

SJR 30 Briefing Paper

Lost Wage Benefit Structure

And Payments

In The

Montana Workers' Compensation System

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By

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Background

Workers' Compensation lost time benefit structures across jurisdictions appear similar in that states generally pay temporary benefits and permanent benefits, but the definitions, calculations, philosophy, length, cost and resulting predictability, equity and adequacy of these benefits vary dramatically from state to state. The total benefits paid in a system are a result of the number of injuries that occur, the benefit levels paid and the duration for which benefits are paid. Hence to look at benefits in any system, one must look at the frequency of lost time injuries; the level of benefits paid for each type of benefit category; the distribution of those payments and the duration for which those benefits are paid. The methods to accomplish this kind of a review vary from factual information (like statutory maximums and minimums) to detailed quantitative studies that compare the earnings losses of workers with like workers who were not injured retrospectively and prospectively. This paper deals only with those methods that can be used within the timeframe and resources available for the SJR30 studies. Further studies of the adequacy and equity of benefits in the Montana system may wish to be undertaken at some point in the future.

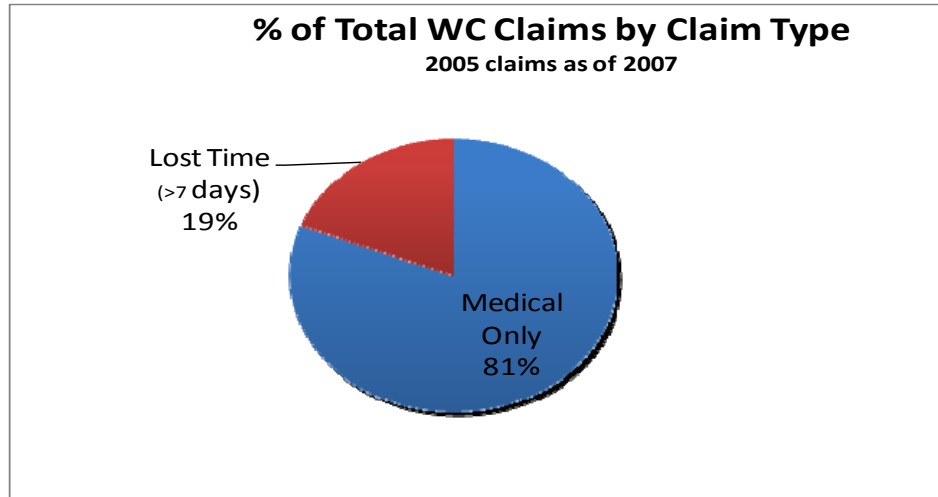
The fact that the employee gave up their right to sue their employer in exchange for the prompt payment of specific benefits itemized under the workers' compensation law generally means that workers' compensation benefits must be paid at a rate and for long enough to make this "exclusive remedy" a reasonable alternative to suing the employer for liability under the "common law" doctrine.

Basics of Workers' Compensation Lost Time Payment Structures

Although the majority of workers compensation benefits are paid on claims where the injured worker loses time from work, by far the greater number of injuries in all workers compensation systems is to workers who need medical treatment, but are not disabled from work. A study by the Workers Compensation Research Institute covering multiple states revealed that on average 81% of reported injuries involved medical treatment but no more than 7 days of lost time and in an average of 19% of reported injuries, the employee needed medical treatment and lost more than seven days of work as a result of their work related injuries.¹

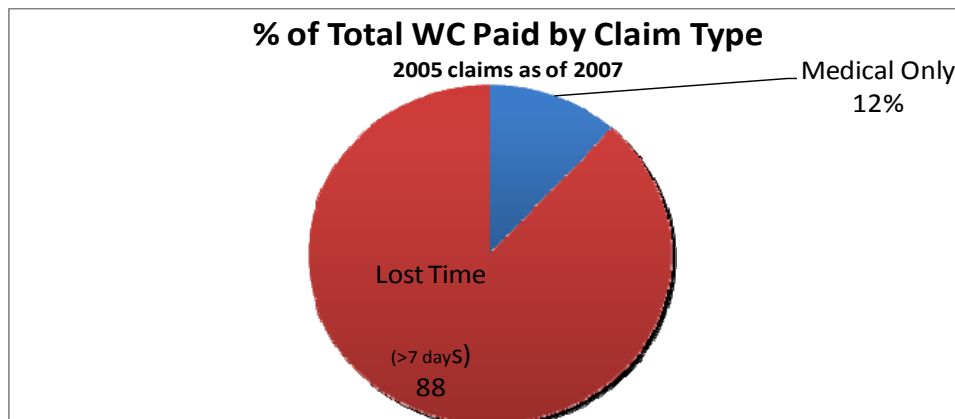
¹ Yang, Rui, Nicole M. Coomer, Stacey Landes, Evenlina Radeva, Carol Telles, and Ramona Tanabe. *CompScope™ Benchmarks, 10th Edition*. December, 2009. Workers Compensation Research Institute.

Chart 1



However, that same study found that on average, the lost time claims accounted for 88% of the benefits paid in those workers' compensation systems. (Chart 2)

Chart 2



This briefing paper discusses only the structure for payment of "lost time" benefit payments in workers' compensation systems in Montana and compares that structure to those of other states, focusing on the "comparator" states most like Montana. Those states are Alaska, Idaho, New Mexico, North Dakota, Oregon, South Dakota, Washington and Wyoming.

Numbers of workers' compensation claims with only medical treatment and those with some type of indemnity benefit (or earnings lost) reported in the comparator states as of 12/31/2008 and the resulting ratios are shown in Table 1 for the years 2003 through 2008. Note that the variation is in part due to the differences in waiting periods between these states, but even though Montana has a lower waiting period before lost time benefits begin, they have consistently the second lowest ratio of lost time claims, after North Dakota.

Table 1

Comparator State Medical/Lost time Claim Ratios as of 12/31/2008

| | Alaska | Idaho | Montana | New Mexico | North Dakota | Oregon* | South Dakota | Washington | Wyoming |
|------------------------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| 2003 | | | | | | | | | |
| Medical Only Claims | 17193 | 33584 | 27581 | 15377 | 16311 | 63000 | 18447 | 92524 | 10171 |
| Lost Time Claims | 8762 | 7875 | 5472 | 5687 | 2442 | 21823 | 5628 | 27794 | 4135 |
| Percentage Lost Time Claims | 33.76% | 18.99% | 16.56% | 27.00% | 13.02% | 25.73% | 23.38% | 23.10% | 28.90% |
| 2004 | | | | | | | | | |
| Medical Only Claims | 16032 | 34867 | 27074 | 15427 | 16722 | 60700 | 19595 | 94894 | 10273 |
| Lost Time Claims | 8472 | 8053 | 5357 | 5983 | 2462 | 22320 | 5232 | 28002 | 4129 |
| Percentage Lost Time Claims | 34.57% | 18.76% | 16.52% | 27.94% | 12.83% | 26.89% | 21.07% | 22.79% | 28.67% |
| 2005 | | | | | | | | | |
| Medical Only Claims | 15595 | 35464 | 28122 | 15269 | 17424 | 62900 | 19664 | 95666 | 10227 |
| Lost Time Claims | 7914 | 7797 | 5421 | 5640 | 2463 | 22111 | 5147 | 28108 | 4242 |
| Percentage Lost Time Claims | 33.66% | 18.02% | 16.16% | 26.97% | 12.38% | 26.01% | 20.74% | 22.71% | 29.32% |
| 2006 | | | | | | | | | |
| Medical Only Claims | 15873 | 36362 | 27165 | 16920 | 19268 | 65000 | 19451 | 97114 | 10184 |
| Lost Time Claims | 7771 | 8006 | 5111 | 5609 | 2320 | 23370 | 5337 | 28426 | 4054 |
| Percentage Lost Time Claims | 32.87% | 18.04% | 15.84% | 24.90% | 10.75% | 26.45% | 21.53% | 22.64% | 28.47% |
| 2007 | | | | | | | | | |
| Medical Only Claims | 15352 | 35839 | 26548 | 14972 | 19022 | 61600 | 19039 | 95991 | 10615 |
| Lost Time Claims | 6395 | 7525 | 5281 | 5499 | 2287 | 23431 | 5565 | 27864 | 3896 |
| Percentage Lost Time Claims | 29.41% | 17.35% | 16.59% | 26.86% | 10.73% | 27.56% | 22.62% | 22.50% | 26.85% |
| 2008 | | | | | | | | | |
| Medical Only Claims | 15484 | 33012 | 26526 | 14918 | 18771 | 57900 | 19987 | 87524 | 10194 |
| Lost Time Claims | 6727 | 6814 | 4449 | 4869 | 2290 | 21660 | 5468 | 25501 | 3274 |
| Percentage Lost Time Claims | 30.29% | 17.11% | 14.36% | 24.61% | 10.87% | 27.22% | 21.48% | 22.56% | 24.31% |

Data for this table was obtained from a survey sent to jurisdictions in October of 2009; Survey Question was "What is the number of medical only claims and lost time claims PAID by date of injury in your state as of 12/31/08 for the following calendar years?"

* Oregon medical only claim totals are estimated

Lost time benefits can further be broken down for any given state into the following categories:

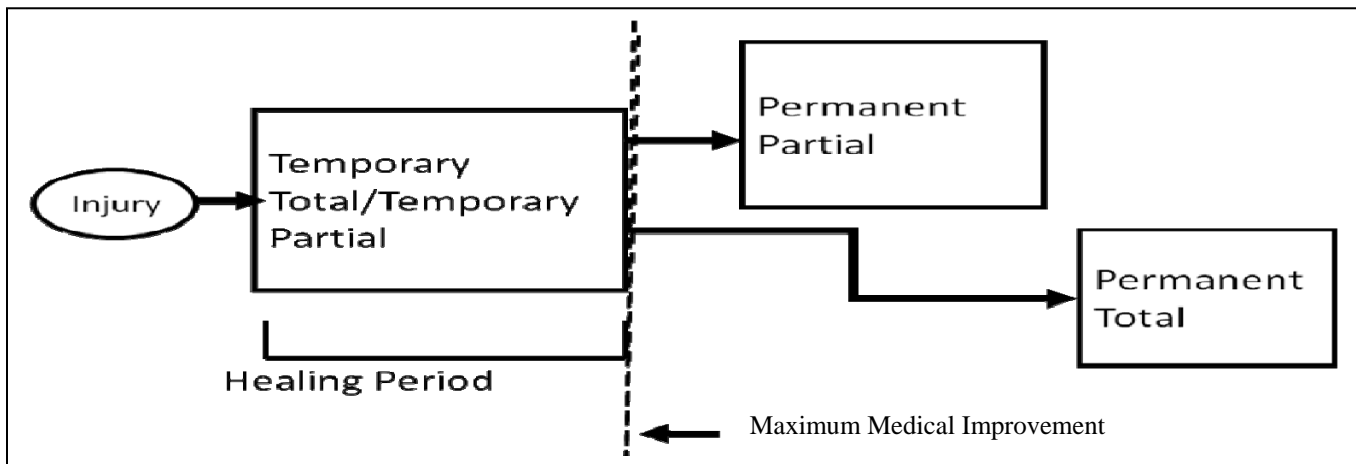
- Temporary Total Disability (benefits paid while the worker is healing from their injury and unable to work at all at any job)
- Temporary Partial Disability (benefits paid while the worker is healing from their injury but is able to work either part time or at another job earning less pay)
- Permanent Partial Disability (benefits paid to a worker for either a permanent physical impairment due to the injury; for estimated or actual future wage losses; or for both)

- Permanent Total Disability (benefits paid to a worker long term when they cannot return to any sustained gainful employment as a result of the injury or a combination of the injury and other health conditions combined)
- Dependency or Fatality Benefits (benefits paid to or on behalf of dependents as a result of the work related death of an injured worker)
- Retraining or Rehabilitation Benefits (benefits paid during a period of retraining or schooling designed to assist an injured worker in returning to sustained gainful employment usually when they physically can no longer do the job they had at the time of injury)
- Disfigurement Benefits (benefits paid to injured workers who suffer disfigurement as a result of an injury that is likely to affect employability)

Since interviews with stakeholders did not reveal any concerns or issues surrounding dependency benefits or disfigurement benefits separate from permanent partial disability; this paper will deal only with those lost time benefits underlined in the above listing: temporary total disability, temporary partial disability, permanent partial disability, permanent total disability, and retraining or rehabilitation benefits.

In general the structure of these benefits looks like the following diagram:²

Diagram 1



When an injury occurs where an employee has a medically verified disability from work past the “waiting period” within a given state, temporary total or temporary partial disability benefits are paid while they are healing. Once the physician determines that further medical treatment will not help to “cure and relieve” the condition and any residual bodily impairment is permanent, benefits shift to either permanent partial or permanent total disability, or both, depending on the system design and in some states, whether the employee goes back to work or is able to work.

Nationally, these lost time benefits are distributed as indicated in Chart 3 where all benefits paid for cases *defined* as a temporary disability, permanent partial disability, permanent total disability or fatality cases are added together. The left pie chart shows the distribution by numbers of cases and the right pie chart shows the distribution by benefits paid. You will notice that this chart uses 2004 accident year data as one needs to have benefits paid on average at least 5 years to be able to see

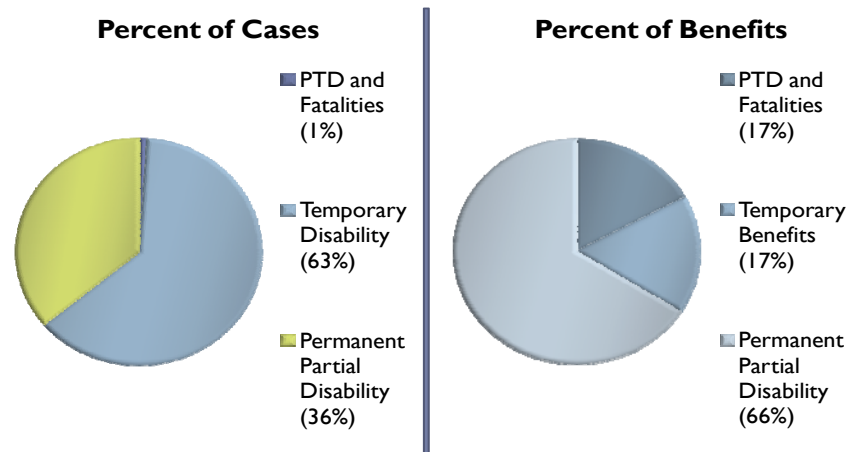
² Diagrams used in this paper are from *Permanent Partial Disability in All 51 Jurisdictions* by Edward Welch and can be found at www.lir.msu.edu/wcc unless otherwise noted.

the permanent total disability cases begin to show since some states pay out the temporary benefits and then the permanent partial disability benefits before permanent total disability benefits are paid.

Chart 3

Distribution of Indemnity Cases and Costs

(2004 Accident Year)



Source: Annual Statistical Bulletin, NCCI 2008, Exhibits X and XII

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Historically, the distribution of indemnity (or lost time) benefits has been looked at in the manner that rating bureaus (the data collection agencies for workers' compensation insurers in the states) have grouped them. This is in part because this was the only dependable data available. As state agencies begin to collect and provide high quality data on claims within their states, other ways of looking at the claims data become available. Montana is fortunate in having the staff and administrative processes to allow for additional analysis of the utilization and distribution of lost time claim data. Table 2 takes the data used in the Department's 2008 Annual Workers' Compensation Report triangle tables and displays it in a manner so one can see the percentage of total benefits payments reported as being paid to the department as of the end of 2007. By looking at the indemnity cases by benefit type paid, we get a very different picture of the distribution of benefit payments by type of payment. We suspect this is true for all states, but at the time of the writing of this report, had not received such data from other states.

Table 2
Distribution of Benefits Paid in Montana

| | Total Medical | TTD | TPD | PPD | PTD | VR | TOTAL |
|------|---------------|--------------|-------------|--------------|-------------|-------------|---------------|
| 2001 | \$78,218,767 | \$39,388,921 | \$2,023,585 | \$20,338,470 | \$4,830,755 | \$3,302,665 | \$148,103,163 |
| | 52.81% | 26.60% | 1.37% | 13.73% | 3.26% | 2.23% | |
| 2002 | \$79,535,674 | \$37,384,224 | \$2,157,384 | \$33,792,002 | \$4,469,897 | \$3,118,307 | \$160,457,488 |
| | 49.57% | 23.30% | 1.34% | 21.06% | 2.79% | 1.94% | |
| 2003 | \$80,352,856 | \$37,371,593 | \$2,589,748 | \$29,508,817 | \$5,124,306 | \$3,202,371 | \$158,149,691 |
| | 50.81% | 23.63% | 1.64% | 18.66% | 3.24% | 2.02% | |
| 2004 | \$74,289,425 | \$31,425,342 | \$2,208,822 | \$25,378,118 | \$3,243,473 | \$2,920,717 | \$139,465,897 |

| | | | | | | | |
|------|--------------|--------------|-------------|--------------|-------------|-------------|---------------|
| | 53.27% | 22.53% | 1.58% | 18.20% | 2.33% | 2.09% | |
| 2005 | \$71,996,099 | \$40,389,565 | \$2,086,638 | \$19,523,250 | \$2,096,530 | \$4,549,765 | \$140,641,847 |
| | 51.19% | 28.72% | 1.48% | 13.88% | 1.49% | 3.24% | |
| 2006 | \$68,869,054 | \$29,685,687 | \$2,052,998 | \$13,414,718 | \$1,266,331 | \$8,265,438 | \$123,554,226 |
| | 55.74% | 24.03% | 1.66% | 10.86% | 1.02% | 6.69% | |
| 2007 | \$61,509,815 | \$24,812,020 | \$2,014,779 | \$7,867,613 | \$163,086 | \$5,272,504 | \$101,639,817 |
| | 60.52% | 24.41% | 1.98% | 7.74% | 0.16% | 5.19% | |
| 2008 | \$39,096,000 | \$15,147,495 | \$1,337,429 | \$2,018,213 | \$24,852 | \$1,558,288 | \$59,182,277 |
| | 66.06% | 25.59% | 2.26% | 3.41% | 0.04% | 2.63% | |

The amount of temporary total disability benefits an injured worker receives depends on the following:

- The waiting period before benefits begin in their state;
- Their average weekly wage at the time of injury;
- The percentage of their average weekly wage to be replaced in a given state;
- Whether or not the weekly benefits recognize numbers of dependents (tax implications on take home pay);
- The maximum and minimum benefits set by each state;
- Whether there is any cost of living escalator allowed; and
- The criteria for termination of temporary total benefits.

The amount of temporary partial disability benefits an injured worker receives depends on the following:

- The waiting period before benefits begin in their state;
- Their average weekly wage at the time of injury;
- The amount they earn working part time or at a lower paying job due to their inability to work at the job they had at the time of injury;
- The percentage of their lost wages to be replaced;
- Whether or not the weekly benefits recognize numbers of dependents (tax implications on take home pay);
- The maximum and minimum benefits set by each state; and
- The criteria for termination of temporary partial benefits.

The amount of permanent partial disability benefits an injured worker is paid in any jurisdiction is much more complex and varies dramatically from state to state. In addition to having a permanent physical limitation to qualify for these benefits, factors that affect the amount and duration of these benefits are:

- The basic design and purpose for these benefits in each jurisdiction;
- The method used to determine what benefits will be paid and when;
- The calculation of the benefit and depending on that, the employee's average weekly wage may be a factor; or a statutory limit for the number of weeks for each bodily member or for the body as a whole may be a factor or a statutory number of dollars may be a factor (depends on system design);
- Whether or not the state requires or suggests that physicians use a specific reference to determine permanent bodily impairment and which reference is used;
- The maximum and minimum benefit levels for this benefit;

- Whether or not the employee returns to work; and
- Whether or not these benefits are paid concurrently with permanent total disability benefits or other benefits.

The amount and duration of permanent total disability benefits paid to an injured worker in any jurisdiction is dependent on the following:

- The statutory definition of a permanent total disability in each state;
- Their average weekly wage at the time of injury;
- The percentage of their average weekly wage to be replaced in a given state;
- Whether or not the weekly benefits recognize numbers of dependents (tax implications on take home pay);
- The maximum and minimum benefits set by each state;
- What other disability benefits will be allowed to offset these benefits;
- Whether there is a limit established by statute; and
- Whether there is any cost of living escalator allowed and how it is paid.

System Issues Involving Predictability, Equity and Adequacy

One of the accepted principles of workers' compensation systems is that they should provide predictable, equitable and adequate benefits in an efficient manner.

Predictability becomes important not just for the worker who needs to be able to anticipate the benefits to which they will be entitled should they be significantly injured, but for the ability to *estimate* employer costs into the future for pricing purposes. Since what an employer pays for workers' compensation coverage this year to a great degree depends on how accurate the assumptions are about the benefits to be paid to all workers for years into the future who are injured in this policy year; a predictable and stable statute and case law that allows insurers and employers to predict their costs will result in less fluctuations in pricing and more competition in the market. This in turn generally will favor more consistent and less volatile pricing and costs for employers.

Historically, two separate measures of equity are discussed in regard to workers' compensation benefit structures; these are referred to as "horizontal" equity and "vertical equity". Horizontal equity refers to the delivery of benefits and services fairly as judged by the program's consistency in providing equal benefits to workers in identical circumstances; and vertical equity as fairly providing benefits and services in proportion to the impairment or disability for those with different degrees of loss³. In other words, workers with similar losses should get similar benefits and workers with more severe losses should get a greater proportion of benefits than workers with less severe losses.

Adequacy of workers' compensation benefits relates to the amount of income replaced for workers who suffer occupational injuries or diseases. Replacing 66 2/3% of the employee's gross weekly earnings has been recommended as the standard for temporary disability benefits⁴; although, this calculation does not address the equity issue that arises with the effect of "take home pay" when one injured worker making the same gross wage has five dependents and another is single. To address this, a structure that uses spendable earnings or a modified approach that varies the percent of gross wages based on number of dependents is often used.

³ National Commission, 1972, p.137

⁴ National Commission

Adequacy of permanent partial disability benefits is more difficult to gain agreement on and to measure and compare across states since in part, the purpose and philosophy of those benefits is slightly different from state to state. The permanent partial disability systems in the states of Wisconsin, California, Oregon, Washington and New Mexico have been studied to measure the adequacy of benefits, including permanent partial disability and have been found to overall replace significantly less than 66 2/3% of the employees current and future lost wages after a significant work related injury.⁵ These findings suggest that after a significant disabling work related injury, many workers may never recover their total potential earning capacity. To date, these states continue to struggle with finding a balance between acceptably adequate levels of benefits to workers at “reasonable costs to employers”.

Comparison of Temporary Total Benefit Structure and Costs across States

The factors involved in the ultimate cost and frequency of temporary total disability benefits can be stated as the public policy decision traditionally made by workers compensation policymakers. These would be:

- ▶ Should there be a waiting period before an injured worker is entitled to workers’ compensation benefits? If so, how long should it be?
- ▶ Should that waiting period be reimbursed if the worker is off work for more than a few days or weeks? (Usually called a retroactive payment period)
- ▶ How much of the injured worker’s wage should be covered while they are healing and unable to work? (Usually referred to a replacement rate or compensation rate)
- ▶ Should the same amount be given to all workers regardless of the number of dependents or the amount they earned? (an equity and adequacy issue)
- ▶ When should temporary total disability benefits end? (a predictability, adequacy and return to work issue)

The waiting period

All US jurisdictions include a waiting period in their workers’ compensation statutes. Since the employer funds both sick leave and workers compensation benefits, and entering the workers’ compensation system increases the employers administrative costs, most systems are designed to pay for lost time from work only when such loss exceeds a reasonable time for which most workers would be entitled to sick leave. This varies by state from a three day waiting period to a seven day waiting period. Table 3 shows the waiting period for states as of July 1, 2008 with those states that are most like Montana demographically highlighted.

Table 3
TTD Waiting Periods In States As Of
July 1, 2008

| No Waiting Period | Three-Day Waiting Period | Four-Day Waiting Period | Five-Day Waiting Period | Seven-Day Waiting Period |
|-------------------|---|-------------------------|-------------------------------------|--|
| | AL, AK , CA, CO, CT, DE, DC, HI, IL, IA, MD, MN, MO, NH, OK, OR , RI, UT, VT, WA , WI, WY | MT* , WV, | ID , MA, MS, NV, ND , | AZ, AR, FL, GA, IN, KS, KY, LA ^{**} , ME, MI, NE, NJ, NM , NY, NC, OH, PA, SC, SD , TN, TX, VA, |

•MT is actually 32 hours or 4 days, whichever is less
 •** LA is actually 1 week

▶ 9 Source: WC Laws, 2nd Edition, Workers’ Compensation Research Institute, 2009 1/28/2010

⁵ Put adequacy studies

Obviously moving from a four day waiting period to a seven day waiting period would reduce benefits a small amount for most workers and moving to a three day waiting period would increase benefits a very small amount to most injured workers.

The Retroactive Period for Temporary Disability

States vary tremendously on their decisions of how long a worker needs to be disabled before the waiting period will be reimbursed and if it will be reimbursed. Table 4 demonstrates this variation. Although the majority of states have decided to reimburse the waiting period after 14 days of disability, this could be simply a logical administrative efficiency mechanism as many states require employers and insurers to make a decision whether to pay or deny a claim within 14 days. If they decide to pay, and the employee is still off work, they can include the waiting period in the first payments made and not have to issue a subsequent payment for the waiting period. Note that Montana is one of four states that have no retroactive period for reimbursement of the waiting period.

Table 4

Retroactive Payment Period for Temporary Disability in States as of July 1, 2008

| 5 Days | 7 Days | 8 Days | 10 Days | 14 Days | 21 Days | 28 Days | 6 Weeks | None |
|-----------------|---|-----------|----------|---|------------------------------------|------------------------|---------|---------------------------|
| NV ND | CT DE NJ SD WV WI | WY | MN VT | AZ,AR, CA, CO, DC, ID , IL, IN, IA, KY, ME, MD, MI, MS, MO, NH, NY, OH, OR , PA, SC, TN, TX, UT, WA | AL, FL, GA, KS, MA, NC,VA | AK NM | LA, NE | HI, MT , OK, RI |

Source: WC Laws, 2nd Edition, Workers' Compensation Research Institute, 2009

Montana could improve the vertical adequacy of their temporary total disability benefits by instituting a retroactive payment of this waiting period if the worker is so severely injured that they are disabled from work for more than two to four weeks. System stakeholders and policymakers should be aware that the waiting period and the retroactive period for which the waiting period will be reimbursed could create financial incentives for workers to remain off work longer than they would have in order to collect benefits for the waiting period if they had used up all their sick pay. This is less likely to happen with a 28 day waiting period than with a shorter one.

Replacement Rate For Temporary Total Disability

The public policy objective of establishing the rate at which lost earnings should be replaced by a workers' compensation system when a worker is healing and unable to work is generally that it be set at a level that is "fair", but not high enough to create a disincentive for return to work. States arrive at a compensation rate for disabled workers by addressing three factors that influence this level:

- The statutory method of calculating the workers' compensation rate;
- The statutory maximum and minimum compensation levels allowed; and

- The result of these levels on individual workers.

There are two common methods to calculate weekly lost earnings in workers' compensation systems, reimbursing a percentage of the workers' gross wages or reimbursing a percentage of the workers' spendable wage. Basing the calculation on the workers' gross wages is easier and more efficient but less equitable. Basing the calculation on spendable wage means there is one more level of investigation required before payments can be made, since one needs to know the number of dependents a workers had at the time of injury to calculate the weekly benefit amount. It also generally requires the state agency to publish a set of charts to identify what the weekly spendable wage will be for workers, depending on their gross wage and number of dependents, so it adds a bit of additional administrative burden. However, a spendable wage approach results in more equitable benefits since there is a recognition that take home pay varies for workers depending on the number of dependents they have. Either method attempts to recognize that workers' compensation disability benefits are not taxable, hence a reduction from total pay, but one method does a better job of recognizing the number of exemptions injured workers may have at the time of injury. Table 5 provides a comparison of approaches used in most states. By far the most common approach is 66 2/3% of gross wages.

Table 5

Method of Calculating the Weekly TTD Payment

| 60% of Gross AWW | 66-2/3% of Gross AWW | 67% of Gross AWW | 70% of Gross AWW | 72% of Gross AWW | 75% of Spendable Wage | 80% of Spendable Wage |
|---|---|------------------|------------------|------------------|-----------------------|-------------------------|
| MA, NH, WA ** | AL, AZ, AR, CA, CO, DE, DC, FL, GA, HI, IL, IN, KS, KY, LA, MD, MN, MS, MO, MT , NE, NV, NM , NY, ND , OR , PA, SC, SD , TN, UT, VT, VA, WV, WI, WY | ID | NJ, OK, TX* | OH | CT, RI | AK , IA, ME, MI, |
| *TX – If employee earns less than \$8.50 per hour, they get 75% of gross AWW for first 26 wks. **WA – Add 5% of married on DOI and 2% per dependent up to 75% of gross AWW | | | | | | |

12 Source: WC Laws, 2nd Edition, Workers' Compensation Research Institute, 2009 2/1/2010

Table 6 provides a more specific comparison on what the differences of these methods mean for workers.

Table 6

Example of Effect of Using Gross aww vs. Spendable vs. WA Method

| (All Workers Earn \$600 a Week) | Single Worker | Worker with Spouse and one Child | Worker with Spouse and Three Children | Worker with Six Children |
|--|---------------|----------------------------------|---------------------------------------|--------------------------|
| Weekly Amt. Payable if 662/3 of Gross Wage (Montana) | \$400 | \$400 | \$400 | \$400 |
| Weekly Amt. Payable if 80% Spendable (Iowa) | \$372.28 | \$406.82 | \$417.49 | \$427.33 |
| Washington Method | \$360 | \$402 | \$426 | \$432 |

15 2/1/2010

.An interesting variation on these two methods is Washington. They use the gross weekly wage method, but vary their level of gross wage reimbursement based on the number of dependents. This method results in a more equitable benefit level without the administrative burden of having the state provide tables for spendable earnings, although the number of dependents still must be investigated.

The second factor that influences the weekly temporary total disability benefit for workers is the statutory level of minimum and maximum temporary total disability benefits. The maximum benefit levels are usually set as a percentage of the statewide average weekly wage and generally are updated each year for injuries that occur within the year. The minimum benefit levels are usually also stated as a percentage of the statewide average weekly wage (usually 20% but this varies) or the actual wage, whichever is less. Table 7 shows the calculation set for the maximum benefits for temporary total disability in comparator states and the actual benefit which results for maximums and minimums as of July 1, 2008. The affect of the maximum compensation rates is that it will reduce the wages replaced by higher wage workers to less than the standard 66 2/3% of gross wages as it becomes a ceiling for weekly benefits. The highest maximum as of July 1, 2008 was Iowa at 200% of their statewide average weekly wage and the lowest were Delaware and Mississippi at 66 2/3% of their statewide average weekly wage. (Note New York is set to move to 66 2/3% of their statewide average weekly wage as of July 1, 2010)

Table 7

Maximum/Min. Compensation Rates for Comparator States as of July 1, 2008

| State | Maximum TTD Benefit | Actual Maximum/Min. Amount as of July 1, 2008 |
|--------------|---------------------|---|
| Alaska | 120% of SAWW | \$706/\$207* |
| Idaho | 90% of SAWW | \$556.20/\$92.70 |
| Montana | 100% of SAWW | \$604/No Min. |
| New Mexico | 100% of SAWW | \$635.46/\$36 |
| North Dakota | 110% of SAWW | \$689/\$376* |
| Oregon | 133% of SAWW | \$1,051.21/\$50** |
| South Dakota | 100% of SAWW | \$598/\$299* |
| Washington | 120% of SAWW | \$1043.49/*** |
| Wyoming | 100% of SAWW | \$815/No Min. |

* Or actual wage, whichever is less ** Or 90% of AWW if less ***Variable according to number of dependents

▶ 13 Source: WC Laws, 2nd Edition, Workers' Compensation Research Institute, 2009 2/1/2010

Once these two factors (the calculation of temporary total disability benefits and the applicable maximum and minimum benefits) are translated into what that means for workers, one can begin to get a better idea of the affect these have on individual workers. Table 8 demonstrates the resulting weekly benefit payments for the same workers within each comparator state. This allows one to better understand the impact of different public policy decisions on individual workers making the same wages at the time of injury (horizontal equity).

Table 8
Example Results on Individual Workers in Comparator States

| State | Worker Makes \$100 a week/3 dependents | Worker Makes \$400 a week /no dependents | Worker Makes \$1000 a week/3 dependents | Worker Makes \$1500 a week/3 dependents |
|--------------|--|--|---|---|
| Alaska | \$92.35 | \$267.60 | \$673.47 | \$939.00 |
| Idaho | \$92.70 | \$266.67 | \$556.20 | \$556.20 |
| Montana | \$66.67 | \$266.67 | \$604 | \$604 |
| New Mexico | \$66.67 | \$266.67 | \$635.46 | \$635.46 |
| North Dakota | \$66.67 | \$266.67 | \$666.67 | \$689 |
| Oregon | \$66.67 | \$266.67 | \$666.67 | \$1035 |
| South Dakota | \$92.35* | \$267.60* | \$598 | \$598 |
| Washington | \$69 | \$276 | \$690 | \$1035 |
| Wyoming | \$66.67 | \$266.67 | \$666.67 | \$815 |

▶ 14 *Estimated since SD has a minimum of \$299 or the actual wage less federal withholding, whichever is less. 2/1/2010

Note that in Table 8, the minimum benefit and the method both affect the compensation rate for very low wage workers in many states (those earning minimum wage or working only part time) and the workers in the second column end up making about the same compensation rates in all states (at an annual wage of about \$21,000). However, as wages increase, the compensation rate becomes more affected by the maximum compensation rates and the method of calculation. So by the time injured workers are earning about \$52,000 per year (the second to last column on the right), we begin to see differences brought about by a state's choice of maximum benefit levels and this shows dramatically in the example of workers' earning over \$79,000 a year (last column on the right).

Duration of Temporary Total Disability

Logically, an injured worker would receive temporary total disability benefits until they can return to work in some capacity. Exactly how states implement this concept varies based on their own history, case law and the level of benefits that may be available after the temporary total disability period ends. In all jurisdictions, once the employee returns to work without any wage loss, temporary total disability ends even if the employee is still undergoing medical treatment. This is the most straightforward and desirable outcome for both workers and employers as it limits the economic losses to workers and to employers.

However, sometimes the worker's recovery is complicated or lengthy and sometimes the worker may never be able physically, emotionally or psychologically to return to the work they did at the time of the injury or onset of the disease. In these cases, states have created other criteria for when temporary total benefits end and other benefits may begin. In general, the options for when temporary total benefits end are:

- The establishment of a maximum number of weeks for which temporary total benefits will be paid ;
- When the physician says further treatment will not help to "cure and relieve" the worker from the effects of the injury (also known as the end of the healing period, maximum medical improvement, maximum medical healing, or medical stability);
- When the worker returns to work in any capacity;

have created the need for the parties to often fight over whether or not the employee has suffered “actual wage loss” because this is a key criterion for the payment of the next benefit, permanent partial disability. The criteria end up being vocational opinions on whether or not the employee is “employable in the current labor market with their current physical limitations combined with their level of marketable skills and education”. It is suspected that the higher than average rehabilitation payments are for these opinions rather than for actual services rendered to assist the employee in returning to work, although there may be some of those costs in these payments as well. The point is that this is a significant “friction” point in the Montana system and one that could be streamlined, possibly made more efficient and more predictable.

In some states, temporary total disability benefits will continue regardless of maximum medical healing as long as the worker has continued wage losses. In those situations (Montana is among these states), there is a huge incentive for an employer and insurer to find and offer a position to the injured worker in order for their ongoing payments to end, or to prove by performing a labor market survey that work exists in the local labor market that the employee can perform. These situations are heavily affected by not only the injured worker’s motivation to return to work and their physical abilities, but also by the labor market in which they live and work. These approaches tend to be less predictable to price and more litigious since there is more individual justice with each case having to be decided on the specific facts involved. It is also unclear from available research that these systems have any better lost earning outcomes for workers since many of these cases end up with settlements where both parties agree to the end of the temporary disability period and the payment of the next benefit in the sequence.

If during any period of temporary total disability, the employer (or another employer) offers the injured worker a position that the physician believed they could do even though they may be recovering, it may be cause for discontinuance of temporary total disability since if they accepted the position, they would have fewer wage losses. In reality, such discontinuance only lasts for the period of such refusal or until the condition becomes worse and they can no longer physically do such a job.

Lastly, in most states, cost of living escalators are not applied to temporary total disability benefits since they seldom last for more than a few weeks to a few years. Where used, it is usually in states that pay ongoing benefits whenever there is any wage loss for as long as wage losses continue but there are exceptions (Idaho for example).

Temporary Partial Disability

The other wage loss benefit that may be paid during the period when the employee is still healing and undergoing active medical treatment is temporary partial disability benefits. These are generally paid when an employee is working less hours or at a different job that may pay them less due to their temporary physical inability to do the job they had at the time of injury. Montana was one of the only states to set a limit of 26 weeks on the length of these benefits, but this was eliminated in 2009 to be more consistent with policies in other states and to eliminate what may have been a disincentive for a worker to return to work.

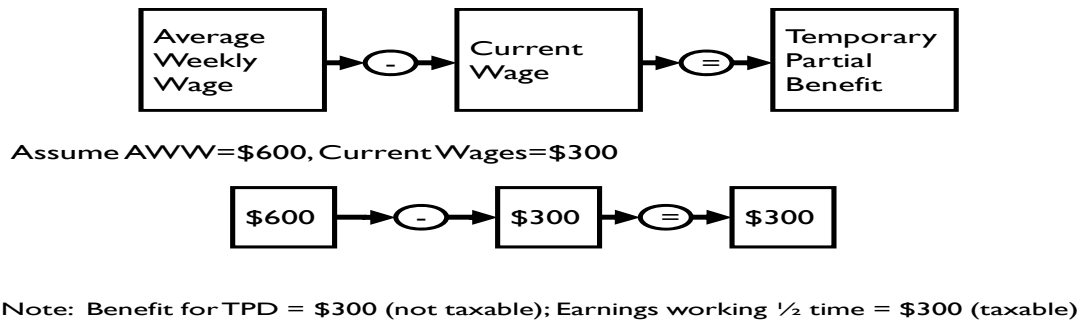
Research has demonstrated that workers recover faster and to a greater extent if they are allowed to heal while continuing to work, even if it is not full time or they cannot do all the duties they had at the time of injury. Our work life plays a significant role in our self image and social lives, much of which deteriorates when a work related injury creates changes and added stress in our already stressful lives. The degree to which workers’ compensation systems create economic incentives or

disincentives to return to work affects more than simply costs for employers, they can reduce the uncompensated losses for workers also.

The amount of temporary partial disability benefits an injured worker receives is usually dependent on the same factors that affect temporary total disability with two exceptions: how temporary partial disability benefits are calculated; and how long they may continue.

Figure 2

Temporary Partial Disability Calculation in Montana



Most states will calculate temporary partial disability as a percentage of the difference between the employees wage at the time of injury and the wage they are able to earn while working part time or at a lower wage due to an injured worker's medically verified disability. Most of these percentages are 66 2/3% or 80% of the difference, but again, there is quite a bit of variation from state to state. For example the percentage can be as low as 50% (in South Dakota for example) or 100% as in Montana. Again, the public policy objective is to fairly compensate the worker but not to a level that will discourage a return to full wages. It is possible that Montana's current policy could discourage some employees from returning to work full time since they actually make more money working in a temporarily disability condition than they do working full time. This occurs because if they were working full time, all their wages would be taxable, but working part time allows the temporary partial disability benefits to not be subject to taxes. This increases a worker's "spendable wage" to more than it would be if they were working full time (See the note at the bottom of Figure 2 for an example)

This may be an intentional public policy decision to encourage return to work; and since temporary partial benefits discontinue at maximum medical healing, it would likely not be a significant cost driver in the Montana system.

Temporary Total Disability Duration in Montana and Other States

Staff at the Employment Relations Division of the Montana Department of Labor used their workers' compensation claims database to estimate the disability duration for temporary total disability claims in Montana. They computed the average number of weeks of temporary disability. These results can be seen in Table 9.

Table 9

**Montana Average Duration of Temporary Disability – ERD Database
---FY03-FY08**

| Fiscal Year | 1 Year Maturity | | | | 3 Year Maturity | | | |
|--------------------------|-----------------|--------|--------|-----------|-----------------|--------|--------|-----------|
| | Plan 1 | Plan 2 | Plan 3 | All Plans | Plan 1 | Plan 2 | Plan 3 | All Plans |
| 2003 | 13.4 | 14.9 | 16.2 | 15.5 | 19.4 | 20.9 | 20.9 | 20.7 |
| 2004 | 11.7 | 13.1 | 16.2 | 14.6 | 18.1 | 18.1 | 21.7 | 20.1 |
| 2005 | 13.2 | 14.1 | 17.0 | 15.6 | 19.2 | 20.1 | 22.4 | 21.2 |
| 2006 | 13.5 | 13.8 | 16.9 | 15.4 | 17.4 | 18.7 | 23.9 | 21.2 |
| 2007 | 14.2 | 14.9 | 15.4 | 15.1 | | | | |
| 2008 | 12.5 | 13.7 | 15.0 | 14.2 | | | | |
| Total # of Claims | 26,384 | | | | 18,324 | | | |

- Note 1, data was captured from 4 WCAP tables injury, subs_rpt, froi, pay_adj on Dec 2009.
- Note 2, only claims with TTD or TPD or both were considered in this calculation.
- Note 3, extremely high (weekly benefit rate>\$626) or low(weekly benefit rate<\$60) values were excluded.
- Note 4, TTD WBR(weekly benefit rate) is used for both TTD and TPD, when TTD WBR is available;
TPD WBR is used when TTD WBR is not available;
Cases are excluded when both TTD WBR and TPD WBR are not available.
- Note 5, for each case, no 1 year maturity is beyond 52 weeks and no 3 year maturity is beyond 157 weeks.
- Note 6, waiting period is changed from 4 days to 7 days in order to compare with WCRI table.
1-3 days, Cases with Duration of Disability is less than or equal to 3 days are excluded.
>3 days, Duration of Disability for other cases is subtracted by 3 days.

As a comparison, we can look at the Workers' Compensation Research Institute's most recent *CompScope™* publication where they compare multiple states' disability durations. The resulting comparison (Table 10) of the WCRI data on their states and comparing it to the Montana durations in Table 8 is useful in that Montana's disability durations for temporary disability do not appear to be at either the low (or as suspected) the highest duration. They are however considerably above the mean and median at 1 Year Maturity (12 months), so there is significant room for improvement. By three years, however, they are closer to the median and mean of the *CompScope™* states. This would tend to support Montana's need to provide earlier return to work opportunities for injured workers.

Table 10

| | <u>12 Month Average Maturity</u> Unadjusted Values # of Weeks 2007-2008 Claims | | <u>36 Months' Average Maturity</u> Unadjusted Values # of Weeks 2005-2008 |
|----------------|---|--|--|
| Louisiana | 16.9 | | 35.7 |
| North Carolina | 16.1 | | 28.4 |
| California | 14.7 | | 22.1 |
| Pennsylvania | 14.2 | | 24 |
| Massachusetts | 14 | | 23.7 |
| Illinois | 13.9 | | 20.2 |
| Texas | 13.9 | | 18.6 |
| Tennessee | 12.2 | | 14.4 |

| | | | |
|----------------|--------------|--|--------------|
| Maryland | 12.1 | | 20 |
| Michigan | 11.8 | | 18.8 |
| Florida | 11.7 | | 15.8 |
| Minnesota | 9.3 | | 13.6 |
| Wisconsin | 8.5 | | 9.6 |
| Median* | 13.9 | | 20 |
| Mean* | 13.02 | | 20.38 |

Data was taken from WCRI CompScope Benchmarks, 10th Edition (December 2009), in descending order by 12 month averages. This data is a *benchmark* for comparison to the Montana data. Please note that this data is not broken out by plan (self-insured, private insurer, state fund).

*Statistics calculated by Data Management Unit, ERD.

However, when the Montana disability durations are divided by plan type (Table 9), it would appear that Plan 3 claims have greater disability durations than other plans. There could be a number of reasons for this, but the most compelling is that Plan 3 is the writer of all workers compensation insurance policies for any employer in Montana that no other insurer is willing to write. This would mean that they probably have the majority of small employers and high risk employers which presents more unique challenges in return to work full time or part time. And since they write about two thirds of the premium in the state of Montana, their experience is a greater influence on all of Montana's outcomes.

Permanent Partial Disability

The most common benefit paid after the injured worker has reached maximum healing or maximum medical improvement in all states, is permanent partial disability. This is also the benefit area with the greatest variation among states and the most difficult to design to accomplish the public policy objectives of predictable, adequate, equitable and efficiently delivered benefits.

The most used references on the history and issues involved in the design and implementation of permanent partial disability benefits are:

1. The National Commission Report of 1972;
2. *Permanent Disability Benefits In Workers' Compensation*, by Berkowitz and Burton, published in 1987 by the W.E. Upjohn Institute for Employment Research;
3. *Permanent Partial Disability Benefits: Interstate Differences*, by Barth and Niss, published in 1999 by the Workers' Compensation Research Institute;
4. *Who Obtains Permanent Partial Disability Benefits: A Six State Analysis*, by Barth, Helvacian and Liu, published in 2002 by the Workers Compensation Research Institute;
5. *Factors That Influence The Amount and Probability of Permanent Partial Disability Benefits*, by Borba and Helvacian, published in 2006 by the Workers Compensation Research Institute; and
6. *Permanent Partial Disability Benefits*, by Edward Welch, published in 2008 by Michigan State University.

Barth and Niss provide a workable definition of permanent partial disability across most states, "Permanent partial disability is designed to compensate a worker for their permanent loss of future income and non-economic losses due to the permanent residual of their work related injury". Montana has two separate benefits that most states would call "permanent partial disability". One is referred to as "impairment" and is paid when the employee has returned to work and has permanent physical limitations but may not have any wage loss, and the other is referred to as permanent partial disability and is defined in the Montana code as "...a physical condition in which a worker, after reaching maximum medical healing: has permanent impairment established by objective medical

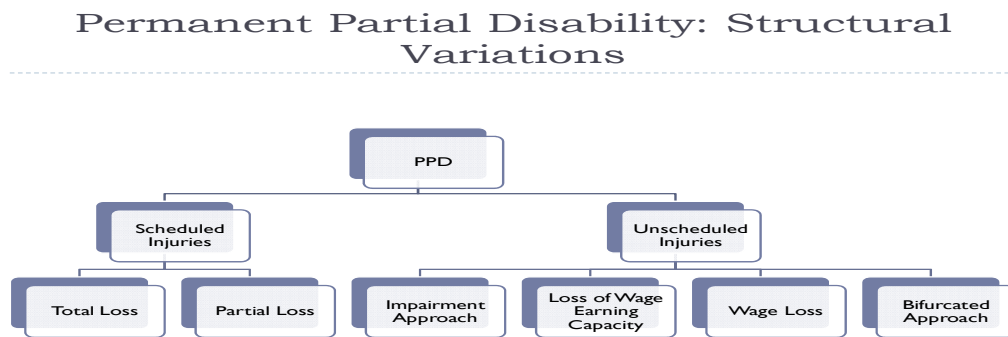
findings; is able to return to work in some capacity but the permanent impairment impairs the worker’s ability to work; and has an actual wage loss as a result of the injury”⁶. The amount paid in states for permanent partial disability benefits is affected by the following:

- The basic design and purpose for these benefits in each jurisdiction
- The method used to determine what benefits will be paid
- The calculation of the benefit and depending on that, the employee’s average weekly wage may be a factor; or a statutory limit for the number of weeks for each bodily member or for the body as a whole may be a factor or a statutory number of dollars may be a factor
- Whether or not the state requires or suggests that physicians use a specific reference to determine permanent bodily impairment and which reference is used
- The maximum and minimum benefit levels;
- Whether the state modifies the benefit for factors such as age, education or extent of physical impairment;
- Whether or not the employee returns to work; and
- Whether or not these benefits are paid concurrently with permanent total disability benefits or even other temporary benefits, such as temporary partial disability.

Basic Design Approaches for PPD

The design of permanent partial disability benefits (PPD) in the states appears to fall into two levels of design decisions historically made by policymakers. The first involves a decision to base estimated loss of future earning capacity and non-economic losses (since we do not know how much a worker will lose until some point in the future) on their degree of permanent physical impairment. This is referred to as an Impairment approach. In the impairment approach either the body as a whole is given a value or states have a “schedule” of body parts that are each given a value. This value usually takes the form of a number of weeks, but some states may use a total dollar value for the whole body or what they refer to as “unscheduled injuries”, meaning injuries to a body part where no statutory schedule exists. A visual diagram of this two step approach to understanding the design of PPD systems exists in Diagram 3.

Diagram 3



*Barth and Niss, *Permanent Partial Disability Benefits: Interstate Differences, 1999*, WCRI

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Examples of Scheduled and Unscheduled PPD Benefits in Impairment States

If a state has “*scheduled PPD benefits*” and the employee lost an entire arm or the use of the entire arm as a result of the work injury, the PPD benefit would be calculated by multiplying the employees

⁶ Montana Statute 39-71-116(24)

PPD rate by the number of weeks of the statutory value of an arm. Table 11 shows the statutory schedule used in Delaware as of 2008.

Table 11

| Delaware Statutory Schedule for PPD | |
|---|-----------|
| Hand | 220 Weeks |
| Arm | 250 Weeks |
| Foot | 160 Weeks |
| Leg | 250 Weeks |
| Thumb | 75 Weeks |
| First finger | 50 Weeks |
| Second finger | 40 Weeks |
| Third finger | 30 Weeks |
| Fourth finger | 20 Weeks |
| Great toe | 40 Weeks |
| Other toes | 15 Weeks |
| Eye | 200 Weeks |

In reality, most injuries do not involve the loss of an entire bodily member, but result in the loss of use of a portion of that member, either due to a permanent loss of motion or function. In scheduled benefit states, the physician would determine when the employee has reached maximum medical improvement and then would use a reference (like the American Medical Association's *Guide to Evaluating Permanent Disabilities*) and follow the guidance on how to come up with a rating of the degree of impairment to a bodily member. They would then communicate this impairment rating to the employer/insurer who then calculates the amount of PPD benefits owed. The resulting benefit calculation would look something like the following for Delaware, a scheduled benefit state:

Table 12

| Body Part Injured | Rating | Value of Entire Hand | Resulting Duration of PPD Benefits | Paid At PPD Compensation Rate |
|--------------------------|---------------|-----------------------------|---|---|
| Hand | 30% | 220 weeks | 66 weeks | 2/3 AWW up to a maximum of 66 2/3% of the SAWW |

If the employee in this example made \$600 a week at the time of injury, the PPD compensation rate for this worker in the above example would be \$400 ($\$600 \times 2/3$) and the resulting PPD benefit in Delaware for this example would be \$26,400.

This first level of variation in state PPD system design is whether or not states have statutory schedules for how much the total loss of a body part is worth. (There is an interesting history of these type of approaches in the Berkowitz and Burton publication dating back to pre-biblical times through the use of these policy decisions to establish fair compensation for the loss of a body part used by the pirates and by accident insurance policies and workers' compensation systems.) Examples of the policy decisions made by some states on the value of an arm and a leg are shown for a select number of states in Table 13.

Table 13

Variations in "Scheduled Injuries" for PPD in Select States

| State | Scheduled Value – Arm | Scheduled Value – Leg |
|--------------|-----------------------|-----------------------|
| Idaho | 350 weeks | 250 weeks |
| Iowa | 250 weeks | 220 weeks |
| North Dakota | Not in Schedule | 234 weeks |
| Tennessee | 200 weeks | 200 weeks |
| Utah | 187 weeks | 125 weeks |

In states like Montana, where there is no statutory "schedule" of benefits by body part, the statute will still specify the maximum weeks or dollars payable for permanent impairment to the body as a whole. (Montana statute allows 375 weeks for the whole body.) These states are categorized as "unscheduled" PPD injury states since they do not have a statutory schedule for individual body parts. Other unscheduled PPD benefit states are Alaska (\$177,000), Connecticut (520 weeks), Florida (2, 3, 4 or 6 weeks for each percentage impairment), Kentucky (425 weeks or 520 weeks), Minnesota (Statutory scale), Nevada (5 years or to age 70 whichever is later), North Carolina (300 weeks), Oregon (1 week for each percent impairment and 1.5 weeks for each percentage impairment if wage loss), South Carolina (340 weeks), Texas (300 weeks), Vermont (405 or 550 weeks), and Wyoming (44 months). All other states have some distinction based on a statutory schedule of body parts or they pay strictly based on actual wage losses.

In the case of Montana, the entire body is worth 375 weeks⁷. Even in states that use "scheduled" PPD benefits, they still usually have a value of the body as a whole for "unscheduled" injuries like backs, internal organs and other such conditions. This maximum value for the body as a whole is then used in the same fashion as in Table 11 above to calculate the PPD benefit for an injured worker. The impairment rating will be lower than the one used in the Delaware since the consideration of impairment is not "how much of the hand function was lost?", but "how much of the body function was lost due to the lost use of the hand?"; a subtle but significant difference. The process of determining the benefit is the same: the physician would determine when the employee has reached maximum medical improvement and then would use a reference (like the American Medical Association's *Guide to Evaluating Permanent Disabilities*) and follow the guidance on how to come up with a rating of the degree of impairment to the body as a whole. They would then communicate this rated impairment to the employer/insurer so they can calculate the amount of PPD benefits owed. The resulting benefit calculation would look something like the following as *the first step* in the benefit calculation for Montana:

⁷ Montana Code Annotated 2009, 39-71-703(3).

Table 14

Example of Impairment Benefit Calculation for Montana

| Body Part Injured | Rating Is To Body As A Whole | Value of Entire Body | Resulting Duration of PPD Benefits | Paid At PPD Compensation Rate |
|--------------------------|-------------------------------------|-----------------------------|---|---|
| Hand | 15% | 375 weeks | 56.25 weeks | 66 2/3 % AWW up to a max of 50% of the SAWW |

If the employee in this example made \$600 a week at the time of injury, the PPD compensation rate for this worker in the above example would be \$302 on 7/1/2008 ($\$600 \times 66 \frac{2}{3}\% = \400 but capped at 50% of SAWW \$302 as of 7/1/2008) and the resulting PPD benefit in Montana for this example would be \$ 16,987 if the employee was back to work (a second step is used in Montana for workers who have not returned to work which will be explained in the next section). This example demonstrates not only the difference in the method used to determine the number of weeks payable, but also points out the differences in the decisions Delaware and Montana have made in the level of compensation to be paid weekly for permanent partial disability benefits.

Modifying Permanent Partial Payments To Ensure More Adequate and Equitable Benefits

As mentioned previously, policymakers strive to design workers' compensation benefit systems that are adequate (replace a fair amount of lost earnings to injured workers, but not to a level that creates a disincentive for return to work) and equitable (so both the more severely injured workers get the most benefits and like injured workers get similar benefits). In the examples of PPD calculations in Tables 11 and 13, you will notice that there is no mention of the risk of job loss from these injuries; and yet, the injured worker's occupation at the time of injury and the resulting permanent loss associated with that injury will affect similarly workers very differently. A typical example is that of the amputation of a hand. Such a loss of function (or permanent physical impairment) may not affect a management consultant in their future earning capacity at all, but it will eliminate the career of the concert pianist. Although additional factors to recognize this disparate affect of similar injuries on the amount of future wage losses of workers creates some additional administrative burden, it generally provides more adequate and equitable benefits. The trick in these design decisions is to create a method that does not once again create disincentives for return to work, but provides more adequate benefits to those workers who actually have more future lost earnings.

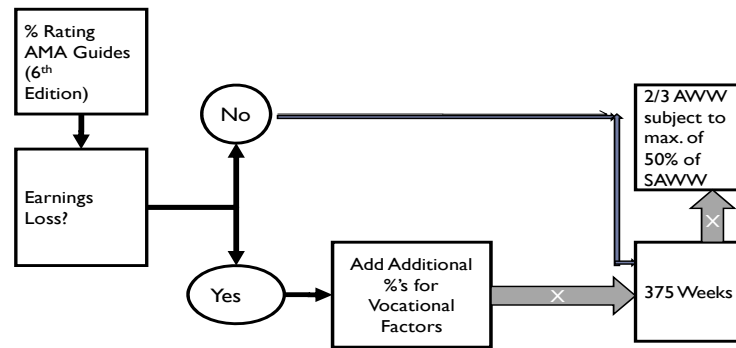
Montana modifies their basic calculation of permanent partial disability benefits due an injured worker so that workers who do not return to work have their PPD benefits increased as a result of age, education, amount of actual wages lost per hour and the physical nature of their work at the time of injury⁸. Diagram 3 visually shows how the permanent partial disability structure works in Montana and Table 15 provides an example of how this affects three different workers with the same injury and the same wage at the time of injury.⁹ The fact that Montana continues to have a fairly low litigation rate and a fairly administratively efficient benefit structure leads one to believe the basic structure is fairly sound and pretty well designed.

⁸ Montana Code Annotated 2009, 39-71-703((5))

⁹ For the reader's reference, diagrams of the comparator state's structures are located in the appendix to this paper. To make this paper more useful specifically to Montana, a full range of details about alternate systems is not being discussed. There is no "one right" way to design PPD benefit structures and every model has both advantages and disadvantages.

Diagram 3

Montana



Source : www.lirmsu.edu/wcc – Permanent Partial Disability in All 51 Jurisdictions

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Montana does a better job of adjusting their benefit structure to the actual wage losses of individual workers than do a number of states, making their benefits more horizontally equitable and probably more adequate in a number of respects. Taking four separate workers and applying the Montana design elements according to statute will result in the following permanent partial disability benefits for these workers:

Table 15

Illustrative Impact of Montana’s PPD Benefit Structure on Three Workers

| Injured Worker’s Situation (all were injured on 7/1/2008) | Type of Permanent Injury | Wage at Time of Injury | Impairment Benefits Due | Additional Vocational Statutory Modifiers Added | Resulting Rating | Resulting PPD Benefits Due |
|---|------------------------------------|------------------------|---------------------------------|--|----------------------------|---------------------------------------|
| 23 year old plumber with vocational school training who does medium labor activity and is back to work at MMI | Back injury; 10% Impairment rating | \$800/wk | \$11,325 (\$302* x 37.5 wks) | None, employee is back to work with no loss of earnings | 10% Impairment rating only | \$11,325 |
| 53 year old construction worker with no HS diploma, does heavy labor activity and is not RTW at MMI | Back injury; 10% Impairment rating | \$800/wk | \$11,325 (\$302* x 37.5 wks) | Add 1% for age over 40; add 1% for education less than 12 years; 20% for wage loss; and add 5% for heavy labor activity that he can no longer do | 37% rating | \$41,902.50 (\$302 x 138.75 weeks) |
| 59 year old administrative assistant with college diploma who does light labor activity and is not RTW at MMI | Back injury; 10% Impairment rating | \$800/wk | \$11,325 (\$302* x 37.5 wks) | Add 1% for age and 20% for wage loss | 31% rating | \$35,107.50 (\$302 x 116.25 weeks) |

- Note that 2/3% of the AWW of all three workers is \$533.33 a week. PPD benefits in Montana pay a weekly maximum amount of 50% of the statewide average weekly wage, which on 7/1/2008 was \$302.

You will note that 2/3% of the average weekly wage of all three workers is \$533.33 a week (2/3% of \$800). PPD benefits in Montana pay a weekly maximum amount of 50% of the statewide average weekly wage, which on 7/1/2008 was \$302. Oklahoma also pays 50% of their SAWW as their maximum (Colorado pays this only for scheduled injures, for unscheduled injuries they pay a higher maximum), but only a few states pay a lower maximum weekly rate for permanent partial disability benefits. North Dakota paid 33 1/3% of the statewide average weekly wages as their maximum as of 7/1/2008 and other states set a statutory dollar figure not tied to their average weekly wage. Examples of states with a statutory dollar maximum payable per week for PPD benefits are Alabama with \$220; California with \$230 for most injuries; and Wisconsin with \$272 as of July 1, 2008. Even for the states that pay a lower maximum weekly benefit rate for permanent partial disability, most of them pay that amount for more weeks than does Montana. See this comparison in Table 16.

Table 16

Maximum PPD Benefit Rates and Whole Body Values in Lower PPD Maximum States as of 7/1/2008

| State | Maximum PPD Weekly Rate | Maximum Number of Weeks for Unscheduled Injuries |
|--------------|-------------------------|--|
| Alabama | \$220 | 300 |
| California | \$230 | |
| Colorado | \$247.42 ¹⁰ | 400 weeks and also a \$ limit |
| Montana | \$302 | 375 weeks |
| North Dakota | \$382.74 | No permanent impairment payment unless rating is at least 16% of the whole body; maximum whole body impairment is 1500 weeks |
| Oklahoma | \$289 | 500 weeks |
| Wisconsin | \$272 | 1000 weeks |

It would appear that the permanent partial disability structure in Montana was not designed to support an injured worker while not working since few workers can live on \$302 a week. And at a maximum of 375 weeks, is probably not adequate to cover the wages lost for most workers who are not able to return to work. An additional comparison of PPD benefits makes sense with comparator states. In table 17 you will find a comparison of the maximum benefits that would be payable for 100% whole person disability of maximum impairment plus maximum modifiers.

Table 17

Maximum Total Amounts Payable for A Non-Scheduled Loss in Comparator States as of 7/1/08

| Alaska | Idaho | Montana | New Mexico | North Dakota | Oregon | South Dakota | Washington | Wyoming |
|-----------|-----------|-----------|------------|--------------|-----------|--------------|------------|-----------|
| \$177,000 | \$169,950 | \$113,250 | \$444,822 | \$574,110 | \$292,038 | \$186,576 | \$174,259 | \$263,571 |

¹⁰ Note this is misleading as this was a statutory maximum which is to be multiplied by the increase in the SAWW each year from July 1, 2000 to the date of injury. So the actual maximum that would have been paid will vary by date of injury and is likely quite a bit higher for a fair comparison to these other states.

Using this comparison, it appears that the total potentially payable for PPD benefits in Montana is lower than all other comparator states. This may mean that Montana's PPD benefits are not as adequate as those of other like states. But a separate study would have to be done to determine this for sure.

Of concern, however is the claim by insurers that the problem in the Montana benefit structure is PPD benefits. If one looks at all benefits paid for in PPD claims, it does appear that this is the most costly category, but then that is the case in most states.

In order to determine if this is the case and if it works in that fashion, one must look at how permanent partial disability benefits interrelate with the "front end" (temporary benefits) and "back end" (permanent total) disability benefits in their system structure as well as how they work with rehabilitation benefits, meaning what economic incentives and disincentives does the structure create and how are return to work tools and assistance structured to reduce those incentives and disincentives so the outcomes work for both the worker and the employer. One can do this theoretically and test this hypothesis with a comparison of actual benefits paid within Montana and in comparison to other states (if data is available in other states). Before this concept is reviewed, we must explain the last disability benefit in our discussion of the Montana system, permanent total disability benefits.

Permanent Total Disability Benefits (PTD)

This benefit was designed for those injured workers with the most severe injuries or for those workers who have little opportunity for any employment after their injury. Although some states statutorily define permanent total disability as the loss of two eyes, two arms, two legs or any combination of two of these losses, Montana's definition is "a physical condition resulting from injury...after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled."¹¹ This definition appears to be more relevant to modern times; post Americans with Disabilities Act (ADA) and the advent of assistive technology than the usual statutory loss of both eyes, etc.

The amount and duration of permanent total disability benefits paid to an injured worker in any jurisdiction is dependent on:

- The statutory definition of a permanent total disability in each state;
- The worker's average weekly wage at the time of injury;
- The percentage of the worker's average weekly wage to be replaced in a given state;
- Whether or not the weekly benefits recognize numbers of dependents;
- The maximum and minimum benefits set by each state;
- What other disability benefits will be allowed to offset these benefits;
- Whether there is a limit established by statute; and
- Whether there is any cost of living escalator allowed.

These are very similar to the factors that affect temporary total disability benefits and in most states the weekly permanent total disability benefit is the same as that paid for temporary total disability with the same maximum and minimum levels, the entitlement for which are generally established based

¹¹ Montana Code Annotated 2009, 39-71-116(25).

on a worker's date of injury. So the previous comparisons in tables 4 and 6 also apply to permanent total disability benefits and the same policy challenge occurs in how to compensate injured workers with more dependents equitably and efficiently. The only exception to the application of those tables to permanent total disability is that for Oregon, their maximum weekly compensation rate for PTD benefits falls from 133% of their statewide average weekly wage to 100% of their statewide average weekly wage.

The factors that are different in most states for PTD benefits are what offsets on these benefits the employer and insurer are allowed to take, how much of an offset they are allowed to take; if a cost of living adjustment is allowed and if so, the amount and frequency of such increase in weekly benefits; and when PTD benefits end.

Table 18 compares these factors for Montana and the comparator states. In addition to the limitations listed, all states will discontinue PTD benefits on the death of the worker or on a finding of employability (which means the worker is no longer permanently and totally disabled).

Table 18

Offsets, Cost of Living Adjustments (COLA), and Limitations on Duration of PTD Benefits in Comparator States

| State | COLA | COLA Calculation | Offsets Allowed | Limitation on Duration | Limitation Based on Retirement |
|--------------|---|---|---|---|---|
| Alaska | None | n/a | AK Teachers' retirement; AK Public retirement; any employer funded union or group retirement program; and half of any social security retirement being received | Benefits are for length of total disability and may be paid for life | None other than offsets |
| Idaho | After 52 weeks of TTD paid and each January 1 thereafter | Based on the % increase in the statewide average weekly wage | None | Benefits are for length of total disability and may be paid for life | None |
| Montana | After 104 weeks of PTD benefits paid ; benefits adjusted each year | Based on the % increase in the statewide average weekly wage | 50% of Social Security Disability may offset workers compensation benefits | Until retirement as defined by receipt of Social Security Retirement Benefits | Until retirement as defined by receipt of Social Security Retirement Benefits |
| New Mexico | None | n/a | Private disability insurance paid by the employer and unemployment benefits | Benefits are for length of total disability and may be paid for life | None |
| North Dakota | Increases each July 1 | Based on increase in 60% of the statewide weekly wage | Social Security Old Age and private insurance arrangements | Payable until retirement (then other state paid benefits may be paid) | Payable until retirement (then other state paid benefits may be paid) |
| Oregon | Paid from a special fund with amount and frequency decided administratively based on monies available | Decided administratively based on monies available in the fund created for this purpose | Social Security Disability | Benefits are for length of total disability and may be paid for life | None |
| South | Increases | Based on the | Social Security Old Age (PTD) | Benefits are for | None |

| | | | | | |
|------------|-----------------------|---|--|--|------|
| Dakota | annually | consumer price index (CPI) for urban wage earners and clerical workers not to exceed 3% | benefits are then 150% of TTD weekly rate less Social Security payments) | length of total disability and may be paid for life | |
| Washington | Increases each July 1 | Based on % increase of 120% of the Statewide weekly wage | Social Security | Benefits are for length of total disability and may be paid for life | None |
| Wyoming | None | n/a | None | Paid for 80 months then benefit becomes "extended PTD" and must be renewed annually but may be paid for life | None |

Source: *WC Laws – 2nd Edition*, 2009, Workers' Compensation Research Institute

Cost Drivers Associated with Permanent Total Disability Benefits

The future cost impact of cost of living escalators on lifetime benefits and legal challenges to the constitutionality of the limitation due to social security retirement is significant on estimated permanent total disability cases.

As an example, of the estimated total amount an employer or insurer may have to reserve (these are amounts of money that are expected to be paid out over time and into the future) on one single case of a 45 year old male who is being paid permanent total weekly benefits injured on 7/1/2008 and paid at the maximum rate of \$604, would be \$1,033,514 if there were no duration or retirement limits. (\$604 a week for a life expectancy of 32.78 years x 52.2 weeks per year = 1711 weeks x \$604 payable per week = \$1,033,514 in benefits) Although this money can be set aside to earn interest on a decreasing principle amount for 32 years (until they are eligible for Social Security), adding a cost of living adjustment that may average 3% a year or so, pretty much cancels the potential current investment earnings, especially since this COLA is compounded. This does not, however mean that state benefit structures should not have cost of living escalators since disabled injured workers cannot be expected to live on what would have been the maximum benefit 20 years ago (\$318 in 1990 for example) without an increase of some kind annually. What it does mean, is that Oregon's approach of having the COLA paid from an administrative fund means that employers and insurers are not reserving for these significant future payments and although they pay into the fund which pays these benefits to workers, the full amount of the future liability is not going into the rate structure.

Since Montana statutorily limits permanent total disability benefits to retirement as defined by the receipt of Social Security Retirement benefits, the benefits in the example above would have been less by about 10.78 years assuming the 45 year old would receive Social Security at age 67. Since this statutory provision was enacted fairly recently and the constitutionality of this provision was challenged in the courts¹² and just recently found to be constitutional, one outstanding question is whether or not insurers reserved as if they had no retirement limitation or whether they reserved as if it *were* going to be found constitutional. If they reserved as if they had no retirement limitation, those excess reserves (those between assumed retirement age and life expectancy) could now be reduced and average incurred figures for these cases would dramatically fall, having a positive effect on

¹² See *Satterlee v. Lumberman's Mutual Casualty*

employer's premiums. (Note that the Montana State Fund has indicated they did not reserve for an adverse decision in the *Satterlee* case.)

Lastly, according to the National Council on Compensation Insurance (NCCI), Montana has a higher than average frequency of injured workers who become permanently and totally disabled and that payments for those claims are higher than those of many other states. Table 19, taken from the NCCI Statistical Bulletin of July 1, 2009 shows that Montana had 4.2% of Indemnity benefits paid for PTD claims after 5 years (meaning at the 5th report). This is the highest percentage of the comparator states for which NCCI has information.

Table 19

Percentage of Indemnity Paid on PTD Claims
(For 2001/2002 Policy Period at 5th Report)

| State | Percentage of Indemnity Paid on PTD Claims |
|--------------|--|
| Alaska | 1.5% |
| Idaho | 1.6% |
| Montana | 4.2% |
| New Mexico | 1.9% |
| Oregon | 1.5% |
| South Dakota | 1.6% |

However, it appears this phenomenon may have been addressed by subsequent legislation and employer and insurer behavior in adjusting to a Supreme Court decision that required them to more actively show that suitable work is available that the employee is physically able to do in order to successfully defend against a claim for permanent total disability benefits¹³. This conclusion is arrived at since the amounts reported to the Employment Relations Division by all workers' compensation payers shows a decrease in the reported PTD cases when looked at after 5 years of benefits have been paid for years 2001 through 2004¹⁴. These figures are shown in Table 20 and show a decreasing trend in the frequency of PTD claims reported by the 4th and 5th year.

Table 20

Number of PTD Cases Reported With Payments To The Employment Relations Division By All Payers

| Year | By End of 4 th Year | By End of 5 th Year |
|------|--------------------------------|--------------------------------|
| 2001 | 40 | 45 |
| 2002 | 39 | 40 |
| 2003 | 39 | 33 |
| 2004 | 25 | 26 |
| 2005 | 25 | ---- |

Source: Montana Department of Labor and Industry, Employment Relations Division, Fiscal Year 2008 Annual Report

¹³ See *Coles v. American Motorists Insurance Company*

¹⁴ See Exhibit 5.13 in the Employment Relation Division's Annual Report for 2009.

Transitions Between Benefit Types and Implications For Structural Issues

Previous mention has been made in this paper of “friction” points and “tension” areas during the transitions from one type of benefit to another. The NCCI reports that in Montana, most of the benefit dollars are spent on cases where permanent partial disability is paid.¹⁵ In the NCCI method, all benefits paid on any case where there is a PPD payment but no PTD or fatality payment is categorized as payment for the PPD case, it may even include some cases where no PPD benefits have been paid, but temporary disability duration lasts longer than 52 weeks. So all medical, temporary total disability, temporary partial disability, or any permanent partial disability paid will all be categorized as payments on a PPD case. If we look at the actual payments by payment type (rather than by benefit case type), one can see that the majority of cases and the majority of benefits fall into the TTD or PTD payments, not the PPD payments for Montana. This can be seen in Table 2, where for example in the fiscal year 2002, about 21.06% of benefits paid were for PPD benefits. (If you use these figures to calculate the total % of each *indemnity* benefit paid for fiscal year 2002 injuries, the result would be 46.2% for temporary total disability; 3.2% for temporary partial disability; 41.8% for permanent partial disability; 5.5% for permanent total disability; and 3.9% for vocational rehabilitation)

This may simply mean that PPD benefits per case are lower than those of other states which increase the amount of payments (and relative percentage) for TTD and PTD benefits. It also could mean that in Montana, there is front end pressure and back end pressure in the system structure surrounding permanent partial disability benefits.

This especially makes sense when the PPD benefit maximum is set at a level where all but the lowest paid workers’ weekly benefits are capped by the maximum benefit, which is set at 50% of the statewide average weekly wage (currently at \$313 a week). This is at a level that very few workers could live on if this was their only source of income and it was always paid out in a bi-weekly fashion. Since the PPD benefit rate is one that workers cannot live on, it is reasonable to assume there would then be significant economic pressure for the injured worker to remain on temporary total disability for as long as they could (if they are not working) or to become eligible for permanent total disability. This effect is what we mean by “front end” and “back end” pressure. Since it would appear that Montana has longer than average temporary total disability and more benefits paid in permanent total disability, this lends some credibility to this theory of pressure points at both ends of the permanent partial disability benefit transitions.

In order to both improve permanent partial disability benefits to reduce some of this pressure at both ends, and ease the transition from TTD to PTD, a number of structural changes could be made. One would be to eliminate the disputes over whether or not there are jobs the employee can do in the local labor market before PPD benefits begin by ending TTD benefits at maximum medical healing (when the doctor says further medical care will not help the employee recover and whatever physical impairment the employee has at that time is permanent) and immediately begin the payment of PPD “impairment” or PPD wage loss benefits based on whether or not the employee has returned to work when TTD benefits end. The second would be that Montana no longer requires that there be an actual wage loss for employees to be eligible for PPD wage loss benefits, it is simply based on if they are back to work or not making at least the wage at the time of injury. There would probably need to be a couple of additional criteria added to ensure neither employees or employers could “game” the system since there are significant economic incentives to do so, such as the employee would not be entitled to PPD wage loss if a suitable job offer has been made and the worker refused it; and that

¹⁵ NCCI publication entitled *Workers’ Compensation System Overview* dated February 2010, Revised.

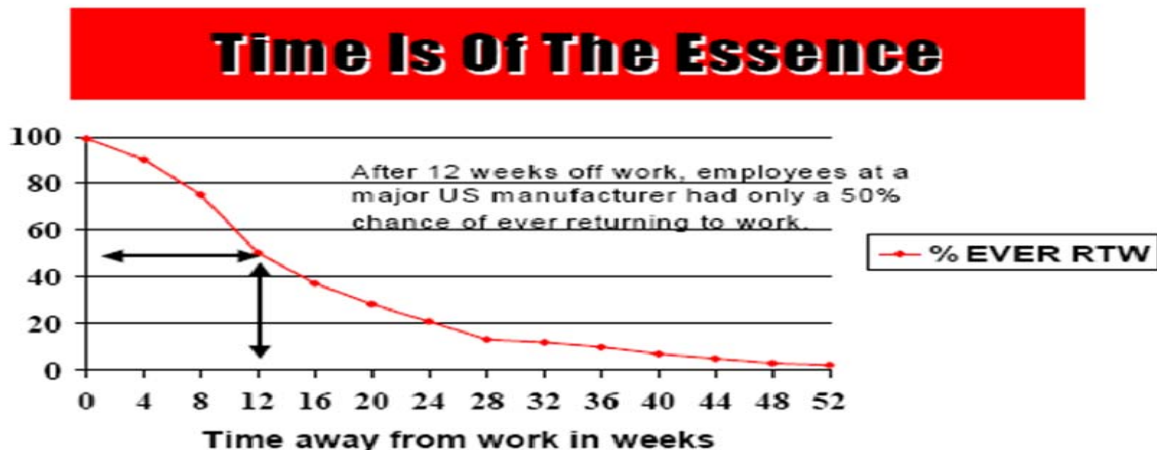
any job offer made by an employer would have to be “suitable”. Lastly, the PPD weekly maximum would have to be increased to at least 75% of the statewide average weekly wage for employees not back to work at the time TTD ends with the goal of increasing it further toward 100% of the statewide average weekly wage if the revisions are successful in reducing unnecessary dueling vocational opinions and makes the system more predictable, adequate and equitable.

Return to Work

Finally, the best outcome for both workers and employers in Montana is if the injured worker can safely return to work as soon as possible. The American College of Occupational & Environmental Medicine notes the following, “The key to preventing disability is intervening while the situation is still fresh and fluid. In addition, one of the major findings of the WCRI publication entitled *Who Obtains Permanent Partial Disability Payments: A Six State Analysis*, by Barth, Helvacian and Lui in 2002 was that “Temporary disability duration is a key to understanding PPD rates.” In that study, they found a very strong association between the duration of temporary disability benefits, and the probability that a case would result in PPD benefits paid. They hypothesized that if claims of comparable severity could be resolved more promptly and workers were able to go back to work earlier, fewer PPD cases and lower system costs may occur.

Research has confirmed that people who never lose time from work have better physical and economic outcomes than people who lose some time from work. Several studies confirm that the odds of returning to work drop with every passing day not at work. Some studies have shown that the odds for return to work to full employment drop to 50-50 by the time 6 months of absence has occurred. Even less encouraging is the study behind Figure 4 (below), showing the decay curve for workers’ compensation cases at a major US manufacturer. In this population, the odds of a worker ever returning to work had dropped to 50% by just the 12th week.”¹⁶

Figure 4



“Preventing Needless Work Disability by Helping People Stay Employed” ACOEM, 2005

Although there has been significant progress in “early reporting” of injuries, the ability to identify which of those “early reported” injuries requires medical or vocational intervention has been problematic. It

¹⁶ *Preventing Needless Work Disability by Helping People Stay Employed*, Stay-at-Work & Return-to-Work Committee of the American College of Occupational & Environmental Medicine, 2005

has become industry practice for Workers' Compensation payers to utilize a variety of criteria at the time of first notice of loss to identify which cases they believe will be prolonged disability cases and to attempt to intervene to shorten such predicted disability. However, this is often too late and the current employer best practice is to intervene on the first day of disability to determine if there is work the employee can do in a partially disabled condition.¹⁷

The American College of Occupational & Environmental Medicine confirms this movement toward more sophisticated tools for identifying with risk factors for prolonged disability. "Many employers and some insurers now begin return to work efforts within 72 hours and some now begin on the day of injury -- rather than the more traditional approach of waiting to intervene until after 90 days of work disability. One large workers' compensation insurer has a group of "pre-injury consultants" who work with employers to set up plans and systems beforehand so that they are prepared to respond promptly to avert needless lost work days from the moment of injury. Attempts are also underway in several quarters to detect workers with pre-existing risk factors for prolonged disability and then manage those cases more intensively right from the onset. Dr. Alan Colledge (a member of this Committee) and some colleagues developed and published a Disability Apgar test, in which a few features of a situation are evaluated (by physicians) and then a risk score can be assigned. The State Fund of California has recently completed a pilot of a program that assesses risk factors at claim intake and makes suggestions for claim management. A workers' compensation insurer in the Australian Northern Territory uses a situation assessment tool at claim intake and revisits it at intervals, in order to speed detection (and intervention) on claims that have signs of delayed recovery.¹⁸

Historically, rehabilitation benefits under the Montana statute since 1997 have focused on retraining and are often not begun until a year or more after a permanent impairment is determined¹⁹. In reality, they often become one more benefit to settle in a lump sum settlement of PPD since section 39-71-703(9) ties the "...PPD payable to be calculated based on the wages that the worker earns "or would be qualified to earn following the rehabilitation plan." As written, section 39-71-1006 appears to not be consistent with "Best Practices" of disability management and most successful return to work programs. Montana's current rehabilitation statutes are not working in assisting injured workers back to work early. Putting the return to work resources at the end of the healing period²⁰ needs to be revised to be consistent with current available research on rehabilitation and return to work. Numerous studies have established that retraining is the most costly and least successful strategy to assist injured workers back to work. It is still necessary and useful for those individuals who have the motivation and capability to undergo additional schooling when that is the only option for them to recover their lost wage earning capacity and avoid a lifetime on disability benefits, but it is appropriate and successful in very few cases. Efforts should focus on injured workers return to productivity as early as possible during their recovery. More efforts should be placed on determining who is at risk on a long term disability and what is necessary to assist them back to work as early as possible.

Conclusion: Montana's benefits structure is fairly easy to understand and appears to be efficient as measured by their litigation rate. It could be revised to be more predictable, equitable and adequate

¹⁷ See disability management award winners of the "Teddy Awards" given by Risk and Insurance at <http://www.riskandinsurance.com/teddyawarddetail.jsp?storyId=268103298>

¹⁸ *Preventing Needless Work Disability by Helping People Stay Employed, Stay-at-Work & Return-to-Work* Committee of the American College of Occupational & Environmental Medicine, 2005

¹⁹ See Montana Annotated 39-71-1006.

²⁰ See Montana Annotated Code 39-71-1006

without losing the current efficiency which should lower costs for employers and benefit most workers at the same time.