

COME NOW Ace American Insurance Co., Ace Fire Underwriters Insurance Co., Ace Indemnity Insurance Co., Ace Property & Casualty Insurance Co., Bankers' Standard Insurance Company, Cigna Insurance Company, Insurance Company of North America, Indemnity Insurance Company of North America, and Pacific Employers Insurance Company, by and through their attorneys, and submit the following opening brief in this case:

I. INTRODUCTION:

This case arises from a dispute between Hielt and the Montana School Group Insurance Authority (MSGIA), which was the school self-insurance pool for Hielt's employer at the time of the injury. Hielt claims she was entitled to payment for certain prescription drugs necessary to control pain and depression resulting from her compensable injury. MSGIA's adjuster "concluded that Hielt's medications constituted 'secondary medical services,' and discontinued payment for these medications because Hielt was not working." *Hielt v. Missoula County Public Schools*, 2003 MT 213, ¶ 10, 317 Mont. 95, ¶ 10, 75 P.3d 341, ¶ 10.

Following three mediations, MSGIA maintained its position that Hielt was not entitled to payment for the drugs. *Hielt*, ¶¶ 11-13. Hielt petitioned the Workers' Compensation Court. *Hielt*, ¶ 13. This Court ruled in part:

Claimant is not entitled to payment for prescription drugs at present, although she may become entitled to such payment if she finds employment and satisfies the conditions of section 39-71-704(1)(b) or (1)(g), MCA (1995).

Hielt v. MSGIA, 2001 MTWCC, ¶ 59, WCC No. 2001-0278, ¶ 59.

Following an appeal to the Montana Supreme Court, it reversed in part this Court's decision, concluding that "Hielt is entitled to receive payment for those prescription drugs necessary for her to sustain medical stability." *Hielt*, ¶ 38.

This Court identified two issues to be addressed as a result of the supreme court reversal:

1) whether the *Hielt* decision abrogates the exclusion of palliative and maintenance care, § 39-71-704(1)(f), MCA, and 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 *Hielt* decision. In other words are insurers liable for secondary medical services to the same extent they are liable for primary medical services?

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Hiatt v. MSGIA, WCC No. 2001-0278, Minute Book Hearing #3603 at 3749.

II. **ARGUMENT:**

A. **The Montana Supreme Court's *Hiatt* Decision Does Not Abrogate The Exclusion Of Palliative And Maintenance Care.**

§ 39-71-704 MCA, states in pertinent part:

(f) Notwithstanding subsection (1)(a), the insurer may not be required to furnish, after the worker has achieved 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.

(g) If the worker's treating physician believes that palliative or maintenance care that would otherwise not be compensable under subsection (1)(f) is appropriate to enable the worker to continue current employment or that there is a clear probability of returning the worker to employment, the treating physician shall first request approval from the insurer for the treatment. If approval is not granted, the treating physician may request approval from the department for the treatment. The department shall appoint a panel of physicians, including at least one treating physician from the area of specialty in which the injured worker is being treated, pursuant to rules that the department may adopt, to review the proposed treatment and determine its appropriateness.

39-71-704(1)(f)(g), MCA, (1995).

The definition section of the Workers' Compensation Act states in relevant part:

(16) "Maintenance care" means treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status.

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(17) "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.

.....
(20) "Palliative care" means treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms.

39-71-116(16)(17) and (20), MCA,(1995)

This court stated in Hiett:

A third source is the palliative and maintenance care provisions found in subsections (1)(f) and (1)(g) of section 39-71-704, MCA (1995). Palliative care, as noted before, is 'treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms.' § 39-71-116(20), MCA (1995). Maintenance care is 'treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status.' § 39-71-116(16), MCA (1995). On-going pain medication and anti-depressants could be characterized as both.

Neither of the palliative/maintenance care subsections apply. Subsection (1)(g) of section 39-71-704, MCA (1995), does not apply since it requires a showing that the treatment will enable the claimant to continue or return to employment. Subsection (1)(f) does not apply since claimant is not permanently totally disabled (subsection (1)(f)(i)) and a prosthetic (subsection (1)(f)(ii)) is not involved.

Hiett v. MSGIA, 2001 MTWCC, ¶¶ 47-48, WCC No. 2001-0278, ¶¶ 47-48.

In reversing this Court's decision denying Hiett's entitlement to payment for prescription drugs, the Montana Supreme Court stated:

[W]e are mindful of the Act's references to and definitions of 'maintenance care' and 'palliative care,' as used in § 39-71-704(1)(f), MCA (1995), and as defined in §§ 39-71-116(16) and (20), MCA (1995), respectively. 'Maintenance care' is defined as treatment designed to provide 'the optimum state

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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.

Hiett, ¶ 34 (emphasis in original).

Further, the Court stated:

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 in original).

The decision in *Hiett* did not totally abrogate the exclusion of palliative and maintenance care, § 39-71-704(1)(f), MCA. The decision is based on the Court's interpretation of the phrases "achieving" medical stability and "achieved" medical stability as meaning sustainment of medical stability. *Hiett*, ¶ 35. The Court concluded that services that are necessary to sustain medical stability are primary medical services. *Id.* Thus, the Court did not decide that *Hiett* was wrongfully denied prescription drugs because they were maintenance care or palliative care. Rather, it ruled that the drugs were necessary to sustain her medical stability. Because the drugs were considered primary medical care, they did not fall within the definitions of maintenance and palliative care. Following *Hiett*, an insurer is authorized to deny payments for maintenance or palliative care. However, the care must be properly classified as palliative or maintenance, rather than primary service, before the exclusion applies.

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B. The Montana Supreme Court's *Hielt* Decision Does Not Wholly Abrogate The Secondary Medical Services Section, 39-71-704(1)(b), MCA.

The pertinent portions of 39-71-704 are:

(1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished:

(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 of 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.

39-71-704(1)(a)(b), MCA, (1995).

The following relevant definitions are:

(17) "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.

.....

(25) "Primary medical services" means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability.

.....

(29)(a) "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

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impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation facilities.

(b)(i) As used in this subsection (29), "disability" means a condition in which a worker's ability to engage in gainful employment is diminished as a result of physical restrictions resulting from an injury. The restrictions may be combined with factors, such as the worker's age, education, work history, and other factors that affect the worker's ability to engage in gainful employment.

(ii) Disability does not mean a purely medical condition.

39-71-116, (17), (25), and (29), MCA, (1995).

The Montana Supreme Court concluded in Hiett that:

[T]he 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.

Hiett, ¶ 33 (emphasis added).

The court stated: "a claimant is entitled to such 'primary medical services' as are necessary to permit him or her to *sustain* medical stability." *Hiett*, ¶ 35 (emphasis in original). It concluded that, "Hiett is entitled to receive payment for those prescription drugs necessary for her to sustain medical stability." *Hiett*, ¶ 38. Consequently, when "medical results once achieved truly constitute an "end," an "attainment," or a

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"completion" *Hiett* ¶ 33, a claimant has reached "[m]edical stability', 'maximum healing', or 'maximum medical healing'", and "Primary Medical Services" end. See 39-71-116(17) and (25). At that point, "[t]he 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." 39-71-704(1)(b) MCA, (1995).

The import of the Montana Supreme Court decision in *Hiett* is that insurers are still not liable for payment of secondary medical services to the same extent they are liable for payment of primary medical services. The decision in *Hiett* did not wholly abrogate the secondary medical services section 39-71-704(1)(b), MCA, (1995). It simply clarified the circumstances of when medical services are "primary," as opposed to "secondary." With this clarification, insurers are still statutorily authorized to deny payments for secondary services that fail to provide a cost effective, recognized form of treatment designed to return the worker to gainful employment.

III. CONCLUSION:

For all the foregoing reasons, this Court should answer the two threshold issues presented in the negative.

DATED this 24th day of June, 2005.

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CERTIFICATE OF SERVICE BY MAILING

This is to certify that on the 24th day of June, 2005, the foregoing attached **OPENING BRIEF** was duly served upon the following attorneys of record, by depositing a true copy thereof in the United States mails, postpaid, addressed as follows, to-wit:

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