

1 WEDNESDAY, OCTOBER 22, 2003

2

3 THE COURT: Well, this is continuing saga
4 of Eula Mae Hiatt versus Missoula Public Schools. We
5 are gathered together here in Helena with Syd McKenna
6 and Leo Ward to determine where we are going from here.
7 And the reason I asked for this conference is because,
8 Syd, you made a common fund request in this case, so
9 that puts it in the realm of the other cases. Have you
10 been following the other case, Leo?

11 MR. GALLAGHER: To some degree. I
12 haven't been in the middle of them.

13 THE COURT: Olly showed up at a
14 couple of the conferences. And how about you, Syd?
15 Have you been following them?

16 MS. McKENNA: I have read the cases
17 and I have visited with a couple of the attorneys to
18 kind of find out what is going on with those cases, so
19 I guess to a point I have been following them.

20 THE COURT: Okay. All right. Well,
21 what I have got, I got on the other case, I have got

22 all a host of challenges to the common fund. The first

23 challenge of course is the retroactivity issue and

24 that's going to get resolved one way or the other.

25 I think I have indicated to counsel that

1 in all of these cases and I will indicate to you, I
2 think the Supreme Court is going to hold, it is going
3 to adopt the united Supreme Court latest standard which
4 says all judicial decisions are retroactive. Whether
5 that's good or bad is of no moment, but I think that's
6 what they are going to do.

7 MR. GALLAGHER: Couple of years it
8 will be good. But right now it is bad. It will all be
9 good in the future. It all comes around again.

10 THE COURT: In any event, I think
11 that's where that's going to end up. And I have --
12 what I have been doing, in all of these cases is, I am
13 saying that. I said that in Flynn, which is the
14 decision, the latest decision on point.

15 MR. GALLAGHER: Seen that.

16 THE COURT: But I am also going
17 through the Chevron analysis, which is the alternative
18 standard for determining retroactivity. In most of the
19 other cases that that I have got, Stan and George <sh>
20 mill, Wild and Matthews. I think what is the other
21 one? It is Dave Ward's case. I can't remember the

22 name of the case off the top of my head, but they are
23 <aurkl> the insurers <rf>, have asked to present some
24 evidence as far as Chevron test goes; and also as far
25 as whether or not it is appropriate case for the common

1 fund, whether it is truly, truly what you call a common
2 fund.

3 So I guess one of the things I need to
4 ascertain today is what kinds of issues are we going to
5 have here. Are we going to have a replay of those
6 issues and do we have other additional issues and I
7 suppose probably the one I ought to ask probably at
8 least initially is, Leo.

9 MR. GALLAGHER: Well, a couple of
10 things of. I understand from your rude decision that
11 you are limiting common fund to the insurer involved S
12 manage accurate.

13 THE COURT: That's accurate.

14 MR. GALLAGHER: Are we still living
15 in that world today.

16 THE COURT: We are still living in
17 that world.

18 MR. GALLAGHER: I am going to base
19 all might have comments on where we are today. Where
20 we are today is rude applies. We are limited to MS GI
21 A and so then you have to Look at what fund are we

22 talking about in this case, because there is no actual
23 fund that exists today. If benefits were denied
24 because they were not secondary, primary and you have
25 to go back to the physician and ask the physician if

1 these, this treatment was necessary to maintain, not
2 just achieve medical stability, then that may create a
3 fund, but that will believe a prospective funneled, so
4 you have to ask yourself what fund are we talking
5 about, where we are going to draw this 25 or 20 percent
6 or whatever it is going to be out of for a common fund.

7 So that's one issue that I have that I
8 don't have an answer to. And maybe this has been
9 addressed in some of these other cases. But they are
10 different because some of these other cases, it is
11 going to be a little easier to ascertain where the,
12 like impairment case, things like that. You can go out
13 and get impairment awards, you can go out and determine
14 whether someone was being apportioned and you no longer
15 apportion. You can fill in the gap there. How do you
16 calculate them in these cases.

17 The other big problem that I see and it
18 was the one I raised in my brief response, well, number
19 one I should go back to another one. It sounded like
20 Syd was asking for benefits and permanent disability
21 case and as I understand height it was of a permanent

22 partial disability case not a permanent total
23 disability case. So in my response I mentioned that.
24 The other issue that I saw and I didn't articulate it
25 very much, I just raised it as a problem is that this

1 has a lot of impact maybe on insurers because it is a
2 problem as all these common fund cases are to
3 administrate. Most insurers now keep a list beside
4 their desk of the various potential deductions they
5 have to take out of any payment to anybody appear it is
6 now a growing list. It has probably got five or six
7 notation on it. Height will just be another one on the
8 list, but my problem was when I looked at the initial
9 request was, okay, who does it really impact the that
10 most <nai> case like this. It doesn't impact the
11 claimant like most of these do. Most of these, the
12 money is coming out of the claimants pocket but the
13 claimant wasn't going to get it now obviously. Now
14 they get a benefit they wouldn't have got. Who is
15 going to be affected by this?

16 Well, eventually it will be claimants and
17 I will tell you why, but first you have to start with
18 who is directly affected. The medical care providers,
19 because as you know, they have to pay a fee scheduled
20 amount. So they have of a fee schedule deduction.
21 Often as much as 20 or 30 percent of what they would

22 normally charge for a procedure.

23 And then if you are taking another 20

24 percent offer or 25 percent, depending on where we are

25 going with this, you are down to like a 40 percent

1 reduction off of their normal. If there was somehow a
2 Lockhart lien the file that would be another 25 percent
3 off.

4 So theoretically in some cases with all of
5 those deductions the medical care provider, be it a
6 doctor, a physical therapist, osteopath, chiropractors
7 will a lot of them, I don't know what they do with
8 pharmacy bills, but pharmacy providers would be in that
9 group as well, because a lot of these are going to be
10 pain medication and anti-depressants and things like
11 that. If you take all these deductions off, these
12 medical providers are going to be providing their
13 services in some cases for below 50 percent.

14 Now, some doctors and hospitals can adjust
15 for that. They don't like to, but they can. Because
16 they over charge to begin with, some of them. Well,
17 hospitals will deny it, but medical providers, I don't
18 have a lot of sympathy for them.

19 The ones I am most concerned about is the
20 pharmacists because I represent pharmacists in this
21 state, and a number of pharmacists against the drug

22 manufacturers and price fixings and I know how fine

23 their margins are. Are you saying there is no fee

24 scheduling.

25 MS. McKENNA: Before you go onto

1 your next point if I could just address that point.

2 MR. GALLAGHER: Why don't you let me
3 finish, and then you can address all the points I make.

4 THE COURT: I will give you a
5 chance. This is sort of a free wheeling thing. So he
6 wants to, we will let him finish.

7 MR. GALLAGHER: I would like to
8 finish my thought. I don't mean to be rude. I would
9 like to finish the thought because I may not remember
10 it if I don't. It is my understanding those are the
11 people who are affected the medical care provider's.
12 They will have this amount taking from what they are
13 suppose to be paid. If you have get all the deductions
14 added up you could have a significant deduction. What
15 ising that going to mean a practical matter in the
16 future. They have a couple of motions. They can
17 provide services at a loss or they can say no when
18 somebody asks them if this stuff was meant to sustain
19 their medical stability. And that's the lesson they
20 are eventually going to learn is if they say no they
21 don't have to provide services at a loss. If they say

22 yes they have to say yes to provide services at a loss.

23 What kind of position does that put medical providers

24 in. That was the biggest concern I had and that's why

25 I said in my preliminary response. Get notice out to

1 some of these people so that they can respond and
2 somehow take a position on this, because just like on
3 the Lockhart lien issue, they were affected by it, and
4 they will be affected again. That was my biggest
5 concern in all of this.

6 THE COURT: Lockhart.

7 MR. GALLAGHER: How that will go.

8 THE COURT: Lockhart, of course I
9 decide Lockhart I held in favor of the medical
10 providers and the Supreme Court reversed me on that.
11 At the Supreme Court level, did they ever get involved?

12 MR. GALLAGHER: I think they filed
13 amicus briefs. Montana Hospital Association. I am not
14 sure all of them did.

15 THE COURT: As far as interested
16 parties who have a stake in this thing, I am open. I
17 am basically in all these case, I have said anybody who
18 wants to come in and speak can have that opportunity so
19 I will give everybody an opportunity.

20 Okay. Do you want to do any more?

21 MR. GALLAGHER: I am going to say, I

22 am not going to provide notice to them because I have
23 just expressed on the record I don't have a lot of
24 sympathy for doctors, but I am not going to provide
25 notice to them. I think they should be notified; but

1 if they are not notified, then they are not going to
2 have an opportunity to speak.

3 So someone should give them some
4 opportunity to be notified through a health
5 organization or something, they should be aware that
6 this issue is out there and the potential impact it
7 has, if it has any. Maybe I am wrong. Maybe I am
8 absolutely wrong as to how that is going to affect
9 them.

10 MS. McKENNA: If I could address
11 that point. My understanding is that the common fund
12 lien is not prospective, so, for instance, from the
13 time the Supreme Court entered their decision, about
14 <r*> if MSGIA or is denying medical benefits on the
15 basis of the statute of 1993, my lien wouldn't apply.

16 So really all we are talking about that
17 the lien would apply to is those medical providers who
18 already been denied payment and so they went from
19 getting nothing to getting something. I mean, that's
20 my understanding. If it is prospective, then I would
21 think that his argument in regard to, you know, the

22 poor medical providers is valid. But my understanding
23 is that the common fund lien is only retroactive. So
24 it would only apply to those situations where the
25 medical providers or their bill has been denied. On

1 the basis of the 1993 statute.

2 THE COURT: Well, you can certainly
3 limit your claim to that and to be honest with you,
4 that's basically what my understanding is at this
5 point. I mean, I don't think anybody has argued that
6 it applies to things that arise in the future. Well,
7 somebody did but they gave up after we sort of --

8 MS. McKENNA: I am not making that
9 argument. So I mean just, I think I am looking at the
10 situation, and it may -- who knows how it may be very
11 miniscule. It may be large I simply don't know, judge,
12 in terms of what we are talking about but certainly
13 I think what we are talking about is those, YOU
14 KNOW, providers who have gotten nothing who may get
15 something. Because of this -- because of the Supreme
16 Court decision in Hiett.

17 THE COURT: Okay. Left me jump to
18 something that Leo, that you didn't mention and I want
19 to teas this out. I am going to come back to all of
20 this because this gets complicated. Everything case
21 has a little bit different twist and obviously this one

22 does because of the medical issues. Because of the

23 Lockhart thing.

24 Is the school fund, trust funding to

25 raise the retroactivity issue?

1 MR. GALLAGHER: No.

2 THE COURT: You are not going to
3 raise the rest.

4 MR. GALLAGHER: No. No, it is lost.

5 THE COURT: Some of attorneys don't
6 think it is lost.

7 MR. GALLAGHER: No, but they are
8 beating their heads against the wall. You have already
9 told them it is lost, so I don't know why they would
10 continue to fight it.

11 THE COURT: It depends on what the
12 Supreme Court does, but I think it is probably lost,
13 too.

14 MR. GALLAGHER: It depends on that,
15 it is lost. Look where we are on Hiett the, when a
16 chief needs a stain. So we don't even have to go into
17 that. I am not going to advise my client to fight a
18 lot battle. The only reason we fought Hiett is because
19 it didn't seem like a lost battle at the time but if we
20 can loose that one, the retroactivity is a chip shot.
21 You have already ruled in Lynn which is probably the

22 best argument that everybody had in that case. So, no,
23 we are not going to raise the retroactivity. From what
24 I hear here, if they are not going to raise prospective
25 and they are willing to limit it to my client, my

1 client is willing to go through and do the analysis to
2 figure out where <swunz> denied a bill that had
3 actually, or a service that had actually been performed
4 and they are willing to pay the physician for that
5 service and for, pay the 20 percent or 25 percent,
6 whatever tthat's being requested. But I hear now that
7 maybe we are going to be going after the bigger
8 picture.

9 MS. McKENNA: I would agree with you
10 that I am not going prospective, but I would agree with
11 your guess about this, that, you know, renew my motion
12 that the insurers be notified and maybe there can be
13 some sort of a situation where some sort of a
14 stipulation or whatever to see what the Supreme Court
15 does, and is it Rud or Rude?

16 THE COURT: We have been calling it
17 Rude, like R-U-D-E.

18 MS. McKENNA: So, no, I think all
19 the insurers need to be notified so I would like to
20 renew my motion in that regard. And it was my
21 understanding from Leo's response that he concurred in

22 that, you know, he indicated in his response that all
23 the insurers should be notified.

24 THE COURT: So you are making --

25 MR. GALLAGHER: If it is going to

1 impact them, yes.

2 THE COURT: You are making the
3 global claim?

4 MS. McKENNA: Yes.

5 THE COURT: What I call --

6 MS. McKENNA: Yes, sure.

7 THE COURT: Which isn't Lee's's
8 battle.

9 MR. GALLAGHER: I could care less.
10 We are willing to cooperate if we are just talking
11 retrospective or situations where permanently partially
12 disabled people like Miss Hiatt were denied benefits
13 under the 19 -- which statute.

14 MS. McKENNA: '93.

15 MR. GALLAGHER: '93 statute. Yes,
16 we will go back and try to figure that out. We are
17 willing to pay and do what is necessary under those
18 facts.

19 THE COURT: Well it sound to me like
20 that pretty much eliminates the issues as far as you
21 are concerned appear then the battle really is Syd's as

22 far as trying to make it global. That simplifies
23 things for me. It simplifies things for everybody.
24 The question is, can you do it. Can you go back and
25 make that determination and have you talked to each

1 other about doing it.

2 MR. GALLAGHER: I haven't talked to
3 Syd about it, but I have talked to the folks at MSGIA,
4 and they are doing their best to figure out where that
5 is at. It is a matter, just like it is for the State
6 Fund, of going through the files where 1993 was the
7 statute and figuring out what happened.

8 This didn't happen very often. I think
9 Hiatt is the only case that I am even aware of where it
10 ever became a controversy. So I don't think it
11 happened a lot with this particular client. I am not
12 sure it has happened with many clients along the way.

13 MS. McKENNA: One, I guess, kind of
14 fine point on that is my understanding is that the
15 predecessor of MSGIA was Alexis and I believe it began
16 happening with Alexis or maybe it was, I tried to pull
17 Equis deposition yesterday. But that might have
18 happened just as the transition was made, but Alexis
19 was, some of the notes from Equis came on Alexis
20 letterhead so I don't know what the --

21 MR. GALLAGHER: Those files are

22 still available. There is still school group files

23 available as far as I know.

24 THE COURT: You are talking about a

25 TPA, a third-party administrator.

1 MR. GALLAGHER: Yes. I think they
2 had a third-party administrator for a while that was
3 administering the claims but that was only for a couple
4 of years, as I recall. And I am not sure when the
5 dates were. The dates may have not even been before
6 the -- They might have been before the '93 statute, but
7 I am not sure.

8 THE COURT: Mickey, what is it? In
9 Wild and Matthews that we sent out the notices? Have
10 those gone out?

11 THE CLERK: Oh, yes.

12 THE COURT: To all insurers?

13 THE CLERK: Yes.

14 THE COURT: We did send notices out
15 in Wild and Matthews, and then I sent them out in fish,
16 frost and Rausch.

17 MS. McKENNA: I saw that one.

18 THE COURT: And we can certainly do
19 the same in this case. It is just an administrative
20 matter. What we have done is we compiled a list of the
21 insurers and in that case, I don't remember how far

22 back we went. But we can certainly, it is easy to go

23 back to, what is it? '93 in this case?

24 MS. McKENNA: Yes.

25 THE COURT: Easy to go back to '93

1 and give those notices. It is a matter of generating
2 mailing labels. The department has been very
3 cooperative and done that. And then we have generated
4 the order. We have put it on the court so they will
5 look at it at least. And I am thinking about, I am
6 thinking about protecting both parties. The insurers
7 if they ignore it ignore it at their peril and may end
8 up paying in addition.

9 So I want to make sure the notice is
10 effective. So if you want to go through that process,
11 we can certainly do that.

12 MS. McKENNA: That would be great.

13 THE COURT: Okay.

14 MS. McKENNA: My understanding is is
15 the plaintiff traditionally has bore the burden of that
16 expense, and we would be glad to do so.

17 THE COURT: Okay. Yeah. I have
18 made them pay the postage. We have done the, I think
19 we have furnished the envelopes. We furnished, I think
20 the order. I think they copy the order?

21 THE CLERK: Right.

22 THE COURT: So, I mean, we can
23 furnish that and then you put postage on it and it
24 goes, and any returns come back to the court so we can
25 monitor the returns.

1 MS. McKENNA: Okay, great.

2 THE COURT: So at least that will
3 preserve the issue for you. The question, the problem
4 I have got now is, coming back to this Lockhart thing,
5 it is really what we are talking about is we are
6 talking about withholding on medical benefits which
7 comes out of, it comes out of the claimants pocket.
8 No, it comes out of the medical providers pocket. It
9 comes out of the benefits paid.

10 So I guess that's not a problem. That may
11 be, that's only a problem in the way we couch the
12 notice. So maybe you can take a look at the notices we
13 sent out in Fish, Frost and Rausch and also in Wild and
14 Matthews and draft me up a proposal.

15 MS. McKENNA: Yeah, okay. I drafted
16 one up but I haven't looked at Matthews and Wild. I
17 didn't send it with, I think I have got it; though.
18 Anyway, I will take a look and revamp that a bit and
19 make sure I look at those two. They should be on-line,
20 I guess.

21 THE COURT: They are posted on-line?

22 THE CLERK: They are.

23 MS. McKENNA: Great. That makes it

24 so easy.

25 THE COURT: I know. It makes it

1 easy for me, too. All right. Well, let's do that.

2 Well, I guess the thing to do, Leo is maybe for you to
3 talk to Syd about what you are doing and if she is
4 happy with that, I think always you have to do is keep
5 me in the loop and go through that process.

6 MR. GALLAGHER: I would like it get
7 it clear on the record today what we are talking
8 about. Permanently partially disabled claim mental
9 under the 1993 statute who were denied medical services
10 that were provided. Is that what we are talking
11 about?

12 MS. McKENNA: I would like to refer
13 to my, because I was pretty careful how I -- I would
14 like to refer to my notice or my brief because I was
15 pretty careful how I worded it and I want to be exact.

16 Well, we have a dispute about whether it
17 is permanent partial and the way I said it, permanent
18 partially disabled and permanently total disabled
19 workers' compensation claimants with dates of injury
20 onset between July 1, 1993, and I said and the present
21 but I think that would be from the date of the decision

22 of the Montana Supreme Court, who have been denied
23 medical benefits after reaching maximum medical
24 improvement and who are not otherwise lawfully
25 precluded from obtaining some benefits. My thinking in

1 that, that that language is that there could be some
2 other legitimate reason that a person was denied
3 medical benefits and of course.

4 THE COURT: For example a closure of
5 his claim include medicals.

6 MS. McKENNA: Sure.

7 MR. GALLAGHER: That's clear.

8 Obviously what we are not disputing is permanent
9 partial disability because that's what Hiatt's case
10 was. You are claiming also permanent total disability.
11 I don't know if there are any in that category anyway
12 but we would dispute that that is not what the Montana
13 Supreme Court or the underlying decision was about. It
14 was a partially disabled person. So we would dispute
15 whether you have access to those type of benefits.

16 THE COURT: Let me ask a question.
17 Obvious lie I can probably resolve that; but is there
18 anything in the secondary medical benefits that is
19 peculiar that as far as permanent partially disabled
20 claimants versus permanent totally disabled claimants.
21 I can't remember?

22 MR. GALLAGHER: There is reference
23 to permanently totally disabled claimants in the
24 statute, reference to the kind of treatment that they
25 are allowed and with related to prosthesis and so

1 forth.

2 THE COURT: Court is it different
3 than the permanent partial secondary medical benefits
4 people?

5 MR. GALLAGHER: You know, I would
6 have to go back and look to see what the differences
7 are. I mean, the case was about a permanently
8 partially disabled person. Not a permanently totally
9 disabled person. That's why I make that argument.

10 THE COURT: Right. I understand
11 that. Syd judge, it was certainly, I know, definitely
12 argued in the in front of the Montana Supreme Court
13 that the interpretation of the statute, when a person
14 reaches maximum heeling, once they reach that point,
15 the way that it was interpreted in terms of achieving
16 medical stability, then would implicate a total
17 disability, a person who was on total disability to
18 point where the only thing they could get is monitoring
19 of their prescription medications and monitoring of
20 their prosthetic, and prosthetic device but they
21 couldn't actually get the prescription medication paid

22 for.

23 It, under the way that this court

24 interpreted the statute together,. So I guess my, and

25 I looked for cases on this point in regard to common

1 fund and whether I would be limited to partial, you
2 know, since Hiatt was a partial, and I didn't find
3 neck.

4 But the only thing I would say is what it
5 did involve interpretation of the statute and this
6 Court's interpretation of the statute implicated total
7 claimants as well and there maybe known out there was
8 ever denied based on the statute; but maybe there was.
9 And if they were, they have benefitted from the Hiatt
10 decision.

11 THE COURT: I guess the question
12 would be is whether or not, if interpreting the
13 statute, whether there might be some distinction
14 between how it affects and applies to permanent total
15 Virts permanent partial.

16 If it is just a matter of statutory
17 interpretation that equally affects both, then there is
18 a pretty good argument that common fund would apply to
19 that. If it is different, that's why I am asking you
20 if there is some sort of difference, if --

21 MR. GALLAGHER: I would have to go

22 back and look and I am not concerned about that anyway
23 because I don't think it happened much, but again we
24 are embarking then on a very slippery slope especially
25 if we continue to recognize common funds and apparently

1 we will see if the legislator gets the last word on
2 that or not but that's a very slippery slope because
3 now we are talking about going beyond the facts of
4 the case as understood and to implicated or potentially
5 implicated individuals who were not involved in the
6 facts of the case. If common funds can be expanded to
7 that agree, then they basically have unlimited
8 potential. I mean, it -- not only are we looking at
9 the factually involved people, the permanently <tis>
10 aged <ber> also looking at anybody that could possibly
11 be affected by it who are not factually involved. I
12 think that's going well beyond anything that's happened
13 with common funds so far.

14 THE COURT: Well, mirror if you
15 remember, mirror, they had the cap on the benefits
16 appear I think that cap affected all classes of
17 benefits. And I don't think they made a distinction.

18 MR. GALLAGHER: Right.

19 THE COURT: Based on the particular
20 claimant and the class of benefits that he was making
21 the we pretty much proceeded.

22 MR. GALLAGHER: It was my
23 understanding mirror was a much broader issue as
24 presented to right court as well. But I mean it could
25 be argued either way.

1 THE COURT: That's what I am
2 wondering. I am wondering if there is some sort of
3 distinction between permanently total and permanently
4 partial that would affect how that statute applies, if
5 there is not, then the argument no the common fund is
6 fairly strong because it is a precedent that affects,
7 it doesn't make any difference whether you are
8 permanently totally or permanently partially.

9 MR. GALLAGHER: I understand when
10 you are saying. I don't think necessarily agree with
11 it, but I do understand what you are saying.

12 THE COURT: Okay. Okay. Well, why
13 don't you look at it and let me know. If it is imean
14 if there are a few of them out there administrative Lee
15 it may not make a great deal of sense to fight over it.
16 If you want to fight over it, then we can, I can brief
17 it and make a decision.

18 MR. GALLAGHER: The first step where
19 will take is to see how many there are for this
20 particular client and make a determination as to
21 whether it is even worth getting excited about. It is

22 my understanding that most people paid permanently
23 totally disabled people regardless of what the statute
24 said. So I don't think it is going to be a big issue
25 anyway. But I didn't want to give it up here. Because

1 I think it is wrong to go that direction. And I I
2 think if I have started a ball rolling in that
3 direction now and that ball continues to role and then
4 the legislator's enactment is over turned by the
5 Supreme Court in the next year, before that's all
6 changed, then there could be a real problem with common
7 funds. Because then they are basically unlimited.
8 They are uncontrollable. If it is the implied and the
9 non implied and everybody is in, then I think you have
10 say problem.

11 THE COURT: We have the global issue
12 sitting out there to look at. So as you know, I don't
13 have the final say on that. My say, in some of these
14 cases has been overturned <shs>, as it in particular
15 case, but at least I was gratified by all, by the
16 comments of all the justices about how good my analysis
17 was about these statutes and how screwed up they are.
18 But they just reached a different conclusion as to one
19 word. Was that argued by wait or did one of the
20 justices just happen to -- did a.

21 MR. GALLAGHER: It was argued. It

22 was definitely argued. On the achieve means maintain.

23 MS. McKENNA: We argued it. Court

24 coat I don't think it was argued before me. Was it.

25 MR. GALLAGHER: Yes. It was one of

1 the issues. You went to the dictionary.

2 THE COURT: That's different. I
3 went to the dictionary.

4 MR. GALLAGHER: God forbid you go to
5 a Dick <shun> <nair> <ree>. That's where my sixth
6 grader went. He said, they must have a different
7 dictionary. I said, you are, right. It was a Harvard
8 grad that made the other decision, so go figure.

9 THE COURT: Well, and it is at least
10 somewhat straightened out. I am still not clear in my
11 mind as to how it is going to apply. I can see even
12 under the decision that there can be controversy as to
13 how we are going to determine what is achieved. What
14 that means in this case, short of a blanket just paying
15 for it. And I don't know how the insurers are going to
16 interpret it and I don't know, what kind of issues I am
17 going to get back on that.

18 The long-term solution is probable plea to
19 recraft the statute for something that everybody can
20 live with and is clearer.

21 MS. McKENNA: Right.

22 THE COURT: Whether or not --

23 MR. GALLAGHER: That's not going to

24 happen. You will get the statute recrafted. Believe

25 me many people will be upset about how it is recrafted.

1 They won't have to be able to live with it. They will
2 have to fight the battle again with a different set of
3 decision makers.

4 THE COURT: That's what makes my job
5 fun.

6 MR. GALLAGHER: Yes. You get
7 bounced around quite a bit.

8 THE COURT: Why don't you do that
9 and you and Syd talk about what you can do for sure on
10 the permanently partial and then maybe on the permanent
11 total depending on what you want to do with that and
12 let me know what you want to do with that. Syd you get
13 a draft of the a notice to go out to the insurers. If
14 it is okay, if it is not okay, send it to Leo.

15 MS. McKENNA: I will send it to Leo
16 as well.

17 THE COURT: Leo if you have some
18 comments about it, let me know. If I want to tinker
19 with it, I might tinker with it and send it back to
20 you. We have never had anything that I have ever
21 tinkered with that anybody has ever disagreed with. We

22 have done that by consensus and I would expect we can
23 do it here, too, and then we will set up some sort of
24 notice and get it out. And I guess it will be a notice
25 letting them know that -- well, you want me to

1 authorize the withholding of the 20 percent. Probably
2 I ought to do that to protect the insurers at least so
3 they can go ahead and withhold that without being
4 accused of being unreasonable. I think that's
5 essential. We don't need any more claims.

6 MR. GALLAGHER: Yes. I guess all I
7 would say, judge, is if you could give notice to
8 Montana Hospital Association and the Montana physicians
9 association, because otherwise you are really not
10 contacting those that are going to be the most affected
11 by this in terms -- but you are talking retrospectively
12 so I guess that's not big of an issue. If that's all
13 we are talking about. I was concerned about
14 prospective Lee because we haven't gone there yet. The
15 way we are going now and the way we are going to go in
16 the future is very uncertain and I think very like lie
17 that's going to be an issue at that time. Syd I am not
18 going to raise that issue. I think we are just looking
19 at those people who haven't gotten their money who
20 would now get their money.

21 MR. GALLAGHER: As long it is clear

22 that we are talking about those who have provided
23 services who are not paid those services. We will pay
24 the partially disabled on that, under the '93 statute.

25 MS. McKENNA: Are you saying you

1 don't think he needs to give notice to those.

2 MR. GALLAGHER: I still think he
3 needs to give notice. There is no harm in giving
4 notice. They will have an understanding what is going
5 on.

6 THE COURT: The Montana Hospital
7 Association. Who else.

8 MR. GALLAGHER: Montana physicians
9 association. They are both located here in town.

10 THE COURT: Okay. We can do that.
11 And as in the other cases, anybody who wants to come in
12 and file an amicus brief, I am going to allow them to
13 do that. Okay. All right. This is going <tok> a lot,
14 this will be a lot easier than some of the other ones.
15 Fortunately. If we get into the global situation, then
16 it is not a lot easier, and my life may become a
17 full-time policeman for how do we administer the
18 global.

19 MR. GALLAGHER: One of the problems.

20 THE COURT: Yes.

21 MS. McKENNA: Yes. I am pretty sure

22 I am -- I know that especially the State Fund, I know
23 that they were also, and maybe it was just from the
24 initial decision of Hiatt, but I had heard of Hiatt
25 letters and I saw a couple of Hiatt letters go out. So

1 where the State Fund said we are denying this because
2 you are not working. So.... But my understanding is
3 that issue is, you have determined that issue already
4 and that's up on appeal.

5 THE COURT: Right. Right.

6 MS. McKENNA: You aren't interested
7 in revisiting that issue.

8 THE COURT: Not terribly. I think
9 my logic was pretty sound in the first place. They may
10 disagree with me, but that's fine. Most of the stuff I
11 am sort of plowing ahead fairly care knee on it, so it
12 is not -- it is not something I have a great deal of
13 doubt that I would want to revisit. Obviously they are
14 going to visit it and the question is is whether. And
15 it may be a while. It may be a year or two before we
16 hear, but in the meantime at least we have gotten
17 everything sort of, well, everything will be protected.
18 The issue will be protected and then depending on what
19 they do, if they come back then, the State or the
20 authorization had withhold object slice will be lifted
21 so they can maybe the payments without withholding if

22 they want to do that. If it comes back and says they
23 are, I have to determine where to go from there. And
24 you will be out of it by then, Leo.

25 MR. GALLAGHER: Well, yeah.

1 Theoretically. There may be other clients that will be
2 in it. The notice that you send out should make that
3 clear, because the medical providers are going to need
4 to understand why certain things are in certain ways.

5 THE COURT: Take a look at it and if
6 you don't think it does, then give me some language.

7 MR. GALLAGHER: Why things have been
8 withhold held, for example, why insurers are not paying
9 100 percent of the fee schedule or whatever it is,
10 because they are going to be confused.

11 THE COURT: Right. Take a good look
12 at it.

13 MS. McKENNA: I notice if the other
14 ones, one thing, the decision were generally attached
15 to the notice. Is that -- is that correct?

16 THE COURT: Yes. I think so. Were
17 they going to attach the decisions in Wild and
18 Matthews?

19 THE CLERK: They didn't.

20 MS. McKENNA: See, I didn't look at
21 those two, so.

22 THE COURT: We can do that. I have
23 no objection of doing that. It is just a printing
24 cost.
25 MR. GALLAGHER: I don't know if you

1 want to go to it that printing cost. All the insurers
2 can get that stuff off the westbound site.

3 MS. McKENNA: If we site the case.

4 THE CLERK: The site could be listed
5 in your notice.

6 MR. GALLAGHER: Just save you a lot
7 of money in your printing cost that you don't need to
8 do. If you sent the decision to the physician, they
9 are not going to understand it anyway. When they get
10 these notices, they are going to contact their
11 attorneys anyway.

12 THE COURT: We can send it to the
13 hospital association and the physician association, and
14 then they can decide.

15 MR. GALLAGHER: Yeah.

16 THE COURT: Okay. All right.
17 Probably ought to put a time period just to report back
18 to me on where you are at.

19 MR. GALLAGHER: I am going to need
20 30 days, I think, although they have been looking at it
21 since we got your notice. I haven't heard back. It is

22 fairly difficult task I think to go through all the
23 files. If you give me 30 days, I will at least be able
24 to report back and see the progress we have made.

25 THE COURT: Okay. 30 days.

1 MS. McKENNA: Sure.

2 MR. GALLAGHER: By then I should be
3 able to determine if there is any PTD case or enough of
4 them to make a difference.

5 MS. McKENNA: I guess the only
6 loosened there would be can I go ahead and indicate,
7 should I just indicate claimants or should I go ahead
8 and indicate PTD and PPD in the notice just so we make
9 sure it is preserved.

10 THE COURT: That's what your claim
11 is, so, yes.

12 MS. McKENNA: Go ahead.

13 MR. GALLAGHER: You are going to
14 have to do that.

15 MS. McKENNA: Okay.

16 THE COURT: Okay. Anything else?

17 MR. GALLAGHER: Nothing.

18 MS. McKENNA: I don't think so,

19 Judge.) 10:42 a. m..)

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