by promulgating Title 40, Part I, Chapter 27, Section 2715(B)(3)(f) of the Louisiana Administrative Code. In order to answer this question, we must determine the scope of the

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see also SS v. State ex rel. Dept. of Soc. Serv., 02-0831, p. 6 (La. 12/4/02), 831 So.2d 926, 931 ("It is also well accepted that the Legislature has the authority to set time limitations on legal actions.").

[17] Note, however, that a natural obligation remains after the accrual of prescription. Comment (b) to La. Civ. Code art. 3447.

[18] *Bailey v. Khoury*, 04-0620, p. 9 (La. 1/20/05), 891 So.2d 1268, 1275; *Bouterie v. Crane*, 616 So.2d 657, 660 (La. 1993).

[19] *State v. Alfonso*, 99-1546, p. 7 (La. 11/23/99), 753 So.2d 156, 161; *Adams v. State Dept. of Health & Human Res.*, 458 So.2d 1295, 1298 (La. 1984) ("Louisiana courts have upheld the constitutionality of statutes delegating broad powers to administrative officers to determine the details of legislative scheme where those statutes express a clear legislative policy and contain sufficient standards for the guidance of the administrative official empowered to execute the law.").

[20] *Alfonso*, 99-1546 at 8, 753 So.2d at 162.

[21] Because we find the Legislature did not delegate to the director of the Office of Workers' Compensation Administration the power to designate a prescriptive period, we do not need to address whether or not the Legislature *could* expressly delegate this power to an agency.

Legislature's delegation to the director.

La. Rev. Stat. 23:1291 creates the Office of Workers' Compensation Administration and delegates to its director various enumerated powers. As relevant to the rule the director promulgated here, La. Rev. Stat. 23:1291(B) delegates the following to the director of the Office of Workers' Compensation Administration:

> The director shall have the following powers, duties, and functions:
>
> . . . .
>
> (5) To establish and promulgate in accordance with the Administrative Procedure Act such rules and regulations governing the administration of this Chapter and the operation of the office as may be deemed necessary and which are not inconsistent with the laws of this state.
>
> . . . .
>
> (10) To require the use of appropriate procedures, including a utilization review process that establishes standards of review, for determining the necessity, advisability, and cost of proposed or already performed hospital care or services, medical or surgical treatment, or any nonmedical treatment recognized by the laws of this state as legal, and to resolve disputes over the necessity, advisability, and cost of same.
>
> (11) To engage the services of qualified experts in the appropriate health-care fields to assist him in the discharge of his responsibilities in Paragraph (10) of this Subsection, and to establish fees and promulgate rules and procedures in furtherance of his performance of these duties.

Moreover, La. Rev. Stat. 23:1203.1(B) requires the director, "through the office of workers' compensation administration, [to] promulgate rules in accordance with the Administrative Procedure Act, La. Rev. Stat. 49:950 et seq., to establish a medical treatment schedule." The Court of Appeal found that both La. Rev. Stat. 23:1291(B) and La. Rev. Stat. 23:1203.1(B) provided a legislative basis for promulgating the rule setting out the 15-day period for appealing the medical director's determination, and Arrant's failure to appeal during this time period provided appropriate grounds for sustaining an exception of prescription. We

disagree. While these statutes delegate to the director broad general authority to promulgate rules and regulations concerning the medical treatment schedule, they do not provide the director power to designate a prescriptive period. This is clear. The Legislature exercised this power *without qualification* in La. Rev. Stat. 23:1209. Indeed, La. Rev. Stat. 23:1209(C) ***specifically*** establishes a prescriptive period for claims for medical benefits like those brought by Arrant:

> All claims for medical benefits payable pursuant to R.S. 23:1203 shall be forever barred unless within one year after the accident or death the parties have agreed upon the payments to be made under this Chapter, or unless within one year after the accident a formal claim has been filed with the office as provided in this Chapter. Where such payments have been made in any case, this limitation shall not take effect until the expiration of three years from the time of making the last payment of medical benefits.

It is a fundamental rule of administrative law that if the Legislature has directly spoken on a specific question at issue, the court as well as the agency must give effect to the Legislature's unambiguously expressed intent.[22] Here, the Legislature explicitly provided a prescriptive period for "all claims for medical benefits." Therefore, any attempt to alter the prescriptive period laid out in this statute is *ultra vires*. Because all of the director's power comes from the enabling statute and no statute explicitly or implicitly delegates to the director the power to alter the prescriptive period plainly provided in La. Rev. Stat. 23:1209(C) for "[a]ll claims for medical benefits payable pursuant to R.S. 23:1203," the 15-day period set out in Title 40, Part I, Chapter 27, Section 2715(B)(3)(f) of the Louisiana Administrative Code cannot provide a legitimate basis for sustaining an exception of prescription under the facts of this case.

The suggestion by the Court of Appeal that the worker could simply re-file

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[22] *Midtown Medical, LLC v. Dept. of Health & Hosp.*, 14-0005, p. 2 (La. 3/14/14), 135 So.3d 594, 595; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

the same request for reimbursement after the OWC has issued a ***judgment*** granting an exception of prescription is legally wrong and practically absurd. Where an action is barred by prescription, the civil obligation is extinguished. It is a final, appealable judgment,[23] and any attempt to reurge the same claim would be vulnerable to a peremptory exception of *res judicata*.[24] Moreover, this course runs contrary to the purpose of the Louisiana Workers' Compensation Act that these claims be resolved quickly and efficiently.[25] Further, this interpretation is economically inefficient—bad for employers/insurers who must pay additional attorney fees to their defense lawyers, bad for workers who must repeat an administrative process in order to receive review of their request for the medical treatment they may very well need, and bad for the State which must expend valuable administrative resources re-examining an initial request for treatment that was already denied at the initial stage. Finally, this interpretation would absolutely and seriously undermine the *quid pro quo* that the Act has established because it affects the worker's access to medical benefits, the most central element of the workers' compensation scheme. All of these considerations further support our decision.

Accordingly, we reverse and vacate in part that portion of the judgment sustaining the defendants' peremptory exception of prescription, and we remand for the OWC to consider the merits of Arrant's claim that the medical director

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[23] *Rousseau v. Emp'rs Mut. of Wausau*, 493 So.2d 121, 124 (La. App. 5 Cir. 1986) ("[A] judgment sustaining the exception of prescription is a final appealable judgment, even in cases where only a portion of the case is dismissed by the exception."); *Sewerage & Water Bd. of New Orleans v. Sanders*, 246 So.2d 734, 735 (La. App. 4 Cir. 1971) ("It is difficult for this court to conceive of a judgment more final than the maintaining of a plea of prescription.").

[24] La. C.C.P. art. 1673 ("A judgment of dismissal with prejudice shall have the effect of a final judgment of absolute dismissal after trial."); *Sims v. American Ins. Co.*, 12-0204, p. 9 (La. 10/16/12), 101 So.3d 1, 7 ("[A] dismissal with prejudice has 'the effect of a final judgment of absolute dismissal after trial,' and therefore, has *res judicata* effect on the parties to the suit dismissed with prejudice.").

[25] La. Rev. Stat. 23:1203.1(L) ("It is the intent of the legislature that, with the establishment and enforcement of the medical treatment schedule, medical and surgical treatment, hospital care, and other health care provider services shall be delivered in an efficient and timely manner to injured employees.").

failed to appropriately apply the medical treatment guidelines in denying the lumbar spine magnetic resonance imaging requested by his orthopedic surgeon. In all other respects, we affirm the judgment.

AFFIRMED IN PART. REVERSED AND VACATED IN PART. REMANDED.

SUPREME COURT OF LOUISIANA

NO. 2015-C-0905

CALVIN ARRANT

VERSUS

WAYNE ACREE PLS, INC. & LOUISIANA WORKERS' COMPENSATION CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, OFFICE OF WORKERS' COMPENSATION, DISTRICT 1E

SJC **CRICHTON, J., dissents and assigns reasons:**

I respectfully dissent from the majority opinion, and would affirm the hearing officer's ruling sustaining defendants' peremptory exception of prescription. In my view, for the reasons set forth below, I find the lower courts correctly found that plaintiff's appeal of the denial of his requested medical treatment (an MRI) was untimely filed, as it was filed outside of the appeal delays found in La. R.S. 23:1203.1 and the corresponding Administrative Code provisions: 40 LAC I.2715(B)(3)(e) and 40 LAC I.2715(B)(3)(f)). Specifically, I do not find the time periods set forth in the aforementioned statutes are prescriptive periods, but are appeal delays appropriately created to comply with the statute's intent to accomplish efficient and swift resolution of medical treatment disputes.

The general prescriptive periods in the Louisiana Workers Compensation Act are set forth in La. R.S. 23:1209(A), which provides that the claim of an injured employee for weekly benefits is not prescribed if filed within the following time periods: (1) within one year from the date of the accident; or (2) one year from the last payment of compensation, except that in cases of benefits payable pursuant to La. R.S. 23:1221(3), the limitation shall not take effect until three years

after the last weekly of compensation; or (3) one year from the time the injury develops. But in all such cases the claim for payment shall be forever barred unless the proceedings have begun within three years of the date of the accident. Similarly, La. R.S. 23:1209(C) provides that all claims for medical benefits under La. R.S. 23:1203 "shall be filed within one year after the accident or death the parties have agreed upon the payments to be made under that Chapter, or unless within one year after the accident a formal claim has been filed with the workers' compensation office." In that instance, the limitation shall not take effect until three years from the time of making the last payment of medical benefits. La. R.S. 23:1209(C).

It is well settled that historically, in line with the general intent of the Workers' Compensation Act and related jurisprudence, courts have utilized a generally lenient view of prescriptive periods.[1] Thus, prescription statutes, including La. R.S. 23:1209(A), are construed in favor of maintaining rather than barring actions. *See, e.g., Taylor v. Liberty Mut. Ins. Co.*, 579 So.2d 443, 446 (La. 1991); *Howard v. Trelles*, 95-0227, p. 4 (La.App. 1 Cir. 02/23/96), 669 So.2d 605, 607. Furthermore, for those time periods that are listed specifically in La. R.S. 12:1209, the purposes are well established: (1) to enable an employer to determine when his potential liability for an accident would cease; (2) to prevent suits based on stale claims where evidence might be destroyed or difficult to produce; and (3) to fix a statute of repose giving rise to a conclusive presumption of waiver of his claim on the part of an employee where he fails to bring his suit within the fixed period. *Harris v. Traders and General Ins. Co.*, 200 La. 445, 458, 8 So. 2d 289, 293 (La. 1942); *Lunkin v. Triangle Farms, Inc.*, 208 La. 538, 23 So. 2d 209 (1945).

[1] *Scott v. Walmart Stores, Inc.*, 03-0104, p. 6 (La. App. 4 Cir. 7/2/03), citing *Millican v. General Motors Corp.*, 34,207, p. 1 (La. App. 2 Cir. 11/1/00), 771 So.2d 234, 235, *writ denied*, 2001-0001 (La.3/23/01), 788 So.2d 426; See, *e.g., Glascock v. Georgia-Pacific Corp.*, 25,677 (La. App. 2 Cir. 03/30/94), 635 So.2d 474, 479; *Wesley v. Claiborne Elec. Co-op., Inc.*, 446 So.2d 857 (La. App. 2 Cir.1984); *See generally*, 14 La. Civ. L. Treatise, H. Alston Johnson III, Workers' Compensation Law and Practice § 384 (4th ed.2002)

See also, 14 La. Civ. L. Treatise, H. Alston Johnson III, Workers' Compensation Law and Practice § 384 (4th ed. 2002).

In my view, however, the time periods set forth in the subject statute, La. R.S. 23:1203.1, are **not** prescriptive statutes at all, and are in fact not intended to satisfy the objectives listed above. Rather, as this court has discussed previously, and as noted by the appellate court in this matter, La. R.S. 23:1203.1 was enacted with the express intent "that, with the establishment and enforcement of the medical treatment schedule, medical and surgical treatment, hospital care, and other health care provider services shall be delivered in an efficient and timely manner to injured employees." La. R.S. 23:1203.1(L). This court thoroughly examined the history and purpose behind La. R.S. 23:1203.1 in *Church Mut. Ins. Co. v. Dardar*, 13-2351 (La. 5/7/14), 145 So. 3d 271, 275-6:

> Enacted by the legislature in 2009, La. R.S. 23:1203.1 is the product of a combined endeavor by employers, insurers, labor, and medical providers to establish meaningful guidelines for the treatment of injured workers. 1 DENIS PAUL JUGE, LOUISIANA WORKERS' COMPENSATION, § 13:6 (2d ed.2013). Dissatisfied with a process for obtaining needed medical treatment that was cumbersome, uncertain and often fraught with expense, employers and their insurers perceived a need for guidelines that would assure them that the treatment recommended by a medical provider was generally recognized by the medical community as proper and necessary. *Id.* In a similar vein, labor and their medical providers were concerned about the unreasonable delays regularly encountered in obtaining approval for treatment when disputes arose as to the necessity for the treatment and with having a procedure for obtaining approval for treatment that might vary from established guidelines. *Id.*[2]

La. R.S. 23:2301.1 provides that the director of the Office of Workers' Compensation Administration "shall . . . .promulgate rules in accordance with the

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[2] The *Church Mut. Ins. Co.* court also stated in a footnote that "[p]rior to the enactment of La. R.S. 23:1203.1. the determination of what medical treatment was appropriate was entrusted in the first instance to an insurer, which was tasked with evaluating any request for medical treatment in excess of $750. La. R.S. 23:1142. If a dispute arose as to whether a particular treatment was reasonable and necessary, the task of resolving that dispute was left to an OWC judge, who would resolve that dispute on an ad hoc basis, generally after a second medical opinion examination, perhaps an OWC-ordered independent medical examination, and on competing testimony of medical providers as to what was, in their respective opinions, "medically necessary" under the circumstances." *Church Mut. Ins. Co., supra*, at n. 3.

Administrative Procedure Act, R.S. 49:950, *et seq.*, to establish a medical treatment schedule." La. R.S. 23:1203.1(B). *See also*, La. R.S. 23:1291(B)(5) (giving authority to the director of the OWC to promulgate rules in accordance with the Louisiana Administrative Code "which are not inconsistent with the laws of this state.") Most pertinent to the issue presently before the court, La. R.S. 23:1203.1(J) and (K) state as follows:

> J. (1) After 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, the payor shall notify the medical provider of their action on the request within five business days of receipt of the request. If any dispute arises after January 1, 2011, as to whether the recommended care, services, or treatment is in accordance with the medical treatment schedule, or whether a variance from the medical treatment schedule is reasonably required as contemplated in Subsection I of this Section, **any aggrieved party shall file, within fifteen calendar days**, an appeal with the office of workers' compensation administration medical director or associate medical director on a form promulgated by the director. The medical director or associate medical director shall render a decision as soon as is practicable, but in no event, not more than thirty calendar days from the date of filing.
>
> (2) If either party, the medical director, or associate medical director believes that a potential conflict of interest exists, he shall communicate in writing such information to the director, who shall make a determination as to whether a conflict exists within two business days. The director shall notify in writing the patient, the physician, and, if applicable, the attorney of his decision within two business days.
>
> K. After the issuance of the decision by the medical director or associate medical director of the office, any party who disagrees with the decision, may then appeal by filing a "Disputed Claim for Compensation", which is LWC Form 1008. The decision may be overturned when it is shown, by clear and convincing evidence, the decision of the medical director or associate medical director was not in accordance with the provisions of this Section. (Emphasis added)

* * *

Under the plain terms of the aforementioned provisions, an appeal from a dispute concerning requested medical treatment requires a multi-step process. After an initial request for authorization for treatment is submitted, the "payor" must notify the medical provider of their decision within five (5) business days. If a dispute thereafter arises as to whether the treatment is in accordance with the

medical treatment schedule or a variance from the schedule is required, any aggrieved party must then file, within fifteen (15) calendar days, an appeal to the medical director or associate medical director. The director then has thirty days to render a decision. After the issuance of that decision, any party who disagrees with the decision may then file an appeal through the filing of a Form 1008 (a Disputed Claim for Compensation). As the revised statute is written, there is no time period listed for the filing of Form 1008. *See* La. R.S. 23:1203.1(K). However, the related Administrative Code provisions (40 LAC I.2715(B)(3)(e) and 40 LAC I.2715(B)(3)(f)) do set forth a time period for the filing of the Form 1008:

> (B)(3)(e) Disputes shall be filed by any aggrieved party on a LWC-WC-1009 **within 15 calendar days** of receipt of the denial or approval with modification of a request for authorization. The medical director shall render a decision as soon as practicable, but in no event later than 30 calendar days from the date of filing. The decision shall determine whether:
>
> > i. the recommended care, services, or treatment is in accordance with the medical treatment schedule; or
> > ii. a variance from the medical treatment schedule is reasonably required; or
> > iii. the recommended care, services, or treatment that is not covered by the medical treatment schedule is in accordance with another state's adopted guideline pursuant to Subsection D of R.S. 23:1203.1.
>
> (B)(3)(f) In accordance with LAC 40:I.5507.C, any party feeling aggrieved by the R.S. 23:1203.1(J) determination of the medical director shall seek a judicial review by filing a Form LWC-WC-1008 in a workers' compensation district office **within 15 calendar days** of the date said determination is mailed to the parties. A party filing such appeal must simultaneously notify the other party that an appeal of the medical director's decision has been filed. Upon receipt of the appeal, the workers' compensation judge shall immediately set the matter for an expedited hearing to be held not less than 15 days nor more than 30 calendar days after the receipt of the appeal by the office. The workers' compensation judge shall provide notice of the hearing date to the parties at the same time and in the same manner.[3]

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[3] Although it does not bear any weight on my viewpoint contained herein, it is interesting to note that the documents provided to the plaintiff in this instance informing him that his requested medical treatment had been denied provide the following instructions for appealing the denial:

> Dispute Resolution Process
>
> Any party feeling aggrieved by the R.S. 23:1203.1(J) determination of the medical director shall seek a judicial review by filing Form LWC-WC-1008 Disputed Claim for Compensation with the appropriate hearing office within 15

* * *

In this case, the Office of Workers' Compensation judge found that the plaintiff's Form 1008, filed May 1, 2013, disputing the Medical Director's denial of his requested MRI on September 18, 2012, and October 19, 2012, was untimely and granted the defendants' exception of prescription. Although I specifically question the use of an exception of prescription as the proper vehicle to enforce this particular appeal period (the statute as written does not presently provide a mechanism), nevertheless, I conclude that the rulings that plaintiff's appeal was untimely were correct. Further, while the appeal of the denial of this particular request in this instance may be untimely in that it was filed outside of the appeal period listed in the statute, as the court of appeal noted as well, the plaintiff is not prevented from filing a *new* request for this medical treatment. La. Civ. Code art. 3463 provides that "[a]n interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending. . . ." Because the original Form 1008 was filed in the workers' compensation office on May 1, 2013, it served as a continuing interruption of prescription. Merely because the workers' compensation judge found that this particular filing by plaintiff was untimely pursuant La. R.S. 23:2301.1—that is, the delay period to appeal the decision regarding treatment lapsed—this does not bar the plaintiff from submitting a renewed or different request for medical treatment.

As the statute specifically states, and the *Church Mut. Ins. Co.* court explained, the purpose of this statute was an attempt to avoid battles over the "choice of physician" and to provide medical treatment in a "timely and efficient" manner. In order to satisfy the legislative intent, the short timeframe of fifteen (15) days was established. Moreover, it is likely the legislature viewed this particular

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days of the date said determination is made to the parties. . . ."

the majority's reasoning that this process is "economically inefficient," I believe the statute was enacted with the intent to avoid unnecessary delays for the employee seeking treatment, while assuring the employer that the medical treatment sought is reasonable and necessary. As such, I would find that the lower courts correctly ruled that the plaintiff's appeal from the medical director's denial of his requested MRI was untimely filed, as the time period under La. R.S. 23:1203.1 had lapsed. For these reasons, I respectfully dissent from the majority's finding otherwise.

Former firefighter's claim for permanent disability and medical benefits not barred by res judicata or prescription.

Richard J. Borja v. FARA St. Bernard Parish Government, 2016-C-0055 (La. 10/19/16)

Claimant was employed by defendant as a firefighter beginning in July 1973. After an accident in June 2002, he received workers' compensation benefits until defendant terminated the benefits in June 2003. In March 2004 he filed a disputed claim for compensation alleging he had injured his right knee and thumb in the 2002 accident. He also alleged he had an occupational disease, indirectly referencing the Fireman's Heart and Lung Act, La. R.S. § 33:2581. Defendant admitted claimant sustained a knee injury in June 2002 but disputed the thumb injury as well as any heart and lung claims related to his employment. Throughout the 2004 litigation, claimant consistently argued that his heart and lung conditions were related to his employment. The dispute went to mediation in 2008, resulting in a compromise by which he received back compensation in two lump sums and weekly indemnity benefits of $398. The litigation was dismissed as settled.

In August 2013 defendant notified claimant it was terminating the weekly benefits, described as Supplemental Earnings Benefits (SEBs), because defendant had received 520 weeks of payments. In November 2013 claimant filed another disputed claim for compensation citing "knees, heart, and lung" as his injuries and claiming he was permanently disabled. Defendant filed exceptions of prescription and res judicata. The workers' compensation judge granted the exception of res judicata for the knee injury and granted the exception of prescription as to the claims under the Heart and Lung Act. On appeal, a majority of the Fourth Circuit affirmed, concluding that the claim for indemnity benefits for the knee injury was barred by res judicata and that the claims for indemnity and medical benefits under the Heart and Lung Act were prescribed.

The Court granted a supervisory writ and reversed. First, the lower courts erred by improperly applying res judicata to find that the 2008 compromise had disposed of the indemnity issues in full. The doctrine of res judicata applies in workers' compensation cases only in certain limited circumstances. If the rules of finality concerning ordinary civil judgments applied to workers' compensation judgments, the flexibility of the workers' compensation system would be greatly restricted. Because the Legislature has expressly provided that a compensation award may be modified by either party because of a change in disability after an award has been made, res judicata applies only when there is a final judgment denying benefits or a lump sum settlement approved by a workers' compensation judge under La. R.S. § 23:1271 and 1274. Here, defendant failed to establish those circumstances. Further, there was no evidence the parties ever agreed on the issues being litigated much less a settlement of all of the issues. The claim for permanent disability benefits, whether the result of claimant's knee injury or his heart and lung conditions, was not barred by the doctrine of res judicata.

Similarly, the lower courts erred in finding the claims for benefits under the Heart and Lung Act were prescribed. Payment of benefits following the 2004 disputed claim

interrupted prescription with respect to the 2013 disputed claim for permanent disability benefits, which was filed within one year of the termination of indemnity benefits. The lower courts manifestly erred in finding the indemnity payments were made only for the knee injury and not for disability as a result of both the knee injury and the heart and lung conditions. The lower courts also erred in concluding claimant's request for medical benefits under the Heart and Lung Act had prescribed. The court of appeal had concluded that all medical benefits were prescribed because the last medical payment by defendant was in May 2009, more than three years prior to the filing of the 2013 disputed claim. However, the May 2009 payment was related to claimant's knee injury, rather than his heart and lung conditions. Because there was no determination by a workers' compensation judge as to claimant's entitlement to benefits for the heart and lung conditions, the three-year prescriptive period of § 23:1209(C) had not commenced, and the claim for medical benefits had not prescribed. Reversed and remanded.

Per Guidry, J.