



February 26, 2020

Economic Affairs Interim Committee  
The Hon. Sharon Stewart Peregoy, Presiding Officer  
P.O. Box 201706  
Helena MT 59620-1706

RE: EAIC objection to MAR Notice No. 24-29-353

Dear Representative Stewart Peregoy,

The Department of Labor and Industry is in receipt of the letter dated February 13, 2020, whereby the Economic Affairs Interim Committee made its formal objection to MAR Notice No. 24-29-352, pertaining to the definition of the term "prosthesis" for certain purposes under the Workers' Compensation Act. Pursuant to § 2-4-406, MCA, the Department is providing its response to the Committee.

The Department will not proceed with the proposed rule before the next legislative session.

The Department respectfully disagrees with the Committee's opinion that the proposed amendments to ARM 24.29.1407 are not within the Department's authority for rulemaking. The compromise that was almost arrived at itself indicates there was no dispute that it is within the Department's authority to define eye glasses, prescription contact lenses, dentures, and hearings aids as prosthesis. The term "prosthesis" is, as the Committee notes, not defined for the purposes of the Workers' Compensation Act. One of the purposes of administrative rule-making is to define terms which the Legislature has left undefined. *Bick v. State Dept. of Justice* (1986), 224 Mont. 455, 730 P.2d 418. The Department is expressly granted rule-making authority to make rules as necessary to carry out the provisions of the Workers' Compensation Act. Section 39-71-203(2), MCA (as noted in the "AUTH" citation for ARM 24.29.1407). Sections 39-71-704 and 39-71-717, MCA, are the two statutes identified as being implemented by the proposed amendments to ARM 24.29.1407.

Section 39-71-717, MCA, provides a process whereby an injured worker may petition the Department for an order reopening medical benefits under § 39-71-704, MCA, which terminate by operation of law 60 months from the date of the industrial injury or occupational disease. The Department respectfully notes that it recently adopted several rules, including a definitions rule, to describe and define the re-opening process. See Title 24, chapter 29, subchapter 31, ARM. The Department respectfully notes that neither the EAIC or any member of the public



objected to the Department's rulemaking authority with respect to its adoption of rules for reopening of medical benefits pursuant to § 39-71-717, MCA. The proposed amendments to ARM 24.29.1407 also serve to implement § 39-71-717, MCA, by the express terms of the language of proposed subsection (1).

Notwithstanding the above, the Department acknowledges the Committee's objection and the Department will not move forward on this rules proposal. While the Department attempted to find consensus with stakeholders, as mentioned at the Committee meeting, the attempted compromise would result in litigation. This would defeat the point of consensus. The stakeholder community was made aware of the original proposed language in October and no compromise solutions were offered until just before the February EAIC meeting. However, moving forward, the Department will continue to work on the issue for future work with all stakeholders.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Lopach". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Tom Lopach, Commissioner  
Mt. Department of Labor & Industry