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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

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| EULA MAE HIETT,<br><br>Petitioner,<br><br>v.<br><br>MONTANA SCHOOLS GROUP INSURANCE AUTHORITY,<br><br>Respondent/Insurer,<br><br>MONTANA STATE FUND and LIBERTY NORTHWEST INSURANCE CORPORATION,<br><br>Intervenors. | WCC No. 2001-0278<br><br>MONTANA STATE FUND'S ANSWER BRIEF REGARDING SCOPE OF DECISION |

COMES NOW the Intervenor, Montana State Fund ("State Fund"), and pursuant to this Court's Minute Entry and briefing schedule of May 11, 2005, hereby files its Answer Brief Regarding Scope of Decision. For the reasons stated herein and in its Opening Brief, the State Fund asserts that the Montana Supreme Court's decision in *Hiett v. Missoula County Pub. Sch.*, 2003 MT 213, 317 Mont. 95, 75 P.3d 341, did not abrogate the exclusion of palliative and maintenance care codified at Montana Code Annotated § 39-71-704(1)(f), nor did it wholly abrogate the secondary medical services provision codified at Montana Code Annotated § 39-71-704(1)(b).

## INTRODUCTION

On June 24, 2005, Eula Mae Hiett ("Hiett") and a number of Respondents filed

opening briefs regarding the scope of the *Hiett* decision. To avoid duplicity, the State Fund incorporates by reference the arguments contained in the Opening Briefs and Reply Briefs filed by the other Respondents.

## ARGUMENT

A substantial portion of Hiett's brief is devoted to a recitation of the background and holding of *Hiett*. The State Fund's Opening Brief and the briefs of the other Respondents also contain summaries of *Hiett*. As a result, the State Fund will not address the background of *Hiett* but will instead focus on Hiett's arguments regarding the threshold issues.

### I. HIETT'S PROPOSED TWO-TIERED SYSTEM OF MEDICAL BENEFITS IN LIGHT OF THE *HIETT* DECISION IS FLAWED BECAUSE HER INTERPRETATION OF *HIETT* IS OVERLY BROAD.

Hiett contends that the WCA and the *Hiett* decision establish two tiers of medical benefits. Hiett asserts that the first tier is composed of "primary medical services," which includes all medical treatments which are rendered while a claimant is in the process of sustaining MMI. Hiett also asserts that the second tier is composed of three types of medical treatments which can only exist after a worker has sustained MMI: (1) secondary medical services; (2) palliative care; and (3) maintenance care. Opening Br. Scope of Common Fund 6 (June 23, 2005) ("Hiett Br."). However, Hiett mistakenly attempts to apply the holding of *Hiett* to claimants suffering from non-chronic conditions. As noted in the State Fund's Opening Brief, *Hiett* did not modify the definition of "achieving MMI" in situations involving non-chronic conditions. *See also Simms v. State Compensation Ins. Fund*, 2005 WL 1633558, __ Mont. ___, ___ P.3d ___ (July 12, 2005) (in a decision published this week, the Montana Supreme Court discussed *Hiett* as applied to a case involving a permanently, totally disabled claimant suffering from a chronic condition). State Fund's Opening Br. Regarding Scope of Decision 2-4 (June 24, 2005). Further, as explained below in more detail, the holding of *Hiett* and the type of medical care which might be necessary for a claimant to sustain MMI are not as broad as Hiett suggests.

#### A. The attorney fee lien of Hiett's counsel does not extend to all denials which were made on the basis of § 704(1)(b) because the "secondary medical services" provision still applies after a worker reaches MMI.

Hiett claims that the concept of "sustainment of MMI" provides the fundamental distinction between her two tiers of medical benefits. Hiett Br. 6. In furtherance of this

contention, Hiett claims that "[s]econdary medical services only apply if a worker is not receiving primary medical benefits." Hiett Br. 8. By this statement, Hiett is suggesting that if a claimant needs certain treatments like prescriptions in order to sustain MMI, then all of the other medical treatments the claimant receives are compensable as primary medical services. Hiett Br. 6-7. *Hiett*, however, did not transform any and all types of medical treatments into primary medical services simply because the claimant has a chronic condition which requires some additional treatment in order to sustain MMI. *See Simms*, ¶ 18 (a claimant suffering from a chronic condition who has reached MMI but is receiving pain medications and other primary medical services can still receive secondary medical services as long as those services enable the worker to return to employment and the criteria of § 704(1)(b) are met).

Hiett fails to appreciate that all claimants, even those suffering from chronic conditions, reach a point of MMI. Once a claimant reaches MMI – even under *Hiett* – most medical treatments constitute secondary medical care and are therefore only compensable if the criteria set forth in § 704(1)(b) is satisfied. The State Fund recognizes that *Hiett* may entitle claimants suffering from a chronic condition to receive additional primary medical services (i.e. prescription medications) if those treatments are necessary to sustain MMI. However, the demarcation between primary medical services and secondary medical services is no longer solely dependent on the date of MMI. Instead, under the holding of *Hiett*, a claimant suffering from a chronic condition who has reached MMI can still receive primary medical services (i.e. prescription medications which are necessary to sustain MMI) and simultaneously receive secondary medical services for treatments which are not necessary to sustain MMI if the requirements of § 704(1)(b) are satisfied.

The secondary medical service provision is still used to determine if a claimant suffering from a chronic condition is entitled to receive post-MMI medical care. Even in the post-*Hiett* environment, insurers are lawfully entitled to deny secondary medical services if the requirements of § 704(1)(b) are not satisfied. Accordingly, the attorney fee lien of Hiett's counsel does not extend to all denials which were made on the basis of § 704(1)(b).

B. The attorney fee lien of Hiett's counsel does not extend to any denials which were made on the basis of § 704(1)(f) because *Hiett* did not abrogate the palliative and maintenance care exclusion.

Hiett claims that the palliative and maintenance care provisions are not inconsistent with the definition of primary medical services. Hiett Br. 7. As a result, she argues that the attorney fee lien filed by her counsel applies to all denials of

palliative/maintenance care which should have been covered as a primary medical service. Hiett Br. 8.

Hiett's contention is directly contradictory to the language contained in the *Hiett* decision. *Hiett*, ¶ 34 (explaining that *Hiett's* conclusion is not irreconcilable with the palliative and maintenance care provisions). Notably, *Hiett* concluded that proper primary care does not include treatment designed to provide the optimum state of affairs, nor is it care which reduces or eases symptoms below that which is already reached with appropriate medication. *Hiett*, ¶ 34. In light of the legislative definitions of palliative care[1] and maintenance care[2], the language purposefully used by the Montana Supreme Court leads to the inescapable conclusion that palliative/maintenance care cannot constitute primary medical services under *Hiett* or the WCA.[3] Therefore, the lien of Hiett's attorney cannot extend to any denials which were made on the basis of the palliative/maintenance care exclusion codified at § 704(1)(f).

C. Section 704 does not violate the *quid pro quo* of the WCA.

In an attempt to broaden the holding of *Hiett*, Hiett attacks the provisions of the WCA which address medical benefits and claims that restricting a claimant's access to medical benefits violates the *quid pro quo* of the WCA. Hiett Br. 3-4, 7. In support of her argument, Hiett cites to the 1993 legislative restrictions on the availability of medical benefits. Hiett Br. 3-4, 7. To the extent Hiett is attempting to challenge the constitutionality and validity of the palliative/maintenance and secondary medical service provisions of the WCA, the State Fund asserts that those arguments are inappropriate on remand and have no bearing on the scope of *Hiett*.

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[1] "'Palliative care' means treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms." Mont. Code Ann. § 39-71-116(21) (2003).

[2] "'Maintenance care' means treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status." Mont. Code Ann. § 39-71-116(17) (2003).

[3] As the State Fund noted in its Opening Brief, palliative care and maintenance care are independent treatment modalities which are separate and distinct from "primary medical services" and "secondary medical services." Therefore, Hiett's "two tier system" needs a third tier which is specific to palliative and maintenance care. State Fund's Op. Br. 4-6.

However, if this Court considers Hiett's *quid pro quo* argument, the State Fund asserts that Hiett's argument fails because claimants are still receiving reasonable medical benefits in connection with their injury. *See generally Sherner v. Conoco, Inc.*, 2000 MT 50, ¶ 17, 298 Mont. 401, ¶ 17, 995 P.2d 990, ¶ 17 ("The purpose of the Act is to protect both the employer and the employee by incorporating a *quid pro quo* for negligent acts by the employer. The employer is given immunity from suit by an employee who is injured on the job in return for relinquishing his common law defenses. The employee is assured of compensation for his injuries, but foregoes legal recourse against his employer."). Lacking a wholesale denial of medical benefits, and because an injured claimant receives reasonable and necessary medical benefits in connection with a workplace injury, the restrictions set forth in § 704 do not violate the *quid pro quo* behind the WCA. *See Simms*, ¶¶ 17-26 (rejecting a similar *quid pro quo* challenge and holding that a handicap-accessible van did not constitute a primary medical service because, among other reasons, it was not necessary to sustain MMI). Further, even if claimants could sue the employer under general tort liability for medical benefits in connection with a workplace injury, the claimants would only be entitled to receive reasonable medical benefits in connection with their injury. *See* Montana Pattern Instruction 25.07 (a jury award "should include the reasonable value of necessary care, treatment and services received . . ."); *Tynes v. Bankers Life Co.* (1986), 224 Mont. 350, 730 P.2d 1115. Therefore, the general tort liability is no different than the pre- or post-1993 versions of § 704 because the medical services have to be reasonable in order to be compensable. Consequently, Hiett's *quid pro quo* argument is unavailing.

Lastly, one of the stated policies behind the WCA is to allow employers to secure workers' compensation coverage at reasonably constant rates. *See* Mont. Code Ann. § 39-71-105(3). In support of that policy, the Legislature can determine what benefits are owed to whom as a result of a workers' compensation injury. *See Ingraham v. Champion Intl.* (1990), 243 Mont. 42, 48, 793 P.2d 769, 772 (In Montana, "[t]he power of the legislature to fix the amounts, time and manner of payment of workers' compensation benefits is not doubted."). Therefore, whether in response to escalating medical costs or for other legitimate reasons, the Legislature acted within its authority when it decided to revise § 704 by modifying the criteria for determining the compensability of medical benefits available under the WCA. Accordingly, Hiett is misguided in her suggestion that the 1993 revisions to § 704 are unlawful.

## CONCLUSION

Hiett's two-tiered system of medical benefits in the post-*Hiett* environment is flawed because her system is based on an overbroad interpretation of *Hiett*. Under

*Hiett*, when a claimant suffering from a chronic condition reaches MMI, medical treatments which are necessary to sustain MMI are still compensable as a primary medical service. If the medical treatment in question is not necessary to sustain MMI, then its compensability will be evaluated under the secondary medical service provision codified at § 704(1)(b) or the palliative and maintenance care provision codified at § 704(1)(f). However, even in the post-*Hiett* environment, palliative care and maintenance care cannot constitute primary medical services and are therefore only compensable if the requirements of § 704(1)(f) are satisfied.

The attorney fee lien of Hiett's counsel does not apply to all denials made on the basis of the secondary medical service provision codified at § 704(1)(b) because an insurer is still lawfully entitled to make denials based on that provision. Further, the attorney fee lien of Hiett's counsel does not apply to any denials made on the basis of the palliative/maintenance care exclusion codified at § 704(1)(f) because *Hiett* did not transform palliative/maintenance care into a primary medical service.

Pursuant to the Court's instruction at yesterday's conference, the Montana Contractor Compensation Fund will not file a separate pleading but instead joins in the filing of this brief.

DATED this 15 day of July, 2005.

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**CERTIFICATE OF MAILING**

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Intervenor State Fund and Montana Contractor Compensation Fund, hereby certify that on this 15th day of July, 2005, I mailed a copy of the foregoing *Montana State Fund's Answer Brief Regarding Scope of Decision*, postage prepaid, to the following persons:

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