



A Subsidiary of Midland Claims Service, Inc.

January 6, 2020

Cindy Zimmerman
DOL&I Employment Relations Division
PO Box 8011
Helena, MT 59604

Re: MAR Notice No. 24-29-352

Dear Sirs:

This letter is responsive to the Notice of Public Hearing on Proposed Amendment of ARM 24.29.1407 as provided in the notice dated December 17, 2019.

As you are aware, this matter was presented to the recent meeting of the Labor Management Advisory Council, on which I am a participating member. The department's Medical Director made a presentation in support for the outlined changes at that time. The undersigned presented an objection to the full scope and language of the proposed changes.

In summary, our objection is three parts:

1. Introduction of "prosthetic devices" including prescription eye glasses, prescription contact lenses, dentures and hearing aids as a new level of items considered to be covered prosthetics under the Montana Workers' Compensation Act is presented inappropriately in the form of a rule change.
2. The changes create ambiguity in the workers' compensation system by indicating/infering coverage for certain items that are specifically limited/excluded elsewhere in the Act
3. The changes create an additional level of conflict between the Montana Act and the Medicare Secondary Payer regulations.

While the rule change attempts to limit the applicability of this additional level of coverage to "For the purposes of identifying what constitutes a prosthesis not subject to the automatic 60-month closure of medical benefits", the layout of the proposed language introduces for the first time coverage for these commonly (non-workers' compensation public) used devices. In fact, coverage for these devices common among aging individuals is excluded by the Workers' Compensation Act at 39-71-119 MCA.

Use of the rule making process is in appropriate. The more proper forum to create new coverage under the Act is the legislative process.

Currently, the term prosthetic is not defined in 39.71.116 MCA. The commonly understood definition of prosthetic: “a **prosthesis** (plural: **prostheses**; from Ancient Greek **prosthesis**, "addition, application, attachment") or **prosthetic** implant is an artificial device that replaces a missing body part, which may be lost through trauma, disease, or a condition present at birth (congenital disorder).

The Act has been in use for decades generally consistently with this definition. If the definition of potentially covered prosthetics is to be changed to include eye glasses, contact lenses, hearing aids, etc., it should be done in the Definitions section of 39.71.116 MCA and go through the rigors of the legislative process.

The current Workers' Compensation Act specifically excludes coverage for eyeglasses, contact lenses and similar external devices unless those items are damaged or lost “as a result of an injury” in 39.71.704 1 (b). Damaged or lost generally means that the devices can be covered under the Act one time, or following the workplace incident which gave rise to the workers' compensation claim. The proposed change creates an inference of coverage for a list of external non-prosthetic devices by reframing 39.71.704 to extend the definition of prosthesis to include these external augmentation devices.

The proposed change, or addition of a new class of potentially covered “prosthetic devices”, is inconsistent with the current statutory foundation of the Act. Such an ambiguity will likely lead to increased numbers of disputes and increased litigation. This is contrary to the public policy objective expressed in the Act at 37.71.105 (4) “Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities”.

Lastly, employees in Montana are working longer than ever before. It has been documented that our workforce is aging. Many of our workers are now working beyond the time that they qualify for Social Security and Medicare. Aging workers are subject to many of the common maladies of aging, such as degraded eyesight and hearing, commonly unrelated to any involvement that they may have had with the workers' compensation system. If there is consideration for long term replacement of items such as eyeglasses, it should be recognized that disputes will arise for medical necessity with the significant increase in cost as Independent Medical Evaluations will be needed to determine if 5, 10 and 20 year replacements are solely due to the workplace injury/illness claim or due to the normal degeneration of body system function caused by aging. Ambiguity typically leads to increased system disputes and costs.

The Medicare Secondary Payer (“MSP”) laws enacted by the Federal government many years ago define state-based workers' compensation payers as the primary payers for medical obligations arising out of workplace injuries and illness. MSP is being enforced greater than ever before. Essentially, it is the position of Medicare that if there is a state-based medical obligation for a workers' compensation claim, that medical must be paid by the state-based payer prior to any payments will be considered by Medicare.

MSP requires that if a workers' compensation claim is to be settled that involves an individual that is a “qualified beneficiary” of Medicare that Medicare's interests be protected.

This is done by seeking Medicare's approval of the state-based settlement (in Montana this applies to all Plans and payers). If approval is sought, a Medicare Set Aside "MSA") must be created, approved by Medicare and funded by the payer for all workers' compensation medical payments to be made as included in the settlement. If there is a statutory limitation or end of coverage, Medicare will honor such limitation or time period when considering an MSA for approval. In Montana, the sixty (60) month rule is applicable and has been observed by Medicare.

Changing the sixty (60) month rule to provide potential coverage for a list of items that are common to all aging individuals creates the potential for conflict with Medicare when attempting to get MSA approval. Essentially the current rule change adding "prosthetic devices" as not subject to the automatic closure provision at a minimum infers potential coverage for such devices with no statutory end to the benefits. The ambiguity between MSP requirements to settle a workers' compensation claim (using the MSA process) and the proposed change will likely lead to a reduction in MSA approvals for Montana workers' compensation claims and/or an increase in the cost of placing MSAs to settle claims where the long term cost of the proposed "prosthetic devices" will need to be included to achieve Medicare approval.

In summary, the proposed changes are unnecessary for the workers' compensation to continue functioning in a smooth and relatively uncontested manner. The changes will have a negative impact upon the ability of payers to achieve settlements of Montana workers' compensation claims where Medicare beneficiaries are involved. If we as a jurisdiction choose to have the debate over increasing the benefits under the Act, such healthy and robust debate should take place through the legislative process.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael J. Marsh".

Michael J. Marsh, RPA, CPIA, CIA, CIU
Midland Claims Service, Inc.
Industrial Injury Claims®