

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 24.29.1407 pertaining to the) PROPOSED AMENDMENT
description of a prosthesis for the)
purpose of reopening medical benefits)
in workers' compensation claims)

TO: All Concerned Persons

1. On January 24, 2020, at 10:00 a.m., the Department of Labor and Industry (department) will hold a public hearing in conference rooms A and B of the Beck Building, 1805 Prospect Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 4:00 p.m., January 17, 2020, to advise us of the nature of the accommodation that you need. Please contact Cindy Zimmerman, Employment Relations Division, P.O. Box 8011, Helena, Montana 59604; telephone (406) 444-1752; facsimile (406) 444-4140; Montana TTD (406) 444-5549; or e-mail Cindy.Zimmerman@mt.gov.

3. The rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

24.29.1407 PROSTHETIC APPLIANCE DEVICES (1) For the purposes of identifying what constitutes a prosthesis not subject to the automatic 60-month closure of medical benefits under 39-71-704, MCA, the term "prosthesis" means, with respect to a body part or organ missing or damaged as the direct result of a workplace accident or occupational disease:

- (a) an artificial substitute to replace that body part or organ; or
- (b) a device to augment the functioning of that body part or organ.

(2) Examples of a prosthetic device include:

- (a) an artificial joint;
- (b) an artificial eye;
- (c) an artificial limb; and
- (d) an artificial tooth.

(3) Examples of a prosthetic device that augments function include:

- (a) prescription eye glasses;
- (b) prescription contact lenses;
- (c) dentures; and
- (d) hearing aids.

~~(1) Claims for furnishing replacement or repair of prosthetic appliances shall be paid to orthotists or prosthetists, who have been certified by the American Board~~

~~for Certification in Orthotics or Prosthetics, and whose services are performed in a certified facility.~~

~~(2) For services provided on or after July 1, 2011, claims must be paid in accordance with the utilization and treatment guidelines adopted by the department in ARM 24.29.1591.~~

AUTH: 39-71-203, MCA

IMP: 39-71-704, 39-71-717, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1407 in light of the department's recent receipt of certain petitions to reopen medical benefits pursuant to 39-71-717, MCA, related to hearing aids, and also in the context of the ruling of the Workers' Compensation Court in the case *Mellinger v. Montana State Fund*, 2018 MTWCC 13. The department initially notes that the existing version of ARM 24.29.1407 was originally adopted by the old Industrial Accident Board prior to 1973. At that time, a prosthesis was generally considered to be a mechanical device, such as an artificial limb. Since that time, the art and science of medical technology has grown, as has medical knowledge. Return to and maintenance of function are the cornerstones of the Montana Utilization and Treatment Guidelines. The department's medical director recently stated that an up-to-date definition of prosthesis more accurately encapsulates appropriate treatment options to address the functional consequences of certain occupational injuries and illnesses than a narrower definition. Based on that evolving medical view, the department, acting upon advice of its medical director, has determined that the scope of the current rule is an anachronism.

The department notes that the proposed definition of prosthesis is limited in its application to requests for reopening of medical benefits pursuant to 39-71-717, MCA, where the prosthesis is required because of the workplace injury or occupational disease. The proposed language of the rule in no way changes the exclusion of damage to a worker's eye glasses, contact lenses, dentures, or hearing aids provided for in 39-71-119, MCA, defining the terms accident and injury, nor does it affect the insurer's obligation for the repair or replacement of those items as provided by 39-71-704(1)(c), MCA.

An example of application of the proposed amendments would arise in the context of hearing aids furnished a worker due to hearing loss caused by occupational exposure to noise. The hearing loss is permanent, and the worker will need hearing aids for the rest of her or his life in order to reasonably function independently in the modern world. That need for working hearing aids will continue past the retirement age of the worker, due to the permanent nature of the hearing loss. Prior to the 60-month automatic closure of medical benefits provided for in 39-71-704(1)(f)(i), MCA (2011), an insurer would have automatically had an ongoing obligation as a primary medical service to pay for new hearing aid batteries and other maintenance related to the hearing aids. The department therefore concludes that there is reasonable necessity to amend ARM 24.29.1407.

Finally, there is reasonable necessity to amend the IMP citation for the rule to include the reference to 39-71-717, MCA, in light of the foregoing.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Cindy Zimmerman, Employment Relations Division, P.O. Box 8011, Helena, MT 59604; fax (406) 444-4140; or e-mail Cindy.Zimmerman@mt.gov, and must be received no later than 5:00 p.m., January 31, 2020.

5. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices, and specifies the particular subject matter or matters regarding which the person wishes to receive notices. Such written request may be mailed or delivered to the Department of Labor and Industry, attention: Mark Cadwallader, 1315 E. Lockey Avenue, P.O. Box 1728, Helena, Montana 59624-1728, faxed to the department at (406) 444-1394, or e-mailed to mcadwallader@mt.gov, or may be made by completing a request form at any rules hearing held by the agency.

6. An electronic copy of this notice of public hearing is available through the Secretary of State's web site at <https://sosmt.gov/arm/>. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that a person's difficulties in sending an e-mail do not excuse late submission of comments.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

9. The Office of Administrative Hearings, Department of Labor and Industry, has been designated to preside over and conduct this hearing.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ GALEN HOLLENBAUGH
Galen Hollenbaugh, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 17, 2019.