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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

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IN THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

WCC No. 2001-0278

BULA MAE NIETT,

Petitioner,

vs.

MONTANA SCHOOLS GROUP
AUTHORITY,

Respondent/Insurer,

and

MONTANA STATE FUND and
LIBERTY NORTHWEST INSURANCE
CORPORATION,

Intervenors.

BRIEF OF J.H. KELLY, LLC

Pursuant to the Court's briefing schedule of May 11, 2005, respondent J.H. Kelly, LLC files its brief on the following threshold issues identified therein, namely:

1. Whether the *Niett* decision abrogates the exclusion of palliative and maintenance care provided for in Section 39-71-704(1)(f), MCA; and
2. Whether the *Niett* decision wholly abrogates the secondary medical services section, 39-71-704(1)(b), MCA, or is it applicable under certain circumstances.

PROCEDURAL BACKGROUND

On February 22, 2005, the Workers' Compensation Court (WCC) issued a Summons to workers' compensation Insurers and Self-Insureds in the State of Montana. The Summons resulted from a Notice of Claim of Attorney's Lien filed by Petitioner Hiatt's attorney, Ms. Sydney E. McKenna, claiming a lien with respect to benefits payable as a result of the Montana Supreme Court's decision in *Hiatt v. Missoula County Pub. Sch.*, 2003 MT 213, 317 Mont. 95, 75 P.3d 341 (2003).

THE STATUTES AT ISSUE

The case involves two subsections of 39-71-704(1), MCA.

Per the Court's briefing schedule, subsection (1)(f) is the first focus. It provides:

"(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:

"(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;

"(ii) when necessary to monitor the status of a prosthetic device; or

"(iii) when the worker's treating physician believes that the 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. A dispute regarding the compensability of palliative or maintenance care is considered a dispute over which, after mediation pursuant to department rule, the workers' compensation court has jurisdiction."

Subsection (1)(b) is the second focus. It provides:

"(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:

"(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."

THE HIETT CASE

The answers to the two "threshold" issues posed by the Court are necessarily going to be determined by the scope of the Montana Supreme Court's decision in *Hiett*. A discussion of the Court's decision therefore follows. The case is complex.

A. Procedural and Factual Background.

Petitioner, Eula Mae Hiett, appealed the Court's determination that she was not entitled to payment for certain prescription drugs needed to control pain and depression resulting from her compensable back injury.

Hiett's compensable back injury occurred on March 1, 1996 while working as a custodian for the Missoula County Public Schools. Her treating doctor, Dr. Sable, found her to be at maximum medical improvement (MMI) in June 1996. She was permanently restricted to sedentary to light-duty work.

After Hiett aggravated her back while attempting modified duties, Dr. Sable prescribed various medications to address her anxiety and depression, which were accepted by the insurer.

In September 1996, the claim was closed with a 26% PPD award. Hiatt did not work further, and the School District terminated her employment effective January 3, 1997. Hiatt began receiving social security disability benefits, and submitted her application for retirement to the Public Employee's Retirement System.

In the meantime, the parties were engaged in a dispute over Hiatt's entitlement to PPD and rehabilitation benefits. A settlement agreement reached in September 1997 paid Hiatt \$27,930 and closed rehabilitation benefits, but reserved "further medical and hospital benefits." At no time was Hiatt or her attorney advised that continued payment for medications was contingent on Hiatt's obtaining employment.

The insurer paid for Hiatt's pain medication from May 1996 to January 1999. It paid for her anti-depressants from August 1996 to January 1999, when a new claims adjuster took over her file and concluded these medications constituted "secondary medical services." Payment was discontinued because she was not working. Hiatt was not notified of this until the fall of 1999 when she attempted to refill one of the prescriptions and was told there was a \$1,600 bill outstanding with the pharmacist. She was then told that no insurance payment had been made for ten months.

After mediation, the insurer did agree to pay for Hiatt's past prescriptions, however, it contested its obligation to pay for further medications because she was not working. After Hiatt's doctor issued an opinion that her medications were essential to her well-being and would allow her to work (at that time she was working for a retirement facility from May-November 2000), the insurer agreed to pay for the medication for as long as she worked.

Some prescription bills remained unpaid as of December 31, 2000 and another radiation was requested. By this time Hiatt had quit her job with the retirement facility (after being hospitalized for drug withdrawal from the medications she had been taking). As a result, the parties could not reach agreement regarding her entitlement to further payments of prescriptions.

The insurer maintained its position that such benefits were "secondary" benefits and would be paid only while Hiatt was employed. Hiatt petitioned the Workers' Compensation Court.

B. The Workers' Compensation Court's Ruling.

The Workers' Compensation Court held that Hielt, who had reached maximum medical improvement in June 1996, 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.

More precisely, the Court concluded that there was no statutory authority for paying Hielt's prescriptions after the worker had reached medical stability unless the prescriptions were either a cost-effective means of returning her to employment under Section 39-71-704(1)(b), or qualified as physician-requested palliative or maintenance care appropriate to enable her to return to work under Section 39-71-704(1)(g).¹

As it was not contemplated that Hielt would return to employment, the Court denied her claim for payment of her prescription drugs.

C. The Supreme Court's Decision.

The Supreme Court reversed.² The Court first noted the distinction between "primary medical services" and "secondary medical services."

The former are defined as:

"treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability." Section 39-71-116(25), MCA.

The latter are defined as:

"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

¹ The impact of Hielt on Subsection (1)(g) is not identified as one of the "threshold issues."

² This Court did affirm that portion of the Court's conclusion that Hielt was entitled to a penalty with respect to benefits the insurer had agreed to pay but failed to pay within a reasonable time.

programs designed to address disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation facilities." Section 39-71-116(29)(a), MCA.

The Court then considered whether "medical stability" was synonymous with maximum medical improvement, as the Workers' Compensation Court had concluded. The Court disagreed with the Workers' Compensation Court's conclusion that "because Hiett has reached MMI she is not entitled to prescription benefits absent a return to employment."

The Court concluded that "achieving medical stability," as used in Sections 39-71-116(25) and 39-71-704(1)(f), should not be narrowly construed as synonymous with maximum medical improvement, as the Workers' Compensation Court did. Rather, in order to arrive at what it felt was a reasonable result serving 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), 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 to sustain medical stability." (Court's emphasis).

Accordingly, the Court held, "* * * we conclude that Hiett is entitled to receive payment for those prescription drugs necessary for her to sustain medical stability."

In its opinion, the Court specifically noted that it was "mindful" of the Act's references to "maintenance" and "palliative" care found in subsection (1)(f), but found "no tension or irreconcilability between the conclusion we reach here" and the Act's references. The Court explained:

"* * * '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. * * * (original emphasis).

D. Hiatt's Impact on Subsections (1)(f) and (1)(b).

This summary did not include certain aspects that were part of the Court's analysis but not directly germane to its holding. Those aspects, however, may shed light on the threshold issues involving Hiatt's impact on Sections (1)(f) and (1)(b) of 39-71-704, MCA.

The Court noted that the Workers' Compensation Court analyzed subsections (1)(f) and (1)(b), as well as (1)(g), and "concluded that none of these provisions were applicable to Hiatt's circumstances.* * *"

The Court agreed with the Workers' Compensation Court's view that the statutes "are confusing and poorly written," and also agreed with the Workers' Compensation Court's determination that Sections 39-71-704(1)(b), (f), and (g) "do not apply to Hiatt's situation."

As shown above, however, the Court disagreed with the Workers' Compensation Court's ultimate conclusion that because Hiatt had reached MMI she was not entitled to prescription benefits absent a return to employment.

The Hiatt Court's actual holding was that "primary medical services" (in that case, drug medications prescribed by her treating physician) necessary for a claimant to sustain medical stability are compensable, regardless of whether or not there has been a return to employment.

With that in mind, we turn to the threshold issues.

1. Has Hiatt abrogated the exclusion of palliative and maintenance care contained in subsection 39-71-704(1)(f)?

The simple answer is no. Palliative and maintenance care are considered different from "primary medical services," i.e., "treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving [sustaining] medical stability." This Court recognized this difference in its discussion. As they noted, such care comes "after" a

claimant's condition reaches maximum medical improvement, even as that term is newly defined.

There is more to it than that, however. The Hiett Court distinguished between those situations where a person actually "achieves" medical stability through a surgical procedure, for instance, repairing a fractured leg or a carpal tunnel syndrome release; in those situations, the condition has become an "end" or "attainment" -- in other words, the condition has resolved.

Juxtaposed against that scenario are conditions that are chronic and "ongoing"; in those situations, stability is achieved only if it can be sustained. The Court used the following examples:

"* * * '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."

This invites the question, under what circumstances has a person truly "achieved" medical stability such that no further services are needed, versus under what circumstances further services are required on an ongoing basis to allow for a sustainment of medical stability. The answer to this question will always be a factual one, decided on a case by case basis. There will always be a class of cases in which continuing medical services, such as prescriptions, will continue to be paid in order to sustain maximum medical improvement. There will also be cases in which ongoing care will not be necessary, the condition will remain stable without care and the claimant will then be entitled to seek palliative or maintenance care.

A person who suffers from degenerative disc disease will often require ongoing care, as anti-inflammatory medications. Similarly, a person who has had a coronary bypass operation may require ongoing medications indefinitely to maintain stability. These are but two examples.

However, to use the Court's examples, surgery to repair a broken leg or treat carpal tunnel syndrome would have "discrete" resolutions and no further treatment is generally required. Strains and sprains would be other examples.

The answer, therefore, is dependent on the facts of each case. Since each person is different and each situation is different, it is not possible to determine, as a matter of law, which type of cases will require ongoing care to sustain maximum medical improvement or will resolve, entitling a claimant to seek palliative or maintenance care.

In sum, the Supreme Court's decision in *Hiett* does not abrogate palliative and maintenance care in all cases. In some it will, since ongoing care will be required to sustain maximum medical improvement.

2. Has *Hiett* wholly abrogated the secondary medical services provision contained in subsection 39-71-704(1)(b), or is it applicable under certain circumstances?

As mentioned at the outset, 39-71-704 subsection (1)(b), MCA, requires that:

"(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."

To repeat the definition of secondary medical services, they consist of:

"those medical services or appliances that are considered not medically necessary for medical stability,* * *" (Examples of secondary medical services are spas, hot tubs, work hardening, and restoration programs, and equipment.)

We assume question #2 is raised in light of *Hiett's* holding that a claimant's return to employment is not a prerequisite to obtaining compensable medical services, so long as they are necessary to "sustaining" medical stability.

The answer here is also fact based. Typically, one who is receiving primary medical services is not entitled to secondary

medical services. To those who require ongoing care to sustain maximum medical improvement, then primary services will always be required. However, at some point, it may be possible to establish that further care is not necessary to sustain maximum medical improvement. At that point, ongoing care would not be compensable.

On the other hand, if ongoing care is not necessary to sustain maximum medical improvement, the further care is not compensable. The claim can be closed. At that point, secondary medical services may be compensable and entitlement to such services is determined on a case by case basis.

The same examples as noted above apply here as well. The Court would not have discussed them, if the distinction between primary and secondary medical services no longer applied. There are many other examples. The issue is a factual one and will be decided based upon the facts of each individual case. In some cases, ongoing primary care will preclude provision of secondary medical services. In other cases, just the opposite will occur.

Query: can a claim be closed if ongoing care is required to sustain maximum medical improvement? Maximum medical improvement is the trigger for closure of a claim. If that condition is not reached because ongoing care is required to sustain that status, does one ever reach it? That is up to another case.

E. Other Considerations.

J.H. Kelly, LLC also to raise and brief issues relating to the propriety of applying the common fund doctrine to this case, whether retroactive or prospective effect is to be given to the *Niett* decision and whether *Schmill* limits the size and breath of any common fund class..

As it relates to the current questions, this decision does not abrogate the exclusion of palliative and maintenance care; nor does it abrogate the secondary medical services provision.

Respectfully submitted this 23rd day of June, 2005.

RONALD W. ATWOOD, P.C.

BY: 

RONALD W. ATWOOD, MSB #5959
of Attorneys for J.H. Kelly, LLC

CERTIFICATE OF SERVICE BY MAIL

I, Sara Turner, hereby declare and state:

I am over the age of eighteen years, employed in the City of Portland, County of Multnomah, State of Oregon, and not a party to the within action. My business address is Ronald W. Atwood, P.C., 333 S.W. Fifth Avenue, 200 Oregon Trail Building, Portland, Oregon, 97204.

On June 23, 2005, I served the within BRIEF OF J.H. KELLY, LLC, on the parties in said caused by placing a true thereof enclosed in a sealed envelope with postage prepaid thereon in the United States Post Office at Portland, Oregon, addressed as follows:

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

Ms. Sydney E. McKenna
Tornabene & McKenna PLLC
815 East Front Street
Suite 4A
Missoula, MT 59802

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED June 23, 2005 at Portland, Oregon.



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June 23, 2005

VIA U.S. MAIL
FIRST CLASS

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

Re: *Bula Mae Nielt vs. Montana Schools Group Insurance*
Authority
WCC No. 2001-0278

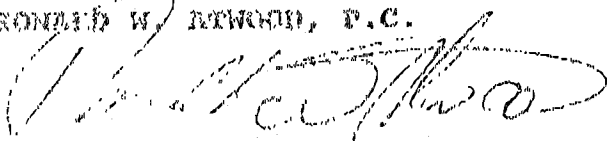
Dear Staff:

We have enclosed the BRIEF OF J.H. KELLY, LLC, for your review and consideration.

Thank you for your time and attention to this matter.

Very truly yours,

RONALD W. ATWOOD, P.C.



RONALD W. ATWOOD

RWA/el

Enclosure

cc w/enc.:

Ms. Sydney E. McKenna
Ms. Barbara Jones