

DARVEL BURGESS

*

NO. 2015-CA-0918

VERSUS

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COURT OF APPEAL

SEWERAGE & WATER
BOARD OF NEW ORLEANS

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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LOBRANO, J., DISSENTS WITH REASONS.

I respectfully dissent from the majority opinion. I remain unconvinced that Louisiana law affords the employee an unfettered choice of pharmacy in all situations, and further, I do not find that a determination whether the employee is entitled to his choice of pharmacy ends the inquiry of whether payment of the disputed pharmacy expenses is due or in what amount.

La. R.S. 23:1203 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.**

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.

(Emphasis added.)

Darvel Burgess introduced evidence of a pharmacy bill by Injured Workers' Pharmacy, an out-of-state provider with a Massachusetts address. The record before us lacks any evidence whether Injured Workers' Pharmacy fits the criteria for a permissible out-of-state provider under La. R.S. 23:1203(A-B) or any evidence of the reimbursement schedule set forth in La. R.S. 23:1034.2. I find that the Office of Workers' Compensation erred by failing to consider these issues. To the extent this circuit has now joined with the Second Circuit in holding that the employee is entitled to his choice of pharmacy, it must be said that the employee's "choice of pharmacy is not boundless." *See Naron v. LIGA*, 49,996, p. 6 (La. App. 2 Cir. 9/9/15), 175 So.3d 475, 478 (finding the employee entitled to his choice of pharmacy but reversing the award of prescription medication expenses to an out-of-state pharmacy).

Further, this case is distinguishable from *Lafayette Bone & Joint Clinic v. Louisiana United Bus. SIF*, 2015-2137 (La. 6/29/16), 194 So.3d 1112. In *Lafayette Bone & Joint Clinic*, the issue was the applicability of La. R.S. 23:1142 to instances in which an in-state provider of pharmaceuticals incurred expenses without the consent of the employer. *See* 2015-2137, pp. 9-10; 194 So.3d at 1120. In the case *sub judice*, it is uncontested that Injured Workers' Pharmacy is an out-of-state provider. Thus, La. R.S. 23:1203(B) provides that the employer's obligation is limited to the reimbursement schedule.

Accordingly, I would reverse the award for the prescription medication expenses of Injured Workers' Pharmacy, and I would remand this matter to the Office of Workers' Compensation for determination of whether pharmacy expenses are due to Injured Workers' Pharmacy as an out-of-state provider, and if so, the amount of expenses due pursuant to the reimbursement schedule. *See, e.g.,*

Savoy v. Cecil Perry Imp. Co., 96-889, p. 19 (La. App. 3 Cir. 2/5/97), 691 So. 2d 692, 703, *as amended on reh'g* (La. App. 3 Cir. 4/7/97).