



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 reply brief in this case:

**I. INTRODUCTION:**

Claimant agrees that the ruling in *Hiett v. Missoula County Public Schools*, 2003 MT 213, 317 Mont. 95, 75 P.3d 341, "did not abrogate the categories of palliative care, maintenance care, or secondary medical services . . ." Claimant's Opening Brief Scope of Common Fund (Claimant's Brief) at 6. Thus, she has answered both issues posed by this Court on May 11, 2005 in the negative, i.e., the *Hiett* decision did not abrogate the exclusion of palliative and maintenance care and the secondary medical services section was not wholly abrogated by the *Hiett* decision. But, Claimant contends the common fund attorney lien in the present matter should apply to all medical care benefits insurers wrongly denied either as secondary medical benefits, palliative care, or maintenance care. *Id.* Claimant apparently argues that because these benefits come into play after a claimant has achieved medical stability; or as the *Hiett* Court stated, "the *sustainment* of medical stability", they are properly considered as "primary" medical services, *Hiett*, ¶ 35. Claimant fails to recognize, however, that the *Hiett* Court acknowledged that maintenance care and palliative care do not fit the definition of primary medical services because they are not intended to sustain medical stability. *Hiett*, ¶ 34. Therefore, if a common fund attorney lien exists, it would only apply to claimant's who were denied "primary medical services" required to sustain medical stability.

**II. ARGUMENT:**

The specific facts from the *Hiett* case that are relevant here include that Claimant was injured in the scope of her employment. She claimed she was entitled to payment for certain prescription drugs necessary to control pain and depression resulting from her compensable chronic injury. A Montana School Group Insurance Authority's (MSGIA) adjustor "concluded that Hiett's medications constituted 'secondary medical services,' and discontinued payment for these medications because Hiett was not working." *Hiett*, ¶ 10.

Following three mediations, MSGIA maintained its position that the benefits were secondary benefits and Hiett was not entitled to payment for the drugs. *Hiett*, ¶¶ 11-13. Hiett petitioned the Workers' Compensation Court. *Hiett*, ¶ 13. "On September 6, 2001, the WCC issued its Findings of Fact, Conclusions of Law and Judgment holding that Hiett was not entitled to payment for her prescription drugs unless the medications would enable her to return to employment and, once employed, enable her to continue working." *Hiett*, ¶ 14. The Montana Supreme reversed this portion of the judgment.

**2. REPLY BRIEF**

Claimant now contends the *Hiett* ruling, in conjunction with the Workers' Compensation Act (WCA), establishes a two tier categorization of medical benefits, i.e., "primary" and "secondary" medical services. She argues that the fundamental difference between "primary medical care" and "secondary medical care," including "palliative care" and "maintenance care," is the concept of "sustainment of medical stability". Claimant's Brief at 6. Claimant then mistakenly concludes that because "[t]he categories of palliative care, maintenance care, and secondary medical services come into play only after a worker has sustained medical stability, 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 [the date the legislature substantially amended the WCA]." Claimant's Brief at 8 (citation omitted).

Claimant's argument is flawed. The *Hiett* court explained:

[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 ruled that palliative care and maintenance care do not meet the definition of primary medical services:

[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 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) (underlining added).

The Court did not decide, as Claimant seems to imply, that a denial of palliative or maintenance care is tantamount to denying primary medical services. Rather, the Court, under the specific facts of that case, decided that when an injury is chronic and medical services are reasonable and necessary to maintain, sustain, or "achieve" maximum medical improvement, those services are properly characterized as "primary" medical services. The decision in *Hiett* simply clarified the circumstances of when medical services are "primary," as opposed to "secondary." It did not create new categories or "tiers" of medical services. Therefore, if a common fund lien is applicable in the present case, it only applies to the proven wrongful denial of "primary" medical services.

DATED this 15th day of July, 2005.

POORE, ROTH & ROBINSON, P.C.

By



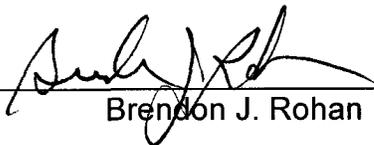
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**CERTIFICATE OF SERVICE BY MAILING**

This is to certify that on the 15th day of June, 2005, the foregoing attached **REPLY 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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July 15, 2005

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Workers' Compensation Court  
1625 11th Avenue  
P. O. Box 537  
Helena, Montana 59624

Re: Hiett v. Montana State Fund et al.  
WCC No. 2001-0278

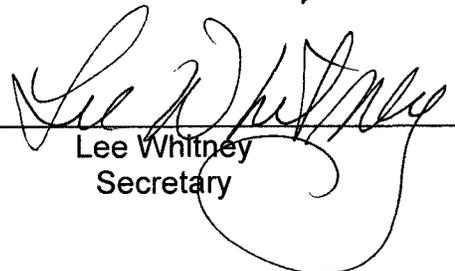
Dear Ms. Kessner:

Enclosed for filing in the above-referenced matter is the original **Reply Brief** to be filed on behalf of the following: 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. I am serving a copy of the document on Plaintiff's attorney via mail and understand that all other parties will be "served" via your web site. Please acknowledge receipt and filing of this document by signing and returning the enclosed postcard. Thank you for your courtesy and attention.

With best regards,

POORE, ROTH & ROBINSON, P.C.

By

  
Lee Whitney  
Secretary

Enclosures