

JANICE HEBERT BARBER,
JOHN H. FAIRBANKS, M.D.,
PIERCE D. NUNLEY, M.D., JOHN
LOGAN, M.D., JOHN FAULKNER,
DARRELL CORMIER, PEGGY
EDWARDS, JOAN SAVOY,
KARIN FRIERSON, AND
VANESSA ARNOLD

NUMBER: SEC.

19TH JUDICIAL DISTRICT COURT

VERSUS

PARISH OF EAST BATON ROUGE

LOUISIANA WORKFORCE
COMMISSION, LOUISIANA
OFFICE OF WORKERS'
COMPENSATION, CHRISTOPHER
RICH, M.D., WES HATAWAY AND
CURT EYSINK

STATE OF LOUISIANA

**PETITION FOR DECLARATORY AND
INJUNCTIVE RELIEF**

NOW INTO COURT, through their undersigned counsel, come the Plaintiffs, JANICE HEBERT BARBER, JOHN H. FAIRBANKS, M.D., PIERCE D. NUNLEY, M.D., JOHN LOGAN, M.D., JOHN FAULKNER, DARRELL CORMIER, PEGGY EDWARDS, JOAN SAVOY, KARIN FRIERSON, and VANESSA ARNOLD, who respectfully represent as follows:

1.

The Plaintiffs are: Janice Hebert Barber, a resident of the full age of majority of Lafayette Parish, State of Louisiana, John H. Fairbanks, M.D., a resident of the full age of majority of Concordia Parish, State of Louisiana, Pierce D. Nunley, M.D., a resident of the full age of majority of Caddo Parish, State of Louisiana, John Logan, M.D. a resident of the full age of majority of St Tammany Parish, State of Louisiana, John Faulkner, a resident of the full age of majority of East Baton Rouge Parish, State of Louisiana; Darrell Cormier, a resident of the full age of majority of Lafayette Parish, State of Louisiana; Peggy Edwards, a resident of the full age of majority of Lafayette Parish, State of Louisiana; Joan Savoy, a resident of the full age of majority of Tangipahoa Parish, State of Louisiana; Karin Frierson, a resident of the full age of majority of St. Tammany Parish, State of Louisiana, and Vanessa Arnold, a resident of the full age of majority of Lafayette Parish, State of Louisiana.

2.

The Plaintiff, Janice Hebert Barber, is an attorney who regularly practices workers compensation law. Her clients have been adversely affected by the Defendants' application of the statutes and regulations cited hereinbelow, and she has been adversely affected herself. The Plaintiffs, John H. Fairbanks, Pierce D. Nunley, Milan G. Mody, Eubulus Kerr and John Logan, are physicians who treat injured workers who have been adversely affected by the Defendants' application of the statutes and regulations cited hereinbelow, and who have been adversely affected themselves. The Plaintiffs, John Faulker, Darrell Cormier, Peggy Edwards, Joan Savoy, Karin Frierson and Vanessa Arnold, are injured workers who have been adversely affected by the Defendants' application of the statutes and regulations cited hereinbelow.

3.

The Defendants herein are the Louisiana Workforce Commission, an agency of the State of Louisiana; the Louisiana Office of Workers' Compensation ("OWC"), an agency of the State of Louisiana and an office of the Louisiana Workforce Commission; Christopher Rich, M.D., the Medical Director of the Louisiana Office of Workers' Compensation, a resident of the full age of majority of the Parish of Rapides, State of Louisiana; Wes Hataway, the Director of the OWC, a resident of the full age of majority of the Parish of East Baton Rouge, State of Louisiana, and Curt Eysink, the Secretary of the Louisiana Workforce Commission, a resident of the full age of majority of the Parish of East Baton Rouge, State of Louisiana.

Introduction

4.

This is an action for declaratory and injunctive relief challenging the constitutionality of certain provisions of the Louisiana Workers' Compensation Act, La. R.S. 23:1203.1, and its implementing regulations, which appear at § 2715 of Title 40, Chapter 27 of the Louisiana Administrative Code, as well as certain provisions of La. R.S. 23:1020.1.

5.

At all times relevant hereto, the Plaintiffs, John Faulkner, Darrell Cormier, Peggy Edwards, Joan Savoy, and Karin Frierson, had property rights in their causes of action for workers compensation benefits, which property rights are protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and La. Const. Art. I § 2. *Cole v. Celotex*, 599 So.2d 1058 (La. 1992) at 1063; *Hammons v. ABB C-E Services, Inc.*, 2005 CA 0807 (La. App. 1 Cir. 1/29/06), 934 So.2d 130.

La. R.S. 23:1203.1

6.

From 1999 to 2012, the Louisiana Legislature enacted a complete revision of the workers' compensation system for injured workers to obtain medical treatment, La. R.S. 23:1203.1, and established new medical treatment guidelines that became effective on July 13, 2011.

7.

La. R.S. 23:1203.1 made significant changes in the medical treatment that is available under the Louisiana's workers' compensation system. La. R.S. 23:1203.1 limits available medical treatment to three (3) categories: (1) treatment within the medical treatment schedule pursuant to La. R.S. 23:1203.1(I); (2) treatment that "varies" from the medical treatment schedule pursuant to La. R.S. 1203.1(I); and (3) treatment not covered by the medical treatment schedule pursuant to La. R.S. 23:1203.1(M). Before July 13, 2011, injured workers were unqualifiedly entitled to "all medical treatment that was reasonable and necessary" under La. R.S. 23:1203. The new La. R.S. 23:1203.1 created the obligation of compliance with the medical treatment guidelines. The statute further established an entirely new system for handling medical disputes under the Louisiana Workers' Compensation Act. La. R.S. 23:1203.1(J) set forth a "new" procedure for appealing a denial of medical treatment. If approval of treatment is denied by the insurer or self-insured employee, Subsection (J) requires injured workers to file an appeal with the OWC Medical Director. Under the previous law, following a denial of medical treatment, injured workers would file a LWC-WC -Form 1008 with the OWC judge having venue and the claim would proceed like any other "disputed claim." The injured worker had three (3) years from the date of the last payment of medical treatment to file the LWC-WC-1008. Once filed, the injured worker was allowed to present evidence to an OWC Judge and the OWC Judge would render a judgment enforceable by law. Now, under La. R.S. 23:1203.1(J), injured workers no longer have the right to have medical disputes heard by an OWC Judge; they must use the system set forth in subsection (J). La. R.S. 23:1203.1 removed injured workers' access to the court for medical disputes and replaced it with a fifteen (15) day window for an appeal to the OWC Medical Director. As such, La. R.S. 23:1203.1 represents a monumental shift in the rights and obligations of Louisiana's workers' compensation claimants to reasonable and necessary medical treatment.

8.

Pursuant to the new statute, the Defendant Hataway, the Director of the Office of Workers' Compensation ("OWC") hired the Defendant Rich as the Medical Director to adjudicate requests for medical treatment. This new system changed not only the available treatment but also greatly increased the burdens of proof for the approval of the recommendations of physicians treating injured workers, thereby further diluting the previous unequivocal right of injured workers under the Workers' Compensation Act., La. R.S. 23:1203, to receive all reasonable and necessary medical services for the treatment of their job injuries.

9.

This new system has enriched workers' compensation insurance carriers and has harmed injured workers in Louisiana. For example, in 2012, during the first twelve (12) months of this new administrative system, the Louisiana Workers' Compensation Corporation ("LWCC"), the largest workers' compensation insurance carrier in the state, paid \$47.8 million in premium dividends to Louisiana employers. 2012's dividend is more than double the \$23.5 million which the LWCC paid in dividends in 2011. On the other hand, as of December 2012, the Medical Director had only approved 14% of all requests by treating physicians for approval of their recommendations for the treatment of their injured worker patients.

10.

The new system that has been created for the approval of the requests of treating physicians for the treatment of their injured worker patients essentially operates the same way for each category of available treatment listed above. However, the burdens of proof differ, depending on the category. The new system essentially operates as follows:

- A. Each medical visit and medical procedure or treatment (including pharmaceutical prescriptions) recommended by the injured workers' treating physician must be approved by either the workers' compensation insurance adjuster/self-insured employer within five (5) business days of receipt per La. R.S. 23:1203.1(J);
- B. The new system effectively requires physicians who choose to treat injured workers to file what are the equivalents of legal pleadings and litigate administrative claims in order to have their treatment recommendations approved by the Medical Director and paid;
- C. Under this system, the health care provider is required to file a pleading titled Form LWC-WC-1010. The carrier/self-insured employer can either accept or deny the requested treatment within five (5) days or reject the request if the adjuster asserts that the physician's Form LWC-WC-1010 is incomplete. If the carrier/self-insured employer simply does not respond or for any reason fails to return the Form LWC-WC-1010 within five (5) business days, *the request for treatment is deemed tacitly denied.*
- D. If the requested treatment is either expressly or tacitly denied by the adjuster/self-insured employer, either the health care provider or the injured worker can request

review of the denial by the OWC Medical Director by filing a pleading titled Form LWC-WC-1009. Only twenty to twenty-five (20%-25%) percent of Louisiana workers' compensation claimants are represented by an attorney and the health care providers typically file the Form LWC-WC-1009 request for review. In order to have treatment approved by the Medical Director, the injured worker or his physician must prove that the treatment is medically necessary under the OWC's Medical Treatment Guidelines by a "preponderance of the evidence."

- E. When requesting treatment which would constitute a "variance" from the Medical Treatment Schedule, the injured workers' treating physician must present proof that the "requested treatment is reasonably required to cure or relieve the claimant from the effects of the injury or occupational disease given the circumstances." LAC 40:2715(B)(3) Further, "The health care provider, claimant, or claimant's attorney filing LWC-WC-1009 shall submit with such form the 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." LAC 40:2715(L)(1). This provision creates stringent, if not impossible, burdens of proof on injured workers and this regulation substantially exceeds the authority provided to the OWC by the enabling legislation.
- F. The Medical Director or his staff then reviews the Form LWC-WC-1009. Even though the treating physician has the burden of proof by a "preponderance of the evidence", there is no right to a hearing or any right of the injured worker or treating physician to appear before the Medical Director or his staff. The Medical Director or his staff makes a decision on the treatment recommended by the treating physician without ever talking to the injured worker or the treating physician. Moreover, the assembling of the administrative record is not protected by any traditional due process protections. There are no restrictions on the Medical Director having ex parte communications with adjusters, employers or anyone else, no restrictions on what can be submitted to the Medical Director by adjusters or employers, no notice to the injured worker or his attorney of what "evidence" is submitted to the Medical Director by adjusters or employers, and no opportunity for the injured worker or his attorney to object to any such "evidence." As a result, surveillance tapes and other non-medical evidence is often submitted to the Medical Director and his staff. Under this system, a nurse employed by the OWC as a subordinate employee to the Medical Director as a practical matter can effectively overrule the treatment recommendation of the treating physician without even talking to the injured worker.
- G. If any party disagrees with the Medical Director's decision on the Form LWC-WC-1009, he or she has the right to "appeal" the Medical Director's decision to an OWC Judge. However, in such appeals, the injured workers have no right to submit evidence or supplement the administrative record. The appeal is heard on the "cold record" which has been compiled without any due process protections. Under the new system, a decision of the OWC Medical Director can only be modified or reversed by a showing of error by "clear and convincing evidence." This provision also creates stringent, if not impossible, burdens on the injured worker on appeal.

11.

The new system which has been created by La. R.S. 23:1203.1 and its implementing regulations and as applied by the Defendants for the administrative adjudication of injured workers' requests for medical treatment violates the due process clause of the Fourteenth Amendment to the United States Constitution and Louisiana Constitution Art 1 § 2. These procedural due process violations include the following:

- A. The injured workers' right to present evidence in support of his or his physician's request for medical treatment is greatly constricted and limited. There is no right to present testimony of either the injured worker, his treating physician or anybody else.
- B. There is no right to object to "evidence" submitted to the Medical Director by the employer or adjuster and there is nothing to prohibit ex parte communications or the submission of prejudicial and unreliable information and/or non-medical evidence.
- C. There is no right to cross examination.
- D. There is no fair and impartial administrative decision-maker because the present Medical Director has multiple and various conflicts of interest with his position as a state employee and OWC Medical Director. Dr. Rich and/or the entities he owns and/or controls have or have had state contracts totaling millions of dollars, in addition to his salary as a state employee. These contracts include a \$2.3 million contract between his company, Louisiana Orthopedic Services and the state for medical services at the Huey P. Long Medical Center, where he is Chairman of Orthopedics, under which his company has received \$61,000.00 per month to provide orthopedic services to indigent patients plus a per patient fee for every patient over twenty (20) years old. Injured workers in central Louisiana whose requests for medical treatment are denied by the Medical Director have often been treated at the Huey P. Long Medical Center.
- E. The aforesaid procedures deny injured workers the right to present their cases for medical treatment and have them fairly judged and deny injured workers any form of a hearing.

12.

The right to appeal the Medical Director's decision only on a "cold record", which the injured worker has a very limited role in compiling, and subject to a "clear and convincing" evidence standard creates a stringent, if not impossible, burden of proof and persuasion on appeal and thus violates substantive due process because it is arbitrary and capricious. This "right to appeal" also violates the provisions of Louisiana Constitution Art. I § 22 which guarantees "every person an adequate remedy by due process of law and justice...for injury to him in his person...." because it is impossible to prove that the Medical Director's decision is erroneous under a "clear and convincing" evidence standard where there is no right to submit evidence into the administrative record to rebut the information relied upon by the Medical Director in his decision. It is arbitrary and capricious to deny injured workers and their treating physicians, who are seeking medical treatment for sometimes life treating medical conditions, any right to address the judge and explain why the recommended treatment is necessary.

13.

The new system also violates substantive due process because it creates stringent, if not impossible, burdens of proof at the Medical Director level on injured workers because it requires them to obtain information that they do not have reasonable access to and which is not readily available. La. R.S. 12:1203.1(J) requires the physician to submit to the adjuster/employer a request for authorization of treatment and the information required by Title 40, Chapter 27, of the Louisiana Administrative Code. Section 2715(L)(1) of Chapter 27 of Title 40 of the Louisiana Administrative Code requires the injured worker's physician to submit the following information in support of treatment recommendations when a variance has been requested. "The health care provider, claimant, or claimant's attorney filing the LWC-WC-1009 shall submit with such form the 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." Most injured workers do not have the education or training to find and decipher scientific medical journal articles in order to provide them to the Medical Director and most physicians do not have the time to research and identify scientific medical literature pertinent to specific treatment issues.

14.

La. R.S. 23:1203.1's delegation of authority to the OWC also violates the separation of powers provision of La. Const. Article III, § 1(A) because:

- A. The statute does not prescribe sufficient standards to guide the agency in the exercise of legislative policy. The statute allows the agency to exercise legislative policy, rather than just administrative, regulatory, or ministerial authority; and
- B. is not accompanied by any adequate procedural safeguards to protect against abuse of discretion by the agency.

15.

La. R.S. 23:1203.1(D) violates the due process clauses of the state and federal constitutions because it is void for vagueness in that it purports to incorporate by reference the laws and regulations of 49 other states of the United States without even specifically identifying or citing these other states' laws or regulations.

16.

The provisions of La. R.S. 23:1203.1, which purport to authorize and require an "appeal" of the Medical Director's decision, violates La. R.S. 23:1301.3, which provides that, with certain non-applicable exceptions, a workers compensation Judge "shall be vested with original, exclusive jurisdiction over all claims and disputes arising out of this Chapter...."

17.

La. R.S. 1203.1 and its implementing regulations also violate Louisiana Constitution Art. I § 3 in that they arbitrarily, capriciously and unreasonably discriminate against injured workers because of their physical condition because the rights of an injured worker to reasonable and necessary medical treatment paid for by the carrier/self-insured employer is greatly qualified and conditional whereas the rights of all other injured persons to medical treatment paid for by the responsible party is not so qualified and conditional.

**Dr. Christopher Rich Cannot be a Fair and Impartial
Administrative Decision-Maker**

18.

Dr. Christopher Rich is engaged by the OWC as a full time "unclassified" state employee and OWC Medical Director at an annual salary of Two Hundred Twenty-Four Thousand Nine Hundred Seventy-Eight and no/100 (\$224,978.00) Dollars.

19.

Dr. Rich cannot be a fair and impartial administrative decision-maker for the following reasons.

- A. As OWC Medical Director, Dr. Rich is a quasi-judicial decision-maker. He often decides questions as to the weight and credibility of evidence. His determinations are afforded very significant, if not conclusive, weight on appeal.
- B. However, by virtue of his \$5 million in state contracts, including the contract for medical services at the Huey P. Long Medical Center, Dr. Rich has a financial incentive to deny treatment to injured workers. These conflicts of interest disqualify Dr. Rich from being a fair and impartial administrative decision-maker, as required by due process of law.
- C. These conflicts of interest are compounded by the fact that the Medical Director is not constrained by any restrictions on ex parte communications or any other ethical restraints and neither the injured worker or his or her attorney (if she/he is represented) is provided copies of documents which are submitted to the Medical Director until after an appeal is filed and the administrative record is closed. Indeed, until this time, neither the injured worker nor his or her attorney have any way to know what the administrative record contains.
- D. The results of the above-described conflicts of interest and due process violations have manifested themselves in numerous arbitrary decisions by the Medical Director, which denied injured workers needed medical treatment. Examples of arbitrary denials are as follows:
 1. Medical benefits have been denied to injured workers because their physicians could not return calls from the Medical Director's staff as soon as the staff would prefer;
 2. One request for medical treatment was denied because the injured worker's attorney submitted too many pages of records to the Medical Director;

3. One request for medical treatment was denied because the workers compensation case itself was twelve (12) years old;
4. Numerous request for medical treatment have been denied because the Medical Director claimed that they were submitted by "bad doctors" who were "bad" simply because they were too favorable to their patients (in the Medical Director's opinion). Such decisions have the purpose and effect of discouraging physicians from treating injured workers and supporting their patients' need for medical care;
5. Requests for medical procedures have been denied based on who owns the medical equipment which would be utilized for the medical procedure;
6. As of December 2012, the Medical Director had only approved 14% of all requests for medical treatment of injured workers which have been submitted by their treating physicians in cases where compensability had already been determined;
7. The Medical Director's staff has rejected one-third (1/3) of all Form LWC-WC-1009s because of their opinions that these forms were incomplete or insufficient as to form;
8. The Medical Director has utilized the Form LWC-WC-1009 process to circumvent injured workers' long-standing legal rights to be treated by pain management physicians of their choice; and
9. The Medical Director has denied requests for medical treatment due to a lack of objective findings where he has no basis for evaluating the credibility of the injured workers because he never even speaks with them.

The Defendant Hataway's Attempt to Influence the Legal and Factual Decisions of the OWC Judges By Ex Parte Communications

20.

Title 40, Subpart 2, Chapter 55 of the Louisiana Administrative Code, § 5533(B)

provides that:

"All workers' compensation judges shall be subject to the Code of Judicial Conduct Civil Service Rules, the Louisiana Code of Governmental Ethics and the Louisiana State Bar Association Code of Professional Conduct."

21.

Canon 1 of the Louisiana Code of Judicial Conduct provides:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code are to be construed and applied to further that objective. As a necessary corollary, the judge must be protected in the exercise of judicial independence."

22.

Cannon 3(A)(6) of the Louisiana Code of Judicial Conduct provides, in pertinent part, that:

"Except as permitted by law, a judge shall not permit private or ex parte interviews, arguments or communications designed to influence his or her judicial action in any case, either civil or criminal...

Where circumstances require, ex parte communications are authorized for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication."

23.

Nevertheless, the Plaintiffs allege, on reasonable information and belief, that the present Director of the OWC, the Defendant Hataway, has repeatedly engaged in ex parte communications with attorneys and other persons representing workers compensation insurance carriers and self-insured employers, who are parties to the pending workers compensation claims, in order to influence the workers compensation judges to rule favorably to insurance companies and employers. These attorneys and other persons have repeatedly sought to compromise the independence of the workers compensation judiciary by engaging in ex parte communications with the Defendant Hataway and by using the Defendant Hataway as an intermediary for ex parte communications with the judges. These communications have even included demands that certain judges be fired because of their rulings favorable to injured workers.

24.

The Defendant Hataway has not protected the workers compensation judges' judicial independence and has allowed himself to be used as an intermediary for ex parte communications with the judges. For example, Hataway and his staff have repeatedly expressed the administration's "positions" on issues to be litigated by the workers compensation judges to these judges. These "positions" often reflect the communications by these defense attorneys and their clients.

25.

The communications have included:

- A. The OWC administration's position that the workers compensation judges should rule that La. R.S. 23:1203.1 and the Medical Treatment Guidelines apply retroactively to workers compensation claims arising out of job accidents occurring before the effective dates of the statutes and guidelines. These communications from Hataway resulted in a decision by one of the workers compensation judges that these statutes and regulations were retroactive. The

judge stated on the record on May 15, 2012: "Basically, I've been instructed by the administration to treat this (the Medical treatment Guidelines) procedurally. I am going to follow their instructions."

- B. Hiring a "floating judge" to "evaluate and train" more experienced workers compensation judges by sitting in their courtrooms and personally observing the workers compensation judges handling of trials, and by inspecting the judges' files, and reporting back to Hataway their rulings, including their rulings awarding attorney's fees and penalties awards to injured workers.
- C. Directing the judges to raise prematurity exceptions to claims for medical benefits even though the Defendants had answered and waived any dilatory exceptions and both parties were prepared for trial.

Act 860 of 2012

26.

By Act 860 of 2012, which was effective as of August 1, 2012, and which enacted, amended, and re-enacted several provision of Chapter 23 of the Louisiana Revised Statutes, the Louisiana Legislature further diluted and conditioned the rights of injured workers in Louisiana.

27.

La. R.S. 23:1020.1(D) provides that:

(2) Disputes concerning the facts in workers' compensation cases shall not be given a broad, liberal construction in favor of either employees or employers; the laws pertaining to workers' compensation shall be construed in accordance with the basic principles of statutory construction and not in favor of either employer or employee.

(3) According to Article III, Section 1 of the Constitution of Louisiana, the legislative powers of the state are vested solely in the legislature; therefore, when the workers' compensation statutes of this state are to be amended, the legislature acknowledges its responsibility to do so. If the workers' compensation statutes are to be liberalized, broadened, or narrowed, such actions shall be the exclusive purview of the legislature.

28.

The above-quoted provisions of La. R.S. 23:1020.1 violate the separation of powers provisions of La. Const. Art. I § 1(A) because these provisions purport to dictate to workers compensation judges how to interpret the facts and the law and purport to instruct the workers compensation judges to violate decades of jurisprudence decided by the Louisiana Supreme Court and lower courts that make it very clear that workers compensation legislation is to be construed in favor of the intended beneficiaries.

29.

La. R.S. 23:1314(E), for the first time in the history of Louisiana, authorizes an employer to file a disputed claim, and in effect sue the injured worker, to controvert benefits or concerning any other dispute arising under the Workers' Compensation Act. This provision enables suits

seeking advisory opinions to be filed against injured workers. This provision violates the equal protection provisions of La. Const. Art. I § 3 because it does not provide for any authorization for an injured worker's attorney to be paid for his or her services in defending an employer's claim in light of La. R.S. 23:1141 (which limits fees which can be earned by claimants' attorneys to 20% of the amounts recovered and criminalizes the receipt of any attorneys fees which are not approved by the workers compensation judge, which approval is necessarily subject to the 20% maximum), while allowing attorneys for employers and workers compensation carriers to be paid fully compensatory legal fees. This statute creates opportunities for insurance companies and employers to file retaliatory suits against injured workers at any time, even while they are in the hospital or otherwise convalescing from their job injuries.

30.

La. R.S. 23:1201(i) provides a new hearing process for the preliminary determination of the injured worker's average weekly wage through a hearing by telephone. This telephone hearing process also applies to changes in the injured workers' average weekly wage calculation resulting from such disputes as the conversion of temporary total disability benefits to supplemental earnings benefits and attempts to lower supplemental earnings benefits rates after return to work or vocational rehabilitation efforts. Disputes of this nature very often present credibility issues. However, the telephone hearing process for these disputes is arbitrary and capricious, and thus violative of substantive due process, because it is impossible for the workers compensation judges to make credibility determinations over the telephone without observing the demeanor of the witnesses. Moreover, this provision violates the equal protection provision of Louisiana Constitution Art I § 3 because it authorizes the payor, if it disagrees with the average weekly wage calculated by the injured worker, to file a request for a preliminary determination of the average weekly wage via a telephone hearing but does not allow the injured worker to request a preliminary determination if he or she disagrees with the employer or insurer's calculation.

Substantial Impairment of Contracts

31.

The Contracts Clause of both the federal, Art. I § 10, and state constitutions, La. Const. Art I § 23, provide that no law shall impair the obligations of contracts.

32.

As a matter of law, La. R.S. 23:1203, as it existed prior to the enactment of La. R.S. 23:1203.1, created contractual rights to reasonable and necessary medical treatment by injured workers for compensable job accidents because the Workers' Compensation Act, as a matter of law, became a part of the Plaintiffs' employment agreements and were incorporated therein, as though expressly forming a part of the Plaintiffs' employment agreements.

33.

The Plaintiffs allege that the enactment of La. R.S. 23:1203.1 and its implementing regulations have substantially impaired the obligations of injured workers' contracts with their employers, in violation of the Contracts Clauses of the state and federal constitutions and has substantially impaired vested property rights in violation of the Due Process Clauses of the Fourteenth Amendment and La. Const. Art. I § 2.

The Louisiana Legislature has Effectively Withdraws the Quid Pro Quo as to Claims for Medical Benefits.

34.

The Louisiana Supreme Court has repeatedly warned the Louisiana Legislature that the creation of stringent burdens of proof for certain types of workers compensation benefits effectively withdraws the quid pro quo, which is the quintessential characteristic of the workers compensation system, as to these claims. *Charles v. Travelers Insurance Company*, 627 So2d 1366 (La. 1993) at n.17; *O'Regan v. Preferred Enterprises, Inc.*, 98-CC-1602 (La. 03/17/00), 758 So.2d 124 at 134-135.

35.

According to the Louisiana Supreme Court, when this occurs, the injured worker is entitled to pursue a tort remedy against his or her employer.

36.

The Plaintiffs allege that, with the enactment of La. R.S. 23:1203.1, the Louisiana Legislature has effectively withdrawn the quid pro quo as to claims for medical benefits.

37.

Therefore, the Plaintiffs allege, in the alternative, and in the event that the constitutionality of La. R.S. 23:1203.1 is upheld for any reason, this Court should render a declaratory judgment that the Louisiana Legislature has effectively withdrawn the pro quid pro as to claims for medical benefits and that injured workers are free to pursue tort remedies against their employers for medical benefits.

WHEREFORE, the Plaintiffs, JANICE HEBERT BARBER, JOHN H. FAIRBANKS, M.D., PIERCE D. NUNLEY, M.D., JOHN LOGAN, M.D., JOHN FAULKNER, DARRELL CORMIER, PEGGY EDWARDS, JOAN SAVOY, KARIN FRIERSON, and VANESSA ARNOLD, pray for judgment against the Defendants, LOUISIANA WORKFORCE COMMISSION, LOUISIANA OFFICE OF WORKERS' COMPENSATION, CHRISTOPHER RICH, M.D., WES HATAWAY, and CURT EYSINK, as follows:

- I. For declaratory relief declaring that the above-cited provisions of the Louisiana Workers Compensation Act and its implementing regulations are unconstitutional, as specifically alleged hereinabove;
- II. For injunctive relief enjoining the application of the provisions of the Louisiana Workers' Compensation Act and its implementing regulations which are declared to be unconstitutional by the Court;
- III. For judgment disqualifying Dr. Christopher Rich as OWC Medical Director;
- IV. For such other declaratory and injunctive relief as the Court may deem appropriate; and
- V. For reasonable attorneys' fees and all costs of this proceeding.

Respectfully submitted,

SMITH LAW FIRM

J. Arthur Smith, III (Bar No. 07730)
830 North Street
Baton Rouge, LA 70802
Telephone: (225) 383-7716
Attorney for Plaintiffs

Please serve the Defendants
as follows:

LOUISIANA WORKFORCE COMMISSION

Through: Curt Eysink
Executive Director
1001 North 23rd Street
Baton Rouge, LA 70802

LOUISIANA OFFICE OF WORKERS' COMPENSATION

Through: Wes Hataway, Director
Louisiana Office of Workers' Compensation
1001 North 23rd Street
Baton Rouge, LA 70802

CHRISTOPHER RICH, M.D.
at 4406 Wellington Blvd.
Alexandria, LA 71303

WES HATAWAY
at 3954 Hundred Oaks Ave.
Baton Rouge, LA 70806

CURT EYSINK
Executive Director
Louisiana Workforce Commission
1001 North 23rd Street
Baton Rouge, LA 70802

James D. "Buddy" Caldwell
Office of Attorney General
1885 North 3rd St.
Baton Rouge, LA 70802

J.S. "Bud" Thompson, Jr.
Director
Office of Risk Management
1201 North 3rd St., Ste. G-192
Baton Rouge, LA 70802