Opinion No. 106

Industrial Accident Board—Statutes, Construction Section 92-706, Revised Codes of Montana, 1947—Physicians—Medical Payments.

Held: Under the medical provisions of the Montana Workman's Compensation Act and in the absence of a hospital contract, an injured workman may choose his doctor.

May 4th, 1950.

Mr. Walter P. Coombs, Chairman
Industrial Accident Board
Helena, Montana

Dear Mr. Coombs:

You have requested my opinion as to whether an injured worker under the Workman's Compensation Act of the State of Montana has freedom of choice to select any doctor he wishes, or whether he must be attended by a physician of the employer's choice.

You add that for some thirty-five years the Board has taken the position that the injured worker may choose his doctor.

The statute involved is Section 92-706, Revised Codes of Montana, 1947, which states in part:

> "Medical and Hospital Services and Such Other Treatment As Approved by the Board to be Furnished. In addition to the compensation provided by this act and as an additional benefit separate and apart from compensation, the following shall be furnished:
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> "During the first nine (9) months after the happening of the injury, the employer or insurer or the Board, as the case may be, shall furnish reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment approved by the Board, not exceeding in amount the sum of five hundred dollars ($500.00), unless the employee shall refuse to allow them to be furnished, and unless such employee is under hospital contract as provided in Section 92-610."

The statute has been often construed by our Supreme Court, but the particular question asked has never been directly considered. However, the court has indicated in its language that, in the absence of a specific hospital contract assented to by the employee, the injured worker may exercise freedom of choice of physicians. Thus, in the late case of Gugler v. Industrial Accident Board, 117 Mont. 38, 48, 157 Pac. (2d) 89 (1945) the court stated:

> "It is true that under Section 2917 the Board in Plan III cases pays for the services of the doctor, but the claim in truth and in fact is that of the injured employee. In this case the injured workman conducted the negotiations for the services of the doctor and himself became liable for such services with the right of indemnity against the fund as a part of his compensation."

The court then points out that the claim is not a separate claim of the doctor but a part of the compensation of the employee and sets forth that the interest of the employee in the limitation to a $500.00 expenditure makes it to his interest to hold down the cost so that the maximum will not be reached sooner than absolutely necessary.

In 1945, the Legislature underlined and emphasized the employees interest by adding the paragraph which states that the medical service is "an additional benefit" for the employee, thus dissociating the medical provision from other compensation and assuring that it be considered as a distinct benefit to the worker. However, the interest of the worker in the expenditure is not lessened. It is the employee's claim.

The earlier case of Murray Hospital v. Angrove (1932) 92 Mont. 101, 118, 119, 10 Pac. (2d) 577, contains the following statement with reference to Section 2917:

> "In other words, section 2917 requires the employer, the insurer or the accident fund to pay for the treatment of an employee injured through an industrial accident."

Here it is clearly stated that the employer's obligation is to **pay for** the treatment of the employee up to $500.00. Beyond the limited amount the obligation rests upon the employee himself. Is it reasonable to compel him to pay a doctor he has no choice in hiring?

Added to the quoted language of the Montana Supreme Court, is the fact that it has been the position of the Board for some thirty-five years that the injured workman may choose the doctor who is to treat him.

The position of the Board in the mater appears wholly justified and reasonable in the light of the language of the act, and the language of the Supreme Court. Certainly it is in keeping with the spirit and intent of the Workman's Compensation Laws that an injured employee is not to be, by such injury, converted to a charity patient or a ward of the employer, insurer, or Board, as the case may be.

If any doubt exists as to the meaning of the section involved, the construction given to an act by the department charged with the duty of enforcing it becomes material (United States v. Tanner, 147 U. S. 661, 37 L. ed. 355).

Mr. Chief Justice Callaway in State v. Brannon, et al., (1929) 86 Mont. 20, 209, 283 Pac. 202, stated the rule:

> "It is a settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest regard, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons."

Later in the same decision, 25 R.C.L. 1025, is cited to the effect that the weight to be given to executive or departmental practice is increased when the Legislature in re-enacting the law or another in pari materia fails to indicate in any way its disapproval of the settled construction of the officer or department. (See, too, Miller Ins. Agency v. Porter, et al., (1933) 93 Mont. 567, 575, 20 Pac. (2d) 643).

While a court is not bound by administrative interpretation, such interpretation bears great weight and is entitled to the highest respect. 42 Am. Jur., (Public Admin. Law,) Section 77, et seq.

I gather from the material submitted with your request that there exists a claim by an employer that the injured workman's exercise of his choice of physician is tantamount to a refusal to accept medical treatment. The position is absolutely without merit.

The statute specifically provides that when there is a hospital contract and the facilities are inadequate, adequate facilities may be obtained and the cost thereof charged against the one contracting to furnish hospital facilities. Kelly v. Montana Power Co. (1940) 111 Mont. 118, 106 Pac. (2d) 339, held that where such contract exists the employer is not liable for care other than that furnishable by the contracting physician or hospital. By entering such contract the employer shifted his liability to the one contracting to furnish the services.

In the absence of such contract the statutory liability remains as in the Gugler case, supra.

The question of refusal to accept treatment has been mentioned in one Montana case. In Dosen v. East Butte Copper Mining Co., 78 Mont. 579, 254 Pac. 880, an injured employee refused to permit an amputation of injured leg. The court indicated in its opinion that this is such a refusal of treatment as to relieve the employer of further liability for the injury. At page 607 of 78 Montana the court quotes:

> "Before the defendant is to be charged, in law or morals, with the duty to compensate him, the claimant should first discharge the primary duty owing to himself and society to make use of every available and reasonable means to make himself whole."

also at page 606:

> "The Board could not order claimant to submit to amputation of the leg, but it could absolve the company from making payments during the period of claimants' obstinate and unreasonable refusal to submit to the operation advised by the surgeons in this case."

Certainly the attempt by an injured workman to obtain the services of a licensed physician of his own choice is not a refusal to use reasonable and available means to make himself whole.

It is therefore my opinion that under the medical provisions of the Montana Workman's Compensation Act and in the absence of a hospital contract, an injured workman may choose his doctor.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.