

1 RONALD W. ATWOOD, P.C.  
2 RONALD W. ATWOOD  
3 200 Oregon Trail Building  
4 333 S.W. Fourth Avenue  
5 Portland, OR 97204-1748  
6 Telephone: (503) 525-0963

7 Of Attorneys for J.H. Kelly, LLC

**FILED**

JUL 15 2005

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

8  
9  
10 **IN THE WORKERS' COMPENSATION COURT**  
11 **OF THE STATE OF MONTANA**

12 WCC No. 2001-0278

13 EULA MAE HIETT,  
14  
15 Petitioner,

16 vs.

17 MONTANA SCHOOLS GROUP  
18 AUTHORITY,

19 Respondent/Insurer,

20 and

21 MONTANA STATE FUND and  
22 LIBERTY NORTHWEST INSURANCE  
23 CORPORATION,

24 Intervenors.

25 **REPLY BRIEF OF J.H. KELLY,**  
26 **LLC**

27 Respondent J.H. Kelly, LLC files its Reply Brief to the  
28 Petitioner's Opening Brief dated June 23, 2005. That Brief, like  
29 the Briefs submitted by the respondents, addressed the following  
30 threshold issues:

- 31
- 32 1. Whether the *Hiett* decision abrogates the exclusion of  
33 palliative and maintenance care provided for in Section  
34 39-71-704(1)(f), MCA; and
  - 35 2. Whether the *Hiett* decision wholly abrogates the  
36 secondary medical services section, 39-71-704(1)(b),  
MCA, or is it applicable under certain circumstances.

Ronald W. Atwood, P.C.  
Attorney at Law

200 Oregon Trail Building  
333 S.W. Fifth Ave.  
Portland, OR 97204  
(503) 525-0963

E-mail: ratwood@ronaldwatwood.com

DOCKET ITEM NO. 100

1 I. RECAP OF J.K. KELLY'S POSITION

2 To repeat for the convenience of the Court, the Supreme  
3 Court's actual holding in *Hiett* was that "primary medical  
4 services" (there, drug medications prescribed by claimant's  
5 treating physician for depression) necessary for her to *sustain*  
6 medical stability are compensable, regardless of whether there  
7 has been a return to employment.

8 Kelly recognizes that the Supreme Court's decision in *Hiett*  
9 to interpret the term "achieve" medical stability, as used in  
10 39-71-704(1)(f), MCA, to mean "sustain" medical stability,  
11 equally affects the definitions of "primary" and "secondary"  
12 medical services.

13 "Primary medical services" now are defined as:

14 "treatment prescribed by a treating physician, for  
15 conditions resulting from the injury, necessary for  
16 [sustaining] medical stability. Section 39-71-116(25).

17 "Secondary medical services" are now defined as:

18 "those medical services or appliances that are  
19 considered not medically necessary for [sustainment  
20 of] medical stability. The services and appliances  
21 include but are not limited to spas or hot tubs, work  
22 hardening \* \* \*."

23 The inclusion of services needed to "sustain" medical  
24 stability brings into play other services not defined as primary  
25 medical services, namely, palliative care and maintenance care.

26 "Palliative care" is defined as treatment designed "to  
reduce or ease symptoms without curing the underlying cause of  
the symptoms." Section 39-16-116(16), MCA.

"Maintenance care" is defined as treatment designed to  
provide "the optimum state of health while minimizing recurrence  
of clinical status." Section 39-16-116(13), MCA.

The Supreme Court expressly reconciled these provisions  
with its interpretation of the phrase "achieve" medical  
stability as meaning "sustain" medical stability:

"\* \* \* These categories of care come into play only  
after one has 'achieved' medical stability, as we

1 interpret the phrase here. \* \* \* Thus, we find no  
2 tension or irreconcilability between the conclusion we  
3 reach here and the Act's reference to 'maintenance' or  
4 'palliative' care." (original emphasis).

5 Nonetheless, the *Hiett* decision results in a blurring  
6 of the lines between the various types of medical care. The  
7 reason is that what was heretofore considered only  
8 palliative, maintenance or secondary care can be elevated  
9 to "primary medical services" status, if prescribed by the  
10 attending physician to enable the claimant to "sustain" his  
11 or her medical stability. That is the effect of *Hiett's*  
12 holding that prescription drugs to sustain the claimant's  
13 condition be treated as a primary medical service, and are  
14 thus compensable.

15 *Hiett*, however, does not abrogate the exemption for  
16 palliative or maintenance care found in Section 39-71-  
17 704(1)(f) as a matter of law. As we argued in our Brief  
18 (pgs. 7-9), each case is fact-dependent: There will be one  
19 category of cases where the claimant reaches medical  
20 stability and does not need ongoing medical treatment to  
21 sustain that stability; there will be another category  
22 where ongoing treatment is needed for sustainment.

23 In the former category, employer need not provide  
24 palliative or maintenance care under *Hiett*; in the latter  
25 category, the exemption may be abrogated based on the  
26 individual facts.

27 Similarly, *Hiett* did not abrogate the "secondary  
28 medical services" provision as a matter of law, either.  
29 Under the statute, the employer has the duty to furnish  
30 secondary medical services "only upon a clear demonstration  
31 of cost-effectiveness of the services in returning the  
32 injured worker to actual employment." Section 39-71-  
33 704(1)(b).

34 As *Hiett* demonstrated, however, a return to employment  
35 is irrelevant if the "secondary" service prescribed is a  
36 service necessary to sustain medical stability, in which  
37 case it becomes a "primary medical service." But if the  
38 service is a "true" secondary service as defined in Section  
39 39-71-116(29)(a), MCA (that is, one considered "not  
40 necessary for [sustainment of] medical stability"), then  
41 the cost-effectiveness factor must be demonstrated.

42 Again, the answer in each case is fact-based.

1  
2           **II. KELLY'S REPLY TO PETITIONER'S OPENING BRIEF**

3           Kelly first notes that Petitioner agrees with its position  
4 that *Hiett* "did not abrogate the categories of palliative care,  
5 maintenance care, or secondary medical service;. \* \* \*" (Pet.  
6 Br., pg. 6). Thus, she agrees that each case is fact-dependent.

7           Kelly next notes that Petitioner agrees with its position  
8 that *Hiett* held that the categories of palliative care,  
9 maintenance care, and secondary medical services "only comes  
10 into play after a worker has sustainment of medical stability."  
11 (Id.)<sup>1</sup>

12           Kelly finds Petitioner's diagram on page 6 showing the  
13 distinction between the "Primary Medical Services" category  
14 (Tier 1) and the other three categories listed under  
15 "Sustainment of Medical Stability" (Tier 2) to be a helpful  
16 tool.

17           Kelly does have one area of disagreement with Petitioner's  
18 Opening Brief, and that is its assertion that the common fund  
19 lien "applies to all primary medical benefits that insurers  
20 erroneously denied, as either secondary medical services,  
21 palliative care, or maintenance care after July 1, 1993." (Id.).

22           Kelly takes issue with Petitioner's description of the  
23 scope of the lien as applying to allegedly erroneous denials of  
24 primary medical services "after July 1, 1993." To the extent a  
25 valid common fund class is later identified (an issue to be  
26 subsequently briefed), the lien applies only to claims that were  
in an open status as of date the *Hiett* Court issued its  
decision, that is, as of August 14, 2003.

Any claims settled or otherwise closed (i.e., "final" in a  
worker's compensation context) as of August 14, 2003 cannot be  
included by reason of the Montana Supreme Court's decision in  
*Schmill v. Liberty Northwest Insurance Corporation*, 2005 WL  
1332128 (June 7, 2005) (*Schmill II*).

In *Schmill II*, the Montana Supreme Court wrote, quoting  
*Dempsey v. Allstate Insurance Company*, 325 Mont. 207, 104 P.3d  
483 (2004):

<sup>1</sup> The Court was referring expressly to the categories of  
palliative care and maintenance care; the category of secondary  
medical services would be included by implication.

1       \*\* \* \* Although *Dempsey* emphasized a presumption of  
2 retroactivity, it also stated that retroactive  
3 application does not mean that prior contrary rulings  
4 and settlements are void *ab initio*. *Dempsey*, para. 31.  
5 Rather, due to reasons of finality, '[T]he retroactive  
effect of a decision ... does not apply to cases that  
became final or were settled prior to a decision's  
issuance.' \* \* \*" (our emphasis).

6       Per the Court's initial scheduling order, Kelly will  
7 address the fundamental issues of common fund doctrine/common  
8 fund class in the next round of briefing.

9       Respectfully submitted this 15<sup>th</sup> day of July, 2005.

10                                   **RONALD W. ATWOOD, P.C.**

11       By:



12                                   RONALD W. ATWOOD, MSB #5959  
13                                   of Attorneys for J.H. Kelly, LLC

CERTIFICATE OF SERVICE BY MAIL

I, Kimberley J. Wouters, hereby declare and state:

I am over the age of eighteen years, employed in the City of Portland, County of Multnomah, State of Oregon, and not a party to the within action. My business address is Ronald W. Atwood, P.C., 333 S.W. Fifth Avenue, 200 Oregon Trail Building, Portland, Oregon, 97204.

On July 15, 2005, I served the within **REPLY BRIEF OF J.H. KELLY, LLC**, on the parties in said caused by placing a true thereof enclosed in a sealed envelope with postage prepaid thereon in the United States Post Office at Portland, Oregon, addressed as follows:


Workers' Compensation Court  
P.O. Box 537  
Helena, MT 59624-0537

Ms. Sydney E. McKenna  
Tornabene & McKenna, PLLC  
815 East Front Street, Suite 4A  
Missoula, MT 59802

A copy of the enclosed has also been sent electronically, in .pdf format, to: [jbockman@mt.gov](mailto:jbockman@mt.gov).

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED July 15, 2005 at Portland, Oregon.

  
\_\_\_\_\_  
KIMBERLEY J. WOUTERS  
Legal Secretary

Ronald W. Atwood\*

Sara Turner  
*Legal Assistant*

Enoy Lawless  
*Legal Assistant*

\* Licensed in Oregon,  
Washington and Montana

**Ronald W. Atwood, P.C.**

Attorney at Law

200 Oregon Trail Building  
333 S.W. Fifth Ave.  
Portland, OR 97204-1748  
(503) 525-0963

FAX (503) 525-0966

E-mail: ratwood@ronaldwatwood.com

July 15, 2005

**VIA E-MAIL & U.S. MAIL**

Workers' Compensation Court  
P.O. Box 537  
Helena, MT 59624-0537

Re: *Eula Mae Hiett vs. Montana Schools Group Insurance  
Authority*  
WCC No. 2001-0278

Dear Staff:

We have enclosed the REPLY BRIEF OF J.H. KELLY, LLC, for  
your review and consideration.

Thank you for your time and attention to this matter.

Very truly yours,

**RONALD W. ATWOOD, P.C.**



RONALD W. ATWOOD

RWA/kjw

Enclosure

cc w/enc.: Ms. Sydney E. McKenna  
Mr. Rick Davenport  
Ms. Barbara Jones