

WORKERS' COMPENSATION COURT

Hearing No. 3603  
Volume XVIII

Helena, Montana  
May 11, 2005

EULA MAE HIETT

Sydney E. McKenna and  
C.J. Tornabene

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

MONTANA STATE FUND  
(Intervenor)

Thomas E. Martello and  
Thomas J. Harrington

LIBERTY NORTHWEST INSURANCE CORPORATION  
(Intervenor)

Larry W. Jones

WCC No. 2001-0278

The in-person conference in the above-entitled matter to identify the legal issues and set a briefing schedule in connection with the global common fund lien of the petitioner's attorneys came on Wednesday, May 11, 2005, at 1:00 p.m., in the Workers' Compensation Court, Helena, Montana. The Honorable Mike McCarter, Judge of the Workers' Compensation Court, presided. Petitioner was represented by Ms. Sydney E. McKenna. Intervenor Montana State Fund was represented by Mr. Thomas E. Martello and Mr. Thomas J. Harrington. Intervenor Liberty Northwest Insurance Corporation was represented by Mr. Larry W. Jones. Also in attendance were Ms. Nancy Butler, Mr. David M. Sandler, Mr. Rick Davenport, Mr. James A. Donahue, Mr. Oliver H. Goe, Mr. Ronald A. Thuesen, and Ms. Diana Ferriter. Appearing telephonically were Mr. Ronald W. Atwood and Mr. Robert F. James. The court reporter in this matter was Ms. Yvonne Madsen.

After extensive discussion, consensus was reached concerning the issues to be briefed and a briefing schedule was set.

Two threshold issues were identified. The first is whether the *Hiett* decision abrogates the exclusion of palliative and maintenance care, § 39-71-704(1)(f), MCA. The second is whether the secondary medical services section, 39-71-704(1)(b), MCA, applies under any circumstances or whether it was wholly abrogated by the *Hiett* decision. In other words are insurers liable for secondary medical services to the same extent they are liable for primary medical services? Counsel agreed that these two issues should be addressed before any other issues are addressed. Simultaneous opening briefs are to be filed by June 24, 2005. Reply briefs shall be filed by July 15, 2005. The issues will then be deemed submitted and will be decided before further briefing of other issues.

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Mr. Jones also raised the issue of the timeliness of the common fund claim, noting that it was not pled in the original petition. I ruled in a previous case that the request need not be made in the petition and may be made after successfully litigating the issue-in-chief. That determination is on appeal. Mr. Jones will note the issue in his brief and it is expressly preserved here but need not be briefed.

Once the threshold issues are resolved, a secondary inquiry will be made of the insurers to determine which ones utilized the primary-secondary services distinction and denied payment of secondary benefits not meeting the statutory criteria, § 39-71-704(1)(b), MCA. Ms. McKenna indicated that she has come across letters denying benefits based on my decision, which was later reversed on appeal.

Another issue which will have to be addressed is whether there is an identifiable class of claimants who are benefitted by the *Hiatt* decision. There was discussion of the difficulties in ascertaining what medical benefits were denied on account of the secondary services statute, and whether it is possible to identify what benefits were denied on that basis short of examining every medical bill denied after the claimants reached maximum medical improvement. Further facts may need to be provided to the Court in this regard and it is conceivable that there may be differences among insurers' ability to identify those denials.

A further conference will be held with all counsel after the threshold issues are decided. At that time a plan for further proceedings will be developed.

A full transcript of this conference will be posted on the Court's WEB site.

Court adjourned at 2:30 p.m.

MIKE McCARTER  
Judge

Minute Entry e-mailed to the *Hiatt* Distribution List and mailed to Ms. Sydney E. McKenna and Ms. Diana Ferriter on May 18, 2005.