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January 28, 2020

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JAN 29 2020

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

Re: Definition of Prosthetic  
MAR Notice No. 24-29-352

Dear Ms. Zimmerman:

Please provide this letter to the appropriate officials regarding the Notice of Public Hearing on the proposed amendment of ARM 24.29.1407 (definition of prosthetic), as provided in the notice dated December 17, 2019.

I was the attorney who raised the issue about what is a "prosthetic" in the case of *Mellinger v. State Fund*, 2018 MTWCC 13. This case involved the earlier version of the sixty month rule announced in Mont. Code Ann § 39-71-704 (2005); however, *Mellinger* is equally relevant to the question of whether Mont. Code Ann § 39-71-704 (1)(f)(ii) applies ("repair or replacement of a prosthesis furnished as a direct result of a compensable injury or occupational disease").

The Workers' Compensation Court denied medical coverage in *Mellinger* under the sixty month closure rule. Mr. Mellinger suffered an industrial injury in the course of his employment on November 2, 2006. He had a near amputation of his right foot. At the time, he was told the "joints in the midfoot were severely destroyed by the injury and likely would require arthrodesis at some point in his life."

Fifty four months later, on May 13, 2011, Mr. Mellinger saw a surgeon who told him he required a distal tibial anterior spur removal surgery. The surgeon requested surgery, and the Montana State Fund agreed to cover it. Unfortunately, Mr. Mellinger put surgery off due to his busy work schedule. Mr. Mellinger did not know that there was an expiration date on his surgery approval. He was not represented by an attorney at the time. Instead, he wanted to work, and he was busy - that is how he lost workers' compensation medical coverage under Montana law.

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On May 9, 2017, Mellinger asked the State Fund to allow him to proceed with surgery, but he was told his medical coverage had closed pursuant to the sixty month rule.

Mr. Mellinger responded that he should be eligible for lifetime medical coverage because he had prosthetics. He cited the Merriam-Webster definition of "prosthetic" ("an artificial device that replaces a missing or injured part of the body"), and Mellinger said he had three different kinds of prosthetics: first, he had external ankle support braces; second, he had rebuilt shoes and boots; and third, he had three orthopedic screws at his left talonavicular fracture-dislocation, which provided internal fixation.

Interestingly, the State Fund had previously paid for all three of these prosthetic devices and, tellingly, the State Fund listed the payments under the category for "prosthetics." Nonetheless, the State Fund swore that these three items were not prosthetic devices.

The "repair or replacement" of a prosthesis, or the "monitoring" of a prosthetic are not precise terms. The ambiguity is caused by the fact that a prosthetic comprises only one-half of the medical equation. In reality, a prosthetic works together with human tissue, and sometimes it is the human tissue that must be "repaired." Therefore, the "repair" of a prosthetic may actually involve a surgery on the human tissue with which the prosthetic corresponds. For instance, with a prosthetic leg, the leg stump may require revision. Mr. Mellinger requested surgery to remove a distal tibial anterior spur, which interfered with the operation of Mellinger's boots, brace, and screws. Essentially, the bone spur grew out of the joint where the prosthetic screws were affixed, so Mr. Mellinger believed the surgery involved the "repair" of a prosthetic.

The State Fund argued against coverage. It said, "Despite [Mellinger's] characterization to the contrary, his ankle AFO brace, rocker shoe, and internal fixation screws are not prosthetic devices." The State Fund cited *Ward v. Liberty Northwest Ins. Corp.*, 2001 MT 31A, wherein the Supreme Court "referenced Dorland's Medical Dictionary, 24th Ed. (1982), which defined prosthesis as "an artificial substitute for a missing body part." However, the State Fund conceded that the definition Merriam-Webster definition was almost the same: "an artificial device that replaces a missing or injured part of the body."

The State Fund argued that, "[t]he surgery currently requested by Petitioner is a distal tibial osteotomy to remove a bone spur." The State Fund disagreed with Mellinger's assertion that the bone spur was connected to the instrumentation in his ankle, and the State Fund said screws (hardware) are not considered prosthetics."

In like manner, the State Fund said that Mellinger's AFO brace and rocker shoes did not "constitute an artificial substitute for a missing body part." The State Fund said, "an ankle-foot orthosis, or AFO, is a support intended to control the position and motion

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of the ankle, compensate for weakness, or correct deformities." The insurer said, "AFOs can be used to support weak limbs, or to position a limb with contracted muscles into a more normal position. It is worn on the outside of the leg; it is not incorporated within the leg. The State Fund said, "Neither item is an artificial replacement for a missing body part." There was no discussion about why there was a weakness, nor was there a thought about what body part was missing to cause the weakness and the need for the AFO.

Ultimately, Mr. Mellinger was denied surgery, which is contrary to Montana's public policy. Montana law says the insurer should provide medical care without regard to fault. See, Mont. Code Ann. § 39-71-105 (1). Clearly, Mr. Mellinger was at fault for working too hard and being too busy post-accident. He should have hired a lawyer, gone off work, and got his treatment. Unfortunately, he was only a laborer working at a grain elevator, so he did not understand he would lose his claim related medical coverage through some trick of the law.

In *Mellinger*, the Workers' Compensation Court said:

The Legislature has not defined "prosthesis" or "prosthetic device" in the WCA, and there is no universally accepted definition in the medical field. There are narrow definitions, under which only devices that replace a missing body part, such as artificial limbs and joints, qualify. And there are broad definitions, under which devices that "replace or augment a missing or impaired part of the body" qualify, including devices such as hearing aids. While this Court adopted a narrow definition in *Wiard*, and while the Department of Labor & Industry has also adopted a narrow definition of "prosthesis," the WCA provides that an "injury" includes "damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids," thereby indicating that the Legislature intended a broader definition in the WCA."

*Mellinger* ¶ 23.

Now, the DLI and LMAC are looking at refining the definition of "prosthesis," because a claimant is entitled to lifetime medical care if she has a prosthesis. Should the DLI tighten the definition of prosthesis to exclude screws placed inside a claimant's back or ankle? For claimants in Montana, I urge the DLI to adopt a more thorough definition that fully understands the term "prosthesis."

The public policy of Montana is not served by terminating medical benefits that are required by an injured worker after he receives a severe injury. For this reason, the Montana Supreme Court has taken a dim view towards limiting medical treatment for injured workers. For instance, in *Hielt v. Missoula County Public Schools*, 2003 MT 213, the Court extended the time to obtain treatment until the claimant can "sustain" medical stability. Likewise, in *Newlon v. Teck American, Inc.*, 2015 MT 317, 381 Mont. 378, 360

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P.3d 1134, the Court narrowly construed the 60 month rule by allowing parties to easily contract away the 60 month statutory limitation. In *Wiard v Liberty Northwest Insurance Corp*, Justice Rice decried the inequity inherent in the 60 month rule:

¶47 The conclusion we have reached herein is stark. The parties admitted for purposes of this appeal that the injured worker's back surgery in September of 2000 was a consequence of his 1992 industrial injury, yet application of the statutes releases the insurer from the burden of that necessary expense and casts it upon the injured worker and, if he cannot sustain the burden, upon society as a whole.

¶48 The culmination of legislative policies which remove the legal profession from the process, impose deadlines for receiving medical care, and then fail to notify injured workers of the deadline, is, in my view, unduly harsh and unfair. It is particularly so when the nature of the injury at issue may require multiple years to fully resolve. In addition to being harsh, this provision has the unintended effect of punishing injured workers who refrain from seeking medical care until their declining condition forces them to do so, which may then be too late.

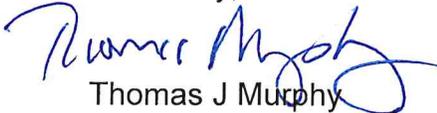
*Wiard v. Liberty Northwest Insurance Corp*, 2003 MT 295, ¶¶ 47 – 48.

There are critics of the proposed definition of prosthesis who say it will expand worker's compensation coverage beyond current limitations, but those critics are wrong. The current Workers' Compensation Act specifically covers eyeglasses, hearing aids, and contact lenses that are damaged or lost "as a result of an injury." Mont. Code Ann. § 39-71-704(1)(c).

On the other hand, if a worker with perfect vision sustains a head injury that leaves her with diminished eyesight, then the law allows repeated replacement of her eyewear – as reasonable and necessary. The future decisions about the cause for the new prescription may require fact-finding to determine if the replacement of the eyewear is causally related, but that is the function of the law. Certainly, a definition of prosthesis should not preclude the woman who lost her eyesight in an accident from receiving future eyeglasses to make up for that loss.

In conclusion, the proposed change to the definition of prosthesis is a good thing. It allows clarity, and that is the purpose of these definitions. If the system is supposed to work without the need for lawyers, then the DLI should do everything in its power to clearly define the rights and obligations of the parties. Thank you for your consideration of this letter.

Sincerely,

  
Thomas J Murphy