

**SENATE JOINT RESOLUTION NO. 17 AND THE
OCCUPATIONAL DISEASE ACT**

February 2004

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The 2003 Legislature enacted Senate Joint Resolution No. 17, which not only requested that an appropriate interim committee clarify and simplify the Workers' Compensation Act and analyze the state's policy of allowing particular employments to be excluded from mandatory workers' compensation coverage, but also requested that the committee investigate options for simplifying and clarifying the Occupational Disease Act. The Economic Affairs Interim Committee was identified as the appropriate committee and was assigned the study. In order to understand how the Occupational Disease Act might be simplified or clarified, it is important that the Committee understand the historical rationales behind the Workers' Compensation and Occupational Disease Acts, along with the legal issues that have led to the request that the Committee clarify and simplify both the Workers' Compensation and Occupational Disease Acts.

Part I of this report will provide historical background and the rationales behind the creation of both the Workers' Compensation and Occupational Disease Acts. Part II will focus on the constitutional challenges raised against the Occupational Disease Act and the subsequent decisions on those challenges by the Montana Supreme Court. Part III will provide the Committee with some options for simplifying and clarifying the Occupational Disease Act in response to Senate Joint Resolution No. 17 and the Montana Supreme Court decisions related to the Occupational Disease Act. This report is not intended as an exhaustive analysis of the history of the Occupational Disease Act, the Montana

Supreme Court decisions cited, or all options available to the Committee, but rather is intended to provide a brief overview of the history of the Occupational Disease Act, an explanation of the pertinent and current legal issues related to the Act, and some examples of the options that might be considered by the Committee.

I. Historical Background: Workers' Compensation and Occupational Disease Acts

The Workers' Compensation Act was enacted in 1915 as an outgrowth of tort law to compensate victims of industrial accidents and injuries. The Act was based on a compromise in which a worker gives up the right to sue an employer for work-related injuries in exchange for a guarantee that the worker would be compensated for the injury. The injured worker gave up the right to receive full compensation for an injury in exchange for a speedy and certain award. The compensation paid was not dependent on the employee establishing that the injury was caused by the negligence of the employer nor was it denied or adjusted downward if the employer could prove that the employee "contributed" to the injury. This "bargain" did not pit employer against employee and was considered fair because of the legal environment that existed when the workers' compensation system was created in 1915.

Because the workers' compensation system established nonfault liability for injuries normally caused by the fault of either the employer or employee, it was designed to compensate only those workers who were injured in workplace accidents, not workers who suffered from occupational diseases due to the "normal" conditions of employment. However, when the incidence of diseases, such as silicosis and asbestosis, began to increase, the Workers' Compensation Act was expanded to provide benefits to workers suffering from those diseases.

In 1959, the Montana Legislature created a statutory remedy for work-related diseases by enacting the Occupational Disease Act, codified separately from the Workers' Compensation Act (section 92-1301 R.C.M. 1947, et seq., now codified as Title 39, chapter 72, MCA). Consistent with the historical

circumstances that gave rise to the two Acts, coverage under either Act was dependent on the worker's medical condition. The medical condition that defined an "injury" under the Workers' Compensation Act differed from an "injury" as defined under the Occupational Disease Act.

When the Workers' Compensation Act was enacted in 1915, an "injury" was defined as follows:

- (k) "Injury" means and shall include death resulting from injury. . . .
- (q) "Injury" or "injured" refers only to an injury resulting from some fortuitous event, as distinguished from the contraction of disease. (Section 6, Ch. 96, L. 1915)

In section 6, Chapter 162, Laws of 1961, the Workers' Compensation Act was amended to define "injury" as:

a tangible happening of a traumatic nature from an unexpected cause, resulting from either external or internal physical harm, and such physical condition as a result therefrom and excluding disease not traceable to injury.

In 1973, the Legislature amended the definition of "injury" to include cardiovascular, pulmonary, or respiratory diseases contracted by firefighters during employment due to overexertion in times of stress or danger or by cumulative exposure over a period of 4 years or more to toxic gases (section 1, Ch. 488, L. 1973).

When the Occupational Disease Act was enacted in 1959, the Act defined "occupational disease" as silicosis or poisoning by a variety of enumerated compounds (section 4, Ch. 155, L. 1959). In 1979, the Legislature redefined "occupational disease" to mean "all diseases arising out of or contracted from and in the course of employment" (section 85(11), Ch. 397, L. 1979).

In 1987, the Legislature overhauled the Workers' Compensation Act. Instead of focusing on the medical condition of the worker, the Legislature focused, in part, on the number of work shifts over which a worker was "injured" or was affected by a work-related "disease". Under the Workers' Compensation Act, the Legislature defined "injury" as follows:

- (1) "Injury" or "injured" means:

- (a) internal or external physical harm to the body;
 - (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
 - (c) death.
- (2) An injury is caused by an accident. An accident is:
- (a) an unexpected traumatic incident or unusual strain;
 - (b) identifiable by time and place of occurrence;
 - (c) identifiable by member or part of the body affected; and
 - (d) ***caused by a specific event on a single day or during a single work shift.*** (emphasis added) (Section 3, Ch. 464, L. 1987, codified at 39-71-119(1), MCA)

At the same time, the Legislature amended the Occupational Disease Act to define "occupational disease" as follows:

"Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and ***caused by events occurring on more than a single day or work shift.*** The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity. (emphasis added) (Section 64, Ch. 464, L. 1987, codified at 39-72-102(10))

Based on the 1987 definitions, a worker who sustains an affliction on one work shift is considered "injured" and is covered under the Workers' Compensation Act, while another worker who obtains the exact same affliction over two work shifts is considered "diseased" and covered under the Occupational Disease Act. Many conditions that constituted "injuries" prior to 1987 are now "diseases" under the new definitions.

In addition to amending the definitions, the 1987 legislative overhaul of the Workers' Compensation Act also statutorily adopted a public policy that stated:

For the purposes of interpreting and applying ***Title 39, chapters 71 and 72***, the following is the public policy of this state . . .

(2) A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, ***it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a***

work-related injury or disease. (emphasis added) (Section 1, Ch. 464, L. 1987, codified at 39-71-105, MCA)

To implement this public policy, the Legislature also enacted statutes providing for rehabilitation services to assist disabled workers in returning to work.

II. Occupational Disease and The Equal Protection Clause

In recent years, injured workers have filed several actions claiming that the Occupational Disease Act, as amended by the Legislature after 1987, violates the equal protection clause of the Montana Constitution. Article II, section 4, of the Montana Constitution, provides that "[n]o person shall be denied the equal protection of the laws". When addressing any equal protection challenge, the Court first identifies the classes of persons involved and determines whether the persons are similarly situated. The equal protection clause requires that "all persons be treated alike under like circumstances". Grooms v. Ponderosa Inn, 283 Mont. 459, 467, 942 P.2d 699, 703 (1997). In the cases challenging the Occupational Disease Act, the two classes are: (1) workers suffering a work-related injury on one work shift; and (2) workers suffering a work-related injury on more than one shift.

Once the Court determines whether the classes of persons are similarly situated, the Court determines whether the challenged statute will be scrutinized under one of three tests: strict scrutiny, middle-tier scrutiny, or rational basis. A strict scrutiny analysis is applied only if a suspect classification is involved or the nature of the individual interest involves a fundamental right. The Court employs the middle-tier scrutiny test when the right in question has its origins in the Montana Constitution, but is not found in the Declaration of Rights. Middle-tier scrutiny requires the state to demonstrate: (1) that its classification is reasonable; and (2) that its interest in the classification is more important than the people's interest in the right infringed upon. See Butte Community Union v. Lewis, 219 Mont. 426, 712 P.2d 1309 (1986).

The Montana Supreme Court has previously held that the workers' compensation statutes do not infringe upon the rights of either a suspect class or a fundamental right that would trigger a strict scrutiny or a middle-tier analysis. See Heisler v. Hines Motor Co., 282 Mont. 270, 937 P.2d 45 (1997); Henry v. State Fund, 1999 MT 126, 294 Mont. 449, 982 P.2d 456 (1999). Rather, the Court held that the test to be applied when analyzing workers' compensation statutes is the rational basis test. See Zempel v. Uninsured Employers' Fund, 282 Mont. 424, 938 P.2d 658 (1997).

The rational basis test requires the government to show that: (1) the statute's objective was legitimate; and (2) the statute's objective bears a rational relationship to the classification used by the Legislature. In other words, the statute must bear a rational relationship to a legitimate governmental interest. Henry v. State Fund citing Heisler v. Hines Motor Co.

As pointed out earlier, the 1987 Legislature specified its governmental interest when it adopted its declaration of public policy, codified at 39-71-105, MCA. That section provides in part:

(2) A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, ***it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.*** (emphasis added).

The Montana Supreme Court first considered the issue of whether disparate legislative treatment existed under the Workers' Compensation Act and the Occupational Disease Act in 1989. In Eastman v. Atlantic Richfield Co., 237 Mont. 332, 777 P.2d 862 (1989), a claimant employed as a welder in an aluminum plant from 1977 until 1985 was diagnosed with chronic obstructive pulmonary disease leading to steroid dependency, which caused severe physical and emotional side effects. Eastman petitioned the Workers' Compensation Court for workers' compensation benefits arguing that his condition had been aggravated by a single incident that led to smoke and fume inhalation while at work. However, the Workers' Compensation Court held that Eastman suffered from an occupational disease,

not a workers' compensation injury, and was therefore limited to a maximum of \$10,000 in benefits under the Occupational Disease Act rather than the greater compensation Eastman would have received under the Workers' Compensation Act. Eastman appealed the decision to the Montana Supreme Court without benefit of counsel and failed to raise the issue of an equal protection violation. In an unprecedented move, the Court cited its rule against deciding constitutional issues not raised in a lower court, yet proceeded to decide the constitutional issue anyway and based its decision on a statute not at issue in the case.

The Court pointed out that the equal protection clause does not require that all aspects of occupational disease and occupational injury be dealt with in the same manner. In the end, the Court concluded that given the reasons for enactment of the Occupational Disease Act, including the historical treatment of workers suffering from occupational diseases, the Legislature had a rational basis for the enactment of the Occupational Disease Act and further concluded that Eastman had failed to show that the Legislature was required to award the same or comparable benefits under the Occupational Disease Act as compared to the Workers' Compensation Act.

Two years after Eastman filed his claim for compensation benefits, the 1987 Legislature substantially revised the definitions of "injury" and "occupational disease" to create two classes of workers based solely upon the number of shifts over which an affliction occurred. After the 1987 changes, a worker who suffered from a herniated disc contracted during one work shift was "injured" and entitled to benefits under the Workers' Compensation Act, while a worker who developed the same injury over more than one work shift suffered from an "occupational disease" and was entitled to fewer benefits under the Occupational Disease Act.

In 1999, the Montana Supreme Court considered a second challenge to the different treatment of workers with "injuries" and workers with "occupational diseases" in Henry v. State Fund, 1999 MT 126, 294 Mont. 449, 982 P.2d 456 (1999). In Henry, the claimant suffered a herniated intervertebral

disc in his back while moving and lifting appliances for his employer. Henry's injury apparently occurred over more than one work shift as it was treated as an occupational disease pursuant to the 1987 statutory changes. After reaching maximum medical improvement, Henry requested, but was denied, rehabilitation benefits under the Workers' Compensation Act because such benefits were not available under the Occupational Disease Act even though Henry was unable to return to the job he performed at the time of his herniated disc. Appealing the denial of rehabilitation benefits, Henry argued that he was denied equal protection of the law because he was denied benefits for an occupational disease that were available had he been "injured" under the Workers' Compensation Act.

In Henry, the Montana Supreme Court concluded that the two classes of workers--workers suffering a work-related injury on one shift and workers suffering a work-related injury on more than one work shift--were similarly situated for purposes of equal protection. In the end, the Court ruled that denying access to rehabilitation benefits to workers suffering occupational diseases bore no rational relationship to the government objective of returning workers to work as soon as possible. According to the Court, there was no rational basis for treating a worker who contracted a herniated disc during one shift differently than a worker who contracted a herniated disc over more than one shift. Economic justifications were dismissed by the Court as an insufficient reason for treating the class of workers injured during one shift differently from the class of workers injured from activity or events that occurred over more than one work shift.

In 2003, the Montana Supreme Court, in Stavenjord v. State Fund, 2003 MT 67, 314 Mont. 466, 67 P.3d 229 (2003), was again asked to consider whether the Occupational Disease Act violated the equal protection clause of the Montana Constitution. In Stavenjord, the claimant was diagnosed with epicondylitis of both elbows as a result of her employment on a Montana ranch. After Stavenjord reached maximum medical improvement, she received a 12% impairment rating and could perform only "light" work. Under the Montana Workers' Compensation Act, Stavenjord's wage loss entitled her to a weekly permanent partial disability rate of \$198. However, the extent of her impairment, along with

her age, education, lifting restrictions, and wage loss, would have entitled her to \$27,027 if her entitlement was calculated under the Workers' Compensation Act. Under the Occupational Disease Act, the maximum that Stavenjord could recover was \$10,000 even though she suffered a wage loss and could not return to her former employment.

In her petition before the Workers' Compensation Court, Stavenjord argued that her right to equal protection under Article II, section 4, of the Montana Constitution had been violated because the Occupational Disease Act limited her to less compensation for her disability than she would have received for the same degree of disability under the Workers' Compensation Act. Citing the Montana Supreme Court's decision in Henry, the Workers' Compensation Court held that Stavenjord was entitled to permanent partial disability benefits in the amount of \$27,027. On appeal, the Montana Supreme Court affirmed the lower court's ruling, concluding that as in Henry, injured workers and those with occupational diseases are similarly situated because regardless of the number of days over which their condition occurs or the mechanism that caused their affliction, both were physically impaired as a result of work-related activity and both were in need of wage supplement benefits to compensate for the impairment to their earning capacity. The Court noted that the Legislature's objective for enacting the Workers' Compensation Act and the Occupational Disease Act as they related to workers who sustain reductions in their earnings capacity due to work-related injuries is set forth in the Legislature's declaration of public policy in section 39-71-105, MCA, which provides in part:

(1) It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. Within that limitation, ***the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.*** (emphasis added)

The Court concluded that providing Stavenjord partial disability benefits in the amount of \$27,027 under the Workers' Compensation Act, but limiting her wage supplement to \$10,000 under the

Occupational Disease Act violated the equal protection clause of Article II, section 4, of the Montana Constitution.

On the heels of the Stavenjord decision, a claimant suffering from an occupational disease arising from employment as a waitress filed a petition in the Workers' Compensation Court, alleging that the fact that the Occupational Disease Act required a reduction in disability benefits for nonoccupational factors, while the Workers' Compensation Act did not, violated the equal protection clauses of the United States and Montana Constitutions. In Schmill v. Liberty Northwest Ins. Corp., 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (2003), Schmill was diagnosed with chronic peritendonitis and tendonosis and filed a temporary total disability claim with her insurer. After Schmill reached maximum medical improvement, she was given a 4% physical impairment rating, but did not suffer an actual wage loss as a result of her occupational disease. Schmill requested, but was denied, an impairment rating for the disability caused by her occupational disease under the Workers' Compensation Act because the Occupational Disease Act did not provide partial disability or impairment benefits. While initially denying the claim for impairment benefits, Liberty Northwest, based on the Stavenjord decision, subsequently agreed to pay Schmill's impairment award, but deducted 20% from her award for nonoccupational factors that contributed to her disability.

Schmill filed a petition before the Workers' Compensation Court, claiming that the apportionment statute of the Occupational Disease Act violated her constitutional right to equal protection of the law. The Workers' Compensation Court agreed with Schmill, ruling that section 39-72-706, MCA, violated the equal protection guarantees of the United States and Montana Constitutions because it provided disparate treatment of injured workers and those with what were statutorily defined as occupational diseases.

On appeal, the Montana Supreme Court affirmed the Workers' Compensation Court's decision, concluding that a worker who seeks an impairment award for a physical impairment caused by an

"occupational disease" is similarly situated to a worker who seeks an impairment award for a work-related "injury". The Court rejected the insurer's argument that the reduction of Schmill's impairment award for nonoccupational factors was consistent with the Legislature's expressed public policy in section 39-71-105, MCA, that compensation was intended only for work-related injury or disease. Instead, the Court concluded that the fact that the workers' compensation system seeks to provide benefits for work-related afflictions does not justify treating the two identified classes of workers differently. As a result, apportioning Schmill's permanent impairment award for her occupational disease under the Occupational Disease Act while providing full benefits for "injured" workers under the Workers' Compensation Act was not rationally related to a legitimate government interest.

III. Options for Simplifying and Clarifying the Occupational Disease Act

The Henry, Stavenjord, and Schmill decisions present the Subcommittee with several options for amending the Occupational Disease Act to address the constitutional issues raised by the three decisions, including but not limited to the following:

(1) Making no changes in the Occupational Disease Act: A decision to make no changes to the Act would allow the Legislature to see if other cases currently working their way through the court system raise additional issues that might need to be addressed or provide the Court with an opportunity to reflect and change their minds on some of the issues in cases cited in this report. However, a decision to make no changes in the Act would also mean that both attorneys and especially lay persons attempting to resolve their claims without the aid of legal counsel might be unaware that current Montana law is incorrect as the statutes have not been amended to incorporate the decisions issued by the Montana Supreme Court.

(2) Merging all or a portion of the Occupation Disease Act into the Workers' Compensation Act: A decision by the Committee to either merge the Workers' Compensation and

Occupational Disease Acts together or move portions of the Occupational Disease Act into the Workers' Compensation Act would address the Court's equal protections claims by treating all workers the same regardless of how the worker obtained a work-related affliction and would possibly make the laws easier to understand for those persons filing claims without the aid of legal counsel by providing for one unified system for all work-related afflictions. However, a merger of the Acts might also result in some unforeseen costs or unintended consequences.

(3) Addressing only those parts of the Occupational Disease Act identified as having legal problems by the Montana Supreme Court: A decision by the Committee to address only those constitutional problems identified by the Montana Supreme Court in Henry, Stavenjord, and Schmill would address those particular equal protection arguments and ensure that the statutes reflect those decisions. However, this narrow approach would not necessarily simplify or clarify the Act for lay persons who attempt to pursue their claims without the aid of legal counsel.

(4) Rewrite and simplify the Occupational Disease Act prior to merging the Act with the Workers' Compensation Act: While many believe there is a need for the Legislature to address the constitutional issues raised by the Montana Supreme Court, others would like to see the Committee recommend a rewrite of the Occupational Disease Act on its own or prior to any possible merger of the Workers' Compensation and Occupational Diseases Acts. While a "rewrite" is likely to make the Act more understandable to the general public, such a "rewrite" might also lead to the same types of unforeseen costs and unintended consequences that might occur with the merger discussed in option #2.

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