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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

EULA MAE HIETT

Petitioner,

v.

MISSOULA SCHOOLS GROUP INSURANCE AUTHORITY,

Respondent/Insurer,

MONTANA STATE FUND and LIBERTY NORTHWEST INSURANCE CORPORATION,

Intervenors.

WCC No. 2001-0278

REPLY BRIEF

Procedural and Factual Background

On May 11, 2005, this Court held an in-person conference to identify legal issues and set a briefing schedule. This Court identified two threshold issues:

1. Whether the *Hiett* decision abrogates the exclusion of palliative and maintenance care, § 39-71-704(1)(f), MCA?

2. Whether the secondary medical services section, § 39-71-704(1)(b), MCA, applies under any circumstances or whether it was wholly abrogated by the *Hiett* decision?

On June 24, 2005, Eula Mae filed her opening brief. She now files this reply brief.

Discussion

In her opening brief, Eula Mae argued that a common fund applies to all primary medical benefits that insurers erroneously denied, as either secondary medical services, palliative care, or maintenance care after July 1, 1993. She also argued that the categories of secondary medical services, palliative care, and maintenance care only come into play after a worker sustains medical stability.

In their opening brief, the insurers seek to limit the scope of the common fund by concocting words and phrases that are not used in the Act. The insurers then use these words and phrases – "typical injury" and "chronic condition" -- to fabricate distinctions that have no legal basis. The insurers embark on this jurisprudential frolic and detour to muddle the Supreme Court's decision in *Hiett* and avoid the purpose of the Act and the 1993 Amendments, which is to provide injured workers with medical benefits.

This Court must interpret the statutes at issue in light of the purpose of the Act. The Montana Supreme Court wrote: "This Court must attempt to discern and give effect to the intentions of the Legislature, and construe each statute so as to avoid an absurd result and to give effect to the purpose of the statute." *Hiett*, ¶ 32. The purpose of the act is to provide injured workers with medical benefits. The Act provides: "It is the objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and *medical benefits* to a worker suffering from a work-related injury or disease." Section 39-71-105(1), MCA, emphasis added. The legislative history of the 1993 Amendments was to contain costs and "to provide timely and effective medical services to injured workers." *Hiett*, ¶ 36. In *Hiett* the Montana Supreme Court wrote:

> Accordingly, in order to arrive at a reasonable result that will serve the purposes for which the Act was intended, we interpret the phrase "achieving" medical stability and "achieved" medical stability as used in §§ 39-71-116(25) and 39-71-704(1)(f), MCA (1995), respectively, to mean the *sustainment* of medical stability. Given this interpretation, a claimant is entitled to such "primary medical services" as are necessary to permit him or her to *sustain* medical stability.

Id., ¶ 35, emphasis original. The Act makes no distinction between a "typical injury" and a "chronic condition." The insurers' construction of the statutes at issue in this case avoids the purpose of the Act.

A. The Act does not make a distinction between a "typical workers compensation injury" and an injury involving a "chronic condition."

In their briefs, the insurers concoct a distinction between "typical workers compensation injury" and an injury involving a "chronic condition." This distinction has no basis in the Act.

Section 39-71-704, MCA (1995) -- the statute that provides workers with medical benefits -- does not include the phrase "typical workers compensation injury" or the phrase "chronic condition." Section 39-71-116, MCA -- the statute that defines important terms used in the Act -- does not include either of the phrases the insurers have created. More importantly, the rules of statutory construction prohibit this Court from adopting the insurers' phrases. "In the

construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. . . ." Section 1-2-101, MCA. To insert the phrases "typical workers compensation injury" and "chronic condition" into the Act is to insert what has been omitted. In interpreting the Act the Montana Supreme Court plainly held:

> Accordingly, in order to arrive at a reasonable result that will serve the purposes for which the Act was intended, we interpret the phrase "achieving" medical stability and "achieved" medical stability as used in §§ 39-71-116(25) and 39-71-704(1)(f), MCA (1995), respectively, to mean the sustainment of medical stability. Given this interpretation, a claimant is entitled to such "primary medical services" as are necessary to permit him or her to sustain medical stability.

Hiett, ¶ 35, emphasis added. Whether a claimant's injuries are "typical" or "chronic" is irrelevant. The insurers' distinction is a fiction.

B. The Act does not define maximum medical improvement ("MMI") as a "fine point in time" or "an ongoing process."

Based on their unfounded distinction between a "typical" injury and a "chronic" injury, the insurers argue that workers with typical injuries reach MMI at a finite point in time and that for workers with chronic conditions MMI is an ongoing process. In its brief, the State Fund wrote:

> For "typical injuries" and recoveries, MMI is still measured by a finite point in time, so *Hiett* appears to have no applicability to non-chronic conditions. However, for injuries involving chronic conditions, MMI cannot be measured by a finite point in time. Instead, MMI is an ongoing process which requires certain "primary medical services" that are necessary for a claimant to sustain medical stability.

State Fund's Opening Brief Regarding Scope of Decision, 4 (Jun. 24, 2005). The Act does not make such fine distinctions.

The Act specifically defines MMI. It provides:

> "Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.

Section 39-71-116(17), MCA (1995). The meaning of this statute in the context of the Act was squarely addressed in *Hiett*. The Court wrote:

> Based on the definition of "medical stability" found at § 39-71-116(17), MCA (1995), we acknowledge that MMI is reached when the underlying condition has stabilized to the point that no further material improvement would be reasonably

> expected from primary medical treatment. However, the question presented here is how or at what point does one "achieve" medical stability? The statutes do not tell us. Is it through the start-stop-start routine of medical services described by the court in its hypothetical, or is it through reaching and maintaining a plateau of stability? Since neither the statutes nor our case law address this pivotal question, we must apply rules of statutory construction to determine what the legislature meant when it spoke in terms of a claimant "achieving" medical stability.

Hiett, ¶ 31. The Court ultimately held that "a claimant is entitled to such 'primary medical services' as are necessary to permit him or her to *sustain* medical stability." *Id.*, ¶ 35, emphasis original. The Court recognized:

> Some medical results once achieved truly constitute an "end," an "attainment," a "completion" – the complete healing of a fracture, or carpal tunnel surgery which resolves a claimant's condition *can* qualify as such achievements. "Achieving" a level of tolerable pain or a relatively healthy mental attitude in the face of a chronic condition, however, is not such a discrete "end." Rather it is an ongoing process.

Id., ¶ 33, emphasis added. A close reading of this passage reveals that Court did not write that such medical results *necessarily* qualify as such an end; rather, the Court wrote such results *can* qualify. *Id.* In other words, the central inquiry remains: Does the medical service – carpal tunnel surgery or any other medical service – sustain a workers medical stability? If it does, it is a primary medical service. "[A] claimant is entitled to such 'primary medical services' as are necessary to permit him or her to sustain medical stability." *Hiett*, ¶ 35, emphasis original.

C. Workers are entitled to medical benefits under the Act that are necessary for them to sustain medical stability even after they reach MMI.

In their brief, J.H. Kelly, LLC, contends that "[m]aximum medical improvement is the trigger for closure of a claim." Br. of J.H. Kelly, LLC, 9 (Jun. 23, 2005). This argument is incorrect.

In *Hiett*, the Montana Supreme Court wrote:

> "Medical stability," as used in the statutes above, is synonymous with "maximum healing" and "maximum medical healing" and means "a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment." Section 39-71116(17), MCA (1995). As will be discussed below in further detail, *the WCC concluded that medical stability was also synonymous with MMI. Such a conclusion is supported by authority from other jurisdictions.*

¶ 19. The Court also held: "[A] claimant is entitled to such 'primary medical services' as are necessary to permit him or her to *sustain* medical stability." *Hiett*, ¶ 35, emphasis original. Thus, even after workers reached MMI, they are still entitled to primary medical benefits that

sustain their medical stability.

Conclusion

The flaw in the insurers' analysis is that they fail to recognize that the categories of secondary medical services, palliative care, or maintenance care only come into play *after* a worker has sustained medical stability. *Hiett v. Missoula County Pub. Schs.*, 2003 MT 213, ¶ 34, 317 Mont. 95, ¶ 35, 75 P.3d 341, ¶ 35. The Montana Supreme Court was absolutely clear regarding this point. It wrote: "These categories of care come into play only *after* one has 'achieved' medical stability as we interpret the phrase here." *Hiett*, ¶ 34, emphasis original. The Court interpreted "achieved" medical stability to mean sustainment of medical stability. *Id.* ¶ 35. If an injured worker needs medical benefits to sustain medical stability, an insurer cannot deny payment of those benefits because they happen to fit the definition of secondary medical services, palliative care, or maintenance care. As this Court recognized in its Findings of Facts, Conclusion of Law, and Judgment, some medical services may fit into several categories. After reviewing the definitions of palliative and maintenance care, this Court wrote: "On-going pain medication and anti-depressants could be characterized as both." *Hiett v. Montana Sch. Group Ins. Authority*, 2001 MTWCC 54, ¶ 47. This, however, does not mean an insurer can deny a worker primary medical benefits. The Montana Supreme Court resolved any confusion regarding the categories of services when it held: "Given this interpretation, *a claimant is entitled to such 'primary medical services' as are necessary to permit him or her to sustain medical stability.*" *Hiett v. Missoula County Pub. Schs.*, 2003 MT 213, ¶ 35, 317 Mont. 95, ¶ 35, 75 P.2d 341, ¶ 35, emphasis added. The categories of secondary medical services, palliative care, and maintenance only come in to play after the sustainment of medical stability. The common fund applies to all primary medical benefits that insurers erroneously denied, as secondary medical services, palliative care, or maintenance care after July 1, 1993. If an insurer denied a worker payment of medical services as secondary medical services, palliative care, or maintenance care and the worker needed or needs those services to sustain medical stability, the insurer must now pay for those services.

DATED this 14th day of July 2005.

SYDNEY E. McKENNA

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the 14 day of July 2005, I mailed a true and correct copy of the foregoing by U.S. Mail, first class, postage prepaid to the following persons:

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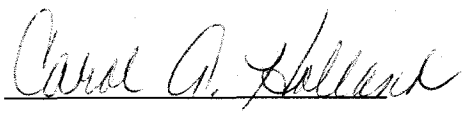

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July 14, 2005
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Re: Eula Mae Hiett v. Montana Schools Group Insurance Authority, et al.
WCC No. 2001-0278

Dear Clerk of Court:

Please find for filing the enclosed Reply Brief of Petitioner. We are faxing a copy and sending the original by U.S. mail.

Thank you.

Sincerely,

Carol A. Holland

Carol A. Holland
Legal Assistant

CAH/cah
Enclosure
c: Leo S. Ward
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