IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 34

WCC No. 9809-8065

EUGENE THIRSK

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

STATE OF MONTANA

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant seeks compensation for 56 chiropractic adjustments over 9 month period, all incurred after insurer informed him it would no longer cover chiropractic treatment for him. Persuasive medical evidence, along with statements made by claimant, indicate claimant had reached maximum medical healing and the chiropractic treatments were maintenance treatments, not actually leading to improvement in claimant.

Held: Under section 39-71-704, MCA (1993), the insurer is responsible for primary and secondary medical services as defined in the statute. Under the circumstances of this case, and where claimant had already reached maximum medical healing, the chiropractic treatments were not primary medical services. Under the statute, the insurer was liable for secondary medical services only upon a clear demonstration of cost effectiveness of the services in returning the injured worker to actual employment. Claimant did not make this demonstration. Indeed, the evidence showed the treatments provided no more than temporary relief and did not improve his condition.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code, section 39-71-704, MCA (1993).** Claimant sought compensation for 56 chiropractic adjustments over 9 month period, all incurred after insurer informed him it would no longer cover chiropractic treatment for him. Persuasive medical evidence, along with statements made by claimant, indicated claimant had reached maximum medical healing and

the chiropractic treatments were maintenance treatments, not actually leading to improvement in claimant. WCC held that under section 39-71-704, MCA (1993), the insurer was responsible for primary and secondary medical services as defined in the statute. Under the circumstances of this case, the chiropractic treatments were not primary medical services. The insurer was liable for secondary medical services only upon a clear demonstration of cost effectiveness of the services in returning the injured worker to actual employment. Claimant did not make this demonstration. Indeed, the evidence showed the treatments provided no more than temporary relief and did not improve his condition.

Benefits: Medical Benefits: Chiropractors. Claimant sought compensation for 56 chiropractic adjustments over 9 month period, all incurred after insurer informed him it would no longer cover chiropractic treatment for him. Persuasive medical evidence, along with statements made by claimant, indicated claimant had reached maximum medical healing and the chiropractic treatments were maintenance treatments, not actually leading to improvement in claimant. WCC held that under section 39-71-704, MCA (1993), the insurer was responsible for primary and secondary medical services as defined in the statute. Under the circumstances of this case, the chiropractic treatments were not primary medical services. The insurer was liable for secondary medical services only upon a clear demonstration of cost effectiveness of the services in returning the injured worker to actual employment. Claimant did not make this demonstration. Indeed, the evidence showed the treatments provided no more than temporary relief and did not improve his condition.

Physicians: Chiropractors. Claimant sought compensation for 56 chiropractic adjustments over 9 month period, all incurred after insurer informed him it would no longer cover chiropractic treatment for him. Persuasive medical evidence, along with statements made by claimant, indicated claimant had reached maximum medical healing and the chiropractic treatments were maintenance treatments, not actually leading to improvement in claimant. WCC held that under section 39-71-704, MCA (1993), the insurer was responsible for primary and secondary medical services as defined in the statute. Under the circumstances of this case, the chiropractic treatments were not primary medical services. The insurer was liable for secondary medical services only upon a clear demonstration of cost effectiveness of the services in returning the injured worker to actual employment. Claimant did not make this demonstration. Indeed, the evidence showed the treatments provided no more than temporary relief and did not improve his condition.

¶1 The trial in this matter was held on February 22, 1999, in Helena, Montana. Petitioner, Eugene Thirsk (claimant), was present and represented by Mr. Richard J. Pyfer. Respondent,

State Compensation Insurance Fund (State Fund), was represented by Ms. Carrie L. Garber.

¶2 Exhibits: Exhibits 1 and 2 were admitted without objection. Exhibit 2 consists of Exhibits 1 through16 as prepared for trial in a prior action, WCC No. 9712-7885.

¶3 Witnesses and Depositions: Claimant and Thomas Fritch were sworn and testified. The parties also submitted the depositions of Catherine Capps, M.D. and Mike H. Pardis, D.C.

¶4 Issues Presented: As set forth in the Pretrial Order, the following issues are presented for decision:

1. Whether Petitioner's industrial accident has required Petitioner to seek chiropractic treatments for his low back and may require him to seek further treatment in the future.

2. Whether or not the chiropractic care in this case was palliative in nature.

3. Whether Respondent should pay the chiropractor bills.

4. Whether attorney fees, costs and penalty should be allowed although petitioner did not specifically request these in the prayer for relief in the petition.

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

FINDINGS OF FACT

¶6 On April 4, 1994, claimant suffered an industrial injury to his low back while employed by the Montana Department of Revenue. The injury occurred as claimant lifted and turned while carrying a mail tray.

¶7 At the time of the injury, the Department of Revenue was insured by the State Fund. The State Fund accepted liability and paid claimant medical and wage-loss benefits.

¶8 Following his injury, claimant sought chiropractic care from Mike H. Pardis, D.C., beginning in May 1994, and continuing until June 1996.

¶9 In August 1995, the State Fund requested Gary P. Blom, D.C., to review Dr. Pardis' treatment. Dr. Blom reviewed Dr. Pardis' records. On August 22, 1995, he wrote that in his opinion the claimant's condition was "ongoing and non-progressive." (Ex. 6.) Additionally, he stated, "I do not feel that continued ongoing manipulation is going to provide him with any significant overall net improvement at this point . . ." (*Id.*)

¶10 On September 22, 1995, Dr. Timothy Browne, an orthopedic surgeon, examined claimant at the request of the State Fund. Dr. Browne recorded that claimant reported

"chiropractic manipulation is really not helping." (Ex. 7 at 84.) He found claimant to be at maximum medical improvement as of September 22, 1995. (*Id.* at 87.)

¶11 As part of his evaluation, Dr. Browne was asked by the State Fund whether he thought continued chiropractic was reasonable and necessary. In response he wrote:

> Continued chiropractic treatment is neither reasonable or necessary, since he is not getting any relief from this, and it is contraindicated in degenerative changes.

(*Id.* at 86.)

¶12 Relying on the opinions of Drs. Browne and Blom, in October 1995, the State Fund notified claimant that it would no longer cover the costs of his chiropractic treatment. (Ex. 11 at 145, Ex. 2-11 at 145.)

¶13 Claimant, however, continued to treat with Dr. Pardis and now seeks reimbursement for those treatments. The treatments at issue are as follows:

October 1995	1
November 1995	0
December 1995	12
January 1996	13
February 1996	7
March 1996	8
April 1996	8
May 1996	6
June 1996	1

(Ex. 2-16 at 224-225.)

¶14 Claimant testified that Dr. Pardis' care helped his back condition by relieving his pain. He felt his condition was improving as a result of the treatments. However, on cross-examination he acknowledged that his pain was continuous and that the relief he received was temporary. He conceded that the pain returned if he did not keep up with regular therapy prescribed by Dr. Pardis.

¶15 Throughout the period that claimant was treated by Dr. Pardis, he related constant, moderate low-back pain. Dr. Pardis testified that although claimant continued to complain of constant pain, he had objective findings of improvement. (Pardis Dep. at 20.) He stated that while he did not expect the claimant's condition to recover to preinjury status, it was his opinion that continued treatment was necessary because claimant's condition had not reached a point of stabilization. (*Id.* at 22.)

¶16 When questioned about the nature of his treatment, Dr. Pardis testified:

> In my opinion it was therapeutic here, and I related that earlier in the testimony, that he was not at a stationary status. He had clinical findings indicating that his condition was not stationary.

(*Id*. at 41.)

¶17 Dr. Pardis' opinions are unpersuasive. In addition to the opinions of Dr. Blom and Dr. Browne, the State Fund presented additional evidence supporting its contention that the care provided by Dr. Pardis after August 1995 was maintenance care and did not improve claimant's condition.

¶18 On January 10, 1996, claimant was seen by Dr. Kenneth V. Carpenter upon the referral of Dr. Pardis. Dr. Carpenter, an orthopedic surgeon, noted that the claimant reported temporary relief with the manipulative chiropractic therapy but that he was having continuing problems with his lower back. (Ex. 3 at 32.) Based upon his examination, Dr. Carpenter referred claimant to a pain management consultant. (*Id*. at 34.)

¶19 Claimant was thereafter seen on June 11, 1996, by Dr. Ronald K. Hull, a pain management consultant. Claimant reported to Dr. Hull that over time his back pain had worsened considerably. (Ex. 9 at 97.) Claimant also told Dr. Hull that the chiropractic treatments he had received had "really not helped a lot." (*Id*. at 98.)

¶20 Dr. Catherine C. Capps, another orthopedic surgeon, also performed an independent medical examination at the State Fund's request. In her report, Dr. Capps opined:

> I do not feel prolonged continuous chiropractic care has improved his condition, nor will it improve his condition in the future. At this point it is primarily palliative and by history only minimally so.

(Ex. 8 at 93.) Dr. Capps testified by deposition. It was her opinion that Dr. Pardis' care was not therapeutic. (Capps' Dep. at 5-7.) She testified that the relief provided by the chiropractic care was very short term and did not help his overall condition. (*Id*. at 7.)

¶21 I find that Dr. Pardis' treatments after August 1995 were maintenance treatments. As noted in paragraph 17, Dr. Pardis' opinions were unpersuasive in the face of other medical opinions indicating that the care he provided was maintenance in nature and did not improve claimant's condition. Claimant's own contemporaneous reports that his condition was not improving despite Dr. Pardis' treatments lends support to those opinions. Finally, the number of treatments in December 1995 to May 1996, which constitute the bulk of treatments for which claimant seeks reimbursement, argue against any finding that they improved claimant's condition. As set forth in paragraph 13, claimant received 12 treatments in December and 13 treatments in January. On the average he was treated every 2 and a half days, *including weekends*. Excluding weekends, the average is approximately every 1 3/4 days during the two months. The average for February through May (29

treatments over 119 days) is a bit better, amounting to a treatment approximately every 4 days, including weekends, but the frequency is still indicative that the treatments provided no long-term relief.

¶22 The State Fund's denial of reimbursement for Dr. Pardis' treatments was reasonable.

CONCLUSIONS OF LAW

I.

¶23 Claimant's industrial injury occurred on April 4, 1994. His claim is governed by the 1993 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II.

¶24 Claimant has the burden of proving that he is entitled to workers' compensation benefits by a preponderance of the probative, credible evidence. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 13045 (1973); *Dumont v. Wicken Bros. Construction Co.,* 183 Mont. 190, 598 P.2d 1099 (1979).

III.

¶25 The insurer's obligation for payment of medical expenses is governed by section 39-71-704, MCA (1993), 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.

"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.

"Secondary medical services" are defined:

> (25) "Secondary medical services" means those medical services or appliances 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.

§ 39-71-116(25), MCA (1993).

¶26 A preponderance of medical evidence establishes that claimant was at maximum medical improvement by August 1995. Dr. Pardis' treatments thereafter were secondary medical services. The State Fund was liable for his services "only upon a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment." § 39-71-704(1)(b), MCA (1993). Claimant has failed to sustain that burden. There is no evidence that the treatments were necessary to return him to work or that they were cost-effective. To the contrary, the evidence presented shows that the treatments provided only temporary relief and did not improve his condition.

¶27 The Court need not consider nor apply the Department of Labor and Industry's rules governing chiropractic care. Those rules, found at ARM 24.29.2003 and .2004, were promulgated long before the legislature adopted the primary-secondary medical services standard found in section 39-71-704, MCA (1993). In any event, based on the Court's findings of fact, under the rules Dr. Pardis' care would be considered non-covered maintenance care ARM 24.29.2004; *Synek v. State Compensation Ins. Fund,* 272 Mont. 246, 900 P.2d 884 (1995).

¶28 The claimant is not entitled to attorney fees, costs, or a penalty since he has not prevailed in this action and, in any event, has failed to demonstrate that the State Fund acted unreasonably. §§ 39-71-611, -612, -2907, MCA.

JUDGMENT

¶29 1. The claimant is not entitled to payment for chiropractic care. His petition is **dismissed with prejudice.**

¶30 Claimant is not entitled to attorney fees, costs, or a penalty.

¶31 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶32 4. 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 11th day of May, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard J. Pyfer
Ms. Carrie L. Garber
Date Submitted: February 22, 1999