

WORKERS' COMPENSATION COURT

Hearing No. 3533
Volume XVII

Helena, Montana
December 16, 2004

EULA MAE HIETT

Sydney E. McKenna

vs.

MONTANA SCHOOLS GROUP
INSURANCE AUTHORITY

Leo S. Ward

WCC No. 2001-0278

An in-person conference was held Thursday, December 16, 2004, at 10:00 a.m., in the Workers' Compensation Court, Helena, Montana. The Honorable Mike McCarter, Judge of the Workers' Compensation Court, presided. Petitioner, Ms. Eula Mae Hiett, was represented by Ms. Sydney E. McKenna and Mr. Justin Starin. Respondent was not represented at the conference. Other parties participating were Mr. Thomas E. Martello, Ms. Cris McCoy, Mr. Bradley J. Luck, Mr. Thomas J. Harrington, Ms. Nancy Butler, Mr. James E. Hunt, Mr. Larry W. Jones, Mr. Greg E. Overturf, Ms. Carol Gleed, and Ms. Diana K. Ferriter. The court reporter in this matter was Ms. Lisa Lesofski.

Colloquy was held between counsel to discuss the following:

Ms. McKenna had previously sent a common fund request (global) notice to all affected insurers. Ms. McKenna and Mr. Leo S. Ward, respondent's counsel, had discussed the fact that respondent did not have any other "Hiett-type" cases. They will continue to discuss how the review was conducted.

Extensive discussion was held on how to define the common fund claimants. Insurance counsel present at the conference argued that there was no common fund and that each carrier was in a different situation. Mr. Luck, counsel for the State Fund, argued that there is no ascertainable class; that the *Hiett* decision should not be applied retroactively; and that the State Fund in any event never followed the primary-secondary benefits distinction with respect to medical benefits. With respect to the retroactivity issue, I noted that the *Stavenjord* and *Schmill* decisions are pending with the Supreme Court and should address that issue.

There was extensive discussion regarding ascertainment of a class of common fund claimants. Ms. McKenna agreed that it may be impossible to ascertain every claimant who might be benefitted by the *Hiett* decision but urged that at least some of those claimants may be identified. I advised counsel that more information is need to determine if that is so.

Discussion was held on whether the Court should first determine the parameters of the common fund or first identify if there is an ascertainable class. Some felt the need for the extent of *Hiett* to be defined. There was discussion concerning palliative and maintenance care provisions and how exclusions regarding those services might come into play in applying *Hiett*. Not enough information was provided for me to reach any legal conclusions today.

With respect to the State Fund's argument that *Hiett* does not apply to it since it did not have a policy of denying benefits based on the secondary benefits distinction, I indicated that I would need evidence regarding the contention.

Mr. Hunt felt the Court needs to determine the criteria for the class to see if indeed insurers have been denying *Hiett* benefits to claimants. Mr. Luck felt it was a legal distinction – that the Court needs to define the scope of *Hiett*, then determine whether there is a common fund, and that this is a legal, not a factual, issue for the Court. Those present discussed whether all insurers need to be joined before the Court makes this determination, and should Liberty and the State Fund intervene. The consensus was that all insurers need to be notified. After all insurers are joined, the Court will then determine how to proceed.

Mr. Luck will draft a proposed notice to the insurers. The notice will be circulated among all attorneys participating in the conference and those non-attending attorneys of record. Ms. Gleed will provide the Court with a list of the insurers from July 1, 1993, to August 14, 2003.

Court adjourned at 11:20 a.m.

MIKE McCARTER
Judge