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OFFICE OF
 WORKER'S COMPENSATION JUDGE
 HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

EULA MAE HIETT,

Petitioner,

v.

MISSOULA COUNTY PUBLIC
 SCHOOLS,

Respondent/Insurer.

WCC No. 2001-0278

**MONTANA STATE FUND'S
 OPENING 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 Opening Brief Regarding Scope of Decision. For the reasons stated herein, 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

During the in-person conference in the above-referenced matter on May 11, 2005, the parties and the Court identified two threshold legal issues which require immediate briefing:

1. Did *Hiett* abrogate the exclusion of palliative and maintenance care codified at Montana Code Annotated § 39-71-704(1)(f)?; and

2. Did *Hiett* wholly abrogate the secondary medical services section codified at § 704(1)(b), or does the section still apply under certain circumstances?

Hiett v. MSGIA, Hearing No. 3603, Vol. XVIII at 3749 (May 11, 2005).

As explained below in more detail, the State Fund asserts that *Hiett* did not abrogate § 704(1)(b) or § 704(1)(f). The *Hiett* decision was based on a unique set of facts and has limited applicability. For chronic conditions, the Montana Supreme Court defined MMI as an ongoing process that is not necessarily identifiable by a specific date, so "primary medical services" include those treatments which are necessary to sustain medical stability. Although *Hiett* may broaden the types of primary medical services which are available to claimants suffering from chronic conditions, *Hiett* does not entitle claimants to receive palliative or maintenance care to treat their chronic conditions. Instead, those types of care are only compensable if the requirements of § 704(1)(f) are satisfied. Likewise, *Hiett* does not entitle claimants to receive all types of secondary medical services to treat their chronic conditions. If a claimant has reached MMI, a "secondary medical service" can become a compensable "primary medical service" under *Hiett* if the service is necessary for the claimant to sustain medical stability. However, if the service is not necessary to sustain medical stability, then it is only compensable if the requirements of § 704(1)(b) are satisfied.

ARGUMENT

The two threshold issues identified above present questions of first impression for this Court in the post-*Hiett* environment. Because of the unique nature of Montana's Workers' Compensation Act ("WCA") and the judicial decisions interpreting its provisions, case law from other jurisdictions provides minimal guidance in resolving the threshold issues. However, the answers to both threshold questions are contained in the express language of WCA and the *Hiett* decision.

As this Court is well-aware, *Hiett* was a case driven by a unique set of facts and involved a claimant who suffered from a chronic pain condition. In analyzing the medical provisions of the WCA and *Hiett*'s potential entitlement to the continued payment of certain prescription medications after she had reached medical stability, the Montana Supreme Court held:

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.**

In reaching this conclusion, we 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.**

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 v. Pub. Sch. ¶¶ 33-35 (italics in original) (boldface added).

A close examination of the *Hiett* holding indicates that the Montana Supreme Court differentiated between a claimant's recovery from a "typical" workers' compensation injury versus a claimant's recovery from an injury involving a chronic condition. For "typical" injuries and recoveries, MMI is still measured by a finite point in

time, so *Hiett* appears to have no applicability to non-chronic conditions. However, for injuries involving chronic conditions, MMI cannot be measured by a finite point in time. Instead, MMI is an ongoing process which requires certain "primary medical services" that are necessary for a claimant to sustain medical stability.

I. HIETT DID NOT ABROGATE THE EXCLUSION OF PALLIATIVE AND MAINTENANCE CARE CODIFIED AT § 704(1)(f).

Hiett's counsel contends that *Hiett* abrogated the palliative and maintenance care provisions of the WCA, so any medical benefit denials which were made on the basis of palliative or maintenance care should be included in her common fund attorney fee lien. However, the *Hiett* decision unmistakably differentiates between primary medical services and palliative/maintenance care. In addressing the differences, the Montana Supreme Court specifically stated that its holding was mindful of the palliative and maintenance care provisions. *Hiett*, ¶ 34. The Montana Supreme Court then implicitly stated that palliative and maintenance care do not meet the definition of primary medical services, nor do they prevent a claimant from relapsing into a non-MMI condition. *Hiett*, ¶ 34. Accordingly, the Montana Supreme Court found "no tension or irreconcilability between the conclusion we reach here and the Act's reference to 'maintenance' or 'palliative' care." *Hiett*, ¶ 34. Therefore, the language contained in the *Hiett* decision establishes that the exclusions of palliative and maintenance care codified at § 704(1)(f) have not been abrogated by *Hiett*, and insurers are still entitled to deny requests for palliative or maintenance care under the statute.

The Montana Supreme Court's conclusion with respect to the continued viability of the palliative and maintenance care exclusion finds support in the following legislative definitions of those terms:

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

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

Mont. Code Ann. § 39-71-116 (2003). See also *Parmer v. State Compen. Ins. Fund*, 2000 MTWCC 33, Findings of Fact, Conclusions of Law & Judgment ¶ 52 (June 9, 2000) ("[M]aintenance care' is preventative in nature, while palliative care addresses symptomatic flareups."). In the WCA, palliative and maintenance care are not included in the definition of "primary medical services," which are defined as "treatment

prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving¹ medical stability." Mont. Code Ann. § 39-71-116(26). In addition, palliative and maintenance care are not included in the definition of "secondary medical services," which are defined as "medical services or appliances that are considered not medically necessary for medical stability. . . ." Mont. Code Ann. § 39-71-116(30). Therefore, under the WCA, palliative care and maintenance care are independent treatment modalities which are separate and distinct from "primary medical services" and "secondary medical services."

The legislature has differentiated between primary medical services, secondary medical services and palliative/maintenance care. The legislature has also provided for limited circumstances in which palliative/maintenance care is compensable:

(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.

¹ As noted above, for chronic conditions, the term "achieving medical stability" is synonymous with "sustaining medical stability" pursuant to the *Hielt* decision.

Mont. Code Ann. § 39-71-704(1)(f) (2003).

Hiett did not disturb the legislative directive regarding the limited compensability of palliative and maintenance care. In recognizing § 704(1)(f), the Montana Supreme Court noted that palliative and maintenance care can only be compensable after a worker "achieves" medical stability, as defined by *Hiett*. *Hiett*, ¶ 34. Consistent with the governing statute, *Hiett* held that in order to "achieve or sustain" medical stability, a claimant is not entitled to receive maintenance care which is designed to provide an optimum state of health. *Hiett*, ¶ 34. Likewise, *Hiett* held that in order to "achieve or sustain" medical stability, a claimant is not entitled to receive non-curative palliative care which is designed to ease symptoms. *Hiett*, ¶ 34. Stated differently, by definition, palliative care and maintenance care are not the type of treatments which are necessary to "achieve or sustain" medical stability.

Hiett did not alter the legislative definitions of palliative care or maintenance care, nor did it modify the potential compensability of those medical treatments. As was the case prior to *Hiett*, palliative care and maintenance care are only compensable if they are "appropriate to enable the worker to continue current employment" or if they provide "a clear probability of returning the worker to employment." See Mont. Code Ann. § 39-71-704(1)(f)(iii). Accordingly, even in the post-*Hiett* environment, insurers are lawfully permitted to deny requests for palliative or maintenance care if the statutory criteria have not been met.

II. HIETT DID NOT ABROGATE THE SECONDARY MEDICAL SERVICE SECTION, AND § 704(1)(b) STILL APPLIES TO DETERMINE A CLAIMANT'S ENTITLEMENT TO SECONDARY MEDICAL SERVICES.

During the in-person conference in this matter on May 11, 2005, the parties and the Court discussed whether *Hiett* abrogated the secondary medical services section. Based on the transcript of the proceeding, the issue appears to have been resolved:

COURT: . . . Are you contending that all secondary medical services are payable now under *Hiett*?

MS. MCKENNA: No.

Hiett v. MSGIA/Montana State Fund, WCC No. 2001-0278, Transcr. Proc. 38:1-3 (May 11, 2005). However, at the end of the hearing, this issue was identified as a threshold issue which required briefing. Assuming it is still an issue, the State Fund asserts that § 704(1)(b) still governs a claimant's post-MMI entitlement to secondary medical benefits.

Again, as noted above, the language of *Hiett* applies to limited situations involving chronic conditions. Consequently, for non-chronic conditions, the traditional view of MMI still applies in determining a claimant's potential entitlement to secondary medical services under § 704(1)(b). Chronic conditions, however, now require a slightly different analysis because *Hiett* essentially broadened the types of post-MMI medical services and treatments which may be available to a claimant.

Under *Hiett*, a claimant suffering from a chronic condition is entitled to receive primary medical services which are necessary to "achieve or sustain" medical stability. The line historically drawn between primary medical services and secondary medical services has become blurred as a result of *Hiett's* holding that MMI is an ongoing process that lacks finite parameters. Without a finite MMI date, it has become more difficult to determine what type of medical treatment is considered "primary" and what type of treatment is considered "secondary." If MMI has been reached in a claim involving a chronic condition, medical treatments will still constitute "primary medical care" if they are necessary for the claimant to "sustain" a point of medical stability. If the treatments are not necessary for the claimant to "sustain" medical stability, then they are only compensable as a secondary medical service if there is "a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment." See Mont. Code Ann. § 39-71-704(1)(b). If the treatments do not meet the statutory criteria of § 704(1)(b), insurers are lawfully permitted to deny them under § 704(1)(b).

Hiett did not transform all secondary medical services into primary medical services. If the treatment is not necessary to sustain MMI, then its compensability must be evaluated under the provisions of § 704(1)(b). Therefore, the language of *Hiett* did not wholly abrogate § 704(1)(b) and its provisions can still be relied upon to determine the compensability of secondary medical services.

CONCLUSION

Hiett involved a unique set of facts and its holding is limited. For non-chronic conditions which have a finite MMI date without the concern of a relapse, *Hiett* has no applicability. For chronic conditions involving an ongoing state of medical stability, *Hiett* broadens the types of primary medical services and treatments available to claimants by making compensable the treatments which are necessary to sustain MMI. However, *Hiett* does not entitle a claimant to receive any and all types of medical treatments or services.

The *Hiett* decision and the WCA both confirm that palliative and maintenance care

do not constitute primary medical services, nor are they considered treatments which are necessary to avoid a relapse into a non-MMI condition. As a result, *Hiett* does not make palliative and maintenance care compensable to treat chronic conditions. Instead, the requirements of § 704(1)(f) must be satisfied for palliative and maintenance care to be a covered medical benefit. If the statutory requirements are not met, insurers may lawfully deny requests for palliative and maintenance care. Because *Hiett* did not abrogate the palliative and maintenance care exclusion codified at § 704(1)(f), the common fund attorney fee lien of *Hiett's* counsel should not apply to claimants who were denied palliative or maintenance care.

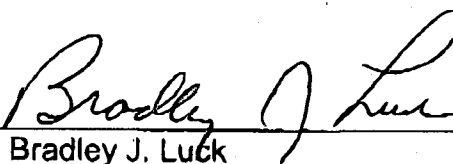
Under *Hiett*, insurers are not liable for secondary medical services to the same extent they are liable for primary medical services. If a claimant suffering from a chronic condition has reached MMI, a "secondary medical service" can be compensable as a "primary medical service" if the service is necessary for the claimant to sustain medical stability. However, if the service is not necessary to sustain medical stability, then it is only compensable if the requirements of § 704(1)(b) are satisfied because *Hiett* did not wholly abrogate the secondary medical services provision.

DATED this 24 day of June, 2005.

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CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Intervenor, hereby certify that on this 24th day of June, 2005, I FAXed and mailed a copy of the foregoing *Montana State Fund's Opening Brief Regarding Scope of Decision*, postage prepaid, to the following persons:

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