

## **Choice of Treating Physician:**

### **Background:**

In Montana, injured workers have always been allowed to choose their treating physician for obvious reasons. Selection of a physician who will touch their body, examine them with or without clothing, and perhaps even perform surgery, is a very personal decision. Montana's broad right of "individual" privacy is a testament to Montanans' continuous and zealous protection of personal autonomy and dignity.<sup>1</sup> Montana's right to privacy broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider, free from government interference.<sup>2</sup>

In 2011, the Montana Legislature made changes to the statutes providing for choice of treating physician. In relevant part, Mont. Code Ann. § 39-71-1101, parts (1) and (2) now provide:

(1) Prior to the insurer's designation or approval of a treating physician as provided in subsection (2) or a referral to a managed care organization or preferred provider organization as provided in subsection (8), a worker may choose a person who is listed in 39-71-116(41) for initial treatment. Subject to subsection (2), if the person listed under 39-71-116(41) chosen by the worker agrees to comply with the requirements of subsection (2), that person is the treating physician.

(2) Any time after acceptance of liability by an insurer, the insurer may designate or approve a treating physician who agrees to assume the responsibilities of the treating physician. The designated or approved treating physician:

(a) is responsible for coordinating the worker's receipt of medical services as provided in 39-71-704;

(b) shall provide timely determinations required under this chapter, including but not limited to maximum medical healing, physical restrictions, return to work, and approval of job analyses, and shall provide documentation;

(c) shall provide or arrange for treatment within the utilization and treatment guidelines or obtain prior approval for other treatment; and

(d) shall conduct or arrange for timely impairment ratings.

The workers compensation insurers and the Montana Employment Relations Division interpret this revised statute as permitting the insurer to select Montana's injured workers' treating physicians.

This position run afoul of the Montana Constitution and the right to privacy Montanans' hold so dear. The Montana Supreme Court noted:

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<sup>1</sup> *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 374-75, 989 P.2d 364, 374.

<sup>2</sup> *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 376, 989 P.2d 364, 375. Const. Art. 2, § 10.

Indeed, medical treatment decisions are, to an extraordinary degree, intrinsically personal. It is the individual making the decision, and no one else, who lives with the pain and disease. It is the individual making the decision, and no one else, who must undergo or forego the treatment. And it is the individual making the decision, and no one else, who, if he or she survives, must live with the results of that decision. One's health is a uniquely personal possession. The decision of how to treat that possession is of a no less personal nature.

... The decision can either produce or eliminate physical, psychological, and emotional ruin. It can destroy one's economic stability. It is, for some, the difference between a life of pain and a life of pleasure. It is, for others, the difference between life and death.<sup>3</sup>

Further support for this idea is found in U.S. Supreme Court's observation from over 120 years ago, "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."<sup>4</sup> Nearly 100 years ago, Justice Cardozo declared that, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."<sup>5</sup> Within the last 25 years, the Supreme Court has reaffirmed that the right to control fundamental medical decisions is an aspect of the right of self-determination and personal autonomy that is "deeply rooted in this Nation's history and tradition."<sup>6</sup>

The courts note, "The legislature has neither a legitimate presence nor voice in the patient/health care provider relationship superior to the patient's right of personal autonomy which protects that relationship from infringement by the state."<sup>7</sup>

- Allowing the insurer to select an injured worker's treating physician violates the Montana Constitution's right to privacy. Article II, Section 10, protects the autonomy of the individual to make personal medical decisions and to seek medical care in partnership with a chosen health care provider free of government interference. *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364.
- This statute unconstitutionally delegates absolute discretion regarding the approval or designation of a treating physician to insurers without any guidance or standards for that grant of power to insurers. The proposed rule and the statute allow insurers to approve or disapprove treating physicians at will, without any

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<sup>3</sup> *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 381-82, 989 P.2d 364, 378-79, citing *Andrews v. Ballard* (D.C.S.D.Tex.1980), 498 F.Supp. 1038, 1047.

<sup>4</sup> *Id.* citing *Union Pacific Railway Co. v. Botsford* (1891), 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734. *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 382-83, 989 P.2d 364, 379-80.

<sup>5</sup> *Id.* citing *Schloendorff v. Society of New York Hosp.* (1914), 211 N.Y. 125, 105 N.E. 92, 93, overruled in part by *Bing v. Thunig*, (1957), 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3.

<sup>6</sup> *Id.* citing *Moore v. City of East* \*\*380 *Cleveland* (1977), 431 U.S. 494, 503, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531.

<sup>7</sup> *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 384, 989 P.2d 364, 380.

restrictions, limitations, or guidance whatsoever. We have heard the comment from worker's compensation adjusters that they do not have to provide any reasons or rationale to approve, deny, or switch an injured worker's treating physician. This is exactly the "absolute discretion" that the legislature must *not* give to private parties as noted in *Ingraham v. Champion International* (1990), 243 Mont. 42, 793 P.2d 769. Rather, the legislature is "required to lay down the policy or reasons behind the statute and to prescribe standards and guides for the grant of the power" that it gives to a private entity just as it would to an administrative agency. *Id.*, 243 Mont. at 48, 793 P.2d at 772. When the legislature gives absolute discretion to a private party or an administrative agency, without guidance and limitation, such delegation of power is unconstitutional. *Id.*; *See also State v. Mathis*, 2003 MT 112, 315 Mont. 378, 385, 68 P.3d 756, 762.

- The insurers and ERD's interpretation is not consistent with legislative intent and needs to be addressed. The Montana State Senate Floor Debate on HB 334 (March 26, 2011, 4:19-4:50) provides that an injured worker gets to choose his or her health care provider as long as that health care provider agrees to follow the statutory requirements, including the utilization and treatment guidelines. The insurer will only designate a treating physician if the worker fails to select a treating physician at all or if the treating physician chosen by the worker does not comply with the statutory requirements. The language "designate or approve" in § 1101(2) means that the health care provider chosen by worker must meet the requirements for a treating physician. The legislative intent is that § 1101 does not limit the treating physician to "a company doctor" and that a worker can choose his own health care provider.
- An interpretation of the proposed rule that absolutely gives the insurer the right to choose the treating physician is offensive. Opinion 9.06 of the American Medical Association's Code of Ethics states:

Free choice of physicians is the right of every individual. One may select and change at will one's physicians, or one may choose a medical care plan such as that provided by a closed panel or group practice or health maintenance or service organization. The individual's freedom to select a preferred system of health care and free competition among physicians and alternative systems of care are prerequisites of ethical practice and optimal patient care.

No person in need of medical care wants an insurance company to choose their doctor. That interpretation is not consistent with the legislative discussion cited above. Allowing the insurer to select an injured workers treating physician violates the Montana widely held belief of self autonomy. Ask yourself, "Would I allow my insurance company to choose my doctor?" If your answer is "no", this law must be changed.

- This is driving quality medical doctors out of the workers' compensation system.

Real Life: The insurer arbitrarily switched the injured worker's treating physician from Dr. Fisher (a podiatrist specializing in the foot/ankle injury the client had) to Dr. Pike (an orthopedic surgeon, not a Podiatrist) who did not want to be the injured worker's treating physician. Dr. Pike just wanted to provide "second opinions". Now Dr. Fisher refuses to see the client because of the insurer's change of the treating physician, denial of authorizations for the client to see Dr. Fisher, denial of Dr. Fisher's recommendations for care. Dr. Fisher's office said it was done with that particular insurer's claimants, and maybe work comp patients generally, due to this negative experience.

- This provision is actually prolonging treatment.

Real Life: See the examples of Gary Stroop and Christopher Carter.