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January 24, 2020

Montana Dept. of Labor and Industry
c/o Cindy Zimmerman
Employment Relations Division
PO Box 8011
Helena, MT 59604

Re: Amendment of ARM 24.29.1407 – Definition of Prosthesis
[MAR 24-29-352, 2295 through 2297]

Dear Ms. Zimmerman:

I am writing on behalf of my client the Montana Municipal Interlocal Authority (MMIA) to provide written and oral comment on the above referenced proposed administrative rule. The MMIA is an interlocal entity operating an employer self-insurance workers compensation pool. Membership in the MMIA and participation in the MMIA workers compensation program is available only to Montana municipalities and consolidated city-county governments.

The MMIA opposes this proposed rule for the following reasons:

1. The change in definition significantly expands the established definition of the term “prosthesis” and therefore the number of claims subject to re-opening after 60 months - - all without legislative consideration.
2. The proposed definition of “prosthesis” is poorly constrained so that it may be construed to include far more devices than what was actually legislatively intended in the Workers’ Compensation Act (“WCA”).

Introduction

The WCA governs the compensation of employees injured on the job. The WCA implements a “no-fault” system where employees’ remedy is limited to the workers compensation system while employers are provided a more predictable occupational injury liability. The WCA has been the source of much legislative wrangling with the most recent significant amendments being enacted by the 2011 Montana Legislature.

Under the current statutes and rules of the WCA, all claims, must be closed within 60 months of the date of injury and claims closed cannot be re-opened. Mont. Code Ann. § 39-71-704(1)(f). This “60-month rule” has the following exception: closed claims can be reopened in the event a prosthesis installed as a result of the workplace injury requires repair or replacement. Mont. Code Ann. § 39-71-704(f)(ii).

For the previous 19 years, the term “prosthesis” in the context of the WCA has specifically and narrowly meant “an artificial substitute for a missing body part.” *Richard Wiard v. Liberty Northwest*, 2001 MTWCC 31A, ¶ 12. This definition was established by the Montana Workers’ Compensation Court and has been law since this 2001 court case. The claims under the WCA have operated under this definitional structure for nearly 20 years.

The 2011 legislature enacted the “60-month rule” in a legal environment where the meaning of “prosthesis” was already established and well understood. The legislature made no changes to the meaning of “prosthesis” at that time and has not done so since.

Without consensus, the DLI is attempting to muscle through changes to this longstanding definition and expand the number of cases capable of being re-opened and the number of medical devices capable of being compensated under the prosthesis exemption to the 60-month rule. To be clear, if the definition of “prosthesis” is expanded as proposed in this rulemaking, the number of cases that will be re-opened will increase.

Argument

The narrow definition of prosthesis that has been used for decades will be significantly expanded under DLI’s proposed rule change. The caselaw first clarifying the meaning of “prosthesis” specifically noted that items such as “plates and screws” did not qualify as a “prosthesis” and would not be sufficient to re-open a closed case. *Id.*, at ¶ 12. DLI’s proposed rule overturns this 19-year understanding of “prosthesis” in Montana workers’ compensation law to include items such as “plates and screws” in the definition of “prosthesis.”

Structurally, DLI’s proposed rule contains what is essentially the current definition of prosthesis: “an artificial substitute to replace that body part or organ;” and the proposed rule additionally contains expansive new language: “a device to augment the functioning of that body part or organ.”

Where is the line in determining what does and does not qualify as a device that “augments the functions of that body part or organ?” DLI’s proposed rule contains no limits of any kind meaning that countless items could qualify as a prosthesis under the proposed definition. This could include:

- Shoes
- surgical screws or plates

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- C-PAP machines
- Walkers
- canes
- wheel chairs
- Compression stockings
- Orthotics
- Insulin pump
- Oxygen concentrator

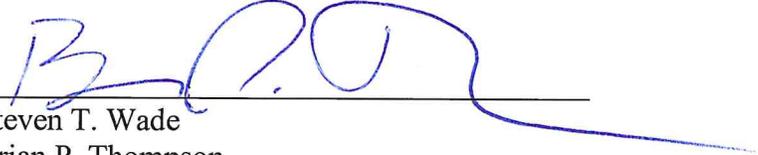
DLI's proposed rule contains no limits. All of these examples, and countless others, are arguably examples of devices that "augment" the functioning of a body part or organ and these examples arguably qualify as a "prosthesis" under DLI's proposed rule.

With this rule change, the DLI is essentially legislating from the executive and making a significant change to the workers' compensation system that has been operating under the same understanding of "prosthesis" for nearly 20 years. With this proposed rule, DLI is creating new policy by expanding the number of claims that are capable of being re-opened. Such a change in the workers' compensation system is properly reserved for the legislature and not a branch of the executive. If the legislature thought an expansion of the definition of prosthesis was needed, it always has the option to consider and pass legislation to that effect. To date, the legislature has made no such changes to the definition of "prosthesis."

For these reasons, the MMIA opposes this rule-making and respectfully requests the new definition be withdrawn.

Sincerely,

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By 
Steven T. Wade
Brian P. Thompson