Dynamic Chiropractic

PERSONAL INJURY / LEGAL

AAA Found Guilty of Discrimination Against Chiropractors -- Scope of Practice Broadened in Michigan

Chicago has their "Chicago Four," Drs. Wilk, Bryden, Arthur, and Pedigo of the Wilk v. AMA fame. In Michigan we have the "Detroit Duo" of Dr. John A Hofman and Dr. Richard C. Herfert who, for several years, have been pursuing a lawsuit against the largest automobile insurance carrier in the state of Michigan. The case was recently adjudicated at the trial court level with Wayne County Circuit Judge Kaye Tertzag entering a decision favorable to all chiropractic physicians in Michigan (Hofmann & Herfert v. Auto Club Insurance Association (ACIA), Wayne County Circuit Court, Detroit, Michigan, August 29, 1990). Plaintiffs were represented by the firm of Sommers, Schwartz, Silver & Schwartz, P.C. of Southfield, Michigan.

After 5 years of litigation, Judge Tertzag released his 86 page ruling which was very favorable to chiropractic physicians. As to the scope of practice issues, the chiropractors were victorious on every issue except thermography, thermoscribe, or similar procedures.

There is a difference of opinion among the appellate courts in Michigan regarding payment for thermograms whether done by an allopath, osteopath, or chiropractor. Thus, this finding is consistent with the state of the law at present in this state. We hope this will change soon; so that Michigan will follow the long line of states who now recognize that thermography is an objective test when correlated as an allowable medical expense.

The court ruled that chiropractors in Michigan may, within the scope of their practice, use and bill ACIA for: orthopedic and neurological tests in the examination of patients; nutritional analysis and nutritional supplements; cervical supports; cervical pillows; lumbar supports; cervical/spinal and/or intersegmental traction; re-evaluation x-rays; pelvic x-rays; hot/cold packs; SOT blocking and wedges.

It took almost five years for the firm to complete the case which included over 200 pleadings, motions, and briefs by the parties necessitating several trips to the Court of Appeals and the Michigan Supreme Court. The four years preceding the trial were spent attempting to reduce AAA's claims and conducting discovery. The trial itself lasted 12 weeks. AAA's blatant dislike of chiropractic was obvious throughout the trial and it became clear during the proceedings that their intent was to denigrate and insult the profession, rather than seek any common ground.

The court specifically found that ACIA, the insurance subsidiary of AAA, was:

"On a mission to emasculate the chiropractic profession and was guilty of 'chiropractic bashing' by taking rigid positions in viewing chiropractors as 'second-class citizens'."

Judge Tertzag further stated, "rather than recognize that chiropractors perform a valuable service to our community, ACIA seemed, throughout, to denigrate the profession. Rather than seek common ground, ACIA seemed interested in divisiveness, appearing inflexible in its approach." The judge frequently commented on ACIA's disregard of the legitimacy of the chiropractic profession.

The judge also found that the actions of the insurance company were clearly discriminatory against all chiropractors.

One reason for the five years of litigation was the result of AAA bringing substantial counterclaims against the two physicians who put their names on the suit. In their counterclaims, AAA alleged: (1) violation of the coordination clause in the policies of AAA and Blue Cross/Blue Shield, (2) violation of a Michigan statute which specifies that a health care provider shall not charge more to a no-fault carrier than is charged to others for similar services, (3) that over 80 different apparatuses and instruments are outside the scope of chiropractic practice in Michigan, (4) and false and misleading advertising as well as a host of other issues too numerous to name. Most of these issues, including the issue of false and misleading advertising, were dismissed before the actual trial commenced.

The court accepted the position of the chiropractic profession, that the Board of Chiropractic Examiners is empowered by the state legislature to enact rules under which chiropractic is practiced in Michigan, whether or not a procedure is specifically mentioned in the scope of practice act. These are the specific items which were ruled within the scope of practice for chiropractic physicians:

1. the right to perform chiropractic, orthopedic, and neurological examination,

2. the right to give nutritional analysis and nutritional supplements,

3. the right to prescribe rehabilitative exercise procedures,

4. the right to use traction, intersegmental, dis-traction, etc., and

5. the right to take re-evaluation x-rays and the right to take a separate pelvic x-ray.

The judge held that thermography, thermoscribe, derma-therma graph, neuro-calometer and similar devices were outside the scope of practice. He seemed to rule that these items should not be included because the testimony led him to doubt the actual "scientific validity" of these procedures more than their relationship to chiropractic diagnosis and analysis. As noted previously, this part of the decision pertaining to thermography, etc., is consistent with the current status of the law in Michigan as to these instruments which are also used by MDs and DOs.

The only negative holding by the trial court dealt with fees charged to no-fault carriers such as ACIA. The court opened a veritable "Pandora's Box" of problems and uncertainties for all health care providers in Michigan by its strict constructionist approach on the issue of appropriate health care charges to no fault carriers. By discouraging health care providers from providing care at reduced rates, or, in some instances, for free, the court's ruling would seriously affect a vast number of poor people and/or Medicare and Medicaid patients. This part of the decision is disturbing to other health care providers in Michigan because it affects all, including D.C.s, MDs, DOs, PTs, and hospitals.

The trial judge ultimately sided with AAA and held that if a chiropractor accepts $8.73 for a visit by a Medicaid patient, even though his charge is normally $25, the doctor must accept the $8.73 from ACIA in an auto accident case as a no-fault benefit. This same reasoning could apply to a Medicare

patient or even a cash patient who is receiving care for a reduced fee. The judge, in effect, ruled that if you accept a reduced fee, then that is your charge. This reasoning is obviously flawed because of the fact that physicians are forced to accept Medicare and/or Medicaid payments in order to participate in those programs.

If this ruling stands, every no-fault carrier in Michigan can force, not only chiropractors, but MDs, DOs, hospitals, and every other kind of health care provider to accept the lowest payment received for any given service as full payment. The plaintiffs do not believe that this was the intent of the legislature when the no-fault law was enacted, and Hofmann and Herfert are appealing this part of the decision to the Michigan Court of Appeals.

It should be emphasized that this decision does not apply to regular health insurance such as sickness and accident or to workers' compensation insurance coverage. This ruling will, no doubt, be applied by AAA to all health care providers, which could cause a wholesale desertion of participating doctors in the Medicare and Medicaid programs, making health care even more inaccessible for the poor and elderly than it already is. It is hoped that other health care providers will join them in the appeal.

Doctors of chiropractic in Michigan are urged, based upon this decision, to re-bill all the items they were denied payment for the last several years by ACIA, which are now allowed.

In Michigan, this was the first time since the Beno decision (Attorney General v. Beno), a case which was very restrictive to chiropractic, where chiropractors can point to a court victory and have legal ground to stand on when charging insurance companies for services other than just adjustments and x-rays. This decision cannot help but strengthen the position of chiropractic physicians when dealing with third-party payers.

Make no mistake. This is not over. AAA will make every attempt to muddy the waters every step of the way. They will try to create every smokescreen imaginable to cloud the issues and to make these proceedings as expensive as possible. The insurance companies have unlimited resources and ACIA will be pressing their appeal in an attempt to overturn the trial court's decision.

Drs. Hofmann and Herfert are well respected in Michigan and in other states. Dr. Hofmann has served as chairman of the board of chiropractic examiners and Dr. Herfert is well known for his computer software billing and office management programs. These doctors are valiant indeed for supporting this cause throughout the course of the five year battle. Many members of the Michigan Chiropractic Legal Action Committee (MCLAC) contributed, and have been contributors since the beginning of MCLAC in early 1984; their support and unwaivering commitment is applauded.

This decision is a major victory for Michigan; which reverses many of the problems posed to the profession in Michigan by the Beno decision. Each and every chiropractor in Michigan will benefit from this ruling. We hope other states, where scope of practice and discrimination issues are even more blatant, will follow this decision once it is affirmed on appeal.[1]

Footnote:

1. The trial attorneys on behalf of Sommers, Schwartz, Silver & Schwartz, P.C. were Deborah G. Tyner (a recently elected circuit judge) and Patrick B. McCauley.

John F. Vos, III
Southfield, Michigan