IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 33

WCC No. 9911-8355

EDWARD PARMER

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

MOUNTAIN POWER, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 39-year-old claimant with bad back sought coverage of chiropractic treatment following work injury. Insurer denied chiropractic treatment where not recommended by a MCO physician.

Held: Demand that insurer cover ongoing chiropractic care and pay back chiropractic bills rejected. Under section 39-71-1101 and -1103, MCA (1997), claimant's right to select an initial treating physician pursuant to subsection (1) was subject to the provisions of (3), which in turn provided that a non-MCO (managed care organization) physician cannot provide treatment, unless authorized by the insurer, if the injury results in total wage loss or an impairment rating. Here, the claimant experienced a wage loss and was referred to the MCO and the MCO physician became his treating physician, per (4). Thereafter, except for emergency treatment, the insurer was responsible for treatment by a chiropractor only if it authorized those treatments. WCC would still review denial of chiropractic treatment, but found claimant had not proven that he sought chiropractic care through the MCO or that such care was superior to services available through the MCO. Where claimant had reached MMI, chiropractic services did not constitute "primary medical services" within 39-71-704, MCA (1997). Chiropractic care may qualify as secondary services, but must meet the requirement of "clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment" in 39-71-704(1)(b). Further, claimant has not demonstrated that chiropractic treatments should be prescribed as palliative care which would, under 39-71-704(1)(g) "enable the worker to continue current employment or that there is a clear probability of returning the worker to employment."

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-1101, -1103, MCA (1997). Under section 39-71-1101 and -1103, MCA (1997), claimant's right to select an initial treating physician pursuant to subsection (1) was subject to the provisions of (3), which in turn provided that a non-MCO (managed care organization) physician cannot provide treatment, unless authorized by the insurer, if the injury results in total wage loss or an impairment rating. Here, the claimant experienced a wage loss and was referred to the MCO and the MCO physician became his treating physician, per (4). Thereafter, except for emergency treatment, the insurer was responsible for treatment by a chiropractor only if the insurer authorized those treatments. WCC would still review denial of chiropractic treatment, but found claimant had not proven that he sought chiropractic care through the MCO or that such care was superior to services available through the MCO.

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-704, MCA (1997). Where claimant had reached MMI, chiropractic services did not constitute "primary medical services" within section 39-71-704, MCA (1997). Chiropractic care may qualify as secondary services, but must meet the requirement of "clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment" in section 39-71-704(1)(b), MCA. Further, claimant has not demonstrated that chiropractic treatments should be prescribed as palliative care which would, under section 39-71-704(1)(g), MCA, "enable the worker to continue current employment or that there is a clear probability of returning the worker to employment."

Managed Care Organizations (MCO's). Under section 39-71-1101 and -1103, MCA (1997), claimant's right to select an initial treating physician pursuant to subsection (1) was subject to the provisions of (3), which in turn provided that a non-MCO (managed care organization) physician cannot provide treatment, unless authorized by the insurer, if the injury results in total wage loss or an impairment rating. Here, the claimant experienced a wage loss and was referred to the MCO and the MCO physician became his treating physician, per (4). Thereafter, except for emergency treatment, the insurer was responsible for treatment by a chiropractor only if it authorized those treatments. WCC would still review denial of chiropractic treatment, but found claimant had not proven that he sought chiropractic care through the MCO or that such care was superior to services available through the MCO.

Physicians: Chiropractors. Demand that insurer cover ongoing chiropractic care and pay back chiropractic bills rejected. Under section 39-71-1101 and -1103, MCA (1997), claimant's right to select an initial treating physician pursuant to subsection (1) was subject to the provisions of (3), which in turn provided that a non-MCO (managed care organization) physician cannot provide treatment, unless authorized by the insurer, if the injury results in total wage loss or an impairment rating. Here, the claimant experienced a wage loss and was referred to the MCO and the MCO physician became his treating physician, per (4). Thereafter, except for emergency treatment, the insurer was responsible for

treatment by a chiropractor only if it authorized those treatments. WCC would still review denial of chiropractic treatment, but found claimant had not proven that he sought chiropractic care through the MCO or that such care was superior to services available through the MCO. Where claimant had reached MMI, chiropractic services did not constitute "primary medical services" within section 39-71-704, MCA (1997). Chiropractic care may qualify as secondary services, but must meet the requirement of "clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment" in section 39-71-704(1)(b), MCA. Further, claimant has not demonstrated that chiropractic treatments should be prescribed as palliative care which would, under section 39-71-704(1)(g), MCA, "enable the worker to continue current employment or that there is a clear probability of returning the worker to employment."

¶1 The trial in this matter was held on February 23, 2000, in Helena, Montana, Petitioner, Edward Parmer (claimant), was present and represented by Mr. Richard J. Pyfer. Respondent, State Compensation Insurance Fund, was represented by Ms. Carrie L. Garber. A trial transcript has not been prepared.

¶2 Exhibits: Exhibits 1 through 18 were admitted without objection.

¶3 Witnesses and Depositions: Claimant and Michael F. McGrorty were sworn and testified. In addition, the parties submitted the deposition of Amy Pezo, D.C., for the Court's consideration.

¶4 Issues Presented: The issues as set forth in the Pretrial Order are:

- Whether Petitioner is entitled to ongoing chiropractic care from Amy Pezo.

- Whether Amy Pezo's bills for chiropractic care, which have been unpaid, should be paid.

- Whether Petitioner is entitled to attorney fees and costs.

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant is 39 years old and has a bad back. He injured his low back in the summer of 1990 while working at Trimline Auto Detailing Shop. (Ex. 10 at 92.) He reinjured it in late July 1991 while working for Associated Foods. (Exs. 5 at 34 and 4 at 28-32.)

¶7 Following his 1991 injury, he was treated by chiropractor Mike Pardis, who over the next 14 months treated claimant 89 times, by the Court's count. (Ex. 5 at 35-38.) There was a lapse of care for nearly two years, but commencing in September 1994, Dr.

Pardis began treating claimant again. (Ex. 5 at 48-55.) He continued to see claimant until December 1996, treating him12 times in the last four months of 1994,19 times in 1995, and 80 times in 1996. Dr. Pardis' records are virtually unreadable, however, a later report of Dr. Allen Weinert indicates that in 1996 the claimant was involved in an automobile accident, injuring his neck and low back, thus some of his treatments in 1996 may have been related to both neck and back.

¶8 Claimant was off work for two years following the 1991 injury. (Ex. 4 at 29.)

¶9 In 1997 claimant began treating with chiropractor Amy Pezo. His first visit was on October 24, 1997, at which time he answered a written questionnaire concerning his 1991 workers' compensation claim. (Ex. 4 at 28-31.) In Dr. Pezo's office note for the visit, she noted that claimant complained of low-back pain with burning and numbness down to his right knee. (*Id.* at 26.) His latest complaints arose two weeks prior. (*Id.*) Dr. Pezo treated claimant on October 31, November 14, November 28, 1997, and on March 30 and 31, 1998. (Ex. 4 at 25.)

¶10 On June 16, 1998, claimant was employed by Mountain Power. On that date, he injured his back for a third time when he jumped off a line truck while setting poles.

¶11 At the time of claimant's industrial injury, Mountain Power was insured by the State Fund. The State Fund has accepted liability for the claim.

¶12 The parties have settled claimant's entitlement to compensation benefits. The dispute in this case is limited to the State Fund's refusal to pay for chiropractic treatments claimant obtained after August 4, 1998, and its refusal to agree to pay for future chiropractic care.

¶13 Following his 1998 injury, claimant saw Dr. Pezo on June 18, 1998. (Ex. 2 at 4; Pezo Dep. at 9.) On the same day, claimant filed a written claim for compensation. (Ex. 1.)

¶14 On June 18th, claimant told Dr. Pezo he was experiencing burning, stabbing pain in his low-lumbar area, more on the right side. (Pezo Dep. at 9.) He described the pain as "similar to past or prior low-back pain." (*Id.* at 11.)

¶15 Dr. Pezo treated claimant with spinal adjustment, electric muscle stimulation and cold packs. (*Id*. at 13.) The latter two treatments were prescribed to reduce claimant's muscle spasm. (*Id*. at 20.)

¶16 Dr. Pezo continued to treat claimant. She saw and treated him on June 19, 22, 24, 26, 29; July 2, 6, 9, 13, 15, 21, 28; and August 4, 1998.

¶17 Meanwhile, the State Fund received and accepted the claim. Mike McGrorty (McGrorty), a claims adjuster for the State Fund, was assigned the claim.

¶18 The State Fund has contracted with the St. Peter's Hospital Managed Care Organization (St. Peter's MCO or MCO) to furnish care to the injured workers it insures.[(1)]

McGrorty referred the claim to the St. Peter's MCO since it involved a loss of wages and treatment by a specialist. (Trial Test.; Ex. 16 at 184.) The MCO designated Dr. Allan Weinert to evaluate and treat claimant. (*See* Exs. 10 at 92 and 13 at 152.) Dr. Weinert had previously seen claimant for an independent medical examination (IME) respecting his 1991 back injury. (Ex. 10 at 92.)

¶19 Claimant was notified that Dr. Weinert had been designated to treat him. While the Court does not have in evidence the actual notice to claimant of Dr. Weinert's designation, claimant thereafter saw Dr. Weinert. Moreover, a note made by the MCO case worker monitoring his care indicates that she sent claimant a letter notifying him of the MCO referral. (Ex. 13 at 152.)

¶20 Dr. Weinert initially saw claimant for his 1998 injury on July 14, 1998. He took a history and did a physical examination, noting a mild antalgic gait on the right side, discomfort and mild restriction on lumbar extension, and diffuse tenderness on the right side of the lumbar region. (Ex. 10 at 92-93.) He reviewed x-ray films of August 17, 1996 and June 30, 1998,[(2)] interpreting them as showing "mild anterior wedge compression of T11 and T12" and "some mild disc space narrowing at L4-5 and L5-S1 levels with associated facet arthrosis . . . ." (*Id.* at 94.) His impression was:

> 1. Degenerative disc disease at L4-5 and L5-S1 levels with facet arthrosis and restricted lumbar extension as a long-standing problem with exacerbation and possible component of right lumbar myofascial strain related to 6/16/98 injury.
>
> 2. Left postural lumbar shift.
>
> 3. Obesity.
>
> 4. Deconditioning.
>
> 5. Depression unrelated to work injury of 6/16/98.

(*Id.*) Dr. Weinert concluded that claimant was capable of light-duty work with lifting limited to 20 pounds and avoidance of "bending or lifting from ground level." (*Id.*)

¶21 Dr. Weinert's recommendations for treatment on July 14th included both chiropractic adjustments and physical therapy:

> 1. Mr. Parmer has experienced significant improvement with chiropractic adjustments I would recommend he receive three additional chiropractic adjustments to move him towards maximum medical improvement.
>
> 2. Mr. Parmer additionally would benefit from four to six additional physical therapy appointments to progress his back exercise program including some postural shifting to reduce left lumbar shift and lumbar stabilization exercises.

(*Id.*) As set out in paragraph 16, claimant did return to Dr. Pezo for further chiropractic treatments on July 21 and 28, and August 4, 1998.

¶22 Dr. Weinert saw claimant again on August 6, 1998, at which time claimant reported he had participated in physical therapy and was performing a home exercise program. (Ex. 10 at 96.) Claimant's gait was normal and he was better overall, although he reported occasional right low-back and hip pain. (*Id.*) Dr. Weinert's impression was unchanged except with regard to number 2, which he modified to read, "2. Left postural lumbar shift, resolved." (*Id.*) He concluded that claimant had reached MMI and "has returned back to baseline." (*Id.*) He found no impairment resulting from the June 1998 injury and released him to return to full-duty work with his "prior work restrictions." (*Id.*)

¶23 In his August 6th office note, Dr. Weinert specifically addressed future chiropractic care, writing:

> He has been instructed in a home exercise program. There is no further treatment that is indicated at this point in time, either physical therapy or chiropractic care. I would be happy to see him on an as needed basis if he should have any change in his symptoms.

(*Id.* at 97.)

¶24 Claimant disagreed with Dr. Weinert's evaluation and requested a second opinion. (*See* Ex. 13 at 156.) An IME was set up with Dr. John A. Vallin, a specialist in physical medicine. (*Id. and see* Ex. 8.)

¶25 Dr. Vallin examined claimant on September 3, 1998. At that time, claimant was complaining of "intermittent aching pain in his low back, with intermittent numbness and tingling [but not pain] radiating into his right thigh." (Ex. 8 at 81.) He reported that prolonged walking or standing increased his pain. (*Id.*) Dr. Vallin's report (ex. 8) goes into detail concerning claimant's back injuries, including the 1996 car accident which Dr. Vallin felt aggravated his low-back condition. Regarding claimant's condition on the date of his examination, Dr. Vallin reported, *inter alia*:

> In general, I would be in concurrence with Dr. Weinert's findings and opinions. However, in order to better objectify Mr. Parmer's subjective symptoms, which are not consistent with organic pathology (right thigh numbness, numbness involving the hips, thighs and legs when lying or sitting), I would recommend that Mr. Parmer undergo an MRI of the lumbar spine to definitively rule out a lumbosacral disc herniation.

(*Id.* at 84.) The doctor went on to state that he would await the MRI before determining if claimant was at MMI or required further treatment. (*Id.*)

¶26 Regarding further chiropractic treatment, Dr. Vallin agreed with Dr. Weinert irrespective of the MRI results:

> Should Mr. Parmer's MRI show evidence of a lumbosacral disc herniation, he may benefit from a lumbar epidural steroid injection. However, should Mr. Parmer have no evidence of a lumbosacral disc herniation, it is my medical opinion he would not warrant additional treatment in the form of physical therapy or chiropractics.

(*Id.* at 85.) Dr. Vallin went on to recommend weight loss, a conditioning program, and cessation of smoking, saying:

> Mr. Parmer appears to be significantly deconditioned as noted by his weight and prior medical records, both from Dr. Weinert and his physical therapist, Mr. Harrington. In addition, he is a smoker which places him at higher risk for low back pain. Non-industrial mitigating factors which are contributing to his chronic intermittent symptoms include his exogenous obesity, deconditioned state and history of tobacco abuse. Therefore, Mr. Parmer would need to remain complaint [sic] with a home exercise program previously taught to him by his physical therapist, and would benefit from a weight loss program and cessation of smoking. Further chiropractics, in my opinion, would constitute maintenance or palliative care and would not be curative.

(*Id.*)

¶27 An MRI was done on December 2, 1998. The radiologist's report is found at Exhibit 6 page 58. Dr. Vallin summarized the findings as follows:

> Multilevel lumbar degenerative disc disease L2/3, L3/4, L4/5 and L5/S1. Disc bulging without focal herniation L3/4, L4/5 and L5/S1, with mild right foraminal stenosis involving L5/S1.

(Ex. 9 at 89.) Dr. Vallin concluded, "Given the multilevel degenerative changes involving Mr. Parmer's lumbar spine, to a reasonable degree of medical probability his most recent injury of June 16, 1998, aggravated a pre-existing condition." (*Id.*) Regarding further treatment, he made the following recommendations:

> **Given the extensive physical therapy and chiropractics Mr. Parmer has had in the past, it is my opinion further formal therapy or chiropractics would not be efficacious in completely eliminating his symptoms and would constitute maintenance or palliative care.**
>
> However, . . . he may be an appropriate candidate for a lumbar epidural steroid injection and/or selective L5 nerve root block at that level, for both diagnostic and therapeutic purposes. Prior to these blocks it may be beneficial for him to undergo neurodiagnostic studies to rule out a right L5 radiculopathy, given his foraminal stenosis, which could be performed by Dr. Weinert. [Emphasis added.]

(*Id*.)

¶28 Claimant returned to Dr. Weinert on January 7, 1999, reporting that he was working but was "having more problems with back pain and numbness and burning down into the right leg, primarily anterior thigh." (Ex. 10 at 99.) Dr. Weinert had the MRI report and was aware of Dr. Vallin's recommendations. (*Id.* at 99-100.) Because of claimant's continuing right leg complaints, Dr. Weinert ordered an EMG and nerve conduction tests, deferring, for the time, Dr. Vallin's recommendation for an epidural steroid injection.

¶29 The EMG and nerve conduction testing were done on January 12, 1999. They were normal. (Ex. 10 at 101-3.) In light of the results, Dr. Weinert then scheduled claimant for an epidural steroid injection. (*Id.*)

¶30 The epidural steroid injection was done on January 20, 1999. (*Id.* at 104.) Claimant reported significant improvement in follow-up visits on January 28, 1999 and February 11, 1999. (*Id.* at 105-8.)

¶31 During the January 28, 1999 follow-up, claimant told Dr. Weinert "that the 50 pound lift restriction that he was placed on precludes him from returning to his prior employment." (*Id.* at 105.) Dr. Weinert discussed a new FCE and claimant agreed to it. (*Id.*) Dr. Weinert also told claimant that if he had a "recurrence of the right lower extremity burning, we certainly could consider repeating the epidural steroid injection but as he is doing so well at this point in time, we will hold off on further injections." (*Id.*)

¶32 A second FCE was done on February 4, 1999. It placed claimant in the "light-medium physical demand classification" and Dr. Weinert restricted his "lifting to 35 pounds on an occasional basis." (Exs. 7 at 68-69 and 10 at 107.)

¶33 On February 4, 1999, Dr. Weinert found that claimant "remains at maximum medical improvement" and released him to light-medium work. (*Id.*) This is the last time claimant saw Dr. Weinert.

¶34 At trial the claimant testified that he has occasional flareups of his low-back pain. The flareups can be caused by ordinary activities, such as getting out of bed. When experiencing a flareup he gets relief through chiropractic care, sometimes for a few days and at other times for longer periods. However, since the State Fund has refused to pay for further chiropractic care, he has only seen Dr. Pezo a few times since August 4, 1998, specifically on August 12 and November 10, 1998, March 22, 25, 26, and 30, 1999, April 2 and 5, 1999, and in August and December 1999. (Ex. 2 at 18-20; Pezo Dep. at 46-47.)

¶35 Dr. Pezo testified that in her opinion claimant had not reached MMI at the time of the November 10, 1998 visit, or in March 1999. (Pezo Dep. at 36, 49.) She was not sure whether he is presently at MMI. (*Id*. at 49.)

¶36 Dr. Pezo mostly agreed with Dr. Weinert's diagnoses. (*Id*. at 50-54.) She testified that her treatments of claimant will not cure his underlying condition, which is degenerative in nature, but does relieve his flareups and helps him to function. (*Id.* at 55, 59-60.) She also agreed that physical therapy, weight loss, and a conditioning program may reduce his flareups. Claimant has not stopped smoking or attempted to lose weight but did testify that he does exercises.

¶37 Claimant is not presently employed. He has worked only sporadically since his 1998 injury, as a janitor for High Country Travel Plaza in December 1998, and for All Season Maintenance in January 1999. He testified that he had to quit the janitorial job because it was difficult. His previous employment was with Mountain Power, where he worked only 8 days before his June 16, 1998 injury. (Ex. 17 at 216.) In 1990 and 1991 he worked for at least two different employers (*see* ¶ 6), and, as noted earlier, he was

off work for two years following his 1991 injury. While he testified that chiropractic treatments will help him work,[(3)] he has not demonstrated any concrete employment plans or efforts since January 1999, or shown any history of long-term, stable employment in recent years. He has failed to persuade me that chiropractic care will result in his obtaining and keeping employment or is a cost-effective means to return him to employment.

¶38 Based on the evidence presented, and the previous findings of fact, I find Drs. Weinert's and Vallin's opinions concerning MMI more persuasive than Dr. Pezo's and conclude that claimant reached MMI at least by the time of Dr. Weinert's second, February 4, 1999 MMI opinion, and more probably than not at the time of his first, August 6, 1998 opinion. Both Drs. Weinert and Vallin are specialists with many more years of medical training than Dr. Pezo. Moreover, claimant's responses to the epidural injection on January 20, 1999, and the post-August 6, 1998 chiropractic treatment show that the treatments provided only temporary relief and that he continued to experience flareups of his underlying condition. His history of flareups began well before his 1998 injury.

¶39 I further conclude and find that while claimant's post-August 4, 1998 treatments by Dr. Pezo have temporarily reduced claimant's symptoms from flareups, her treatments did not improve his underlying condition. Some treatments, by claimant's own admission, helped for only a few days. Prior to the 1998 injury, claimant had a long history of flareups and had received frequent chiropractic treatments. His history of flareups after August 6, 1998, is consistent with his pre-injury history.

¶40 Finally, while no direct testimony was presented showing that Dr. Pezo is not a participating MCO medical provider, the evidence is sufficient for me to infer that she is not. If she were, then claimant could have continued his care with her and would not have been referred to Dr. Weinert. (*See* ¶ 19.)

CONCLUSIONS OF LAW

¶41 Claimant's entitlement to medical benefits is governed by the 1997 version of the Montana Workers' Compensation Act since that was the law in effect at the time of his 1998 injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶42 The 1997 version of the Workers' Compensation Act authorizes insurers to contract with managed care organizations to provide medical care to injured workers. Section 39-71-1103(3), MCA (1997), provides:

> (3) Insurers may contract with certified managed care organizations for medical services for injured workers. A worker who is subject to managed care may choose from managed care organizations in the worker's community that have a contract with the insurer responsible for the worker's medical services.

Since the State Fund has contracted with an MCO to provide health care services to the injured workers it insures, the MCO provisions of the Workers' Compensation Act apply.

¶43 Section 39-71-1101, MCA (1997), governs claimant's choice of physicians and treatment, providing:

> **39-71-1101. Choice of physician by worker -- change of physician -- receipt of care from managed care organization.** (1) Subject to subsection (3), a worker may choose the initial treating physician within the state of Montana.
>
> (2) Authorization by the insurer is required to change treating physicians. If authorization is not granted, the insurer shall direct the worker to a managed care organization, if any, or to a medical service provider who qualifies as a treating physician, who shall then serve as the worker's treating physician.
>
> (3) A medical service provider who otherwise qualifies as a treating physician but who is not a member of a managed care organization may not provide treatment unless authorized by the insurer, if:
>
> (a) the injury results in a total loss of wages for any duration;
>
> (b) the injury will result in permanent impairment;
>
> (c) the injury results in the need for a referral to another medical provider for specialized evaluation or treatment; or
>
> (d) specialized diagnostic tests, including but not limited to magnetic resonance imaging, computerized axial tomography, or electromyography, are required.
>
> (4) A worker whose injury is subject to the provisions of subsection (3) shall, unless otherwise authorized by the insurer, receive medical services from the managed care organization designated by the insurer, in accordance with 39-71-1104. The designated treating physician in the managed care organization then becomes the worker's treating physician. The insurer is not liable for medical services obtained otherwise, except that a worker may receive immediate emergency medical treatment for a compensable injury from a medical service provider who is not a member of a managed care organization.

¶44 As can be seen by reading the statute, the claimant's right to select an initial treating physician pursuant to subsection (1) was subject to the provisions of subsection (3), which in turn provided that a non-MCO physician cannot provide treatment, unless authorized by the insurer, if the injury results in total wage loss or an impairment rating. In this case, the claimant experienced a wage loss and was referred to the MCO and MCO-physician Dr. Weinert. As provided in subsection (4), upon that referral Dr. Weinert became the claimant's treating physician. Thereafter, except for emergency treatment, the State Fund was responsible for treatment by Dr. Pezo only if it authorized her treatments. Subsection (4) is plain and clear in this regard.

¶45 While the failure of the insurer to authorize treatment by a non-MCO physician may constitute a dispute within the jurisdiction of the Workers' Compensation Court, *cf. Ingraham v. Champion Intern.,* 243 Mont. 42, 793 P.2d 769 (1990) (holding that a provision granting an insurer final and unreviewable authority to grant or deny a lump

sum to a claimant unconstitutionally delegated legislative power to the insurer and unconstitutionally deprived claimant of his right to judicial review), claimant has failed to provide any evidence that it was necessary for him to go outside the MCO for chiropractic care. He did not present evidence showing that there are no chiropractors participating in the St. Peter's MCO and failed to persuade me that chiropractic care is superior to physical therapy, weight loss, and a conditioning program -- treatments which were affirmatively shown to be available through the MCO and which Dr. Pezo conceded would reduce claimant's flareups (*see* ¶ 36). Where adequate care is available from MCO providers, only exceptional circumstances will justify a finding that the claimant is entitled to care by an non-MCO provider. Since claimant has not shown that he sought chiropractic care within the MCO, or that chiropractic care was unavailable from the MCO, or that chiropractic care was superior to physical therapy and other medical assistance offered through the MCO, or some other special circumstance, his request for reimbursement for Dr. Pezo's services must be denied.

¶46 The claimant's request must also be denied on other grounds. Payment for medical services by any medical provider is governed by section 39-71-704, MCA (1997), which provides in relevant part:

> **39-71-704. Payment of medical, hospital, and related services -- fee schedules and hospital rates -- fee limitation.** (1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished:
>
> (a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable **primary medical services** for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires.
>
> (b) The insurer shall furnish **secondary medical services** only upon a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment.
>
> . . . .
>
> (f) Notwithstanding subsection (1)(a), the insurer may not be required to furnish, after the worker has achieved medical stability, **palliative or maintenance care** except:
>
> (i) when provided to a worker who has been determined to be permanently totally disabled and for whom it is medically necessary to monitor administration of prescription medication to maintain the worker in a medically stationary condition; or
>
> (ii) when necessary to monitor the status of a prosthetic device.
>
> (g) If the worker's treating physician believes that palliative or maintenance care that would otherwise not be compensable under subsection (1)(f) is appropriate

> to enable the worker to continue current employment or that there is a clear probability of returning the worker to employment, the treating physician shall first request approval from the insurer for the treatment. If approval is not granted, the treating physician may request approval from the department for the treatment. The **department** shall appoint a panel of physicians, including at least one treating physician from the area of specialty in which the injured worker is being treated, pursuant to rules that the department may adopt, to review the proposed treatment and determine its appropriateness. [Emphasis added.]
>
> . . . .

Whether deemed "primary" or "secondary" services, the claimant has not established he is entitled to payment for either Dr. Pezo's past, post-August 6, 1998 treatments, or for future care by her.

¶47 "Primary medical services" are defined in section 39-71-116(26), MCA (1997), as follows:

> (26) "Primary medical services" means treatment **prescribed by a treating physician**, for conditions resulting from the injury, **necessary for achieving medical stability.** [Emphasis added.]

As set forth in the subsection, **both** of the bolded conditions must be met for the medical care to be deemed "primary medical services" for which the insurer is responsible.

¶48 Medical stability is defined in section 39-71-116(18), MCA, as follows:

> (18) "Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.

I have found as fact that claimant more probably than not reached medical stability on August 6, 1998. The chiropractic services therefore did not constitute "primary medical services."

¶49 Even if claimant had not reached medical stability when the past chiropractic treatments were provided, the post-August 6, 1998 chiropractic treatments were not prescribed by claimant's physician. While the failure or refusal of the treating physician to authorize chiropractic treatment may be a dispute over which the Court has jurisdiction (*see* ¶ 45), the claimant has failed to persuade me that Dr. Pezo's post-August 6, 1998 treatments were necessary. The August 12th treatment was six days after Dr. Weinert saw claimant and found him to be at MMI. On August 6th, the claimant was substantially improved. There is no indication that prior to seeing Dr. Pezo on any occasion after August 6th the claimant contacted Dr. Weinert to inform him his condition was worse or to seek care from Dr. Weinert. He acted on his own, without providing Dr. Weinert an opportunity to treat him or refer him to a chiropractor or other physician. The provision for primary medical services does not make the treating physician's prescription for treatment unreviewable, but it does require, at minimum, that the

treating physician be made aware that claimant is seeking further treatment and be given an opportunity to evaluate and prescribe further treatment. Claimant in this case bypassed Dr. Weinert and cannot now argue that he should have approved Dr. Pezo's care.

¶50 Claimant's request fares no better under the provisions governing "secondary medical services," which are defined in section 39-71-116(30), MCA, as follows:

> (30)(a) "Secondary medical services" means those medical services or appliances that are considered not medically necessary for medical stability. The services and appliances include but are not limited to spas or hot tubs, work hardening, physical restoration programs and other restoration programs designed to address disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation facilities.
>
> (b)(i) As used in this subsection (30), "disability" means a condition in which a worker's ability to engage in gainful employment is diminished as a result of physical restrictions resulting from an injury. The restrictions may be combined with factors, such as the worker's age, education, work history, and other factors that affect the worker's ability to engage in gainful employment.
>
> (ii) Disability does not mean a purely medical condition.

Chiropractic services may qualify as secondary services where they increase claimant's ability to work. However, they must still meet the requirements of section 39-71-704(1)(b), MCA (1997), quoted earlier, which requires a "clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment." While claimant testified in general terms that his flareups interfere with his ability to work, he has worked only sporadically and has not persuaded me that his unemployment, which has lasted for the last year and a half, is a consequence of his flareups or the lack of chiropractic care, or that chiropractic care is a cost-effective means of returning him to employment. The statutory criteria are not met.

¶51 This is not to say that the criteria for secondary medical services might not be met in the future. If it can be shown that claimant has returned to work or has employment lined up, and that chiropractic services are cost-effective and are necessary for him to work on a regular, sustained basis, then claimant may be entitled to payment for treatment.

¶52 Finally, the Court considers subsection (1)(g) of section 71-39-704, MCA (1997), which is the final provision which might apply to claimant's request. As quoted above, the subsection governs "palliative" and "maintenance" care. Both terms are defined in section 71-39-116, MCA (1997), as follows:

> (17) "Maintenance care" means treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status.
>
> (21) "Palliative care" means treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms.

Based on the definitions, "maintenance care" is preventative in nature, while palliative care addresses symptomatic flareups. The care rendered by Dr. Pezo is palliative in nature.

¶53 Under section 71-39-704, MCA, the treating physician must prescribe palliative care but the insurer is not required to approve it. If it refuses to approve the treatment, then the claimant may seek review of its refusal by petitioning the Department. In 1999, the legislature renumbered subsection (1)(g) as subsection (1)(f)(iii) and amended the subsection to provide that the disputes shall be subject to the Workers' Compensation Court's jurisdiction following mediation. 1999 Mont. Laws, Ch. 442, §19. Since the change is procedural, this Court has jurisdiction over a dispute arising under the 1997 subsection.

¶54 In this case, the treating physician did not prescribe the chiropractic care, thus the section literally does not apply. But, as noted earlier, the failure of the treating physician cannot deprive claimant of an opportunity for judicial review or the Court of its jurisdiction to determine whether the services should be ordered. (¶ 45.) Thus, the Court therefore has jurisdiction to order the services, if they meet the statutory criteria.

¶55 Under section 39-71-704(1)(g), MCA (1997), the claimant must show that the chiropractic treatment he requests "is appropriate to enable the worker to continue current employment or that there is a clear probability of returning the worker to employment." As with secondary medical services, claimant has failed to show that chiropractic treatment would do so. He is not presently employed and he has failed to persuade me that chiropractic services has "a clear probability of returning him to employment." He had several chiropractic treatments in March and April 1999, but has not obtained employment since then or even demonstrated that he has made an active, good faith effort to do so.

JUDGMENT

¶56 1. Claimant is not entitled to medical payments for chiropractic treatments after August 6, 1998. His petition is **dismissed with prejudice**.

¶57 2. This JUDGMENT is certified as final for purposes of appeal.

¶58 3. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 9th day of June, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Richard J. Pyfer
Mr. Thomas E. Martello
Submitted: February 23, 2000

1. While there was no direct testimony about the contract between the MCO and the State Fund, the Court infers from other evidence, viz. records of a case manager with the MCO (Ex. 13) and the fact that the State Fund referred claimant to the MCO, that in fact the State Fund has contracted with the MCO as authorized by section 39-71-1103(3), MCA (1997-99). See ¶ 42 for the text of the statute.

2. The x-rays of June 30, 1998, were ordered by Dr. Pezo and taken at St. Peter's Hospital. They were read by Dr. R.R. Sibbitt, who is probably a radiologist. (Ex. 6 at 57.)

3. Claimant also testified that he is depressed. However, Dr. Weinert's records state that claimant's depression is "unrelated to work injury of 6-16-98." (Ex. 10 at 94, 96.) Dr. Pezo's qualifications to diagnose and treat depression are questionable but in any event she testified that claimant "didn't relay to me feelings of depression." (Pezo Dep. at 50.) There is no medical evidence relating claimant's depression to his June 1998 injury, or indicating that it precludes his employment.