BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF LACROSSE (HIGHWAY DEPARTMENT),
LACROSSE CITY EMPLOYEES UNION, LOCAL 180, SEIU

and

CITY OF LACROSSE

Case 303
No. 58879
MA-11092

(Chiropractic Coverage Grievance)

Appearances:

Davis, Birnbaum, Marcou, Seymour & Colgan, LLP, by **Mr. James G. Birnbaum** and **Ms. Carla J. Hughey**, on behalf of the Union.

Mr. Peter B. Kisken, Deputy City Attorney, on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "City", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in LaCrosse, Wisconsin, on January 18, January 19, March 21, and March 22, 2001, at which time the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed and the parties thereafter filed briefs, reply briefs, and other materials that were received by August 23, 2001.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUES

Since the parties did not jointly agree on the issues, I have framed them as follows:

1. Is the grievance arbitrable?

2. If so, did the City violate Article 3, Section G, and/or Memorandum of Understanding No. 5 of the contract after it changed the third-party administrator for its self-insurance plan and after certain employees were denied chiropractic benefits under the contractually-provided health insurance plan and, if so, what is the appropriate remedy?

BACKGROUND

The City for a number of years has self-funded its health insurance plan, which includes chiropractic care. Prior to January 1, 1998, the City contracted with Wisconsin Physicians' Service ("WPS"), to serve as the plan's administrator. The City on January 1, 1998, replaced WPS with Gundersen Lutheran Health Plan, Inc. ("Gundersen"), which has served as the plan's administrator from that time forward.

The City's health insurance plan is offered to all qualified City employees, including those who are in different bargaining units, and employees under the plan are free to select any doctor they want. It therefore is an open, rather than a closed, plan. The instant grievance is the only one that has led to arbitration.

1. Union Witnesses

Dr. David Bentz, a chiropractor, could not recall one instance of where chiropractic care was denied under WPS. He added that since Gundersen "has taken over, virtually every patient that comes in, they will allow some care, but then the denials come in stating its not medically necessary, and they'll state that the documentation is not appropriate, although I vigorously challenge that. . .", and that Gundersen now requires "infinite documentation, and when you send it in, they still deny it saying it's inappropriate." He also said that he has treated City employee Connie Doerre since 1990; that she mainly suffers from lower back and neck pain; that she has had the same problems both before and after January 1, 1998; that he has provided the same treatment and documentation throughout that time; that Gundersen refused to pay for treatment rendered to her on July 17, 2000; that Gundersen also stated that there was improper documentation; and that WPS earlier had paid for the identical treatment.

He also testified that he has treated City employee Bernie Niedercorn since December 20, 1997; that Niedercorn suffers from lower back pain; and that whereas WPS paid for that pre-1998 treatment, Gundersen refused to pay for certain post-1998 treatment that was identical in nature. He added that Gundersen has rejected the kind of documentation previously approved by WPS; that it, unlike WPS, has refused to pay for subluxation – a

misalignment of a spinal vertebra or extremity joint; and that its refusal to pay for subluxation means that chiropractic coverage is no longer available because Wisconsin state law mandates that subluxations are the only treatments chiropractors can perform. He also said that Gundersen had changed the insurance coverage Doerre and Neidercorn previously had received under WPS and that, unlike WPS, it no longer pays for surface EMG studies.

On cross-examination, Dr. Bentz testified that the most common reasons for non-payment from Gundersen were "insufficient documentation"; that he has treated Doerre since 1990; that "maintenance care" refers to the plateau and stabilization that some patients reach after receiving treatment; that such maintenance treatment is not covered under the health plan; that he prescribed exercises for Doerre; that he did not consider sending Doerre out to see a different doctor for different treatment; and that Gundersen never denied any of Doerre's treatment up to February 8, 2000, when it informed him that additional documentation for her would be needed in the future (Union Exhibit 3). He also said that one of his patients was denied care in 1997.

Dr. David Washa, a chiropractor, testified that at the beginning of the year 2000, "I began experiencing denials for chiropractic service that were once being paid for routinely by the insurance company", and that "after '98, doing the same thing I did prior to 1998, I wasn't getting paid for." He said that he treated City employee Anita Lemke since 1992; that she suffers from finger numbness, difficulty in sleeping, headaches and lower back pain; that he treated her by manipulating her spine; that all of her bills were paid before 1998; and that, "The services began becoming denied in January of the year 2000" for services that had been previously reimbursed. He also said that patients themselves mark down the code for their subjective pain and that medical care under Gundersen has:

> "been changed, in the fact that what was once considered routine for reimbursement to Ms. Lemke, suddenly and inexplicably became, either denied or required additional paperwork that was never required upon me before 1998."

He also said that Gundersen insisted on more documentation; that some bills were denied on the ground they were not medically necessary; and that he was never told between 1993-1998 that any claims were not medically necessary.

On cross-examination, Dr. Washa testified that he has referred Lemke to other physicians; that Lemke over the years has suffered from different ailments; and that he saw Lemke for about 171 times over a seven-year period; that his documentation was never questioned before 1998.

Susieann Hammond, a LaCrosse School District employee, is covered under the City's health care plan because her husband is a City employee. She testified that she broke her back and that she has been treated by Dr. William Sterba, a chiropractor, for about six years; that Dr. Sterba in the past recommended that she be hospitalized, that she take pain pills, and that she should exercise; that she has not taken medicine because of allergic reactions and that she has exercised; and that Dr. Sterba's treatment "Definitely" alleviated her pain. She also said that Dr. Sterba in 2000 cured her pain after Gundersen Lutheran Clinic was unable to do so because its "physical therapy wasn't working"; that Dr. Sterba recommended she see an orthopedic surgeon about her rotator cuff problem; that Gundersen paid all of her claims after it asked Dr. Sterba for more documentation; that Gundersen told her that chiropractic care would be denied after March 13, 2000, unless she developed a new condition; and that she disagrees with Gundersen's claim that chiropractic care was not effective or beneficial.

On cross-examination, Hammond testified that before she saw Dr. Sterba, she had previously seen a medical doctor about her condition, and that he did not relieve her pain.

Dr. Sterba, when asked if chiropractic coverage has changed since 1998, replied:

> "On paper, no. They have great benefits on paper, but when it comes down to brass tacks, it's changed dramatically, yes."

He testified that he has been treating Hammond since about 1993 for various problems, and that all the care was paid for before 1998; that while Gundersen paid him for those pre-1998 claims, it informed him that certain care rendered between October 25, 1999 – January 8, 2000, was not medically necessary; that Gundersen imposed new standards to determine whether care was a medical necessity; and that chiropractic coverage for Hammond has changed since 1998.

On cross-examination, Dr. Sterba testified that while Gundersen paid for all of Hammond's treatment, Hammond never returned for treatment after being told that certain past treatment was not medically necessary. He also said, "I don't have this problem with any other group whatsoever", and that the concept of medical necessity is dynamic and always changing.

Union President Ken Iverson testified that the November 9, 1999, Memorandum of Understanding No. 5 in the collective bargaining agreement came about after the City in the early 1990's had earlier tried to change the "usual and customary" rates provided for in the health care plan, and that the City told employees that there would be no reduction in health care benefits when Gundersen took over from WPS in January, 1998. He also said that he first heard complaints about chiropractic care in January, 2000, and that the Union in the earlier arbitration proceeding before Arbitrator Lee Crowley told the City the names of individual

employees who would be called to testify. He also said: "there's been a change in our coverage concerning general chiropractic care without it being negotiated through the union and the contract negotiations."

On cross-examination, Iverson testified that the Union at a November 18, 2000, grievance meeting did not identify specific employees because all the employees had not been identified and that certain employees had trouble receiving chiropractic benefits before 1998.

City employee Doerre suffers from back, neck and shoulder pain. She testified that Dr. Bentz has treated her by doing spinal adjustments; that all of his treatment before 1998 was paid for; that some bills totaling $1,350 were not paid in 2000; and that that marked a change even though her treatment was "Exactly the same." She received a letter dated September 29, 1998, stating that the City had agreed to pay all 1998 claims "on an exception basis" and that, "In the future, guidelines for medical necessity will be applied." She received another letter on February 8, 2000, stating that if her chiropractic care continued beyond February 8 of 2000, such charges would be denied as not medically necessary. Pursuant to the plan's internal appeal process, Doerre appealed Gundersen's refusal to pay certain claims on the grounds that the care was not medically necessary, but she was unsuccessful in doing so. She also stated that chiropractic benefits changed between 1998 and the present.

On cross-examination, Doerre testified that she reached a tentative plateau "at different times throughout the years, yes" and that Dr. Bentz never gave her a release date. She added that she has never sought alternative types of medical treatment for her back pain because "the chiropractor gives me relief instantly within a matter of weeks if the pain is real bad" and because medical doctors "either give you pain pills or muscle relaxers and that doesn't solve the problem." She added that she suffers from lower back, neck, and shoulder pain, and that she never told Dr. Bentz she had stopped doing exercises.

City employee Niedercorn testified that Dr. Annis, a neurosurgeon at Gundersen Lutheran Clinic, told him in 1994 that he should see a chiropractor because "that was the best pain relief for me"; that Dr. Alexis Norelle, another neurosurgeon at the Gundersen Lutheran Clinic, wrote on August 26, 1998 (Union Exhibit 6), that chiropractic treatment "is a very reasonable treatment alternative and certainly cheaper in the long run. . ."; that he subsequently was treated by Dr. Bentz; and that all of his chiropractic bills were paid before February 8, 2000, when Gundersen informed him that his chiropractic care no longer would be covered. Niedercorn appealed that denial pursuant to the plan's internal appeal procedure, but to no avail. Because of the refusal to pay for his chiropractic care, Niedercorn has been treated by a chiropractor only three times since February 8, 2001, which he has paid for himself. Asked to describe his current pain, he replied:

> A Well, I live with it from day-to-day. It may be a bull rider's mentality, but this is what I do for a living, and I accept it. The pain is a never-ending – it's like a lingering toothache. The more I jar my back and neck, the harder it is on me. But I've never come to work for a paycheck and I don't intend to. The pain is at times daily a No. 2. And the only alternative probably would be to have surgery, and there are no guarantees that I'm willing to take the risk of a 50-50 percent.

He also replied "Most definitely", when asked if his chiropractic coverage has changed since 1998.

On cross-examination, he testified that his chiropractor never referred him to a medical doctor; that his pain now is "probably a four" on a scale of 10; that all of his pain was work-related; that he stopped exercising because it was not doing him any good; and that he is unaware that there is a worker's compensation exclusion under the City's health plan.

Linda Italiano is married to City employee George Italiano and is covered under the City's health plan. She testified that she suffers from shoulder and back pain; that she has been treated by Dr. Peterson, a chiropractor, since about 1990; that she is unsure whether all of her chiropractic care was paid for before January 1, 1998; and that she now owes Dr. Peterson $4,233.80 in unpaid bills.

On cross-examination, she testified that she was treated by Dr. Peterson about 42 times in 1998 and 41 times in 1999; that she sees him about every two weeks; that Gundersen has denied some of these claims; and that she does not know whether all of her bills were paid for before 1998. She also says that she regularly does the exercises that Dr. Peterson prescribed; that Dr. Peterson has not given her a release date; that Dr. Peterson has never recommended that she see a medical doctor; and that he has never prescribed a medicine for her.

George Italiano, Linda Italiano's husband, testified that all of her chiropractic bills were paid for before 1998; that Gundersen refused to pay certain bills when it took over; that he, Italiano, appealed some of those denials, but to no avail; and that Gundersen's refusal to pay certain claims constituted a change in his chiropractic coverage. He also said that his wife broke her foot and subsequently fell down and reinjured herself; that her medical doctor referred her to a chiropractor; and that Gundersen later refused to pay for that treatment.

On cross-examination, he said that WPS in 1997 initially refused to pay for chiropractic treatment given to him and his wife on the ground it was not medically necessary; that WPS eventually paid for it after he filed an appeal; and that he did not appeal all of Gundersen's refusals to pay certain chiropractic bills. He also said that he had received chiropractic treatment after a medical doctor recommended it and that he was never given a release date.

Dr. Peterson treated Linda Italiano over "different conditions". He said that whereas all of her treatment was paid for before 1998, Gundersen refused to pay for similar treatment in 1999 on the ground that it was not medically necessary; that he disagrees with that claim; that he has released her from his care at various times throughout his treatment of her; that Gundersen after 1998 questioned his documentation; that he believes he has supplied the proper documentation; and that the level of coverage for Linda Italiano from 1998 to the present "has changed dramatically" because they "just deny everything". He also said that he treated Linda Italiano many more times before 1998 than he did after 1998 because she has required less treatment and that certain unpaid claims, now totaling about $4,233, are now pending before Gundersen.

On cross-examination, Dr. Peterson testified that WPS in 1996 required him to provide further documentation relating to Linda Italiano's treatment and that while it is not uncommon for insurance companies to require further documentation, "It's what they do with it when they get the records that seems to be the difference." He also said that Linda Italiano needed more treatment when she recently fell and broke her foot and that Gundersen has never told him he no longer can do subluxations.

City employee Lemke testified that Dr. Washa has treated her since 1992 for back pain, arm pain, shoulder pain, and neck pain; that all such treatment was paid for before 1998; that Gundersen has refused to pay for similar treatment; that Gundersen told her that all of her treatment between 1992-1998 was "not medically necessary" (Union Exhibit 27); and that she owes about $340 in unpaid chiropractic bills. She unsuccessfully appealed her denial of chiropractic coverage, at which time she was told that whoever had reviewed her medical file had never reviewed her X-rays and that she never was on a maintenance plan. She said that she asked both the City and Gundersen to provide her with whatever guidelines are being followed in determining whether a claim should be paid, and that both refused to do so. She also said that her chiropractic coverage has changed because "Everything was paid prior to 1998", which is no longer the case even though her treatment now is roughly identical to her pre-1998 treatment.

On cross-examination, Lemke testified that she had 171 chiropractic visits in 7 years and that she has seen a physical therapist and a medical doctor regarding her pain. She also said that she helps fill out her treatment card which measures her level of pain; that some claims were denied because some of Dr. Washa's notes supposedly were deficient; and that she sometimes forgets to do her exercises. She also said that most of her pain is attributed to her job; that she has never filed a worker's compensation claim; that Dr. Washa has told her she has a deteriorating disk in her neck; that her back pain is caused by a prior injury; and that he has taken X-rays of her condition.

City employee Alan Tauscher, who has been treated by Dr. Sharon Fuller, is on a leave of absence because of his back problem and surgery. Gundersen has refused to pay about $400 in chiropractic bills and it told him in December, 1998: "If treatment continues beyond February 8, charges will be denied as not medically necessary." (Union Exhibit 44). He also said that all of his pre-1998 chiropractic bills were paid and never challenged and that his treatment since 1998 has been the same. He filed an appeal and attended a hearing, where he asked for the guidelines being followed, only to be told that the City had them. He then asked City representative Pam Ghouse for the guidelines, only to be told that Gundersen had them. He also said that Dr. Fuller recommended that he see a neurosurgeon and that he subsequently was examined by Dr. Burton M. Onofrio, a neurosurgeon, who told him in 2000: "the chiropractor, heat and massage seems to have been beneficial to him and I think that continuing would be a good idea." (Union Exhibit 70). Tauscher also said that there has been a change in his chiropractic coverage because "you keep getting letters and it never happened before."

On cross-examination, he testified that Gundersen has paid some of his recent bills; that he does not know whether it will pay the remaining unpaid bills; that his chiropractic coverage has changed because "we never had to go through all the paperwork"; and that treatment by neurosurgeons has not relieved his back pain, for which he has had 3 operations. He also said that he has taken many pain medications and that "Ibuprofen does more for me."

City employee Maria Italiano testified that she has received chiropractic treatment for her back and neck for about 9 years and that while WPS sometimes questioned her pre-1998 treatment, it eventually paid for it. She said that Gundersen since 1998 has refused to pay for similar treatment; that she has appealed that refusal; that unpaid bills now total $372; and that she has foregone treatment because of Gundersen's refusal to pay for it.

On cross-examination, she stated that she has never taken medicine for her back pain; that Dr. Cassellius has never referred her to a medical doctor or physical therapist; that she has injured her back at work; that she sees Dr. Cassellius for her back and Dr. Washa for her knees; and that Dr. Cassellius has never given her a date as to when her treatment would end. She also said that she has never seen a medical doctor about her neck pain because: "I don't want to be put on muscle relaxers. I don't want to be put on pain medication. My stomach does not take medication well", and because, "I have a lot of allergic reactions to medicine."

Dr. Cassellius has treated Linda Italiano since 1999 for neck pain, low back pain, headaches and arm pain. He testified that he has seen a "rather dramatic change" since 1998 in getting claims paid; that Gundersen has lowered its payments for certain treatment; and that unlike WPS, Gundersen has not paid for treatment rendered on an intersegmental traction table and certain other kinds of treatment. He also said that some of Linda Italiano's treatment was billed under worker's compensation; that some claims remain unpaid; and that he was never told before 1998 to prepare a four-week care plan. He also said that chiropractic coverage

since 1998 "has dramatically changed" because of "the extreme amount of documentation", the downcoding of services (i.e. the fees that would be paid), and the denial of either chiropractic adjustments of adjunctive therapies. He also said that information requested in a September, 25, 2000 letter (Union Exhibit 63) from Gundersen was never a condition of payment before 1998 and that Gundersen in that letter also refused to pay for mechanical traction that was previously paid by WPS.

On cross-examination, Dr. Cassellius testified that there was only one chiropractic code for manipulations and adjustments before 1997; that Linda Italiano has reached "treatment plateaus on many occasions"; and that he has never referred her to a medical doctor because "she hadn't had a problem that we haven't been able to effectively deal with."

Dr. Sharon Fuller testified that she saw City employees both before and after 1998, and that since 1999, "there's been less coverage for the adjustments" and ultrasound treatment, slower payment, and much more documentation in order to get paid. She has treated City employee Tauscher since 1989 because he has suffered from low back pain, mid-back pain, and neck pain. She also said that Gundersen has failed to pay $455 in claims; that she disputes Gundersen's claim that Tauscher has not improved under her care; and that she referred Tauscher to a neurosurgeon who recommended that Tauscher continue with chiropractic treatment if it gave him relief.

On cross-examination, she testified that payment depends on a number of factors; that some claims were denied before she submitted any documentation; that she is unaware of Gundersen's internal appeal process; that Tauscher's condition varied over time; and that she uses travel cards to mark Tauscher's treatment.

2. City Witnesses

City Employee Benefits Coordinator Ghouse administers the City's self-funded health insurance plan. She testified that there was no chiropractic care in 1978 and that the definition of medical necessity over the years "has not changed or changed very little." She said that WPS before 1998 had denied certain chiropractic claims filed by Christine Abramnowski, Mary Clements, Maria Italiano, George Italiano, and Linda Italiano on the ground that the treatment was not medically necessary and that the City nevertheless agreed to pay for those claims because it retains the power to grant exceptions via the issuance of an "Exception For Claim Denial Form". She also said that WPS formerly made retrospective claim denials as to whether past claims would be paid and that the health plan now is better because Gundersen makes its determinations prospective in nature, thereby guaranteeing payment for services up to that point.

Ghouse also testified that Niedercorn was denied certain claims because they were filed under the City's worker's compensation system which also is self-funded, and that George and Maria Italiano had filed worker's compensation claims that were also denied by WPS. Asked whether there is any difference in coverage between WPS and Gundersen, she replied: "No, it's not. We worked very hard to make sure it didn't."

On cross-examination, she testified that the City paid for all of Maria Italiano's claims by making "an exception" for her; that the Union was not copied with correspondence relating to such exceptions; and that she did not respond to certain of Niedercorn's inquiries (Union Exhibits 14 and 15) because of advice of counsel.

Carla Marcou is employed by Gundersen and Gundersen Lutheran Medical Center as a provider-relations field representative. She formerly worked for WPS between 1992 and 1996 and said that Maria Italiano received "an out-of-pocket exception" which paid for her chiropractic care. She said that unlike Gundersen, WPS did retrospective denials which could result in employees paying for past claims that were denied, and that the present system is more liberal because no out-of-pocket reviews or exceptions are needed "because the claims will not be denied back to the date the medical necessity was not documented and therefore the patient has no financial liability out-of-pocket." She also said that there is no difference in the amount of documentation required by WPS and Gundersen; that there is no difference in the administration of chiropractic claims; and that the health care booklet given to employees under Gundersen is the exact booklet given under WPS except for changing its cover.

On cross-examination, Marcou testified that all of Maria Italiano's chiropractic claims were paid under WPS when the City overrode WPS' initial denials and that the Union never received notice of the City's override policy. She also said that Gundersen refused to pay for future surface EMG studies in 1999 (Union Exhibit 3), and that 15 visits represent the trigger for reviewing chiropractic claims under Gundersen, which is something that is not spelled out in the benefits booklet.

Ann Kiel is employed by Gundersen. She testified that a number of claims "appeared excessive" in 1998; that, "We started requesting records to make medical necessity determinations"; and that the documentation in some cases was "very poor". She said that the standard for medical necessity now used is the same as WPS'; that the plan does cover subluxations; that EMG's are covered for certain treatment; that no claims have ever been denied without receiving the documentation; and that she recommended in 1999 that "we try to educate the chiropractors" by sending them certain information. She also said that all chiropractic bills were paid in 1998; that about 452 visits – or only 5 percent - have not been paid since 1998 (City Exhibit 30); that some of Lemke's and Neidercorn's claims should have been filed under worker's compensation; that it was a "mistake" to tell Lemke that all of her claims since 1993 were not medically necessary; that she never provided Lemke with

Gundersen's guidelines upon Ghouse's advice; and that maintenance therapy is excluded under the plan.

On cross-examination, Kiel testified that she has no direct knowledge of WPS' policies and practices; that she has never reviewed WPS' internal policies; and that she lacks any first-hand knowledge to dispute the testimony of those employees who testified that Gundersen is not now paying for services previously paid for by WPS. She said that Gundersen will not pay for EMG studies; that she cannot dispute Niedercorn's testimony that Gundersen has refused to pay for services previously paid for by WPS; that the denial of some of Neidercorn and Lemke's bills had nothing to do with worker's compensation; and that one of Gundersen's consultants determined that none of Lemke's care from 1993 to 1998 was medically necessary.

Kiel also said that the booklets given to employees do not relate that a review is automatically triggered if there are more than 15 visits, and that some members of the internal appeal process, i.e. Marc Williams and Gary Bryant, sit in and discuss the very cases where they themselves have denied claims, but that they do not vote on those cases. Asked whether she developed new guidelines, she replied:

> Yes, we did. Gundersen Lutheran Health Plan is a relatively new plan and we didn't have any guidelines in place yet for reviewing chiropractic claims for medical necessity, because we used Chirocare Managed Care Network for all of our other groups, so we were developing these guidelines.

She was then asked:

> Q. All right. So I understand the process you followed is you were setting up new procedures for processing of claims, right?
>
> A. Yes.
>
> Q. All right. In addition to that, you were setting up new standards for the determination of medical necessity, weren't you?
>
> A. Based on the industry standard guidelines, that's correct.

Director of Personnel Jim Geissner testified that the Union refused to provide the City with any details when the parties first met to discuss the Union's grievance; that chiropractic care was not provided to City employees until 1988; that the City in the past has paid for claims that were initially denied; and that the City has not cut health benefits. He also said that the City has paid all but about $25,000 worth of claims out of $540,000; that "chiropractors have a vested interest in keeping the checkbook flowing"; and that the City is adhering to industry standards by taking the position it has taken here.

On cross-examination, he said that the City "generally" committed itself to maintaining the same level of benefits when it agreed to Memorandum of Understanding No. 5.

Dr. Kevin McCabe, a chiropractor, reviewed many of the disputed claims herein. He testified that he agreed with the decision to deny those claims; that the notes prepared by Dr. Peterson, Dr. Cassellius, Dr. Washa, Dr. Bentz, Dr. Sterba and Dr. Fuller were all inadequate for one reason or another; and that Gundersen simply requires "the same level of documentation that is required throughout the profession." He also said that he never heard of adjustments for the ear; that he doubted the testimony of Dr. Bentz, Dr. Washa, Dr. Sterba, and Dr. Peterson to the effect they never had a claim denied by WPS and/or that they have experienced special difficulties under Gundersen. He also said that Tauscher (51), Lemke (57), Maria Italiano (57), Doerre (59), George Italiano (79), and Linda Italiano (183), had an inordinate number of visits between January 1, 1998 – March 7, 2001 (City Exhibit 34). He added that he had no first-hand knowledge regarding any possible differences between WPS and the present plan.

On cross-examination, McCabe testified that he has been paid by the City to review the pertinent records and to testify in this proceeding. He said that he never personally examined any of the City employees who testified; that his knowledge about them is limited to having reviewed their files; that he is unfamiliar with WPS' claims review practices; and that the weaknesses he found in Dr. Peterson's documentation were the same weaknesses that existed before 1998 and under WPS.

Charles Stanfield, a benefits consultant, testified that chiropractors are reluctant to refer patients out for other medical treatment; that certain other health plans in other Wisconsin cities exclude maintenance treatment from chiropractic coverage; and that the new service plan between the City and Gundersen added a phrase stating that services would be rendered in a cost-effective level. He also said that he spoke to a WPS representative who told him that WPS before 1998 had used 15 visits as a trigger mechanism for reviewing claims; that the Gundersen plan is identical to the prior WPS plan as far as the "level of benefits" being rendered; and that the definition of medical necessity has remained the same.

On cross-examination, Stanfield testified that he has been hired by the City over the years to perform various duties, and that he has no first-hand knowledge as to how WPS formerly administered certain aspects of the health plan.

POSITIONS OF THE PARTIES

The Union mainly asserts that the City violated Article 3, Section G, of the contract and/or Memorandum of Understanding No. 5 by failing to maintain the pre-January 1, 1998, level of chiropractic care after Gundersen succeeded WPS and became the City's third-party

administrator for the City's self-insurance health plan. The Union thus claims that the grievance is arbitrable and that it "followed all arbitrable procedural requirements"; that Gundersen "has an incentive to deny chiropractic claims"; that the past practice surrounding the "interpretation and/or application of medical necessity. . ." changed after Gundersen became the third party administrator; and that the City has failed "to rebut the testimony of eight union members and their six treating chiropractors that their chiropractic benefits have been dramatically reduced." As a remedy, the Union asks that the City be ordered to restore the *status quo ante* and that it make employees whole for all of their out-of-pocket costs spent on chiropractic care.

The City, in turn, contends that the grievance is not substantively or procedurally arbitrable because an arbitrator here lacks "subject matter jurisdiction" over the issue presented, and because Union members "failed to exhaust their internal remedies available. . ." under the Gundersen plan. The City also claims that the "Union has not met its burden of proof in establishing a unilateral reduction in insurance benefits"; that the "evidence does not support the Union's past practice argument"; that the City's witnesses have effectively rebutted the Union's past practice claim; that Gundersen in fact does not have any incentive to deny chiropractic claims; and that Dr. McCabe successfully rebutted the Union's chiropractic testimony.

DISCUSSION

In resolving the issues presented herein, it is first necessary to point out what this case does *not* involve.

Contrary to the City's claim, it does *not* center on the very narrow question of whether individual employees are or are not entitled to chiropractic care because it is "medically necessary" under the current health plan. Instead, the larger issue here turns on whether the City has violated the past practice and the parties' agreements by changing the interpretation and application of the term "medically necessary" that was formerly followed by WPS, the City's prior third-party administrator up until Gundersen assumed that role on January 1, 1998. The Union therefore correctly points out that the issue here involves what changes, if any, were made once Gundersen became the third-party administrator in January, 1998, and whether any such changes violated the parties' contractual requirements. Since individual employees cannot raise these larger questions when they have been denied chiropractic care, the instant proceeding is the proper forum for determining whether the parties' contractual agreements have been violated.

In this connection, Article 3, Sections G and H, of the contract state:

ARTICLE 3
HEALTH INSURANCE

G. Level of Benefits
The health insurance benefits shall be no less than the level of benefits quoted by WPS on May 2, 1978.

H. City's Right to Name Carrier/Self Insure
The City shall have the right to name the health insurance carrier and/or to self insure the level of benefits described in paragraph G above. (Emphasis added.)

In addition, Memorandum of Understanding No. 5 of the parties' collective bargaining agreement states:

. . .

> This letter is to confirm the understandings reached by the parties during negotiations for the 2000-2001 collective bargaining agreement. The parties both believe that additional discussions regarding the health insurance provisions contained in the 2000-2001 collective bargaining agreement may need to take place. The parties further agree that the level of health insurance benefits, generally, and the practices concerning UCR charges as of 12/31/93, specifically, shall not be altered or reduced unless any such changes are negotiated in the contract.

. . .

The Union asserts that the City has violated this latter proviso because it has reduced the level of benefits formerly provided by WPS through the different interpretation and application of the term "medically necessary".

Since health care benefits can be reduced by the simple expedient of giving different meanings to the same terms and/or by following different administrative procedures even though the terms themselves have not changed on the face of a plan document, the Union's challenge is proper under Article 2 of the contract, entitled "Grievance Procedure", which states:

. . .

Matters involving the interpretation, application or enforcement of this contract shall constitute a grievance under the provisions set forth below:

Step 1. The employee shall meet with and discuss the grievance with their immediate supervisor, with union representative present, within thirty (30) calendar days or by the first regular working day following thirty (30) calendar days, of the date the employee should have known of the grievable matter. If no solution is reached, the employee may,

Step 2. Reduce the grievance in detail to writing within seven (7) calendar days following the meeting, using an "Initiation of Grievance Form" and submit it to the supervisor who will forward it to the Director of Personnel, who, with the Department Head, within ten (10) working days (Monday through Friday, excluding holidays) shall attempt to resolve the grievance and answer the grievance in writing. Within those ten (10) working days, representatives of the Union, the grievant, the Personnel Director, the Department Head and the supervisor shall meet to attempt a resolution of the disputed matter.

Step 3. If a satisfactory solution cannot be reached, the Union may, within thirty (30) calendar days of the grievance meeting, appeal to the Wisconsin Employment Relations Commission who will appoint a neutral arbitrator. The Union shall copy the City on all requests for grievance arbitration, the findings of the arbitrator to be final and binding on the parties hereto.

It is understood that the 30 calendar day requirement to file a grievance in Step #1 above shall be interpreted to mean the next regularly scheduled working day that both the employee and supervisor are present at work.

The parties may by written agreement extend the time limits contained in the grievance procedure.

The arbitrator shall not add to, or subtract from the terms of this agreement.

. . .

There is nothing in this part of the contract – or any other part of the contract for that matter – that excludes health insurance disputes from the contractual grievance procedure.

To the contrary, Article 2 goes on to state: "The grievance procedure set forth herein shall be the exclusive complaint of any employee as to any matter involving the interpretation or application of this agreement." Accordingly, it must be assumed that grievances can be filed over "the interpretation, application or enforcement of this contract. . .", including Memorandum of Understanding No. 5, supra, which guarantees that the preexisting level of health care benefits shall continue.

The March 13, 2000, grievance (Joint Exhibit 4) also was timely filed because it centers on the City's alleged ongoing violation of Memorandum of Understanding No. 5 by refusing to provide the same level of chiropractic benefits that previously existed when WPS was the third-party administrator before Gundersen took over in January, 1998. As such, it is a continuing grievance and can be filed at any time under the continuing violation doctrine. See Elkouri and Elkouri, *How Arbitration Works* (BNA, 5th Ed., 1997), pp. 281-282. In addition, the Union properly filed its grievance within 30 days of first learning from its members that they were being denied chiropractic care because it did not have any prior knowledge of their problems. For, as the Union's brief rightly points out, the Union did not file its grievance earlier because: "It is very difficult for a union to discover when health insurance coverages are being changed" given the fact that insurance benefits represent "a private, privileged matter for each employee." The Union therefore complied with the 30-day filing requirement set forth in Article 2, Step 1, above.

The City nevertheless argues that the grievance cannot be heard because it is not "ripe" and because all but one employee did not first exhaust the internal grievance procedure set forth in the Gundersen plan.

There also is no merit to this claim – which was not formally raised by the City until the first date of the hearing - because there is no contractual requirement that employees must do so. In addition, the City's claim runs contrary to Article 25 of the contract, entitled "Amendment Provision", which states: "This agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Union wherein mutually agreeable. . ." Here, no such written agreement relating to an exhaustion requirement exists.

In addition, the City's challenge to arbitrability claims in essence that the grievance procedure set forth in Article 2 quoted above should in effect be read as providing: "Matters involving the interpretation, application or enforcement of this contract – except for Memorandum of Understanding No. 5 and Article 3, Section G, dealing with the level of health insurance benefits which can only be addressed in a health plan's internal appeals system – shall constitute a grievance under the provisions set forth below." But, the contract does not contain the underlined exception that the City is insisting must be read into this part of the contract. Since an arbitrator under Article 2 is elsewhere prohibited from adding to the terms

of the contract in the manner urged by the City, its attempt to change the language in this fashion cannot be sustained. Accordingly, it is immaterial whether such an appeal procedure is mandated under state law, as that is a separate question from whether such a procedure must be exhausted before the Union can grieve to enforce the provisions of the collective bargaining agreement.

Moreover, any such exhaustion requirement – which would be limited to the individual circumstances of each individual employee each and every single time that chiropractic care is denied - would prevent the Union from challenging the *wholesale* changes it asserts have taken place in violation of the contract and it likewise would prevent the Union from obtaining the wholesale relief it seeks here. That is why the City's approach, if adopted, would lead to endless, piecemeal litigation and why it would not address the broader issues raised by the Union which can be, and have been, fully addressed in this proceeding.

Given the broad presumption of arbitrability noted by the courts, I therefore find the grievance here is arbitrable. See UNITED STEELWORKERS OF AMERICA V. WARRIOR AND GULF NAVIGATION CO., 363 U.S. 574 (1960); UNITED STEELWORKERS OF AMERICA V. AMERICAN ENTERPRISE WHEEL AND CAR CORP., 363 U.S. 593 (1960); JEFFERSON JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASS., 78 WIS. 2D 94 (1977).

The City further argues that the Union should have earlier identified the individual employees who complained about their chiropractic care. As I ruled at the hearing, I agree that the Union under the Municipal Employment Relations Act was legally obligated to supply the City with such information. However, nothing in the contract requires the Union to do so and the City itself did not file a prohibited practice complaint to get this information. Moreover, Arbitrator Lee Crowley, who earlier was designated to hear this matter, ruled that such information did not have to be provided. While I disagree with that ruling, the principle of *res judicata* must be applied here because the City at the beginning of the January 18, 2001, hearing had this information and because there is no proof that the City was prejudiced at the hearing before me by not having this information earlier.

Turning now to the substantive merits of the grievance, it must be pointed out here that this record is factually complex and that there was an enormous amount of very detailed testimony from the various witnesses who testified. As a result, it is impossible to here detail every nuance of what they said. I therefore have summarized the most salient points of their testimony. This is not to suggest that the entire record has not been considered. It has.

The combined testimony of City employees Niedercorn, Lemke, Doerre, Hammond, George Italiano, Maria Italiano and Tauscher, which I credit, establishes one paramount fact: All of them have seen changes in their chiropractic health benefits after Gundersen took over from WPS as the third-party administrator.

The combined testimony of Drs. Bentz, Washa, Sterba, Peterson, Fuller, and Cassellius, which I also credit, establishes another paramount fact: All of them have seen changes in how chiropractic health benefits have been provided by Gundersen, including the need for completely new documentation, after Gundersen took over from WPS on January 1, 1998.

In the face of these massive changes, the City argues: "The Union has not met its burden of proof in establishing a unilateral reduction in insurance benefits."

But, how can that possibly be when: 1.), chiropractic care has been denied to Niedercorn even though he received similar treatment before 1998 and even though a neurosurgeon with the Gundersen Lutheran Clinic wrote that chiropractic care for him "is a very reasonable treatment alternative, and certainly cheaper in the long run" (Union Exhibit 6); 2.), Gundersen claimed that all of Lemke's chiropractic care from 1993 to 1997 was not "medically necessary" even though WPS determined otherwise; 3.), Gundersen claimed that certain treatment for Doerre was not "medically necessary" even though WPS determined otherwise for similar treatment; 4.), Gundersen claimed that certain chiropractic treatment given to Linda Italiano was not medically necessary even though WPS determined otherwise for similar treatment; 5.), Gundersen told Dr. Bentz that charges for certain surface EMG studies will not be covered in the future even though WPS paid for them; 6.), Gundersen told Hammond that it would not pay for future chiropractic treatment after March 13, 2000, unless it was for "a new condition" even though WPS had determined otherwise for similar treatment; 7.), Gundersen informed Tauscher that it would not pay for treatment after February 8, 2000, because it was not "medically necessary" even though WPS had determined otherwise for similar treatment and even though a neurosurgeon wrote: "the chiropractor, heat and massage seems to have been beneficial to him and I think continuing would be a good idea."

In the face of all this, the City claims that the Union's chiropractic testimony was "successfully rebutted by City witness Dr. McCabe." It certainly is true that Dr. McCabe testified extensively as to why he believed all of the disputed chiropractor bills were properly denied based upon the standards followed elsewhere and why he believed some of the documentation here was below commonly-accepted professional standards.

But, what goes on elsewhere is not the issue here. Rather, the issue here turns on what were the pre-1998 level of benefits relating to chiropractic treatment and chiropractic documentation, as they represent the level of benefits that must be maintained under this collective bargaining agreement and Memorandum of Understanding No. 5. Since McCabe admitted on cross-examination that he had no personal knowledge of WPS' prior claim review process, his testimony cannot be given much weight when it is weighed alongside the combined, composite testimony of Drs. Bentz, Cassellius, Fuller, Peterson, Sterba and Washa all of whom have direct personal knowledge and all of whom testified in substance that there

has been a major change between the way Gundersen and WPS have administered and paid for the chiropractic health care benefits in dispute.

It therefore is immaterial whether some of the treatment here is not medically necessary and/or whether some of the documentation is not proper under established health care guidelines established elsewhere. What matters here is what the parties have bargained for in Memorandum of Understanding No. 5. As to that, Memorandum of Understanding No. 5 protects and perpetuates the level of benefits formerly provided by WPS even if they were not provided in any other health care plan, and even if some employees have taken advantage of WPS' and the City's largesse by seeing chiropractors once a week for several years. That is why this is not a Cadillac plan. It, instead, more appropriately can be described as a Rolls Royce plan, as a Cadillac pales in comparison to what was formerly provided by WPS and/or the City before 1998, i.e. everything.

In this connection, the record establishes that Linda Italiano had about 183 chiropractic visits between January 1, 1988, and March 7, 2001 (City Exhibit 5). This most certainly constitutes maintenance care as that term is used elsewhere in the health care industry. It therefore is no wonder that the City has tried to rein in its chiropractic costs.

However, WPS and/or the City paid for all of Linda Italiano's 77 or so visits in 1996 and 56 or so visits in 1997. Having paid for that treatment then, the City cannot now yank the plug on continued treatment since Memorandum of Understanding No. 5 provides for such continued treatment irrespective of costs.

I therefore want to emphasize the very narrow scope of my ruling below. Nothing herein should be misconstrued to mean that I favor or that I think it is right for certain individuals to receive excessive treatment. All that is being decided here is whether Memorandum of Understanding No. 5 has been violated. If the City therefore wants to curtail its chiropractic costs – which it most certainly has the right to do – it must do so at the bargaining table rather than through the back door measures it and Gundersen have taken here.

That therefore raises the question of what remedy is appropriate to rectify the City's contractual breach.

As to that, the City must restore the *status quo ante* that existed before January 1, 1998, when WPS was the plan's administrator and when the City granted exceptions for those claims WPS initially denied. The City thus must immediately pay all outstanding chiropractic bills of the above-named employees (including Linda Italiano), and it also must immediately reimburse all of them for any out-of-pocket expenses they may have spent on chiropractic care because of the City's refusal to pay for it. (Such payment need not be made for any other City employees because their claims are not part of this proceeding.) The City in the future also must pay for any chiropractic care for those above-named employees (including Linda Italiano)

that is similar to what was provided for under WPS and/or paid by the City. As a result, the City, through its agent Gundersen, is expressly precluded in the future from denying payment on the ground that any such treatment for these above-named employees is "not medically necessary." In addition, the City in the future must pay for all such treatment based on the kind of documentation that doctors provided to WPS before January 1, 1998. As a result, the City, through its agent Gundersen, is expressly precluded in the future from denying payment on the grounds that any such documentation is inadequate.

As for other bargaining unit members who were not directly involved in this proceeding, the City, through its agent Gundersen, is expressly precluded in the future from: (1), denying payment for any chiropractic treatment that is the same or similar to what was previously paid for under WPS and/or the City; and (2), denying payment in the future because of a purported lack of proper documentation if such documentation was previously accepted by WPS and/or the City.

In other words, the City is contractually required pursuant to Memorandum of Understanding No. 5 to adhere to the level of benefits, which includes documentation, previously provided up until January 1, 1998. If the City fails to do that, and if chiropractic treatment is not properly provided based upon the pre-January 1, 1998, level of benefits for all bargaining unit employees and their dependents, I will consider whatever future remedy the Union asks for after it specifically identifies all such nonpayments to the City and after the City has had the opportunity to respond.

In light of the above, it is my

AWARD

1. That the grievance is arbitrable.

2. That the City violated Memorandum of Understanding No. 5 of the contract after it changed the third-party administrator for its self-insurance plan and after certain employees were denied chiropractic benefits under the contractually-provided health insurance plan.

3. That to rectify that contractual violation, the City shall take all of the remedial action stated above which includes: (1), paying all outstanding chiropractic bills of the above-named employees and dependents who testified herein; (2), reimbursing all said employees and dependents who testified herein for any out-of-pocket chiropractic expenses that have not been paid by the City; (3), paying for all of the chiropractic treatment that said employees and dependents receive in the future if such treatment is the same or similar to what WPS and/or the City paid for in the past; (4), honoring all documentation that chiropractors submit in the future if that is the kind of documentation that was accepted by WPS and/or the City before

January 1, 1998; and (5), paying for all future chiropractic treatment given to any other bargaining unit employees and their dependents if such treatment is the same or similar to what WPS and/or the City paid for in the past.

4. That to resolve any questions that may arise over application of this Award, I shall retain my jurisdiction for at least 90 days.

Dated at Madison, Wisconsin this 12th day of December, 2001.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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