

January 31, 2020

Cindy Zimmerman
Employment Relations Division
P.O. Box 8011
Helena, MT 59604

(Sent via e-mail)

Re: Proposed Amendment to ARM 24.29.1407

Dear Ms. Zimmerman:

I am providing written comments to supplement my testimony at the rule hearing on January 24, 2020 in conjunction with MAR Notice No. 24-29-352. I appreciate the Department's willingness to consider my comments.

1. The rule proposal creates an expansive and vague definition of "Prosthetic Devices" resulting in uncertainty and litigation, contrary to the enunciated objective stated in Section 39-71-105(4), MCA, to minimize reliance upon lawyers and the courts to interpret liabilities.

The rule proposal greatly expands the definition of a "prosthetic" resulting in medical benefits not terminating for a large number of claims. The replacement of the current definition of a prosthetic with the proposed language infers a substantial amount of uncertainty where none currently exists. The current definition, "an artificial substitute for a missing body part" is readily identifiable and easy to administer. The proposed definition to include "a device to augment function" leaves too much uncertainty to be left to chance. The term "device" is not defined in the rule proposal, but the ordinary dictionary definition includes "a thing made or adapted for a particular purpose." When terms are undefined, resorting to the ordinary dictionary definition is appropriate. As such, any thing that augments function may be within the universe of potential prosthetics. Included are the obvious items listed in the rule proposal, but the breadth will go well beyond the enumerated items. Every rod, plate, screw, brace, wrap, pill, salve and poultice may be considered a device to augment function. The effect will be to frustrate the intent of the legislature in seeking to have closure of medical benefits except in very limited circumstances. Even the dicta in the *Mellinger* decision that is relied upon and cited in the statement of reasonable necessity did not go as far as the current proposal. The ambiguity created by the rule proposal will necessarily require the courts to interpret what is or is not included. As such, the stated objective to have a "system designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities" will not be met by the rule proposal. Section 39-71-105, MCA. At a minimum, further definition is required to perpetuate a self-administering system.

2. The rule proposal frustrates the Legislative intent in having medical closure of claims after a reasonable period of time and invades the province of the legislature to define the benefits payable under the Workers' Compensation Act.

The rule proposal dramatically increases the number of claims that will potentially not be subject to medical closure.¹ The proposed expansive definition of a prosthesis results in the bestowal of additional benefits without legislative consideration. The expanded definition is invading the province of the legislature to "fix the amounts, time and manner of payment of workers compensation benefits..." *Ingraham v. Champion International*, 243 Mont. 42, 48. The legislative action giving rise to the medical closure after 5 years was undertaken to effectuate the purpose of providing assistance to injured workers at a reasonable cost to the employer. Section 39-71-105, MCA. The benefits provided are not designed to make the worker whole. *Id.* The delicate balance that was accomplished with the 2011 reforms is jeopardized by the rule proposal and the Department should not try to accomplish more than what the legislature intended. The law defining a prosthesis at the time of the enactment of HB 334 in 2011 was stable with the definition being an artificial replacement for a missing body part. *Ward v. Liberty NW Ins. Co.*, 2001 MTWCC 31A. If the legislature wanted to change that definition, it would have within the context of House Bill 334 in 2011. The fact that the Legislature did not modify the definition is telling and the Department should not undertake a change that the Legislature was unwilling to do.

The medical closure was priced at minus 12.1% by NCCI as a part of the House Bill 334 reforms. The proposed expanded definition of a prosthetic should likewise be priced so that the impact of the change can be evaluated. Had this proposal been considered by the legislature, as is proper, the pricing would have occurred so that informed decision making would result. In fact, the Economic Affairs Interim Committee expressed its concern over the rule proposal by writing to Acting Commissioner Lopach informing him of the Committee's objection to the rule and required delayed adoption. (Letter Attached) Given the issues surrounding the revised definition, I would request the Department to not move forward with the rule proposal but rather seek to define a prosthesis through legislation.

I would like to express my appreciation to the Department for its consideration of my comments.

Kevin Braun
General Counsel,
Montana State Fund

¹ A review of MSF claims since July 1, 2011 that have assistive devices as identified by procedure codes, not including prescription drugs, indicates more than 11,000 claims that would potentially not be subject to closure under the rule proposal.