IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 42

WCC No. 2006-1699

JOHN PORTER

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner injured his back in an industrial accident for which Respondent accepted liability. Petitioner sought chiropractic treatment and subsequently alleged that the treatment aggravated a preexisting cervical condition. Petitioner ceased to treat with the chiropractor and began to treat with a physician who had previously treated his cervical condition without Respondent's approval to change treating physicians. Months after he last treated Petitioner, the chiropractor declared him to be at MMI and released him to his time-of-injury job without restriction. The chiropractor withdrew that opinion when he learned Petitioner had treated with other doctors. Prior to filing this lawsuit, Petitioner's counsel requested a complete copy of Respondent's claims file and Respondent provided only certain material until compelled to remit the remainder pursuant to subpoena. Petitioner moved this Court to adopt guidelines to compel insurers to turn over claims files upon request. Petitioner further alleged that Respondent's adjusting of his claim was unreasonable.

Held: Petitioner failed to prove that the chiropractic treatment aggravated his preexisting cervical condition. Except for the chiropractor's withdrawn opinion, no doctor has found Petitioner to be at MMI and he is therefore entitled to TTD benefits retroactive to the date of termination. Respondent's refusal to reinstate TTD benefits in light of the lack of a doctor's opinion that Petitioner was at MMI or released to return to work is unreasonable and Petitioner is therefore entitled to a penalty. Respondent's adjustment of this claim, taken as a whole, was likewise unreasonable and Petitioner is entitled to his attorney fees. This Court has no jurisdiction to set forth the claims file guidelines Petitioner desires because it does not have jurisdiction over a claim until a petition has been filed.

Topics:

Maximum Medical Improvement: When Reached. Where a claimant's treating physician opined that the claimant had reached maximum medical improvement (MMI) when he had not treated the claimant in 14 months, and where the claimant had treated with other doctors in the interim, and where the treating physician then withdrew his opinion upon learning that the claimant had treated with other doctors since his last appointment with the treating physician, the Court does not find the claimant to be at MMI.

Benefits: Termination of Benefits. Although Respondent's claims adjuster testified that he informed Petitioner by letter that his benefits were being terminated, no copy of the letter was found in Petitioner's claim file. The claims adjuster conceded that no journal entry or any documentation in the claim file supported his assertion that Petitioner had been informed that his benefits were being terminated. Petitioner testified that he was never informed that his benefits were being terminated. The Court finds that Petitioner was not informed that his benefits were being terminated, nor was Petitioner provided a rationale for their termination.

Injury and Accident: Aggravation: Generally. Where both Petitioner and his treating chiropractor testified that the chiropractor never adjusted Petitioner's neck, and where a neurosurgeon examined Petitioner and opined that his cervical problems were due to progressive degeneration and unrelated to Petitioner's chiropractic treatment, Petitioner has failed to prove that his cervical condition was aggravated by his chiropractic treatment.

Benefits: Temporary Total Disability Benefits. Where Petitioner's treating physician withdrew his opinion that Petitioner had reached maximum medical improvement (MMI) and no other doctors have opined that Petitioner has reached MMI, Petitioner is entitled to reinstatement of his TTD benefits.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2907. Where the claims adjuster admitted during his deposition that he was aware that Petitioner's treating physician had withdrawn his finding that Petitioner was at MMI, and further admitted that the withdrawal meant that Respondent would have to reinstate benefits, Respondent nonetheless took no action and did not reinstate Petitioner's TTD benefits. The Court concluded this was an unreasonable refusal to pay benefits and that Petitioner was therefore entitled to a 20% increase of the full amount of benefits due, pursuant to § 39-71-2907, MCA.

Penalties: Insurers. Where the claims adjuster admitted during his deposition that he was aware that Petitioner's treating physician had withdrawn his finding that Petitioner was at MMI, and further admitted that the withdrawal meant that Respondent would have to reinstate benefits, Respondent nonetheless took no action and did not reinstate Petitioner's TTD benefits. The Court concluded this was an unreasonable refusal to pay benefits and that Petitioner was therefore entitled to a 20% increase of the full amount of benefits due, pursuant to § 39-71-2907, MCA.

Discovery: Claims File. Without a filed petition, this Court has no jurisdiction over any alleged claim, and the Court cannot order an insurer to provide a copy of its claims file to a claimant. However, if a claimant is forced to file a petition in this Court simply to receive a copy of his claims file, this fact would be taken into consideration in determining whether a claim was adjusted reasonably.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. Respondent terminated Petitioner's benefits without notice and while relying on the opinion of a treating physician whom Respondent knew had not treated Petitioner in over a year. Respondent's claims adjuster further knew that Petitioner had sought authorization to change treating physicians and a previous claims adjuster on the case had indicated that she intended to grant the change. Respondent's claims adjuster refused to authorize treatment with a specialist to whom Petitioner's treating physician refused to refer him for the reason that the treating physician did not want to provide a referral. Respondent's claims adjuster received medical bills for Petitioner which he did not pay without informing Petitioner that the bills were not being paid or why. The claims adjuster further undertook no investigation in spite of knowing that Petitioner was dissatisfied with his treating physician, that his treating physician refused to provide him a referral to a specialist, and that a previous claims adjuster had already determined that a change in treating physicians was warranted. The insurer's actions were unreasonable and Petitioner is entitled to his attorney fees.

Attorney Fees: Reasonableness of Insurers. Respondent terminated Petitioner's benefits without notice and while relying on the opinion of a treating physician whom Respondent knew had not treated Petitioner in over a year. Respondent's claims adjuster further knew that Petitioner had sought authorization to change treating physicians and a previous claims adjuster on the case had indicated that she intended to grant the change. Respondent's claims adjuster refused to authorize treatment with a specialist

to whom Petitioner's treating physician refused to refer him for the reason that the treating physician did not want to provide a referral. Respondent's claims adjuster received medical bills for Petitioner which he did not pay without informing Petitioner that the bills were not being paid or why. The claims adjuster further undertook no investigation in spite of knowing that Petitioner was dissatisfied with his treating physician, that his treating physician refused to provide him a referral to a specialist, and that a previous claims adjuster had already determined that a change in treating physicians was warranted. The insurer's actions were unreasonable and Petitioner is entitled to his attorney fees.

¶ 1 The trial in this matter was held on Tuesday, October 31, 2006, in Helena, Montana. Petitioner John Porter was present and represented by Steven S. Carey and David T. Lighthall. Respondent was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1 through 3 were admitted without objection. Exhibit 4 was objected to by Respondent on relevancy grounds, and the Court ruled that its admissibility would be addressed within these findings and conclusions. As discussed below, Exhibit 4 is not admitted. Exhibit 5 was introduced and admitted.

¶ 3 Witnesses and Depositions: The depositions of Don Butler, D.C., and Gary Holt were submitted to the Court and will be considered part of the record. The parties agreed that Petitioner's sworn statement can be considered part of the record and will be given the same weight as the filed depositions. A post-trial deposition of Chriss A. Mack, M.D., was taken on December 19, 2006, filed with the Court on January 3, 2007, and will be considered part of the record. Petitioner and Gary Holt were sworn and testified at trial. Don Butler, D.C., appeared via videoconferencing and was sworn and testified.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues:

¶ 4a Whether Petitioner's cervical condition was aggravated by his chiropractic treatment with Dr. Butler.

¶ 4b Whether Petitioner has achieved maximum medical improvement relative to his work-related injury.

¶ 4c Whether [P]etitioner is entitled to temporary total disability benefits, and if so, for what period of time is he entitled to those benefits.

¶ 4d Whether Petitioner's need for further medical treatment of his cervical condition is related to his chiropractic treatment with Dr. Butler.

¶ 4e Whether a penalty should be assessed against Respondent.

¶ 4f Whether the Court should determine an insurer's obligations regarding production of a claimant's file upon request by a claimant or a claimant's counsel.

¶ 4g Whether Petitioner is entitled to his costs and attorney's fees.[1]

FINDINGS OF FACT

¶ 5 Petitioner worked as a laborer for Missoula Concrete in Missoula, Montana. On November 12, 2004, Petitioner lifted an end block and injured his back while turning.[2]

¶ 6 Respondent was the insurer for Missoula Concrete on the day of the accident and accepted liability for the injury.[3]

¶ 7 Petitioner had a preexisting cervical condition which had been diagnosed and treated by neurosurgeon Chriss A. Mack, M.D.[4] Dr. Mack first saw Petitioner on March 9, 1998.[5] Petitioner's cervical condition ultimately required a fusion and decompression from C-3 to C-6 in 1998.[6] A few months after his surgery, Petitioner was involved in a motor vehicle accident. Subsequent x-rays revealed that some of the screws in his neck were fractured, but Dr. Mack concluded that the screws would likely remain stable. He planned to monitor Petitioner's neck condition.[7]

¶ 8 Dr. Mack saw Petitioner from time to time. Nine months after the motor vehicle accident, the plate in Petitioner's neck remained stable with no migration of the screws.[8] Petitioner did not see any doctor for his neck condition between February 1999 and March

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[1] Pretrial Order at 9.

[2] Pretrial Order at 2, Uncontested Facts, ¶ 1.

[3] Pretrial Order at 2, Uncontested Facts, ¶ 2.

[4] Mack Dep. 5:1-3.

[5] Mack Dep. 4:22-25.

[6] Mack Dep. 5:5-18.

[7] Mack Dep. 6:21 - 7:24.

[8] Mack Dep. 11:2-7.

2005.[9] After February 10, 1999, Dr. Mack did not see Petitioner again until March 15, 2005, although he had occasional phone contact with him through 2000.[10]

¶ 9 Subsequent to the November 12, 2004, industrial accident, Petitioner experienced a biting feeling in his back.[11] Petitioner underwent chiropractic treatment by Don Butler, D.C.[12] Dr. Butler is a Doctor of Chiropractic Medicine, licensed to practice in the State of Montana.[13] Dr. Butler saw Petitioner seventeen times from November 2004 through March 4, 2005.[14]

¶ 10 After the industrial accident, Petitioner first developed low-back problems, but he later experienced other symptoms.[15] He felt tingling in his arms, numbness in his buttocks and legs, and his lower back pain worsened.[16] Later, he developed headaches.[17] Dr. Butler diagnosed Petitioner with a lumbar disk herniation at the L5-S1 level, causing neuritis and radiculitis into the L4 and L5 dermatome and a subluxation in the middle back region secondary to scoliosis instability that was aggravated and reinjured by work.[18]

¶ 11 Petitioner informed Dr. Butler about his low neck pain and arm numbness. Dr. Butler told Petitioner he could not work on Petitioner's neck due to the cervical fusion.[19] Dr. Butler knew that Petitioner experienced some pain during his adjustments, but not to the extent

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[9] Trial Test.

[10] Mack Dep. 11:15 - 12:20.

[11] Sworn Statement of John Curtis Porter ("Petitioner Statement") 13:6-12.

[12] Pretrial Order at 2, Uncontested Facts, ¶ 3.

[13] Butler Dep. 5:18-22.

[14] Butler Dep. 8:10-14.

[15] Petitioner Statement 14:11-18.

[16] Petitioner Statement 14:25 - 15:24.

[17] Petitioner Statement 16:9-12.

[18] Butler Dep. 8:4-9.

[19] Butler Dep. 8:23 - 9:3.

which Petitioner later claimed.[20] Dr. Butler asserted that he never adjusted Petitioner's neck.[21] Petitioner also testified that Dr. Butler never adjusted his neck.[22]

¶ 12 In a February 7, 2005, letter to Respondent, Dr. Butler noted that Petitioner had been "treating for lumbar and thoracic disc irritation secondary to a work related injury." Dr. Butler stated that Petitioner "has gone through his initial phase of care and is stable enough to return to work now."[23] Dr. Butler testified that he released Petitioner to work without restriction because Petitioner's job required heavy lifting, and that if he gave Petitioner a lifting restriction, Petitioner would have been unable to return to work.[24]

¶ 13 Respondent's senior claims consultant Gary Holt (Holt) relied on Dr. Butler's letter to terminate Petitioner's benefits,[25] though no temporary total disability (TTD) benefits had been paid at this point.[26] Petitioner testified that Dr. Butler did not tell him he was being released to return to work in February 2005.[27] Petitioner was not copied on the February 7, 2005, release letter.[28]

¶ 14 Petitioner asked Dr. Butler for a referral to Dr. Mack, but none was forthcoming.[29] Dr. Butler explained that although Petitioner asked for a referral, Dr. Butler wanted Petitioner to call Dr. Mack's office himself.[30] However, Dr. Butler's staff later informed him that Petitioner needed a referral and on March 15, 2005, Dr. Butler wrote a referral letter.[31]

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[20] Butler Dep. 9:13-22.

[21] Butler Dep. 10:25 - 11:4; 51:10.

[22] Petitioner Statement 26:16-17.

[23] Pretrial Order at 2, Uncontested Facts, ¶ 4.

[24] Butler Dep. 36:17 - 37:8.

[25] Pretrial Order at 2, Uncontested Facts, ¶ 5.

[26] Holt Dep. 13:5-9.

[27] Trial Test.

[28] Butler Dep. 37:24 - 33:2.

[29] Petitioner Statement 23:19-23.

[30] Trial Test.

[31] Butler Dep. 43:13 - 44:5.

Petitioner was not sent a copy of the letter and he was unaware that he had been referred.[32]

¶ 15 Dr. Butler treated Petitioner through March 4, 2005.[33] Dr. Butler testified that Petitioner's condition at the time of his last appointment was such that he was not capable of returning to work on that date.[34] However, it does not appear that Petitioner's February 7, 2005, work release was rescinded. At that appointment, Dr. Butler gave Petitioner a treatment plan for weekly adjustments for six weeks, at which point Dr. Butler intended to perform an examination to determine if Petitioner was at maximum medical improvement (MMI).[35] Petitioner never returned. When a patient ceased to treat unexpectedly, Dr. Butler's practice was to have his staff call a patient once or twice to see if they planned to return, and if the patient did not return, Dr. Butler assumed the patient was doing well.[36] Dr. Butler believes his staff left messages for Petitioner which were not returned.[37]

¶ 16 During Petitioner's last appointment on March 4, 2005, Petitioner believes Dr. Butler did twice as many adjustments as he normally performed, and Petitioner went numb during the adjustment.[38] Petitioner stated that while he was on the table, he called Dr. Butler a "f. . . idiot," and later, as he was leaving the clinic, he referred to Dr. Butler as a "f. . . quack".[39] Petitioner informed one of Dr. Butler's employees that he would not return for another appointment.[40] Dr. Butler testified that Petitioner never made these statements to him. His staff never reported that Petitioner left disgruntled, and Dr. Butler testified he would have called a patient if he were aware that the patient left upset with his treatment.[41]

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[32] Trial Test.

[33] Pretrial Order at 2, Uncontested Facts, ¶ 6.

[34] Trial Test.

[35] Butler Dep. 24:14-18.

[36] Butler Dep. 24:19-24.

[37] Butler Dep. 27:5-10.

[38] Petitioner Statement 23:23 - 24:8.

[39] Petitioner Statement 24:11-23 (expletives deleted).

[40] Petitioner Statement 25:10-12.

[41] Butler Dep. 13:11-18.

¶ 17 Petitioner had not received any TTD benefits as of February 2005.[42] Sometime after March 4, 2005, Respondent sent Petitioner a single check for the amount of TTD benefits which Respondent calculated were owed at that point.[43] Petitioner never received any additional TTD benefit payments, nor did Respondent advise him that his TTD benefits had been terminated.[44]

¶ 18 Petitioner testified that he phoned Holt a few times prior to March 2005 asking to be allowed to see another doctor, and Holt informed him that he would need to get a referral from Dr. Butler.[45] Holt confirmed that he had spoken with Petitioner via telephone and Petitioner had informed him Dr. Butler's treatments were not helping him and he wished to see another doctor.[46]

¶ 19 Prior to Holt's involvement with Petitioner's file, Petitioner's claim had been adjusted by Anna Waller (Waller). On February 22, 2005, Waller noted in the file that Petitioner wanted to see another physician as he was having increasing problems with his upper back and shoulder. She listed as a "Goal" that Respondent would "authorize change in treating MD."[47] However, Petitioner's claim was transferred to Holt soon afterward, and Holt never authorized a change in treating physicians.[48]

¶ 20 At the time Holt took over Petitioner's claim from Waller, he was aware that Waller intended to authorize a change in treating physicians, but Holt decided not to do so.[49] Holt never investigated why Petitioner wanted to change treating physicians, and he never investigated why Waller intended to authorize the change. He simply decided he was not going to authorize a change in treating physicians and took no further action on the issue.[50]

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[42] Holt Dep. 13:5-9.

[43] Holt Dep. 33:20 - 34:8.

[44] Trial Test.

[45] *Id*.

[46] Holt Dep. 31:5-12.

[47] Ex. 1 at 15.

[48] Holt Dep. 36:8-24.

[49] Trial Test.

[50] *Id*.

¶ 21 Since Dr. Butler was unwilling to refer him to Dr. Mack and Respondent would neither authorize an appointment with Dr. Mack without a referral nor authorize Petitioner to change treating physicians,[51] Petitioner saw Mark Coward, M.D., on March 8, 2005, on his own initiative. Dr. Coward requested a referral to Dr. Mack, which was authorized by Respondent.[52]

¶ 22 Petitioner had an appointment with Dr. Mack set for March 15, 2005, as a result of Dr. Coward's referral. Coincidentally, on March 15, 2005, Dr. Butler wrote a letter referring Petitioner to Dr. Mack regarding Petitioner's severe neck pain radiating into his arms, dizziness, and blacking out. Dr. Butler expressed concern over the state of Petitioner's cervical fusion.[53] Dr. Butler testified that in light of Petitioner's symptoms regarding his cervical area, he felt he needed to see Dr. Mack in a "very severe way."[54] Dr. Butler explained that although Petitioner complained of these symptoms, he did not note Petitioner's cervical pain and dizziness in his treatment notes because he did not believe these were related to Petitioner's industrial injury.[55]

¶ 23 On March 15, 2005, Petitioner reported to Dr. Mack that he experienced neck and head pain while getting chiropractic treatment for his lower back. Dr. Mack examined Petitioner and suspected that Petitioner had progressive cervical spondylosis from his previous neck injury.[56] From x-rays, Dr. Mack determined that the inferior aspect of the plate and screw which was installed in Petitioner's neck during his 1998 surgery had migrated into the C6-7 disk space. Dr. Mack suspected this migration had been present for a prolonged period of time and it would account for Petitioner's new symptoms.[57] Dr. Mack ordered spine films, a Medrol Dosepak, and a follow-up MRI if the condition did not resolve.[58] Holt testified that Dr. Mack's report did not address any return-to-work issues and Holt therefore did not question Petitioner's ability to work at that time.[59]

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[51] *Id*.

[52] Pretrial Order at 2, Uncontested Facts, ¶ 7. (Note: the date set forth in the Pretrial Order is incorrectly set forth as March 8, 2004.)

[53] Ex. 3 at 14.

[54] Trial Test.

[55] Butler Dep. 42:1-17.

[56] Ex. 3 at 52.

[57] *Id*. at 50.

[58] Ex. 3 at 50; Pretrial Order at 2, Uncontested Facts, ¶ 8.

[59] Holt Dep. 18:7-15.

¶ 24 On May 25, 2005, Holt sent a letter to Dr. Butler asking him whether Petitioner was at MMI, whether he was capable of returning to his time-of-injury employment, and whether he had any permanent restrictions or permanent impairment.[60] Holt knew that Petitioner had not seen Dr. Butler since March 4, 2005, and had treated with other doctors in the interim. However, since Respondent never authorized Petitioner to change treating physicians, Holt believed his inquiry was properly addressed to Dr. Butler as the treating physician. Holt asserted that even though Dr. Butler had not seen Petitioner in months and Petitioner had subsequently been examined and treated by other doctors, he still considered Dr. Butler to be Petitioner's treating physician.[61]

¶ 25 On July 12, 2005, Dr. Butler replied to Holt's letter and opined that Petitioner was at MMI with no impairment or restrictions and was capable of returning to his time-of-injury job. Respondent then denied any further liability.[62] At the time Dr. Butler signed the letter, he had not seen Petitioner since March 4, 2005. He believed Petitioner was "feeling fine." He was not aware that Petitioner had seen Dr. Coward and Dr. Mack subsequent to his final appointment with Dr. Butler. Dr. Butler also did not know that a subsequent MRI revealed a disk protrusion displacing the left L3 nerve root.[63] Dr. Butler testified that if he had been aware that Petitioner had received follow-up treatment with other doctors, he would have deferred to their opinions in his July 12, 2005, letter.[64]

¶ 26 Respondent terminated Petitioner's TTD benefits based on Dr. Butler's July 12, 2005, opinion letter. Holt never informed Petitioner that his benefits were being terminated, nor did Holt notify Petitioner as to the rationale behind the termination.[65]

¶ 27 Clearly, Petitioner was not at MMI on July 12, 2005, when Dr. Butler replied to Respondent's letter. Dr. Butler had not seen Petitioner for months and had no evidence that Petitioner was at MMI with no impairment or restrictions. He guessed that Petitioner was at MMI because Petitioner had ceased to treat with him. Upon learning that Petitioner was treating with other doctors at the time Dr. Butler purportedly placed him at MMI and released him without impairment or restrictions, Dr. Butler withdrew his opinion, testifying

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[60] Ex. 1 at 16.

[61] Trial Test.

[62] Pretrial Order at 2, Uncontested Facts, ¶ 10.

[63] Butler Dep. 48:9-24.

[64] Butler Dep. 49:6-13.

[65] Trial Test. (Holt).

that he would have deferred to the opinions of the doctors who had more recently treated Petitioner if he had been aware that Petitioner was treating elsewhere.[66]

¶ 28 Holt explained that when Dr. Butler released Petitioner to work, Dr. Butler had not received a job analysis but Holt assumed Dr. Butler was releasing Petitioner to do concrete work.[67] Holt agreed that in determining whether a claimant can return to work, a treating physician must take into consideration all of the conditions that a claimant has and not just the work-related condition, or in other words, that one takes the claimant as one finds him.[68]

¶ 29 Holt believes Petitioner was informed by letter that his benefits were being terminated but Holt could not find a copy of the letter in Petitioner's file.[69] No journal entry was made indicating that Petitioner was informed his benefits were being terminated.[70] Holt admitted that no documentation exists which indicates that Respondent informed Petitioner that his benefits were being terminated or the rationale for termination.[71] Based on Respondent's lack of documentation and Petitioner's assertion that he was never notified, I find that Petitioner was not informed that his benefits were being terminated nor was he provided with a rationale for the termination.

¶ 30 During Holt's deposition, Petitioner's counsel read him an excerpt from Dr. Butler's deposition as follows:

> Q. . . . "And based on the understanding which you just obtained, that there indeed was a workup done by other physicians, would you withdraw these conclusions until you had an opportunity to review those records and/or simply defer to the other physicians?
>
> And his answer was, "Yes. I would defer to the other physicians."[72]

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[66] Butler Dep. 48:11 - 49:20.

[67] Holt Dep. 17:13-22.

[68] Trial Test. *See Weisgerber v. American Home Assurance Co.,* 2005 MTWCC 8.

[69] Holt Dep. 34:17-25.

[70] Holt Dep. 35:4-9.

[71] Holt Dep. 35:17-24.

[72] Holt Dep. 40:7-14, *citing* Butler Dep. 49:14-20.

Holt then agreed that Dr. Butler had withdrawn his opinions from the letter he sent to Holt on July 12, 2005.[73] Holt further agreed that in light of Dr. Butler's opinion having been withdrawn, Respondent did not have an opinion from a physician that Petitioner is at MMI nor did Respondent have a physician's release for Petitioner to work in any capacity, and therefore Respondent should pay Petitioner his TTD benefits retroactive to the date of termination.[74] Holt admitted that he was aware that Dr. Butler had withdrawn his opinion that Petitioner was at MMI, but he stated that he did not believe Dr. Butler had withdrawn his opinion that Petitioner could return to work.[75] Holt admitted that if Dr. Butler had withdrawn that opinion as well, Petitioner would be entitled to reinstatement of his TTD benefits.[76]

¶ 31 Holt testified that Respondent received a bill for x-rays which he does not recall authorizing and therefore Respondent did not pay the bill. However, he did not explain to Petitioner that Respondent was denying payment or the rationale for doing so.[77] Holt further testified that he does not recall Petitioner ever calling him to ask why the bill had not been paid.[78]

¶ 32 Holt further testified that Petitioner was terminated from his time-of-injury employment, and that this would provide independent grounds for termination of TTD benefits under § 39-71-701(4), MCA.[79] He admitted that this was not the rationale that was used, but asserted that it "could have been."[80] Holt further admitted that he never investigated whether Petitioner was terminated and that it is "probably true" that if, as Petitioner testified in his deposition, he called his employer and explained that he was unable to perform his job because of his injury and his employer then replaced him, this would not be a basis for termination of TTD benefits.[81]

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[73] Holt Dep. 40:16-20.

[74] Holt Dep. 40:21 - 41:20.

[75] Holt Dep. 39:3-10.

[76] Holt Dep. 39:13-18.

[77] Holt Dep. 78:9 - 79:25.

[78] Holt Dep. 85:5-9.

[79] Holt Dep. 86:2-17.

[80] Holt Dep. 99:1-13.

[81] Holt Dep. 101:16 - 102:1.

¶ 33 In April 2006, Petitioner went to R.D. Marks, M.D. Dr. Marks sought Respondent's authorization for further MRIs and a referral to Dr. Mack.[82] Holt testified that when he received Dr. Marks' treatment notes of April 6, 2006, he became aware that Petitioner needed follow-up treatment for his low back.[83] However, Holt did not take any action to reinstate Petitioner's benefits, and he denied payment for Dr. Marks' services because they were not preauthorized.[84] Holt did not authorize further treatment with Dr. Marks because he still considered Dr. Butler to be Petitioner's treating physician, even though he was aware that Petitioner had not treated with Dr. Butler in fourteen months and that Petitioner had requested authorization to change treating physicians.[85]

¶ 34 In September 2006, Respondent authorized a follow-up examination with Dr. Mack.[86] Petitioner returned to Dr. Mack on September 22, 2006. Dr. Mack suspected that Petitioner was suffering from early spinal myelopathy from progressive spondylitic stenosis at C6-7 and recommended a cervical MRI.[87] On September 23, 2006, cervical x-rays were taken which were compared to the x-rays of Petitioner's cervical region which had been taken subsequent to his motor vehicle accident. Dr. Mack determined that the plate and screws did not look different than they had in 1998, but noted that Petitioner had reported increased neck pain since his recent chiropractic manipulations.[88] Dr. Mack recorded this information based on what Petitioner related to him and Dr. Mack agreed that he has no reason to doubt Petitioner's account that a chiropractic manipulation of his neck "lit up" his cervical symptoms.[89]

¶ 35 In a letter to Petitioner's counsel on October 23, 2006, Dr. Mack opined that Petitioner's cervical symptoms were not related to his chiropractic treatment and that the chiropractic treatment did not aggravate his cervical condition.[90] In his treatment notes on October 30, 2006, Dr. Mack reiterated that he does not believe Petitioner's symptoms stem

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[82] Pretrial Order at 2, Uncontested Facts, ¶ 11.

[83] Trial Test.

[84] *Id*.

[85] *Id*.

[86] Pretrial Order at 3, Uncontested Facts, ¶ 12.

[87] Ex. 3 at 65.

[88] Ex. 3 at 66.

[89] Mack Dep. 39:19 - 40:2.

[90] Ex. 3 at 69a.

from his chiropractic treatment, but rather, "It was likely simply a matter of time as progressive degenerative changes at that [C]6-7 level led to progressive expansion of uncinate spurring, progressive reduction in neural foramen and a high probability of eventual symptoms without any kind of malpractice event by Dr. Butler."[91] Dr. Mack informed Petitioner that he believed these to be progressive, degenerative changes and unrelated to his chiropractic treatment.[92]

¶ 36 Respondent has denied liability for Petitioner's neck condition.[93]

CONCLUSIONS OF LAW

¶ 37 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's injury.[94]

¶ 38 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[95]

Exhibit 4

¶ 39 As a preliminary matter, at trial, I reserved ruling on the admissibility of Exhibit 4, which was objected to by Respondent on relevancy grounds. Exhibit 4 consists of correspondence between Petitioner's counsel and representatives of Respondent regarding Petitioner's attempts to obtain a complete copy of his claims file prior to the filing of the Petition for Emergency Trial in this case. Since, as will be further explained below, I have determined that this Court does not have jurisdiction to order insurers to release claims files prior to a petition being filed in this Court, this issue is resolved on jurisdictional grounds without the particulars of Petitioner's case being reached. Therefore, Petitioner's pre-petition correspondence regarding the release of his claims file is not relevant and Exhibit 4 is not admitted.

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[91] Ex. 3 at 69b.

[92] Ex. 3 at 69b; Mack Dep. 21:18-22.

[93] Pretrial Order at 2, Uncontested Facts, ¶ 9.

[94] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[95] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

Issue I: Whether Petitioner's cervical condition was aggravated by his chiropractic treatment with Dr. Butler.

¶ 40 Dr. Butler and Petitioner both testified that Dr. Butler made no adjustments to Petitioner's neck. Dr. Mack testified that the reason why he reported this in his treatment notes of September 23, 2006, was because Petitioner reported to him at that time that Dr. Butler had adjusted his neck, and Dr. Mack had no reason to doubt Petitioner's account. However, Dr. Mack opined that Petitioner's cervical problems were due to progressive degeneration. Dr. Mack further opined that Petitioner's cervical symptoms were not related to his chiropractic treatment and that the chiropractic treatment did not aggravate his cervical condition. Petitioner submitted no medical evidence to support the allegation that his cervical condition was aggravated by his chiropractic treatment with Dr. Butler. Accordingly, Petitioner has not met his burden of proof with respect to this issue.

Issue II: Whether Petitioner has achieved maximum medical improvement relative to his work-related injury.

¶ 41 Petitioner was not at MMI on July 12, 2005, when Dr. Butler wrote to Respondent and opined that Petitioner was at MMI with no impairment or restrictions and was capable of returning to his time-of-injury job. Dr. Butler had not seen Petitioner for months and did not rely on any evidence in making this determination. Rather, Dr. Butler merely hazarded a guess based on the fact that Petitioner had ceased to treat with him. Upon learning that Petitioner was treating with other doctors at the time Dr. Butler purportedly placed him at MMI and released him without impairment or restrictions, Dr. Butler withdrew his opinion, testifying that he would have deferred to the opinions of the doctors who had more recently treated Petitioner if he had been aware that Petitioner was treating elsewhere. Respondent has not drawn this Court's attention to the opinion of any doctor who believes Petitioner to be at MMI. I therefore conclude Petitioner is not at MMI.

Issue III: Whether Petitioner is entitled to temporary total disability benefits, and if so, for what period of time he is entitled to those benefits.

¶ 42 A worker is eligible for TTD benefits when he suffers a total loss of wages as a result of an injury until he reaches MMI or is released to return to his time-of-injury employment or an employment with similar physical restrictions.[96] Petitioner argues that he is entitled to reinstatement of his TTD benefits because Dr. Butler withdrew the opinion he expressed in his July 12, 2005, letter when he learned that Petitioner had treated with other doctors

[96] § 39-71-701(1), MCA.

in the time between his last appointment with Dr. Butler and July 12, 2005. Petitioner asserts that with Dr. Butler's opinion withdrawn, no doctor has placed him at MMI nor released him to return to his time-of-injury employment. The evidence before this Court supports Petitioner's assertions. Petitioner is therefore entitled to reinstatement of his TTD benefits from the date of termination until such time as he has reached MMI or is released to return to his time-of-injury employment or an employment with similar physical restrictions.

Issue IV: Whether Petitioner's need for further medical treatment of his cervical condition is related to his chiropractic treatment with Dr. Butler.

¶ 43 Although presented as a "different" issue to the Court, I cannot discern how this issue differs from Issue One. Therefore, I reach the same conclusion as that which I arrived at regarding Issue One.

Issue V: Whether a penalty should be assessed against Respondent.

¶ 44 The Workers' Compensation Court Judge may increase by 20 percent the full amount of benefits due a claimant during the period of delay or refusal to pay when an insurer unreasonably delays or refuses to pay benefits.[97] On October 18, 2006, senior claims consultant Gary Holt admitted during his deposition that he had read Dr. Butler's deposition and that he was aware that Dr. Butler had withdrawn his finding that Petitioner was at MMI.[98] Holt did not believe Dr. Butler withdrew his release to return to work, but testified that if Dr. Butler had done so, it would be appropriate to reinstate Petitioner's TTD benefits.[99] Petitioner's counsel then asked Holt:

> Q. And then on Page 49 I asked [Dr. Butler] . . . "And based on the understanding which you just obtained, that there indeed was a workup done by other physicians, would you withdraw these conclusions until you had an opportunity to review those records and/or simply defer to the other physicians?"
>
> And his answer was, "Yes, I would defer to the other physicians."
>
> A. Okay.

[97] § 39-71-2907, MCA.

[98] Holt Dep. 39:3-8.

[99] Holt Dep. 39:9-18.

Q. So based on your opportunity to review this with me now, would you agree that Dr. Butler's opinion stated on Page 16 of your file dated 7-12-05 has been withdrawn?

A. It appears that, yes.

Q. And as a result of that, at this juncture, or at least as of the date of Dr. Butler's deposition, Liberty Northwest should reinstate temporary total disability benefits retroactive to their termination.

. . . .

A. Um, that's probably - - we would probably have to do that if he actually withdrew those, yes.[100]

¶ 45 Holt further agreed that without a doctor's opinion that Petitioner is at MMI and without a doctor's opinion that Petitioner is released to work in any capacity, Petitioner would be entitled to TTD benefits.[101] However, it does not appear that Respondent ever reinstated Petitioner's TTD benefits. Respondent simply sat on its hands and, even though Holt was aware at least as early as October 18, 2006, that Dr. Butler had withdrawn his opinions, Respondent neither paid TTD benefits nor obtained the opinion of any doctor who found Petitioner either to be at MMI or released to work.

¶ 46 While I question whether Respondent acted reasonably in relying upon the opinion of Dr. Butler, whom Holt knew had not seen Petitioner in months and whose treatments had been superceded by the treatment of other doctors, there is no doubt that Respondent acted unreasonably in failing to reinstate Petitioner's TTD benefits once Dr. Butler withdrew his conclusions. For these and for further reasons which are discussed under Issue VII below, I conclude Respondent unreasonably refused to pay Petitioner's TTD benefits and Petitioner is therefore entitled to a 20 percent increase of the full amount of benefits due, pursuant to § 39-71-2907, MCA.

Issue VI: Whether the Court should determine an insurer's obligations regarding production of a claimant's file upon request by a claimant or a claimant's counsel.

¶ 47 Petitioner moved this Court, pursuant to § 27-8-101, *et seq.*, MCA, for an order declaring that a workers' compensation insurer has an affirmative obligation to produce a

[100] Holt Dep. 40:6 - 41:7.

[101] Holt Dep. 41:8-20.

claimant's file in a timely manner upon request by a claimant or a claimant's counsel, and establishing guidelines regulating an insurer's production of a claims file.[102] Petitioner explains that after he obtained counsel, his counsel requested a copy of Respondent's file. Respondent did not comply with his request, remitting only certain portions of the file and forcing Petitioner to subpoena Respondent to obtain the complete file. Petitioner further asserts that his counsel is aware of "numerous instances" in which insurers have sent substantially incomplete copies of claims files when files have been requested by claimants or their counsel.[103]

¶ 48 Petitioner argues that Respondent's failure to provide a complete copy of his claims file upon request substantially impeded his ability to determine Respondent's benefit calculation and the basis for its denial of benefits.[104] Petitioner concedes that an insurer has the right to withhold attorney work product and reserve information, but maintains that a complete copy of the rest of a claims file should be produced upon request.[105]

¶ 49 Petitioner notes that § 39-71-107(3), MCA, provides that an insurer shall maintain claims files in a manner that allows the documents to be retrieved and copied at the request of the claimant or the department. Petitioner asserts that it is within this Court's discretion to set forth guidelines by which insurers must release claims files to claimants upon request.[106]

¶ 50 Respondent responds that this Court does not have jurisdiction to provide the remedy Petitioner has requested.[107] Respondent argues that this Court has a limited right to issue declaratory rulings as delineated by § 2-4-501, MCA, which states that this Court may issue "declaratory rulings as to the applicability of any statutory provision or of any rule or any order of the agency."[108] In the case at hand, Respondent points out, no statutory provision, rule, or order of the agency is at issue. Rather, Petitioner asks this Court to promulgate new "guidelines" for insurers to follow regarding copying claims files.

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[102] Petitioner's Motion for Declaratory Relief to Establish Guidelines for the Production of a Claimant's File and Brief in Support ("Declaratory Motion") at 1.

[103] Declaratory Motion at 2.

[104] Declaratory Motion at 2-3.

[105] Declaratory Motion at 3.

[106] *Id*.

[107] Respondent's Response to Petitioner's Motion for Declaratory Relief and Request for Discovery and a Hearing ("Response") at 2.

[108] Response at 1.

Respondent further argues that, since Petitioner's request is that the Court promulgate rules which insurers would have to follow prior to litigation, the Court does not have jurisdiction to do so.[109] Respondent further argues that Petitioner has not substantiated the factual allegations he has made, including providing no evidence of the "numerous instances" in which insurers have refused to provide complete copies of claims files upon request.[110]

¶ 51 Respondent further argues that Petitioner's reliance on § 39-71-107(3), MCA, is misplaced. While the statute provides for the manner in which the claims files are to be maintained by insurers, it does not promulgate rules which insurers must follow to produce requested documents prior to litigation.[111]

¶ 52 In *Blaylock v. Montana State Fund,*[112] this Court considered whether it could order a treating physician to provide a claimant with documentation on how the physician determined the claimant's impairment rating, and whether it could order a sanction or remedy for the employer's alleged refusal to show the claimant the documentation releasing him to return to work.[113] The Court concluded that it could not order the doctor to provide additional documentation to the claimant regarding his impairment rating, noting that the claimant could have deposed the doctor, but did not do so.[114] The Court further concluded that it had no jurisdiction to sanction an employer for failure to provide the claimant with the requested documentation, at least where the employer had not violated any discovery orders from the Court.[115]

¶ 53 I find this situation to be analogous to the one in *Blaylock*. At the time Respondent refused to give Petitioner a complete copy of his claims file, no petition had been filed in this Court. Without a filed petition, this Court has no jurisdiction over any alleged claim. However, I would caution insurers that there is also a point at which, if a claimant is forced to file a petition in this Court simply to receive a copy of his claims file, this fact would certainly be among the issues taken into consideration in determining whether an insurer acted reasonably in its adjustment of the claim.

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[109] Response at 2.

[110] *Id*.

[111] *Id*.

[112] *Blaylock v. Montana State Fund,* 2004 MTWCC 54.

[113] *Blaylock*, ¶ 4.

[114] *Blaylock*, ¶ 10.

[115] *Blaylock*, ¶ 17.

Issue VII. Whether Petitioner is entitled to his costs and attorney fees.

¶ 54 An insurer shall pay reasonable costs and attorney fees if it denies liability for a claim or terminates compensation benefits and the claim is judged compensable in this Court and, in the case of attorney fees, if this Court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.[116] As the prevailing party, Petitioner is entitled to his costs. Petitioner further seeks attorney fees which, under § 39-71-611(1)(c), MCA, he is entitled to only if this Court determines Respondent's actions in denying liability or terminating benefits were unreasonable.

¶ 55 I conclude Respondent's termination of Petitioner's benefits and subsequent failure to reinstate these benefits after Dr. Butler withdrew his initial opinion placing Petitioner at MMI and releasing him to work, was unreasonable.

¶ 56 In terminating Petitioner's TTD benefits, Respondent relied upon Dr. Butler's July 12, 2005, letter to Respondent in which Dr. Butler released Petitioner to return to work. However, Respondent did not inform Petitioner that his benefits were being terminated and Dr. Butler did not inform Petitioner that he was released to return to work. Moreover, at the time that Respondent obtained this opinion from Dr. Butler, Petitioner had ceased treating with Dr. Butler months earlier. Meanwhile, although Respondent's claims file reflects back in February that Petitioner sought authorization to change physicians and, indeed, authorization for such a change was noted as a goal of the claims adjuster, authorization was not granted when adjustment of the claim was assumed by a new claims adjuster, Holt, apparently for no other reason than because Holt simply decided not to authorize it. Although Petitioner asked Respondent on several occasions to authorize an appointment with Dr. Mack, Holt refused on the grounds that Petitioner needed a referral from Dr. Butler. However, Dr. Butler refused to give Petitioner a referral to Dr. Mack, not because he objected to Petitioner seeing Dr. Mack, but because Dr. Butler believed Petitioner should call Dr. Mack's office directly. Petitioner was then caught in the absurd catch-22 of being unable to obtain the medical treatment he needed because neither his treating physician nor Respondent was willing to take the necessary step which would allow Petitioner to obtain treatment.

¶ 57 In spite of the fact that Holt knew that Petitioner had ceased treating with Dr. Butler and was treating with other doctors, he continued to refuse to authorize a change in treating physicians and relied upon Dr. Butler's medical opinion to terminate benefits. Furthermore, Holt disregarded medical bills which Respondent received from other doctors with whom Petitioner sought treatment. Holt did not pay these bills on the grounds that the

[116] § 39-71-611, MCA.

treatments were not authorized. However, he made no effort to contact Petitioner to inform him that the bills were not being paid, nor on what grounds they were being denied.

¶ 58 It should go without saying that an insurer is not required to authorize every request for a change in treating physician. However, in this case, Holt knew firsthand from Petitioner that he was dissatisfied with Dr. Butler's care and that he did not think the treatment was helping him. Holt further knew Petitioner was unable to obtain a referral from Dr. Butler to treat with Dr. Mack. Finally, Holt knew that the claims adjuster who handled the claim previously had apparently already determined that authorization for a new treating physician was warranted. However, when Holt took over the case from the previous claims adjuster, he decided to ignore her determination without undertaking any investigation.

¶ 59 For the reasons set forth here, as well as under Issue V above, I find that Respondent's actions in terminating Petitioner's benefits were unreasonable and conclude that Petitioner is entitled to his attorney fees pursuant to § 39-71-611, MCA.

JUDGMENT

¶ 60 Petitioner has not proven that his cervical condition was aggravated by his chiropractic treatment with Dr. Butler.

¶ 61 Petitioner has not achieved MMI relative to his work-related injury.

¶ 62 Petitioner is entitled to TTD benefits retroactive from the date of termination until such time he is either found to be at MMI or released to work in his time-of-injury employment or an employment with similar physical restrictions.

¶ 63 Petitioner has not proven that any alleged need for further medical treatment of his cervical condition is related to his chiropractic treatment with Dr. Butler.

¶ 64 Petitioner is entitled to a penalty pursuant to § 39-71-2907, MCA.

¶ 65 The Court does not have jurisdiction to set forth guidelines dictating an insurer's obligations regarding production of a claimant's file upon request by a claimant or a claimant's counsel when that request is made prior to the filing of a petition in this Court.

¶ 66 Petitioner is entitled to his costs.

¶ 67 Petitioner is entitled to his attorney fees pursuant to § 39-71-611, MCA. Within twenty days following the expiration of the appeal period or remittitur on appeal of the

Court's final decision, Petitioner's attorney shall file with this Court a claim for attorney fees which shall comport with the requirements set forth in ARM 24.5.343.

¶ 68 This JUDGMENT is certified as final for purposes of appeal.

¶ 69 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 19th day of October, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Mr. Steven S. Carey
Mr. Larry W. Jones
Submitted: May 16, 2007