

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1998 MTWCC 82**

**WCC No. 9705-7754**

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**DARCI SELLEY**

**Petitioner**

**vs.**

**LIBERTY NORTHWEST INSURANCE CORPORATION**

**Respondent/Insurer for**

**TURN OF THE CENTURY, INCORPORATED**

**Employer.**

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**DECISION AND JUDGMENT**

**Summary:** After learning the claimant's physician, Dr. Richard A. Nelson, did not have hospital privileges and thus did not meet the criteria of section 39-71-116(30), MCA (1993) for designation as a treating physician, insurer informed claimant it would not reimburse for future treatment by that physician. Claimant argued the insurer had compensated Dr. Nelson during her first two years of treatment with him, that changing physicians would create a hardship, and that the insurer was equitably estopped from refusing future compensation to Dr. Nelson. Claimant also argued section 39-71-116(30), MCA (1993) was unconstitutional in that it limited medical payments under the WCC to physicians with hospital privileges.

**Held:** The insurer was not equitably estopped from refusing future payment to Dr. Nelson where it did not make any representation or concealment of fact and was not shown to have knowledge that Dr. Nelson did not meet statutory criteria for a treating physician. [Note: the WCC was reversed on this ground; see [Selley v. Liberty Northwest, 2000 MT 76](#).] The statutory distinction between physicians with and without hospital admitting privileges is not unconstitutional. While claimant invoked the due process clauses of the Montana and federal constitutions, her arguments follow equal protection analysis. In determining whether the distinction is rationally related to a legitimate government objective, the Court is not limited to the legislative record but must consider any possible purpose of the legislation. A requirement of hospital privileges does have legitimate legislative purposes. If a claimant requires hospitalization and her treating physician does not have admitting

privileges, another physician must be called in, leading to a likely learning curve and potential additional cost. Moreover, hospital privileges are not granted to every licensed physician and the requirement can serve as a means to filter out the least competent physicians. Although the record contains no question of Dr. Nelson's competence, and suggests he gave up admitting privileges as a result of moving his residence beyond hospital proximity requirements, the distinction nonetheless is rationally related to legitimate governmental purposes. The fact that a legislative classification is "imperfect" does not mean it necessarily violates equal protection.

### **Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-116(30), MCA (1993).** The insurer was not equitably estopped from refusing future payment to claimant's physician, whom it learned did not have hospital admitting privileges and thus did not qualify as a treating physician, where the insurer did not make any representation or concealment of fact and was not shown to have had knowledge that the doctor did not meet statutory criteria for a treating physician. [Note: the WCC was reversed on this point; see [Selley v. Liberty Northwest, 2000 MT 76.](#)]

**Estoppel and Waiver: Equitable Estoppel.** The insurer was not equitably estopped from refusing future payment to claimant's physician, whom it learned did not have hospital admitting privileges and thus did not qualify as a treating physician, where the insurer did not make any representation or concealment of fact and was not shown to have had knowledge that the doctor did not meet statutory criteria for a treating physician. [Note: the WCC was reversed on this point; see [Selley v. Liberty Northwest, 2000 MT 76.](#)]

**Physician: Treating Physician: Who may be.** The insurer was not equitably estopped from refusing future payment to claimant's physician, whom it learned did not have hospital admitting privileges and thus did not qualify as a treating physician, where the insurer did not make any representation or concealment of fact and was not shown to have had knowledge that the doctor did not meet statutory criteria for a treating physician. [Note: the WCC was reversed on this point; see [Selley v. Liberty Northwest, 2000 MT 76.](#)]

**Constitutional Law: Equal Protection.** The distinction drawn by section 39-71-116(30), MCA (1993) between physicians with and without hospital admitting privileges is not unconstitutional. In determining whether the distinction is rationally related to a legitimate government objective, the Court is not limited to the legislative record but must consider any possible purpose of the legislation. A requirement of hospital privileges has legitimate legislative purposes. If a claimant

requires hospitalization and her treating physician does not have admitting privileges, another physician must be called in, leading to a likely learning curve and potential additional cost. Moreover, hospital privileges are not granted to every licensed physician and the requirement can serve as a means to filter out the least competent physicians. Although the record contains no question of Dr. Nelson's competence, and suggests he gave up admitting privileges as a result of moving his residence beyond hospital proximity requirements, the distinction nonetheless is rationally related to legitimate governmental purposes. The fact that a legislative classification is "imperfect" does not mean it necessarily violates equal protection. [Note: the WCC's decision was reversed on other ground, with the Supreme Court not reaching the constitutional argument, see [\*Selley v. Liberty Northwest\*, 2000 MT 76.](#)]

¶1 This case is presented for decision based on an agreed statement of facts and stipulated exhibits. The issue is whether respondent's, Liberty Northwest Insurance Corporation (Liberty), refusal to recognize and reimburse Dr. Richard A. Nelson as claimant's treating physician was improper.

#### Facts

¶2 Darci Selley (claimant) was injured on January 7, 1995, while working for Turn of the Century, Incorporated, which was insured by Liberty. Liberty accepted liability for her claim and has paid both wage loss and medical benefits.

¶3 Since her injury the claimant has been treated by Dr. Nelson. For the first two years of treatment, Liberty reimbursed Dr. Nelson for his treatments, however, in the first quarter of 1997, Liberty's claims adjuster learned that Dr. Nelson does not have hospital admitting privileges at any hospital near his medical practice. Liberty then refused further reimbursement to Dr. Nelson on the basis that he does not qualify as claimant's treating physician. Its refusal affected only prospective reimbursement. It did not refuse payment of any of Dr. Nelson's bills incurred prior to its notice that it was not responsible for his services.

#### Discussion

¶4 Liberty's refusal to reimburse Dr. Nelson after it learned he lacks hospital admitting privileges is based on section 39-71-116(30), MCA (1993), which provides:

(30) "Treating physician" means a person who is primarily responsible for the treatment of a worker's compensable injury and is:

(a) a physician licensed by the state of Montana under Title 37, chapter 3, **and has admitting privileges to practice in one or more hospitals, if any, in the area where the physician is located;**

- (b) a chiropractor licensed by the state of Montana under Title 37, chapter 12;
- (c) a physician assistant-certified licensed by the state of Montana under Title 37, chapter 20, if there is not a physician, as defined in subsection (30)(a), in the area where the physician assistant-certified is located;
- (d) an osteopath licensed by the state of Montana under Title 37, chapter 5; or
- (e) a dentist licensed by the state of Montana under Title 37, chapter 4. [Emphasis added.]

¶15 The parties agree that Dr. Nelson does not have admitting privileges at either St. Vincent Hospital or the Deaconess Hospital in Billings, Montana. They also agree that he has not had admitting privileges at either hospital for the last seven years. He had them prior to that time but resigned his privileges when he moved to Columbus, Montana.

¶16 Based on the agreed issues presented in this case, the Court must and does assume that the Billings hospitals are the relevant hospitals for purposes of section 39-71-116(30), MCA (1993), or that Dr. Nelson does not have admitting privileges at any other hospital "in the area" where he practices. At least claimant does not argue that Dr. Nelson has admitting privileges which would satisfy the section.

¶17 In disputing Liberty's refusal to further reimburse Dr. Nelson, claimant tenders two legal grounds. First, she argues that Liberty's prior payments to Dr. Nelson estops it from now disputing that he is her treating physician. Second, she argues that section 39-71-116(16), MCA (1993), is unconstitutional.

### I. Estoppel

¶18 The doctrine of equitable estoppel precludes a party from profiting from its wrong:

Equitable estoppel has long been recognized in Montana and is invoked to promote justice, honesty and fair dealing; the purpose of the doctrine of equitable estoppel is to prevent a party from taking unconscionable advantage of his or her wrong while asserting a strict legal right.

*Billings Post No. 1634 v. Montana Dept. of Revenue*, 284 Mont. 84, 90, 943 P.2d 517, 520 (1997). Even without consideration of the specific elements of the doctrine, claimant has failed to demonstrate any wrong by Liberty. At best she has demonstrated that Liberty belatedly learned that Dr. Nelson did not have admitting privileges and therefor did not satisfy the definition of a treating physician.

¶19 Beyond a general purpose analysis, the elements which the claimant must prove to estop Liberty are:

1. the existence of conduct, acts, language, or silence amounting to a representation or a concealment of a material fact;
2. these facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him;
3. the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him;
4. the conduct must be done with the intention, or at least the expectation, that it will be acted upon by the other party, or under circumstances both natural and probable that it will be so acted upon;
5. the conduct must be relied upon by the other party and, thus relying, he must be led to act upon it; and
6. he must in fact act upon it in such a manner as to change his position for the worse.

(*Id.*)

¶10 The facts of this case do not satisfy the first element. Liberty's payment of Dr. Nelson's bills did not amount to a representation or concealment of fact. It simply paid the bills he submitted.

¶11 Even if the payments can be construed as a representation or concealment, claimant has failed to satisfy the second element. She has failed to establish that Liberty knew Dr. Nelson did not meet the treating physician definition. She has also failed to show that the circumstances were "such that knowledge of" that fact must be imputed to it.

¶12 Even assuming that the first two elements are satisfied, the third is not. In *Elk Park Ranch, Inc. v. Park County*, 282 Mont 154, 166, 935 P.2d 1131, 1138 (1997), the Supreme Court elaborated on the requirement that the complaining party have no knowledge concerning the truth of the represented facts:

In addition, equitable estoppel also requires that the complaining party must have no knowledge of the truth of the facts which it claims were misrepresented to it. We have held, however, that the complaining party must lack not only the actual knowledge itself, but also lack "a readily available means of knowledge as to the true facts." Moreover, the doctrine of equitable estoppel will not be applied where both parties have the same opportunity to determine the truth of the facts at issue. [Citations omitted.]

In this case, there is no evidence that claimant lacked equal means to ascertain whether Dr. Nelson had hospital privileges. Indeed, she could have simply asked him.

## II. Constitutionality

¶13 In attacking the constitutionality of section 39-71-116(30), MCA (1993), claimant bears a heavy burden. She must persuade the Court *beyond a reasonable doubt* that the statute is unconstitutional.

[L]egislative enactments are presumed to be constitutional. The party challenging the legislative enactment bears the burden of proving its unconstitutionality beyond a reasonable doubt. If any doubt exists, it must be resolved in favor of the legislative enactment.

*Heisler v. Hines Motor Co.*, 282 Mont. 270, 279, 937 P.2d 45, 50 (1997) (citations omitted).

¶14 Claimant's constitutional challenges are directed at the requirement that Dr. Nelson have hospital privileges to qualify as a treating physician. While invoking the due process clauses of both the Montana and United State Constitutions, Mont. Const. Art. II, sec. 17; U.S. Const. Amend. 14, claimant's specific arguments are based on an alleged right to freedom of contract and on equal protection analysis. The contract argument amounts to two sentences and does not warrant discussion. Her equal protection arguments, however, are well developed, although not well cited.

¶15 Both the United States and Montana constitutions guarantee equal protection of the laws. U.S. Const. Amend. 14; Mont. Const, Art. II, § 4. "The principal purpose of the Equal Protection Clause is to ensure that citizens are not subject to arbitrary and discriminatory state action." *Zempel v. Uninsured Employers' Fund*, 282 Mont. 424, 428, 938 P.2d 658, 661 (1997). The Clause "does not require that all persons be treated alike regardless of whether their circumstances are the same; it requires only that all persons be treated alike under like circumstances." *Id.* at 432, 938 P.2d at 663.

¶16 To satisfy equal protection demands, legislatively drawn distinctions in workers' compensation matters must be "rationally related to a legitimate government objective." *Id.* at 429, 938 P.2d at 661. In *Montana Stockgrowers v. Dept. of Revenue*, 238 Mont. 113, 777 P.2d 285 (1989), the Court described the rational basis inquiry in the following terms.

[T]o survive scrutiny under the rational basis test, classifications must be reasonable, not arbitrary, and they must bear a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Eisenstadt v. Baird* (1972), 405 U.S. 438, 447, 92 S.Ct. 1029, 1035, 31 L.Ed.2d 349, 359. In applying this test the Court in *Eisenstadt* framed the inquiry as: "whether there is some ground of difference that rationally explains the different treatment . . ."

238 Mont. at 117-18, 777 P.2d at 288 (1989).

¶17 In determining the purpose of the hospital privileges requirement, the Court is not limited to the legislative record when ascertaining the possible purpose of the legislation or the relationship between the legislation and that purpose. *Kadrmus v. Dickenson Public Schools*, 487 U.S. 450, 463 (1979). Similarly, in examining the relationship between legislation and its purpose, the Court is not limited to justifications reflected in legislative history. Legislatures are not required to engage in the sort of fact-finding and analysis required of courts. *Federal Communications Comm. v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). Thus, the Court must consider "every conceivable basis" which might support the statute. *Id.* at 315. In *Federal Communications Comm. v. Beach*, the Supreme Court articulated the reasons for the broad judicial analysis of the challenged statute:

[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. *United States Railroad Retirement Bd. v. Fritz*, supra, at 179. See *Flemming v. Nestor*, 363 U.S. 603, 612, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960). Thus, the absence of "legislative facts" explaining the distinction "on the record," 294 U.S. App. D.C. at 389, 959 F.2d at 987, [\*\*\*16] has no significance in rational-basis analysis. See *Nordlinger v. Hahn*, 505 U.S. 1, 15, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992) (equal protection" does not demand for purposes of rational-basis review that a legislature or governing decision maker actually articulate at any time the purpose or rationale supporting its classification"). In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. See *Vance v. Bradley*, supra, at 111. See also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981). **"Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."** *Lehnhausen*, supra, at 365 (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510, 81 L. Ed. 1245, 57 S. Ct. 868 (1937)). [Emphasis added.]

*Id.* at 315, 1993 U.S. LEXIS 3744.

¶18 In applying these principles, I must first determine whether the definition of a treating physician affects an insurer's liability for medical services. If it does not, then Liberty would be liable for Dr. Nelson's services irrespective of the definition.

¶19 The definition does in fact affect Liberty's liability to Nelson. Liberty's liability for claimant's medical expenses is spelled out in section 39-71-704, MCA (1993). Subsection (1) provides:

**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.

Under subsection (1)(a), Dr. Nelson's services must satisfy the definition of "primary medical services." The Court assumes, as it must, that this is the provision involved in the present case since neither party has argued that "secondary medical services" are at issue.

¶20 "Primary medical services" are defined in section 39-71-116(21), MCA (1993), as follows:

(21) "Primary medical services" means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability.

Stringing sections 39-71-116(21) and 39-71-704(1)(a) together, Liberty is liable for Dr. Nelson's services if, and only if, his services are "primary medical services." Since "primary medical services" must be prescribed by a treating physician, and since Dr. Nelson does not qualify as a treating physician, Liberty is not liable for his services or for any treatment he prescribes. Thus, the issue raised by claimant is properly joined in this litigation.

¶21 Utilizing the equal protection analysis set out previously, the Court must determine whether the legislature's limitation of medical payments to physicians with hospital privileges has a legitimate governmental purpose and whether the limitation is related to that purpose.

¶22 Claimant urges that the hospital privileges requirement is rifle shot legislation aimed specifically at Dr. Nelson, therefore its purpose is corrupt and illegitimate. Consideration of her argument would require that I engage in a fact-finding exercise regarding the legislature's intent. The Montana legislature has 100 representatives and 50 senators. Any attempt by me, or any other court, to determine the motivation of legislators voting for the requirement would require mind-reading. It is the sort of analysis condemned by the United States Supreme Court.

¶23 Claimant's challenge, however, is not limited to legislative motives. She further argues that the denial of reimbursement for treatment by a physician lacking hospital privileges is irrational. The Court disagrees.

¶24 A requirement of hospital privileges has a legitimate purpose. If a claimant requires hospitalization and her treating physician does not have admitting privileges, then another physician will have to be called in. There is a learning curve for any new physician, and the potential of an additional cost.

¶25 Moreover, hospital privileges are not granted every licensed physician. In this day and age, concern with the competency of physicians goes beyond minimal licensing requirements. The Congress of the United States has by law established a national registry of physicians with the express purpose of obtaining and disseminating information concerning medical malpractice suits, disciplinary action by licensure boards, and disciplinary action taken with regard to hospital privileges. 42 USC §§ 11101 to 11137. The national registry was established in 1986, P.L. 99-660. Insurance companies, medical licensing boards, and health care entities, including hospitals, are required to report malpractice claims, adverse licensing actions, and actions adversely affecting clinical privileges. 42 USC §§ 11131 to 11133. Hospitals are required to obtain information reported to the national database prior to granting a physician clinical privileges and to check with the national registry every two years concerning physicians with hospital privileges. 42 USC § 11135. Hospitals are likely to filter out the least competent physicians in granting and continuing hospital privileges.

¶26 In saying this, the Court does not intend to disparage Dr. Nelson's competence or qualifications. It has no evidence to indicate that Dr. Nelson gave up his hospital privileges for any reason other than his relocating to Columbus, Montana. I assume that he is highly qualified and competent. However, the fact that he would be granted hospital privileges if he requested them does not invalidate the hospital privileges requirement.

¶27 The fact that a legislative classification is "imperfect" does not mean it necessarily violates equal protection principles. *Arneson v. State by and through Dept. of Admin., Teachers' Retirement Div.*, 262 Mont. 269, 274, 864 P.2d 1245, 1248 (1993). Mathematical nicety and perfect equality are not required. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Given the scrutiny contemplated by Congress in adopting the national registry for physicians, it is reasonable to assume that, as a group, physicians with hospital privileges are more competent, as measured by malpractice and adverse actions with respect to licensure and medical privileges, than the group of physicians lacking hospital privileges.

¶28 Claimant points out, however, that medical practitioners *other than physicians licensed under Title 37, chap. 3, MCA*, are not subject to the hospital privilege requirement. She argues that there is no rational basis for the distinction. The Court disagrees.

¶29 The distinction between medical doctors, on the one hand, and dentists and chiropractors, on the other, is rationally justified by the fact that the conditions treated by the latter two professions are far more limited than the conditions treated by medical doctors and typically do not require hospitalization. Chiropractic treatment is essentially

limited to external adjustment and manipulation: chiropractors cannot prescribe prescription drugs or perform surgery, however, minor.<sup>(1)</sup> The practice of dentistry is limited to mouth.<sup>(2)</sup>

Medical doctors are required to have a far broader knowledge of medical conditions and treatment, and are authorized to perform treatment which chiropractors and dentists are not. If the patient has a medical condition that may require hospitalization, then the patient is likely to also have a medical doctor attending him or her in addition to any chiropractor or dentist.

¶30 Osteopaths licensed under Title 37, chapter 5, MCA, are similarly exempt from the hospital privileges requirement. § 39-71-116(30)(d), MCA (1993). Osteopaths may be licensed under either Title 37, chapter 5, or as medical doctors under Title 37, chapter 3. Osteopaths licensed under chapter 5 are limited in their practice, much like chiropractors. Section 37-5-101(2), MCA, defines the practice of osteopath, *within the meaning of that chapter*, as follows:

(2) Every person is "practicing osteopathy" within the meaning of this chapter who:

(a) appends to or uses in connection with his or her name the words "doctor of osteopathy, diplomate of osteopathy, osteopath, osteopathist, osteopathic practitioner, osteopathic physician", or words of like import or any abbreviation thereof or the letters "D.O."; or

(b) professes publicly to or who, either on his own behalf, in his own name or in his trade name, or in behalf of any other person, corporation, association, partnership (as manager, bookkeeper, practitioner, or agent), treats, cures, alleviates, or relieves any ailment or disease of either mind or body or cures or relieves any fracture or misplacement or abnormal condition or bodily injury or deformity by any treatment or manipulation or method of manipulating a human body or any of its limbs, muscles, or parts by the use of the hands or mechanical appliances in an effort or attempt to relieve any pressure, obstruction, misplacement, or defect in any bone, muscle, ligament, nerve, vessel, organ, or part of the body, after having received or with the intent or expectation of receiving therefor, either directly or indirectly, any bonus, gift, or compensation whatsoever; provided, however, that nothing in this section restrains or restricts any legally licensed physician or surgeon in the practice of his profession.

Osteopaths licensed under the chapter are expressly precluded from prescribing drugs or doing surgery. § 37-5-305, MCA.<sup>(3)</sup>

¶31 As noted briefly above, osteopaths may also be licensed as medical doctors under Title 37, chapter 3. Section 37-3-306(6), MCA, which is part of the licensing chapter applicable to medical doctors, provides:

(6) Holders of the degree of doctor of osteopathy granted in 1955 or before will be certified [as medical doctors] only on the basis of taking and passing the examination given by the department, subject to 37-1-101. **Holders of the degree of doctor of osteopathy granted after 1955 will be certified in the same manner as provided above for physicians.** [Emphasis added.]

Osteopaths who have graduated since 1955 from schools accredited by the American Osteopathic Association are licensed as medical doctors. §§ 37-3-102, 305, 306, MCA. Thus, they are subject to the hospital privileges requirement of section 39-71-116(30)(a), MCA (1993).

¶132 The distinction between medical doctors and physician assistants has a different sort of justification. That justification is apparent from the text of section 39-71-116(30)(c), MCA (1993), which provides that a claimant may elect a physician assistant (PA) as a treating physician only "if there is not a physician, as defined in subsection (30)(a), in the area where the physician assistant-certified is located." It is only when a medical doctor is unavailable to act as a treating physician that the provision comes into play. Permitting treatment by a PA is certainly more reasonable than requiring a claimant to obtain treatment outside of the area where he or she resides, or to go without treatment altogether. Inclusion of PAs in the list of treating physicians does not render subsection (30) irrational.

¶133 Claimant has failed to persuade me beyond a reasonable doubt that the hospital privileges requirement of section 39-71-116(30)(a), MCA, violates either her or Dr. Nelson's right to equal protection of the laws. The requirement has a legitimate purpose and is reasonably related to that purpose. The distinctions between medical doctors and other types of medical practitioners who may act as treating physicians are rational and not arbitrary.

¶134 Finally, I consider claimant's request for attorney fees and a penalty. An award of either requires a finding that the insurer has acted unreasonably. §§ 39-71-612, -2907, MCA. Whether or not I am correct in my decision on the merits of this case, the insurer's defenses are not unreasonable. Claimant's estoppel argument is not so patently correct that it cannot be reasonably disputed. And, unless a statute has already been declared unconstitutional, a litigant is entitled to rely on the presumption that the statute is constitutional.

### JUDGMENT

¶135 1. The requirement that a physician licensed under Title 37, chapter 3, MCA, have hospital privileges in order to be designated a treating physician under section 39-71-116(30), MCA (1993), does not violate either the claimant's or Dr. Nelson's rights to equal protection of the laws.

¶36 2. The petition is dismissed with **prejudice**.

¶37 3. This Decision and Judgment is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶38 4. Any party to this dispute may have 20 days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 16th day of November, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Don Edgar Burris

Mr. Larry W. Jones

Submitted: September 9, 1998

1. Section 37-12-101(3), MCA, defines the practice of chiropractic as follows:

(3) "Chiropractic" is the system of specific adjustment or manipulation of the articulations

and tissues of the body, particularly of the spinal column, for the correction of nerve interference and includes the use of recognized diagnostic and treatment methods as taught in chiropractic colleges but does not include surgery or the prescription or use of drugs.

2. Section 37-4-101(2), MCA, defines the practice of dentistry as follows:

(2) Except for the provisions of 37-4-104, a person is "practicing dentistry" under this chapter if the person:

(a) performs, attempts, advertises to perform, causes to be performed by the patient or any other person, or instructs in the performance of dental operations, oral surgery, or dental service of any kind gratuitously or for a salary, fee, money, or other remuneration paid or to be paid, directly or indirectly, to the person, any other person, or any agency;

(b) is a manager, proprietor, operator, or conductor of a place where dental operations, oral surgery, or dental services are performed, unless the person is the personal representative of the estate of a deceased dentist or the personal representative of a disabled dentist, as provided in 37-4-104;

- (c) directly or indirectly, by any means or method, furnishes, supplies, constructs, reproduces, or repairs a prosthetic denture, bridge, appliance, or other structure to be worn in the human mouth;
- (d) places the appliance or structure in the human mouth or attempts to adjust it;
- (e) advertises to the public, by any method, to furnish, supply, construct, reproduce, or repair a prosthetic denture, bridge, appliance, or other structure to be worn in the human mouth;
- (f) diagnoses, professes to diagnose, prescribes for, professes to prescribe for, treats, or professes to treat disease, pain, deformity, deficiency, injury, or physical condition of human teeth, jaws, or adjacent structures;
- (g) extracts or attempts to extract human teeth or corrects, attempts, or professes to correct malpositions of teeth or of the jaw;
- (h) gives or professes to give interpretations or readings of dental roentgenograms;
- (i) administers an anesthetic of any nature, subject to the limitations provided in 37-4-511, in connection with a dental operation;
- (j) uses the words "dentist", "dental surgeon", or "oral surgeon", the letters "D.D.S.", "D.M.D.", or any other words, letters, title, or descriptive matter that in any way represents the person as being able to diagnose, treat, prescribe, or operate for any disease, pain, deformity, deficiency, injury, or physical condition of human teeth, jaws, or adjacent structures;
- (k) states, advertises, or permits to be stated or advertised, by sign, card, circular, handbill, newspaper, radio, or otherwise, that the person can perform or will attempt to perform dental operations or render a diagnosis in connection with dental operations; or
- (l) engages in any of the practices included in the curricula of recognized dental colleges.

3. The section provides:

**37-5-305. Limitations on certificate -- prescribing drugs -- surgery.** The certificates provided for in this chapter do not authorize the holders thereof to prescribe or use drugs in the practice of osteopathy or to perform major or operative surgery. A person holding a certificate under this chapter who prescribes or uses drugs in the practice of osteopathy or who performs major or operative surgery is guilty of a misdemeanor, provided that nothing in this chapter may be construed to prohibit any legalized osteopath in this state from practicing major or operative

surgery after having passed a satisfactory examination in surgery before the Montana board of medical examiners.