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July 28, 2017

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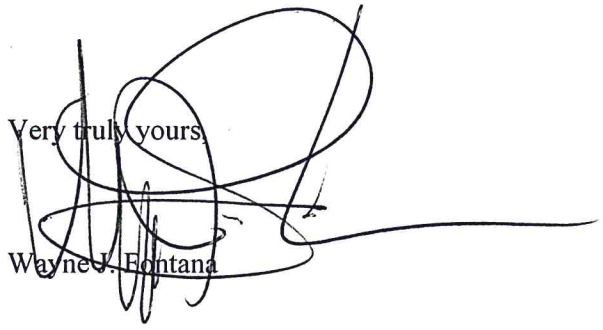
via email:
Gary Patureau
LASIE

RE: Darvel Burgess v. Sewerage and Water Board of New Orleans
Louisiana Supreme Court – Docket no. 2016-C-2267
Fourth Circuit Court of Appeals – Docket no. 2015-CA-0918
Our file no. (6280) 11858

Dear Gary:

I am attaching a case summary which hopefully comprehensively describes the impact of the Burgess decision. It's probably impossible to overstate the importance of this decision as I believe this employer victory to be not only complete and overwhelming regarding the pharmacy choice issue, but it also provides us with viable arguments as we continue to fight on other expensive and equally important issues. If any of you have any questions or need further information regarding the decision, please contact us.

With best regards, I remain



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Enclosure(s)

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Darvel Burgess v. Sewerage & Water Board of New Orleans

On June 29, 2017, the Louisiana Supreme Court issued a landmark decision in the *Burgess v. Sewerage and Water Board of New Orleans* case. This decision was the culmination of a multi-year battle between employers/payors and both employee attorneys and price-gouging pharmacies. The decision resolved a 2-2 split in the Appellate Courts regarding whether the employee or employer has the choice of pharmacy. Given the abuses of Injured Workers Pharmacy, certain physician dispensing and the very practice of drug re-packaging at grossly inflated prices, the Supreme Court's recognition of employer choice of pharmacy certainly impacts Louisiana's workers' compensation system to the tune of tens of millions of dollars. For several years, our firm has filed a series of amicus briefs on behalf of employer/payors and a multitude of business groups and associations, including the Louisiana Association of Business and Industry (LABI) and the Louisiana Association of Self-Insured Employers (LASIE). LABI acts as the state Chamber of Commerce and the largest business association in the state and LASIE is a watchdog of workers' compensation issues for Louisiana's very large self-insured business community.

In the *Burgess* case, however, and as the case proceeded through the court system, we were eventually engaged directly by the Sewerage and Water Board (S&WB) to represent the Board itself, and on May 3, 2017, we orally argued the pivotal issues surrounding pharmacy choice to the Louisiana Supreme Court. As mentioned, the Court rendered its employer favorable decision on June 29, 2017.

CASE BACKGROUND AND SUMMARY OF S&WB ARGUMENTS

The Injured Workers Pharmacy ("IWP") has for many years taken advantage of a loophole in the Louisiana medical fee schedule by merely repackaging medication and setting its own prices, free of market competition, at levels many times ten to twelve times higher than could be obtained at either local pharmacies or national drug store chains. IWP benefited from these obscene profits as did employee attorneys who sought to dramatically increase the future pharmaceutical exposure of their cases for settlement purposes. To combat this unconscionable price setting scheme, we provided the Supreme Court with three reasons why the IWP billings should be either completely disallowed or severely limited:

1. IWP is an impermissible out-of-state pharmacy not entitled to reimbursement from any party or entity;

2. Alternatively, IWP had not obtained prior authorization pursuant to La. R.S. § 23:1142(B) and was thereby limited to $750.00; and

3. Under a combination of Louisiana workers' compensation statutes, the employer, the Sewerage and Water Board, had the choice of pharmacy and IWP was not its choice.

OVERALL RESULT

The Supreme Court ultimately found in favor of employers on all issues but, in addition, recognized several important principles for employers/payors in pharmacy cases as well as perhaps in other healthcare provider cases. The decision accepted virtually all of the S&WB arguments, and, in many instances, the decision adopted very similar language as that contained in the S&WB briefs. Additionally, the Supreme Court decision relied upon the same exact cases and statutes presented in the S&WB brief.

IMPERMISSIBLE OUT-OF-STATE PROVIDER

On this issue, the Supreme Court acknowledged that statutory law "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.'" Since IWP is an out-of-state medical provider and since drug dispensing is available in Louisiana from hundreds if not thousands of sources, IWP's prices must be comparable to in-state prices. Under its current business model, those prices are significantly inflated thereby taking IWP out of the game under its current business model and practices.

$750.00 CAP

Some thirty years ago, our firm drafted legislative language ultimately adopted by the legislature which imposed a $750.00 cap per healthcare provider unless prior consent to the medical services was obtained by the healthcare provider. The statute meant to financially absolve both the employer and the employee from any charges exceeding $750.00, and it also intended to impose a duty on healthcare providers to obtain pre-authorization or be at risk of not being paid. Adopting our argument as to why this $750.00 limit applied, the Supreme Court in *Burgess* recognized that "the word 'treatment' under 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." As a result, the pre-approval requirements and the $750.00 cap absent prior consent apply to the dispensing of prescription medications from whatever source (in state pharmacies, out-of-state pharmacies or physicians *e.g.*).

SUPREME COURT'S DECLARATION ON EMPLOYER'S CHOICE OF PHARMACY

By far, the most important proclamation in Burgess is its recognition that the employer has the choice of pharmacy. This will allow employers to choose the most effective and cost efficient method of delivering necessary drugs to injured workers. Price gouging can be avoided and substantial savings can be achieved. This holding appears to put a stake in the heart of IWP and similar entities' practices of re-packaging and setting their own exorbitant prices. Under its present method of operation, IWP should be out of business in Louisiana and their predatory prices a rather expensive footnote in Louisiana workers' comp history.

We had long argued to the courts that the employer's obligation "to furnish all necessary drugs" could be properly discharged through employer choice. The obligation is to "furnish" the drugs, not to "pay" for them as required by an Alabama statute and Alabama caselaw improperly relied upon in earlier 4th Circuit appellate decisions which had established employee choice. The Supreme Court ultimately accepted our argument.

Key to the Court's finding of employer choice was the Court accepting the distinction between a choice of physician and a choice of pharmacy. Again tracking our brief language, the Supreme Court declared the following:

> "By contrast, the legislature has specifically delegated to the employee 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... Notably, the legislature utilized the very specific term 'physician', rather than the more expansive 'healthcare provider' which is defined in the LWCA to include pharmacies."

THE DEATH OF LIBERAL CONSTRUCTION

At our urging in multiple past amicus briefs and the S&WB briefs in *Burgess* (the case arrived at the Supreme Court twice), the 2002 legislative purpose language amendments to the LWCA were finally cited and recognized by the Courts. In two important areas, the Supreme Court noted, quoted and applied those reforms. We had asked the Supreme Court to recognize this change in the law in an amicus brief which we filed in the recent *Lafayette Bone & Joint* case. That case ultimately found that physician-dispensed medication was subject to the $750.00 cap. To our knowledge, the Supreme Court decisions in *Lafayette Bone and Joint* and *Burgess* are the first times that the purpose statute, La. R.S. § 23:1020.1, has ever been cited in any Louisiana court decision.

That statute prohibits broad, liberal construction in favor of either employees or employers, and it includes an explicit pronouncement that when the workers' compensation statutes are to be liberalized, broadened or narrowed, such actions shall be the exclusive purview of the legislature. The off quoted and judge created, decades old statement that "workers' compensation is social legislation to be liberally construed in favor of the employee" is dead.

The Supreme Court seized the S&WB's arguments regarding impermissible expansion of the law and, again, tracking language very similar to that contained in the S&WB brief, held the following:

> "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... 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)... 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).... Thus, while the injured employee is entitled to choose his treating physician under the LWCA, we hold that the law does not provide the employee a right to choose a specific pharmaceutical provider."

The bottom line is that the Supreme Court accepted the distinction between "physician" and "pharmacy," and refused to expand the employee's physician selection rights to include the right to choose a pharmacy. In contrast, the Supreme Court specifically determined that "the employer has the right to choose the pharmacy to furnish necessary prescription drugs to an injured employee in a workers' compensation case."

COST IS A VALID CONSIDERATION FOR EMPLOYERS

After repeatedly asking the Court to recognize Section 1020.1's stated purpose of the workers' compensation system, "to facilitate injured workers' return to employment at a reasonable cost to the employer" (emphasis added), the Supreme Court noted that "the expression of legislative intent set forth in La. R.S. § 23:1020.1 makes it clear that the reasonableness of medical costs is an important consideration." The Court even acknowledged that Section 1034.2(D) leaves open "the possibility that medical fees, even though falling within the amount set forth the reimbursement schedule, may be deemed unreasonable, unnecessary or not 'usual and customary', and therefore not subject to compensation under certain circumstances."

SUMMARY OF BURGESS HOLDINGS

- Out-of-state providers are allowed only when the care, services or treatment are not reasonably available in Louisiana or when they can be provided at comparable costs.

- The $750.00 cap of La. R.S. § 23:1142(B) applies as pharmacy dispensing is "treatment" under this statute.

- Employers are afforded the choice of pharmacy to "furnish" drugs to injured workers.

WHAT BURGESS HAS NOT DECIDED

About the only issue which the Supreme Court did not fully resolve was what constitutes consent for charges over the $750.00 limit. Regarding consent, the Supreme Court stated: "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."

RECOMMENDATIONS

With this in mind, employer/payors who have PBMs which issue prescription cards should continue to advise employees when the cards are issued that they are prohibited from obtaining their medication from any source other than participating pharmacies, and that the bills from any other sources, including those from their physicians, will not be paid. While it has not been ruled out that the first $750.00 might still have to be paid, employees, physicians and non-participating pharmacies should not be advised that only up to $750.00 is authorized. Non-approved entities should simply be advised that they do not have the authorization to dispense. Such dispensers should also be alerted that the Louisiana Supreme Court case of *Burgess* has recognized that the employer/payor has the right to select the pharmacy, that they are not the employer/payor's selection and that their bills, therefore, cannot be paid. Again, however, it is still possible that $750.00 would be owed to a provider who did not obtain prior consent to dispense drugs, but these providers should certainly be informed that they are not the employer/payor's choice of pharmacy as early as practical or in advance, if possible. As previously mentioned, the predatory pricing of IWP and like pharmacies should be over unless, of course, an employer/payor consents to their dispensing or otherwise simply pays their outlandish prices.

BURGESS LANGUAGE HELPFUL IN OTHER DISPUTES

In light of the Supreme Court's recognition of drug dispensing as "treatment," employers can now argue, in opposition to First Circuit decisions, that prescriptions are subject to the 1010/1009 medical director review process. Finally, and since cost is now a reasonable consideration for employers, those charges which don't neatly fit into the fee schedule can be scrutinized for their reasonableness. A few immediate battles which come to mind are the cost of compound drugs, the cost of medical appliances and implants, and the outrageous billing demands of outpatient surgical facilities.

We realize this is a lot of information concerning this important decision, so please feel free to contact us should you have any questions or need for further information.

Very truly yours,

Wayne J. Fontana

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