

Summary

The magnum opus of the Economic Affairs Committee (the Committee) in the 2009-2010 interim resulted in a decision to sponsor as a Committee bill the Labor-Management Advisory Council's consensus bill draft, which proposes significant changes in Montana's workers' compensation system. Concern about Montana's ranking high on the Oregon study of all states' workers' compensation premiums underlie the interest in making significant changes to the work comp system, as did recently released information from the U.S. Bureau of Labor Statistics indicating that Montana saw an increase in fatalities over the previous year. The Committee approved two other bill drafts related to workers' compensation plus two bill drafts developed on topics related to its monitoring activities.

The Committee spent a majority of its time in 2009 and 2010 on the study of workers' compensation directed in Senate Joint Resolution No. 30 (SJR 30). Moderate amounts of time went into the Senate Joint Resolution No. 14 (SJR 14) study primarily focused on state laboratories in the Bozeman area. The remaining Committee time involved monitoring the activities of various departments assigned to the Committee in statute, particularly the Department of Livestock.

In sum, the Economic Affairs Committee accomplished the following in the 2009-2010 interim on the SJR 30 and SJR 14 studies:

- agreed to accept as a Committee bill the consensus bill draft developed over the past two years by the Labor-Management Advisory Council, which makes changes to how various benefits are determined, how claim closures and claim settlements can be done, what is considered to be within the course and scope of employment, and how attorneys are paid in an adjudicated medical settlement;
- proposed a bill draft allowing the state to self-insure for workers' compensation or go to private insurers rather than requiring coverage through the Montana State Fund;
- proposed a bill draft requiring one person on the Montana State Fund board to have executive management experience in an insurance company or an insurance financial firm, keeping the number of board

- members at seven;
- recommended that the possibility of combining the Veterinary Diagnostic Laboratory and the Wildlife Laboratory in a joint facility be included in long-range building discussions and that increased communication with Montana State University-Bozeman be continued regarding collaboration between the state laboratories and academic departments; and
 - wrote a letter to the national organization that accredits veterinary diagnostic laboratories, urging continued accreditation of the Montana Veterinary Diagnostic Laboratory in light of progress made during the SJR 14 study to initiate discussions between state agencies and officials at MSU-Bozeman about the future of the Veterinary Diagnostic Laboratory and the Wildlife Laboratory and a commitment by MSU-Bozeman to set aside additional, temporary space for the Veterinary Diagnostic Laboratory. The letter also asked for the accreditation committee to recognize current budgetary constraints that prevent construction of a new facility at this time.

For the Committee's monitoring activities, the following actions resulted:

- a Committee bill was moved forward for consideration by the full legislature that would define an "order" in the Department of Livestock to apply only temporarily in situations that do not create a new program;
- communication increased among various agencies and ranchers, as well as legislators, on the problems associated with the potential transmission of brucellosis from wildlife to cattle;
- examination of the duties of brand inspectors drew attention to the uncertain status of their workers' compensation coverage. Although the issue of the brand inspectors' duties remained unresolved, the Department of Livestock agreed to provide work comp coverage to the volunteer brand inspectors who work on behalf of the Department of Livestock. This coverage is expected to remove the potential liability for ranchers as well as provide workers' compensation benefits, if needed, to the volunteer brand inspectors.
- the Board of Outfitters had additional impetus to work with the Montana Outfitters and Guides Association, whose members complained about new rules affecting licensing and emergency guides; and
- a draft was approved as a Committee bill to provide a three-strike provision in the medical assistance programs that are intended to help medical professionals deal with addictions, mental illness or chronic

physical illness and be able to keep their licenses but be monitored to address public safety concerns.

Introduction

At the first meeting of the 2009-2010 interim in June 2009 members of the Economic Affairs Committee (the Committee) had yet to know that over the next 14 months they would become familiar with such issues as brucellosis, outfitter licensing, or medical provider impairment. They might have forecast that they would learn plenty about workers' compensation through the Senate Joint Resolution (SJR) No. 30 study. And they might have expected a certain amount of familiarity with the Department of Livestock through the SJR No. 14 study of certain state labs, which included the Veterinary Diagnostics Laboratory.¹ Although the Committee decided in its work plan to devote the majority of its time to the SJR 30 study, with only a moderate amount of time to agency monitoring and minimal involvement on member issues or monitoring important activities, the interim unfolded somewhat differently.

Certainly the majority of the Committee's time went to the SJR 30 study. However, when a legislator not on the Committee asked for stepped-up monitoring of the DOL because of a new brucellosis action plan and a designated surveillance area in counties near Yellowstone National Park, the time spent on agency monitoring and on the SJR 14 study both increased. Similarly, another legislator not on the committee asked for reviews of new requirements before the Board of Outfitters, and Committee Member Rep. Don Roberts asked for more attention to certain professional licensing boards. The flexible time frames of the work plan allowed these changes, as did the accommodating nature of the Committee members.

Typically, the Committee has focused on economic development during many of its interims. All the agencies over which the Committee has monitoring and oversight responsibility deal in some way or another with business, industries, and labor issues. The agencies monitored by the Committee are:

- the State Auditor's Office, with its responsibilities for insurance and securities;
- the Department of Agriculture;
- the Department of Commerce;
- the Department of Labor and Industry;
- the Department of Livestock; and
- the Governor's Office of Economic Development.

In addition to discussing a work plan at the first meeting, the Committee elected Sen. Jim Keane

¹Both the SJR 30 and the SJR 14 study are described in separate final reports for each.

as the presiding officer and Rep. Gordon Vance as the vice presiding officer. The Committee discussed traveling outside of Helena for many of its meetings to hear from constituents around the state but decided to limit travel as a cost-saving measure. Instead, at its November 2009 meeting, the Committee arranged for a video link to a Billings site so that representatives of the medical and business communities there could easily participate as part of the SJR 30 workers' compensation study.

This report is divided into the SJR 30 study and general monitoring duties, with subchapters for each. The SJR 14 study is in a separate report.

Chapter 1: Workers' Compensation - The SJR 30 Study

The top-rated study request for the 2009-2010 interim, as determined by a poll of legislators after the 2009 session, called for looking at the cost drivers behind Montana having the second highest workers' compensation premiums in the nation in 2008, among other related issues. With the next Oregon rankings due out late in 2010, comparing all states' workers' compensation premiums, Montana very well may be rated as having the highest premiums in the nation. (The 2008 number-one state, Alaska, saw a decrease in its 2010 loss costs of more than 10% -- compared with Montana's decrease of slightly more than 6%, which suggests Montana's ranking may be worse in 2010.) Concern about Montana's national ranking and reputation regarding workers' compensation motivated the Economic Affairs Interim Committee to spend significant hours learning more about workers' compensation after receiving its assignment from the Legislative Council to carry out the Senate Joint Resolution Number 30 (SJR 30) study on workers' compensation.

The Committee had the benefit of research being carried out by Department of Labor and Industry (DOLI) consultants, who also reported to the DOLI-convened Labor-Management Advisory Council (LMAC), which coordinated much of its work with the Committee members' priorities and schedule. For the past three-plus years LMAC² and a private-public offshoot of LMAC called WorkSafeMT have worked toward addressing the following cost drivers:

- frequency of accidents;
- duration of workers' compensation claims; and
- high medical costs.

There are other cost drivers, but a 2007 analysis by the Workers' Compensation Research Institute (WCRI) of Montana's workers' compensation system indicated that these areas were significantly out of line with experiences in other states studied by WCRI, as was Montana's approach to rehabilitation services for injured workers.³

² As an advisory council, LMAC can be reinstated and currently is on its second 2-year term. This suggests that even after the end of the Economic Affairs Committee's interim work, the LMAC may continue to deal with other work comp issues.

³Duncan S. Ballantyne, "Workers' Compensation in Montana: Administrative Inventory", Workers Compensation Research Institute (WCRI), Cambridge, Massachusetts, 2007. The executive summary of the report noted the following areas where Montana differed from other states reviewed by WCRI:

- overall medical and indemnity benefit costs for every 100,000 workers are higher due to a higher frequency of injuries, a higher proportion of claims for every 100,000 workers that include wage-loss benefits and that are classified as permanent partial disabilities, and a higher than average incurred medical cost for every lost-time claim;
- claims involving medical benefits remain open longer than in most states studied by WCRI;
- more workers receive vocational rehabilitation maintenance benefits than in other study states;
- prior to changes in statute regarding medical fee schedules, the payments provided incentives for invasive surgeries; and
- barriers exist to keep people on temporary total disability benefits, a factor WCRI said may have

In addition, under SJR 30 the Committee looked at the structure of Montana's three-insurance plan system to determine if changes might help, possibly through enhanced competition or increased oversight, to lower premiums. And the Committee sought to determine if cost-shifting occurred between workers without health insurance and those with health insurance. The result from that review was inconclusive, partly due to many intervening factors.

Among the key deliverables related to the SJR 30 study were the following Committee bills:

- the LMAC consensus bill;
- a proposal to allow the state to self-insure; and
- a proposal to revise the Montana State Fund Board of Directors to include within the existing seven members one person who has executive management experience in either insurance or insurance financial information.

The committee reviewed the following points in SJR 30 that were not part of the LMAC bill:

- the frequency of claims by types of claims. *This was part of the initial overview and also was reviewed during the March meeting.*
- medical costs, in particular: (a) the duration and availability of and access to medical treatments, (b) the use of utilization and treatment guidelines and their effectiveness in other jurisdictions, and (c) an evaluation of the impact on cost containment and access to medical treatment resulting from changes to medical fee schedules implemented by the Department of Labor and Industry in 2007 and 2008. *These reviews were included in September, November, January, and March.*
- presumptive disease regarding specific occupations. Comments from firefighters were made at the March meeting.
- exemptions, *which were targeted to specific concerns raised during the June Committee meeting;*
- structural issues as they relate to the three-tiered system involving self-insurers, private carriers, and the Montana State Fund, *addressed during the January meeting;* and
- the operation and structure of the Montana State Fund and Montana State Fund's relationship with state government and other insurers, as well as oversight of Montana State Fund. *These issues were part of the January and May meetings.*

Caveats

While Montana's second-place ranking, as determined by the Oregon Department of Consumer and Business Services from its 2008 survey, served as a serious wake-up call to LMAC and the EAIC, the findings, recommendations, and proposed legislation are not necessarily undertaken simply to improve Montana's ranking. That ranking is relative to what other states are doing. Premium pricing also uses experience as a key determinant, so that actions taken in one year do not reflect immediately on premium pricing. Instead, generally three years pass before

added costs to the system unnecessarily.

results show up in premium pricing. Further complicating the overall trend is that Montana's plethora of small employers may find that no matter what pricing recommendations are implemented, the experience-dependent, shared risk climate may mean only slight changes to small business premiums when overall decreased costs are projected.

Priorities:

The following subchapters will review the work of both the Economic Affairs Committee and the LMAC, providing first an overview of the problem and then information presented to the Committee or the Council and an explanation of the action taken, if any. The subchapters are based on the priorities that the Committee members outlined early in the interim. The final subchapter also will address some of the reasons that small employers in Montana have difficulties in lowering their premiums:

Subchapter A -- high priority issues:

- **Return to work programs, safety, and frequency of injuries.**
- **Medical fee schedules and medical utilization and treatment guidelines.**

Subchapter B -- medium priority issues:

- **Claim closure, duration of indemnity and medical claims**
- **Course and Scope Definitions**
- **Structural issues, including Montana State Fund-related issues and competition**

Subchapter C -- medium to low priority issues:

- **Fraud and cost-shifting**
- **Presumptive Illness**
- **Benefit issues, including vocational rehabilitation**
- **Exemptions**

Subchapter D -- low priority issues:

- **Proportion of claims involving indemnity**
- **Access to primary care physicians**
- **Attorney fees paid out of medical costs/access to attorneys**
- **Shorter waiting period (to obtain benefits)**

Subchapter E -- Problems faced by small employers

Subchapter A: High Priority Issues

- **Return-to-Work Programs**

Overview -- Various presenters told the Committee that the earlier that injured workers return to the job, the better off they are both physically and financially. Early return to work is not intended to send someone back to the same time of injury job if they physically are unable to do that job. Rather, the idea is to help both workers and employers learn that if a worker is unable to perform the time-of-injury job, then placing the worker in a modified position until the worker recovers is better psychologically for most workers. The idea is to help avoid a situation where workers feel victimized and to help employers' workers' compensation costs by decreasing the

potential that their experience rating will be affected.

Department of Labor and Industry analysts indicated that by far most workers who were injured returned to work within 24 days. Of the approximately 3,000 injuries studied between Oct. 1, 2000, and Dec 31, 2002, those employees out for less than 24 days numbered 1,803. See Table 1.

Important to employers who invest time and money to train their employees is that fewer than half of the injured workers off the job longer than two

years ended up going back to their time of injury employer.⁴ Reducing injured workers' time away from work was an overarching goal of three "60 Summits" conferences held in 2008 in Billings, Great Falls and Missoula.⁵ The "60 Summits" conferences emphasized improved communication for employers, employees, and medical providers.

Result -- The LMAC proposed bill draft includes several new sections related to getting an injured worker back to the time-of-injury job, if at all possible and as quickly as possible. Sections 1 through 13 address a combination of return-to-work procedures and vocational rehabilitation to help an injured employee at the front-end of the process rather than after an injured worker has been determined to have a permanent impairment and is unable to return to the time-of-injury job or a similar job and who has an actual wage loss.

In essence, the proposed bill draft creates a system that allows self-insured employers, insurers, or the Department of Labor and Industry (in cases where the insurer cannot be immediately determined) to put a worker, soon after an injury occurs, in touch with rehabilitation counselors and others to provide a stay at work/return to work plan with the highest priority set at getting a worker back to the time-of-injury job. A descending order of priorities recognizes

Within 24 days	1,803 workers
Between 24 days and 168 days (nearly 6 months)	687 workers
Between 168 days and 413 days (a bit more than 13 months)	333 workers
Between 413 days and 758 days (a bit more than 2 years)	138 workers
Between 758 days and 1424 days (nearly 4 years)	19 workers

As measured between Oct. 1, 2000, and Dec. 31, 2002.

⁴Tyler Wiltgen and Erin Austin, "Return-to-Work Breakdown", presentation to the Labor-Management Advisory Council, March 4, 2008. <http://erd.dli.mt.gov/wcstudyproject/Advisory%20Council%20Conference%20Calls/RTW%20Presentation.PDF>

⁵For more about "60 Summits, see: <http://www.60summits.org/>. For a report on Montana's summits, see <http://erd.dli.mt.gov/wcstudyproject/60SummitsExecutiveSummary.pdf>.

that not all workers, especially those who suffer a serious impairment, will be able to return to their original job. For these workers, on-the-job training or retraining are included as possibilities. (See Section 2 of the LC 0255.)

- **Safety.**

Discussed by LMAC and further encouraged by the "60 Summit" conferences was formation of the public-private, nonprofit partnership called WorkSafeMT.⁶ The organization, funded through the Department of Labor and Industry with \$463,623 state special revenue for the FY 2010-2011 biennium and a \$1 million one-time-only appropriation, is currently anticipating increased funding from businesses across the state and possible independence from the Department of Labor and Industry, which provided three staff positions for the start-up. WorkSafeMT has ramped up public awareness of safety to help promote a culture of safety through advertising on television, radio, at movie theaters and sporting events. The organization also has held one safety fair in Helena attended by approximately 500 people and plans another later in 2010 elsewhere in the state to help provide hands-on work with employers and employees on safety issues.

- **Frequency of Injuries**

The WCRI report comparing Montana's workers' compensation system with other states noted that 2005 data from the U.S. Office of Safety and Health Administration showed that Montana had 6.6 injuries and illnesses for every 100 full-time workers compared with 5.4 in Oregon, 5.6 in Utah, 5.8 in Wyoming, and 6.1 in Washington. The overall rate in Montana, the report said, was 16% higher than the median of the other four states. Larger deviations occurred in earlier years for Montana's incurred total claim frequency, which the WCRI report said ranged from 10% to 31% higher than the median of neighboring study states.⁷

- **Medical fee schedules and medical utilization and treatment guidelines.**

One of the issues raised frequently before the Committee involved changes to the ways that the Department of Labor and Industry planned to address medical fee schedules and utilization and treatment guidelines. Provisions enacted in the 2007 Legislature allowed the department to set the fee schedules by rule, based on insurance company charges, and to adopt utilization and treatment guidelines. The department started the process for revising medical fee schedules in 2007. The utilization and treatment guideline process began in 2009, using a committee of medical providers that included surgeons and other physicians, a chiropractor, a physical therapist, and a nurse. That committee met seven times, from August 2009 to February 2010, reviewing four options for treatment guidelines: those developed by the American College of Occupational and Environmental Medicine (ACOEM), the Official Disability Guidelines (ODG)

⁶For more information on WorkSafeMT, see: <http://www.worksafe.mt.com>.

⁷WCRI report, op. cit., pp. 90-91.

developed by the Work Loss Data Institute, and guidelines developed in Colorado and Washington State. The Montana medical provider group endorsed the Colorado guidelines, with supplemental backing from a group to be determined by the Department of Labor and Industry. The medical provider group urged ease of use for providers as one of the criteria to be considered by the department, which has said an on-line system is being requested.

As one indication of the role of workers' compensation as a revenue source for hospitals or ambulatory surgery centers in Montana, a study for HJR 48 indicated that of 49 hospitals reporting workers' compensation as a revenue source (even to indicate 0%), the following had 5% or more of their revenues from workers' compensation:

- Kalispell Orthopedic Surgery Center - 18%
- Missoula Bone and Joint - 15%
- Summit Surgery Center in Butte - 10%
- Yellowstone Ambulatory Surgery Center - 9%
- Providence Surgery in Missoula - 8.78%
- Helena SurgiCenter - 6%
- Great Falls Central Medical Surgery Hospital - 6%
- Kalispell Healthcenter Northwest - 5.1%
- Billings Advanced MRI - 5%
- Dahl Memorial Hospital in Ekalaka - 5%
- Marias Medical Center in Shelby - 5%.

Subchapter B -- Medium Priority Issues:

- **Claim closure, duration of indemnity and medical claims**
- **Course and Scope Definitions**

Subchapter C -- Medium to Low Priority Issues:

- **Fraud and cost-shifting**

The Committee had two separate presentations on fraud concerns, plus reports from the DOLI consultant who provided a list of possible options for addressing fraud concerns. No bills were requested after these presentations.

- **Presumptive Illness**

The issue of presumptive illness was included in SJR 30 after firefighters were unable to obtain passage of HB 408 in the 2009 Legislature. That bill provided a list of diseases that reportedly occur with higher frequency among firefighters and may be presumed to be caused by the toxic fumes or other hazards faced by firefighters. The fiscal note, which had no specific number attached to the bill, noted that local governments that employ firefighters were likely to see an increase in premium costs. The Committee urged Doug Neil with the Montana State Firemen's Association to work with insurers for local governments to determine the potential scope of a

presumptive disease bill. Mr. Neil, who also spoke to LMAC about extending a presumptive illness provision for firefighters, noted that about 43 other states have some form of a presumptive illness for firefighters.

- **Benefit issues, including vocational rehabilitation**
- **Exemptions**

Subchapter D -- Low Priority Issues:

- **Proportion of claims involving indemnity**
- **Access to primary care physicians**

A survey by the Department of Labor and Industry indicated a range of responses from physicians as to their satisfaction with workers' compensation. (MORE from SURVEY)

After the Committee endorsed the LMAC bill as a Committee bill, members of the Montana Medical Association wrote to that organization to comment on their concerns about the change in fee schedules and, in particular, suggested that they may no longer serve workers' compensation patients because of the high costs involved for unreimbursed time. (MORE TO COME)

- **Attorney fees paid out of medical costs/access to attorneys**
- **Shorter waiting period (to obtain benefits)**

Subchapter E -- Small Business Concerns

In an effort to get input from small employers, Committee staff contacted the Insure Montana program to see if that program, which limits participation to fewer than 10 employees, would ask participants to comment on their workers' compensation issues. Responses came from 8 employees. For their comments, see:

http://leg.mt.gov/content/Committees/Interim/2009_2010/Economic_Affairs/Meeting_Documents/MemoRTW_revised.pdf

Chapter 2: General Monitoring

At the Committee's first meeting, directors of the departments that the Committee monitors gave brief overviews of their work. (See the minutes for the June 2009 meeting for details.) In its work plan, the committee also planned to hear twice from the agencies regarding proposed legislation for the 2011 legislative session - an early overview and a later review closer to the end of the interim. The Committee requested specifically that more information on unemployment insurance be part of a later presentation by the Department of Labor and Industry. (See the minutes from November 2009 for more information on that presentation.)

Other presentations by the agencies monitored by the Committee were either in response to constituent requests of legislators on the Committee or requests from other legislators. They included the following:

- a request by Rep. Gordon Vance on behalf of a constituent for the State Auditor's Office to review implementation of a law that prohibits insurers from steering automotive repairs to certain shops. The discussion of this issue included the information that the State Auditor's Office formally investigated complaints only from the insurance customer and not from repair shops that had reason to believe they were losing business to certain insurer-endorsed repair shops. Privacy reasons limited the investigations to those directly brought by customers, according to Jesse Laslovich, chief attorney for the State Auditor's Office. As a result of this discussion, Mr. Laslovich reported at a later meeting that some informal investigations would be pursued to make sure insurers were not steering to certain repair shops.
- a review of medical impairment assistance programs, a topic of interest to Rep. Don Roberts, an oral surgeon. At the November 2009 meeting, department representatives provided general information on licensing boards and briefly commented on the two impairment programs that serve the Board of Medical Examiners, the Board of Dentistry, the Board of Nursing, and the Board of Pharmacy. The Committee revisited the issue at its June 2010 meeting, after which Sen. Keane, the presiding officer, appointed a subcommittee of Rep. Roberts and Rep. Hunter to work with the board representatives and program managers on mutually agreeable options. (See below for more details.)
- presentations required by statute for two programs in the Department of Commerce. At the last Committee meeting, in August 2010, Paul Reichert of the Montana Historic Preservation and Development Committee apprised the Committee of the indirect cost rate charged by the Department of Commerce for administrative overhead. Also at that last meeting, Department of Commerce Director Dore Schwinden reviewed the grants and the projects funded under the Distressed Wood Products Industry Program.

There were no specific presentations other than those at the first meeting from the Department of Agriculture or the Governor's Office of Economic Development, although the Department of Agriculture did make legislative bill draft presentations.

I. Department of Livestock Monitoring

In past interims, the Department of Livestock (DOL) and the Committee had little interaction except for routine updates similar to those given by all the other agencies for which the Committee has oversight responsibility. This interim the DOL's Diagnostic Veterinary Laboratory was at the center of the SJR 14 study of certain state laboratories. Discussions about coordinating or combining certain services at various laboratories related to the DOL, the Department of Fish, Wildlife, and Parks (FWP), and the Department of Agriculture resulted in increased communication with all three departments. The Department of Public Health and Human Services (DPHHS) initially was contacted about the SJR 14 study, but the DPHHS labs were in Helena, while all the other labs in the study were in Bozeman. The Committee voted at its May 2010 meeting to keep the focus on the labs in Bozeman, specifically excluding the Seed Laboratory at Montana State University and the Grain Lab in Great Falls. When the brucellosis issue rose (see below), the Committee's contacts with DOL and FWP increased. For more details on the SJR 14 study, see that report.

- **Brucellosis Issues and the Designated Surveillance Area.**

While the SJR 14 study provided reasons for the Committee to hear from DOL periodically, the intensity of the interactions increased after Sen. Debby Barrett asked that the Committee include on its next agenda a discussion of a proposed order for a Designated Surveillance Area (DSA) for brucellosis. The Board of Livestock⁸ made that order final in January 2010, shortly before the Committee's January meeting.

The order questioned by Sen. Barrett, Official Order No. 10-01-D, required the following (with the least onerous requirements and the broadest number of counties affected listed first progressing to the most onerous requirements on parts of four counties):

- **brucellosis testing of cattle**, other than steers or spayed heifers, within 30 days of a change of ownership for livestock producers in seven counties⁹ who had not done a whole-herd brucellosis test on cattle after Jan. 1, 2009, or submitted to DOL an operation specific risk survey. Also excepted were animals being sent directly to slaughter or animals sent to approved Montana livestock markets, if the testing was done on arrival.

⁸The Board of Livestock is the titular head of the Department of Livestock as provided by 2-15-3101, MCA. This situation is a holdover from the past when many departments received their policy direction from a board rather than from the Governor (who in most cases appoints board members). The situation is somewhat problematic because in the definition of "director" for Title 2, chapter 15, the term "does not mean a commission, board, commissioner, or constitutional officer", although "department head" includes "board" within its definition. There is no specific provision in Title 2, chapter 15, for a "director" of the Department of Livestock. The executive officer of the Department of Livestock, hired by the Board of Livestock, runs the day-to-day operations. The officer is not listed in the Governor's Cabinet.

⁹Thee counties were similar to those affected by a previous order for brucellosis testing: Beaverhead, Carbon, Gallatin, Madison, Park, Stillwater, and Sweet Grass counties.

- **official calfhood vaccination (OCV)** of all eligible animals in any part of Beaverhead, Gallatin, Madison, or Park counties prior to a change of ownership. The eligible animals are those capable of becoming pregnant but with an unknown history of pregnancy that could potentially transmit brucellosis through an aborted fetus. The department's more precise term was "intact, female cattle and domestic bison 4-12 months of age". There were options for vaccinations, a quarantine, or for a rancher to sell to a state that accepted "non-OCV animals". (The Board of Livestock at its July 2010 meeting considered a statewide requirement for OCV for breeding/grazing unspayed cows.)
- **annual brucellosis testing with individual animal identification plus specific brucellosis tests within 30 days of a change of ownership or movement out of the DSA.** The brucellosis testing is for all age-eligible animals (those 12 months or older and sexually intact, regardless of male or female -- with variations for those going to slaughter) and individual identification (ear tags or clips approved by the U.S. Department of Agriculture) by livestock producers in the Designated Surveillance Area, which was parts of Beaverhead, Gallatin, Madison, or Park counties.

Among various issues, Sen. Barrett questioned whether the order was valid absent a Montana Environmental Policy Act review, which she said would have required analysis of the economic impact on ranchers and livestock producers in the DSA. The parts of four counties in the DSA were chosen for their proximity to Yellowstone National Park (YNP) where brucellosis is suspected not only in the park's bison herds but in elk herds, based on testing of elk herds in the surrounding states of Wyoming, Idaho, and Montana. Sen. Barrett also raised concerns that the order violated one of the enumerated rights in the Montana constitution, that of a "clean and healthful environment" (in Article II, Section 3).

Others who testified at the Committee's January meeting noted that there was no "end" to the requirements imposed on the ranchers in the DSA, even if testing proved negative. Some questioned whether the DOL should have issued the "order" as a "rule", which would have required written responses to comments. A rule also requires a public hearing. (The DOL had public meetings in Twin Bridges and Livingston in December 2009 before implementing the new order, as well as various meetings while a similar temporary order was in effect.) Among other issues raised were problems related to determining which agency had responsibility when brucellosis transmission is between wildlife and cattle, with wildlife under FWP and livestock under DOL. Further, the disease is not bounded by state or national park boundaries, which brings in federal and other state regulatory agencies. Among the observations was that Wyoming's policy of using feeding grounds to keep elk away from Wyoming ranchers' haystacks resulted in "breeding" grounds for transmission of brucellosis within those elk. And Montana has no say in that.

From the DOL perspective Executive Officer Christian Mackay pointed out at the January meeting that the order was a way of maintaining a "Class Free Status", which reassures out-of-

state buyers that Montana cattle are free of brucellosis. A DOL handout noted that 10 states had imposed import regulations on Montana when the state lost its "Class Free Status" after a second case of brucellosis was confirmed in June 2008.¹⁰ After comments from the public, Sen. Keane asked for a work group to meet to discuss options with all the parties and to see if an end date might be set for the DSA. The working group met twice. (See appendix A for more information on the working group.) Its key recommendations delivered at the Committee's March meeting were requests for:

- a new order on which a MEPA analysis had been conducted;
- adherence by the Board of Livestock and DOL to statutes that protect livestock;
- an action plan from DOL (at its first annual review of the DSA order) to address wildlife disease management in cooperation with FWP;
- an implementation plan from DOL at the May meeting of the Committee;
- support for production of an oral vaccine against brucellosis for wildlife; and
- an end date of 2012 for the DSA.

Also at the March meeting the Committee heard from FWP officials regarding concerns about brucellosis in elk. The FWP representative noted that conversations were taking place with YNP officials, but that basically eradication of brucellosis in Montana was not feasible. In response to concerns about the costs imposed on livestock producers and the state by the DSA, the Committee decided to request formal input from the Board of Livestock regarding the recommendations of the working group and a request from Sen. Hansen that funding with Beef Check-Off dollars might be explored.

At the May Committee meeting a representative from the U.S. Department of Agriculture's Animal Plant Health and Inspection Service provided the Committee with a review of how international trade also impacted the DSA order. Dr. P. Ryan Clarke of Belgrade noted that the U.S. government was likely to emphasize that all areas in the United States other than the Greater Yellowstone Area were brucellosis free but that monitoring was still needed in the three states bordering Yellowstone National Park. That also is an indication these states may see federal help on brucellosis issues. Also at the May meeting, Mr. Mackay provided information indicating that the Beef Check-Off funds cannot be used for live animal projects and along with Board of Livestock Chair Jan French provided responses to the working group recommendations.

The Board of Livestock at its July 2010 meeting had on its agenda a proposal to convert the DSA order into a rule. Nothing has been drafted as of this report, but the DOL is in discussions¹¹

¹⁰For meeting materials see the January 20-21, 2010, meeting materials under Handouts or Links:
http://leg.mt.gov/css/Committees/Interim/2009_2010/Economic_Affairs/Meeting_Documents/meetings.asp

¹¹Email from Christian Mackay, Aug. 17, 2010.

with industry leaders who began meeting sporadically, partly in response to the working group's discussions. Some of those industry leaders were at the Board of Livestock meeting in Bozeman in May.

Also, previously the Board had indicated that it would request a MEPA analysis of the DSA order. According to an email from Mr. Mackay, the DOL may do a check-list of MEPA items as part of its annual review of the DSA.¹² As for other responses to the working group requests, an end date is unlikely to occur as long as: there remain concerns about brucellosis in wildlife; the entire state resists vaccination of fertile cows against brucellosis (an attempt to require OCV for the full state has met opposition), and the DOL perceives a need to provide assurance for the entire state's livestock industry being brucellosis free.

Stimulated by concern about orders not having the same opportunities for public comment and response as occurs in the rule-making process, Rep. Vance proposed a bill draft for consideration by the Committee that would define for the DOL the term "order" and make orders subject to the contested case provisions of Title 2, chapter 4, part 6. The bill draft also would require the DOL to issue other "directives" of general purport as rules adopted under the Montana Administrative Procedure Act.

- **Brand Inspectors - Duties and Workers' Compensation Coverage**

At the request of Sen. Roy Brown, staff attorney Bart Campbell looked into whether the DOL had the authority to ask brand inspectors to determine if ranchers in the DSA were following the testing and vaccination requirements imposed on those in the DSA. Mr. Campbell's response was that the brand inspector could ask for proof of the testing and plans required of those in the DSA but that the brand inspector had no authority to deny a certificate of transfer if the brand on the cattle being transferred belonged to the owner making the transfer. An attorney contracted by DOL disagreed with Mr. Campbell's opinion and provided the Committee with an oral explanation. He was asked to provide a written explanation.

The discussion of brand inspectors triggered a question from Sen. Ken Hansen about whether the brand inspectors had workers' compensation coverage or whether ranchers were liable if a brand inspector got hurt while on a ranch. Of the 600 or so brand inspectors, some are either department personnel or on county payrolls. But many other brand inspectors, at least 150, have an agreement with DOL in which they volunteer as brand inspectors but can collect fees from ranchers for performing the service. As a result of the Committee's inquiries, DOL looked further into the issue and learned that the volunteer brand inspectors, while performing services for DOL, could be endorsed as volunteers under the DOL workers' compensation policy. The cost for covering these volunteers is going to depend on claims reported and the related payroll associated with those claims.

¹²*Ibid.*

II. Department of Labor and Industry Monitoring

With much work spent on the SJR 30 study of workers' compensation, the Committee had frequent interactions with the Employment Relations Division of the Department of Labor and Industry (DOLI), which regulates workers' compensation and originated then renewed the authority for the Labor-Management Advisory Council. The Committee reliance on the Labor-Management Advisory Council's work is discussed in the SJR 30 report. This report will cover issues other than workers' compensation with which the Committee met with DOLI officials. These included: unemployment insurance, the cost of professional and occupational licensing fees, board actions related to the Board of Outfitters and the Board of Dentistry, medical impairment assistance programs, and a brief look at a proposed rule, later withdrawn, that would have changed the way certain professionals were treated for overtime.

• Unemployment Insurance

As mentioned earlier, the Committee asked for specific review by the Unemployment Insurance Division of the different benefit plans and sources as well as the new employer tax schedules. Division Administrator Roy Mulvaney, with the help of Senior Economist Barbara Wegner, described the following at the November 2009 meeting:

- the revised tax schedules for businesses to help maintain solvency in the Unemployment Trust Fund;
- the differences between benefits for regular unemployment insurance, the Trade Adjustment Assistance Act, extended benefits, and various provisions for unemployment insurance under the American Resource Recovery Act;
- factors that affect unemployment triggers.¹³

• Cost of Professional and Business Licensing Fees

Members of the Committee often hear questions similar to: why can't professional and occupational licensing boards keep fees from continually increasing. At the Committee's November meeting Business Standards Division Administrator Jack Kane provided an overview of licensing boards and the division schematic showing the various levels of administration for the licensing boards. He also pointed out the requirement in 37-1-134, MCA, for fees to be commensurate with costs (not vice versa). Mr. Kane noted that in 2005 changes enacted by the Legislature refined the way the Business Standards Division handled licensing and also required the division to notify the Economic Affairs Committee if a board is not charging enough to meet its costs.

• Board of Outfitter Licensing Application and "Emergency Guide" Concerns

Sen. Rick Ripley, who is not a member of the Committee, asked that the Committee include on

¹³For handouts and reports see the November 2009 Economic Affairs Committee meeting materials page:
http://leg.mt.gov/css/Committees/Interim/2009_2010/Economic_Affairs/Meeting_Documents/meetings.asp

its March 2010 agenda an opportunity for outfitters to discuss changes to the Board of Outfitters license application and a proposal to revise the way "emergency guides" operate. Mac Minard, executive director of the Montana Outfitters and Guides Association (MOGA), reviewed for the Committee the changes to the license application and discussed the problems of the DOLI proposal to require all guides to follow the licensing application, even emergency guides. In the past, an outfitter might have named someone who did not technically have a license to be an emergency guide. The Board of Outfitters chair noted in a followup presentation at the June 2010 Committee meeting that the Board of Outfitters has been following DOLI protocols to make certain that all people who called themselves guides or outfitters followed licensing procedures.

Discussions between MOGA and the Board of Outfitters eventually resulted in the repeal of the rule allowing emergency guide licenses and a new rule providing for a provisional guide license. That rule, published as final in late August 2010, allowed an outfitter to endorse up to three additional guides each license year by identifying them on the outfitter's application form as "inactive" guides and submitting required documentation along with an activation fee, set at \$100. Renewal is possible at a cost of \$50 a year. There appeared to be little comment on the new type of license.

- **Board of Dentistry Expansion of Practice for Certain Dental Hygienists**

Rep. Roberts asked that the Committee review a decision by the Board of Dentistry to allow dental hygienists to practice at Paris Gibson School in Great Falls under a limited access permit. Rep. Roberts said that limited access permits were introduced into statute to allow dental hygienists to practice in rural areas underserved by dentists -- not in downtown Great Falls. Dr. David Johnson of the Board of Dentistry. Carol Price, a dental hygienist on the Board of Dentistry explained that the board heard the concerns of dentists but decided to allow a dental hygienist to practice at the Paris Gibson School, which serves some populations specified under 37-4-405, MCA, including those "who, due to age, infirmity, disability, or financial constraints, are unable to receive regular dental care". The Committee took no action on the issue. Representatives of dental hygienists later asked the Children, Families, Health, and Human Services Interim Committee to consider as a committee bill specific permission for dental hygienists to "provide a school-based sealant program without the prior authorization or presence of a dentist".

- **Medical Impairment Assistance Programs**

In May the Committee heard in depth from board members and program managers regarding medical impairment assistance programs, an issue that Mr. Kane had briefly reviewed in November. Rep. Roberts outlined his concerns about the medical impairment assistance programs, which included: a question of whether licensing boards allowed too many second chances to medical professionals who enter an assistance programs but either drop out of the program or continue to abuse substances such as alcohol or drugs. Representatives of the four boards that participate in one of two medical impairment assistance programs discussed their

support for the programs and how their boards have worked with the programs to make sure licensees who have substance abuse problems get help and retain their ability to practice their profession, all while protecting public safety. The Board of Medical Examiners, the Board of Dentistry, the Board of Nursing, and the Board of Pharmacy participate in either the Montana Assistance Program (for pharmacists and nurses) or the Montana Professional Assistance Program (for doctors, dentists, physician assistants, and emergency medical technicians). The board members on the May panel noted that licensees had to follow strict program guidelines intended to protect public safety and that it was important that confidentiality be maintained for those who voluntarily signed up for the program. The concern is that without confidentiality and a threat to their license, medical professionals would not seek help and instead continue to practice until something went wrong or they otherwise were caught abusing drugs or alcohol, according to Dr. Mary Ann Guggenheim, a member of the Board of Medical Examiners.

Another concern voiced by Rep. Roberts was that audits of the assistance programs are not routinely done. In fact, until the Board of Medical Examiners hired an outside evaluator in 2009 to review the Montana Professional Assistance Program -- in response to legislative requests that the Legislative Audit Division (LAD) do a program evaluation, which LAD could not do for a nonprofit program -- no audit had been done of either program. As pointed out at the May meeting, the audit of the Montana Professional Assistance Program resulted in mostly complimentary evaluations. However, in response to Rep. Roberts' comment that the licensing boards often oppose legislation that they later adopt by rule or practice, Sen. Keane as chair of the Committee appointed a subcommittee to see if issues raised by Rep. Roberts could be addressed satisfactorily for Rep. Roberts, the licensing boards, and the two assistance programs..

The Medical Impairment Assistance Subcommittee met July 22, 2010, with Rep. Roberts and Rep. Chuck Hunter joined at the table by Dr. Guggenheim, Dr. David Johnson from the Board of Dentistry, Mike Bertagnolli of the Board of Pharmacy, and Heather O'Hara of the Board of Nursing. Mike Fanning and Anjeanette Lindle, DOLI attorneys who work with the boards, also were present but not at the table. The issues that the panelists discussed included:

- whether statutes should be changed to require increased notification of boards of participants' activities in the professional assistance programs;
- whether there should be a recognition in statute to distinguish between the nondisciplinary or nonpublic track and the disciplinary or public tracks;
- whether there should be a limit to the number of times that a participant in a professional assistance program can relapse without loss or suspension of a license; and
- whether out-of-state auditors ought to be used for the assistance programs.

The Subcommittee and participants agreed to include in a proposed bill the following:

- a three-strikes trigger to discipline action by the licensing board;
- an external audit every five years and an internal audit every five years, with each paid

for by the licensing board. The payment issue was not unanimous because at least one board member expressed a concern that licensees who do not have substance abuse problems should not bear the cost of an audit on a program they may never use. But other comments at the subcommittee meeting indicated that the licensees in the medical assistance programs already are paying substantial costs. In one respect, all licensees benefit from a program that provides monitoring of licensees who otherwise might be harming the public and bringing discredit to the licensed profession.

- similar language for all the boards involved in the medical assistance programs.

Based on these recommendations, the Committee reviewed and voted to approve LCmihp in draft form, or LC _____. The bill draft also took language on confidentiality of the medical assistance programs that had been in the Board of Medical Examiners' laws and made that provision applicable to all of the medical assistance programs.

III. Department of Commerce Monitoring

The 2009-2010 interim was fairly quiet as far as Department of Commerce monitoring. Two programs under the Department of Commerce, the Montana Heritage and Preservation Commission and the Distressed Wood Products Industry Revolving Loan Program, both provided reports, as required in statute, at the Committee's August meeting. Additionally, the Environmental Quality Council heard reports on the Distressed Wood Products Industry Revolving Loan Program at its Sept. 10, 2009, meeting. As part of a Historic Preservation study assigned to the Education and Local Government Committee, that committee also reviewed the work of the Montana Heritage and Preservation Commission as well as grants for historic preservation made through the Department of Commerce at its March 12, 2010, meeting. For more information on these activities see the minutes and meeting materials for those meetings in addition to the minutes and reports from the Aug. 19, 2010, meeting of the Economic Affairs Committee.

IV. State Auditor's Office

In its role of dealing with insurance (as well as securities), the State Auditor's Office met with the Committee on two different issues: a discussion about how the Insurance Commissioner handles complaints about insurers who might be steering customers to certain automotive repair shops, which is prohibited by statute, and information about how the Insurance Commissioner handles regulation of workers' compensation "Plan 2" insurers, or those insurers licensed under Title 33.

- **Complaints regarding steering to certain automotive repair shops**

Concerns voiced by Rep. Vance's constituents in the Bozeman area generated a Committee review March 31, 2010, of the State Auditor's Office's practices for investigating complaints about steering, which is prohibited under 33-18-221, MCA. That statute allows an insurance company to provide a list of preferred repair shops but prohibits a requirement or any coercion to use a particular company or location for automotive repairs. The problem, as described by

Barbara van der Mars with the State Auditor's Office, is that for the office to investigate a steering complaint, the automotive policyholder must generate the complaint -- not the automotive repair shop. Ms. van der Mars explained that an investigation generated by a repair shop would require looking at a policy of someone who might not have made the complaint, and the State Auditor's Office chooses not to violate that policyholder's privacy unless the policyholder complains. After a separate discussion with the State Auditor's Office Chief Legal Counsel, Jesse Laslovich, at the May 25, 2010, meeting, the State Auditor's Office agreed to informally investigate complaints from auto repair shops without beginning a formal investigation.

- **Regulation of workers' compensation "Plan 2" insurers.**

As part of the SJR 30 study, the Committee examined the structure of workers' compensation, which included looking at the State Auditor's regulation of Plan 2 insurers and what alternatively is the oversight provided to the Montana State Fund. State Auditor Monica Lindeen described to the Committee at its Jan. 20, 2010, meeting how her office conducts rate reviews, examines solvency conditions, and performs market conduct examinations to make sure that marketing and underwriting (pricing) are done according to state law.¹⁴ Also at that January meeting, the Legislative Auditor's Office (LAD) noted that, as part of its duties to determine state agencies' compliance with state laws, and under 39-71-2361 and 39-71-2362, MCA, LAD provides rate review and financial and compliance audits of the Montana State Fund. The rate review is handled under a contract with an external actuary, while the financial and compliance audits are done by LAD.

V. Other Agency Monitoring

All of the agencies assigned to the Committee in 5-5-223, MCA, provided an overview of their activities at the Committee's first meeting July 8, 2009. Highlights include:

- The Governor's Office of Economic Development reviewed data regarding Montana's export growth (seventh fastest growing economy in the United States in the previous three years), improving job quality, unemployment below the national average, and diverse energy projects.¹⁵
- The Department of Commerce presentation¹⁶ focused on various economic development programs, including reports on reduced funding for some programs and increased funding for others as provided by legislation enacted in 2009. The Department of

¹⁴For information on the regulatory oversight provided by the State Auditor's Office see: http://leg.mt.gov/content/Committees/Interim/2009_2010/Economic_Affairs/Meeting_Documents/10-jan-st-ate-auditor-overview.pdf.

¹⁵See the presentation at: http://leg.mt.gov/content/Committees/Interim/2009_2010/Economic_Affairs/Meeting_Documents/09_7GOED.pdf

¹⁶http://leg.mt.gov/content/Committees/Interim/2009_2010/Economic_Affairs/Meeting_Documents/Commerce.pdf

Commerce also reported on funding available for new worker training, energy audits and energy efficiency funding (particularly for schools and tribal governments), a biomass energy study, plus the historic preservation grants and community development grants, including those available under the Treasure State Endowment Program, and housing tax credit assistance available through the Board of Housing.

- The Department of Agriculture emphasized the importance of wheat and beef in Montana's economy.
- The Department of Livestock noted concerns about brucellosis in Montana.
- The State Auditor's Office reported on the income generated from investigating investor fraud and the scope of services provided to insurance consumers and producers.
- The Department of Labor and Industry reviewed the work of its various divisions, including the Unemployment Insurance Division and the Workforce Services Division. Commissioner Keith Kelly also noted that the SJR 30 study would involve close work with his department's Employment Relations Division.

Within the original work plan was a question of whether the Committee wanted to take up a request from the Senate Agriculture, Livestock, and Irrigation Committee to further explore the implications of patented plants and residual seeds addressed in House Bill No. 445, which died in that Senate committee. The Committee did not act on the request. However, the Department of Agriculture did meet during the interim with stakeholders that included the Montana Farmers' Union, the Montana Farm Bureau, the Alternative Energy Resources Organization, and organic farmers. A representative of the Department of Agriculture said the meeting participants looked at various legislative and practical approaches to the issues raised by HB 445, which sought to exempt Montana farmers from liability if they unknowingly possessed or used a patented plant. The bill also allowed for sampling of plants to determine if patented seeds had blown into or otherwise crossed into the territory of a farmer who had not planted those seeds. And the bill would have required a Montana venue for related lawsuits.

Appendix A: Designated Surveillance Area Work Group

The work group on issues related to the Designated Surveillance Area involved nearly 40 people, most of them at both the February session in Helena and a March session in Bozeman at the Montana Farm Bureau offices. Sen. Debby Barrett, not a member of the Economic Affairs Committee but the person who requested that the Committee monitor activities related to the DSA, was in charge of both sessions, which technically were not meetings of a formally appointed subcommittee. The work group was asked to get stakeholder input on addressing the DSA and any possible end date for the DSA requirements. (MORE TO COME)

Appendix B: Economic Affairs Committee Meeting Summaries

July 8, 2009 Organizational Meeting

Sept. 9, 2009

Nov. 17, 2009

Jan. 20-21, 2010

March 30-31, 2010

May 25-26, 2010

June 29, 2010

Aug. 19, 2010 Final Meeting

Subcommittee Meetings:

- HIPAA Subcommittee:

March 30, 2010

May 10, 2010

May 24, 2010

June 24, 2010

- Medical Impairment Subcommittee

July 22, 2010

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