

PEDRO BURGAA/K/A JUAN RODRIGUEZ

NO. 23-CA-26

VERSUS

FIFTH CIRCUIT

AMERICAN REMEDIATION GROUP, LLC
AND UNITED WISCONSIN INSURANCE
COMPANY, INC.

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE OFFICE OF WORKERS' COMPENSATION,
DISTRICT 7
STATE OF LOUISIANA
NO. 21-3217
HONORABLE SHANNON BRUNO BISHOP, JUDGE PRESIDING

December 06, 2023

STEPHEN J. WINDHORST
JUDGE

Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Stephen J. Windhorst

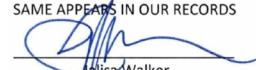
AFFIRMED AS AMENDED

SJW

SMC

FHW

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS


Alisa Walker
Deputy, Clerk of Court

PLAINTIFF/APPELLANT,
PEDRO BURGA PALACIOS
IN PROPER PERSON

WINDHORST, J.

In this *pro se* appeal, claimant/appellant, Pedro Burga a/k/a Juan Rodriguez, seeks review of the Office of Workers' Compensation's November 7, 2022 judgment. For the following reasons, we amend the OWC's judgment to vacate the application of the \$750.00 cap to Dr. Paul Phillips' bill, and affirm the OWC's judgment as amended.

EVIDENCE and PROCEDURAL HISTORY

Beginning in approximately 2018, Mr. Burga worked for American Remediation Group, LLC, performing demolition and cleanup work at properties affected by natural and other disasters.¹ On July 29, 2020, Mr. Burga was injured while assisting in the cleanup of a fire-ravaged property for American Remediation.

As a result, on June 9, 2021, Mr. Burga filed a disputed claim for compensation against American Remediation. Mr. Burga claimed that on July 29, 2020, at 10:30 A.M., he injured himself while cleaning up remnants of a building damaged by a fire when a piece of ceiling and a large lamp fell onto his back and left shoulder. After this incident, American Remediation did not pay him indemnity wage benefits. American Remediation answered the claim, denying the allegations.

This matter proceeded to trial on October 20, 2022, with Mr. Burga representing himself. He testified, but did not call any witnesses. As exhibits, the parties primarily submitted copies of Mr. Burga's medical records and paychecks. The evidence and testimony presented revealed the following:

Mr. Burga testified that on July 29, 2020, his job was to pick up trash that the workers on the roof dropped to him and put it in a black plastic bag. At one point, something fell on him. He fell to the ground and could not get up without help. He testified that he learned from the other workers that a lamp had fallen on him.

¹ During his employment with American Remediation, Mr. Burga was paid under two different names, Pedro Burga and Juan Rodriguez.

One day later, on July 30, 2020, American Remediation took Mr. Burga to Concentra Medical Centers in Kenner, Louisiana, where he complained of moderate back pain and decreased rotation on his left side. An examination revealed bruising, swelling, and muscle spasms, with pain on left rotation movement. An x-ray revealed mild scoliosis and spondylosis deformans, a degenerative disc disease. He was treated with a prescription for medication to reduce pain, inflammation, swelling, and muscle spasms.

On August 3, 2020, Mr. Burga returned to Concentra for a follow up visit with complaints of continued pain. The written medical summary of this appointment indicates that the medical assessment revealed contusion of his left back. The medical provider, however, opined that Mr. Burga could return to modified work/activity that day, including lifting up to ten pounds and finishing his entire shift. The summary also reflects that he had reached approximately 50% of the necessary capacity for the physical requirements of his job.

Although the record contains limited documentation, medical records show that Mr. Burga also received medical treatment from Advanced Medical Group in August and September 2020. According to his medical records summary, Mr. Burga's medical treatment at Advanced Medical Group consisted of the following: clinic visits between August 5, 2020 and September 29, 2020; and physical therapy treatment from August 5, 2020 thru October 12, 2020, all related to his lumbar spine. At his visits on August 5 and September 2, 2020, Mr. Burga did not mention shoulder pain, first reporting left shoulder pain during his September 29, 2020 visit. Coincidentally, on September 29, 2020, Advanced Medical Group provided Mr. Burga with a full duty work release, stating that he could return to his work, without restrictions, as a helper at construction sites, mostly picking up debris and cleaning.

On January 4, 2021, Mr. Burga sought treatment at University Medical Center ("UMC"), during which he underwent a left shoulder MRI scan. At UMC, Dr.

Michael O'Brien reviewed the MRI results and determined that Mr. Burga had a torn rotator cuff and a torn biceps tendon. The UMC treatment providers prescribed physical therapy, which Mr. Burga attended from February to April, 2021. Because the physical therapy did not relieve his pain, in May 2021, Dr. O'Brien recommended that Mr. Burga undergo left shoulder surgery. Based on his evaluation, Dr. O'Brien opined that the work-related accident caused the left shoulder injury.

UMC medical records reflect that Mr. Burga underwent surgery on his left shoulder on July 1, 2022, which was performed by Dr. Paul Phillips, IV. Dr. Phillips reported in Mr. Burga's medical records that typical recovery from this type of surgery is 12 months.

American Remediation introduced into evidence a choice of physician form dated May 26, 2021, in which Mr. Burga selected Dr. O'Brien as his choice of orthopedic surgeon. At trial, claimant acknowledged that his signature appears on the choice of physician form. This form specifies that once an employee selects a doctor, he may not be permitted to choose another doctor in that same field or specialty to treat him for his injury. As discussed below, the form does not contain the signature of an employer representative, as required by La. R.S. 23:1121 B(4).

American Remediation chose Dr. Douglas Lurie to evaluate the claimant and to obtain a second medical opinion. Dr. Lurie concluded that the work-related accident caused Mr. Burga's lumbar pain but not his left shoulder injury. He reached this conclusion primarily because Mr. Burga's initial post-accident medical records referenced lumbar spine pain, but not left shoulder pain. Dr. Lurie found that Mr. Burga first complained of shoulder pain on September 29, 2020, two months after the July 29, 2020 work-related incident.

In response to Mr. Burga's motion to appoint an independent medical examiner, on December 8, 2021, the OWC appointed an independent medical expert,

Dr. William Junius, III, in the field of orthopedics to evaluate Mr. Burga's medical records and to examine him. The OWC ordered the independent medical expert to provide his opinion as to whether Mr. Burga's left shoulder complaints were related to the work accident, and his work status relative to his work-related injuries. In a written evaluation dated February 1, 2022, Dr. Junius concluded that Mr. Burga's left shoulder issues were related to his work accident. Dr. Junius' opinion referenced the fact that Mr. Burga was working a relatively high demand, manual labor job without any complaints of shoulder pain before the incident. He also concluded that while Mr. Burga could not to return to his previous level of employment, he was capable of a low demand job.

According to Mr. Burga's testimony, after the accident, he worked some light duty jobs when available. He would watch his friend's tools so they did not get stolen, helped remove nails, and put lightweight trash in the wheelbarrow.

After trial, in a judgment dated November 7, 2022, the OWC ruled that Mr. Burga had met his burden of proving that (1) he was involved in a work-related accident while in the course and scope of his employment with American Remediation Group, LLC; and (2) he sustained injuries as a result of the accident that occurred in the course and scope of his employment. The OWC, however, ruled that Mr. Burga failed to show that he was disabled as a result of the injuries suffered in the work-related accident. Based on these findings, the OWC denied Mr. Burga past and future indemnity benefits, but awarded him future reasonable and necessary medical treatment related to the work incident. The OWC also found that Mr. Burga selected Dr. Michael O'Brien as his choice of physician in orthopedic surgery, and that Mr. Burga treated with Dr. Phillips without pre-authorization, resulting in payment of Dr. Phillips' bill being capped at \$750.00 under La. R.S. 23:1142(1)(a).

In reasons for judgment, the OWC stated as follows with regard to indemnity benefits:

In the instant case, there is no evidence to show that Claimant is disabled from work as a result of the work accident. In fact, Advanced Medical Group provided a work status report on September 29, 2020 indicating that Claimant could return to work without any restrictions. Additionally, as previously mentioned, Dr. Junius opined that Claimant could return to a low demand job. Based on the evidence presented to the Court, Claimant failed to prove that he is disabled as a result of the work accident.

Mr. Burga appealed this judgment.

LAW and ANALYSIS

Although Mr. Burga's *pro se* brief specifies no assignment of error and presents scant legal argument, based upon the statements made therein, we construe his assignments of error to be: (1) whether the OWC erred in concluding that Mr. Burga failed to show that he is disabled as a result of the injuries he suffered in the course and scope of his employment with American Remediation, and in denying him past and future indemnity benefits; and (2) whether the OWC erred in applying the \$750.00 statutory cap to Dr. Phillips's medical bill under La. R.S. 23:1142(1)(a).

Standard of Review

The appellate court's review of the workers' compensation court's findings of fact is governed by the manifest error or clearly wrong standard. Flores v. Jefferson Feed & Garden Supply, 22-235 (La. App. 5 Cir. 3/29/23), 360 So.3d 112, 119; Barbarin v. TLC Home Health, 02-1054 (La. App. 5 Cir. 4/29/03), 845 So.2d 1199, 1202. As a result, the findings of the workers' compensation court will not be set aside by a reviewing court unless they are found to be manifestly erroneous or clearly wrong in light of the record viewed in its entirety. Mendez v. Reg'l Transit Auth. (TMSEL), 13-297 (La. App. 5 Cir. 11/19/13), 130 So.3d 352, 355. In applying the manifest error/clearly wrong standard, the appellate court does not determine whether the trier of fact was right or wrong, but whether the factfinder's conclusion

was a reasonable one. Soniat v. Crown Buick & Risk Mgmt. Servs., 18-257 (La. App. 5 Cir. 12/12/18), 260 So.3d 1292, 1296, writ denied, 19-58 (La. 3/6/19), 266 So.3d 902. The court of appeal may not reverse the findings of the lower court even when convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Id.; Flores, 360 So.3d at 120.

Indemnity Benefits

To establish entitlement to temporary total disability (TTD) benefits, a claimant must prove by clear and convincing evidence that he is physically unable to engage in any employment or self-employment due to his injury. La. R.S. 23:1221(1)(c); Summers v. Ritz-Carlton New Orleans, 14-800 (La. App. 5 Cir. 5/28/15), 171 So.3d 329, 342, writ denied, 15-1256 (La. 9/25/15), 178 So.3d 569; Jimmerson v. Johnson Storage & Moving Co., 13-962 (La. App. 5 Cir. 5/14/14), 142 So.3d 111, 116-117. A claimant must present objective medical evidence to establish by clear and convincing evidence that she is unable to engage in any type of employment. Summers, 171 So.3d at 343; Fassitt v. Jefferson Parish Hosp. Serv., 07-695 (La. App. 5 Cir. 12/27/07), 974 So.2d 757, 760. An employee is not entitled to collect either TTD or permanent total disability when he is physically able to engage in any employment. Camardelle v. K Mart Corp., 04-224 (La. App. 5 Cir. 7/27/04), 880 So.2d 90, 93.

Thus, in order for Mr. Burga to receive TTD benefits, he was required to prove by clear and convincing evidence that he was unable to engage in *any* employment. “Clear and convincing” in the workers’ compensation context is “an ‘intermediate’ burden of proof falling somewhere between the ordinary preponderance of the evidence civil standard and the beyond a reasonable doubt criminal standard.” Sarrio v. Stalling Const. Co., 04-34 (La. App. 5 Cir. 5/26/04), 876 So.2d 157, 162, writ denied, 04-1593 (La. 10/15/04), 883 So.2d 1059. A claimant must satisfy this

burden unaided by any presumption of disability. Miken Specialties v. Abarca, 16-231 (La. App. 5 Cir. 12/7/16), 209 So.3d 268, 275, writ denied, 17-37 (La. 2/10/17).

The record contains a September 29, 2020 work release from Advanced Medical Group for Mr. Burga. In addition, the medical records contain various opinions regarding whether Mr. Burga's injury was caused by the July 29, 2020 incident that occurred in the course and scope of his employment with American Remediation and whether he was capable of working.

Dr. O'Brien, who was Mr. Burga's choice of physician, related Mr. Burga's left shoulder injury to the July 29, 2020 incident that occurred in the course and scope of his employment and opined that Mr. Burga was unable to work. Dr. Lurie, who evaluated Mr. Burga at American Remediation's request, opined otherwise: that the left shoulder injury was not a result of the incident that occurred in the course and scope of his employment. Dr. Lurie relied on the fact that Mr. Burga's initial presentation was for back pain, and that the shoulder complaints began two months after the work-related incident. Based upon this, Dr. Lurie did not find that Mr. Burga had any work restrictions caused by the work-related injury.

Dr. Junius, the independent medical examiner, opined that Mr. Burga's left shoulder injury was caused by the incident that occurred in the course and scope of his employment, because there was no evidence of any prior left shoulder injury or pain. Dr. Junius' opinion referenced the fact that Mr. Burga was working a relatively high demand, manual labor job without any complaints of shoulder pain before the incident. Dr. Junius, however, concluded that he could return to a low demand job immediately.

Based on the evidence presented, the OWC concluded that Mr. Burga failed to prove he was disabled as a result of the work accident, and did not award him any past or future indemnity benefits.

Considering the OWC's reasonable weighing of the evidence, and Mr. Burga's testimony that he had some jobs after his work-related injury, we do not find the OWC's conclusion that Mr. Burga failed to prove he was disabled due to the accident that occurred while in the course and scope of his employment was manifestly erroneous or clearly wrong. Thus, we find no error in the OWC's denial of TTD benefits to Mr. Burga.

An employee that is not entitled to total temporary disability benefits may recover supplemental earnings benefits (SEB). An employee is entitled to SEB if the employee sustains a work-related injury that results in the inability to earn ninety percent (90%) or more of his average pre-injury wage. La. R.S. 23:1221(3)(a). The employee bears the initial burden of proving by a preponderance of the evidence that the injury caused his inability to earn ninety percent (90%) or more of his average pre-injury wage. Clay v. Our Lady of Lourdes Regional Medical Center, Inc., 11-1897 (La. 5/8/12), 93 So.3d 536, 539; Richard v. HSLI & Touro Infirmary, 12-873 (La. App. 5 Cir. 5/23/13), 119 So.3d 617, 621. Once the employee meets this burden, the burden shifts to the employer who, in order to defeat the employee's claim for SEB, must prove by a preponderance of evidence that the employee is physically able to perform a certain job, and that the job was offered or was available to the employee in his or the employer's community or reasonable geographic region. Id.; La. R.S. 23:1221(3)(c)(i). If the employer meets this burden, then the employee must establish by clear and convincing evidence that he cannot engage in any employment. La. R.S. 23:1221(3)(c)(ii).

Although procedural rules are to be liberally construed in favor of a claimant in worker's compensation cases, he is still required to establish his right to recover by presenting the necessary proof. Dufrene v. S. Indus. Contractors, Inc., 95-759 (La. App. 3 Cir. 1/31/96), 670 So.2d 290, 293. Evidence is required to determine the claimant's earnings or ability to earn. Id.

In this case, Mr. Burga did not meet his initial burden of establishing by a preponderance of the evidence that the injury prevented him from earning 90% or more of his average pre-injury wage. Mr. Burga testified that he had some light duty work after the accident, but there is no evidence in the record to show how often he was working or how much he was paid. We have nothing upon which to calculate his post-injury earnings or to determine the extent to which the injury reduced his earnings. As a result, we find no manifest error in the OWC's denial of SEB to Mr. Burga.

The Cap on Dr. Phillips' bill

An employee has the right to select one treating physician in any field or specialty. La. R.S. 23:1121 B(1). La. R.S. 23:1121 B further states:

(2)(a) If the employee is treated by any physician to whom he is not specifically directed by the employer or insurer, that physician shall be regarded as his choice of treating physician.

(b) When the employee is specifically directed to a physician by the employer or insurer, that physician may also be deemed as the employee's choice of physician, if the employee has received written notice of his right to select one treating physician in any field or specialty, and then chooses to select the employer's referral as his treating specialist after the initial medical examination as signified by his signature on a choice of physician form. The notice required by this Subparagraph shall be on a choice of physician form promulgated by the assistant secretary of the office of workers' compensation and shall contain the notice of the employee's rights provided under R.S. 23:1121(B)(1). Such form shall be provided to the employee either in person or by certified mail.

(3) Paragraph (2) of this Subsection shall not apply to other physicians to whom the employee is referred by the physician selected by the employer unless the employer or insurer has obtained the choice of physician form provided for under Subparagraph (2)(b) separately for any such physician after the initial medical examination with that physician.

(4) In instances where the employee is illiterate or has a language barrier, an authorized representative of the employer or insurer shall attest by his signature on the form that he has reasonably read and explained the form to such employee prior to their signatures.

La. R.S. 23:1142 B(1)(a) provides that:

Except as provided herein, each health care provider may not incur more than a total of seven hundred fifty dollars in nonemergency diagnostic testing or treatment without the mutual consent of the payor and the employee as provided by regulation. Except as provided herein, that portion of the fees for nonemergency services of each health care provider in excess of seven hundred fifty dollars shall not be an enforceable obligation against the employee or the employer or the employer's workers' compensation insurer unless the employee and the payor have agreed upon the diagnostic testing or treatment by the health care provider.

An employer has a statutory duty to furnish to an employee all necessary medical treatment caused by a work-related injury. La. R.S. 23:1203 A; Jones v. Int'l Matex Tank Terminal, 96-957 (La. App. 5 Cir. 5/14/97), 696 So.2d 61, 63, writ denied, 97-1592 (La. 10/3/97), 701 So.2d 202. The right to reimbursement for medical expenses is separate and distinct from the right to compensation. Ridlen v. St. Charles Manor Nursing Center, Inc., 94-275 (La. App. 5th Cir.10/12/94), 644 So.2d 244, 247, writ denied, 94-3039 (La. 2/3/95), 649 So.2d 410. Therefore, an employee may recover medical expenses even though there is no recovery for compensation. Id.

La. R.S. 23:1142 E sets forth an exception, which provides that if "the payor has denied that the employee's injury is compensable under this Chapter, then no approval from the payor is required prior to the provision of any diagnostic testing or treatment for that injury." Louisiana jurisprudence provides that under La. R.S. 23:1142 E, when an employer or insurer has denied that a claimant's injury is compensable, the statutory cap does not apply. Loar v. Luba Worker's Comp Terminix Serv. Co., Inc., 17-683 (La. App. 5 Cir. 9/19/18), 254 So.3d 1267, 1276; Perrilloux v. Uniforms by Kajan, Inc., 13-377 (La. App. 5 Cir. 12/27/13), 131 So.3d 1026, 1032-33; Washington v. Lyon's Specialty Co., 96-263 (La. App. 1 Cir. 11/08/96), 683 So.2d 367, 381. Louisiana courts have held that an employer who disputes the compensability of its employee's injury should not be allowed to

complain that it was not given the opportunity to authorize previously incurred medical expenses. Loar, 254 So.3d at 1276; Carradine v. Regis Corp., 10-529 (La. App. 3 Cir. 11/03/10), 52 So.3d 181, 192; Martin v. Elmwood Medical Center, 95-415 (La. App. 5 Cir. 11/15/95), 665 So.2d 470. In reaching this conclusion, the courts have reasoned that “It does not further the purpose of La. R.S. 23:1142 to punish employees for failing to request authorization from employers who do not accept their liability for benefits under the law of workers’ compensation.” Id. The application of the exception in La. R.S. 23:1142 E to unauthorized medical expenses ensures that claimants in this situation are not deprived of reimbursements for medical services which the employer is typically required to furnish. Loar, 254 So.3d at 1276.

The record indicates that American Remediation was contesting whether Mr. Burga’s shoulder injury was work-related. As a result, based on La. R.S. 23:1142 E and the case law discussed above, the \$750.00 cap is rendered inapplicable.

Moreover, relative to the choice of physician form, because Mr. Burga has a language barrier, an authorized representative of his employer was required to sign the form, attesting that the form and the right of physician choice was reasonably explained to Mr. Burga before he signed the form. La. R.S. 23:1121 B(4). American Remediation failed to comply with this requirement in executing the form by not having an American Remediation representative sign the form. The form states that the employer’s failure to have a representative sign the form and make this attestation “can jeopardize the employer’s/insurer’s right to subsequently refuse consent to the employee’s request for treatment by a different physician within the same field or specialty.”

The record in this case indicates clearly that there was a language barrier between Mr. Burga and those with whom he was interacting in regard to both his injury and his workers’ compensation claim. Consequently, we find the employer’s

failure to have a representative sign the form attesting that the form and the right of physician choice was reasonably explained to Mr. Burga before he signed the form renders the form invalid, and precludes American Remediation's right to contest Mr. Burga's choice to see a different physician.

Considering the foregoing, we find that the \$750.00 cap does not apply to Dr. Phillips' bill, and we amend the judgment to vacate that portion of the November 7, 2022 judgment. As noted above, the right to reimbursement for medical expenses and the right to compensation are separate and distinct. Ridlen, 644 So.2d at 247. Accordingly, we find that American Remediation and/or its insurer is therefore liable for the amount due for Dr. Phillips' medical treatment of Mr. Burga related to his left shoulder surgery.

DECREE

For the reasons stated herein, we affirm the OWC's November 7, 2022 judgment denying Mr. Burga TTD benefits and SEB. That notwithstanding, we amend the judgment to vacate the OWC's ruling that Dr. Phillips' bill is subject to the \$750.00 cap set forth in La. R.S. 23:1142(1)(a), thus making American Remediation and/or its insurer liable for the amount due for Dr. Phillips' medical treatment of Mr. Burga related to his left shoulder surgery. We affirm the judgment as amended.

AFFIRMED AS AMENDED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
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JUDGES



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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED
IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY
DECEMBER 6, 2023 TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES
NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in blue ink, reading "Curtis B. Pursell", is written over a horizontal line.

CURTIS B. PURSELL
CLERK OF COURT

23-CA-26

E-NOTIFIED

OFFICE OF WORKERS' COMPENSATION, DISTRICT 7 (CLERK)
HON. SHANNON BRUNO BISHOP (DISTRICT JUDGE)
NATHAN L. SCHRANTZ (APPELLEE)

MAILED

PEDRO BURGA (APPELLANT)
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HARVEY, LA 70058