



January 23, 2020

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

Re: *MAR Notice No. 24-29-352*
Proposed Amendment of ARM 24.29.1407

Dear Ms. Zimmerman:

This letter is sent in support of the Employment Relations Division's proposed amendment of ARM 24.29.1407. We collectively support the proposed amendment on behalf of the hundreds of injured workers we represent.

Procedurally, the Department of Labor and Industry is authorized to engage in rulemaking by exercising the powers conferred upon it by the legislature. Though administrative agencies may only exercise the powers given to them by the legislature, the statutory provisions found in the Worker's Compensation Act clearly confer this power.¹ A rule is an agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy.² When an agency engages in rulemaking it has the authority to add substance to the acts of the legislature, to complete absent but necessary details, and to resolve unexpected problems.³ The Department's proposed changes to ARM 24.29.1407 comport with agency rulemaking authority.

The proposed amendment of ARM 24.29.1407 is appropriate in that it will add substance, applicability and clarity to otherwise vague and missing statutory language. The Workers' Compensation Act does not define "prosthesis" yet uses this language to describe the availability of benefits under the Act. As the Department identified, a more accurate definition of "prosthesis" is necessary for determining when petitions to reopen medical benefits are necessary under §39-71-704 (1)(f) (i-ii), MCA. This statute provides that medical benefits do not close if treatment is necessary to repair or replace a prosthesis furnished as a direct result of a compensable injury or occupational disease. Injured workers must have access to repair or replace prosthetics furnished as a direct result of a compensable injury or occupational disease. Clarifying this language will alleviate unnecessary petitions to reopen medical benefits which will save time and administrative costs.

In addition to the Employment Relations Division's statutory and procedural authority to amend the rule, the clarification to the rule is necessary to avoid cost-shifting to injured

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¹ See § 39-71-203, MCA.

² *New Hampshire Ins. Co. v. Matejovsky*, 2016 MTWCC 8 citing *Core-Mark Intern. v. Mont. BD. of Livestock*, 2014 MT 197

³*Id.*

workers, taxpayers and private insurance consumers. When a prosthesis becomes necessary due to a workplace injury or occupational disease it is not the injured worker that should bear the cost of repair, maintenance or monitoring of the prosthesis for the rest of their life. If the workers' compensation insurer that was responsible for the prosthetic placement is not responsible for these devices in the future, who bears the burden of repair, replacement, or monitoring of a prosthesis after the closure of medical benefits? The workers' compensation insurers would have that burden fall on the worker. On the other hand, if the worker is fortunate enough to have private health insurance, Medicaid or Medicare, the burden falls on those entities which ultimately pass the cost on to the populous through premium increases or taxes. Consequently, we all end up paying for medical care that was the responsibility of the workers' compensation insurer.

Likewise, clarification of the rule is necessary to avoid costly litigation. We have many clients affected by this statute and the ambiguity. In one claim, an injured worker suffered a severe back injury. Ultimately, he underwent a multi-level fusion with a metal cage inserted into his spine to help support the fusion. After his medical benefits closed, the cage broke and needed to be removed. Leaving the broken cage in his back was not an option. Montana State Fund denied treatment claiming the medical benefits closed and this artificial, metal device inserted into the injured worker's body to support his spine was not a prosthetic. Montana State Fund claimed it did not owe for removal of the broken cage despite the fact Montana State Fund was responsible for the implementation of the cage. In another case, an injured worker severely fractured his ankle requiring numerous screws and plates so he could walk again. After his medical benefits closed, one of the screws broke and needed to be removed. Again, Montana State Fund denied treatment claiming a metal screw inserted to hold bones together and to allow the injured worker to walk was not a prosthetic. Montana State Fund would not pay for treatment to fix the broken screw they were responsible for inserting. This is not the intent of the statute and this rule change will clarify the injured workers will not be left holding the bag when foreign devices fail or need replacement. The definition of "prosthesis" must be clarified to avoid such injustice.

Another example we commonly see is when an injured worker suffers a permanent condition, such as hearing loss which requires a permanent prosthesis to maintain the normal function of the body. Many times these are law enforcement officers who lost their hearing in the line of duty due to the noise associated with sirens and guns. Hearing loss in these officers does not cease because worker's compensation medical benefits close. Yet Montana State Fund has denied payment of hearing aids after medical closure and has forced our clients to file with the Workers' Compensation Court to obtain the devices needed. See Workers' Compensation Court Petition attached as Ex. 1. The officers continue to need the prosthesis to hear and this need continues beyond the injured workers' retirement or five-year closure of medical benefits. Without this clarification, a law enforcement officer with duty-related hearing loss would not be entitled to the replacement of their hearing aids.

Reopening medicals under § 39-71-717, MCA, is not sufficient to address these issues. In the officer's claim noted above, when he retires he is not even permitted to petition to reopen the medical benefits based on the current statutory framework which requires medical benefits may only be reopened to keep the injured worker at work or return him or her to work. Since he is retired, the hearing aids are not necessary to "keep him at work" despite the fact he lost his hearing on the job and it affects his entire life. The retired officer should not be required to pay for his own loss that is the responsibility of the insurer.

We further support the proposed amendment as the Department’s proposed definition of “prosthesis” comports with the Workers’ Compensation Court’s interpretation of the statute and the legislature’s intended definition.⁴ Consistency with the Court’s decision is appropriate.

Contrary to comments submitted on this issue, § 39-71-119, MCA, does not exclude coverage for “prosthetic” devices. This statute merely clarifies that an “injury” is not damage to eyeglasses, contact lenses, dentures, or hearing aids which a worker possesses as the result of a pre-existing non-work-related condition. However, when a work-related injury or occupational disease is caused by or worsened by employment and a “prosthesis” is furnished as the direct result, the statutory language of the Workers’ Compensation Act makes clear an insurer remains liable.

The proposed rule changes should be adopted to keep costs where they belong and to avoid unnecessary litigation. Thus, on behalf of our clients, we urge the Department to adopt the proposed amendment to ARM 24.29.1407.

Sincerely,



Stacy Tempel-St. John



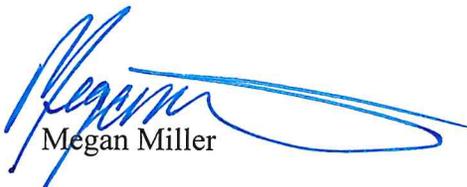
J. Kim Schulke



Richard J. Martin



Michele Reinhart Levine



Megan Miller

⁴ *Mellinger v. Montana State Fund*, 2018 MTWCC 13, ¶ 23.

FILED

JAN 21 2020

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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Attorneys for Petitioner

COPY

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

Walter D. O'Fallon)

Petitioner,)

-vs-)

Montana State Fund)

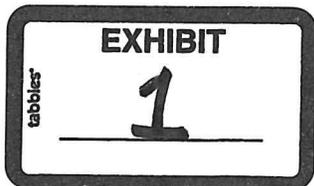
Respondent.)

WCC NO. 2020-4902

PETITION FOR TRIAL

Pursuant to Rule 24.5.301, ARM, Petitioner alleges as follows:

1. Petitioner, Walter D. O'Fallon, suffered bilateral hearing loss while performing his duties as a Deputy Sheriff for Cascade County Sheriff's Office, Great Falls, Cascade County, Montana.
2. On January 30, 2013, Petitioner filed a First Report of Injury for bilateral hearing loss.
3. Petitioner's claim was accepted by Respondent on September 24, 2013.



DOCKET ITEM NO. _____

4. Petitioner was last provided hearing aids by the Respondent on December 19, 2017. Hearing aids typically require replacement every four to five years. The hearing aids are sold with a two-year supply of standard batteries. After two years, the standard batteries must be purchased. Standard batteries must be replaced every four to five days. Rechargeable batteries must be replaced once every year. Petitioner will need to replace his rechargeable batteries this year.

5. On November 27, 2017, Respondent advised Petitioner that his medical benefits would terminate 60 months from the date of his diagnosis. Respondent advised Petitioner he may request a reopening of his medical benefits by filing a petition with the Department of Labor & Industry within sixty months of the termination of his medical benefits.

6. On November 25, 2019, Petitioner, through his counsel, requested that the insurer rescind its assertion that Petitioner's workers' compensation claim related benefits terminated because the statutory language of § 39-71-704 (1) (f) (i), MCA (2011) does not apply based on § 39-71-704 (1) (f) (ii), MCA (2011) and § 39-71-704 (1) (g) (ii), MCA (2011).

7. Petitioner must wear hearing aids as the direct result of his work-related occupational disease for bilateral hearing loss. Hearing aids are a prosthesis furnished as a direct result of Petitioner's compensable occupational disease. Section 39-71-704 (1) (f) (ii), MCA (2011), provides that subsection 39-71-704(1) (f) (i), MCA (2011) does not apply for the repair or replacement of a prosthesis furnished as a direct result of an occupational disease.

8. The Respondent has maintained its denial of ongoing benefits associated with Petitioner's workers' compensation claim for bilateral hearing loss.

9. The parties have complied with §39-71-2411, MCA, regarding mediation.

10. Petitioner has freely exchanged all available and pertinent medical records with Respondent pursuant to 24.5.317, ARM, and will continue to do so.

11. Respondent's denial has been unreasonable, entitling Petitioner to an award of attorney fees, costs and a penalty pursuant to §39-71-611 and §39-71-2907, MCA.

12. Petitioner's potential witnesses and summary of the subject matter of their anticipated testimony are as follows:

<u>Name</u>	<u>Subject Matter</u>
Walter D. O'Fallon c/o Linnell Newhall Martin & Schulke P.O. Box 2629 Great Falls, MT 59403	Description of injuries, medical treatment, and work-related issues

Name

Subject Matter

Tammy Gibson
c/o Montana State Fund
P.O. Box 4759
Helena, MT 59604

Claims Management and Investigation

Rebuttal and impeachment witnesses

Witnesses identified through discovery

Witnesses identified by Respondent

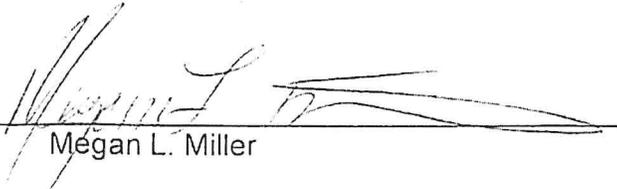
13. The written documents relating to the claim, which may be introduced as evidence by Petitioner, are described on the attached Exhibit List.

WHEREFORE, Petitioner requests that:

1. This matter be set for trial at the next term of the Court in Great Falls, Montana;
2. This Court order Respondent to rescind its denial and termination of ongoing claim related benefits and pay for Petitioner's ongoing claim related treatment including for the repair, replacement, and monitoring of his hearing aids.
3. This Court award attorney fees, costs, and a penalty pursuant to § 39-71-611 and § 39-71-2907, MCA.
4. This Court afford any other benefits under the Workers' Compensation Act to which he is entitled; and,
5. Such other and further relief as the Court deems just.

DATED this 15th day of January, 2020.

LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.

By 

Megan L. Miller

Walter D. O'Fallon
v.
Montana State Fund

WCC No. _____
EXHIBIT SHEET

EX #	ADMT Y/N	DESCRIPTION OF EXHIBIT	FOUND. OBJ. Y/N	PARTY* OFFERING	OB J ✓	SPECIFIC OBJECTION
1.		Attorney Retainer Agreement dated October 31, 2019, 1 p.		P		
2.		First Report of Injury dated January 30, 2013, 2 pp.		P		
3.		Hadley letter to Petitioner dated September 24, 2013, 1 p.		P		
4.		Hadley letter to Petitioner dated January 20, 2014, 2 pp.		P		
5.		Root letter to Petitioner dated November 27, 2017, 1 p.		P		
6.		M. Miller letter to Gibson dated November 25, 2019, 1 p.		P		
7.		Medical records from Costco Hearing Aid Center, dated December 15, 2012, 6 pp.		P		
8.		Hearing Life Audiologic Report, June 27, 2013, 1 p.		P		
9.		Beltone Records dated December 20, 2017, 4 pp.		P		
10.		All documents listed by the Respondent				
11.		All documents received through the course of discovery				
12.		Rebuttal and impeachment documents				