

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 33

WCC No. 2001-0278

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EULA MAE HIETT

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent/Insurer

MONTANA STATE FUND and LIBERTY NORTHWEST INSURANCE  
CORPORATION

Intervenors.

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ORDER DETERMINING THRESHOLD ISSUES IN SCOPE OF DECISION

**Summary:** Following briefing by the parties, the Court determined whether the Montana Supreme Court's ruling in this case abrogates the exclusion of palliative and maintenance care set forth in § 39-71-704(1)(f), MCA; and whether the criteria for furnishment of secondary medical services set forth in § 39-71-704(1)(b), MCA, may still apply under any circumstances or whether this section was wholly abrogated by *Hiett*.

**Held:** The *Hiett* decision has not abrogated the exclusion of palliative and maintenance care, and the secondary medical benefits provision has not been wholly abrogated by *Hiett* and may still apply to particular claims.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704.** The Montana Supreme Court's holding in *Hiett v. Missoula County Pub. Sch.*, 2003 MT 213, 317 Mont. 95, 75 P.3d 341, has not abrogated the exclusion of palliative and maintenance care, nor has it wholly abrogated the secondary medical benefits provision, as found within this statute.

**Benefits: Medical Benefits: Maintenance Care.** The Montana Supreme Court's holding in *Hiett v. Missoula County Pub. Sch.*, 2003 MT 213, 317 Mont. 95, 75 P.3d 341, has not abrogated the exclusion of maintenance care as found within § 39-71-704, MCA.

**Benefits: Medical Benefits: Palliative Care.** The Montana Supreme Court's holding in *Hiett v. Missoula County Pub. Sch.*, 2003 MT 213, 317 Mont. 95, 75 P.3d 341, has not abrogated the exclusion of palliative care as found within § 39-71-704, MCA.

¶ 1 Following the May 11, 2005, conference held in the Workers' Compensation Court, Helena, Montana, and subsequent briefing by the parties, this Court has made its determination regarding two threshold issues in this case which were identified at the conference and subsequently briefed.

¶ 2 The threshold issues to be resolved in this Order are:<sup>1</sup>

¶ 2a Whether the Montana Supreme Court's decision in *Hiett*<sup>2</sup> abrogates the exclusion of palliative and maintenance care set forth in § 39-71-704(1)(f), MCA;<sup>3</sup> and

¶ 2b Whether the criteria for furnishment of secondary medical services set forth in § 39-71-704(1)(b), MCA, may still apply under any circumstances or whether this section was wholly abrogated by *Hiett*.<sup>4</sup>

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<sup>1</sup> See Minute Entry No. 3603.

<sup>2</sup> *Hiett v. Missoula County Pub. Sch.*, 2003 MT 213, 317 Mont. 95, 75 P.3d 341.

<sup>3</sup> Any reference to statutes cited from the Montana Code will employ the language from the 1995 version.

<sup>4</sup> Section 39-71-704, MCA, provides in pertinent part:

(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:

(a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires.

(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.

...  
(f) Notwithstanding subsection (1)(a), the insurer may not be required to furnish, after the worker has achieved medical stability, palliative or maintenance

¶ 3 For the reasons discussed below, the Court determines that the answer to both issues is *no*.

¶ 4 In *Hiett*, the Montana Supreme Court held that Petitioner was entitled to payment for prescription drugs necessary to control pain and depression resulting from a compensable back injury.<sup>5</sup> This decision reversed this Court’s holding that an insurer was not required to pay for such medications after a worker has reached medical stability except where the medications would return the claimant to employment or enable an employed claimant to continue working.<sup>6</sup>

¶ 5 In arriving at its decision in *Hiett*, the Montana Supreme Court found that this Court had interpreted the word “achieving” too narrowly as it is used in the context of “achieving medical stability” in §§ 39-71-116(25) and -704(1)(f), MCA.<sup>7</sup> The Supreme Court found that “[r]eaching a level of tolerable physical and mental health after a chronic injury can be ‘achieved’ only when it can be sustained.”<sup>8</sup> Following this interpretation, the Supreme Court found that “a claimant is entitled to such ‘primary medical services’ as are necessary to permit him or her to *sustain* medical stability.”<sup>9</sup>

¶ 6 With respect to any perceived conflict the Court’s holding may have with the Workers’ Compensation Act’s references to and definitions of “maintenance care” and “palliative care,” the Supreme Court found:

“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

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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;

or

(ii) when necessary to monitor the status of a prosthetic device.

<sup>5</sup> *Hiett*, ¶ 2.

<sup>6</sup> *Hiett v. Montana Sch. Groups Ins. Auth.*, 2001 MTWCC 52, ¶ 51.

<sup>7</sup> *Hiett*, 2003 MT 213, ¶ 33.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, ¶ 35 (emphasis in original).

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.<sup>10</sup>

¶ 7 In answering the threshold issues identified above, this Court notes that all parties who provided briefs to the Court agreed that the Supreme Court’s holding in *Hiett* does not abrogate the exclusion of palliative and maintenance care as codified in § 39-71-704(1)(f), MCA. The parties also agreed that some circumstances still exist under which the secondary medical care provision, § 39-71-704(1)(b), MCA, would apply. The parties’ respective interpretations of the holding is summarized as follows:

¶ 7a Petitioner argues that the statutes, read in conjunction with *Hiett*’s assertions that the maintenance and palliative care provisions “come into play only *after* one has ‘achieved’ medical stability”<sup>11</sup> allow these provisions to be viewed without conflict if the system is construed as a two-tiered approach. Petitioner asserts that primary medical services,<sup>12</sup> as allowed for in § 39-71-704(1)(a), MCA, comprise the first tier. The second tier consists of secondary medical services,<sup>13</sup> palliative care,<sup>14</sup> and maintenance care.<sup>15</sup> As held in the Montana Supreme Court’s decision in *Hiett*, ¶ 34, these Tier 2 services would not come into play until after a person has achieved medical stability.

¶ 7b Ace American Insurance Co. (Ace)<sup>16</sup> agrees that *Hiett* did not abrogate the exclusion of palliative and maintenance care, noting that the Montana Supreme Court determined that Petitioner was wrongfully denied prescription

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<sup>10</sup> *Id.*, ¶ 34 (emphasis and ellipses in original).

<sup>11</sup> *Hiett*, 2003 MT 213, ¶ 34 (emphasis in original).

<sup>12</sup> “Primary medical services” means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for the achievement of medical stability. § 39-71-116(25), MCA.

<sup>13</sup> See § 39-71-704(1)(b) and § 39-71-116(29), MCA.

<sup>14</sup> See § 39-71-704(1)(f) and § 39-71-116(20), MCA.

<sup>15</sup> See § 39-71-704(1)(f) and § 39-71-116(16), MCA.

<sup>16</sup> 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 filed a joint Opening Brief (Docket Item No. 92) and Reply Brief (Docket Item No. 102).

drugs because they were necessary to sustain her medical stability, *not* because they were maintenance or palliative care. Ace argues that a treatment would have to be properly classified as palliative or maintenance before the exclusion could apply.

¶ 7c J.H. Kelley, LLC (J.H. Kelley)<sup>17</sup> posits that in some instances, a claimant may achieve medical stability with no further services needed to maintain that stability, while in other cases, a claimant may require ongoing care to allow medical stability to be sustained. In the former situation, palliative and/or maintenance care might apply. J.H. Kelley further argues that § 39-71-704(1)(b), MCA, was not abrogated by *Hiatt* and that situations remain in which it might also apply.

¶ 7d Montana State Fund<sup>18</sup> likewise argues that *Hiatt* did not disturb the legislative directive regarding the limited compensability of palliative and maintenance care. Montana State Fund further asserts that § 39-71-704(1)(b), MCA, still governs a claimant's post-MMI entitlement to secondary medical benefits.

¶ 8 While many of the parties took this briefing opportunity to set forth various hypothetical scenarios in an attempt to entice this Court to set forth its opinion as to which types of claims may fall into which categories, it is not necessary for the Court to entertain such speculation in reaching a decision on the narrow issues before it.

¶ 9 Both the explicit language of *Hiatt* and the briefs submitted support a conclusion that *Hiatt* has not abrogated § 39-71-704(1)(b) and (f), MCA. THEREFORE, this Court holds that the *Hiatt* decision has not abrogated the exclusion of palliative and maintenance care,<sup>19</sup> and the secondary medical benefits provision<sup>20</sup> has not been wholly abrogated by *Hiatt* and may still apply to particular claims.

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<sup>17</sup> Brief of J.H. Kelly, LLC (Docket Item No. 90) and Reply Brief of J.H. Kelly, LLC (Docket Item No. 100).

<sup>18</sup> Montana State Fund's Opening Brief Regarding Scope of Decision (Docket Item No. 94) and Montana State Fund's Answer Brief Regarding Scope of Decision (Docket Item No. 101).

<sup>19</sup> § 39-71-704(1)(f), MCA.

<sup>20</sup> § 39-71-704(1)(b), MCA.

DATED in Helena, Montana, this 11<sup>th</sup> day of October, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Sydney E. McKenna  
Leo S. Ward  
Bradley J. Luck  
Thomas E. Martello  
Larry W. Jones  
Submitted: July 18, 2005.