THE MONTANA WORKERS' COMPENSATION ACT

AND THE APPLICABILITY OF THE EXCLUSIVE REMEDY RULE

Prepared by

Eddye McClure
Staff Attorney
Montana Legislative Services Division

February 2000

INTRODUCTION

This memorandum was prepared in response to a request from the Senate Joint Resolution No. 15 Subcommittee, which is studying workers' compensation benefits and claim frequency. The Subcommittee requested general information related to the exclusive remedy rule of Montana's Workers' Compensation Act and an analysis of court decisions focusing on the question: Is there any evidence that Montana's exclusive remedy rule may be in jeopardy as a result of the benefit levels being paid to injured workers?

Part I will provide a brief history of the workers' compensation system and the exclusive remedy rule in Montana, while Part II will examine the application of the exclusive remedy rule by the Montana Supreme Court and discuss those circumstances in which the Montana Supreme Court has ruled that the exclusive remedy rule is not a bar to a tort action by an injured employee. Because a workers' compensation system is designed to meet the unique needs and philosophies of each state, this memorandum will focus primarily on Montana law and the major decisions of the Montana Supreme Court related to the exclusive remedy rule. However, because court decisions in other states have the potential of affecting workers' compensation issues in Montana, Part III will examine the exclusive remedy challenge currently before the Oregon Supreme Court. A conclusion will summarize issues related to the exclusive remedy rule and offer the Committee a recommendation related to the exclusive remedy rule as it relates to Senate Joint Resolution No. 15.

PART I
Overview of Workers' Compensation Act

Before the development of the workers' compensation system, it was a well-established common-law principle that a master or employer was responsible for the injury or death of an employee resulting from a negligent act. In the wake of the industrial revolution, work-related injuries increased. As a result, it soon became apparent that some system was needed to ensure that a worker injured on the job would be compensated. Prior to the adoption of a workers' compensation system, an employee injured on the job faced an almost insurmountable task in attempting to recover compensation for the employee's injuries because, in addition to the cost of litigation, the employer could raise the traditional common-law defenses of contributory negligence, assumption of risk, and the fellow servant rule to defeat the claim or delay payment. Employees who received any compensation were often forced to settle out of court for sums that were out of proportion to the degree of their injuries.

Workers' compensation laws, adopted by all states between 1911 and 1940, were designed to achieve two goals: to provide medical care and income to workers injured on the job and death benefits to families of workers killed on the job and to protect employers from costly and unpredictable lawsuits by workers. In the initial stages, worker's compensation laws faced constitutional challenges centered on issues of due process, equal protection, impairment of contract obligations, trial by jury, and the privileges and immunities of the citizens of the different states. As a result, the majority of states, including Montana, enacted constitutional amendments that eliminated the constitutional challenges surrounding workers' compensation laws. Today, each state has its own web of workers' compensation laws and regulations that reflects that state's needs, philosophy, and policies.

Montana was one of the first states to recognize the needs of injured workers and, in 1909, the Legislature enacted the State Accident Insurance and Total Permanent Disability Fund[1] for coal miners. Under the law, the employer and the employee were both required to contribute to a state fund and a covered employee or the employee's beneficiaries could elect to sue at common law or receive compensation from the fund. Workers, however, could not receive the benefits of both.

In 1911, the Montana Supreme Court declared that the Act unconstitutionally denied employers equal protection of the laws because there was a potential for double liability as employers had to contribute to the state compensation fund and additionally were open to suit if an employee or beneficiary so elected.[2] In 1915, the Montana Legislature enacted a second and more comprehensive Workers' Compensation Act[3] that withstood a constitutional challenge[4] and has become the framework for Montana's current Act.

The Role of the Exclusive Remedy Rule

Virtually all workers' compensation systems in the United States contain some type of exclusive remedy provision providing, with few exceptions, that workers' compensation is the *only* remedy available to the injured employee.[5] This exclusive remedy rule is perhaps the most firmly entrenched doctrine in workers' compensation law.

In Montana, the concept of exclusive remedy for an employee who is injured or killed in the scope of employment has its genesis in Article II, section 16, of the Montana Constitution, which provides, in part:

> Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable ***except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state***. (emphasis added)

Montana's constitutional provision was implemented through section 39-71-411, MCA, which reads as follows:

> ***For all employments covered under the Workers' Compensation Act*** or for which an election has been made for coverage under this chapter, ***the provisions of this chapter are exclusive***. Except as provided in part 5 of this chapter for uninsured employers and except as otherwise provided in the Workers' Compensation Act, ***an employer is not subject to any liability whatever for the death of or personal injury to an employee covered by the Workers' Compensation Act or for any claims for contribution or indemnity asserted by a third person from whom damages are sought on account of such injuries or death***. The Workers' Compensation Act binds the employee himself, and in case of

> death binds his personal representative and all persons having any right or claim to compensation for his injury or death, as well as the employer and the servants and employees of such employer and those conducting his business during liquidation, bankruptcy, or insolvency. (emphasis added)

Since adoption of this statute, the Montana Supreme Court has many times held that the Montana Workers' Compensation Act provides the exclusive remedy for employees injured on the job.[6]

PART II

Workers' compensation laws are often described as a *quid pro quo* exchange of rights and remedy, intended to serve employees by relieving them of the responsibility of proving employer negligence and to serve employers by relieving them of liability from common-law suits involving negligence. As one legal scholar observed:

> If . . . the exclusiveness defense is a "part of the *quid pro quo* by which the sacrifices and gains of employees and employers are to some extent put in balance," it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.[7]

Since workers' compensation laws are intended to compensate and protect for negligence-based injuries, the question has then shifted to the courts to determine what constitutes employer "negligence" for the purpose of applying the exclusive remedy rule and to consider under what circumstances the exclusive remedy rule cannot be used to bar an employee injured on the job from filing a tort claim for damages.

When Does the Exclusive Remedy Rule Not Apply?

<u>The Dual Capacity Doctrine</u>

One exception to the exclusive remedy rule is the "dual capacity doctrine", which holds that "an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers upon him obligations independent of those imposed on him as an employer".[8] The dual capacity doctrine is most often argued in cases involving negligent medical treatment and in cases of products liability.

The Montana Supreme Court adopted the dual capacity doctrine in 1940 in Vesel v. Jardine Mining Co..[9] Vesel, who was employed in the employer's mine, was struck in the eye by a steel fragment that separated from Vesel's drill. Vesel sought the aid of the company's foreman who, on behalf of the employer, "voluntarily and gratuitously assumed to render medical aid and attention" to Vesel.[10] The foreman took Vesel for treatment to a woman who had no medial qualifications. Due to the woman's negligence, Vesel lost the sight in the injured eye.

In outlining the types of acts that would remove an employer from the protection of the exclusive remedy statute, the Montana Supreme Court stated that "[i]t was never intended or contemplated that an employer could hide behind the Compensation Act and thereby escape liability from his negligent or malicious acts towards an employee for an act having no connection with the course of employment".[11] Since the Vesel decision in 1940, however, the Montana Supreme Court has not really addressed the dual capacity doctrine.

Employer Conduct: "True Intentional Tort"

In the majority of jurisdictions, including Montana, courts are unanimous in allowing an injured worker to sue an employer when the employee's injury is the result of the employer's commission of an intentional tort. In Montana, section 39-71-413, MCA, provides:

> If an employee receives an injury while performing the duties of his employment and the injury or injuries so received by the employee are ***caused by an intentional and malicious act or omission*** of a servant or employee of his employer, then the employee or in the cause of his death his heirs or personal representatives shall, ***in addition to the right to receive compensation under the Workers' Compensation Act, have a right to prosecute any cause of action he may have for damages*** against the servants or employees of his employer causing the injury. (emphasis added).

However, the question that arises in cases alleging misconduct by an employer is whether the conduct is "intentional". Courts frequently struggle with the issue of defining "intentional" and have employed terms ranging from merely negligent, negligent, and grossly negligent to culpable negligence, willful, wanton, and reckless misconduct, and intentional misconduct.[12]

In 1971, the Montana Supreme Court had its first opportunity to distinguish between a negligent and reckless employer in Enberg v. The Anaconda Co..[13] In Enberg, a plaintiff filed an action after the plaintiff's husband died in a mine explosion that had occurred after several mine fires. Even though the plaintiff had alleged that The Anaconda Company had violated safety statutes regarding the storage of explosives, had breached its own safety regulations, and had continued blasting operations despite serious and ongoing mine fires, the Montana Supreme Court affirmed the District Court's dismissal of the employee's tort action, ruling that the plaintiff's sole remedy was workers' compensation. Quoting a well-respected workers' compensation treatise, the Court ruled that the employee's death was "accidental" and stated:

> [W]hat is being tested here is not the degree of gravity or depravity of the employer's conduct but rather the narrow issue of intentional versus accidental quality of the precise event producing injury. The intentional removal of a safety devise or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an injury does happen, that this was ***deliberate infliction of harm comparable to an intentional left jab to the chin***.[14] (emphasis added)

Similarly, in 1980, the Montana Supreme Court, in Great Western Sugar Co. v. District Court,[15] held that the exclusion to the exclusive remedy rule does not exist unless evidence shows that the person injuring the employee intended to do so. In Great Western, the plaintiff alleged that the plaintiff's injuries occurred during the course of employment when the plaintiff's employer required the plaintiff to work with equipment on which the plaintiff was not qualified and that the plaintiff was untrained to operate and when the employer knew that the equipment was extremely hazardous. In dismissing the claim, the Montana Supreme Court held that allegations of negligence, no matter how wanton, are insufficient to avoid the exclusive remedy of the Workers' Compensation Act. Specifically, the Court stated:

> [T]he "intentional harm" which removes an employer from the protection of the exclusivity clause of the Workers' Compensation Act is such harm as it ***maliciously and specifically directed at an employee, or class of employee*** out of

> which such specific intentional harm the employee receives injuries as a proximate result. Any incident involving a lesser degree of intent or general degree of negligence ***not pointed specifically and directly at the injured employee*** is barred by the exclusivity clause as a basis for recovery against the employer outside the Workers' Compensation Act.[16] (emphasis added)

Three years later, however, the Montana Supreme Court, in Millers Mutual Insurance Co. v. Strainer,[17] held that the language of section 39-71-413, MCA, "refers to an intentional act ***without regard to intending the results of the act***".

In 1985, however, the Court, in Noonan v. Spring Creek Forest Products, Inc.,[18] ignored its holding in Millers Mutual and returned to its holding in Great Western Sugar. In Noonan, the plaintiff urged the Court to adopt the minority rule or "substantial certainty" doctrine to determine employer intent, under which an employee can establish the exception to the exclusivity clause by showing that the employer knows or should have known that harm is a "substantially certain consequence of the unsafe workplace" and allows the hazards to exist anyway. Although the Court believed that the employer in Noonan had operated a hazardous and dangerous workplace that had resulted in an unusual number of employee injuries, the Court declined to adopt the "substantial certainty" doctrine and reaffirmed that a specific intent to injure the employee was necessary to overcome the exclusive remedy rule. As a result, Montana continues to apply the "majority rule", which holds that "failure to provide a safe workplace" does not constitute an intentional tort. Instead, as with a majority of other jurisdictions, Montana limits an employee's recovery to cases in which the employer commits a "true intentional tort", such as fraudulent concealment or an assault and battery.

The Montana Supreme Court recognized this very narrow exception to the exclusive remedy rule in 1986 in Sitzman v. Schumaker.[19] In Sitzman, the plaintiff was a ranch hand who admittedly did not get along with his employer. Following an argument at work, the employer picked up a 4-foot length of 2-inch pipe and struck the employee in the head. The employee applied for and received workers' compensation benefits, then subsequently filed an action against the employer for damages. The District Court dismissed the suit, holding that filing for benefits exclusively subjected the employee to the provisions of the Workers' Compensation Act. In reversing the decision and allowing the employee to pursue the tort action, the Montana Supreme Court held that the exclusive remedy provision did not preclude actions when there was evidence that the employee suffered injuries as a result of an assault and battery committed personally by

the employer upon an employee who may have filed for and received benefits. Quoting Great Western Sugar, the Court reaffirmed that the intentional harm that removes an employer from the protection of the exclusivity clause of the Workers' Compensation Act is such harm as is "maliciously and specifically directed at an employee . . . out of which such specific intentional harm the employee receives injuries as a proximate result".[20]

In 1993, in Blythe v. Radiometer America, Inc.,[21] the Montana Supreme Court reaffirmed the "true intentional tort" rule established in Great Western Sugar and followed in Noonan and other cases by dismissing a claim against an employer when the employee had not provided proof that an intent to harm had been directed at the specific employee who had been injured. Additionally, the Court held that the type of malice necessary to satisfy section 39-71-413, MCA, was that described in section 1-1-204(3), MCA, which defines malice as "a wish to vex, annoy, or injure another person" and not actual malice, as described in section 27-1-221(2), MCA, which provides that a person acts with malice:

> [I]f the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:
>
> (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff or;
>
> (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

In a dissent to the majority's decision in Blythe, Justice Trieweiler argued that the plain language of section 39-71-413, MCA, did not require a specific intent to injure the employee and therefore it was more reasonable and logical to apply the statutory definition of malice found in section 27-1-221(2), MCA, and that Millers Mutual, not Great Western Sugar, more accurately applied the language of section 39-71-413, MCA, and should be followed.

However, without resolving the inconsistencies in prior decisions, the Montana Supreme Court in 1997 reaffirmed its holding in Great Western Sugar in Schmidt v. State [22] by holding that allegations of negligence, no matter how wanton, are insufficient to avoid the exclusive remedy of the Workers' Compensation Act. In Schmidt, a plaintiff whose husband had been killed on the job argued that the employer was liable for damages outside the Workers' Compensation Act because the state's employee, the plaintiff's husband's supervisor, had acted intentionally and

maliciously in ordering the husband to use an old tractor to accomplish a particular task. Schmidt argued that it made no difference whether the Court applied the definition of malice in section 27-1-221(2), MCA, or the definition found in section 1-1-204(3), MCA, because the requirement of malice was satisfied based on the employer's violation of the Montana Safety Act, which required the employer to provide and require "the use of health and safety devices" and to "do any other thing reasonably necessary to protect the life, health, and safety of employees".

However, the Montana Supreme Court held that to succeed in avoiding the exclusivity provision, the plaintiff must show that the employer's employee or agent intended the result of any intentional act. And, the Court added, a violation of the Montana Safety Act, by itself, only indicated negligence, not an intentional act.

Noncompensable Injuries: No *Quid Pro Quo*

In each case discussing the exclusive remedy rule, the Montana Supreme Court has reviewed the history of the Workers' Compensation Act and emphasized the compromise between industry and labor in which workers received guaranteed no-fault recovery and industry was relieved of the possibility of large damage awards in the tort system. As stated in Stratemeyer v. Lincoln County (Stratemeyer II):[23]

> The *quid pro quo* between employers and employees is central to the Act; thus it is axiomatic that there must be some possibility of recovery by the employee for the compromise to hold.[24]

In 1993, the Montana Legislature amended the public policy provision of its Workers' Compensation Act by providing in section 39-71-105(5), MCA:

> . . . It is the intent of the legislature that ***stress claims, often referred to as "mental-mental claims" and "mental-physical claims", are not compensable under Montana's workers' compensation and occupational disease laws***. The legislature recognizes that these claims are difficult to objectively verify and that the claims have a potential to place an economic burden on the workers' compensation and occupational disease system. The legislature also recognizes that there are other states that do not provide compensation for various categories of stress claims and that stress claims have presented economic problems for certain other jurisdictions. In addition, not all injuries are compensable under the present

> system, as is the case with repetitive injury claims, and it is within the legislature's authority to define the limits of the workers' compensation and occupational disease system.

The Montana Supreme Court applied this principle in 1993 in Stratemeyer v. Lincoln County and MACO Workers' Compensation Trust (Stratemeyer I).[25] Stratemeyer, an 8-year veteran of the Lincoln County Sheriff's Department, responded to a suicide call. En route to the scene, Stratemeyer learned that the victim, a teenaged girl, was still alive. Upon arriving at the victim's home, Stratemeyer found the teenager, who had shot herself in the head, covered in blood and in the arms of her father. Stratemeyer forcibly removed the girl from her father's arms and began administering cardiopulmonary resuscitation. When the ambulance arrived, Stratemeyer assisted in loading the girl onto the gurney and into the ambulance. Later, Stratemeyer learned that the girl had died and was thereafter plagued by thoughts of the girl's suicide and his decision to forcibly tear the victim from her father's arms. Subsequently, Stratemeyer experienced a lack of concentration and mental disorientation and was diagnosed with post traumatic stress disorder. Unable to return to work, Stratemeyer filed a workers' compensation claim for wage loss and medical expenses.

In denying the claim, the Workers' Compensation Court determined that Stratemeyer had not suffered an "injury" as defined by Montana law, but held that the exclusion of mental stress from the definition of "injury" unconstitutionally violated the equal protection clause of the Montana Constitution. On appeal, the Montana Supreme Court reversed, ruling that the exclusion of mental stress was not unconstitutional as it was rationally related to the legitimate governmental objective of controlling the costs of the workers' compensation program and providing benefits.[26]

While the case was pending before the Montana Supreme Court, Stratemeyer filed a tort claim in District Court against Lincoln County arguing that Lincoln County failed to train, supervise, treat, and debrief the officer following the incident. Stratemeyer also argued that the District Court interpreted the Montana Safety Act too narrowly when it construed it to include only physical harm. The District Court held that since Stratemeyer's "employment" was covered under the Act, the Act therefore provided the exclusive remedy.

On appeal, the Montana Supreme Court reversed the lower court's decision in Stratemeyer II,[27] ruling that by definition, the mental "injury" Stratemeyer suffered was expressly excluded

from coverage under the Act and citing as evidence the policy statement adopted by the 1993 Legislature. Since there could be no *quid pro quo* for a worker who suffered "mental-mental" injuries, the exclusive remedy could not shield the employer from tort liability.

Later in 1996, the Montana Supreme Court extended the holding of Stratemeyer II slightly in Kleinhesselink v. Chevron U.S.A..[28] Kleinhesselink, a safety coordinator at the Stillwater Mine near Nye, brought an action for damages against the mine to recover for psychological injuries suffered from deaths and injuries at the mine allegedly resulting from the mine's failure to follow Kleinhesselink's safety recommendations. When Kleinhesselink's requests for workers' compensation benefits were denied, Kleinhesselink filed a complaint alleging negligence against Chevron and the other defendants. Chevron filed a motion to dismiss, arguing that the exclusive remedy rule bars Kleinhesselink from filing a negligence claim if the employer has secured workers' compensation insurance. The District Court agreed with Chevron and dismissed Kleinhesselink's negligence action.

On appeal, the Montana Supreme Court reversed, ruling that Montana law excludes both physical and mental conditions arising from emotional or mental stress from coverage under the Workers' Compensation Act. As in Stratemeyer II, the Court ruled that since Kleinhesselink was clearly precluded from recovery under the Act for the alleged injuries, he should be allowed to pursue a negligence tort claim.[29]

In 1997, in Yarborough v. Montana Municipal Insurance Authority,[30] a Billings firefighter, responding to a residential fire, received first- and second-degree burns on his hands and face when a "fireball" exploded. After the accident, Yarborough returned to work without restrictions, but subsequently filed for workers' compensation benefits after being diagnosed as suffering from post traumatic stress disorder as a result of the accident. In denying the claim, the Workers' Compensation Court held that Yarborough's post traumatic stress disorder arose from "emotional or mental stress" and was excluded from the definition of "injury" and thus was noncompensable under Montana law.

On appeal, the Montana Supreme Court affirmed, ruling that just as in Stratemeyer II and Kleinhesselink, Yarborough's post traumatic stress disorder did not arise from a physical stimulus, in this case the burns to his hands and face, as required by law, but rather arose from mental stress due to the explosion. Consequently, Yarborough's claims constituted a "mental-mental" injury,

which was excluded from the definition of "injury" under Montana's Workers' Compensation Act. Without the necessary *quid pro quo*, the Court ruled that Yarborough could pursue a tort action against the employer.

Inadequate Benefit Levels: "Unfair" *Quid Pro Quo*

To my knowledge, a Montana court has on only one occasion addressed a claim by a person arguing that an employer's immunity under the exclusive remedy rule of the Workers' Compensation Act should be removed because the benefit level provided by the Act was so inadequate. In Nelson v. Hawkins,[31] a 1999 United States District Court decision, Nelson was transporting a carnival ride by a tractor-trailer owned by Inland Empire when the vehicle rolled after the driver, Hawkins, was stung by a bee. While Hawkins was immediately killed, Nelson survived the accident but later died en route to the hospital. When an employee, without a beneficiary, dies as the result of a work-related accident, the Montana's Workers' Compensation Act provides for a lump-sum payment to the plaintiff's surviving parent or parents in the amount of a $3,000 death benefit, $1,400 for funeral expenses, and $240 for medical expenses.

Basing their arguments on the Court's earlier holdings in Stratemeyer II, Kleinhesselink, and Yarborough, Nelson's parents argued that when there is not a "fair" *quid pro quo* in the facts of a given case, then the employer's immunity under the exclusive remedy rule must be removed and the employee must be allowed to file a tort claim. In other words, the plaintiffs argued that "too little compensation amounts to no compensation". While sympathizing with what it characterized as "unconscionable" and "draconian" death benefits, the District Court denied the parent's "equitable" argument, ruling that unlike the situations in Stratemeyer II, Kleinhesselink, or Yarborough, Nelson's injury was covered by workers' compensation and the benefit statute cannot be construed to mean that a "bad benefit is the same as no benefit".[32]

PART III
Oregon Exclusive Remedy Challenge

In November 1999, the Oregon Supreme Court heard oral arguments regarding that state's exclusive remedy provision. In Smothers v. Gresham Transfer,[33] Smothers, a mechanic for a trucking firm, was found lying on the employer's lunchroom floor suffering from a respiratory illness caused by cleaning fluids. Smothers filed a workers' compensation claim for a lung

disorder because of the chemical exposure at work. In 1990, however, the state of Oregon had changed its law to exclude "pre-existing conditions" from coverage under its workers' compensation laws. The Oregon Workers' Compensation Board denied the claim, ruling that Smothers had not established "by a preponderance of the evidence" that the respiratory condition was compensable.

Smothers subsequently filed a tort suit against the employer for negligence on the theory that a tort action would be allowed under the exclusive remedy rule since no remedy existed for the injury under the state's workers' compensation laws. In 1997, however, the Oregon Court of Appeals affirmed dismissal of Smothers' tort claim,[34] citing the Oregon Legislature's 1995 amendment of the state's workers' compensation laws, which extended that state's exclusive remedy "to all injuries and to diseases, symptom complexes or similar conditions" arising out of employment ***"whether or not they are determined to be compensable under this chapter"***.[35] As a result, the Court ruled that Smothers had no remedy under the state's workers' compensation laws nor could Smothers file a tort claim. Smothers then filed an action with the Oregon Supreme Court, requesting that the Court rule the 1995 statute unconstitutional as the state's constitution guarantees that "every man shall have a remedy by due course of law for injury done him in person, property or reputation".[36] At this date, the Court has not issued a decision.

Unlike Oregon, Montana allows an employee whose injury is not compensable under the worker's compensation laws to file a tort action for recovery.

CONCLUSION

Workers' compensation laws, a compromise between industry and labor, created a "tradeoff" under which the system guaranteed employees injured on the job with some form of compensation in exchange for relinquishing potential tort claims against the employer. With this tradeoff, the injured employee is relieved from proving employer negligence and the employer forgoes the common-law defenses of contributory negligence, assumption of risk, and the fellow servant rule. As a result, with few exceptions, workers' compensation is the only remedy available to an injured employee.

Among the exceptions that remove an employer from the protection of the exclusive remedy, the Montana Supreme Court adopted and quickly abandoned the doctrine of "dual capacity", under which an injured employee could sue an employer acting in a capacity other than employer. As in a majority of courts, the Montana Supreme Court currently allows an employee to sue an employer when an injury is the result of a "true intentional tort", such as fraudulent concealment or an assault and battery, or in those cases in which an employee's injury cannot be compensated under the provisions of the Act. In the one Montana decision challenging the inadequacy of a benefit, the federal District Court denied a plaintiff's attempt to avoid the exclusive remedy rule by arguing that, by analogy, an inadequate benefit should be treated the same as no benefit.

Certainly, court decisions in other jurisdictions must be monitored and analyzed to determine their possible applicability to Montana's workers' compensation system. To my knowledge, however, there is no case currently pending in Montana or any other jurisdiction in which a plaintiff is challenging the exclusive remedy rule solely on the basis of the level of benefits paid to an injured employee. While the filing of such an individual claim or a class action suit based on benefit levels is always possible, the court, in my opinion, would be reluctant to "throw out" the exclusive remedy rule based solely on the level of benefits being paid. Such a decision would result in a return to the common-law tort system, which would again saddle the employee with the burden of establishing an employer's negligence, subject an employer to the possibility of large judgments, burden both with the risks and costs of litigation, and increase the pressure on already overworked courts. However, it would not be unlikely or even surprising if the Montana Supreme Court, provided with an opportunity, decided to reexamine the issue of employer conduct as it relates to the current "true intentional tort" standard or the definition of "malice", nor would it be surprising if the Court "carved out" new causes of action subjecting an employer to tort liability.

Therefore, if the Subcommittee decides to recommend legislation to the 2001 Legislature to increase workers' compensation benefit levels, that decision should be motivated by a factor other than the belief that a Montana court is on the verge of eliminating the exclusive remedy rule based solely on the level of workers' compensation benefits paid to injured workers.

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ENDNOTES

1. Chapter 67, L. 1909, p. 81.

2. Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 119 P. 554 (1911).

3. Chapter 96, L. 1915, p. 168.

4. Shea v. North-Butte Mining Co., 55 Mont. 522, 179 P. 499 (1919).

5. See "The Exclusivity Rule: Dual Capacity and the Reckless Employer", Bohyer, 47 Mont. L. Rev. 157, note 11 providing list of state exclusive remedy statutes.

6. See generally Wirta v. North Butte Mining Co., 64 Mont. 279, 210 P. 332 (1922); Enberg v. Anaconda Co., 158 Mont. 135, 489 P.2d 1036 (1971); Carlson v. The Anaconda Co., 165 Mont. 413, 529 P.2d 356 (1974); Brown v. Stauffer Chem. Co., 167 Mont. 418, 539 P.2d 374 (1975); Great W. Sugar Co. v. District Court, 188 Mont. 1, 610 P.2d 717 (1980); Iverson v. Argonaut Ins. Co., 198 Mont. 340, 645 P.2d 1366 (1982); Noonan v. Spring Creek Forest Prod., Inc., 216 Mont. 221, 700 P.2d 623 (1985).

7. 2A Arthur Larson, The Law of Workmen's Compensation, sec. 65.40 (perm. ed. rev. vol. 1995).

8. Bohyer, 47 Mont. L. Rev. 157, 162 (1986).

9. 110 Mont. 82, 100 P.2d 75 (1940); see also, Mitchell v. Shell Oil Co., 579 F. Supp. 1326, 41 St. Rep. 278 (D.C. Mont. 1984) (products liability suit by employee in which court questions whether dual capacity doctrine exists in Montana).

10. Id. at p. 84, 100 P.2d at p. 76. While the facts did not establish that the woman treating Vesel was an employee of the mining company, the Court believed the relationship was close enough to attribute the woman's negligent medical care to the employer.

11. Id. at p. 99, 100 P.2d at p. 83.

12. Bohyer, 47 Mont. L. Rev. 157, 167 (1986) (citing Noonan v. Spring Creek Forest Prod., Inc., 216 Mont. 221, 700 P.2d 623 (1985); Iverson v. Argonaut Ins. Co., 198 Mont. 340, 645 P.2d 1366 (1982); Great Western Sugar Co., 188 Mont. 1, 610 P.2d 717 (1980); Brown v. Stauffer Chemical Co., 167 Mont. 418, 539 P.2d 374 (1975)).

13. 158 Mont. 135, 489 P.2d 1036 (1971).

14. Id., at p. 137, 489 P.2d at p. 1037.

15. 188 Mont. 1, 610 P.2d 717 (1980).

16. Id. at p. 7, 610 P.2d at p. 720.

17. 204 Mont. 162, 663 P.2d 338 (1983).

18. 216 Mont. 221, 700 P.2d 623 (1985).

19. 221 Mont. 304, 718 P.2d 657 (1986).

20. Id. at p. 308, 718 P.2d at p. 659.

21. 262 Mont. 464, 866 P.2d 218 (1993).

22. 286 Mont. 98, 951 P.2d 23 (1997).

23. 276 Mont. 67, 915 P.2d 175 (1996).

24. Id. at p. 75, 915 P.2d at p. 179.

25. 259 Mont. 147, 855 P.2d 506 (1993).

26. Id.

27. See also, Buerkley v. Aspen Meadows Ltd. Partnership, 294 Mont. 263, 980 P.2d 1046 (1998) (allowing employee suit when employer deliberately avoided cost of insuring employee by failing to acknowledge employee's existence in payroll records).

28. 277 Mont. 158, 920 P.2d 108 (1996).

29. Id.

30. 282 Mont. 475, 938 P.2d 679 (1997).

31. 24 Mont. Fed. Rep. 446 (1999).

32. Id. at p. 452.

33. 149 Or. App. 49, 941 P.2d 1065 (1997).

34. Id.

35. Oregon Laws Chapter 332 (1995) amending ORS 656.018.

36. Article I, section 10, Oregon Constitution.