OPINION NO. 73-085

Syllabus:

The Bureau of Workmen's Compensation and the Industrial Commission have discretion to approve or disapprove the cost of chiropractic services, but may not approve the cost of any such services rendered illegally in violation of the State Medical Board's rules respecting the practice of chiropractic. However, the Bureau and Commission are bound only by the duly adopted rules of the Medical Board.

To: Anthony R. Stringer, Administrator, Bureau of Workmen's Compensation, Columbus, Ohio

By: William J. Brown, Attorney General, August 28, 1973

I have before me your predecessor's request for my opinion, which reads as follows:

> The Bureau of Workmen's Compensation and the Industrial Commission have for many years recognized limited medical practitioners to the extent of their license by the State Medical Board. Among such limited practitioners are Chiropractors. Many industrial claimants exercising their right to be treated by a physician of their choice will select a local chiropractor. The Ohio State Medical Board, under its published Rules and Regulations, defines chiropractic to be the detecting and adjusting by hand only of vertebral subluxations. This definition it appears has remained unchanged since 1916. Pursuant to this definition doctors of chiropractic since the enactment of the Medical Practice Act have always examined in general diagnostic procedures.
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> Because of the claimant's right to select his own physician and pursuant to Section 4123.95 Ohio Revised Code, requiring a liberal construction on behalf of the claimant, the Medical Section of the Bureau and the Industrial Commission had up until December of 1970, quite liberally approved bills submitted on behalf of claimants for chiropractic treatment. In December of 1970, the Ohio Medical Board published what they termed to be a 'position paper'. I have attached herewith a copy of this paper regarding the extent of chiropractic practices. This position paper reiterated the definition set forth above but went on to set forth a 'comment' which seems to try and further refine the general definition. Following publication of this position paper the Bureau and Commission Medical Section adopted a much stricter interpretation with

regard to the approval or disapproval of bills submitted for treatment by chiropractors. As a result of this new interpretation a great deal of discontent has arisen. This comes in part from claimants whose bills for service rendered by a chiropractor are being disapproved by the Bureau and the claimant has been forced to assume the obligation for the service and also from the chiropractors themselves who seem to feel that they are rendering a legal service within the broad definition of their practice, yet their bills are being turned down under the strict interpretation adopted as a result of the position paper. This has also resulted in a particular hardship in some cases where treatments had been paid on a continuing basis for a considerable length of time by the Bureau only to have the claimant informed after December, 1970, that these same treatments would no longer be authorized or paid by the Bureau.

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The statutes of Ohio and the rules and regulations of the Ohio State Medical Board authorize a person with a license to practice chiropractic, to examine, diagnose, and to assume responsibility and care of patients. This position has been supported by the Ohio Supreme Court in the case of Willett v. Bowekamp 134 O.S. 285.

In view of this situation, I am hereby requesting an opinion from you with regard to the legal effect of the position paper published by the Ohio State Medical Board in December 1970, and in particular to the interpretation set forth in the position paper under the heading comment . I would point out that this interpretation is not to be found in the printed rules and regulations of the Ohio Medical Board. If it is your opinion that this interpretation has no legal or binding effect upon the Bureau of Workmen's Compensation and the Industrial Commission, I would further request your opinion as to the extent of the authority of the Bureau and the Commission to interpret and recognize chiropractic treatment for industrial claimants. Do the Bureau and Industrial Commission have the right under the provisions of the Ohio law to return to the more liberal interpretation of chiropractic that was applied prior to December of 1970? Do the Bureau and Industrial Commission have the right under the Ohio law to exercise discretion in the interpretation and recognition as to what constitutes chiropractic practice within the broad general guidelines of the definition established by the Ohio Medical Board in 1916?

In In re Wilton Hardware Co., 19 Ohio App. 2d 157, 160 (1969), the authority of administrative agencies was defined as follows

> An administrative agency can exercise only such jurisdiction and powers as conferred upon it by the Constitution or statute which created it or vested it with such power.

The jurisdiction of the Ohio State Medical Board over chiropractors was established by R.C. 4731.15, which provides, in part, as follows

> The state medical board shall also examine and register persons desiring to practice any limited branch of medicine or surgery, and shall establish rules and regulations governing such limited practice. Such limited branches of medicine or surgery shall include chiropractic, * * * and such other branches of medicine or surgery as the same are defined in section 4731.34 * * *.

The powers and duties of the State Medical Board are outlined in R.C. 4731.20, as follows:

> Sections 4731.07, 4731.08, and 4731.14 to 4731.28, inclusive, of the Revised Code, shall govern the state medical board, all of the officers mentioned therein, and the applicants for and recipients of limited certificates to practice a limited branch of medicine or surgery. In addition to the power of the board to revoke and suspend certificates provided for in Section 4731.22 of the Revised Code it may also revoke or suspend the certificate of any one to whom a limited certificate has been issued upon proof of violation of the rules or regulations established by the board governing such limited practice.

It will be noted that R.C. 4731.15, provides for the establishment of rules and regulations by the State Medical Board governing limited practitioners and that R.C. 4731.20 provides penalties for violation of said rules and regulations. It will be further noted that no mention is made in the preceding statutes of interpretations or other such advisory opinions by the State Medical Board. In light of the restrictive language in In re Wilton Hardware Co., supra, it would follow that a comment by the State Medical Board, which is not included in the printed rules and regulations of said board on file with the Secretary of State, would have no legal effect as to the limited practitioners expressly governed by the statutes in question. That is, any action taken by the State Medical Board pursuant to Section 4731.20, Revised Code, against a limited practitioner must be based on a duly adopted rule of the Board.

The Medical Board can adopt or amend rules and regulations only in accordance with the provisions of the Administrative Procedure Act, R.C. 119.01 to 119.13. This conclusion is compelled by R.C. 119.02, which reads as follows:

> Every agency authorized by law to adopt, amend, or rescind rules shall comply with the procedure prescribed in sections 119.01 to 119.13, inclusive, of the Revised Code, for the adoption, amendment, or rescission of rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule.

R.C. 119.01 (A) defines "agency" as follows:

> "Agency" means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in the bureau of unemployment compensation, the civil service commission, the department of industrial relations, the department of liquor control, the department of taxation, the industrial commission, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13, inclusive, of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses. * * *

In construing these provisions, the court in In re Petition, 2 Ohio App. 2d 237, 240 (1965) stated as follows:

> Under Section 119.01 (A), Revised Code, there are three ways in which a state board may be subjected to the Administrative Procedure Act, namely:
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> 1. Certain boards are specifically named.
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> 2. The legislation concerning a board specifically subjects such board to this act.
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> 3. A board which has authority to issue, suspend, remove or cancel licenses.

The Medical Board is not specifically named in R.C. 119.01 (A), nor does R.C. Chapter 4731. specifically subject it to the terms of the Administrative Procedure Act. However, R.C. 4731.20

gives the Board authority to issue, suspend, revoke or cancel licenses. Therefore, in light of the foregoing authority, it is subject to the Administrative Procedure Act in exercising its rulemaking powers. I understand that the requirements of public notice and hearing, imposed by R.C. 119.03, were not met in adopting the "comment." Therefore, under R.C. 119.02, it is legally invalid as a rule. Cf. State, ex rel. v. Board, 29 Ohio St. 2d 198 (1972), in which the court held, in the first branch of the syllabus, as follows

> "Where the State Medical Board seeks to withdraw the standing accorded a school giving instruction in limited branches of medicine or surgery pursuant to R.C. 4731.19, procedural due process requires notice and an opportunity for the school to be heard.

If the "comment" has no legal effect with respect to the limited practitioners specifically under the jurisdiction of that board, it follows that the same would have no effect on another state agency such as the Bureau of Workmen's Compensation.

With respect to duly promulgated rules of the Medical Board defining the practice of chiropractic, the Bureau and Commission are required to observe such rules. Payments can be made to chiropractors, or other limited practitioners for medical services rendered to industrial claimants, only to the extent of the limited practitioner's license.

The regulation of all branches of the practice of medicine has been committed to the Medical Board. State, ex rel. Copeland v. Medical Board, 107 Ohio St. 20, 27-28 (1923). Williams v. Scudder, 102 Ohio St. 305 (1921). Pursuant to this authority the Medical Board adopted rules governing the practice of chiropractic medicine. These rules have the force and effect of law, Kroger v. Glander, 149 Ohio St. 120, 125-126 (1948), and the Medical Board's interpretation of its own rules is entitled to great weight. State, ex rel. Wildow v. Industrial Commission, 129 Ohio St. 573, 580-581 (1934). The weight of authority seems to be that there can be no recovery for medical services rendered without a license. See 42 O. Jur. 2d 690-692.

However, the Bureau and Commission have wide discretion to approve or disapprove payments for the services of limited practitioners, rendered within the scope of the practitioner's license. R.C. 4123.66 provides

> In addition to the compensation provided for in sections 4123.01 to 4123.94, inclusive, of the Revised Code, the industrial commission shall disburse and pay from the state insurance fund such amounts for medical, nurse, and hospital services and medicine as it deems proper and, in case death ensues from the injury or occupational disease, reasonable funeral expenses shall be disbursed and paid from the fund in an amount not to exceed seven hundred fifty dollars. The commission shall reimburse anyone, whether dependent, volunteer, or otherwise, who pays the funeral expenses of any workman whose death ensues from any injury or occupational disease as provided

> in this act. The commission may adopt rules and regulations with respect to furnishing medical, nurse, and hospital service and medicine to injured or disabled employees entitled thereto, and for the payment thereof. * * *

This section has been interpreted to grant broad discretion on the part of the Industrial Commission in the determination of payments to be made for medical services. See the recent case of State, ex rel. Breno v. Indus. Comm. 34 Ohio St. 2d 227 (1973). In that decision, the Court quoted at 229 with approval from State, ex rel. Campbell v. Indus. Comm., 28 Ohio St. 2d 154 (1971), in the following discussion:

> The court, in the Campbell case, at page 157, determined that R.C. 4123.651, although allowing injured employees to select their own physicians and medical services, also grants broad discretion to the Industrial Commission to approve or disapprove the cost of such services.

The Industrial Commission, pursuant to its statutory authority, has determined that payments shall be made to limited practitioners for medical services rendered to industrial claimants to the extent of the limited practitioner's license. The Ohio State Medical Board has adopted the following rules for the purpose of defining the extent of chiropractic practice:

> "B-1-01 The Board had defined the work 'limited branch or branches of medicine or surgery' to mean those branches of medicine or surgery which provide for a simple therapeutic system, appliance, application, operation or treatment for the relief or cure of a wound, fracture or bodily injury, infirmity, or disease, which does not involve the use of drugs or major surgery.
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> "B-1-02 (I) Certificates authorizing the practice of any limited branch or branches of medicine or surgery, under group 1, authorize the holders to examine and diagnose and to assume responsibility and care of patients.
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> "B-1-05(A) Chiropractic is hereby understood to be the detecting and adjusting by hand only of vertebral subluxations."

As can be seen, these rules are rather general in nature and are subject to varying degrees of interpretation. See Curtis v. State Medical Board, Case No. 235,837, Franklin County Court of Common Pleas, November 30, 1972, reversed and vacated on jurisdictional grounds, Case No. 73AP-31, Franklin County Court of Appeals, June 26, 1973; and State v. DeVido, 35 Ohio App. 2d 9 (1973).

Moreover, it is difficult to determine just what change in the practices of the Bureau and Commission resulted from the comment. The comment itself reads as follows:

> The definition of chiropractic is clearly defined as being the physical detection and adjustment by hand only of vertebral subluxations. Within the definition of chiropractic, there is nothing that suggests that this limited practitioner can take blood tests, do urinalyses, or perform any other kind of diagnostic techniques which do not have to do with hand detection of vertebral subluxations. Diagnostic X-rays may be used as limited by the definition of chiropractic (spine only).
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> As far as Item 3 MB-1-02 is concerned, this paragraph gives the right to limited Group 1 certificate holders to examine and diagnose and to assume responsibility and care of patients as defined in the limited branch concerned. Therefore, the Board interprets MB-1-02 as meaning that chiropractors may have patients and assume responsibility for the care of patients who have been diagnosed by hand as having vertebral subluxations. If in the opinion of the chiropractor after his physical examination by hand only, the patient does not have a vertebral subluxation, then he should promptly and immediately refer the patient to a licensed doctor of medicine or doctor of osteopathic medicine.

The case law reveals little about the practical construction given to Rule MB-1-02 and MB-1-05 (A) prior to 1970. Since the rules themselves are not self-explanatory, the exact extent of the change of construction caused by the comment cannot be determined on the basis of the facts before me.

However, the authority discussed previously imposes a general rule which may be applied to the facts: insofar as the "comment" effected a change in the rules of the Medical Board, as opposed to a mere clarification of those rules, it was invalid. Hence, any substantial change in the construction of the existing rules was unauthorized, because it was not properly adopted under the terms of the Administrative Procedure Act, R.C. 119.01 to 119.13. Consequently, the Bureau and Commission are justified in returning to the interpretation of Rule MB-1-05 (A) applied from 1916 to 1970, because that Rule was not changed in 1970. If the Medical Board wishes to change its rules with respect to the practice of chiropractic, the proper method is by formal amendment pursuant to the Administrative Procedure Act. Such amendment, when and if it is made, will bind the Bureau and the Industrial Commission.

The foregoing discussion also provides the answer to your second question. The Bureau and Commission do have authority to exercise discretion in awarding payment for chiropractic treatment, within the guidelines established by the rules of the Medical Board.

In specific answer to your question, it is my opinion and you are so advised that the Bureau of Workmen's Compensation and the Industrial Commission have discretion to approve or disapprove the cost of chiropractic services, but may not approve the cost of any such services rendered illegally in violation of the State Medical Board's rules respecting the practice of chiropractic. However, the Bureau and Commission are bound only by the duly adopted rules of the Medical Board.