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

**2001 MTWCC 51**

**WCC No. 2000-0263**

---

**JULIA MESSITTE**

**Petitioner**

**vs.**

**LIBERTY MUTUAL FIRE INSURANCE COMPANY**

**Respondent/Insurer for**

**GLACIER PARK, INCORPORATED**

**Employer.**

---

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**NOTE: On 1/4/02 these Findings were set aside and rescinded due to a settlement based on the stipulation of the parties. The case was dismissed with prejudice.**

**Summary:** During the summer of 1991, claimant worked as a waitress in the coffee shop at Lake McDonald Lodge in Glacier Park. She developed pain in her upper and middle back, from carrying heavy tubs and trays. Her claim was accepted as an occupational disease. Over the years she has continued to have the same back complaints as during the summer of 1991 and, with some lapses, has received treatment continually since then, primarily in the form of massage and exercise. The insurer paid until 1998 then denied liability, but has since paid for treatment to date. Thus, any future treatment is at issue. Claimant has been diagnosed with fibromyalgia and her current physician has prescribed a gym membership and massage. The insurer disputes the diagnosis and cites an IME physician's opinion that claimant does not need further treatment.

**Held:** Whether or not claimant's condition is properly ascribed to fibromyalgia, she continues to suffer from a medical condition which began during employment at Lake McDonald Lodge. Under section 39-72-704, MCA (1989), claimant is entitled, "without limitation as to length of time or dollar amount, reasonable medical services, hospitalization, medicines, and other treatment approved by the department [of labor]." The insurer is obligated to continue covering reasonable periodic treatment by the treating

physician and prescribed medications. The recommendations for massage and health club membership present a different situation. Because these are not provided or supervised by medical personnel, they fall under the phrase "other treatment approved by the department." The Department of Labor and Industry (Department) promulgated regulations to implement the statutory language. The regulations allow treatment necessary to return the patient to preclinical status or establish a stationary status, but disallow a "maintenance" regime or "procedures necessary to prevent the development of clinical status." ARM 24.29.2003 and .2004. The treating physician's testimony squarely places massage and exercise in the "maintenance" category; thus, it is not compensable.

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Administrative Regulations (non-Workers' Compensation Court): ARM 24.29.2003 and .2004.** Claimant suffering from muscle ailment beginning with lifting heavy items during waitressing work ten years prior was not entitled to massage and health club membership under treating physician's recommendations. Under treating physician's testimony, the massage and exercise would constitute maintenance which is not compensable under the regulations. ARM 24.29.2003 and .2004.

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-704, MCA (1989).** Claimant suffering from muscle ailment beginning with lifting heavy items during waitressing work ten years prior was entitled to continued medical services from her treating physician, and prescribed medicines, but not to massage and health club membership. The physician's recommendations for massage and health club membership must be judged under the language of section 39-72-704, MCA (1989), allowing "other treatment approved by the department." ARM 24.29.2003 and .2004 set out the Department's standards in implementation of the statute. Under treating physician's testimony, the massage and exercise would constitute maintenance which is not compensable under the regulations.

**Benefits: Medical Benefits: Liability.** Claimant suffering from muscle ailment beginning with lifting heavy items during waitressing work ten years prior was entitled to continued medical services from her treating physician, and to prescribed medicines, but not to massage and health club membership. The physician's recommendations for massage and health club membership must be judged under the language of section 39-72-704, MCA (1989), allowing "other treatment approved by the department." ARM 24.29.2003 and .2004 set out the Department's standards in implementation of the statute. Under treating

physician's testimony, the massage and exercise would constitute maintenance which is not compensable under the regulations.

**Benefits: Medical Benefits: Maintenance Care.** Claimant suffering from muscle ailment beginning with lifting heavy items during waitressing work ten years prior was entitled to continued medical services from her treating physician, and prescribed medicines, but not to massage and health club membership. The physician's recommendations for massage and health club membership must be judged under the language of section 39-72-704, MCA (1989), allowing "other treatment approved by the department." ARM 24.29.2003 and .2004 set out the Department's standards in implementation of the statute. Under treating physician's testimony, the massage and exercise would constitute maintenance which is not compensable under the regulations.

**Medical Conditions: Fibromyalgia.** Claimant suffering from muscle ailment beginning with lifting heavy items during waitressing work ten years prior was entitled to continued medical services from her treating physician, and prescribed medicines, but not to massage and health club membership. Where the Court credits claimant's testimony, supported by the medical record, that she suffers from the same muscle ailment that began during employment, it is not necessary to resolve whether fibromyalgia is a proper diagnosis or to judge debates in the medical community regarding fibromyalgia.

**Occupational Disease: Disease.** Claimant suffering from muscle ailment beginning with lifting heavy items during waitressing work ten years prior was entitled to continued medical services from her treating physician, and prescribed medicines, but not to massage and health club membership. Where the Court credits claimant's testimony, supported by the medical record, that she suffers from the same muscle ailment that began during employment, it is not necessary to resolve whether fibromyalgia is a proper diagnosis or to judge debates in the medical community regarding fibromyalgia.

¶1 The trial in this matter was held on April 9, 2001, in Missoula, Montana. Petitioner, Julia Messitte (formerly known as Julia Holman) (claimant), was present and represented by Mr. Norman H. Grosfield. Respondent, Liberty Mutual Fire Insurance Company (Liberty), was represented by Mr. Larry W. Jones. The parties were granted leave to file post-trial briefs and the matter was deemed submitted on May 9, 2001.

¶2 Exhibits: Exhibits 1 through 20, 23, and 24 were admitted without objection. The Court reserved ruling on the admission of Exhibits 21 and 22 pending review of the deposition of

Dr. Dowd. Those exhibits, articles regarding fibromyalgia, are admitted and were considered by the Court only insofar as they provide context for questions asked of Dr. Andrew D. Brown and Dr. Andrew Dowd. Those portions of Exhibit 25 discussed in the deposition of Dr. Brown were admitted. Exhibit 26, excerpted pages from the claims file, was admitted over respondent's objection.

¶3 Witnesses and Depositions: The parties agreed that depositions of claimant, Dr. Andrew D. Brown and Dr. Andrew Dowd shall be considered by the Court. Claimant and Gary Schild testified at trial.

¶4 As stated in the Pretrial Order, the issues are as follows:

> ¶4A Whether Respondent is responsible for Petitioner's continued medical treatment as prescribed and recommended by her current treating physician.
>
> ¶4B Whether the actions of Respondent in denying medical treatment were unreasonable, entitling Petitioner to an award of attorney fees, costs, and a penalty.

(Pretrial Order at 2.)

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

## FINDINGS OF FACT

¶6 Claimant is 32 years old.

¶7 During the summer of 1991, claimant worked as a waitress in the coffee shop at Lake McDonald Lodge in Glacier Park (Glacier). (Messitte Dep. at 7.) Her duties included carrying bus tubs and trays of silverware, glasses, and dishes. (*Id.* at 9.) Given the volume of tourists passing through the coffee shop, the pace was hectic.

¶8 Over approximately six weeks, claimant experienced increasing pain in her upper and mid back. Eventually, she could no longer work. On July 11, 1991, claimant sought emergency room treatment. Dr. M. Raine recorded:

> S: This 22 y.o., waitress at Lake McDonald Lodge is complaining of back pain in the lumbosacral area. She has had similar discomfort for many years. She has mild scoliosis by report. She denies any trauma. Her friend, who is a masseuse, has been giving her some massages to no avail.

> O: Back has slight decrease in muscle spasm of the paraspinous musculature. Otherwise, it is straight, nontender, without any obvious deformities. She seems to have a good range of motion.
>
> A: Thoracolumbar back pain and strain secondary to muscle spasm.
>
> P: Ansaid 100 mgs. BID and Norflex 1 TID. Follow up in two weeks for recheck. We will send for some old x-rays taken last winter for review. If she is still having a lot of back pain, we will do thoracolumbar spine x-rays to assess her scoliosis.
>
> (Ex. 7 at 2.)

¶9 Claimant testified at deposition and trial that she had pulled a muscle in her lower back when playing soccer as a kid, but that the pain she experienced working at Glacier was a different pain in a different part of her back. (Messitte Dep. at 26.) Her testimony was credible.

¶10 Claimant continued to have back pain. On July 17, 1991, claimant received medical care at the Great Falls Clinic. (Ex. 7.) She reported "a tendency to minor aches and pains in her lower back since she was a teenager and has been told that she has a minor scoliosis and also minor rotatory changes in her spine." (*Id.* at 1.) After examining claimant, Dr. Steven P. Akre diagnosed "probabl[e] paravertebral muscle strain possibly related to mild scoliosis but most likely simply exertional." (*Id.*) He advised continued pain medication and physical therapy. (*Id.*)

¶11 On July 23, 1991, claimant began receiving physical therapy at North Valley Hospital. (Ex. 8.) She received regular therapy during July, August, and September, 1991. When therapy terminated, she reported "discomfort but less." (*Id.* at 9.)

¶12 After leaving Glacier Park, claimant moved to San Francisco. On November 5, 1991, she began treating with the Center for Sports Medicine at St. Francis Memorial Hospital. Dr. Marie Schafle's initial report notes "a previous history of mild lumbar scoliosis in the lower back and mild difficulties, but nothing like this." (Ex. 9 at 1.) Claimant asserted she was unable to work due to back pain. She reported "popping" her back to gain relief, which was only fleeting. Dr. Schafle's physical exam revealed the following:

> Julia is a well developed and well nourished young woman in no acute distress. The spine is relatively straight with a slight curve in the lumbar area and with the left hip slightly higher than the right. On forward bending there appears to be no true scoliosis. On exam of the thoracic spine, at T6-7 there is marked immobility of the facet joints and almost no spring to the spine. Above and below these joints the

> flexibility of the spine appears normal and is not tender. At T6-7-8 she is tender to palpation, centrally and along the facet joints.
>
> The range of motion of the spine is essentially not particularly limited. Torquing causes pain, but forward bending and extension are not that limited - although not that much range of motion is happening in the thoracic spine.

(*Id*. at 1-2.)

Her impression was: "[l]eft parathoracic strain and bilateral thoracic facet syndrome." The doctor prescribed physical therapy, icing, ibuprofen, and exercise. (*Id*. at 2.)

¶13 When claimant returned to Dr. Schafle during November, she was working on the sales floor at FAO Schwartz and was "markedly improved." (*Id*. at 4.) She had some spasm but range of motion was better. (*Id*.) The doctor prescribed "joint mobilization exercises" to help her at work. (*Id*. at 5.) During December, claimant reported not getting any worse but also "not getting a whole lot better." (*Id*. at 6.)

¶14 On January 29, 1992, claimant was "improved but continues to have minimal mobility at the T8 thoracic facet, especially on the left side." (*Id*. at 7.) She was referred to a chiropractor for mobilization of the T8 facet joint. (*Id*.)

¶15 On February 18, 1992, Dr. Schafle wrote a prescription for claimant to swim three to five times a week, stating "she will need to use the pool facilities for 20 weeks." (*Id*. at 9.) The doctor hoped that if claimant increased her musculature, her symptoms would abate.

¶16 During June of 1992, claimant filed a claim for occupational disease, with the date of onset "From June 1 - 2nd wk. of July - 1991." (Ex. 1.) Liberty accepted liability and began paying medical benefits, and continued to do so through the end of 1998.

¶17 On June 11, 1992, claimant was evaluated by Dr. Michael S. Sutro, a specialist in adult reconstructive spinal surgery in San Francisco. (Ex. 10.) Dr. Sutro reviewed records, took claimant's history, examined her, and ordered and reviewed an MRI. Other than "tenderness in the midline at approximately T8," the physical exam was normal. Dr. Sutro read x-rays from July 1991 as revealing "a mild thorocolumbar double scoliosis with no other abnormalities." (Ex. 10 at 1.) The MRI was read as normal. (*Id*.) During a second visit, Dr. Sutro tried an injection at "the interspinous ligament region at approximately T7-8," which temporarily relieved claimant's pain. He concluded:

> Her findings seem consistent with a thoracic sprain. I am unclear as to why her symptoms have persisted despite the treatment that she has received. Because of her lack of progress toward recovery, she should probably be considered permanent and stationary.

> She really has very mild physical impairment by my examination. I do not anticipate the need for any major medical intervention for this problem in the future.

(*Id*. at 1-2.)

¶18 During July 1992, claimant's acupuncturist and chiropractor separately wrote the insurer that claimant showed some progress with treatment, but needed continued services. (Ex. 11.) The acupuncturist noted the possibility claimant "will have to attempt to manage this pain for an indefinite period of time." (*Id*. at 1.)

¶19 On July 22, 1992, physical therapist Terri L. Handy wrote to claims adjuster Sandy McDonald: "At discharge, Julia still had residual effects of the original injury including decreased mobility in her thoracic spine. I believe that the altered biomechanics this caused complicated with muscular weakness has led to a chronic pain situation." (Ex. 9 at 11.)

¶20 On September 4, 1992, Dr. Schafle noted claimant had "no permanent alleviation of the problem" despite physical therapy, chiropractic treatment, acupuncture, and continued exercise. (*Id*. at 12.) On exam, there was continued "palpable spasm and areas of tenderness and spasm in the rhomboid musculature, especially on the left side, and she continues to be tender over the T8-9 facet joint." (*Id*.) The doctor referred claimant to begin Alexander therapy, a technique to "alleviate postural habits which may be contributing to this." He also prescribed massage therapy. (*Id*.)

¶21 On October 13, 1992, Dr. Schafle reported claimant's symptoms had waxed and waned. Claimant felt she was gaining relief from the Alexander therapy. Dr. Schafle expected "that once she has completed her Alexander therapy that she will be able to be self-sufficient in terms of this injury." (*Id*. at 13.) The doctor did not expect claimant "to have any permanent disability from this." (*Id*.)

¶22 On November 4, 1991, claimant's Alexander therapist recommended "eight months of private sessions bi-weekly followed by four to six months of weekly sessions as a minimum treatment plan." (Ex. 12.) On November 18, 1992, Dr. Schafle wrote the claims adjuster that claimant had shown steady improvement with the Alexander therapy. The doctor acknowledged "this is not a usual therapy which is encountered by Workers' Compensation companies," but she had found "it to be less expensive and more efficient in this stage of the rehabilitation therapy." (Ex. 9 at 19.) The goal was to teach claimant postural modifications to "prevent recurrence of this problem." (*Id*.)

¶23 On November 24, 1992, clamant told a physical therapist she continued to have pain in her left side. She was advised to return to Dr. Schafle. (*Id*. at 18.)

¶24 During December 1992, at the request of the insurer, claimant was evaluated by Dr. Sanford Lazar, an orthopedic surgeon in San Francisco. (Ex. 13.) She had some midline pain, but most of the discomfort was paraspinal. (*Id.* at 6.) The physical examination was normal other than "slight increase of the upper thoracic kyphosis" and "midline tenderness at the interspinous ligaments of the T6 and T8" on palpation. (*Id.* at 7.)

¶25 Dr. Lazar diagnosed "chronic thoracic sprain syndrome." (*Id.* at 9.) He believed claimant had not yet reached maximum medical improvement from the Glacier Park injury. Although recognizing that Alexander training was "essentially 'nonmedical,'" he found it helpful in treating some patients and recommended that claimant continue. (*Id.* at 10.) Dr. Lazar believed it likely "that her symptoms will subside completely with this treatment." (*Id.*)

¶26 On April 20, 1993, claimant was seen by Dr. David R. Kell, also with the St. Francis Memorial Hospital Sports Center. (Ex. 9 at 20.) She was still in Alexander therapy, which reportedly improved her comfort in many positions. (*Id.*) Dr. Kell's impression was "persistent, but improving, multilevel midthoracic somatic dysfunction, status post a repetitive lifting injury sustained nearly two years ago." (*Id.,* capitalized in original.) He found motion restriction "still present at T5 and T8." (*Id.*) He recommended continued Alexander therapy, exercise, and yoga. (*Id.* at 21.)

¶27 Claimant returned to Dr. Kell on July 20, 1993, reporting "modestly improved" symptoms. She was preparing to leave for a year in Italy, where she hoped to find an Alexander therapist, yoga instructor, and gym. (*Id.* at 23.) On July 27, 1993, Dr. Kell wrote to Sandy Scholl (formerly McDonald), opining that claimant had not plateaued. (*Id.* at 24.)

¶28 It is not clear from the record whether claimant received treatment during her year in Italy.

¶29 On September 27, 1994, having returned to the United States, claimant was evaluated by Dr. Sam W. Wiesel, a specialist in adult spine reconstruction in the Department of Orthopedic Surgery at Georgetown University Medical Center in Washington, D.C. (Ex. 14.) Claimant reported midthoracic spine pain. Aside from "some tender points in the thoracic area," her physical exam was normal. (*Id.* at 1.) Dr. Wiesel's impression was "probably fibromyalgia," but he wanted to rule out mechanical abnormality with a new MRI. (*Id.*) Both Dr. Wiesel and the MRI radiologist read the new MRI as normal. (*Id.* at 6-7.) Dr. Wiesel referred claimant to Dr. Daniel Clauw, a specialist in fibromyalgia at the Georgetown University Medical Center. (*Id.* at 7.)

¶30 Dr. Clauw examined claimant on November 22, 1994. (*Id.* at 13.) In addition to pain in the mid through upper back, claimant reported difficulty sleeping, non-restorative sleep,

some problems with concentration and headaches, and urinary frequency. (*Id.*) Dr. Clauw "suspected" a "mild form of fibromylagia." (*Id.* at 15.) He prescribed a muscle relaxant and low impact aerobic exercise. She was given information on fibromyalgia. (*Id.*)

¶31 Claimant continued treating with Dr. Clauw. During January 1995, she reported improvement in sleep and energy, but continued to have pain and muscle spasms. Her symptoms persisted through intermittent visits to Dr. Clauw. (*Id.* at 17-18.)

¶32 In September 1995, having moved to Atlanta, claimant began treating with Dr. John A. Goldman, a rheumatologist. (Ex. 15 at 1.) Dr. Goldman recorded "a history of fibromyalgia, which began in 1991, after she was waitressing in Glacier National Park." (*Id.*) Claimant complained of stiffness in the morning in the upper back, neck pain, and back pain, described as "more on the left, but also some on the right side of the back, especially in the muscles." (*Id.*)

¶33 After physical examination, Dr. Goldman's assessment included: fibromyalgia, myofacial pain, background of hypermobility, history of back injury (summer of 1991), and systolic heart murmur. (*Id.* at 3-4.) He recommended an upper back extension program and use of a kneeling chair at work. (*Id.* at 4, 9.)

¶34 Claimant continued treating with Dr. Goldman. He recommended myotherapy, twice a week, indefinitely. (*Id.* at 11-14.) In correspondence with the insurer, he resisted placing claimant at maximum medical healing and referenced fibromyalgia as a chronic pain syndrome. (*Id.*) On August 7, 1996, he recommended claimant "be seen by a chronic pain center to de-program her pain." (*Id.* at 17.) At that point, claimant was reporting neck and shoulder pain as her main problems, but also noting headaches. (*Id.*)

¶35 On August 21, 1996, claimant began treatment in the Promina Windy Hill Hospital React Center in Marietta, Georgia. (Ex. 17.) She reported "pain from the mid back up across the upper back into the shoulders and neck." (*Id.* at 1.) Her evaluation team included a RN case manager, psychologist, and physician. After the initial interview, her case manager identified the following problems: "1. Ineffectual individual coping related to Chronic Pain Syndrome, and sleep difficulty. 2. Alteration in comfort: chronic pain related to upper back. 3. Knowledge deficit related to Chronic Pain Syndrome: upper back." (*Id.* at 3.)

¶36 The "Psychodiagnostic Evaluation" prepared by James H. Rogers, Ph.D. noted that claimant was generally unwilling to acknowledge stress or difficulties associated with everyday problems. (*Id.* at 8.) He observed she had "little interest in examining underlying psychological factors that might be contributing to her current pain complaints" (*id.*) and "exhibits a tendency to focus on somatic complaints rather than on emotional distress." (*Id.* at 9.)

¶37 Dr. Roger's conclusions were: "1. Pain Disorder associated with both psychological factors and a general medical condition. 2. Somatization trends noted. 3. Insomnia associated with #1." (*Id.,* capitalized in original .) He suggested claimant enroll in the Center's "customized pain rehabilitation program," which would include "psychoeducation as well as biofeedback training." (*Id.* at 10.)

¶38 Dr. Marc J. Kornfield, a medical doctor, examined claimant as part of the same evaluation. The exam was normal, except for "mild discomfort with left rotation, right lateral bending," and some trigger point tenderness. The doctor wrote: "She does not have tender areas in the normal fibromyalgia locations except in the upper back. The only trigger points noted were in the left levator scapula and left trapezius but these were mild." (*Id.* at 13.)

¶39 Dr. Kornfield assessed: "1. History of thoracic sprain. 2. Mild myofascial pain." (*Id.,* capitalized in original.) He believed claimant had reached MMI "from a physical standpoint," having "no recommendations for treatment other than more frequent pacing and stretching." (*Id.* at 13-14.) However, he believed "psychological issues may have a bearing on her persistent pain." (*Id.* at 14.)

¶40 The team adopted Dr. Kornfield's diagnosis, and recommended biofeedback training and education regarding chronic pain perception and management. (*Id.* at 15.)

¶41 On September 6, 1996, Dr. Kornfield held an "extensive meeting" with claimant. He summarized as follows:

> I discussed with her that she has essentially reached MMI. We are recommending biofeedback therapy. This would be 8-12 sessions. She had a difficult time understanding why we are not recommending further passive treatment, including massage. She feels the insurance company is still responsible for her fitness center. We did the best we could in explaining to her why she is at MMI.

(*Id.* at 16.)

¶42 At trial, claimant testified the Promina Windy Hill Hospital providers recommended extensive work in a pain clinic, which she said she did not have time to do. Her attitude suggested she believed the Promina Windy Hill Hospital recommendations had no relevance to her condition.

¶43 Claimant did report for biofeedback training during September and October 1996. (*Id.* at 17-22.) On October 29, 1996, she stated, "In general, everything is much better." (*Id.* at 22.)

¶44 On November 11, 1996, the Pain Clinic case manager wrote the insurer that claimant's "attitude has been positive and her compliance has been excellent." (*Id.* at 24.) She was quoted as saying "the biofeedback and associated relaxation/stress management training has been helpful in giving her additional tools to deal with stress and chronic pain." (*Id.*) However, at trial, when asked about biofeedback, claimant testified, "I guess I never caught on to that."

¶45 On December 3, 1996, Dr. Kornfield noted claimant had completed the course of therapy with "about nine sessions." He reported:

> The therapist notes she has been practicing and she is doing better. She has more control of her stress and pain. Also, she is sleeping better. The patient agrees with these comments. She also notes that if she does not exercise her pain increases, and she is aware that she will need to use her biofeedback techniques and her exercises to manage her pain for the rest of her life. We also talked about the differences between her present pain problems and a new injury. She also understands these techniques are better to control chronic pain than to use drugs, and she is presently not taking any medicine. She seems to have accepted that passive treatment, such as massage, is not in her best interest.
>
> She has full upper extremity and lower trunk motion. She has full flexion and extension of the neck. She has about 15 degrees limitation of neck rotation and 5 degrees limitation of lateral bending, reproducing some discomfort in the neck.
>
> At this time, she is at MMI. I explained to her what this was. I can give an impairment rating if necessary. I talked with her about the difference between impairment and disability.

(*Id.* at 25.)

¶46 Almost two years later, having moved to New York City, claimant sought new treatment. On February 6, 1998, she was examined by Dr. Eric S. Roth, a specialist in physical rehabilitation. She reported "pain in the neck, shoulders, upper back and mid-back with her symptoms being predominantly on the left." (Ex. 18 at 1.) She told Dr. Roth her complaints stemmed from the 1991 occupational disease, stating her symptoms "have persisted and progressed since that time." (*Id.*) She also reported "occasional left arm numbness, headaches, fatigue and general lack of energy," as well as difficulty falling asleep. (*Id.*) Her symptoms were worse at the end of the day. (*Id.*)

¶47 On examination, Dr. Roth found pain and restriction of flexion in the cervical spine, a trigger point in the right upper trapezius muscle, and evidence of paraspinal spasm and tenderness from T6 to T8 on the left in the thoracic spine. (*Id.* at 2.) He found an area of

"paraspinal spasm and tenderness from T9 to L5" in the lumbar spine when vertebrae were rotated to the right. (*Id.*) His impression was:

1. Myofascial pain.
2. Cervical spasm
3. Thoracic spasm
4. Lumbar spasm
5. Chronic restrictions of the cervical, thoracic and lumbar spines
6. Spinal enthesopathy

(*Id.* at 2-3.) Dr. Roth's treatment plan involved myofascial release, joint mobilization, and trigger point therapy on a weekly basis. (*Id.*)

¶48 Claimant did not continue treating with Dr. Roth. At trial, she testified she had trouble finding a provider who accepted workers' compensation coverage, suggesting she moved on from Dr. Roth because he did not.

Treatment with Dr. Andrew D. Brown

¶49 On March 3, 1998, claimant first treated with Dr. Andrew D. Brown, who has continued as her treating physician. Dr. Brown is a specialist in physical medicine and rehabilitation, associated with Downtown Physical Medicine and Rehabilitation in New York. (Ex. 19 at 1.) In her first meeting with Dr. Brown, claimant described her occupational disease and reported "thoracic pain and neck pain radiating to the left upper extremity to forearm with numbness and tingling." (*Id.*) Physical examination revealed "diffuse tenderness in the bilateral paracervical muscles and no spasm." (*Id.* at 2.) Dr. Brown noted "[a]reas of point firmness and tenderness consistent with myofascial trigger points . . . in the bilateral paracervical muscles." (*Id.*) He found muscle weakness in claimant's neck, along with decreased sensation at the C6 vertebrae. (*Id.*)

¶50 Dr. Brown assessed: "Traumatic Myofascial Pain Syndrome and Cervical Radiculitis." (*Id.* at 3.) He recommended "physical therapy to conservatively treat the injury." (*Id.*) On March 10, 1998, Dr. Brown opined claimant was **not** at MMI because "at no time did this patient receive trigger point injections as part of the treatment plan." (*Id.* at 9.) He recommended trigger point injections as "curative," not merely "palliative." (*Id.*)

¶51 Claimant began a course of Lidocaine and saline injections with Dr. Brown. (*Id.* at 10.) Reports of progress during April were equivocal. (*Id.* at 11-13.) At deposition, Dr. Brown testified that he thought the injections were working because claimant's pain patterns were

changing. However, on May 6, 1998, claimant told him there was "essentially no change" except for "more soreness and pain." (*Id.* at 14.) Dr. Brown concluded claimant was "not responding to her trigger point injections" and that she should "discontinue physical therapy." (*Id.*) At that point, he concluded exercise was the key to her condition, recommending "a gym membership to supplement the patient's home exercise program." He considered her "present residuals" to be "permanent." (*Id.*)

¶52 During July 1998, claimant sent the insurer Dr. Brown's prescription for ongoing massage therapy, noting: "I'm attempting to find a massage therapist and time in my schedule for this." (*Id.* at 15.) During August 1998, claimant began receiving massage therapy at $75 per session. (*Id.* at 18.)

¶53 On September 9, 1998, Dr. Brown opined that claimant's "present condition is causally related to her work at Glacier Park in June of 1991." (*Id.* at 19.) He wrote:

> It is the nature of her diagnosis (fibromyalgia) that any static condition, and/or any muscular force can cause increased symptomatology. Therefore, any employment would cause an increase in symptomatology, and not her specific employment at this time. The patient has been able to continue working at her present job description.

(*Id.*)

¶54 Dr. Brown told the insurer fibromyalgia patients were "always at risk for recurrences and exacerbations," making it "inevitable that she will require repeat treatment." (*Id.*) He noted:

> The patient is presently receiving medical massage. Without some type of ongoing treatment, this patient's functionability will distinctly decrease, which may result in increased loss time. I can not give you a specific time frame, in relation to her treatment plan. Again, it is the nature of her underlying diagnosis to have exacerbations and remissions, though it is rear [sic] to return to a pain free state.

(*Id.*)

¶55 Because claimant's diagnosis was not "curable," Dr. Brown opined that "without the treatment plan noted above (massage and health club), the patient will significantly regress, and therefore, will have increased loss time." (*Id.* at 20.) It was his "medical opinion that she will require ongoing medical massage, and the use of a health club." (*Id.*)

¶56 On November 17, 1998, claimant told Dr. Brown that "with working 12 to 14 hour days, her pain is significantly intensifying." (*Id.* at 21.) She was considering quitting employment

in January of 1999. Because the insurer had not been covering massage or gym membership, Dr. Brown wrote:

> It is not practical for this patient to do only a home exercise program. Without her ongoing exercise program, this patient will have a regression and will then require a more restorative type program. Though fibromyalgia is chronic in nature, there is no "cure," the treatment plan outlined above is considered standard treatment for this entity.

(*Id*. at 21.)

¶57 On December 9, 1998, Dr. Brown recorded that claimant was "working between 14-16 hours per day as well as weekends secondary to down sizing at her facility. She states that this has caused significant increased pain and dysfunction." (*Id*. at 22.) She planned a leave of absence from work. (*Id*.)

¶58 That same date, Gary Schild (Schild), claims examiner, wrote to claimant that Liberty would not pay for future medical treatment or prescriptions. He based the denial on information from Dr. Brown suggesting that claimant's regression was caused by her current work. (Ex. 3.)

¶59 On August 10, 1999, Dr. Brown again wrote to the insurer, opining that claimant's recent turn for the worse was not caused by her work station, but rather by her extended work hours. (Ex. 19 at 27.)

¶60 On November 17, 1999, claimant reported left arm pain, which Dr. Brown found unrelated to the occupational disease. An MRI was performed and read as normal. Exercise was prescribed for the arm condition. (Brown Dep. at 19.) During that same month, Dr. Brown wrote again to the insurer that "her working diagnosis of fibromyalgia does relate to the injuries" for which the insurer was responsible. (Ex. 19 at 30.)

¶61 Examinations by Dr. Brown during 2000 indicated essentially no change. (*Id*. at 31-34.) He did prescribe Elavil and Zoloft. (*Id*. at 31.)

¶62 Dr. Brown's last examination of claimant prior to his deposition was on February 7, 2001. His diagnosis continued to be fibromyalgia. He continued to prescribe Zoloft and Elevil. (Brown Dep. at 20.)

¶63 At deposition, Dr. Brown defended his opinion that claimant's weeks of waitressing in 1991 are the cause of her present condition. He had no specific information about the weight claimant carried, but testified that she had been "basically overloading her muscular structures - overloading the integrity of the muscle fibers, and I believe that is what caused it." (*Id*. at 23.)

¶64 When pressed as to how claimant's work in 1991 was the cause of a 2001 condition, Dr. Brown testified that fibromyalgia is not curable, "so yes, it is diagnosed in 1991 and I think it remains." (*Id*. at 24.) According to the record, fibromyalgia was not actually diagnosed until 1994, when claimant was treated in Washington, D.C. Earlier diagnoses involved sprain, strain, and mechanical back dysfunction.

¶65 Respondent challenged Dr. Brown on his diagnosis of fibromyalgia, asking whether claimant in fact met the "gold standard" of diagnostic criteria for the condition. (Brown Dep. at 25; *see* Exs. 1, 2.) In particular, respondent asserted that diagnostic criteria were not met because Dr. Brown did not locate "trigger points" below claimant's waist. Dr. Brown maintained his diagnosis, asserting that the diagnosis remains within the discretion of the physician. (Brown Dep. at 35.)

¶66 Dr. Brown agreed that there are no imaging or blood studies to confirm a diagnosis of fibromyalgia. (*Id*. at 37.) He also made it clear that he accepted claimant's pain reports, testifying he did not use any distraction techniques or other means to determine whether there was an objective basis for her claims of pain.

¶67 At deposition, Dr. Brown repeated his opinion that exercise is "a key" to claimant's "functionability." (*Id*. at 13.) He testified: "[W]hat we try to do, since we can't usually fully take away the pain, we try to maximize the claimant's functionability. This is usually done by maintaining muscle strength and flexibility through an exercise program." (*Id*.)

¶68 Dr. Brown reiterated his recommendation for a gym membership "to supplement the patient's home exercise program." (*Id*. ) He explained: "Well, gyms in general have more equipment than most people can fit into a New York apartment, which would give her greater variation in the exercises she could do." (*Id*. *at* 13-14.) "Also, with machines, she can isolate certain muscle groups and control it a little better than she can with free weights." (*Id*. at 14.)

¶69 He opined that if claimant has access to a health club, "hopefully the need for any real supervised physical therapy will significantly go down because flexibility, strength and endurance will be maintained." (*Id*. at 20.) However, he noted "[t]here is always the chance that she may require short courses of either massage or physical therapy to try to deal with any really acute exacerbations in an attempt to bring her back to a baseline so that she may continue her home exercises or gym program." (*Id*. at 20-21.)

¶70 Dr. Brown testified that when claimant has acute exacerbations,

> . . . she is in more pain with decreasing function.

> I can't say that there will be permanent residual from those. Most of the time they will come back to a baseline, but it takes a much longer period of time. The patient is in much more pain and during that period, her functionability will decrease.
>
> So if she is employed at the time, there's a good chance she will not be able to work at least at full capacity.
>
> I can't say she won't be able to work at all, but she may require reduced hours, reduced workloads, and things like that. That possibility exists.

(*Id*. at 21.)

¶71 Dr. Brown wrote the insurer that swimming is "a crucial component" to claimant's exercise program. (Ex. 19 at 25.) At deposition, he clarified:

> It doesn't have to be swimming specifically, but in the pool, gravity is reduced, so therefore the stresses on the muscle are less and it is a little easier to control the forces, and I find in most cases when you do exercises in the pool, you can actually do more increased endurance, so hopefully when you get out of the pool, you are starting at a better state and therefore the success of the exercise program would be better.

(Brown Dep. at 17-18.)

Dr. Andrew Dowd

¶72 During 2000, the insurer requested an independent medical examination (IME) of claimant. On March 29, 2000, claimant was notified by MCN-East, a Medical Consultant firm, that an appointment had been arranged for her with Dr. Andrew Dowd at the request of the Montana Department of Labor and Industry. (Ex. 4.)

¶73 Dr. Dowd practices orthopedic medicine in New York. (Dowd Dep. at 5.) He is in solo practice, specializing for the last two years in hand surgery relating to trauma. (*Id*. at 5, 16.) His prior ten years of practice focused more generally on orthopedic trauma. (*Id*. at 16.) He is certified with the American Board of Orthopedic Surgeons and has privileges at several New York hospitals. (*Id*. at 6.) While not a rheumatologist, Dr. Dowd testified that his orthopedic training included an overview of orthopedic rheumatology. (*Id*. at 16-17.)

¶74 Dr. Dowd's report is dated April 21, 2000. (Ex. 20.) The report indicates he discussed claimant's situation with her, reviewed medical records, and conducted a physical examination. (*Id*. at 1-2.) Dr. Dowd wrote:

> On physical examination, this patient is a 31 year-old right-handed woman, well nourished and in no acute distress, who appears her stated age. The claimant is alert, oriented and cooperative.
>
> On examination of the cervical spine, there was preservation of the normal cervical lordosis. There was no muscle spasm noted in the paraspinal muscles of the cervical region. Cervical range of motion was complete, with 45 degrees of flexion, 45 degrees of extension, 45 degrees of right and left lateral bend, and 80 degrees of right and left rotation. Upper extremity motor power was 5/5. There was no sensory changes in either upper extremity. Deep tendon reflexes of the biceps tendon were +2.
>
> Examination of the left shoulder revealed full active and passive range of motion, 160 degrees elevation, 160 degrees abduction, external rotation 60 degrees, internal rotation to T12. No atrophy or weakness was noted. There was no focal tenderness, swelling, or erythema. Impingement signs were negative. Apprehension and drop arm signs were negative.

(*Id*. at 2.)

¶75 Dr. Dowd's impression was resolved cervical sprain and resolved left shoulder contusion. (*Id*. at 2.) He opined claimant required "no further orthopedic treatment or testing." He also found "no further need for message [sic] therapy or club membership." (*Id*.) While believing claimant's original symptoms were causally related to the Glacier Park work, he found there was no current orthopedic disability. (*Id*.)

¶76 At the subsequent request of the insurer, Dr. Dowd opined that prescription medications were not indicated for claimant as of the date of his examination. He did not believe a "diagnosis of fibromyalgia was present on 4/21/00 and that if this diagnosis was present prior to that day, it was not related to the accident on 6/30/91." (*Id*. at 4.)

¶77 On May 3, 2000, Schild forwarded Dr. Dowd's report to claimant and stated the insurer believed it was not responsible for further medical care. (Ex. 5.) The insurer did cover charges from Dr. Brown, and for massage therapy, incurred prior to May 3, 2000. (*Id*.)

¶78 Claimant testified that the examination with Dr. Dowd was cursory. His office was crowded and her appointment lasted approximately five minutes. She testified that Dr. Dowd had not reviewed any information about her case prior to seeing her. (Messitte Dep. at 18-19.) The physical examination consisted only of range of motion tests, which claimant estimated took less than a minute. (*Id*. at 19, 20.) She was standing the entire time. There was no examination table in the room. (*Id*. at 20.) Dr. Dowd did no trigger point

tests which other doctors have done, though he did squeeze around her left shoulder. (*Id*. at 20-21.)

¶79 Claimant testified that Dr. Dowd "didn't really ask questions about going into detail." (*Id*. at 20.) She estimated the question-answer segment of the exam took "maybe two minutes." (*Id*.)

¶80 At deposition taken April 17, 2001, Dr. Dowd acknowledged he had no specific memory of claimant. (Dowd Dep. at 18.) He also did not have records from the examination before him. (*Id*. at 6.) He testified based on his IME practices, which he said always included reading medical records sent to him, though not necessarily prior to an examination. (*Id*. at 9.) He testified that his IMEs typically take between five and fifteen minutes. (*Id*. at 19.) He sees around ten IME patients a week, evidently on a single day as arranged by his staff. (*Id*. at 7.)

¶81 In addition to opining that claimant did not suffer from fibromyalgia, Dr. Dowd made it clear that he was not impressed with the diagnosis in general. He testified that fibromyalgia is a "diagnosis of exclusion for pain of undetermined origin."

> It basically means that I have pain in my neck, back, shoulders and in my muscles and everything hurts. That's in common layman's terms, but that's my view of that diagnosis. And you are correct, there is no firm diagnostic test out there that will give that diagnosis. And it's more of a diagnosis of exclusion, meaning that it's a diagnosis that's used to describe pain, but there's no conclusive evidence that it exists.

(*Id*. at 11.) In essence, he considered the diagnosis merely a description of the symptom of muscle pain. (*Id*. at 15.)

¶82 I have not relied upon the testimony of Dr. Dowd in resolving this matter. To begin with, I credit claimant's description of the cursory nature of the physical exam performed by Dr. Dowd. The doctor has no recollection of the actual examination and, in any event, concedes that his physical examinations during IMEs are sometimes as short as five minutes. More importantly, Dr. Dowd is an orthopedic surgeon now specializing in treating hand trauma. While he received an overview of rheumatology in medical school, and presumably general training on muscle ailments, he has no special expertise in the muscle-fascia condition from which claimant suffers for me to favor his opinion over those of Dr. Brown and other physicians. In short, Dr. Dowd does not have the credentials, nor did he perform a sufficient examination.

<u>Claimant's Current Symptoms</u>

¶83 At deposition taken March 22, 2001, claimant described her pain as "constant, and the area doesn't change much, but the level of discomfort does fluctuate." (Messitte Dep. at 10.) She testified her pain is concentrated in the upper and mid back and shoulder area. "It's always there, but it's not always unbearable." (*Id.*) She described the pain as "an aggravating dull pain, maybe a throbbing pain," when it is at its least. (*Id.* at 11.) At its worst,

> It's a very sharp, I guess tooth ache type pain is correct. Because that's typically a nerve pain. At its worse [sic] it's a very sharp pain. And it's always worse on the left side than on the right side. At its worst it does radiate a bit up the - from that area in my back up toward my neck and sometimes up toward my left arm.

(*Id.* at 11-12.) When the pain radiates towards her arms, there is a tingling, but that happens "only maybe ten percent of the time." (*Id.* at 14.) The pain is also sometimes a stiffness, which doctors have explained as the fascia, or "the connective tissue that gets hard and becomes very stiff." (*Id.* at 15.) Claimant testified these symptoms were all present by the end of July 1991 and were still present. (*Id.* at 16.)

¶84 Claimant testified she has had no accidents or injuries requiring medical treatment since the end of July 1991. (*Id.* at 16.) She also testified her present symptoms did not exist prior to her work at Glacier. (*Id.* at 25.)

Resolution

¶85 I found claimant a credible witness. I am persuaded that she is currently suffering from a condition which began at Glacier and has been with her since that time.

¶86 I am troubled that her symptoms have shifted and expanded. For instance, while she reported pain in her upper and middle back during the first few years after the exposure, by August 1996, when she was treated in Washington, D.C., she reported pain into her shoulders and neck. (Ex. 17 at 5.) More troublesome is the fact that several symptoms not initially reported, such as headaches, fatigue, and difficulty sleeping, are now experienced by claimant as aspects of the same condition. Nevertheless, I find that her current upper and middle back pain, which is at the heart of her complaints, had its genesis in the work exposure.

¶87 This conclusion is supported by the medical record. I find it very significant that claimant has consistently sought treatment for a condition she has continued to describe in the same basic fashion. While the condition has been worse at times more than others, and while there have been some breaks in medical treatment, claimant has for the most part consistently sought relief for the pain in her upper and middle back.

¶88 In addition, her treating physicians have not questioned her veracity in reporting this pain. There is considerable medical evidence suggesting that her condition may have become a chronic pain condition, and/or that there may be a psychological component to her experience of her pain. Nevertheless, the medical record in general supports claimant's contention that she continues to suffer from a medical condition beginning with work exposure. That condition continues to be compensable.

¶89 The insurer has argued extensively that the Court should refuse to admit Dr. Brown's opinions that claimant suffers from fibromyalgia and requires certain treatments for that condition. *See* Respondent's Trial Brief (arguing the Court should act as a gate-keeper for expert evidence on fibromylagia under *Dauber v. Merrel Dow Parmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993)). I decline to reach this issue because my decision does not rest on Dr. Brown's testimony that claimant suffers from fibromyalgia. As I have indicated in prior cases (*see*, *Klein v. Liberty Northwest Ins. Corp.*, WCC No. 9608-7591 (3/4/97)),[(1)] claimant is not required to prove a particular diagnosis, but only to prove it is more probable than not that she suffers from an occupational disease originating in employment. I am persuaded that she does.

¶90 To the extent respondent desires the Court to exclude all testimony from Dr. Brown due to his opinions on fibromyalgia, I decline to do so. In essence, respondent would like this Court to hold that because the diagnosis of fibromyalgia is controversial, claimant not only has to introduce expert testimony, but must lay broad scientific foundation before the testimony is considered. Initially, I note that while controversial, the diagnosis of fibromyalgia is not new to this Court. *See*, *Klein, supra*. Second, claimant has not convinced me the diagnosis is so far from medical legitimacy that the Court should act as a gatekeeper. The gatekeeper analysis requires better evidence and better experts than rendered in the present case. Rather than introduce comprehensive expert testimony regarding fibromyalgia, respondent chose to rely on Dr. Dowd, who has little expertise relevant to diagnosing fibromyalgia, and to challenge Dr. Brown's diagnosis and treatment recommendation obliquely through questioning about articles arguably inconsistent with his views. Respondent could have presented expert testimony of a physician or scientist with expertise in the study of fibromyalgia (or what is labeled fibromyalgia), preferably an expert who had also reviewed claimant's medical history and testimony. If such evidence had been presented, the Court would have been in the position to contrast Dr. Brown's opinions and treatment recommendations with other opinions, and could have evaluated both on the basis of the experts' qualifications, particular testimony, and how their opinions fit with the facts of the case as found. The gatekeeper argument cannot take the place of presenting persuasive expert evidence.

¶91 In finding claimant continues to suffer from the condition originating at Glacier, I have considered the testimony of Dr. Brown, though I do not rely on his diagnosis of fibromyalgia. Dr. Brown's testimony is significant in that it corroborates claimant's continued experience of pain. While her condition is not verifiable by MRI or other test, Dr. Brown has recorded observations indicating an objective condition. For instance, on the first exam, he found "points firmness and tenderness consistent with myofascial trigger points." (Ex. 19 at 2.) Testing indicated restricted range of motion and decreased muscle strength. (*Id*. at 5-6.) Over the months he treated claimant, Dr. Brown continued to find areas of tenderness and restricted range of motion. (*Id*. at 6-34.) While Dr. Brown conceives of these indications as fitting a fibromyalgia diagnosis, they are important to my decision only in that they corroborate claimant's testimony regarding a painful muscle or fascia condition.

¶92 While I have found that claimant continues to suffer from an occupational disease, Liberty's conduct in terminating medical benefits was not unreasonable. To a large degree, my decision rests upon the fact that I credit claimant's testimony about her condition. Given the history of this case, Liberty was entitled to question whether claimant was still, after ten years, suffering from the results of a relatively brief work exposure. The insurer's doubt was all the more reasonable given the lack of imaging evidence to prove the type of condition from which claimant suffers. Further, for the reasons explained in the Conclusions of Law below, while I find claimant entitled to continued reasonable medical benefits, I do not find all of the treatments she seeks compensable. Thus, respondent has prevailed in part.

¶93 At trial, in arguing for a penalty, claimant's counsel pointed to a memorandum written by claims adjuster Gary Schild on September 7, 1999. (Ex. 6.) The memorandum includes the following:

> The approach we are now taking is trying to find a doctor or a panel of doctors to take a look at the long history of this case and essentially to tell us that the condition of fibromyalgia no longer continues to relate to her exposure while working with Glacier Park. To date the medical history does not reflect that and as such we continue to be responsible for treatment of that condition.

(*Id*. at 2.)

¶94 The quoted language suggests prejudgment by the insurer, which causes serious concern to the Court. In this particular case, however, the insurer terminated benefits only after an IME arranged by the Department which supported termination of benefits.

## CONCLUSIONS OF LAW

¶95 The 1989 version of the Occupational Disease Act applies because claimant's condition arose prior to July 1, 1991, the effective date of 1991 amendments to relevant statutes.[(2)] *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶96 Claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2s 1304 (19873); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

*¶97* Section 39-72-704, MCA (1989), controls medical benefits, providing as follows:

> In addition to the compensation provided by this chapter, an employee who becomes either totally or partially disabled from an occupational disease is entitled to receive for the treatment of the occupational disease, without limitation to the length of time or dollar amount, reasonable medical services, hospitalization, medicines, and other treatment approved by the department.

¶98 I have found claimant is still suffering from a compensable disease. She is entitled to reasonable medical services and medicines under section 39-72-704, MCA (1989), "without limitation to the length of time or dollar amount."

¶99 Periodic treatment with Dr. Brown, and the medicines he prescribes, constitute reasonable medical services and medicines under the statute.

¶100 Whether claimant is entitled to all the treatments or privileges Dr. Brown recommends is a different matter. Under section 39-72-704, MCA (1989), claimant is entitled to "other treatment approved by the department." Massage therapy, gym membership, pool access, or other modalities or privileges not actually administered by a medical provider fall under this clause.

¶101 The question arises whether this Court is the appropriate forum initially to "approve" or disapprove those type of medical benefits. Neither party challenges this Court's present jurisdiction to resolve a dispute about "other treatment" under section 39-72-704, MCA (1989). Moreover, since 1989, section 39-72-704, MCA, has been amended to delete reference to "other treatment approved by the department," leaving no doubt that original jurisdiction to determine "other treatment" benefits now lies in this Court. *See* 1995 Session Laws, ch. 243, § 26. Because the legislature may change the forum for resolving disputes without impacting substantive rights, (*State Compensation Insurance Fund v. Sky Country, Inc.,* 239 Mont. 376, 780 P.2d 1135 (1989)), this Court may decide the question of "other treatment."

¶102 Although present procedural rules are applicable, the Court must determine claimant's right to "other treatment" in accordance with 1989 law. This raises the question whether the treatment sought by claimant was "approved by the department" when claimant's injury arose.

¶103 In 1972, the Department promulgated regulations in the exercise of its authority under the "approved by the department" language of both section 39-72-704, MCA, and section 39-71-704, MCA, (the medical benefits provision of the Workers' Compensation Act).[(3)] Beginning at ARM 24.29.2001, the regulations fall under a heading, "Chiropractic Service Rules," but the two regulations relevant to this matter are not expressly limited to chiropractic issues. These regulations are as follows:

> **24.29.2003 Workers Compensation Does Pay** (1) For "therapeutic" 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 for 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.

¶104 In *Synek v. State Compensation Mutual Ins. Fund*, 272 Mont. 246, 900 P.2d 884 (1995), the Supreme Court recognized the Department's authority to promulgate rules to define "other treatment approved by the Department." Addressing these particular rules, the Court found they "constitute[d] the Department's 'interpretation' of the statute'" and "are entitled to deference unless they produce an absurd result." *Id.* at 252. The Court also found that "the administrative rules at issue, which include treatments of some kind and exclude others, and which were promulgated pursuant to broad statutory language, are not facially or inherently arbitrary, capricious or unreasonable." *Id*.

¶105 When applied to the present case, ARM 24.29.2003 and .2004 require denial of compensation for massage therapy or membership in a gym and/or pool facility. Under Dr. Brown's testimony, massage and exercise are non-compensable "maintenance," designed "to provide the optimum state of health while minimizing the recurrence of clinical status." *See* ARM 24.29.0004. As justification for his recommendation of massage and health club membership, Dr. Brown very specifically stated that the purpose is to prevent increased symptomatology and to maintain "functionability." (Ex. 19 at 19, 21; Brown Dep.

at 13, 21.) This brings his recommendation squarely within the realm of preventative treatment undertaken for the purpose of "minimizing recurrence of the clinical status." Such treatment is expressly made not compensable under ARM 24.29.2004. Moreover, Dr. Brown's records establish that claimant is suffering from an incurable condition with "permanent residuals." (*Id.* at 14, 20-21.) This conclusion is supported, of course, by her failure to fully recover in over ten years of various forms of treatment. In addition, several providers prior to Dr. Brown had found claimant to have reached a stationary point. (Ex. 17 at 25.) Dr. Brown had opined she was not yet at MMI because she had not received trigger point injections. (Ex. 19 at 9.) But those injections have since been given, with claimant reporting they did not help. (*Id.* at 14.) Without doubt, claimant has reached a stationary status, though she may have worse and better periods. Her treatments are therefore no longer "therapeutic" within ARM 24.29.2003.

JUDGMENT

¶106 Claimant is entitled to reasonable medical services and medicines for treatment of her ongoing occupational disease. These include reasonable periodic examinations by Dr. Brown or another qualified physician selected by claimant in accordance with applicable law, as well as reasonable prescribed medications.

¶107 Claimant is not entitled to the massage and health club and/or pool memberships recommended by Dr. Brown.

¶108 Claimant is entitled to costs, but not attorneys fees or penalty.

¶109 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.

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

DATED in Helena, Montana, this 31st day of August, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Larry W. Jones
Submitted: May 9, 2001

1. In *Klein*, I found: "After considering all the evidence, I am persuaded that claimant suffers from a preexisting condition which, *for lack of a better term*, is diagnosed by some members of the medical profession as fibromyalgia. While none of the doctors examining

claimant could find any specific physiological basis for the condition, and even though the diagnosis of fibromyalgia is one of exclusion and may be merely descriptive of a patient who complains of multiple areas of muscle and joint pain and sleep disturbance, there is no credible evidence that the claimant fabricated her reports of pain or that her pain was imaginary, although there is evidence that claimant's perception of her pain may have been enhanced by psychological factors. I decline Liberty's invitation that I get involved in a semantical debate over the diagnosis." (*Id.,* ¶ 47.)

2. The 1989 and 1991 versions of 39-72-704, MCA, are in any event identical.

3. Section 39-71-704, MCA (1989), the medical benefits provision of the 1989 Workers' Compensation Act, contained virtually identical language to section 39-72-704, MCA (1989), entitling injured workers to "reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment as may be approved by the department for the injuries sustained."