

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 76

WCC No. 9401-6989

VIOLET M. SYNEK

Appellant

vs.

STATE COMPENSATION MUTUAL INSURANCE FUND

Respondent

for

PROFESSIONAL NURSING PERSONNEL POOL

Employer.

ORDER ON APPEAL

This is an appeal from the Findings of Fact, Conclusions of Law, and Order entered by James L. Keil, hearing examiner for the Montana Department of Labor and Industry (DLI), on January 14, 1994. The order determined:

The State Compensation Insurance Fund is not liable for payment of past or, in absence of specific authorization, future chiropractic treatments rendered by Karlene Berish, D.C., to the claimant, Violet Synek, from December of 1988 forward.

On January 28, 1994, Violet M. Synek (Synek) appealed the order on the ground that the decision was "erroneous in fact, procedure and law."

Standard of Review

Judicial review of the DLI order is authorized under section 39-71-204(3), MCA⁽¹⁾, which provides that any party who is aggrieved by a department order "may appeal the dispute to the workers' compensation judge." The standard of review is set forth in the Montana Administrative Procedure Act, section 2-4-704(2), MCA, which provides in relevant part:

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) The administrative findings, inferences, conclusions, or decisions are:

...

(ii) in excess of the statutory authority of the agency;

...

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;

...

The standard of review applicable to the hearing examiner's findings of fact is whether the findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." ***State Compensation Mutual Insurance Fund v. Lee Rost Logging***, 252 Mont. 97, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA.) The standard for reviewing his conclusions of law is whether the conclusions are correct. ***Steer, Inc. v. Department of Revenue***, 245 Mont. 470, 474-5, 803 P.2d 601 (1990).

Discussion

At issue is the State Fund's liability, if any, for chiropractic treatments for Synek's low-back condition which was caused or triggered by an October 10, 1980 industrial accident. Chiropractor J. L. Cromwell treated Synek following her accident but dismissed her from his care in January 1981. He thereafter resumed her treatment in February 1983. Dr. Cromwell then sold his practice to Karlene Berish, D.C., who has treated Synek continuously since June 1984.

Since June 1984 Dr. Berish has treated Synek on an average of between one and one-half to three times per week. (Finding of Fact No. 33.) The State Fund paid for the treatments until December 1988, at which time it refused further payment to Dr. Berish. Its refusal was based on the opinion of its consulting chiropractor that further chiropractic treatments amounted to "maintenance" treatment.

On January 10, 1992, Synek petitioned the DLI for review of the State Fund's refusal to pay for her continued chiropractic care. A contested case hearing was held on May 29, 1992. Dr. Berish testified. In addition to the testimony of Dr. Berish, the hearing examiner considered Dr. Berish's prior deposition, Synek's deposition, and numerous exhibits.

Applicable Law

Synek was injured in 1980. Therefore, the law in effect on that date applies. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 321, 730 P.2d 380 (1986).

At the time of Synek's injury, the insurer's obligation for payment of medical expenses was governed by section 39-71-704, MCA (1979), which provided in relevant part:

39-71-704. Payment of medical, hospital, and related services. In addition to the compensation provided by this chapter and as an additional benefit separate and apart from compensation, the following shall be furnished:

(1) After the happening of the injury, the employer or insurer shall furnish, without limitation as to length of time or dollar amount, reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, *and such other treatment as may be approved by the division for the injuries sustained.* [Italics added.]

Chiropractors are not "physicians or surgeons" as those terms were used in the 1979 Montana Workers' Compensation Act. **See *Weis v. Div. of Workers' Compensation*, 232 Mont. 218, 221, 755 P.2d 1385 (1988).** Chiropractic treatment therefore falls under the "such other treatment as may be approved by the division" language of section 39-71-704 (1), MCA (1979). Synek agrees that the power of the DLI "to make rules regulating the delivery of compensable chiropractic services to injured workers is unquestioned." (Appellant's Reply Brief at 3.)

The rules governing chiropractic treatment are found at ARM 24.29.2003 and 2004. They provide:

24.29.2003 Workers' Compensation Does Pay (1) For "therapeutics" defined as: any treatment considered necessary to return the patient to a preclinical status or establish a stationary status.

(2) Rehabilitation procedures necessary for reeducation or functional restoration of a disabled body system or part.

24.29.2004 Workers' Compensation Does Not Pay (1) For maintenance -- a regime designed to provide the optimum state of health while minimizing recurrence of the clinical status.

(2) Prevent treatment -- procedures necessary to prevent the development of clinical status.

Substantial Evidence

The hearing examiner determined that the treatments since 1988 were "maintenance" treatments and therefore subject to ARM 24.29.2004 (1). Synek argues that the Court should reverse the decision of the hearing examiner because his determination is not supported by substantial evidence.

This Court has addressed chiropractic treatments in two previous cases: **Miller v. State Fund**, WCC No. 8510-3292 (May 30, 1986), and **Worts v. Pac. Emp. Ins. Co.**, WCC No. 8701-4199 (January 26, 1989). In **Miller** chiropractic treatments for claimant's back injury initially improved his condition, however, he continued to seek treatment after his condition stabilized because the treatments helped reduce his pain. This Court held: "Since the claimant's chiropractic treatments are now performed simply to maintain his condition rather than to improve same, they are not compensable under ARM 24.29.2003 and .2004." *Id.* at 7. In **Worts** the Court reached the same conclusion where the claimant was receiving chiropractic care for a low-back injury on an as needed basis but the treating chiropractor characterized the treatments as palliative care which would not permanently improve the claimant's condition.

The facts in this case are analogous. Dr. Berish testified that Synek's chiropractic treatments were initially therapeutic but became palliative when she realized that Synek's condition would neither be cured nor improved by the treatments. According to Dr. Berish, Synek had reached maximum medical healing by December 1988. (A chiropractor is qualified to determine whether or not maximum healing has been reached. **Windy Boy v. Lutheran Home of the Good Shepherd and State Compensation Insurance Fund**, WCC No. 8705-4337 (1987).) There are also medical opinions as far back as 1982 suggesting that Synek had reached maximum medical healing at that time. (Finding of Fact No. 7.)

In correspondence with the State Fund, Dr. Berish indicated on several occasions that the primary purpose of the treatments was to temporarily relieve Synek's pain, and that no cure or improvement of Synek's condition was expected. In her testimony, Dr. Berish indicated that Synek's condition continues to deteriorate with age and that more frequent treatments are required because she is in more pain and without the treatments her condition may deteriorate faster. (Finding of Fact No. 38.) This testimony is the primary basis for Synek's challenge to the hearing examiner's decision. She argues that in **Miller** the chiropractic treatment maintained Synek's condition, while in her case it prevents it from deteriorating as rapidly.

The chiropractic rules are clear and they were properly applied to the facts of this case. Dr. Berish's treatment is not necessary to "return the patient to a preclinical status or establish a stationary status" (ARM 24.29.2003(1)) nor are they aimed at "reeducation or functional restoration of a disabled body system or part" (ARM 24.29.2003(2)), since Synek will never achieve preclinical status and her condition will continue to deteriorate even with treatment. As in **Miller** the sheer number of treatments of Ms. Synek (presently 100 per year) is indicative that they do not improve Synek's condition. Thus, the treatments do not meet the criteria for payment.

Synek argues that she is entitled to payment because the concept of "maximum healing" means that her condition must reach stability. The chiropractic rules, however, do not

specifically use "maximum healing" as a criteria for payment or non-payment. As quoted above, payment is predicated on whether the treatments are necessary to return Synek to preclinical status or a stationary status, or for reeducation or functional restoration. Since the treatment in this case would promote none of those goals, it does not meet the criteria for payment.

Moreover, although the Supreme Court has sometimes used the terms "maximum healing" and "medically stable condition" interchangeably or in the alternative, **e.g. *Allen v. Employer's Comm. Union*, 246 Mont. 105, 109-10, 803 P.2d 644 (1990); *EBI/Orion Group v. State Compensation Ins. Fund*, 249 Mont. 449, 452-53, 816 P.2d 1070 (1991)**; the Court has never held that a claimant's condition must be static or stable for there to be maximum healing. Current statutes define "maximum healing", "medical stability" and "maximum medical healing" as terms which all mean "a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment." § 39-71-116(14), MCA (1993). The 1979 statutes did not specifically define these terms. However, the definitions of permanent partial disability, permanent total disability, and temporary total disability all included reference to the worker being "**as far restored as the permanent character of the injuries will permit.**" § 39-71-116(12), (13), (19), MCA (1979). In discussing the cited definitions, the Supreme Court in ***Belton v. Hartford Accident & Indemnity Co.*, 202 Mont. 384, 390, 658 P.2d 405 (1983)**, said that the definitions "have as their focal point a state in which the question turns on whether the 'injured worker is as far restored as the permanent character of his injuries will permit.'"

The hearing examiner's determination that Synek's chiropractic care is maintenance in nature -- "a regime designed to provide the optimum state of health while minimizing the recurrence of clinical status" (ARM 24.29.2004(1)) -- is supported by substantial evidence. The treatments also fail to satisfy the criteria for payment under ARM 24.29.2003.

Validity of the Chiropractic Rules

Synek next contends that if the hearing examiner's interpretation of the chiropractic service rules is correct, then the rules are unreasonable and absurd. She cites ***Weis v. Div. of Workers' Compensation*, 232 Mont. 218, 755 P.2d 1385 (1988); *Montana Tavern Assoc. v. St. Dept. of Rev.*, 224 Mont. 258, 729 P.2d 1310 (1986)**, for the proposition that an agency's interpretation of a statute must be reasonable so as to avoid an absurd result.

Weis is inapposite. The regulations in this case are not ones interpreting a statute. Rather, they were adopted pursuant to the authority expressly granted the DLI to regulate "**such other treatment as may be approved by the division for the injuries sustained.**" § 39-71-704 (1), MCA (1979).

The regulations, as interpreted and applied, do not lead to an absurd result. Synek compares the rule regarding chiropractic services to other types of medical care and

suggests that "[a] similar rule for medication would deny seizure medication to a head injury victim." (Appellant's Initial Brief.) However, core medical benefits, including physicians' services, hospitalization, **and medications**, are not subject to the DLI's rule making powers and are subject only to the requirement that they be "reasonable" and "needed." The legislature did not include chiropractic treatment in its list of core benefits thereby permitting greater restricting on the utilization of chiropractic treatment.

Synek further argues that the rules at issue "constitute an unconstitutional exercise of the power delegated to the Department." However, Synek fails to cite any authority for her contention, identify the relevant part of the constitution violated, or provide any further discussion of this contention. Therefore, the Court cannot address her contention.

DLI Procedures

Synek also argues that the DLI's procedures for determining this dispute deprived her of her constitutional rights. She notes that at the time of her injury the Division of Workers' Compensation (DWC) was charged with the administration of rules governing medical benefits, but that a subsequent statutory restructuring of the DLI eliminated the DWC and transferred responsibility for workers' compensation matters to the DLI.⁽²⁾ Synek contends that the reorganization, and the wait over a year before the DLI issued the decision in this case, amounted to an ex post facto change in the law. She also cites ***Carmichael v. Workers' Compensation Court***, 234 Mont. 410, 763 P.2d 1122 (1988), and argues that this Court must take original jurisdiction over this matter and hold a trial de novo.

Initially, it is unclear to the Court why the elimination of the DWC should require, as a matter of constitutional law, that jurisdiction over medical disputes be transferred to this Court rather than to the DLI, or what procedural difference the transfer makes. The change certainly cannot constitute an ex post facto law since ex post facto laws concern penalties and typically concern criminal matters. ***Carmichael*** is also inapposite. The issue in that case was whether a mediation requirement adopted enacted in 1987 could constitutionally be applied to injuries which occurred prior to the effective date of the statute. Previously, a worker could immediately petition the Workers' Compensation Court whenever a dispute over benefits arose. The new mediation procedure, which had to be exhausted before filing with the Court, could delay the filing of a petition up to 100 days. The Court found that sort of delay was substantial and affected workers' substantive right to an early resolution of the workers' dispute. It determined that the Contract Clause precluded retroactive application of the requirement.

This case does not involve any statute which imposes any new penalty or any new procedural or substantive requirements upon a claimant. Jurisdiction for resolving disputes was merely transferred from one administrative entity to another. Synek also has not shown that the elimination of the DWC and transfer of the DWC to its parent department has

either increased the amount of time required for adjudication or that the adjudication procedures have been changed. Synek's constitutional challenge is without merit.

ORDER

The January 14, 1994 Findings of Fact, Conclusions of Law and Order are **affirmed**.

DATED in Helena, Montana, this 26th day of August, 1994.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Terry Spear

Ms. Susan C.Witte

Ms. Melanie A. Symons

1. At the time of injury the applicable statute read in part: "A claimant or an insurer who has a dispute concerning any benefits under chapter 71 of this title may petition the workers' compensation judge for a determination of the dispute. § 39-71-2905, MCA (1979).

2. Reference to the Division of Workers' Compensation was deleted by the 1989 Montana Legislature and replaced by reference to the DLI. 1989 Montana Laws, ch. 613.