IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 41

WCC No. 9403-7015

MICHAEL E. HEISLER

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HINES MOTOR COMPANY

Employer.

Reversed in *Heisler v. State Compensation Insurance Fund,* 282 Mont. 270

ORDER DENYING SUMMARY JUDGMENT

Summary: Claimant challenged State Fund's refusal to recognize his choice of treating physician or to pay certain medical bills.

Held: Administrative requirement that claimant obtain approval prior to changing treating physician does not violate statutory or constitutional provisions.

Petitioner, Michael E. Heisler (Heisler), alleges that the respondent/insurer, State Compensation Insurance Fund (State Fund), unreasonably refused to approve his choice of a treating physician and has failed to pay certain medical bills. He is now pursuing summary judgment despite his acknowledgment, found at page 3 of his Memorandum of Authorities in Support of Petitioner's Motion for Summary Judgment[1], that after the filing of

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[1]Heisler also filed a memorandum of the same title on June 6, 1994. However, unless otherwise indicted, all references to his Memorandum of Authorities in Support of Petitioner's Motion for Summary Judgment are to the memorandum filed November 9, 1994.

the Petition for Trial the respondent recognized his choice of physician and paid the contested medical bills. His Motion for Summary Judgment is **denied**.

Factual and Procedural Background

Heisler was injured in an industrial accident on June 28, 1993, while working for Hines Motor Supply Company (Hines) in Great Falls, Montana. (Petition for Trial ¶ 1; Response ¶ 1.) At the time of the accident, Hines was insured by the respondent, State Fund. (Response ¶ 1.) The State Fund accepted liability for the claim. (*Id.*)

A dispute arose concerning Heisler's treating physician. In his Petition for Trial, Heisler alleges that he chose Dr. Richard A. Nelson as his treating physician and that the State Fund refused to recognize his choice. (Petition for Trial ¶S 9, 10 AND 14.) In its Response to Petition the State Fund alleges that Heisler "changed" treating physicians without its prior approval. (Response to Petition ¶ 2.) Exhibit 1 to the Insurer's Response to Petitioner's Summary Judgment Memorandum suggests that claimant was initially treated for his injuries by Dr. William Shull. The State Fund further asserts that it is not responsible for medical treatment by Dr. Nelson or for treatment ordered by him because Heisler did not obtain its prior approval of Dr. Nelson. (*Id*.)

In his Petition for Trial, Heisler itemizes a number of unpaid medical bills which are related to Dr. Nelson's care. The bills include Dr. Nelson's bills, pharmacy bills and charges for a cervical collar and an MRI.

The Petition for Trial contains the following prayers for relief:

> a. Whether the insurer acted reasonably in refusing to recognize Dr. Richard A. Nelson as the Petitioner's treating physician and/or to authorize the Petitioner's consultation with a neurologist of his choice for the neurological conditions from which he suffers;
>
> b. Whether the Claimant has a right of choice of his physician under the provisions of § 33-22-111 M.C.A. (1991).
>
> c. Whether the Insurer has a right to interfere with the Petitioner's full freedom of choice of physician pursuant to Article II Sections 3, 4 and 10 of the 1972 Montana Constitution and the 9th and 14th Amendments of the United States Constitution;

> d. Whether the Petitioner has a right of full freedom of choice of physicians pursuant to Article II Sections 3, 4 and 10 of the 1972 Montana Constitution and the 9th and 14th Amendments of the United States Constitution;
>
> e. Whether the Insurer's conduct is reasonable;
>
> f. Whether the Insurer's conduct is unreasonable and entitles the Petitioner to recover penalties pursuant to the provisions of § 39-71-2907 M.C.A.;
>
> g. Whether the Petitioner is entitled to recover his attorney's fees and costs incurred herein.

Heisler did not request payment of the unpaid medical bills in his prayer. However, the Court believes that such request is implicit.

This matter was originally set for trial during the week of June 27, 1994. However, on June 6, 1994, Heisler filed his motion for summary judgment, along with a supporting memorandum of law. In view of the lateness of the filing, and the lack of any supporting affidavits or discovery, I confirmed the trial setting and postponed consideration of Heisler's arguments until such time as the parties submitted proposed findings of fact and conclusions of law. Order Confirming Trial Setting; Order Postponing Briefs (June 8, 1994).

Counsel for both parties then agreed that the substantive issues raised by the Petition for Trial were legal and not factual, and that they could be submitted by way of an agreed statement of facts and summary judgment. (June 9, 1994 Letter of Lawrence A. Anderson to Judge McCarter and June 16, 1994 Letter of Clara Wilson to Mr. Lawrence A. Anderson.) The Court held a pretrial conference on June 21, 1994. A briefing schedule was set for the motion for summary judgment and the trial was postponed. (June 24, 1994 Memo of Clarice V. Beck, Hearing Examiner.) The trial was reset for the week of October 3, 1994. (Rescheduling Order (June 24, 1994).) The briefing schedule was subsequently vacated by agreement of both counsel. (July 13, 1994 Letter of Norman C. Peterson to Ms. Clarice V. Beck.)

The Court conducted a second pretrial conference on September 26, 1994. The pretrial notes reflect the following:

> Counsel agree and the Court concurs that the trial which is scheduled for the week of October 3, 1994 will be vacated pending a decision on petitoners' [sic] motion. The issues of

> attorney fees and costs and the penalty will be bifurcated, until the **final** resolution of the motion.

Following the pretrial conference the parties submitted a final PRE-TRIAL ORDER and their briefs on the summary judgment motion. The final brief was submitted January 30, 1995.

In the meantime, the State Fund approved Heisler's choice of Dr. Nelson and paid the disputed medical bills. That development is acknowledged in Heisler's Memorandum of Authorities in Support of Petitioner's Motion for Summary Judgment.

> Until after the filing of this summary judgment motion and initial brief, the State Fund had refused to recognize Dr. Nelson as Heisler's treating physician; and/or had refused to authorize his services as a consulting physician. Until June 13, 1994, the State Fund had refused to pay for the following medical services and medications incurred as a result of his industrial injury:
>
> . . .
>
> The State Fund has now recognized Dr. Nelson as Heisler's treating physician. . . .

(*Id.* at 3-4.) In its responsive brief, the State Fund confirms that the medical bills have been paid and that it has recognized Dr. Nelson as claimant's treating physician. (Insurer's Response to Petitioner's Summary Judgment Motion at 2.) Nonetheless, Heisler presses his motion for summary judgment. He argues that the requirement that a claimant obtain the insurer's approval to change treating physicians is in violation of statute and is unconstitutional. The State Fund responds that the matter is moot, and that the requirement is valid and constitutional.

Discussion

The present controversy concerns the validity of regulations governing the selection of a treating physician. At the time of Heisler's injury on June 28, 1993, the selection was governed by ARM 24.29.1511, which provided in relevant part:

> (1) Although section 33-22-111, MCA, provides freedom of choice in selection of a physician, workers' compensation and occupational disease case law also recognizes that a worker must select a single physician who is responsible for the overall medical management of the workers' condition. That physician is known as the treating physician.

(2) The worker has a duty to select a treating physician. Initial treatment in an emergency room or urgent care facility is not selection of a treating physician. The selection of a treating physician must be made as soon as practicable. A worker may not avoid selection of a treating physician by repeatedly seeking care in an emergency room or urgent care facility. The worker should select a treating physician with due consideration for the type of injury or occupational disease suffered, as well as practical considerations such as the proximity and the availability of the physician to the worker. **A worker must obtain prior authorization before changing treating physician.**

(3) Only the treating physician may refer an injured worker to another provider. The treating physician remains responsible for the overall medical management of the injured worker, despite the referral. If the treating physician transfers that responsibility to another physician, the physician loses the status of being the worker's "treating physician" and will not be able to make referrals. Prior authorization is required for change of treating physician. [Emphasis added.]

This particular section was adopted effective April 1, 1993. (1993 MAR 404.) It was amended effective December 1, 1993. (1993 MAR 2809-10.) The amendment added a sentence to the end of subsection one. That sentence enumerates the types of medical providers an injured worker can choose as his or her treating physician.[2]

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[2]As amended, ARM 24.29.1511 (1) provides:

(1) Although 33-22-111, MCA, provides freedom of choice in selection of a physician, workers' compensation and occupational disease case law also recognizes that a worker must select a single physician who is responsible for the overall medical management of the workers' condition. That physician is known as the treating physician. For claims arising before July 1, 1993, the worker may select any person licensed as one of the following providers as that worker's initial "treating physician"

(a) physician;
(b) physician assistant-certified;
(c) dentist;
(d) osteopath;

The requirement that an injured worker obtain prior approval to change treating physicians has a long history. It was originally adopted in 1972 by the old Division of Workers' Compensation as ARM 24.29.1403. The original rule, which is set out in the margin,[3] was repealed effective April 1, 1993, upon adoption of ARM 24.29.1511. (1993 MAR 404.)

In *Garland v. Anaconda Co.,* 177 Mont. 240, 243, 581 P.2d 431 (1978), the Supreme Court expressly approved the Division's adoption of the rule as within its general powers to make rules "which are necessary or convenient in the exercise of any power, authority, or jurisdiction conferred upon it under this act." Declaring that the "rule requiring prior authorization to change physicians has a functional purpose," the Court went on to specifically hold:

> This rule was properly adopted by the Division of Workers' Compensation. The intent of the rule was to require the injured worker to obtain authorization before changing doctors.

(e) chiropractor;
(f) optometrist;
(g) podiatrist;
(h) psychologist; or
(i) acupuncturist.

[3]Prior to its repeal in 1993, ARM 24.29.1403, provided in relevant part:

> (1) The injured worker may select the physician to provide the initial treatment. Authorization is required to change treating physicians. The insurer should be advised by the treating physician when unusual treatment is required for emergency or critical cases.
>
> . . .
>
> (3) Except in an emergency, approval of the insurer shall be obtained before referral of a worker to a medical specialist for consultation. . . .
>
> . . .
>
> (5) Authorization or approval as required in subsections (1) and (2) shall not be unreasonably withheld.

Id. Applying the rule, the Supreme Court affirmed the decision of this Court denying payment for the services of an unauthorized second doctor. *Id.* at 244.

A decade later, in *Carroll v. Wells Fargo Armored Service Corp.,* 240 Mont. 151, 783 P.2d 387 (1989), the Supreme Court again affirmed a decision of this Court which denied payment for treatment by an unauthorized physician. In its discussion, the Court said:

> Claimant received medical treatment from Dr. Baggenstos for which defendant refused to pay. Defendant refused to pay Dr. Baggenstos' costs because neither did claimant's treating physician refer claimant to Dr. Baggenstos nor did defendant authorize Dr. Baggenstos' visit.
>
> Montana law specifically requires either a referral from a claimant's treating physician or an authorization by the insurer before an insurer will be liable for medical treatment expenses. Claimant's visit to Dr. Baggenstos was clearly unauthorized under Montana law, even though claimant felt he had good reason for his actions. We affirm the Workers' Compensation Court's decision disallowing payment of Dr. Baggenstos' medical costs. [Citation omitted.]

Id. at 156.

Notwithstanding these precedents, Heisler argues that the prior approval requirement is contrary to statute and is unconstitutional. Specifically, he argues that the requirement is contrary to the freedom of choice guarantee contained in section 33-22-111, MCA (1991), and violates his right to privacy as guaranteed by the Montana and United States Constitutions. These challenges were not specifically considered in either *Garland* or *Carroll*, so those precedents are not dispositive of his arguments.

As an initial matter the Court must consider the State Fund's argument that Heisler's challenges are moot because it has approved Dr. Nelson as claimant's treating physician and paid the disputed medical bills. Heisler vigorously argues that his claims are not moot. He points out that the State Fund has not abandoned its position that the prior approval requirement is valid. He will certainly be subject to the requirement if in the future he seeks to once again change physicians.

The Supreme Court set out a definition of mootness in *State ex rel. Miller v. Murray,* 183 Mont. 499, 600 P.2d 1174, 1176 (1979). It reads, "A moot question is one which existed once but because of an event or happening, it has ceased to exist and no longer presents an actual controversy." *Miller* at 503. Since the medical bills in dispute have

been paid, and the State Fund has approved necessary medical treatment by Dr. Nelson, there is no longer any actual controversy regarding those particular matters.

However, Heisler is still threatened by the rule should he want to again change physicians. That threat is critical in determining whether the matter is moot.

Montana has adopted the "capable of repetition, yet evading review" doctrine. The doctrine is summarized in *School Dist. No. 4 v. Board of Personnel Appeals,* 214 Mont. 361, 692 P.2d 1261 (1985):

> This doctrine is limited to a situation where two elements are combined: (1) the challenged action was in its duration too short to be fully litigated prior to the cessation or expiration; and (2) there was a reasonable expectation the same complaining party would be subjected to the same action again.

School Dist. No. 4 at 364. The doctrine has been applied in *Romero v. J&J Tire,* 238 Mont. 146, 777 P.2d 292 (1989); *Butte-Silver Bow Local Government v. Olsen,* 228 Mont. 77, 743 P.2d 564 (1987); and *Common Cause v. Statutory Committee,* 263 Mont. 324, 868 P.2d 604 (1994), which illustrate the type of situations to which the doctrine applies.

In *Romero* the plaintiff brought a district court action alleging racial discrimination. He argued that a requirement that he pursue administrative remedies before the Montana Human Rights Commission (HRC) prior to bringing his suit was unconstitutional. *Id.* at 146. The district court rejected the constitutional challenge and plaintiff appealed to the Supreme Court. *Id.* at 147. Meanwhile, the Commission issued a "right-to-sue" letter authorizing Romero to file suit in district court within ninety (90) days, but he failed to exercise the right. *Id.* at 148. Based on the issuance of the letter, the HRC argued that the appeal should be dismissed as moot. *Id.* The Supreme Court rejected the argument because the constitutional question "was capable of recurring yet typically evading review." *Id.* at 146. The Court did not elaborate.

In *Butte-Silver Bow* a district court judge issued an ex parte order fixing salaries of court personnel. *Id.* at 79. The county governing body appealed. *Id.* at 78. In the meantime the county adopted a budget which included funding of salaries at the level fixed by the judge. *Id.* at 79. The Supreme Court rejected the contention that such action rendered the appeal moot, again relying on the "capable of repetition, yet evading review" doctrine. *Id.* at 82. In its discussion of the doctrine, the Court quoted from *Lee v. Schmidt-Wenzel,* 766 F.2d 1387, 1390 (9th Cir. 1985), as follows:

> ". . . The exception to mootness for those actions that are capable of repetition, yet evading review, usually is applied to

> situations involving governmental action where it is feared that the challenged action will be repeated. The defending party being constant, the emphasis is on the continuity of identity of the complaining party."

Butte-Silver Bow at 82 (quotes in original). The Court concluded that the doctrine was applicable because the district judge "could in the absence of our decision, make a budget order for 1987 and the years beyond." *Id.* Thus, the continued threat of future action was important to the decision.

In *Common Cause* the Supreme Court repeated its statement that the doctrine is typically applied "to situations involving governmental action where it is feared that the challenged action will be repeated." *Id.* at 328. In that case an advisory committee authorized to present the Governor with a list of recommendations for the position of Commissioner of Political Practices met in violation of the open meeting law. *Id.* at 325. By the time the appeal was considered by the Supreme Court, the Governor had made his appointment and the appointment had been confirmed by the Senate, thereby entitling the new Commissioner to his office. *Id.* at 327. The Supreme Court rejected the committee's argument that the open meeting issue was moot:

> Here, the alleged violation of the open meeting statutes and the public's right to know is capable of recurring, in the context of both future selection and appointment procedures for the position of Commissioner and actions taken by other purely advisory entities. Further, to allow an alleged violation of the public's right to know escape judicial scrutiny, simply because legal proceedings are not always swift, would soon vitiate that important right guaranteed to the people of Montana by their constitution. Thus, we conclude that the issues raised by this appeal are not moot.

Id. at 328.

The common thread in these Montana cases is the possibility that if the court does not address the legality of conduct which gave rise to the action, then the issue may never be resolved or resolution may be unduly delayed. On that basis, the validity of the prior approval requirement is not moot since in any future case the State Fund could simply repeat what it has done in this case and again evade review.

Other courts have considered whether the voluntary discontinuance of the conduct or action which gave rise to a lawsuit renders the suit moot. A discussion of those cases is found in 13A, Wright, Miller and Cooper, *Federal Practice and Procedure,* §§ 3533.5 and

3533.7. Section 3533.5 concerns a discontinuance by a private defendant, and section 3533.7 concerns a discontinuance by a public official or body. In both situations it appears to be the rule that any discontinuance must be complete and permanent. In this case, the discontinuance appears to be only temporary and for purposes of this particular case.

Finally, Heisler has cited *Reeve Aleutian Airways, Inc. v. U.S.*, 889 F.2d 1139 (D.C. Cir. 1989), as precedent for rejecting the Fund's mootness argument. The Commercial Airlift Review Board [CARB], which is an agency within the Department of Defense [DOD], suspended an airline from carrying military personnel. *Id.* at 1140. While the airline was pursuing an appeal of its suspension, CARB reinstated the airline and argued that the appeal was moot. *Id.* at 1141. The United States Court of Appeals for the D.C. Circuit rejected the agency's argument, adopting the airline's characterization of the argument:

> "[i]f reinstatement could moot a challenge to the CARB's procedures in suspending a carrier, then DOD could forever avoid judicial review of its actions by promptly reinstating any aggrieved carrier which filed a lawsuit and any carrier wishing judicial review of a suspension would be compelled to forego any attempt at reinstatement."

889 F.2d at 1142 (quotes in original).

The situation in this case is similar. The State Fund could continue to avoid any resolution of challenges to its authority to require prior approval to any change of physicians by simply agreeing to pay medical bills of unapproved physicians whenever a claimant petitions the Court. Therefore, I conclude that the validity of the prior approval requirement is not a moot issue and should be decided in this case.

II

As previously noted, the requirement that an injured worker obtain the prior authorization of the insurer before changing treating physicians is imposed by administrative regulation (ARM 24.29.1511) rather than by statute. Heisler relies on section 33-22-111, MCA (1991), in arguing that the regulation is invalid and unenforceable. At the time of his injury, section 33-22-111, MCA, provided:

> **Policies to provide for freedom of choice of practitioners - professional practice not enlarged.** (1) All policies of disability insurance, including individual, group, and blanket policies, and all policies insuring the payment of compensation under the Workers' Compensation Act shall provide the insured

> shall have full freedom of choice in the selection of any duly licensed physician, physician assistant-certified, dentist, osteopath, chiropractor, optometrist, podiatrist, psychologist, licensed social worker, licensed professional counselor, acupuncturist, or nurse specialist as specifically listed in 37-8-202 for treatment of any illness or injury within the scope and limitations of his practice.

In an Order on Motion for Declaratory Judgment issued January 26, 1993, in *Wieland v. State Compensation Mutual Insurance Fund,* WCC No. 9208-6554, this Court held that a regulation requiring prior approval of a change in treating physicians conflicts with this section and is invalid. Responding to that decision, the 1993 legislature amended section 33-22-111, MCA, by deleting the reference to "all policies insuring the payment of compensation under the Workers' Compensation Act." 1993 Montana Laws, ch. 628, § 1. The legislature expressly made its amendment retroactive, providing:

> Because of the decision in *Wieland v. St. Compensation Mutual Insurance Fund,* WCC No. 9208-6554, there is a conflict between the interpretation of 33-22-111 and Rule 24.29.1403, Administrative Rules of Montana, implementing 39-71-704, upheld in *Garland v. Anaconda Co.,* 177 Mont. 240 (1978), upon which workers' compensation medical benefits were premised, the legislature, in order to resolve the conflict through the curative legislation in [section 1][33-22-111], intends that [section 1][33-22-111] apply retroactively, within the meaning of 1-2-109, to all causes of action arising before [the effective date of this act].

1993 Montana Laws, ch. 628, § 17. The amendment was effective July 1, 1993, three days after Heisler's injury.

Heisler challenges any retroactive application of the amendment, arguing that such application violates the "ex post facto provisions of the Montana and United States Constitutions." (Memorandum of Authorities in Support of Petitioner's Motion for Summary Judgment at 9.) This argument is meritless: The "[r]ule against ex post facto laws applies only to penal or criminal matters," *O'Shaughnessey v. Wolfe,* 212 Mont. 12, 13, 685 P.2d 361 (1984), and provisions governing choice of a physician can hardly be construed as penal in nature.

It is apparent that Heisler intended to challenge the retroactive application as violative of the Contract Clauses since he cites three contract clause cases — *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 730 P.2d 380 (1986); *Trusty v.*

Consolidated Freightways, 210 Mont. 148, 681 P.2d 1085 (1984); and *Carmichael v. Workers' Compensation Court,* 234 Mont. 410, 763 P.2d 1122 (1988). However, the Court need not address any Contract Clause challenge since *Wieland* was wrongly decided and the regulation was permissible under the law in effect at the time of Heisler's injury.

The *Wieland* decision overlooked section 33-1-102(5), MCA (1991), which provided, "This code does not apply to workers' compensation insurance programs provided for in Title 39, chapter 71, parts 21 and 23, and related sections." The "code" to which the subsection refers is the "Montana Insurance Code", § 33-1-101, MCA, of which section 33-22-111, MCA, is a part. The probable effect of the exemption was recognized by this Court in *Wieland* on February 5, 1993, when it entered a Stay of Order on Motion for Declaratory Judgment after the State Fund filed a motion for reconsideration citing section 33-1-101, MCA. However, the case was apparently settled and no further action was taken in *Wieland,* leaving it to the present Court to finally resolve the issue.

Section 33-1-102(5), MCA (1991), is plain on its face, requires no interpretation, and, therefore, must be applied as written. *Lovell v. State Compensation Insurance Fund,* 260 Mont. 279, 285, 860 P.2d 95 (1993). On its face, it exempts employers that self-insure pursuant to Title 39, chapter 71, part 21 (Plan 1), and the State Fund, which is governed by Title 39, chapter 71, part 23 (Plan 3), from the Montana Insurance Code. Since section 33-22-111, MCA, is a part of the Insurance Code, self-insurers and the State Fund are exempt from its application.

The fact that section 33-22-111, MCA (1991), specifically referred to "all policies insuring the payment of compensation under the Workers' Compensation Act" does not create a conflict between that section and section 33-1-102(5), MCA (1991). Section 33-1-102(5) does not exempt insurance companies writing workers' compensation insurance pursuant to Title 39, chapter 71, part 22, i.e., the so-called Plan 2, or private insurers. Thus, the reference to policies issued under the Workers' Compensation Act has meaning and refers to Plan 2 insurers which have traditionally been subject to the Insurance Code.

Since ARM 24.29.1511 does not conflict with section 33-22-111, MCA (1991), and the Supreme Court has already held that the Division of Workers' Compensation may adopt a regulation requiring prior approval for a change of treating physicians, I must conclude that the regulation in question in this case is valid unless it is unconstitutional.

III

Heisler further attacks the regulation as violating his right to privacy. He cites numerous Supreme Court decisions as "protect[ing] the individual from unwarranted governmental interference into certain personal decisions." (Memorandum of Authorities in Support of Petitioner's Motion for Summary Judgment at 12.) Arguing that "[n]either the

government nor insurers have any right whatsoever to interfere with a person's choice of properly licensed medical care," (*Id.* at 14), he cites the following cases:

> *Griswold v. Connecticut,* 381 U.S. 479 (1965) (the decision whether to practice contraception is protected by the right to privacy) (*Id.* at page 485); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) (the right to educate children in public, private, or parochial schools is protected under the right to privacy); *Meyer v. Nebraska,* 262 U.S. 390 (1923) (the decision whether to learn a foreign language is protected under the right to privacy); *Roe v. Wade,* 410 U.S. 113 (1973) (the right to privacy protects a woman's decision to abort a fetus) (*Id.* at page 153); *Loving v. Virginia,* 388 U.S. 1 (1967) (freedom to marry is a personal decision afforded protection from unreasonable state regulation); *Prince v. Massachusetts,* 321 U.S. 158 (1944) (recognizing the realm of family life is protected from state action); *Skinner v. Oklahoma,* 316 U.S. 535 (1942) (protecting the individual from involuntary sterilization).

(Memorandum of Authorities in Support of Petitioner's Motion for Summary Judgment at 12-13.) He also relies on *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990), which held that a competent individual has a right to refuse medical treatment, and *Washington v. Harper,* 494 U.S. 210, 110 S.Ct. 1028, 1036, 108 L.Ed.2d 178 (1990), which held that under the Due Process Clause a prisoner has a significant liberty interest in avoiding unwanted anti-psychotic drugs.

The landmark cases cited by Heisler are inapposite. They involved flat prohibitions on specific activities, e.g., abortion, birth control, interracial marriage, teaching of a foreign language, attendance at private schools; some action compelled by government, e.g., involuntary sterilization, involuntary administration of psychotropic drugs; or abstract statements concerning the right to refuse medical care (*Cruzan*) and to raise children (*Prince*). The regulation in this case does **not** prohibit Heisler from choosing his own treating physician or from changing to another physician, nor does it force him into treatment with a physician chosen by the insurer. Heisler can, and indeed has, chosen his own physician. What the regulation does do is warn Heisler that unless the insurer approves his changing physicians it is not responsible for **paying** for the new physicians.

Heisler bears the heavy burden of persuading the Court beyond a reasonable doubt that the challenged regulation is unconstitutional. *City of Helena v. Krautter,* 258 Mont. 361, 364, 852 P.2d 636 (1993). There is a huge difference between prohibiting an activity and simply refusing to pay for it. None of the cases cited by claimant support his theory

that he has a fundamental right not just to change physicians but to compel an insurer to pay the bills of whomever he chooses.

ORDER

The motion for summary judgment is **denied**. This matter shall be placed on the next trial calendar to determine whether Heisler is entitled to attorney fees or a penalty.

Dated in Helena, Montana, this 1st day of June, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Lawrence A. Anderson
Mr. Norman C. Peterson
Mr. Joseph P. Mazurek (Courtesy Copy)