

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 73

WCC No. 9807-8020

DANIEL MURPHY

Petitioner

vs.

CIGNA COMPANIES

Respondent/Insurer for

DARIGOLD FARMS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: A 73-year old claimant receiving permanent total disability benefits following severe 1979 back injury requested coverage of chiropractic treatment. Insurer denied, arguing treatments were maintenance care and not covered. Medical testimony indicated claimant reached maximum medical improvement in 1987 and will never return to pre-injury status. Chiropractic treatments were being administered on an as-needed basis when claimant suffered flare-ups. Chiropractor conceded treatments provided only temporary relief and that flare-ups were inevitable.

Held: Under section 39-71-704, MCA (1979), claimant must establish that chiropractic care is "such other treatment as may be approved by the division for the injuries sustained." Administrative rules provided that workers' compensation pays for treatment necessary to return the patient to preclinical status or establish a stationary status, but does not pay for "a regime designed to provide the optimum state of health while minimizing recurrence of the clinical status." Under *Synek v. State Compensation Mutual Ins. Fund*, WCC No. 9401-6989, Order on Appeal (August 26, 1994), aff'd 272 Mont. 246, 900 P.2d 884 (1995), chiropractic treatments providing only temporary relief and not restoring claimant to either a preclinical or stationary status are not compensable. This case falls within that rule. Petition dismissed.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-704, MCA (1979). A 73-year old claimant receiving PTD benefits following severe 1979 back injury sought coverage of chiropractic treatment on as-needed basis for flare-ups of back condition. Chiropractor testified flare-ups were inevitable and treatments provided only temporary relief. WCC followed *Synek v. State Compensation Mutual Ins. Fund*, WCC No. 9401-6989, Order on Appeal (August 26, 1994), aff'd [272 Mont. 246, 900 P.2d 884 \(1995\)](#), which applied section 39-71-704, MCA, and ARM 24.29.2003 and -2004, to find not compensable chiropractic treatments providing only temporary relief and not restoring claimant to either a preclinical or stationary status.

Benefits: Medical Benefits: Chiropractors. A 73-year old claimant receiving PTD benefits following severe 1979 back injury sought coverage of chiropractic treatment on as-needed basis for flare-ups of back condition. Chiropractor testified flare-ups were inevitable and treatments provided only temporary relief. WCC followed *Synek v. State Compensation Mutual Ins. Fund*, WCC No. 9401-6989, Order on Appeal (August 26, 1994), aff'd [272 Mont. 246, 900 P.2d 884 \(1995\)](#), which applied section 39-71-704, MCA, and ARM 24.29.2003 and -2004, to find not compensable chiropractic treatments providing only temporary relief and not restoring claimant to either a preclinical or stationary status.

Physicians: Chiropractors. A 73-year old claimant receiving PTD benefits following severe 1979 back injury sought coverage of chiropractic treatment on as-needed basis for flare-ups of back condition. Chiropractor testified flare-ups were inevitable and treatments provided only temporary relief. WCC followed *Synek v. State Compensation Mutual Ins. Fund*, WCC No. 9401-6989, Order on Appeal (August 26, 1994), aff'd [272 Mont. 246, 900 P.2d 884 \(1995\)](#), which applied section 39-71-704, MCA, and ARM 24.29.2003 and -2004, to find not compensable chiropractic treatments providing only temporary relief and not restoring claimant to either a preclinical or stationary status.

¶1 The trial in this matter was held on September 28, 1998, in Missoula, Montana. Petitioner, Daniel Murphy (claimant), was present and represented by Mr. Rex Palmer. Respondent, CIGNA Companies (CIGNA), was represented by Mr. Leo S. Ward. A transcript of the trial has not been made.

¶2 Exhibits: Exhibits 1 and 2 were admitted without objection.

¶3 Witness and Deposition: Claimant was sworn and testified. The parties also submitted the deposition of Patrick R. Montgomery, D.C., for the Court's consideration.

¶4 Issue Presented: The sole issue presented by the petition is whether claimant is entitled to payment for continuing chiropractic treatments.

* * * * *

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

FINDINGS OF FACT

¶16 Claimant is 73 years old.

¶17 On January 24, 1979, the claimant severely injured his back in a work-related accident. His employer was insured by CIGNA Companies, which accepted liability for his claim. Over the years, CIGNA has paid compensation and medical benefits.

¶18 Following his injury, claimant attempted to return to work but was unsuccessful. He was then determined to be permanently totally disabled and has not worked since. (Montgomery Dep. Ex. 1.)

¶19 Over the last 19 years claimant has suffered from chronic back pain. At times he experiences flareups of his pain. During flareups claimant is able to walk only a half block; he has difficulty standing straight and walks in a bent position; he has difficulty sleeping; and he has difficulty getting into and out of a chair. There have been occasions when he has had to use crutches to get around.

¶20 In the past claimant took medication for his pain, however, he testified that he developed ulcers as a result of the medication. Claimant does take 800 milligrams of Ibuprofen daily.

¶21 Since 1987 claimant has been treated by Dr. Patrick Montgomery, who is a chiropractor. Since 1994 the number of Dr. Montgomery's treatments have declined, as shown by the following chart of treatments each year:

1994 - 36

1995 - 22

1996 - 18

1997 - 9

(Montgomery Dep. at 11.) Dr. Montgomery treats claimant on an as-needed basis during his flareups. The treatments ameliorate the flareups and improve claimant's functioning.

¶22 At CIGNA's request, David F. Cox, D.C., reviewed Dr. Montgomery's chiropractic care. He opined by letter that the care "appears maintenance in nature." (Ex. 2.)

¶23 Dr. Montgomery testified that claimant has been at maximum medical improvement for as long as he has treated him (since 1987) and that chiropractic treatment is not going to improve his physical condition. (Montgomery Dep. at 6.) He agreed that claimant will

never return to his "preclinical status" (the state of health he enjoyed prior to his injury) and confirmed that he is treating claimant on an as-needed basis when claimant suffers flareups. (*Id.* at 7-9.) He conceded that chiropractic treatments provide only temporary relief and that flareups are inevitable. (*Id.* at 7, 9.)

¶14 In further examination by CIGNA's counsel, Dr. Montgomery agreed that chiropractic treatments were "designed to optimize his [claimant's] state of health by relieving pain as his condition deteriorates with age." (*Id.* at 10.) He disagreed that the treatments are maintenance care, defining maintenance care as "care directed upon a particular condition in order to prevent that care - in order to maintain that present level of a condition." (*Id.* at 12.) He testified that claimant's treatments were to restore claimant "to the previous level of care before the flare-up." (*Id.*) Finally, he agreed that even with periodic chiropractic treatments, flareups in claimant's condition are inevitable.

CONCLUSIONS OF LAW

I.

¶15 The 1977 R.C.M.s apply in this case as it was the law in effect at the time of claimant's January 24, 1979 industrial injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d, 380, 382 (1986). The Court will cite to the 1979 MCA statutes as they are more readily available and substantively the same.

II.

¶16 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.

¶17 The insurer's obligation for payment of medical expenses is governed by section 39-71-704, MCA (1979), which provides 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.** [Emphasis 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). Their services do not fall under the core medical benefits enumerated in the section, rather they fall under the "such other treatment as may be approved by the division" language of the section. *Synek v. State Compensation Mutual Ins. Fund*, WCC No. 9401-6989, Order on Appeal (August 26, 1994), *aff'd*, 272 Mont. 246, 900 P.2d 884 (1995).

¶18 Pursuant to the "other treatment" language of section 39-71-704, MCA (1979), the Department of Labor and Industry (Department) promulgated specific rules governing "other treatment." The general rule is set forth in ARM 24.29.2003, which provides:

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.

Additionally, the Department adopted a rule specifically governing chiropractic care. ARM 24.29.2004 provides:

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.

¶19 In *Synek* this Court and the Supreme Court held that where chiropractic treatments provide only temporary relief and will not permanently restore a claimant to either a pre-clinical or stationary status, the treatments are maintenance in nature and not compensable. In that case, the chiropractor testified that treatment was provided "as needed" and for "temporary relief from pain." 272 Mont. at 251, 900 P.2d at 886. The Supreme Court held that the testimony established that the care was "maintenance" care under ARM 24.29.2004. Moreover, as the discussion in both this Court's and the Supreme Court's *Synek* decisions indicate, the treatments did not satisfy the general requirements set forth in ARM 24.29.2003. Specifically, the treatments would not restore claimant to either a preclinical or stationary status and would not reeducate nor functionally restore a disabled body system or part. 272 Mont. at 250-51, 900 P.2d at 886; WCC No. 9401-6989, Order on Appeal (August 26, 1994) at 4.

¶20 While the number of treatments in this case (presently 9 per year) are far less than the number in *Synek* (100 treatments annually), the testimony in this case is indistinguishable from that in *Synek*. The treatments provided to the claimant herein are administered on an as-needed basis and provide only temporary relief. They will not permanently restore him

to either a preclinical or a stationary status, nor will they reeducate or functionally restore his back. I therefore conclude that *Syne* is controlling and that CIGNA is not liable for claimant's chiropractic care.

¶21 In reaching this result, I am aware that the annual cost of chiropractic treatment for 9 treatments a year is \$315 and that should claimant seek treatment of his flareups from a physician the cost may well exceed that amount. That consideration should be a practical consideration for the insurer in determining whether to pay for the chiropractic care, however, it is not a consideration under the Department rules or for this Court.

JUDGMENT

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

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

¶24 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 15th day of October, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Rex Palmer

Mr. Leo S. Ward

Date Submitted: September 28, 1998