

COURT OF APPEAL UPHOLDS LOUISIANA MEDICAL TREATMENT GUIDELINES REVIEW/APPEAL PROCESS

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In a long awaited decision, the First Circuit Court of Appeal has rendered a judgment in the case of *Barber vs. Louisiana Workforce Commission*, No. 2017 CA 0844 (La. App. 1 Cir. 10/19/2018), reversing the district court and finding the administrative review/appeal process for medical treatment of injured workers constitutional. The decision is yet another vindication of legislative intent and the cooperative effort that produced the Medical Treatment Schedule (MTS) and the utilization review process implemented under La. R.S. 23:1203.1.

Background:

In 2009, the Louisiana Legislature passed La. R.S. 23:1203.1, requiring the Office of Workers' Compensation (OWC) to develop and promulgate treatment guidelines for injured workers in this state. With input from a medical advisory council and other stakeholders, OWC enacted the MTS in June of 2011, including an administrative process for reviewing and appealing medical treatment decisions.

The *Barber* litigation commenced in 2013, in the 19th Judicial District Court for East Baton Rouge Parish. The plaintiffs, consisting of attorneys, physicians, and injured workers, challenged various portions of the statute and the administrative rules implementing it. In particular, they sought to permanently enjoin OWC from enforcing the following:

- LAC 40:I.2715(E)(2) and LAC 40:I.2715(H), providing for “tacit denials” of treatment requests based on a payor’s failure to respond within five days;
- La. R.S. 23:1203.1(I), and LAC 40:I.2715(L), providing the process for requesting approval of treatment that varies from the approved guidelines;
- La. R.S. 23:1203.1(M), providing the process for approval of treatment not covered under the guidelines, particularly including reference to guidelines adopted by other states under R.S. 23:1203.1(D)(5); and
- La. R.S. 23:1203.1(J)(1) and (K), R.S. 23:1314(D) and (E)(1), LAC 40:I.2715(B)(3)(d)-(f), and LAC 40:I.2715 (F), (H)-(L), regarding the statutory and administrative process for appealing medical treatment decisions to the OWC medical director and judges.
- Unrelated to the MTS, plaintiffs also asserted that OWC had violated constitutional due process and separation of powers provisions by interfering with the independence of the workers’ compensation judiciary.

Procedural History:

After filing suit in April of 2013, plaintiffs sought a preliminary injunction. Following a hearing, on June 24, 2015, the district judge granted a preliminary injunction precluding OWC from enforcing the disputed statutes/regulations. The decision was stayed pending appellate review.

A direct appeal to the Louisiana Supreme Court was rejected based on the court's conclusion that constitutional issues were not properly before it, and the appeal was transferred to the First Circuit Court of Appeal. In an unpublished opinion issued on June 2, 2016, that court reversed the trial court's judgment as procedurally improper, and remanded the matter for trial.

On remand, evidence from the prior hearing was supplemented to include testimony from the current OWC director. Following trial, the district judge issued a judgment on March 2, 2017, finding the disputed portions of the statute and administrative rules unconstitutional, and permanently enjoining the agency from enforcing them. The judge also enjoined OWC "from allowing anyone to attempt to communicate with judges of the OWC regarding pending workers' compensation claims," and ordered the agency to take proper action to ensure that workers' compensation judges and their staff were insulated from undue influence.

Defendants suspensively appealed to the First Circuit Court of Appeal.

Appellate Court Decision:

The appeal was heard in November of 2017, before a three judge panel consisting of Judges Guidry, Crain, and Pettigrew. On October 19, 2018, the court rendered a decision largely reversing the trial court's judgment and finding the MTS process as implemented by OWC to be constitutional.

1. Tacit Denials under LAC 40:I.2715(E)(2) and (H) –

a. Separation of Powers

After finding that at least one of the employee plaintiffs had standing, the court turned to the substance of the appeal, first addressing the plaintiffs' contention that "tacit denials," i.e. denials based on a payor's failure to approve or deny treatment within five days after receiving a request for treatment, are unconstitutional.

The plaintiffs asserted that tacit denials are not included in §1203.1 and exceed the authority delegated to OWC by the Legislature. They argued that an administrative rule creating tacit denials violates the separation of powers doctrine in the Louisiana Constitution. The court rejected that argument. It noted that while the legislature cannot delegate "primary legislative power," it "may confer upon administrative officers ... the power to 'fill up the details' by prescribing administrative rules and regulations."

Citing La. R.S. 23:1291, the court observed that the Legislature had delegated authority to the OWC director to establish administrative rules as necessary to administer the workers' compensation system, provided they are not contrary to statutory law. In that regard, while §1203.1

does not expressly provide for tacit denials, prior law recognized that a failure to respond to a request for treatment was deemed a denial. Moreover, consistent with the expressed purpose of the MTS, “by promulgating a regulation that treats a non-response as a tacit denial... the claimant is able to quickly pursue review before the medical director.”

The court concluded that the rule providing for tacit denial was consistent with the authority granted to the director under §1291 and §1203.1.

b. Substantive Due Process

Similarly, the court rejected plaintiffs’ contention that tacit denials violate substantive due process under the federal and state constitutions. It agreed that claims for medical treatment are protected “property interests” subject to constitutional protection. However, it concluded that plaintiffs failed to prove that the tacit denial rule amounts to arbitrary and capricious conduct.

To the contrary, the court agreed that defendants purported justifications for the rule – i.e. that the practice was consistent with prior practices; that the tacit denial, as opposed to a tacit approval, prevents doctors from administering care that may subsequently be deemed unnecessary; and that tacit denials guarantee that providers will be paid for services that are ultimately found to be necessary – are rationally related to the legitimate government interests of protecting injured workers from unnecessary treatment and ensuring that providers are paid for proper treatment.

2. Variances

The court next considered plaintiffs’ contention that the administrative process for approval of treatment contrary to the MTS, i.e. “variances” from the approved guidelines, is unconstitutional. La R.S. 23:1203.1(I) provides for “medical care... that varies from the promulgated medical treatment schedule.” For approval of a variance, the statute requires “scientific medical evidence, that a variance... is reasonably required to cure or relieve the injured worker from the effects of the injury...”

The process for requesting a variance is delineated in LAC 40:I.2715(L). Consistent with the statute, the rule requires that the provider/employee seeking a variance must submit supporting “scientific medical literature that is higher ranking and more current than the scientific medical literature contained in the medical treatment schedule” to the OWCA medical director.

a. Due Process

The plaintiffs asserted that §2715(L) is unconstitutionally vague and violates state and federal due process rights. They argued that an “ordinary person” can’t understand the meaning of “higher ranking medical literature.” Further, they contended the rule violates the separation of powers doctrine and exceeds the authority delegated to OWC by the legislature, by imposing an unrealistic burden of proof beyond the simple preponderance standard articulated by law.

The court disagreed and concluded that “higher ranking medical literature” is not unconstitutionally vague. It cited testimony offered at trial that the different levels of medical literature are described in the MTS. “While the process of locating higher ranking scientific medical literature may be difficult, it is not unclear as to what must be proved.”

b. Separation of Powers

Likewise, the court found plaintiffs failed to prove that the variance rule violates the separation of powers doctrine by raising the burden of proof beyond that required by statute. “[F]rom our review of the statutory provision and the regulation, we find that the burden of proof in seeking a variance remains a preponderance of the scientific medical evidence, and LAC 40:1.2715(L) merely addresses the type of evidence needed to meet this burden of proof.”

3. Non-covered Treatment

With regard to approval of treatment not covered by the MTS, the court again found the trial court erred in enjoining defendants from applying or enforcing R.S. 23:1203.1(M). That paragraph provides that treatment not addressed in the guidelines must nevertheless be in accordance with evidence based medicine and §1203.1(D). Treatment not covered by the MTS or in paragraph (D) “shall be due... when it is demonstrated to the medical director... that a preponderance of the scientific medical evidence supports approval of the treatment that is not covered.”

Plaintiffs argued that R.S. 23:1203.1(D)(5), providing that the MTS “shall be based on guidelines which ... [a]re, by statute or rule, adopted by any other state,” is unconstitutionally vague “because an ordinary person... would not know which states have medical treatment guidelines and researching which states have guidelines and what those guidelines are is unduly burdensome.” Noting that “a statute is not vague because it may at times be difficult to prove,” the court held that §1203.1(M), and its incorporation of §1203.1(D)(5), set forth a clear standard concerning what must be proved to obtain approval of treatment not covered by the MTS.

4. 1009/1008 Appeal Process

Remaining consistent, the court also rejected the plaintiff’s assertion that the administrative process for appealing denials of treatment to the OWCA medical director and judges violates procedural and substantive due process. The plaintiffs argued that the administrative process is unconstitutional because (1) the injured worker is not provided with an opportunity to object to information submitted by the payor; (2) the injured worker is not provided with an opportunity to present evidence or examine witnesses before the medical director; and (3) the appeal of the medical director’s decision to the workers’ compensation judge is confined to the record, with no right to call witnesses or submit evidence, precluding him/her from meeting the “clear and convincing evidence” standard required in §1203.1.

a. Procedural Due Process

Addressing procedural due process first, the court observed that “in the context of administrative action, the judicial model of an evidentiary hearing is neither required nor even the most effective method of decision making in all circumstances.” It cited three factors to be weighed in assessing the specifics required by due process, including (1) the private interest that is affected; (2) the risk of an erroneous deprivation of such interest under the current procedure, and the value that may be added by additional safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burden that will be imposed by alternative procedures.

Considering these factors, the court concluded that the MTS process as implemented by OWC represents a rational policy choice to ensure that proper health care services are delivered to injured workers, while also maintaining the welfare of the workers' compensation industry. Reviewing the trial record, it noted:

- Testimony from the former medical director concerning the process by which 1009 requests for treatment are reviewed;
- Testimony from the current OWCA director that seventy percent of treatment requests are now being approved by the medical director;
- Testimony from the current and former OWCA directors that all workers' compensation judges have access to the electronically stored records submitted to the medical director;
- Testimony from one of the attorney plaintiffs that she had been allowed to object to certain records submitted by the payor when appealing decisions to the OWC judge;
- Jurisprudence from four of the five circuit courts allowing employees to submit additional evidence to the workers' compensation judge when appealing a decision of the medical director.

The court concluded that while the plaintiffs' interest in obtaining proper medical care was substantial, they had not shown that the process adopted by OWC failed to adequately protect that interest. "As detailed above, the review process provides claimants with an opportunity to present their claim for review at multiple levels... Given the procedural protections afforded claimants, the risk of an erroneous deprivation is low."

b. Substantive Due Process

Likewise, the court rejected plaintiffs' substantive due process argument.

"With regard to the medical director review process, we find that plaintiffs have failed to present any evidence that the detailed medical director review process, which streamlines and expedites the review process, is arbitrary or that it is not rationally related to the government's interest in insuring that health care services are delivered to injured workers in an efficient and timely manner. **The fact that plaintiffs do not agree with the process... does not establish that the process itself is arbitrary.**"

Again, the court rejected plaintiffs' argument that the "clear and convincing" standard required for workers' compensation judges to reverse decisions of the medical director was unconstitutional. "Because the guidelines determine medical necessity at the outset, it makes sense that in order to overcome the presumptively correct decision of the provider and/or medical director, that a claimant must meet the higher burden of establishing by clear and convincing evidence that the medical director's decision was not in accordance with ... 1203.1."

5. Judicial Interference

Peripheral to the MTS challenges, plaintiffs asserted that OWC was improperly interfering with the agency's judiciary via (1) a program to evaluate judges via a special assistant to the director,

(2) meetings to direct judges on how they should rule on particular issues, and (3) by entertaining *ex parte* communications/complaints from attorneys regarding judges. They argued that the agency's conduct violated their constitutional right to due process and the separation of powers doctrine.

a. Undue Influence

Regarding the claims of undue influence raised by the first two points, the court noted that workers' compensation judges are not part of the judiciary branch. Nonetheless, "the administrative adjudicatory process is subject to due process constraints, and an impartial decision-maker is essential to those requirements."

Reviewing the record, the court cited a statement from one judge that she had been "instructed by the administration" that the medical treatment schedule was procedural and should be applied retroactively.¹ In addition, the record referenced an incident when an assistant to the director had informally told an attorney that she could not win a hearing regarding a dispute over medical treatment.

The court concluded that OWCA had violated plaintiffs' due process rights by interfering with the independence of the OWC judiciary. As such, it affirmed the trial court's decision enjoining the agency from communicating with WCJ's regarding pending claims, and ordering the agency to take appropriate action to insulate its judges and their staff from undue influence.

b. *Ex Parte* Communications

As a final matter, the court rejected plaintiffs' contention that *ex parte* communications from third parties to the director violate due process. That issue largely centered on complaints from workers' compensation attorneys regarding particular judges and/or pending matters. In each instance, the director referred the complaints to the Chief Judge without taking any action against the judge involved.

The court noted that prior to the district judge's decision, in December of 2015, OWC had already enacted a rule for submitting complaints about workers' compensation judges. (See LAC 40:I.5534). It concluded that plaintiff's failed to prove that the third party communications were forwarded to the judges, or otherwise resulted in any interference or improper influence.

¹ Contrary to the plaintiffs' assertion that OWC instructed its judges to rule that the MTS applied retroactively, multiple judges including this writer reached the opposite conclusion and issued judgments accordingly. The Louisiana Supreme Court ultimately agreed with the agency, holding that R.S. 23:1203.1 and the administrative process adopted under it applied retroactively.

Conclusion:

The First Circuit's decision is a clear defeat for the *Barber* plaintiffs and further validates the MTS review/appeal process implemented in the Administrative Code. Although the plaintiffs will presumably seek review by the Louisiana Supreme Court, the current rate of approvals by the OWC medical director – some 80% versus the 40% approval rate when suit was filed – may have assuaged some of their concerns.

Whether the process works as intended is a broader issue. Louisiana's treatment guidelines have not been substantially updated since they were enacted almost eight years ago. A 2015 update based on changes to Colorado's guidelines was opposed and ultimately withdrawn. Likewise, a current proposal to update chronic pain guidelines will certainly face challenges from the business community, which has largely been excluded from the current incarnation of the state's Workers' Compensation Advisory Council.

Legitimate concerns exist based on judicial decisions that have arguably invalidated delays to appeal decisions of the OWC medical director, and/or regarding evidence that may be considered on appeal. Further, under the current system, all disputed treatment requests funnel through a single physician who serves at the pleasure of the Governor and his appointees. As such, changes in administration have seen sudden and substantial shifts in what is or is not deemed "necessary" medical treatment. If the goal of workers' compensation is to expedite good medical treatment and return injured workers to the workforce, it seems short-sighted to allow the propriety of treatment to ebb and flow with the tides of electoral fortune.