

**LEGISLATIVE HISTORY**  
**OF MAJOR WORKERS' COMPENSATION LEGISLATION**  
**AFFECTING BENEFITS LEVELS AND CLAIM FREQUENCY**

**1987 - 99**

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January 2000

**INTRODUCTION**

The 1999 Legislature enacted Senate Joint Resolution No. 15, which directed an interim study and a report of findings and possible recommendations to the 57th Legislature of the current level of benefits paid to injured workers and the frequency of indemnity claims under the Workers' Compensation Act. Montana's current Workers' Compensation Act is patterned after the original act passed in 1915, with a major reform of the system occurring in 1987. Additional amendments to the Act since 1987 have impacted both the amount of benefits paid to injured workers and the frequency of claims filed under the Act.

This memorandum was prepared at the request of the Senate Joint Resolution No. 15 Subcommittee to provide a background of major legislative action affecting benefits paid to injured workers and the number of claims filed under the Act from 1987 through 1999. Part I will provide the background leading to the 1987 major reform of the Workers' Compensation Act. Part II will discuss the major changes made by the 1987 and subsequent Legislatures and their significance to benefits paid to injured workers or the frequency of indemnity claims under the Act.

From 1987 through 1999, the Legislature enacted numerous bills related to the workers' compensation system. This memorandum is not intended to cover all legislation enacted by the Legislature, but will highlight the major pieces of legislation affecting the whole workers' compensation system and legislation that directly affected the filing of claims and the amount of benefits paid to injured employees.

## **PART I**

### **1985: GOVERNOR'S SPECIAL ADVISORY COUNCIL ON WORKERS' COMPENSATION**

In January of 1985, Governor Schwinden appointed a special advisory council to study the workers' compensation system in Montana and suggest revisions.<sup>1</sup> The review was thought necessary because the system had become too expensive, too litigious, and too unpredictable.<sup>2</sup> Between fiscal years 1977 and 1986, the annual cost of claims with the State Compensation Insurance Fund had increased 577%, from 9.5 million to 64.3 million dollars.<sup>3</sup> During this time period, the number of claims increased by only 67%.<sup>4</sup> By 1986, the State Fund had an unfunded liability of \$200 million dollars.<sup>5</sup>

In his charge to the council, Governor Schwinden requested that the study and subsequent recommendations be "people sensitive and cost conscious."<sup>6</sup> After 18 months of study, the Council presented the Governor with its recommendations for change to the workers' compensation system.<sup>7</sup> While Senator VanValkenburg introduced legislation<sup>8</sup> that included the recommendations of the council, the Schwinden administration chose to introduce a reform package of its own that contained provisions that were either identical to the council recommendations or that closely resembled them<sup>9</sup>. Nevertheless, several of the reform proposals differed greatly.

As originally drafted, the Governor's proposal sought, among other things, to abolish the Workers' Compensation Court and to create an administrative adjudication process with review by the

District Court. The legislation introduced by Senator VanValkenburg subsequently died in the Senate Labor and Employment Relations Committee. In the end, the bill enacted by the 1987 Legislature was a product of compromise.

**PART II**  
**REFORM OF THE WORKERS' COMPENSATION SYSTEM**  
**1987 Legislature**

Senate Bill No. 315 was a total revision of the workers' compensation system. Although it contained many changes, the principal changes affecting benefits occurred in five areas: the definition of "injury"; the definition of "disability"; the circumstances under which partial disability benefits would be awarded; the limitations on lump-sum conversions; and the regulation on attorney fees that could be charged by claimants' attorneys.

Definition of Injury

Prior to 1987, an "injury" was defined as "tangible happening of a traumatic nature from an unexpected cause or unusual strain resulting in either external or internal physical harm . . . ." <sup>10</sup> The definition was broad and included harm from trauma or unusual strain. Under this definition, Montana courts had found workers injured when trauma caused a heart attack,<sup>11</sup> phlebitis,<sup>12</sup> and carpal tunnel syndrome over time from repeated mini-trauma.<sup>13</sup> Additionally, courts had found that workers had suffered from unusual strain in situations in which lifting caused a back injury<sup>14</sup>, where previous heart disease had been aggravated by employment stress,<sup>15</sup> repeated minor trauma had accelerated the degenerative process in a worker's knee joints,<sup>16</sup> and work-stress had ruptured a pre-existing aneurysm.<sup>17</sup>

As amended, an "injury" had to be caused by an accident and would not include a physical or mental condition arising from emotional or mental stress or a nonphysical stimulus or activity.<sup>18</sup> The term "injury" no longer applied to workers who were disabled from trauma occurring during the course of employment on 2 or more consecutive days, workers who suffered disabling emotional breakdowns at work, brain-damaged workers who suffered a ruptured aneurysm, or heart attack victims who suffered myocardial infarctions from job-related stress.<sup>19</sup> Under the 1987 amendment, the definition of "injury" retained the accepted concepts of traumatic incident or unusual strain, but required that the event, or series of events, occur on a single day or work shift.<sup>20</sup> The new definition differentiated between an "injury" covered under the Workers' Compensation Act and a "disease" covered under the Occupational Disease Act by requiring that an "injury", for workers' compensation purposes, be tied to a specific point in time while at work.

#### Definition of Disability

Prior to 1987, "permanent partial disability" was defined as "a condition resulting from injury as defined in this chapter that results in the actual loss of earnings *or earning capability* less than total that exists after the injured worker is as far restored as the permanent character of the injuries will permit".<sup>21</sup> Under this definition, the Montana Supreme Court had repeatedly ruled that the loss of "earning capability" meant something different than an actual loss of earnings and, in one instance, was defined by the Court to mean "a loss of ability to earn in the open labor market".<sup>22</sup> After the 1987 amendment, permanent partial disability means a condition, after a worker has reached maximum hearing, in which the worker has a medically determined physical restriction as a result of an injury and is able to return to work in the worker's job pool but suffers impairment or partial wage loss, or both.<sup>23</sup>

Additionally, prior to 1987, "permanent total disability" was defined as "a condition resulting from injury . . . that results in the loss of actual earnings or earning capability . . . and which results in the worker having no reasonable prospect of finding regular employment of any kind in the normal labor

market".<sup>24</sup> Under this definition, the Montana Supreme Court held that the worker must prove which jobs constitute the worker's normal labor market and that the worker is completely unable to perform the duties associated with those jobs.<sup>25</sup> Once the worker had provided that proof, the burden to show that suitable work was available shifted to the insurer.<sup>26</sup>

Under the 1987 amendments, "permanent total disability" was defined as "a condition resulting from injury, after a worker reaches maximum healing, in which a worker is unable to return to work in the worker's job pool. "Worker's job pool" was defined as:

(7)(a). . . those jobs typically available for which a worker is qualified, consistent with the worker's age, education, vocational experience and aptitude and compatible with the worker's physical capacities and limitations as a result of the worker's injury. ***Lack of immediate job openings is not a factor to be considered.***

(b) A worker's job pool may be either local or statewide, as follows:

. . .

(ii) ***A statewide job is one anywhere in the state of Montana.***<sup>27</sup> (emphasis added)

The new approach expanded the traditional normal labor market to a statewide basis. One observer of the change commented that the fact that a number of workers did not have the choice or ability to pursue a theoretical position across the state did not matter as "such individuals will be compensated as though they had".<sup>28</sup>

#### Circumstances for Payment of Partial Disability Benefits

Prior to 1987, a worker's partial disability rate was based upon the percentage of the difference between what the worker was capable of earning on the open job market prior to the injury

and what the worker was able to earn with the injury, and benefits were payable so long as the worker remained partially disabled but could not exceed 500 weeks.<sup>29</sup> According to the Montana Supreme Court, the duration of benefits was not to be reduced by a factor equal to the percentage of disability.<sup>30</sup>

As amended in 1987, a worker's partial disability benefits are determined by comparing what the worker *actually earned* at the time of injury to a wage that the worker might be capable of earning in the worker's "job pool" after the injury. The duration for wage supplement benefits was limited to 500 weeks from the date of maximum healing. As noted in the definition of "disability", the creation of the "job pool" concept geographically expanded the traditional "normal labor market" consideration to a statewide basis.<sup>31</sup> The permanent partial disability amendments repealed the former schedule of injuries that limited benefits by body part affected.<sup>32</sup> As amended, all events are related to "whole man" injuries under the maximum 500 weeks of benefits available. Previous "earning capacity" concepts were replaced with wage supplement benefit payments.<sup>33</sup> If a worker has not returned to work, the new total disability benefit is paid during the period in which the worker's work potential is evaluated.<sup>34</sup> Afterward, if rehabilitation services are arranged, the worker continues to receive full benefits and auxiliary assistance with incidental expenses.<sup>35</sup>

### Lump-Sum Conversions

Prior to 1987, an injured worker could request that disability payments be paid in a lump sum, rather than biweekly, if needed to deal with substantial debts or other financial considerations. If an insurer refused the lump-sum request, the Workers' Compensation Court had jurisdiction over the controversy.<sup>36</sup> In court decisions, the Montana Supreme Court had ruled that biweekly benefits were favored and lump-sum payments were the exception.<sup>37</sup> However, lump-sum payments would be permitted when they were in the best interests of the claimant, the claimant's family, or the public or were justified by the existence of a pressing need or outstanding indebtedness.<sup>38</sup> Factors that were found to be in the claimant's best interest included paying doctor bills and repairing housing,<sup>39</sup>

purchasing housing in a more suitable climate,<sup>40</sup> satisfying debts,<sup>41</sup> and investing in a business.<sup>42</sup> The court held as invalid reasons for requesting conversion of benefits to lump sum instances in which the claimant sought to collect interest on the lump sum,<sup>43</sup> sought to purchase a home to avoid future rent increases,<sup>44</sup> and wanted to obtain a lump sum because the claimant would probably not live long enough to receive all future benefits.<sup>45</sup>

As amended, no partial disability benefits can be converted to lump sum without the concurrence of the insurer and the amount of total disability benefits that can be converted is limited to \$20,000.<sup>46</sup> With this amendment, Montana joined a small number of states that required that the injured worker and the insurer must agree to convert the future benefits to a lump sum.<sup>47</sup> Prior to 1987, failure of the claimant and insurer to reach an agreement created a dispute over which the Workers' Compensation Court had jurisdiction.<sup>48</sup> As amended, the failure to reach an agreement regarding conversion to lump sum is no longer a dispute over which a mediator or the Workers' Compensation Court has jurisdiction except in those cases where permanently totally disabled workers seek lump sum advances.<sup>49</sup> If the parties agree to convert benefits, the agreements are subject to approval by the Division of Workers' Compensation.<sup>50</sup> A lump-sum award will usually be discounted by the insurer to present value because the lump-sum payments convert tomorrow's dollars into one current payment.<sup>51</sup>

#### Attorney Fees

Prior to 1987, the Workers' Compensation Act provided that when an insurer denied a claim that was later judged to be compensable or when there was a controversy regarding the amount of compensation and the court awarded an amount greater than the amount offered by the insurer, the claimant could be awarded costs and attorney fees in addition to benefits.<sup>52</sup> This "net recovery" concept, discussed by the Montana Supreme Court in 1983,<sup>53</sup> provided that the statutes awarding attorney fees to a successful claimant were for the purpose of providing the claimant with a "net recovery" equal to the claimant's lawful benefits and that when a claimant had entered into a contingent

fee agreement with an attorney, there existed a presumption that the contingent fee was the reasonable basis for the award of attorney fees entered against the insurer. In response, the 1985 Legislature amended that portion of law regarding attorney fees to provide that when attorney fees were awarded against an insurer or an employer, the sum must be based on the number of hours spent by the attorney rather than on the contingent fee that the client must actually pay.<sup>54</sup>

Additionally, the Department of Labor and Industry amended its attorney fee rule<sup>55</sup> in 1986 to reduce the percentages permitted to 20% in cases that had not gone to trial and 25% in those cases in which a judgment had been entered. In cases in which an hourly rate was agreed upon, the rule prohibited an attorney from charging more than \$75 an hour. In 1987, the Legislature further amended laws pertaining to attorney fees by requiring an insurer to pay reasonable costs and attorney fees if the insurer denies liability for a claim for compensation or terminates benefits that are later adjudged compensable *and* the court determines that the insurer's actions were unreasonable.<sup>56</sup> As amended, the claimant must prove that the insurer acted unreasonably in denying benefits to obtain attorney fees. Combined with the limits on lump-sum payments, the \$20,000 cap in lump-sum advances for permanent total disabilities, and the statutory changes made in contingency fee arrangements, attorney fees came from clients' biweekly benefits, which could result in attorneys collecting payments over several years.<sup>57</sup>

### **1989 Legislature**

Additional legislation that was enacted in 1989 created the State Compensation Mutual Insurance Fund and a board of directors and transferred the Workers' Compensation Judge office to the Department of Labor and Industry.<sup>58</sup> Legislation also created a guaranty fund for employers who self-insure under workers' compensation laws to provide payment of claims against self-insured employers who become insolvent and unable to pay claims.<sup>59</sup>



The 1989 Legislature also allowed a workers' compensation impairment evaluator to be a chiropractor if the claimant's treating physician is a chiropractor, <sup>60</sup> clarified a worker's job pool area and entitlement to rehabilitation benefits, required notice prior to reduction in biweekly benefits, and coordinated definitions of wages, payroll, and earnings <sup>61</sup>, and provided that a workers' compensation insurer was not liable for benefits on an existing claim to an employee who suffered a nonwork-related injury to a previously injured part of the body if the employee previously reached maximum healing.<sup>62</sup>

Senate Bill No. 315 also required the State Fund and private insurers to allow employers the option of including a medical deductible term in a policy and provided that benefits paid under this option not be included for purpose of setting rates.<sup>63</sup> Senate Bill No. 372 clarified the purpose and procedure in mediation provisions.<sup>64</sup>

### **1989 Special Session**

Despite revision of the workers' compensation system by the Legislature in 1987, the unfunded liability of the system was estimated to be \$215 million in June 1989. Without action by the Legislature to address the unfunded liability, the state was faced with two choices: allow what actuaries predicted would be a 22% increase in workers' compensation rates effective on July 1, 1989, or reduce employee benefits. As a result, during the June 1989 special session of the Legislature, Representative Driscoll introduced legislation<sup>65</sup> in an effort to raise revenue and subsidize workers' compensation rates to allow Montana to remain competitive with surrounding states.<sup>66</sup>

As enacted, House Bill No. 56 continued the freeze on the maximum weekly compensation employee benefits payable by insurers, extended the period for which a freeze was imposed on the maximum fee schedule for medical, hospital, and related services, and required quarterly estimated payments by all taxpayers subject to corporate license or income tax who had annual state tax liabilities in excess of \$5,000. According to the sponsor, the freeze on benefits raised \$3 million, while

accelerating the estimated tax payments raised approximately \$12 million, which was deposited into a workers' compensation tax account to be used to reduce the unfunded liability in the State Fund.<sup>67</sup> Despite the freeze in benefits and the imposition of a tax, it was still necessary for the Legislature to appropriate an additional \$20 million from the general fund to address the shortfall in the State Fund.

### **1991 Legislature**

Legislation enacted by the 1991 Legislature affecting benefits or claims included House Bill No. 837, a major revision of the workers' compensation system, and House Bill No. 280, which impacted eligibility for temporary total disability benefits.

House Bill No. 837,<sup>68</sup> sponsored by Representative Driscoll, represented a joint effort of Legislators and interest groups to address two primary problems in delivering permanent partial benefits and rehabilitation benefits.<sup>69</sup> The legislation implemented a formula based on age, education, and work experience to determine the amount of benefits if a worker is permanently or partially disabled. The 1987 law instituting the 500 weeks wage-loss system was changed to 350 weeks of an impairment award and included 8 weeks of rehabilitation. If retraining of the injured worker was found necessary, the legislation included up to 104 weeks of retraining.

As enacted, once an injured worker reaches maximum medical improvement and cannot return to the worker's former job position, the insurer is required to appoint a rehabilitation provider who completes a vocational assessment of the worker's professional abilities, training, education, skills, work history, and any other indicator of the worker's ability and determines if the worker can return to work in a normal labor market. The rehabilitation expert has 10 weeks to find a worker a job. If there is no job available that the injured worker can perform, the worker has the opportunity of spending the remainder of the 104 weeks in rehabilitation. If the injured worker disagrees with the return-to-work assessment, the worker can demand rehabilitation benefits.

Additional legislation enacted in 1991 attempted to provide a financial incentive for employers and injured workers to return to work. House Bill No. 280<sup>70</sup> provided that if the treating physician released an injured worker to return to the same, modified, or alternative position with the same employer at an equivalent or higher wage than the worker was receiving at the time of an injury, the worker was no longer eligible for temporary total disability benefits, even though maximum healing had not been reached. The then-current law had allowed an injured worker who had not reached maximum healing to refuse a position offered by the worker's employer without any effect on the worker's benefits. The intent was to provide employers with an incentive to develop and modify alternative positions for injured workers and to provide injured workers with an incentive to accept those positions.<sup>71</sup>

### **1993 Legislature**

The 1993 Legislature enacted a package of legislation affecting the areas of the old fund unfunded liability, safety, medical cost containment, and workers' compensation fraud.

#### **Old Fund Unfunded Liability**

Despite attempts made by previous Legislatures to find a mechanism to address the unfunded liability of the old fund, including a 0.28% payroll tax that had been placed on employers during the May 1990 special session of the Legislature,<sup>72</sup> the old fund unfunded liability had increased to approximately \$400 million by 1993.<sup>73</sup>

As a result, the 1993 Legislature enacted legislation<sup>74</sup> to increase the employer payroll tax from 0.28% to 0.5% and imposed a 0.5% payroll tax on employees and others receiving compensation in

the state. According to testimony before the Senate Select Committee on Workers' Compensation, passage of the legislation made Montana the only state in the nation where employees would pay to provide insurance for employers.<sup>75</sup>

## Safety

The 1993 Legislature also created the Montana Safety Culture Act,<sup>76</sup> which was intended to affect almost everyone in the state as an employer, an employee, or as a student. Depending on the number of employees, the Act requires safety orientation for employees, self-inspections, safety meetings, and documentation of a safety program. The legislation also allowed the State Fund to implement variable pricing levels and to place a surcharge on high-loss employers.

## Fraud

The 1993 Legislature also focused on reducing costs in the workers' compensation system by reducing fraud and abuse within the system by employers, employees, and medical providers. Legislation<sup>77</sup> was enacted that created a workers' compensation fraud investigation and prosecution office in the Department of Justice and a fraud prevention and detection unit in the State Fund. The bill stipulated that a worker who unlawfully received wages and workers' compensation benefits was guilty of theft and would be criminally prosecuted. The legislation has also resulted in regular interagency coordination between the Department of Justice, the Department of Labor and Industry, and the State Fund in the form of monthly fraud meetings that have resulted in referrals for criminal prosecution, troubleshooting, and discussion of new avenues for detection.<sup>78</sup>

The State Fund fraud unit is responsible for investigating possible claimant, employer, and provider fraud and consists of a fraud coordinator, two fraud investigators, one fraud auditor, and one administrative support staff. The State Fund contracts for services provided by the Department of Justice. The expenditures determined to be associated with a specific claim file are allocated to that claim file. Private investigative services are allocated to the claim file when applicable and are not included in either fraud unit's budget.

The state maintains a general "fraud hotline" with the Citizens' Advocate Office. The State Fund fraud unit receives leads and makes determinations for further investigations as warranted. The fraud unit may assign an in-house investigator or use private investigative services. As investigations are completed, the fraud coordinator will refer appropriate cases to the Department of Justice for further investigation and possible prosecution.

Once cases are referred to the Department of Justice, the Department's fraud prosecution unit will determine whether to investigate further with or without assistance from the State Fund's fraud unit. The Department of Justice fraud prosecution unit consists of one prosecutor, four criminal investigators, and two administrative support staff and may assist county attorneys in the prosecution of fraud cases or will handle those cases at the request of the counties. As of October 31, 1999, the State Fund reported that its fraud unit had referred 248 cases to the Department of Justice for prosecution.<sup>79</sup> To date, there have been a total of 57 convictions, including 52 plea agreements and 5 convictions as a result of jury or bench trials. The State Fund reported that as of October 31, 1999, total fraud recoveries totaled \$9.89 million.

The Uninsured Employer program within the Department of Labor has also detected and investigated fraud, specifically by employers who do not carry workers' compensation insurance as required by state law. The Legislature also enacted legislation<sup>80</sup> requiring the Department of Family Services (now Department of Health and Human Services) and the Department of Revenue to provide information to the Department of Labor and Industry for the purpose of preventing fraud and abuse in the unemployment and workers' compensation program.

#### Medical Cost Containment

Most medical cost containment in traditional health care is found in managed care and preferred provider organizations rather than in workers' compensation systems. However, legislation<sup>81</sup> provided

for the use of managed care and preferred provider organizations in the workers' compensation system. The Department of Labor and Industry was responsible for developing rules for managed care certification, which were in place by March 1, 1994. By September 1994, three managed care organizations were fully certified.<sup>82</sup>

The bill also allowed each insurance company that carries workers' compensation insurance to contract with certified managed care organizations and to develop its own preferred providers. The Department of Labor and Industry was responsible for developing a system to regulate hospital rates and for establishing a medical committee to develop treatment guidelines for workers' compensation.<sup>83</sup>

The legislation also revised workers' compensation laws to attain better medical cost containment, revised a provision regarding an injured worker's freedom of choice of physician, distinguished between primary and secondary medical services, and required the injured worker to comply with recommended medical treatment.<sup>84</sup>

### **1995 Legislature**

The 1995 Legislature enacted three bills, one having a major impact on employee benefits. Although there was major reform to workers' compensation in 1987 and 1993, according to testimony, a 1994 workers' compensation study placed Montana's compensation rate as the second highest in the nation even though benefit levels had not changed since 1991.

As introduced by Senator Benedict, Senate Bill No. 375<sup>85</sup> impacted the compensation for permanent partial disability, defined "actual wage loss" and "objective medical findings", revised lump-sum conversions, and revised the definitions of "disabled worker" and rehabilitation benefits.





### Permanent Partial Disability Benefits

Prior to 1995, if an injured worker suffered a permanent partial disability and was no longer entitled to temporary total or permanent total disability benefits, the worker was entitled to a permanent partial disability award. The permanent partial disability award was arrived at by multiplying the percentage arrived at through the calculation of an impairment rating using the medical impairment rating determined by the latest edition of the American Medical Association Guides to the Evaluation of Permanent Impairment and determined by adding the applicable percentages to the impairment rating for age, education, wage loss, and physical restriction. Pursuant to 39-71-703, MCA:

(1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award.

(2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.

(3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%.

(4) The percentage to be used in subsection (3) must be determined by adding all of the following applicable percentages to the impairment rating:

(a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;

(b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education or who has received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 2%;

(c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%. and

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10% . . . .

The impact on permanent partial disability benefits can be noted by comparing the ***bolded and italicized language*** in section 39-71-703, MCA, which was applicable after 1995. After 1995 , that worker became entitled to an award:

(1) . . . ***if that worker:***

***(a) has an actual wage loss as a result of the injury; and***

***(b) has a permanent impairment rating that:***

***(i) is established by objective medical findings; and***

***(ii) is more than zero as determined by the latest edition of the***

***American medical association Guides to the Evaluation of Permanent Impairment.***

***(2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.***

(3) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (5) by 350 weeks.

(4) A *permanent partial disability* award granted an injured worker may not exceed a permanent partial disability rating of 100%.

(5) The percentage to be used in subsection (3) must be determined by adding all of the following applicable percentages to the impairment rating:

(a) if the claimant is *40 years of age or younger at the time of injury, 0%*; if the claimant is over *40 years of age at the time of injury, 1%*;

(b) for a worker who has completed less than *12 years of education, 1%*; for a worker who has completed 12 years *or more* of education or who has received a graduate equivalency diploma, *0%*;

(c) if a worker has no *actual* wage loss as a result of the industrial injury, *0%*; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, *10%*; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, *20%*. *Wage loss benefits must be based on the difference between the actual wages received at the time of injury and the wages that the worker earns or is qualified to earn after the worker reaches maximum healing.*

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, *5%*; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, *3%*; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, *2%*.

(6) The weekly benefit rate for permanent partial disability is  $66 \frac{2}{3}\%$  of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(7) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

***(8) If a worker is eligible for a rehabilitation plan, permanent partial disability benefits payable under this section must be calculated based on the wages that the worker earns or would be qualified to earn following the completion of the rehabilitation plan . . . . (emphasis added)***

#### Actual Wage Loss

Prior to 1995, an actual wage loss was not required before an injured worker could qualify for benefits. A worker needed only to demonstrate that the worker was unable to return to the job held at the time of the injury.<sup>86</sup> As defined by the 1995 legislation, "actual wage loss" means that the wages that worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the injury".<sup>87</sup> Without an actual wage loss, an injured worker did not qualify for permanent partial disability benefits. According to testimony, the purpose of tying permanent partial benefits to wage loss was to provide an incentive to get injured workers back to work as soon as possible at the same wage and, for the first time, to give employers some degree of cost control.<sup>88</sup>

#### Objective Medical Findings

The 1995 Legislature also required that an injury entitlement for wage loss disability benefits be established by "objective medical findings", which was defined as "medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings".<sup>89</sup>



### Lump-Sum Conversions

As amended, permanent partial disability benefits may be converted to a lump sum payment only if an insurer accepted initial liability for an injury and the claimant and the insurer agree to a lump-sum conversion.<sup>90</sup> Benefits for rehabilitation may not be converted to lump sum, but may only be received biweekly.<sup>91</sup>

### Definition of "Disabled Worker"

Prior to 1995, a "disabled worker" meant one who had a medically determined restriction resulting from a work-related injury that precluded the worker from return to the job held at the time of the injury.<sup>92</sup> As amended in 1995, the term now means "a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury".<sup>93</sup> Without an actual wage loss, the worker is not considered disabled.

### Rehabilitation Benefits

Rehabilitation benefits consist of vocational rehabilitation expenses upon certification by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services), auxiliary benefits up to \$4,000 and 104 weeks of benefits, a rehabilitation plan, an additional 10 weeks of benefits while waiting for the plan to begin, and 8 weeks of job placement benefits.<sup>94</sup> Legislation removed the 8- and 10-week payments but maintained job replacement benefits for 104 weeks. The rehabilitation plan was a new requirement that reduced a worker's wage loss and specified

that the plan must begin within 78 weeks of reaching maximum medical healing and be completed within 26 weeks of the anticipated completion date.

### **1997 Legislature**

Senate Bill No. 67<sup>95</sup> provided for termination of the old fund liability tax on employers, employees, and self-employed persons as soon as the old fund became adequately funded; merged the old and new funds and transferred \$63.8 million to the old fund account; and repaid the \$20 million to the general fund. Additionally, Senate Bill No. 67 removed limitation on payment of dividends by the new fund, allowed the calculation of investment income and operational expense, and allowed the State Fund to contract with licensed insurance agents for the sale of State Fund insurance policies. The bill increased State Fund board of directors from five to seven members, provided State Fund customers with the option of multistate coverage, and allowed the State Fund to prepare a joint fraud office budget with the Department of Justice and the Department of Labor and Industry.

The legislation also clarified the definition of "dependent" for fatal injury beneficiary claims, provided that a worker who has not reached maximum healing but who is released by a treating physician and refuses the offer of employment in a modified or alternative position at an equivalent or higher wage is not eligible for temporary partial or temporary total disability benefits, and adjusted the lifting requirement for light activity for permanent partial disability benefits. The bill increased access to rehabilitation benefits and defined "treating physician" to include those physicians licensed in other states. It included psychologists and functional capacity evaluations and provided for an examination by a licensed physician in another state when requested by the insurer. Senate Bill No. 67 also provided for fraud investigation and prosecution for the uninsured employers' fund by the Department of Justice and limited the time for bringing an action to resolve a benefits dispute.

Other legislation<sup>96</sup> clarified the process for paying rehabilitation benefits to disabled workers' compensation claimants injured on or before June 30, 1997; limited funding for certain rehabilitation benefit payments; and provided for direct payment of rehabilitation benefits by insurers to disabled workers insured on or after July 1, 1997. The 1997 Legislature also redefined the definition of "treating physician" to include an advanced nurse practitioner or a clinical nurse specialist .<sup>97</sup>

### **1999 Legislature**

During the 1999 session, the State Fund provided a report<sup>98</sup> to members of the Senate Labor and Employment Relations Committee, which summarized and compared Montana's premium rates, benefit levels for permanent total, permanent partial, and temporary total indemnity claims and the frequency of claims for each lost time claim with those of other states in the region. By the end of the session, the Legislature had enacted three bills related to workers' compensation, only two bills which provisions related directly to benefits, claims, or premiums. Senate Bill No. 117,<sup>99</sup> which, among other procedural changes, provided for payment of benefits in a disputed claim prior to mediation and specified termination of benefits after mediation. Senate Bill No. 68<sup>100</sup> clarified the current law related to payment of dividends by the State Fund, required use of the National Association of Insurance Commissioners' risk-based capital requirements in setting rates, and eliminated the State Fund's authority to assess an additional 20% surcharge on premiums payable to the State Fund by high-loss employers..

However, the issue of the adequacy of benefit levels was brought to the forefront in 1999, not by legislation that passed, but rather by two bills that failed. Senate Bill 389 and Senate Bill 508 were tabled in Committee, but were primarily responsible for the passage of Senate Joint Resolution 15.

Senate Bill 389 was introduced by Senator Ellingson, who argued that in reforming the Workers' Compensation system, the Legislature had "gone too far in cutting benefits to workers".<sup>101</sup>



As introduced, Senate Bill 389 proposed to eliminate the cap on temporary total disability benefits, providing that benefits may not exceed the state's average weekly wage at the time of injury; to eliminate the requirement of an actual wage loss for compensation; to extend the permanent partial disability award from 350 to 500 weeks; to allow the injured worker, rather than the insurer, to designate a rehabilitation provider; and to eliminate the requirement of an actual wage loss before a worker would be entitled to rehabilitation benefits. Senate Bill 389 was tabled in the Senate Business and Industry Committee.

In introducing Senate Bill No. 508, Senator Cocchiarella argued that the 1991 reduction from 500 weeks to 350 weeks for calculation of a permanent partial disability award coupled with the 1995 changes in disability impairment ratings, had negatively impacted severely injured workers in the state.<sup>102</sup> As introduced, Senate Bill No. 508 proposed to increase the weeks from 350 to 400. Senator Cocchiarella's bill was tabled in the Senate Labor and Employment Relations Committee.

The sponsors of Senate Bill 389 and Senate Bill 508, along with labor leaders, argued for restoring balance to the workers' compensation system and claimed that a positive business environment cannot be created "if we are basing our competitiveness upon the backs of the workers who are not adequately compensated".<sup>103</sup> Failure to address the issue also ignored the state's obligation to take care of injured workers and subjected the exclusive remedy provision to possible legal challenge.<sup>104</sup> However, since the Senate Labor and Employment Relations Committee had no data or other information on whether the current benefits paid injured workers in the various categories were adequate or needed adjustment, the Committee requested and enacted Senate Joint Resolution No. 15.

#### Senate Joint Resolution No. 15

Senate Joint Resolution No. 15 requested that the appropriate interim committee study the current workers' compensation benefit levels for permanent total, permanent partial, and temporary total indemnity claims and the frequency of claims for each lost time claim, and report to the 2001 Legislature on whether any adjustment of benefits in each category was advisable. The resolution also asked for study and recommendations for reducing the frequency of all injury claims, with particular focus on reducing the high number of permanent partial indemnity claims.

## **CONCLUSION**

The 1987 Legislature enacted legislation that reformed the workers' compensation system and impacted the level of benefits and frequency of claims filed by injured workers. Additional legislation affecting benefit levels and claims occurred in the 1989 special session, which froze benefit levels, and again in the 1991 session, which addressed permanent partial and rehabilitation benefits and eligibility for temporary total disability benefits. In 1993, the Legislature increased a 1990 tax placed on employers and imposed a new tax on employees to address the old fund unfunded liability and enacted legislation to address safety, medical cost containment, and fraud within the workers' compensation system.

Legislation during the 1995 legislative session directly affected benefit levels and frequency of claims by changing eligibility for permanent partial disability benefits, redefining "disabled worker" and requiring an "actual wage loss" and "objective medical findings" to qualify for benefits, and revising lump-sum conversion and rehabilitation provisions. Solvency of the workers' compensation system allowed the 1997 Legislature to enact legislation to terminate the old fund liability tax on employers, employees, and self-employed persons and clarify rehabilitation benefits to injured workers. Efforts by legislators in the 1999 legislative session to restore benefits to injured workers was unsuccessful but led to passage of Senate Joint Resolution No. 15, which requested an interim study of benefit levels and claim frequency.

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**LEGISLATIVE HISTORY  
OF MAJOR WORKERS' COMPENSATION  
LEGISLATION AFFECTING  
BENEFIT LEVELS  
AND  
CLAIM FREQUENCY**

**1987 - 99**

**January 2000**



**Published By**

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1. Executive Order 1-85, Office of the Governor, State of Montana (Jan. 15, 1985).
2. "The 1987 Amendments to the Montana Workers' Compensation Act--From the Employer's Perspective", Luck, 50 Mont. L. Rev. 103 (1989).
3. Ibid., footnote no. 2.
4. Ibid.
5. Ibid., footnote no. 5.
6. Executive Order 1-85 (Jan. 15, 1985).
7. "Workers' Compensation Advisory Council, Recommendations For Changes In The Montana System", June 23, 1986.
8. Senate Bill No. 330 (1987).
9. Senate Bill No. 315 (Ch. 464, L. 1987).
10. Mont. Code Ann. 39-71-119 (1985).
11. Davis v. Jones, 216 M 300, 701 P2d 351 (1985).
12. Wise v. Perkins, 202 M 157, 656 P2d 816 (1983).
13. Hoehne v. Granite Lumber Co., 189 M 221, 615 P2d 863 (1980).
14. Robins v. Ogle, 157 M 328, 485 P2d 692 (1971).
15. Tocco v. Great Falls, 220 M 221, 714 P2d 160 (1986).
16. Shepard v. Midland Foods, Inc., 205 M 146, 666 P2d 758 (1983).
17. Snyder v. San Francisco Feed & Grain, 230 M 16, 748 P2d 924 (1987).
18. Mont. Code Ann. 39-71-119 (1987).
19. "The New Workers' Compensation Act--Something for All Montanans to Be Ashamed Of ", Trieweiler, 50 Mont. L. Rev. 83, 86 (1989).
20. Mont. Code Ann. 39-71-119 (1987).
21. Mont. Code Ann. 39-71-116 (1985).

22. *Shaffer v. Midland Empire Packing Co.*, 127 M 211, 214, 259 P2d 340, 342 (1953).
23. Mont. Code Ann. 39-71-116(14) (1987).
24. Mont. Code Ann. 39-71-116(13) (1985).
25. *Coles v. Seven Eleven Stores*, 217 M 343, 705 P2d 1048 (1985).
26. *Id.*, at 347, 705 P2d at 1051, citing *Metzger v. Chemetron Corp.*, 212 M 351, 687 P2d 1033, 1036 (1984).
27. Mont. Code Ann. 39-71-1011 (1987).
28. "The 1987 Amendments to the Montana Workers' Compensation Act--From the Employer's Perspective, Luck, 50 Mont. L. Rev. 103, 112 (1989).
29. Mont. Code Ann. 39-71-703 (1985).
30. See *McDonald v. B.N. Transp., Inc.*, 208 M 470, 679 P2d 1188 (1984).
31. Under previous law, a determination of permanent total disability required the establishment by the claimant of (a) what jobs were included in his normal labor market before the injury; and (b) the total inability of the claimant to engage in any such normal labor market jobs due to the disability resulting from the industrial injury. See *Metzger v. Chemetron Corp.*, 212 M 351, 687 P2d 1033 (1984). The court applied the "normal labor market" on a limited geographical area or a reasonable commuting distance.
32. Mont. Code Ann. 39-71-705 (1985). The new section 39-71-703 (1987) does not mention scheduled injuries.
33. Mont. Code Ann. 39-71-703(1)(b) (1987).
34. Mon. Code Ann. 39-71-1023 (1987).
35. Mont. Code Ann. 39-71-1024, 1025 (1987).
36. Mont. Code Ann. 39-71-741 (1985).
37. *Utick v. Utick*, 181 M 351, 593 P2d 739 (1979).
38. *Id.* See also *Kustudia v. Indus. Accident Bd.*, 127 M 115, 258 P2d 965, 969 (1953); *Buckman v. Montana Deaconess Hosp.*, 224 M 318, 730 P2d 380 (1986).
39. *Hock v. Lienco Cedar Prod.*, 194 M 131, 634 P2d 1174 (1981).

40. Polick v. Whalen's O.K. Tire Warehouse, 203 M 280, 661 P2d 38 (1983).
41. Willoughby v. Arthur G. McKee & Co., 187 M 253, 609 P2d 700 (1980).
42. Utick v. Utick, 181 M 351, 593 P2d 739 (1979).
43. Kent v. Sievert, 158 M 79, 80-81, 489 P2d 104, 105 (1971).
44. Belton v. Carlton Transp., 220 M 194, 714 P2d 148, 150 (1986).
45. Laukaitis v. Sisters of Charity of Leavenworth, 135 M 469, 474, 342 P2d 752, 755 (1959).
46. Mont. Code Ann. 39-71-741 (1987).
47. As of 1989, other states include Alabama, Alaska, Arizona, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Texas, and Virginia. See footnote no. 24, "1987 Changes to Lump-Sum Payment Provisions in the Montana Workers' Compensation Act", Smith, 50 Mont. L. Rev. 119, 121 (1989).
48. Mont. Code Ann. 39-71-741(5) (1985).
49. Mont. Code Ann. 39-71-741(1) (1987).
50. Mont. Code Ann. 39-71-741 (1) through (4) (1987).
51. Mont. Code Ann. 39-71-741 (1987), contains no provision regarding discounting, but since lump-sum payments for permanent total disability are capped at \$20,000 and all other forms of lump-sum payments are subject to employer or insurer agreement, it is likely that an employer or insurer will not agree to an amount exceeding the present value of future benefits.
52. Mont. Code Ann. 39-71-611, 612 (1985).
53. Wight v. Hughes Livestock Co., Inc., 204 M 98, 664 P2d 303 (1983).
54. Mont. Code Ann. 39-71-614 (1987).
55. ARM 24.29.3801 (1987).
56. Mont. Code Ann. 39-71-611, 612 (1987).
57. See "1987 Changes to Lump Sum Payment Provisions in the Montana Workers' Compensation Act", Smith, 50 Mont. L. Rev. 119, 125 (1989).
58. Senate Bill No. 428 (Ch. 613, L. 1989).

59. Senate Bill No. 278 (Ch. 244, L. 1989).
60. House Bill No. 33 (Ch. 161, L. 1989).
61. House Bill No. 347 (Ch. 333, L. 1989).
62. House Bill No. 155 (Ch. 184, L. 1989).
63. Senate Bill No. 315 (Ch. 641, L. 1989).
64. Senate Bill No. 372 (Ch. 427, L. 1989).
65. House Bill No. 56 (Ch. 9, June Sp. Sess. 1989).
66. Testimony by Representative Driscoll on House Bill No. 56, First Sp. Sess., Joint House and Senate Labor and Employment Committees, June 27, 1989.
67. Ibid.
68. House Bill No. 837 (Ch. 574, L. 1991).
69. Testimony by Norm Grosfield on House Bill No. 837, Senate Labor and Employment Relations Committee, March 26, 1991.
70. House Bill No. 280 (Ch. 52, L. 1991).
71. Testimony by Representative Thomas on House Bill No. 280, House Labor and Employment Relations Committee, January 31, 1991.
72. House Bill No. 2 (Ch. 4, Sp. L. May 1990).
73. Testimony relating to \$400 million deficit by Rick Hill, Governor's Office, on House Bill No. 504 before the Senate Select Committee on Workers' Compensation, April 1, 1993; additional comments by Scott Seacat, Legislative Auditor, projecting possible continuation of fund deterioration, placing deficit between \$406 million and \$475 million.
74. House Bill No. 504 (Ch. 637, L. 1993).
75. Testimony on House Bill No. 504 by Don Judge, Ex. Sec., Mont. State AFL-CIO, Senate Select Committee on Workers' Compensation, April 1, 1993.
76. Senate Bill No. 163 (Ch. 295, L. 1993).
77. Senate Bill No. 164 (Ch. 296, L. 1993).

78. "Workers' Compensation: Alternatives and Reform Oversight", A Report to the Governor and the 54th Legislature from the Joint Subcommittee on Workers' Compensation Alternatives, Fox, Montana Legislative Council, 44-47 (November 1994).
79. Information Provided by State Fund, December 10, 1999.
80. House Bill No. 526 (Ch. 410, L. 1993).
81. Senate Bill No. 347 (Ch. 628, L. 1993).
82. "Workers' Compensation: Alternatives and Reform Oversight", A Report to the Governor and the 54th Legislature from the Joint Subcommittee on Workers' Compensation Alternatives, Fox, Montana Legislative Council, 43 (November 1994).
83. Ibid.
84. Ibid.
85. Senate Bill No. 375 (Ch. 243, L. 1995).
86. Testimony on Senate Bill No. 375 by Nancy Butler, State Fund General Counsel, Senate Labor and Employment Relations Committee, February 16, 1995.
87. Mont. Code Ann. 39-71-116(1) (1995).
88. Testimony of Chuck Hunter, Department of Labor and Industry, Senate Labor and Employment Relations Committee, February 16, 1995.
89. Mont. Code Ann. 39-71-116(15) (1995).
90. Mont. Code Ann. 39-71-741 (1995).
91. Mont. Code Ann. 39-71-2001 (1995) (renumbered 39-71-1006).
92. Mont. Code Ann. 39-71-1011(2) (1993).
93. Mont. Code Ann. 39-71-1001(2) (1995).
94. Testimony on Senate Bill No. 755 by Nancy Butler, State Fund General Counsel, Senate Labor and Employment Relations Committee, February 16, 1995.
95. Senate Bill No. 67 (Ch. 276, L. 1997).
96. Senate Bill No. 62 (Ch. 122, L. 1997).



97. House Bill No. 519 (Ch. 404, L. 1997).
98. "Montana Workers' Compensation System Results", prepared by National Council on Compensation Insurance (NCCI), January 1999.
99. Senate Bill No. 117 (Ch. 377, L. 1999).
100. Senate Bill No. 68 (Ch. 407, L. 1999).
101. Testimony on Senate Bill No. 389 by Senator Ellingson, Senate Business and Industry Committee, February 9, 1999.
102. Testimony on Senate Bill No. 508 by Senator Cocchiarella, Senate Labor and Employment Relations Committee, February 18, 1999.
103. Closing testimony on Senate Bill No. 389 by Senator Ellingson, Senate Business and Industry Committee, February 9, 1999.
104. Ibid.