IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 52

WCC No. 2001-0278

EULA MAE HIETT

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent/Insurer for

MISSOULA COUNTY PUBLIC SCHOOLS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

REVERSED AND REMANDED; AFFIRMED IN PART 8/14/03

Summary: Montana Schools Group Insurance Authority (MSGIA) accepted liability for school custodian's back injury and paid disability and medical benefits. When claimant reached MMI, she was restricted to sedentary to light-duty work. MSGIA and claimant settled her claim for indemnity benefits with the proviso: "Further medical and hospital benefits are reserved by the claimant." At the time of the settlement, MSGIA was paying for claimant's injury-related medications. Subsequently, a new adjuster on the file determined that claimant was not working and was not entitled to payment for her medications. The adjuster relied on section 39-71-704(1)(b), MCA (1995), which provides that 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." The insurer argued that claimant has already reached MMI, so the prescriptions are not primary medical services under section 39-71-704(1)(a), MCA (1995), and that coverage under subsection 1(b) is not mandated where claimant is not working. Claimant is in fact receiving Social Security Disability benefits and there is no showing she is diligently seeking work. Claimant argues: (1) the settlement agreement, executed at a time when the insurer was paying for prescriptions, requires continued coverage; (2) prescriptions should be covered in order to maintain claimant's "medical stability"; and (3) the insurer should be estopped from denying coverage.

Held: The settlement agreement, by reserving medical benefits, did nothing more than reserve to claimant those medical benefits to which she is entitled under section 39-71-704, MCA (1995). Claimant's entitlement to coverage of the prescriptions, if such exists, must arise under the provisions of that section. The statutes regarding medical services are, unfortunately, poorly written and raise difficult questions of statutory interpretation. Under the statutes as written, prescriptions after claimant has reached MMI are not "primary medical services" because the term primary medical services is defined in section 39-71-116(25), MCA (1995), as "treatment . . . necessary for *achieving* medical stability." (Emphasis added.) Coverage does not arise under the secondary medical services provision, subsection (1)(b), because secondary medical services are compensable only upon a demonstration of cost-effectiveness in returning claimant to actual employment and claimant has not satisfied that requirement. While this reading may render some statutory provisions meaningless, the Court is forced to choose between inserting language into the statutes which is not present, or construing some provisions as meaningless. It must choose the latter. Finally, the insurer is not estopped from prospectively refusing coverage of prescriptions where claimant has not demonstrated any detriment.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-116(25), MCA (1995). After claimant has reached MMI, she is not entitled to continued coverage of prescription medications under provisions authorizing primary medical services, § 39-71-704(1)(a), MCA (1995), because such services are defined as and limited to services "necessary for *achieving* medical stability." § 39-71-116(25), MCA (1995)(emphasis added).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-704(1)(b), MCA (1995). Where claimant has reached MMI, is not working, and is unlikely to work, she is not entitled to continued coverage of prescription medications under provisions authorizing secondary medical services because the provision limits secondary medical services to cases in which there is "a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment." § 39-71-704(1)(b), MCA (1995).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-704, MCA (1995). After claimant has reached MMI, she is not entitled to continued coverage of prescription medications under provisions authorizing primary medical services, § 39-71-704(1)(a), MCA (1995), because such services are defined as and limited to services "necessary for *achieving* medical stability." § 39-71-116(25), MCA (1995) (emphasis added).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-704, MCA (1995). Where claimant has reached MMI, is not working, and is unlikely to work, there is no provision in section 39-71-704, MCA (1995), which requires payment for her medications.

Benefits: Medical Benefits: Prescriptions. Claimant is not entitled to continued coverage of prescription medications were she has reached MMI, is not working, and is unlikely to work. Prescription coverage as a medical benefit must arise under section 39-71-704, MCA (1995). While statutes regarding medical services are poorly written, the medications are not within provisions authorizing primary medical services since those services are available only prior to MMI, § 39-71-116(25), MCA (1995), or provisions authorizing secondary medical services, since those services are available only if there is a "clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment." § 39-71-704(1)(b), MCA (1995). The medications are also not within provisions allowing for palliative and maintenance care. § 39-71-704(1)(f)-(g), MCA (1995).

Benefits: Medical Benefits: Primary Medical Services. After claimant has reached MMI, she is not entitled to continued coverage of prescription medications under provisions authorizing primary medical services, § 39-71-704(1)(a), MCA (1995), because such services are defined as and limited to services "necessary for *achieving* medical stability." § 39-71-116(25), MCA (1995) (emphasis added).

Benefits: Medical Benefits: Secondary Medical Services. Where claimant has reached MMI, is not working, and is unlikely to work, she is not entitled to continued coverage of prescription medications under provisions authorizing secondary medical services because the provision limits secondary medical services to cases in which there is "a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment." § 39-71-704(1)(b), MCA (1995).

Estoppel and Waiver: Equitable Estoppel. Insurer was not equitably estopped from discontinuing prospective coverage of prescriptions to which claimant was not entitled under section 39-71-704, MCA (1995), where she did not prove detriment.

Settlements: Medical Benefits. Where claimant has settled her entitlement to indemnity benefits but reserved "[f]urther medical and hospital benefits," she is entitled only to those benefits ordinarily available to her under statutory provisions for medical benefits.

Statutes and Statutory Interpretation: Absurd Results. Even though plain construction of statute may lead to an absurd result, the Court cannot rewrite the statute or insert additional provisions in the statute.

Statutes and Statutory Interpretation: Inserting or Removing Items. Even though plain construction of statute may lead to an absurd result, the Court cannot rewrite the statute or insert additional provisions in the statute.

¶1 The trial in this matter was held on April 11, 2001, in Missoula, Montana. Petitioner, Eula Mae Hiett (claimant), was present and represented by Ms. Sydney E. McKenna. Respondent, MSGIA, was represented by Mr. Leo S. Ward.

¶2 Exhibits: Exhibits 2, 3, and 8 were admitted without objection. Exhibits 1 and 4 through 7 were admitted over relevancy objections. If mentioned in this decision, they are relevant.

¶3 Witnesses and Deposition: The parties submitted the deposition of Charles Edquest for the Court's consideration. Claimant and Charles Edquest were sworn and testified.

¶4 Issues Presented:

1. Did the Insurer breach the settlement agreement when it stopped paying medical benefits.

2. Was the Insurer's unilateral decision to terminate benefits and subsequent failure to notify claimant of that decision unreasonable.

3. If the Insurer's actions were unreasonable, is claimant entitled to attorney fees.

4. Was the delay in payment of benefits promised unreasonable and if so is claimant entitled to a 20% increase in those benefits.

5. Is the Insurer estopped from termination of claimant's medical benefits.

6. Are claimants [sic] medical benefits secondary medical benefits and thereby not owed even though the Insurer agreed to reserve medical benefits.

(Pretrial Order at 2.)

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the parties' arguments, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant is 64 years old. She has a history of back pain dating back to 1980. (Ex. 1 at 736.) She also has a history of asthma dating back to 1981. (*Id*.) She presently suffers from asthma, chronic obstructive pulmonary disease, and osteoporosis, as well as a bad back.

¶7 In 1981 the Missoula County Public Schools (School District) hired claimant as a custodian. (*Id.* at 24.) She continued working for the School District through 1996.

¶8 On March 1, 1996, claimant was lifting a 30-gallon trash can into a dumpster when she experienced a sharp pain in her back. (*Id*. at 24.) She was subsequently diagnosed as suffering compression fractures in the thoracic spine at the T6 and T8 levels. (Ex. 1 at 727, 732, 734.)

¶9 At the time of the injury, the School District was a member of a school self-insurance pool known as Montana Schools Group Insurance Authority (MSGIA). (Uncontested Fact No. 2.) MSGIA accepted liability for claimant's condition and paid disability and medical benefits. (Uncontested Fact No. 3.)

¶10 Claimant continued to experience back pain. She began treating with Dr. Aaron W. Sable, a physiatrist. Dr. Sable found her at maximum medical improvement (MMI) on June 5, 1996, and permanently restricted her to sedentary to light-duty work. (Ex. 1 at 744-45.)

¶11 On July 29, 1996, claimant returned to work in a part-time, modified school custodian position. Initially she worked two hours a day; later on she worked four hours a day. (*Id*. at 37-38, 60-61.) In August she reported to Dr. Sable that she had been working four hours a day as custodian but that the window washing, climbing ladders, mopping, and cleaning bathrooms were aggravating her back pain. (*Id*. at 749.) He recommended that she contact Kathy Kleinkopf (Kleinkopf) to see if she could get a hall monitor job with the School District. (*Id*.)

¶12 When claimant followed-up with Dr. Sable on August 27, 1996, he noted that she was depressed about her situation at work as she felt she had no future. (*Id*. at 751.) Dr. Sable later diagnosed her as suffering anxiety and depression (*id*. at 752-55), and opined that her depression was related to her pain and her inability to work as a janitor for the School District (*id*. at 96). Based on Dr. Sable's opinion, MSGIA accepted liability for psychotropic medications. (*Id*. at 188.) Dr. Noel L. Hoell, a psychiatrist, who examined claimant in January 1997 at MSGIA's request, provided further verification that claimant's depression was related to her industrial accident. (*Id*. at 775.)

¶13 In December 1996, the School District notified claimant that her employment was being terminated effective January 3, 1997. (*Id*. at 97-98.)

¶14 In January 1997, claimant began receiving Social Security Disability (SSD) benefits retroactive to September 1996. (*Id*. at 200.)

¶15 Meanwhile, a vocational consultant for MSGIA prepared a number of job analyses for jobs she felt were appropriate for claimant. Several of the job descriptions - para-educator/student supervisor, school crossing guard, and motel cleaner - were approved in September 1996 by Dr. Sable without conditions. (*Id*. at 137, 156, 161.) Others were approved on either a trial basis or with modifications and comments. (*Id*. at 144, 151, 167, 172, 183.) The approved jobs paid from $4.49 to $5.63 per hour. Claimant had been earning over $10.00 an hour as a custodian. (*Id*. at 24, 90.)

¶16 Based on Dr. Sable's MMI determination and his approval of alternative jobs, on October 14, 1996, MSGIA terminated claimant's temporary partial disability (TPD) benefits. (*Id*. at 80-81.) It tentatively calculated her permanent partial disability (PPD) entitlement at 26%, or $17,290. (*Id*. at 81.) However, an impairment rating was not available at that time. It also notified claimant that she might be entitled to rehabilitation benefits. (*Id*.)

¶17 Claimant received impairment ratings from both Dr. Sable and Dr. David C. Gray, a chiropractor. Dr. Sable's rating was 2% (*id*. at 744) and Dr. Gray's was 32%. (*Id*. at 195.)

¶18 Negotiations over the claimant's entitlement to PPD and rehabilitation benefits commenced in January 1997. (*Id.* at 198.) By that time, claimant was represented by counsel, who proposed a $39,235 settlement. (*Id*.) After an exchange of offers and counteroffers (*id*. at 206-13), in July 1997, the parties entered into a settlement agreement compromising the claim for the sum of $27,930. (*Id.* at 230.) The agreement, which was approved by the Department of Labor and Industry (Department), closed rehabilitation benefits but reserved medical benefits. (*Id*.) The reservation of medical benefits reads, "**Further medical and hospital benefits are reserved by the claimant.**" (*Id*., emphasis in original.)

> ¶19 At the time of the settlement, the claims adjuster for the School District had the following information about claimant's employment situation:
>
> ¶19A Claimant's modified job with the School District had been terminated six months previous without any indication to the claims adjuster of re-employment or any inquiry by the claims adjuster into claimant's efforts to find a job. (Ex. 1 at 97, 186.)
>
> ¶19B Claimant had been offered a lunch co-hostess position by the School District in the fall of 1996 but turned the position down. (*Id*. at 190.) (Claimant testified that the position was only two hours a day.) There were also a number of crossing guard, noon duty aide, and co-hostess jobs with the School District which were available during the last four months of 1996 but claimant did not apply for them. (*Id*. at 188.) She did apply for but did not get a full-time hall monitor job because she was not qualified for the position. (*Id.* at 186, 188.)
>
> ¶19C Claimant had been found disabled and awarded SSD benefits in January 1997. (*Id.* at 200-202.)
>
> ¶19D On January 27, 1997, claimant submitted her application for retirement to the Public Employees Retirement System. (*Id*. at 197.)

¶20 At no time prior to the settlement did MSGIA tell claimant or her attorney that continued payment for medications were dependent upon claimant obtaining employment.

¶21 At the time of the settlement, the claimant believed that MSGIA would continue to pay for injury-related medications for the remainder of her life. She testified that had she known that it would not, then she would not have settled her claim. However, while claimant might have refused to enter into the settlement if she had been aware MSGIA would not pay for prescription drugs unless she was employed. I am persuaded that she is **not** in a worse position now than she would have been had she been aware of such fact. Even if she had refused to enter into the agreement her medical benefits would still be limited to those provided by statute. And she has failed to prove that she could have extracted any greater compensation benefits had she not settled. She did not, and does not, contend that she was entitled to permanent total disability (PTD) benefits. The sole dispute between the parties was the impairment award. (Ex. 1 at 200-216.) Except for the dispute over the impairment award, she got exactly what she demanded. As to the disputed impairment award, claimant has failed to present evidence showing that she could have obtained a greater impairment award than obtained through the settlement.

¶22 At the time of the settlement, claimant was not working. Since then she has worked occasionally selling tickets at high school sporting events. She was also employed from May 23, 2000 to November 21, 2000, as an assisted-living attendant for the Senior Village Residence (Senior Village). (Ex. 7 at 9.) Claimant left that job when hospitalized for drug withdrawal from narcotic medications she had been taking. She also testified that she has looked for work since losing her job with the School District but Wal-Mart and other businesses will not hire her because of her back condition.

¶23 MSGIA began paying for claimant's pain medications in May 1996 and for anti-depressants in August 1996. Following the settlement, it continued to pay for the medications until January 1999, when Charles Edquest (Edquest) began adjusting the claim. He determined that claimant was not working and was therefore not entitled to payment for her medications. He relied on section 39-71-704(1)(b), MCA (1995), which provides that "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." Secondary services, by definition, are "those medical services or appliances that are considered not medically necessary for medical stability." § 39-71-116(29)(a), MCA (1995).

¶24 In cutting off payment for claimant's medications, Edquest did no investigation other than to review documents in the claims file. (Edquest Dep. at 27, 39-41, 48.) The file contains nothing indicating that MSGIA inquired as to claimant's job status or whether her medications were necessary for her to continue employment.

¶25 MSGIA did not inform claimant of the cutoff of benefits and did not tell her she might requalify for payment of medications if she returned to work. In fact, claimant did not learn that MSGIA had stopped paying for her medications until the Fall of 1999 when she went to

Wal-Mart for a prescription refill and discovered she had an outstanding balance of approximately $1600.[(1)]

¶26 On October 7, 1999, claimant's attorney contacted Edquest about paying for claimant's medications, specifically for her anti-depressants. (*Id.* at 246.) She wrote that MSGIA had previously agreed to pay for the anti-depressants. (*Id.*) Edquest agreed to pay for the medications, in part because he had not informed claimant or her attorney regarding the termination of her medical benefits. (Edquest Dep. at 25-26, 34, 46, 49, 55-56.) However, the bills for claimant's medications remained unpaid for several months.

¶27 Since the bills remained unpaid, claimant requested mediation. On March 13, 2000, following mediation, MSGIA paid $1,200 in prescription bills, however, some bills which Edquest promised to pay were not paid. Claimant's attorney again wrote to Edquest on April 14, 2000, advising him that some prescription expenses for claimant were still outstanding. (Ex. 1 at 267.) Edquest was apologetic for the delays in payments which he had agreed to pay, citing various explanations for the delay. Essentially, the reasons he gave were institutional ones, involving oversight or processing problems.

¶28 At some point, claimant and her attorney were notified that MSGIA contested payment for further medications if claimant was not working. A second mediation was held in September 2000. At the time of the second mediation, claimant was working as an assisted-living attendant at the Senior Village, so the mediation was postponed pending a response from claimant's treating physician as to the necessity of claimant's medications. (*Id.* at 300.) Dr. Smith responded on September 20, 2000, that claimant's depression and pain medications were "essential" for claimant and would control her pain to a degree that would allow her to work. (*Id.* at 276.) MSGIA then agreed to pay claimant's medical bills as long as she works. (Edquest Dep. at 54.)

¶29 Some prescriptions still remained unpaid as of December 31, 2000, and a third mediation was requested. However, by the time of that mediation, claimant was no longer working and the parties could not reach agreement as to claimant's further entitlement to payment for prescription drugs. MSGIA maintained its position that it is not liable for claimant's prescription benefits because they are secondary benefits and claimant is not working.

¶30 Claimant then petitioned the Court. Pending a final decision by the Court, MSGIA agreed to continue to pay for claimant's injury-related medications under a reservation of rights. At the time of trial, all medications had been paid.

CONCLUSIONS OF LAW

¶31 The 1995 version of the Workers' Compensation Act applies to claimant's injury since that was the law in effect on the date of her injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986.)

¶32 The claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶33 This case involves interpretation and application of provisions for medical benefits. Those provisions are found in section 39-71-704(1), MCA (1995). Some of the terms used in the section are defined in section 39-71-116, MCA (1995).

¶34 The portions of section 39-71-704(1), MCA (1995), potentially applicable to the present case are as follows:

> (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 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.
>
> (g) If the worker's treating physician believes that palliative or maintenance care that would otherwise not be compensable under subsection (1)(f) is appropriate to enable the worker to continue current employment or that there is a clear probability of returning the worker to employment, the treating physician shall first request approval from the insurer for the treatment. If approval is not granted, the treating physician may request approval from the department for the treatment. The department shall appoint a panel of physicians, including at least one treating physician from the area of specialty in which the injured worker is being treated,

pursuant to rules that the department may adopt, to review the proposed treatment and determine its appropriateness.

The section 39-71-116, MCA (1995), definitional sections are as follows:

(16) "Maintenance care" means treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status.

(17) "Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.

. . . .

(20) "Palliative care" means treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms.

. . . .

(25) "Primary medical services" means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability.

. . . .

(29)(a) "Secondary medical services" means those medical services or appliances that are considered not medically necessary for medical stability. The services and appliances include but are not limited to spas or hot tubs, work hardening, physical restoration programs and other restoration programs designed to address disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation facilities.

(b)(i) As used in this subsection (29), "disability" means a condition in which a worker's ability to engage in gainful employment is diminished as a result of physical restrictions resulting from an injury. The restrictions may be combined with factors, such as the worker's age, education, work history, and other factors that affect the worker's ability to engage in gainful employment.

(ii) Disability does not mean a purely medical condition.

¶35 Claimant tenders three theories to support her claim that the insurer should continue paying for her injury-related prescriptions whether or not she is working. First, she contends that whether or not she is statutorily entitled to the benefits, she is contractually entitled to them pursuant to the settlement agreement. Second, she contends that the medications are "necessary for medical stability" and therefore not within the "secondary medical services" exclusion. Third, she argues that MSGIA either waived its right to contest

her entitlement to the benefits or is estopped from doing so. I will address the arguments in order.

I. Settlement Agreement

¶36 The settlement agreement provides, "Further medical and hospital benefits are reserved by the claimant." Medical and hospital benefits are governed by section 39-71-704, MCA (1995), as set forth above. The language in the settlement agreement does nothing less or more than reserve to claimant the benefits to which she is statutorily entitled. There is nothing in the language to suggest that the parties intended to expand benefits beyond those provided in the Workers' Compensation Act, and there is nothing ambiguous in the reference to the benefits. The claimant's first argument is without merit.

II. Medical Stability

¶37 The claimant argues that her medications are necessary for her to maintain "medical stability," hence they are not excluded secondary medical services. She relies upon the definition of secondary medical services as "those medical services or appliances that are considered ***not*** **medically necessary for medical stability**." § 39-71-116(a), MCA (1995) (emphasis added). Essentially, she argues that her medications are medically necessary for her to **maintain** medical stability, and therefore do not fall under the secondary medical services limitation.

¶38 Unfortunately, the statutes regarding medical services are poorly written and raise extremely difficult questions of statutory interpretation. I will outline the difficulties in interpreting the statutes.

¶39 Initially, section 39-71-704(1)(a), MCA (1995), requires payment for all "primary medical services." "Primary medical services" are defined as "treatment . . . necessary for ***achieving*** medical stability." § 39-71-116(25), MCA (1995). "Medical stability," of course, is the same thing as "maximum medical improvement" and "maximum medical healing," meaning the "point in the healing process when further material improvement would not be reasonably expected from primary medical treatment." § 39-71-116(17), MCA (1995). MSGIA's argument appears straightforward: Since claimant "achieved" medical stability, the primary services provision does not apply, and the authorization in section 39-71-704(2), MCA (1995), for secondary services also does not apply because the services authorized by that section are limited to services for which there is "a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment" and claimant has offered no evidence to support that conclusion.

¶40 The medical stability definition is circular insofar it defines medical stability as a point where "further material improvement would not be reasonably necessary from **primary medical treatment**." "Primary medical treatment" is defined as "treatment . . . necessary for achieving medical stability." Plugging that definition into the medial stability definition

yields a definition of medical stability as "a point in the healing process when further material improvement would not be reasonably expected from *treatment necessary for achieving medical stability.*" I must therefore read the provision simply meaning that "any further medical treatment" would not materially improve a claimant's condition.

¶41 Even though a claimant may have reached medical stability, her condition may deteriorate and require further treatment to again reach stability. For example, a worker may suffer a herniated disk, not need surgery, and thereafter get as good as she is going to get with conservative treatment, i.e., reach MMI. Later on, however, her condition may deteriorate to the point that surgery is necessary to improve her condition. At that point, she will no longer be at MMI since there is now treatment which will materially improve her condition. Thus, the surgery will be a "primary medical service."

¶42 Analogous to the foregoing case is a situation where a claimant reaches MMI through drug therapy but the drug therapy must be continued to maintain her in a medically stable condition. A clear example is hypothyroidism, which is treatable with natural or synthetic thyroxine or triiodothyronine; withdraw the drug and the individual returns to hypothyroidism, which causes physical complications. At that point the claimant (assuming the hypothyroidism is a work-related condition) is no longer at MMI. With the return to non-MMI status, the drug again becomes a primary medical service. The example given here could very well apply to the claimant's treatment for depression.

¶43 The treatment of pain with drug therapy is further removed, but still may be analogous; withdraw pain medication and not only may the individual's suffering increase but she may also suffer physical regression when compensating for her increased pain. The increased pain may also cause increased disability. Pain control is a component of the "healing process" and reintroduction of pain medications may therefore materially improve the individual's condition and once more constitute primary medical services.

¶44 Does the primary-secondary services distinction require that claimant terminate drug therapy and relapse before the insurer is once again liable for the therapy? Applying the primary services provision as written, it appears so, unless some other provision requires payment of medications once the worker has reached MMI.

¶45 One possible source of authority for payment of medications prescribed after MMI is the secondary services provision set forth in section 39-71-704(1)(b), MCA (1995), which provides:

> (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.

On its face, the subsection requires secondary medical services where cost-effective to return an injured worker to actual employment. It has no application to the present facts

since claimant has failed to demonstrate her medications will enable her to return to actual employment. Similarly, it has no application to permanently totally disabled claimants, or to permanently partially disabled claimants where cost-effectiveness is unproven.

¶46 Another possible source is found within definition of secondary services. Section 39-71-116(29), MCA (1995), provides in relevant part:

> (29) (a) "Secondary medical services" means those medical services or appliances that are considered **not medically necessary for medical stability.** The services and appliances include but are not limited to spas or hot tubs, work hardening, physical restoration programs and other restoration programs designed to address disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation facilities. [Emphasis added.

The bolded language does not contain the word "achieve," as does the primary services provision in section 39-71-704(1)(a), MCA (1995). "Medically necessary for medical stability" can reasonably be read as meaning not only medically necessary for "achieving" but also for "**maintaining**" medical stability. If that reading is a correct one, then medications and other services necessary for maintaining or keeping a claimant at medical stability, and without which the claimant would revert to non-MMI status, would not be secondary medical services at all. The problem is with the next step, to wit, finding authority for payment of this other type of medical service. I am unable to find that authority in section 39-71-704, MCA (1995), or any other section.

¶47 A third source is the palliative and maintenance care provisions found in subsections (1)(f) and (1)(g) of section 39-71-704, MCA (1995). Palliative care, as noted before, is "treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms." § 39-71-116(20), MCA (1995). Maintenance care is "treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status." § 39-71-116(16), MCA (1995). On-going pain medication and anti-depressants could be characterized as both.

¶48 Neither of the palliative/maintenance care subsections apply. Subsection (1)(g) of section 39-71-704, MCA (1995), does not apply since it requires a showing that the treatment will enable the claimant to continue or return to employment. Subsection (1)(f) does not apply since claimant is not permanently totally disabled (subsection (1)(f)(i)) and a prosthetic (subsection (1)(f)(ii)) is not involved.

¶49 Some of the language in subsection (1)(f), however, is confusing. The subsection begins, "**Notwithstanding subsection (1)(a),** the insurer may not be required to furnish, after the worker has achieved medical stability, palliative or maintenance care . . ." (Emphasis added.) The language is confusing because subsection (1)(a), to which the

bolded language refers, requires the furnishing of medical services only until the worker achieves medical stability. It does not require furnishing services after the worker reaches medical stability. Thus, the "notwithstanding" language of subsection (1)(f) is either meaningless, or the legislature intended the primary services provision to encompass the furnishing of some medical services even after the claimant has reached MMI. If indeed it did so intend, it failed to specify those services.

¶50 And that is not the end of the confusion within the subsection. Subsection (1)(f)(i) provides for payment of maintenance and palliative care for permanently totally disabled workers which "is medically necessary to monitor administration of prescription medication to maintain the worker in a medically stationary condition." The drug monitoring exception applies only to permanently totally disabled workers, who by definition have reached MMI. Where is the requirement that the insurer pay for the drug therapy itself as opposed to the monitoring of the therapy? It is not in subsection (1)(a) since the claimant has achieved MMI, and I cannot find it anywhere else. It is, of course, absurd to require an insurer to pay for monitoring of drug therapy but not the drugs themselves, and the provision strongly suggests that the legislature intended insurers to pay for post-MMI prescription drugs for at least permanently totally disabled claimants.

¶51 Absurd construction of a statute is, of course, to be avoided if at all possible. "It is a well-established rule of statutory construction that a statute is to be read as a whole and construed so as to avoid absurd results." *Clover Leaf Dairy v. State,* 285 Mont. 380, 388-89, 948 P.2d 1164, 1169 (1997). But the Court is also constrained by the prohibition against inserting additional terms and requirements that are not in the statute. *Russette v. Chippewa Cree Housing Authority,* 265 Mont. 90, 93, 874 P.2d 1217, 1219 (1994). I read the latter prohibition as trumping the absurd construction rule. Thus, even after reading all of the various provisions in section 39-71-704, MCA (1995), and construing them together, I am unable to find anything in the statute which could be construed as requiring payment for 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. § 39-71-704(1)(b) and (1)(g), MCA.

III. Waiver and Estoppel

¶52 Claimant's final argument is that MSGIA waived its right to contest claimant's entitlement to payment for medications or is estopped from doing so.

¶53 "Waiver is an equitable doctrine, applicable when there is an intentional or voluntary relinquishment of a known right, claim or privilege, or such conduct as warrants an inference of the relinquishment of such right." *Sperry v. Montana State University,* 239 Mont. 25, 30, 778 P.2d 895, 898 (1989). Unlike the insurer in the recent case of *Swartz v. State Fund*, 2001 MTWCC 50, MSGIA did not expressly state that claimant is entitled to the benefits she seeks. Certainly, in signing the settlement agreement, it expressly agreed to

pay any medical benefits required by statute. Although it was paying benefits without evidence of employment or the likelihood of employment when the agreement was signed, that conduct does not rise to the level of an intentional and voluntary relinquishment of its right to contest claimant's right to payment for prescription drugs.

¶54 As a general matter, estoppel arises when a party, through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse. *Selley v. Liberty Northwest Ins. Corp.*, 299 Mont. 127, 998 P.2d 156 (2000)(citations omitted). The doctrine is designed to prevent one party from unconscionably taking advantage of a wrong while asserting a strict legal right, and will be invoked where "justice, honesty, and fair dealing" are promoted. *In re Marriage of K.E.V.* 267 Mont. 323, 331, 883 P.2d 1246, 1251 (1994).

¶55 The six elements of equitable estoppel are:

> 1. There must be conduct amounting to a representation or a concealment of material facts;
>
> 2. These facts must be known to the party estopped at the time of the conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him;
>
> 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when it was acted upon by him;
>
> 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon;
>
> 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it;
>
> 6. He must in fact act upon it in such a manner as to change his position for the worse, in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reasons of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

Kuzara v. State Compensation Ins. Fund, 279 Mont. 223, 231, 928 P.2d 136, 141 (1996) (citations omitted). All six elements must be satisfied, *Billings Post No. 1634 v. Montana Dep't of Revenue* 284 Mont. 84, 90, 943 P.2d 517, 520 (1997), and they must be satisfied by clear and convincing evidence. *Beery v. Grace Drilling* (1993), 260 Mont. 157, 163, 859 P.2d 429, 433.

¶56 Even assuming that MSGIA represented, at least implicitly, that it would pay for prescription drugs for claimant's lifetime irrespective of her employment situation, and that the next four elements are also met, the sixth element -- detriment to the claimant -- is lacking. To show detriment, claimant must prove that she is worse off because of the alleged misrepresentation. She has failed to persuade me that is the case. While she might have refused to enter into the settlement had she been aware MSGIA would not pay for prescription drugs, what would she have gained by her refusal? She could not have insisted on payment for prescription drugs unless she satisfied the terms of section 39-71-704, MCA (1995). She did not, and does not, contend she was entitled to PTD benefits. Except for the dispute over the impairment award, she got exactly what she demanded. (Ex. 1 at 200-216.) As to the disputed impairment award, claimant has failed to present evidence showing that she could have obtained a greater impairment award than obtained through the settlement. Since element (6) is lacking, MSGIA is not estopped from denying payment for claimant's prescription drugs.

IV. Summary

¶57 Claimant has failed to establish her entitlement to prescription drugs. If in the future she secures employment and satisfies the conditions of section 39-71-704(1)(b) or (1)(g), MCA (1995), at that time she may become entitled to payment for her prescription medications.

V. Penalty and Attorney Fees

¶58 Although claimant is not entitled to further prescription benefits until she meets the statutory criteria for those benefits, she is entitled to a penalty with respect to the benefits MSGIA agreed to pay but failed to pay within a reasonable time. Section 39-71-2907, MCA (1995), provides:

> **39-71-2907. Increase in award for unreasonable delay or refusal to pay.** (1)
>
> The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:
>
> (a) **the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant**; or
>
> (b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments. [Emphasis added.]

In October 1999, MSGIA agreed to pay for prescription drugs up to that time, however, it failed to do so until March 2000. It also failed for several months to pay all prescription bills for the period claimant was working in 2000 despite its agreement to do so. Its delay in making the agreed payments was unreasonable and its excuses unavailing. It had a duty to

insure that the bills were paid within a reasonable time. Claimant is therefore entitled to a 20% penalty with respect to the amounts due through October 1999 and amounts due for the period in 2000 during which claimant was working and which were unpaid as of December 31, 2000. If the parties cannot compute the amounts, the Court will hold a further hearing to determine what is due.

¶59 Claimant is not entitled to attorney fees under either sections 39-71-611 or -612, MCA (1995), since both sections require that the Court award claimant benefits as a prerequisite to attorney fees.

JUDGMENT

¶60 Claimant is not entitled to payment for prescription drugs at present, although she may become entitled to such payment if she finds employment and satisfies the conditions of section 39-71-704(1)(b) or (1)(g), MCA (1995).

¶61 Claimant is entitled to a penalty with respect to the late payments made by MSGIA with respect to prescription bills incurred between January 1, 1999 and October 30, 1999, and also those bills incurred during claimant's period of employment in 2000 which were unpaid as of December 31, 2000.

¶62 Claimant is not entitled to attorney fees.

¶63 Claimant is entitled to costs with respect to the penalty issue.

¶64 This JUDGMENT is certified as final for purposes of appeal.

¶65 Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 6th day of September, 2001.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Sydney E. McKenna
Mr. Leo S. Ward
Date Submitted: April 24, 2001

1. On March 13, 2000, Edquest paid some bills in the amount of $1281.77 some of which dated back to January 1999. (Edquest Dep. at 37; Ex. 1 at 246.)