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Louisiana Workers Compensation

Chapter 10

Medical Benefits

An employee injured in a job accident is entitled to "all necessary drugs, supplies, hospital care and services, medical and surgical treatment, and any nonmedical treatment recognized by the laws of [Louisiana] as legal" for the treatment of that injury.[1] Louisiana provides guidelines for what constitutes "necessary" medical treatment by promulgating, through the Office of Workers' Compensation's Medical Director, a medical treatment schedule.[2] If a dispute arises regarding the necessity of medical treatment, an "aggrieved party," meaning the injured employee or the medical provider that recommended the treatment, may request that the Medical Director review the proposed treatment and determine whether it conforms with the medical treatment schedule.[3] The Medical Director's decision may be appealed, but it will only be overturned if it is shown by clear and convincing evidence that the decision was not in accordance with the medical treatment schedule.[4] The maximum amount that an employer is required to pay for medical services provided to an injured employee is set by a reimbursement schedule published by the Office of Workers' Compensation.[5]

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[1] *La. R.S. 23:1203(A)(1).*
[2] *La. R.S. 23:1203.1(B).*
[3] *La. R.S. 23:1203.1(J)(1).*
[4] *La. R.S. 23:1203.1(K). The appeal is made by filing a Disputed Claim for Compensation with the Office of Workers' Compensation. Unlike the initial request for a decision from the Medical Director, which may only be filed by the employee or medical provider, an appeal may be filed by any party (employer, employee or medical provider) that disagrees with the Medical Director's decision.*
[5] *La. R.S. 23:1203(B).*

Choice of Physician

1. Employer and Employee are each entitled to one choice of physician per field or specialty

La. R.S. 23:1121(A):

> An injured employee shall submit himself to an examination by a duly qualified medical practitioner provided and paid for by the employer, as soon after the accident as demanded, and from time to time thereafter as often as may be reasonably necessary and at reasonable hours and places, during the pendency of his claim for compensation or during the receipt by him of payments under this Chapter. The employer or his workers' compensation carrier shall not require the employee to be examined by more than one duly qualified medical practitioner in any one field or specialty unless prior consent has been obtained from the employee.

La. R.S. 23:1121(B):

> The employee shall have the right to select one treating physician in any field or specialty.
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> . . . . .
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> After his initial choice the employee shall obtain prior consent from the employer or his workers' compensation carrier for a change of treating physician within that same field or specialty. The employee, however, is not required to obtain approval for change to a treating physician in another field or specialty.

Although an injured employee has right to select one treating physician in any field or specialty, the treatment must be necessary in order for employer to be obligated to pay for those expenses. Scott v. Piccadilly Cafeteria, App. 3 Cir.1998, 97-1584 (La. App. 3 Cir. 4/1/98), 708 So.2d 1296. The employee is required to submit only for examination by the employer's choice of physician, not for treatment; the employee has the right to be treated by a physician of its own choosing. Delafield v. Maples, App.1942, 6 So.2d 41. Also, merely expressing desire to see doctor does not constitute "selection." Baker v. Davison Transport, App. 2 Cir.1994, 26,164 (La. App. 2 Cir. 9/21/94), 643 So.2d 278.

The employer, not the employee, has the right to choose the pharmacy to furnish necessary prescription drugs to an injured employee in a workers' compensation case. Burgess v. Sewerage & Water Board of New Orleans, 2016-C-2267 (La. 6/29/17). One court has held that the Employee's choice of physician does not include a choice of nurse care manager. Baird v. Policy Management Systems, Inc., 731 So. 2d 461 (La. App. 2d Cir. 1999. Another court has held that the Employee's

choice does includer a choice of facility to perform diagnostic tests. Louisiana Clinic v. Patin's Tire Service, 731 So.2d 525 (La. App. 3rd Cir. 1999). More recently, however, the same court questioned that conclusion and noted that the issue of choice of facility in Louisiana Clinic was ancillary to the court's ruling. Gautreaux v. K.A.S. Constr., L.L.C., 05-1192 (La. App. 3 Cir. 2/22/06), 923 So.2d 850, 851.[6]

Choice of Functional Capacity Evaluation (FCE) Provider

The choice of FCE provider deserves its own subsection because Louisiana courts appear to be developing guidelines for determining whether the employer, the employee, or both, have the right to select the FCE provider. Louisiana courts, including the Louisiana Supreme Court, agree that the physical therapist that conducts the FCE is a "medical practitioner," not a "physician." Under La. R.S. 23:1121(A), the employer is responsible for providing a "medical practitioner;" La. R.S. 23:1121(B), only gives the employee a choice of "physician." At least one court stopped the inquiry there. In Gautreaux v. K.A.S. Construction, LLC, 05-1192 (La. App. 3rd Cir. 2/22/06), the court held that, because the physical therapist is a medical practitioner, not a physician, the employer alone has the right to choose the FCE provider.

In Rison v. Lifecare Hosps. of Shreveport, 50,675 (La. App. 2 Cir. 05/18/16) 196 So. 3d 657, the court held that the choice of FCE provider depends on the reason that the FCE is being performed. An FCE may be classified as medical treatment when it is used as a diagnostic reference for treatment purposes, for example to assess a patient's progress or to determine an endpoint for treatment. In such cases, the employee is entitled to a choice of provider. When the FCE is used primarily to determine the employee's ability to return to work, however, it is not medical treatment, and, therefore, the employer has the exclusive choice of provider.

In Clavier v. Coburn Supply Co., 2016-0625 (La. 06/29/17), 161 So.3d 15, the Louisiana Supreme Court confirmed that La. R.S. 23:1121(A) requires an injured employee to submit to an examination by a "medical practitioner" provided by the employer, while La. R.S. 23:1121(B) grants the employee the right to select one "treating physician" in any field or specialty. Based on the differing terms used in the two statutes, the court concluded that "an employee is entitled to select a physician for treatment purposes, and not any other medical practitioner for an examination." The issue in Clavier was whether the employee was entitled to a choice of FCE provider to respond to an FCE previously performed by the employer's choice of provider. On the facts of that case, the employee was not entitled to a choice of FCE provider because she was seeking it for litigation purposes, i.e., to contest the results of the initial FCE, not for treatment purposes. The Louisiana Supreme Court muddied the issue somewhat, however, by specifically withholding its opinion on whether the result would have different if the employee had been under a treatment plan by her treating physician calling for an FCE.

2. Consenting to treatment by employer's physician does not equal choice.

Before 2003, some Louisiana courts had held that an employee could make a "de facto" choice of physician by consenting to treatment by a physician selected by the employer. In Smith v. Southern Holding, Inc., 2002-1071 (La. 1/28/03), however, the Louisiana Supreme Court overruled these cases and held that an employee has an absolute right to select one physician in any field, even if the employee had consented to prolonged treatment, including surgery, with a physician selected by the employer.

In response to Smith, the Louisiana legislature clarified the circumstances under which a physician initially selected by an employer may become the employee's choice. For a physician chosen by the employer to become the employee's choice, the employee must (1) receive written notice of the employee's right to choose a physician; (2) attend an initial evaluation with the physician chosen by the employer; and, only then, after that initial evaluation, (3) complete a choice of physician form promulgated by the Office of Worker' Compensation.[7] The "Choice of Physician Form" completed by the Employee is not conclusive, however. The court will look to the circumstances surrounding the selection to determine whether the Employee voluntarily chose the physician named on the form. Skelton v. Hunt Forest Products, App. 3 Cir.2001, 01-0158 (La. App. 3 Cir. 6/6/01), 787 So.2d 1216.

3. Physician who renders emergency treatment is nobody's choice

La. R.S. 23:1121(E):

> Nothing in the Section shall be construed as to provide that a physician who, regarding the work-related injury, administered emergency treatment only shall be the physician of choice of either the employee or the employer.

4. Consenting to continued treatment by emergency physician does equal choice

In Snearl v. Kelly's Industrial Services, Inc., 06-0218, 924 So.2d 138 (La. 3/17/06), the Louisiana Supreme Court held:

When (1) a physician provides treatment to an injured employee at an emergency room following a job accident, and (2) the employee continues to treat with that physician after the initial emergency treatment, the physician is the employee's choice of physician.

[7] La. R.S. 23:1121(B)(2)(b).

Compare Snearl to the holding of Smith v. Southern Holding, Inc., (discussed above), in which the Louisiana Supreme Court held that an employee has an absolute right to select one physician in any field, even if the employee had consented to prolonged treatment, including surgery, with a physician selected by the employer. The difference in the two cases is that Smith involved treatment by the employer's choice of physician, whereas the employer was not involved in the selection of the emergency room physician in Snearl. When the employee is treated by any physician not specifically selected by the employer, that physician is regarded as the employee's choice of physician.[8]

5. Employer may not arbitrarily and capriciously, or without probable cause, deny Employee's request for change of treating physician.

La. R.S. 23:1121(C):

> If the employer or insurer has not consented to the employee's request to select a treating physician or change physicians when consent is required by this Section, and it is determined by a court having jurisdiction that the withholding of such consent was arbitrary and capricious, or without probable cause, the employer or the insurer shall be liable to the employee for reasonable attorney's fees related to this dispute and for any medical expense so incurred by him for an aggravation of the employee's condition resulting from the withholding of such physician's services.

The employee is not entitled to a change of physicians merely because the initial choice of physician released the employee to return to work. Reed v. St. Francis Medical Center, App. 2 Cir. 2009, 44,211-WCA (La. App. 2 Cir. 4/8/09); Boudreaux v. Albertson's, App. 3 Cir.2002, 01-1124 (La. App. 3 Cir. 2/6/02), 815 So.2d 930; Lang-Parker v. Unisys Corp., 809 So.2d 441 (La. App. 1st Cir. 2001); Wiley v. Kenneth Parker Logging, App. 3 Cir.1998, 97-1247 (La. App. 3 Cir. 3/6/98). *But see*, Pekinto v. Olsten Corp., App. 4 Cir.1991, 587 So.2d 68, which found that the employer arbitrarily denied change when the initial physician's release to return to work was contrary to evidence concerning the employee's ongoing medical problems. The employee is entitled to change physicians if the initial choice of physician is unwilling or unable to continue treating the employee. Livaccari v. Alden Engineering Service, App. 4 Cir.2001, 2000-0526 (La. App. 4 Cir. 3/21/01), 785 So.2d 915.

[8] La. R.S. 23:1121(B)(2)(a)

6. Employee is entitled to additional examination at employee's expense

La. R.S. 23:1121(D):

> After all examinations have been conducted but prior to any order directing the injured employee to return to work, the employee shall be permitted, at his own expense, to consult with and be examined by a physician of his own choosing. Such report shall be considered in addition to all other medical reports in determining the injured employee's fitness to return to work. Should disagreement exist, after such consultation and examination, as to the fitness of the employee to return to work, the provisions of R.S.23:1123 shall be followed.

The Third Circuit has held that, after the initial visit at employee's expense, the employer must pay for treatment by the newly selected physician if that treatment is necessary. Stelly v. United Parcel Service, 600 So.2d 156 (La. App. 3rd Cir. 1992).

7. Remedies for Failure to Comply with Statute

Employee's remedy when Employer does not consent to treatment by Employee's choice of physician or arbitrarily and capriciously does not consent to change of treating physician:

(1) Expedited hearing (La. R.S. 23:1121(B): hearing date set by the court within three days of receiving motion, hearing date no less than ten and no more than thirty days from the date employee receives notice, by certified or registered mail); and

(2) Attorney's fees related to the dispute (La. R.S. 23:1121(C).

Employer's remedy when Employee refuses to submit medical examination by Employer's choice of physician or refuses to submit to Independent Medical Examination:

(1) Expedited hearing (La. R.S. 23:1124 (B): same procedure as described above; and

(2) Suspension of benefits and prosecution rights until the employee complies. (La. R.S. 23:1124(A) and (B).

Independent Medical Examinations

The Louisiana Workers' Compensation Act includes two statutes regarding Independent Medical Examination. If a case is not in litigation, the parties are limited to requesting an independent medical examination through the Office of Workers' Compensation. If a case is in litigation, the parties may request and independent medical examination through the Office of Workers' Compensation or through the workers' compensation judge.

1. IME selected by the Office of Workers' Compensation

La. R.S. 23:1123 (prior to August 1, 2012):

> If any dispute arises as to the condition of the employee, the director, upon application of any party, shall order an examination of the employee to be made by a medical practitioner selected and appointed by the director. The medical examiner shall report his conclusions from the examination to the director and to the parties and such report shall be prima facie evidence on the facts therein stated in any subsequent proceedings under this Chapter.

Bob's Plumbing and Heating, Inc. v. Reynolds, App. 5 Cir.1998, 98-325 (La. App. 5 Cir. 10/14/98), 719 So.2d 1169, held that a dispute concerning the employee's work status is not a dispute concerning the condition of the employee and, therefore, does not meet the requirements for an Independent Medical Examination under La. R.S. 23:1123. In Bob's Plumbing, both physicians concluded that the employee had reached maximum medical improvement. Employer's doctor released to return to work without restriction; employee's doctor released to return to work with restrictions. The court held that neither party was entitled to an IME.

In response to Bob's Plumbing, the Louisiana legislature amended La. R.S. 23:1123, effective August 1, 2012, to read as follows:

> If any dispute arises as to the condition of the employee, or the employee's capacity to work, the director, upon application of any party, shall order an examination of the employee to be made by a medical practitioner selected and appointed by the director. The medical examiner shall report his conclusions from the examination to the director and to the parties and such report shall be prima facie evidence on the facts therein stated in any subsequent proceedings under this Chapter.

McCrary v. New Orleans Health Corp., App. 4 Cir.2001, 2001-1632 (La. App. 4 Cir. 9/26/01), 798 So.2d 1085, held that a dispute concerning the necessity of diagnostic tests is not a dispute concerning the condition of the employee, and, therefore, the trial court properly denied request for independent medical examination. If the Employee submits to the IME, however, the court will not exclude the IME report on the basis that there was no dispute concerning the Employee's condition. Vanderberg v. Atlantic Southeast Airlines, 831 So.2d 1067 (La. App. 3rd Cir., 2002).

2. IME selected by workers' compensation judge

La. R.S. 23:1124.1:

> . . . the workers' compensation judge, on his own motion, may order that any claimant appearing before it be examined by other physicians.

A judge's order to have the employee examined by another physician will not be overturned absence an abuse of discretion. Watkins v. Asphalt Associates, Inc., App. 3 Cir.1996, 96-249 (La. App. 3 Cir. 12/4/96), 685 So.2d 393.

3. Procedure for Independent Medical Examinations

La. R.S. 23:1317.1:

> A. Any party wishing to request an independent medical examination of the claimant pursuant to R.S. 23:1123, 1124.1 shall be required to make its request at or prior to the pretrial conference. Requests for independent medical examinations made after that time shall be denied except for good cause or if it is found to be in the best interest of justice to order such examination.
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> B. An examiner performing independent exams pursuant to R.S. 23:1123 shall be required to prepare and send to the office a certified report of the examination within thirty days after its occurrence.
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> E. When the independent medical examiner's report is presented within thirty days as provided in this Section:
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> (1) The examiner shall be protected from subpoena except for a single trial deposition. However, upon a proper motion for cause, the workers' compensation judge may order further discovery of the independent medical examiner as deemed appropriate.

(2) Except to schedule the deposition or further discovery as described above, the office of the independent medical examiner shall not be contacted regarding the claimant by any party, attorney, or agent.

F. Objections to the independent medical examination shall be made on form LDOL-WC-1008, and shall be set for hearing before a workers' compensation judge within thirty days of receipt. No mediation shall be scheduled on disputes arising under this Section.

Improper contact with independent medical examiner by any party, attorney, or agent regarding workers' compensation claimant is expressly prohibited by statute, and the court will not hesitate to exclude IME reports when circumstances indicate even the slightest possibility that physician's opinion or neutrality may have been compromised. Duhon v. Snelling Personnel Services, App. 3 Cir.1997, 97-347 (La. App. 3 Cir. 10/8/97), 702 So.2d 922. Improper contact with independent medical examiner regarding workers' compensation claimant does not require exclusion of IME report, however, when the contact occurs after IME formed his medical opinion. Duhon v. Snelling Personnel Services, App. 3 Cir.1997, 97-347 (La. App. 3 Cir. 10/8/97), 702 So.2d 922.