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“Outlook for Future LA Workers’ Compensation”

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I. INTRODUCTION

- Taylor Porter represents the Office of Workers’ Compensation Administration (OWCA) in the *Barber* lawsuit, which was filed in April 2013.
- The *Barber* plaintiffs challenged the constitutionality of certain provisions under La. R.S. 23:1203.1 and its implementing regulations and sought an injunction of the challenged provisions of this “new” workers’ compensation claims administration system.
- After several years of litigation, the district court ultimately rendered Judgment in March 2017, granting the permanent injunction as requested by the plaintiffs.
- The OWCA suspensively appealed that Judgment in June 2017 and argued before the First Circuit Court of Appeal in November. The appeal is still pending.
- All statutes and regulations challenged in the suit remain in effect unless and until all appeals are exhausted and the Judgment is affirmed.

II. BRIEF OVERVIEW OF THE CURRENT SYSTEM

- La. R.S. 23:1203.1 was enacted in 2009 and became effective in 2011 when its implementing regulations were adopted by the OWCA.
- The statute achieved the following:
 - Created a Medical Advisory Council of physicians who developed (and is charged with reviewing and amending) the Medical Treatment Guidelines (MTGs) that define the medical care, services, and treatment that are presumptively deemed necessary and, therefore, due by an employer to the employee.
 - Created a Workers’ Compensation Advisory Council made up of appointed members who represent stakeholders in the workers’ compensation system, including plaintiff and defense attorneys, physicians and the OWCA. The Advisory Council provides input to proposed rules and regulations before they are promulgated or modified.
 - Created a three-tier system for the efficient and timely review and administration of workers’ compensation requests for medical care, services, and treatment:
 - Form LWC-WC-1010: initial request for authorization of medical treatment submitted by an employee’s medical provider to the employer or workers’ compensation insurer (the “payor”).

- Form LWC-WC-1009: appeal from a 1010 request that has been denied or “deemed denied” reviewed by the Medical Director (a position created by the statute).
 - Form LWC-WC-1008: appeal from the Medical Director’s 1009 decision to an OWCA judge.
- The *Barber* plaintiffs asserted five constitutional challenges to La. R.S. 23:1203.1 and its implementing regulations as the bases for the permanent injunction. The district court found in favor of the plaintiffs on four of those challenges:

III. PLAINTIFFS’ CONSTITUTIONAL CHALLENGES

1. Automatic “Tacit” Medical Treatment Denials

- La. R.S. 23:1203.1(J) provides that after a medical provider has submitted a request for authorization of treatment to a payor, the payor “shall notify the medical provider of their action on the request within five business days of receipt of the request.”
- The OWCA has promulgated regulations (LAC 40:2715(E)(2) and (H)) to provide that a request be deemed denied if the payor fails to respond within five business days of receipt of the request.
 - If a claimant’s Form 1010 request is deemed denied, the claimant can file a Form 1009 appeal of the denial or resubmit a Form 1010 request.
 - The “tacit denial” of Form 1010 requests is consistent with stakeholders’ practice under the prior workers’ compensation system. That is, when a carrier/employer did not respond to a request for treatment, injured workers’ attorneys proceeded as if the request had been denied and litigated the presumably disputed claim.
 - The regulation promulgated by the OWCA provides for tacit denial, rather than tacit approval, of a treatment request in order to:
 - Prevent the possibility that an injured worker undergoes treatment (particularly surgeries) which could ultimately be determined to be medically unnecessary.
 - Ensure that doctors will not administer care that could ultimately be determined to be medically unnecessary, in which cases they would not likely be compensated for the care rendered.
- The Court enjoined these regulations on grounds that they are not specifically authorized by La. R.S. 23:1203.1
- **THE OUTLOOK:** If the *Barber* injunction is upheld, the statute, on its own, does not address what happens if the payor fails to respond within five days. Without legislative action, injured workers’ Form 1010 claims could potentially be in “limbo” without a mechanism to move the claim forward. Any such

legislative action should also contemplate the OWCA's rationale with respect to tacit approval vs. tacit denial.

2. Procedural and Substantive Due Process

a. Procedural Due Process: The Compilation of the 1009 Appeal Record

- The district court found that the 1009 appeal process violates due process because it does not provide:
 - An adequate procedural mechanism for the injured worker to be notified of or object to the evidence submitted by the payor before the Medical Director considers the record.
 - A procedural mechanism or safeguard for compilation of the administrative record.
 - An opportunity for a claimant or his health care provider to be heard by the Medical Director.
- The current procedures for a claimant to submit a grievance to the Medical Director, as well as guidelines for the presentation of supporting evidence to the Medical Director, provide:
 - The 1009 submission and its supporting documentation must be sent to the carrier/employer.
 - The OWC must notify all parties of receipt of the 1009 submission.
 - The regulation then addresses the steps for the carrier/employer to respond with its own evidence, including the obligation to provide a copy of its submission to the claimant. The parties must certify on their 1009 submission forms that they have sent a copy of the submission to each other.
 - Under the current administration, a complete Form 1009 record is scanned into a docketing system and held for approximately seven days before the Medical Director attempts to review the record. During this period, the parties have an opportunity to submit additional information.
- The findings regarding an opportunity to be heard essentially amount to a finding that injured workers are entitled to a hearing before the Medical Director in which a claimant's subjective complaints and the recommendation of a claimant's treating physician should be given some degree of deference.
- Under the current system:
 - Medical necessity is codified. The Medical Director does not assess medical necessity in his review of a Form 1009 submission.
 - The Medical Director reviews only the clinical data in the Form 1009 submission to determine whether it meets the criteria set forth in the MTGs. The clinical data should address all of the MTGs criteria, including for example, a claimant's subjective complaints in the medical history.

- **THE OUTLOOK:** The statutes and regulations enjoined in the *Barber* ruling essentially eliminate the 1009 appeal process. There are two schools of thought as to how the system would function in the absence of the 1009 appeal process:
 - View 1: The current system would be “gutted” without any legal default or mechanism for processing claims beyond a decision on a request for authorization.
 - View 2: Existing statutes under Title 23 (that are not subject to the injunction) confer jurisdiction on the workers’ compensation courts to hear appeals from decisions on requests for authorization, much like the system prior to the enactment of La. R.S. 23:1203.1.

b. Procedural and Substantive Due Process: The 1008 Appeal Process

- The district court further determined that the 1008 appeal process violates procedural and substantive due process.
 - The district court found that the OWCA does not have a rule, regulation, policy or guideline that allows a party to submit additional evidence to the OWCA judge on appeal from the Medical Director’s 1009 decision.
 - The right to supplement the record on 1008 appeal is dictated by the controlling appellate jurisdiction of the OWCA court in which a claimant brings his appeal. There is a split among the Louisiana Courts of Appeal on this issue, so the OWCA judges follow the decision of their respective circuits.
 - The district court further deemed the “clear and convincing” burden of proof governing the 1008 appeal to be “unrealistic.”
- **THE OUTLOOK:** Legislative action could resolve the split among the circuits by clarifying the statutory provisions that govern the 1008 appeal process. The “clear and convincing” burden of proof governing this appeal procedure is also a legislative prerogative.

3. Variances from the Medical Treatment Schedule

- The district court also permanently enjoined, restrained and prohibited the OWCA from enforcing the regulation that governs a request for a variance from the medical treatment schedule. The court ruled this regulation was unconstitutional because it requires a claimant to meet “a higher burden of proof” than that which is statutorily required.
 - The statute (La. R.S. 23:1203.1(I)): the necessity of a variance must be “demonstrated by a preponderance of the scientific medical evidence.”
 - The regulation (LAC 40:2715(L)): a request for a variance must be submitted to the Medical Director with “scientific medical literature that is higher ranking and more current than the scientific medical literature

contained in the medical treatment schedule, and which supports approval of the variance.”

- **THE OUTLOOK:** While, arguably, the regulation implements the standard set by the statute, consistent with the Legislature’s intent, this is an area that can be modified to address the issues raised by the plaintiffs. Considerations for resolution include revising the regulation to mirror the statute.

4. Judicial Independence: Separation of Powers

- The district court concluded that the OWCA had “violated the separation of powers doctrine by “compromising judicial independence.” The district court permanently enjoined, restrained and prohibited Defendants from:
 - Allowing anyone to attempt to communicate, via the Defendants, with OWCA judges about workers’ compensation claims; and
 - From engaging in any off-the-record communication with party litigants or [their] representatives about pending litigation, without all parties present.
- Additionally, the district court ordered Defendants:
 - “[T]o take all action necessary” to eradicate and insulate OWCA judges from “improper influence.”
- The district court’s findings focused primarily on the evidence and testimony regarding a program implemented by the previous administration. The program involved review of closed case files and observation of workers’ compensation judges in the courtroom, as part of an initiative to improve the overall administration of the OWCA courts.
 - The bases for the court’s findings are moot to the extent that program ended in late 2013, and the OWCA is now under a different administration.
 - Even if this portion of the Judgment is upheld, the OWCA’s operations should remain unaffected, as the OWCA is not engaging in any of the enjoined activities.
- The OWCA promulgated LAC 40:5534 in December 2015 to provide a procedure for the submission and investigation of complaints alleging judicial misconduct or disability:
 - Complaints alleging misconduct or disability on the part of any workers’ compensation judge be submitted to the OWCA Director in writing.
 - If the complaint concerns a pending matter, the complainant must certify that a copy of the complaint has been provided to all parties and/or their counsel of record.
 - Any complaints that “solely criticize a judge’s official decision making or claim judicial error subject to appellate review” are deemed “frivolous” and must be rejected.