IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0278

EULA MAE HIETT

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent/Insurer

MONTANA STATE FUND and LIBERTY NORTHWEST INSURANCE CORPORATION

Intervenors.

OPENING BRIEF
SCOPE OF COMMON FUND

COMES NOW Sydney E. McKenna respectfully files this brief.

Procedural and Factual Background

On March 1, 1996, Eula Mae Hiett injured her back while working for Missoula County Public Schools. *Hiett v. Missoula County Pub. Schs.*, 2003 MT 213, ¶ 3, 317 Mont. 95, ¶ 3, 75 P.3d 341, ¶ 3. Eula Mae suffered compression fractures to her T6 and T8 thoracic vertebrae. *Id.* The Montana School Group Insurance Authority (MSGIA) accepted liability for Eula Mae's condition and began paying her medical benefits. *Id.*, ¶ 4. In June 1996, Eula Mae's treating physician, Dr. Sable, determined that she had reached maximum medical improvement. *Id.* MSGIA continued to pay for Eula Mae's pain and anti-depression medication until January 1999, at which point a new claims adjuster began to manage Eula Mae's file. *Id.*, ¶ 10. The claims adjuster concluded that Eula Mae's medications constituted secondary medical services and discontinued payment of them because Eula Mae was not working. *Id.*

Eula Mae petitioned this Court and, on September 6, 2001, this Court held a trial. *Hiett v. Montana Schools Group Insurance Authority*, 2001 MTWCC 52, ¶ 1 ("*Hiett WCC*"). One of the issues before this Court was whether Eula Mae, who had reached

maximum medical improvement in June 1996, was entitled to ongoing payments for depression and pain medication. *Id.*, ¶ 4. Eula Mae contended that "the medications [were] 'necessary for medical stability' and therefore [were] not within the 'secondary medical services' exclusion." *Id.*, ¶ 34. This Court rejected Eula Mae's contention and concluded that she was not entitled to medical benefits. *Id.*, ¶ 60.

Eula Mae appealed to the Montana Supreme Court. On August 14, 2003, the Court reversed and remanded the decision of this Court. *Hiett*, ¶ 39. The Montana Supreme Court reasoned that this Court interpreted the word 'achieved' too narrowly and incorrectly concluded that Eula Mae was not entitled to medical benefits. The Court wrote:

> We conclude that the WCC interpreted the word "achieving," as it is used in §§ 39-71-116(25) and 39-71-704(1)(f), MCA (1995), too narrowly. As the WCC fully conceded, interpreting "achievement" of stability to encompass only the first experience of well-being, while ignoring the inevitable relapse that will occur as soon as the medication that made that experience possible is removed, leads to an unreasonable and unjust result. 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. Temporary freedom from pain is meaningless if eight hours later intolerable pain and depression have returned. Reaching a level of tolerable physical and mental health after a chronic injury can be "achieved" only when it can be sustained.

Id., ¶ 33. The Court also reasoned that its interpretation of the phrase, "achieved medical stability" to mean "sustainment of medical stability," was not inconsistent the Workers' Compensation Act's definition of "maintenance care" and "palliative care." The Court wrote:

> In reaching this conclusion, we are mindful of the Act's references to and definitions of "maintenance care" and palliative care," . . . . "Maintenance care" is defined as treatment designed to provide "the optimum state of health. . . ." "Palliative care" is defined in terms of treatment designed "to reduce or ease symptoms. . . ." These categories of care come into play only *after* one has "achieved" medical stability, as we interpret the phrase here. More to the point, the ability to avoid a relapse through proper primary care is not the Cadillac of treatments -- it is not an "optimum" state of affairs, nor is it care which will reduce symptoms below that level already reached with appropriate medication. Thus, we find no tension or irreconcilability between the conclusion we reach here and the Act's reference to "maintenance" or "palliative" care.

Id., ¶ 34, emphasis original. The Court 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.

Id., ¶ 35, emphasis original.

On August 18, 2003, Eula Mae's attorney, Sydney E. McKenna, moved this Court for application of the common fund doctrine and filed notice of an attorney's fee lien.

On November 17, 2003, this Court issued notice of claim of attorney lien to all insurers and self-insurers who write or maintain workers' compensation coverage in the State of Montana on or after July 1, 1993, the Montana Hospital Association, and the Montana Medical Association.

On February 22, 2005, this Court filed a summons naming several insures and self-insurers. Subsequently, several of those insurers filed notices of appearance.

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?

Eula Mae now files her brief.

Historical Background

The Workers Compensation Act (the Act) was first enacted in 1915 for the "protection and safety of workmen in all places of employment. . . ." *Hiett.*, ¶ 17. The Act struck a compromise between industry and labor. The Montana Supreme Court has often described this compromise as a *quid pro quo*. "[W]orkers receive guaranteed no-fault recovery, and industry is relieved of the possibility of large . . . recoveries in the tort system." *Stratemeyer v. Lincoln County* (1996), 276 Mont. 67, 74, 915 P.2d 175, 179. The Montana Constitution recognizes the *quid pro quo* in Art. II, § 16, which provides:

> Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable *except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state.* Right and justice shall be administered without sale, denial, or delay.

Emphasis added.

A crucial component of the *quid pro quo* is medical benefits. "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.

Prior to 1993, the payment of medical benefits under the Act was plain. Section 39-71-704(1)(a), MCA (1991), provided:

> After the happening of the injury and subject to the provisions of subsection (1)(d), the insurer shall furnish, *without limitation as to the length of time and dollar amount, reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed.* . . .

Emphasis added.

In 1993, the Legislature substantially amended the Act. The purpose of the amendment was to contain costs and simultaneously "to provide timely and effective medical services to injured workers." *Hiett*, ¶ 36. The amendment basically divided medical benefits into categories: primary medical benefits, secondary medical benefits, maintenance care, and palliative care. Section 39-71-704, MCA (1993). The Legislature also provided specific definitions for each of these categories. Section 39-17-116, MCA (1993). The 1993 amendments created perplexing questions. As this Court noted, "the statutes regarding medical services are poorly written and raise extremely difficult questions of statutory interpretation." *Hiett*, ¶ 22. The conundrum centered on the meaning of the phrases "achieving medical stability" and "achieved medical stability" contained in §§ 39-71-116(25), MCA (1995) and 39-71-704(f), MCA (1995), respectively.

In *Hiett v. Missoula County Pub. Schs., supra,* the Montana Supreme Court addressed the confusion. The Court construed the statutory provisions of the Act in light of its purpose, which, the Court wrote, "was primarily created to assure compensation and *medical benefits* to injured workers . . . ." *Hiett*, ¶18; also § 39-71-105(1), MCA, emphasis added. The Court provided a clear and pragmatic interpretation of the phrases "achieving medical stability" and "achieved medical stability." The Court wrote:

> [I]n 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.

Hiett, ¶ 35, emphasis added. The Court's interpretation of § 39-71-704(1), MCA (1995) is:

> (a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature and the injury or the process of recovery requires.
>
> (b) The insurer shall furnish secondary medical services only upon a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment.
>
> . . .
>
> (f) Notwithstanding subsection (1)(a), the insurer may not be required to furnish, after the worker has [*sustainment* of] medical stability, palliative or maintenance care except:
>
> (i) when provided to a worker who has been determined to be permanently totally disabled and for whom it is medically necessary to monitor administration of prescription medication to maintain the worker in a medically stationary condition, or
>
> (ii) when necessary to monitor the status of a prosthetic device.

Hiett, supra, interpretation included and emphasis added. The Court's interpretation of § 39-71-116 (25), MCA (1995) is: "'Primary medical services means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for [*sustainment* of] medical stability." *Hiett, supra*, interpretation included and emphasis added.

More importantly, after reaching the conclusion that "achieved" or "achievement" meant "sustain" or "sustainment", the Montana Supreme Court defined the relationship between primary medical services, and other categories of care like maintenance care and palliative care. *Hiett*, ¶ 34. The Court wrote:

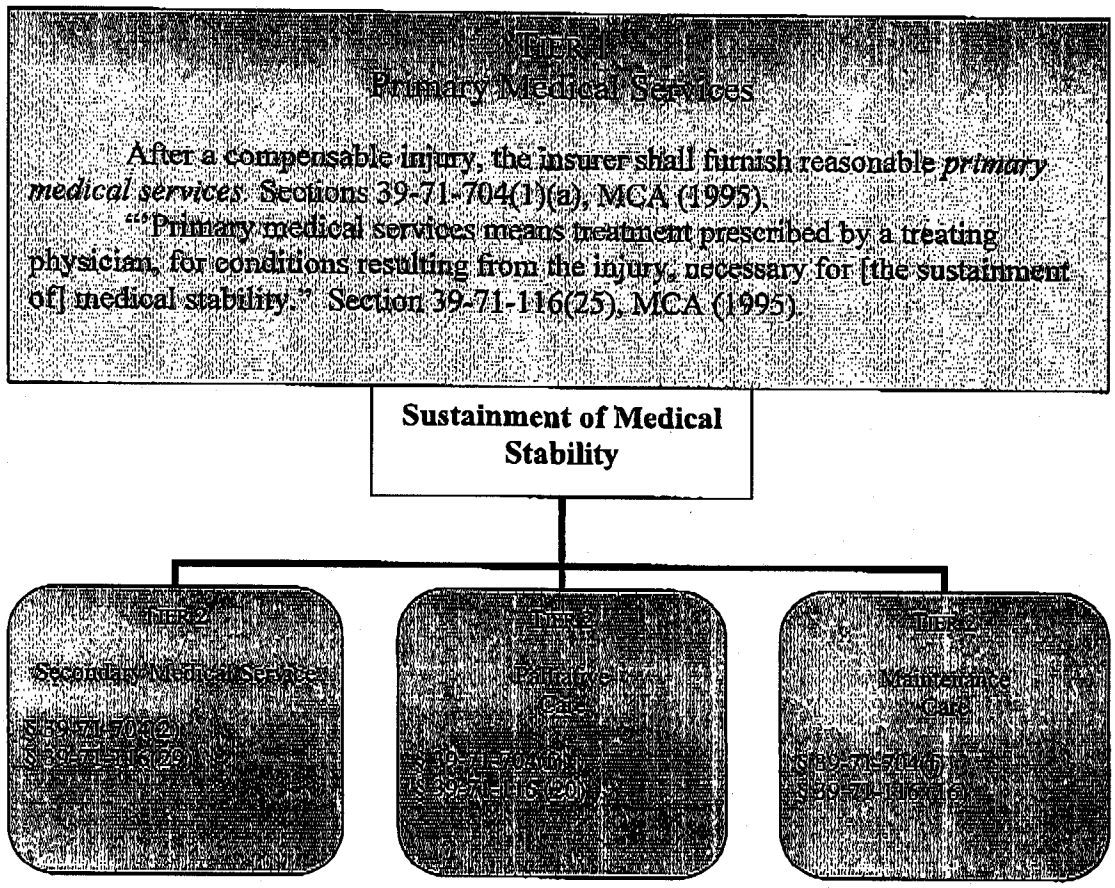
> In reaching this conclusion, we are mindful of the Act's references to and definitions of "maintenance care" and "palliative care," . . . . These categories of care come into play only after one has "achieved" medical stability *as we interpret the phrase here*. . . . [W]e find no tension or irreconcilability between the conclusion we reach here and the Act's reference to "maintenance" or "palliative" care.

Id., emphasis added.

Discussion

The Montana Supreme Court's ruling in *Hiett, supra*, did not abrogate the categories of palliative care, maintenance care, or secondary medical service; rather, the Court's ruling interpreted these categories in relation to primary medical services. The common fund lien in this Case applies to all primary medical benefits that insurers erroneously denied, as either secondary medical services, palliative care, or maintenance care after July 1, 1993.

When the Act is read in conjunction with the Court's ruling in *Hiett, supra*, the categories of medical benefits form two tiers. The fundamental distinction between the two tiers is the concept of "sustainment of medical stability." The following diagram illustrates the relationship between primary medical services and the other categories.



The second tier categories only come into play *after* a worker has sustainment of medical stability. *Hiett*, ¶ 34. In other words, an injured worker, like Eula Mae, was entitled to medication for pain and depression that sustain her medical stability, even though an adjuster squeezed the worker's medications into the definitions of palliative care, maintenance care, or secondary medical service.

A. Primary Medical Services are those necessary to sustain medical stability.

> The Act provides for primary medical services.
> After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable *primary medical services* for conditions resulting from the injury for those periods as the nature and the injury or the process of recovery requires.

Section 39-71-704(1)(a), MCA (1995), emphasis added. "'Primary medical services' means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for [the sustainment of] medical stability." Section 39-71-116(25), MCA (1995), *Hiett* interpretation included. Any medical service necessary for the sustainment of medical stability is primary whether it is medication, physical therapy, a hot tub, acupuncture, or otherwise. An injured worker is entitled to primary medical benefits that sustain his medical stability. This is consistent with the *quid pro quo*, the purpose of the Act, and the purpose of the Legislature's 1993 amendments. "[W]orkers receive guaranteed no-fault recovery, and industry was relieved of the possibility of large . . . recoveries in the tort system." *Stratemeyer*, 276 Mont. at 74, 915 P.2d at 179. The purpose of the Act is 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 purpose of the 1993 amendment was "to provide timely and effective medical services to injured workers." *Hiett*, ¶ 36.

B. Palliative care and maintenance care come into play only after a worker has sustainment of medical stability.

The categories of palliative care and maintenance are on the second tier; they come into play only after primary medical benefits. "'Palliative care' means treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms." Section 39-16-116(16), MCA (1995). "'Maintenance care' means treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status." Section 39-16-116(13), MCA (1995). These categories only come into play after a worker has sustainment of medical stability and they are not inconsistent with primary medical benefits. In *Hiett*, the Montana Supreme Court wrote:

> These categories of care come into play only *after* one has "achieved" medical stability as we interpret the phrase here. More to the point, the ability to avoid a relapse through proper primary care is not the Cadillac of treatments – it is not an "optimum" state of affairs, nor is it care which will reduce symptoms below that level already reached with appropriate medication. Thus, we find no tension or irreconcilability between the conclusion we reach here and the Act's reference to "maintenance" or "palliative" care.

¶ 34, emphasis original.

C. Secondary medical benefits only come into play after a worker has sustainment of medical stability.

The category of secondary medical benefits is on the second tier. Like palliative and maintenance care, secondary medical benefits come into play only after primary medical benefits. Section 39-71-704(b), MCA (1995) provides: "The insurer shall furnish secondary medical services only upon a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment."

> "Secondary medical services" means those medical services or appliances that are considered *not medically necessary for medical stability*. The services and appliances include but are not limited to spas or hot tubs, work hardening, physical restoration programs and other restoration programs designed to address disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation facilities.

Section 39-16-116(29), MCA (1995). Secondary medical services only apply if a worker is not receiving primary medical benefits. For example, if an injured worker's treating physician prescribed any of the items or services listed in § 39-16-116(29) – work hardening, equipment, etc. – so that the worker may sustain medical stability, the items or services are primary, not secondary. Only when these items or services are "not medically necessary for medical stability" are they considered secondary medical services. Section 39-16-116(29), MCA (1995). In *Hiett*, for example, the adjuster discontinued paying Eula Mae's medical benefits because he defined them as secondary medical benefits. ¶ 10. The Supreme Court held that Eula Mae's medications were primary medical services because they were necessary for the sustainment of her medical stability. *Hiett*, ¶ 38; § 39-71-116(25), MCA (1995).

Conclusion

The Court in *Hiett, supra*, interpreted the Legislature's 1993 amendments of the medical benefits statutes to make them consistent with the purpose of the Act, which is to provide injured workers with medical benefits. "'Primary medical services' means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for [the sustainment of] medical stability." Section 39-71-116(25), MCA (1995), *Hiett, supra*, interpretation included. The categories of palliative care, maintenance care, and secondary medical services come into play only after a worker has sustainment of medical stability. *Hiett*, ¶ 34. The common fund lien in this case applies to all primary medical benefits that insurers erroneously denied, as secondary medical benefits, palliative care, or maintenance care after July 1, 1993.

DATED this 23rd day of June 2005.

Sydney E. McKenna
SYDNEY E. McKENNA

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the 23 day of June 2005, I mailed a true and correct copy of the foregoing by U.S. Mail, first class, postage prepaid to the following persons:

Leo S. Ward
Browning, Kaleczyc, Berry & Hoven, P.C.
P.O. Box 1697
Helena, MT 59624-1697
Attorney for Montana School Groups Insurance Authority

Bradley J. Luck
Thomas J. Harrington
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula, MT 59807-7909
Attorneys for Montana State Fund and Montana Contractors Compensation Fund

Larry W. Jones
Law Office of Jones & Garber
An Insurance Company Law Division
700 SW Higgins, Suite 108
Missoula, MT 59803-1489
Attorney for Liberty Northwest Insurance Corporation, Liberty Insurance Company, Liberty Mutual Fire Insurance Company, Wausau Underwriters Insurance Company, Liberty Insurance Corporation, Wausau Business Insurance Company, LM Insurance Corporation and First Liberty Insurance Corporation

Todd A. Hammer
David M. Sandler
Hammer, Hewitt, Sandler & Jacobs, PLLC
P.O. Box 7310
Kalispell, MT 59904-0310
Attorneys for ASARCO, Inc., Benefis, Crawford & Company, Continental Casualty Company, Golden Sunlight Mines, Northwest Healthcare Corporation, Plum Creek Timber Co., L.P., F. H. Stoltz Land & Lumber Company, and Safeway

Daniel J. Whyte
Keller, Reynolds, Drake, Johnson & Gillespie, P.C.
P.O. Box 598
Helena, MT 59624
Attorney for Hortica, f/k/a Florists' Mutual Insurance Company, and Arch Insurance Company

Ronald W. Atwood, P.C.
333 S.W. Fifth Avenue
200 Oregon Trail Building
Portland, OR 97204
Attorney for J.H. Kelly, LLC

Maxon R. Davis
James A. Donahue
Davis, Hatley, Haffeman & Tighe, P.C.
P.O. Box 2103
Great Falls, MT 59403-2103
Attorneys for Lumber Mutual Insurance Company

Laurel Wolfenden
P.O. Box 5432
Cincinnati, OH 45201
Attorney for Great American Alliance, Great American Assurance, Great American Insurance Company of NY

Kelly Wills
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula, MT 59807-7909
Attorneys for Western Guaranty Fund

Brendon J. Rohan
Poore, Roth & Robinson, P.C.
P.O. Box 2000
Butte, MT 59702
Attorneys for Ace American Insurance Co., Ace Fire Underwriters Insurance Co., Ace Indemnity Insurance Col, Ace Property & Casualty Insurance Co., Bankers' Standard Insurance Company, Cigna Insurance Company, Insurance Company of North America, Indemnity Insurance Company of North American, Pacific Employers Insurance Company

Oliver H. Goe
Browning, Kalexzyc, Berry & Hoven, P.C.
P.O. Box 1697
Helena, MT 59624-1697
Attorneys for Security National Insurance Company, Trinity Universal Insurance Company of Kansas, Trinity Universal Insurance Company, Montana Municipal Insurance Authority, Argonaut Insurance Company, Argonaut Midwest Insurance Company, Argonaut Northwest Insurance Company, Electric Insurance Company, Great American Assurance Company, Great American Insurance Company, Great American Insurance Company of New York, West American Insurance Company, Protective Insurance Company, Arch Insurance Company, Pharmacist Mutual Insurance Company, Montana Health Network WC Insurance Trust, Safety National Casualty Corp.

Robert F. James
Ugrin, Alexander, Zadick & Higgins, P.C.
P.O. Box 1746
Great Falls, MT 59403
Attorneys for TIG Premier Insurance Co., TIG Insurance Co., Fairmont Insurance Co.

Steven S. Carey
Carey Law Firm
P.O. Box 8659
Missoula, MT 59807-8659
Attorneys for Indiana Lumberman's Mutual Insurance Company

Carol A. Holland

TORNABENE & McKENNA, PLLC

Charles J. Tornabene

815 East Front Street, Suite 4A
P.O. Box 7009
MISSOULA, MT 59807-7009
TELEPHONE: (406) 327-0800
FACSIMILE: (406) 327-8706

Sydney E. McKenna

June 23, 2005
VIA FACSIMILE
(406) 444-7798

Clerk of Court
Workers' Compensation Court
P.O. Box 537
Helena, MT 59624-0537

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 Opening Brief of Petitioner. We are faxing a copy and sending the original by U.S. mail. When I spoke on the telephone with Jackie, she advised me that we are not required to provide a certificate of mailing, listing all of the parties to whom we sent copies of the Brief, due to the magnitude of the parties involved and the fact that the list is constantly changing. However, Syd McKenna wished to provide a copy of the brief to the parties that have filed appearances according to the docket on the website. We will monitor the website for documents filed by the other parties.

Thank you.

Sincerely,

Carol A. Holland

Carol A. Holland
Legal Assistant

CAH/cah
Enclosure