

Tweaking Workers' Compensation Statutes . . . And More

Seeking Simplicity and Compliance With Court Decisions

A Final Report on Senate Joint Resolution No. 17

Economic Affairs Interim Committee

Representative Joe McKenney, Presiding Officer
Senator Glenn Roush, Vice Presiding Officer

Prepared by
Pat Murdo, Research Analyst
and Eddy McClure, Staff Attorney

August 2004

**Economic Affairs Interim Committee
2003-04 Interim**

Members

Senator Sherm Anderson
(R-Deer Lodge)

Senator Jeff Mangan
(D-Great Falls)

Senator Glenn Roush
(D-Cut Bank) Vice Presiding Officer

Senator Mike Taylor
(R-Proctor)

Representative Nancy Rice-Fritz
(D-Missoula)

Representative Jim Keane
(D-Butte)

Representative Joe McKenney
(R-Great Falls) Presiding Officer

Representative Scott Mendenhall
(R-Clancy)

Committee Staff

Pat Murdo, Research Analyst
Bart Campbell, Staff Attorney
Eddy McClure, Staff Attorney
Dawn Field, Secretary

Montana Legislative Services Division

Lois A. Menzies, Executive Director
Gregory J. Petesch, Director, Office of Legal Services
David D. Bohyer, Director, Office of Research and Policy Analysis

Table of Contents

	Page
Executive Summary	1
I. History and Workplan	
II. Ad Hoc Working Group	
III. Simplification: Revising References and Repealing Redundancies	
IV. Reviewing Workers' Compensation Exclusions and Exemptions	
V. Addressing Montana Supreme Court Decisions on Occupational Disease	
VI. Proposed Legislation	
VII. Other Areas of Interest -- State Fund and Independent Contractors	
VIII. Summary and Conclusions	
Appendices:	
Appendix A - SJR 17	
Appendix B - List of exemptions under 39-71-401, MCA, with history	
Appendix C - Department of Labor proposals, LC 0188 and LC 0189	
Appendix D - Legislative proposals on exemptions	
Appendix E - Legislative proposals to meet Supreme Court decisions	
Appendix F - Letter from Sydney McKenna to EAIC, March 18, 2004	

Executive Summary

The Economic Affairs Interim Committee (EAIC) traditionally oversees workers' compensation issues, both those coming under its purview during monitoring of the Department of Labor and Industry (DOLI) and those accepted under an agreement with the State Administration and Veterans' Affairs Committee to monitor the Montana State Fund.¹ The assignment by the Legislative Council of a study on workers' compensation simplification and clarification, required by Senate Joint Resolution No. 17 (SJR 17), came naturally to the EAIC.

Based on SJR 17, the Committee directed staff to undertake three main tasks:

- simplify workers' compensation statutes and administrative rules;
- review statutory exemptions and exclusions; and
- address the lack of clarity arising from Montana Supreme Court decisions on the Occupational Disease Act of Montana and the Workers' Compensation Act.

Two threads of discussion developed among an ad hoc working group composed of insurance representatives, claims adjusters, trial attorneys, and DOLI workers' compensation staff, who met to provide information and recommendations on SJR 17. One thread was that tweaking workers' compensation laws for simplicity would not help as much as a complete rewrite of statutes. The other thread was a concern that any change would be problematic because those who are accustomed to working with workers' compensation laws now know where to look and what to expect; any change, they said, would cause confusion for them as well as result in possible unintended consequences or new litigation. Nevertheless, as a result of SJR 17, informal changes occurred in the ways that the DOLI and the Workers' Compensation Court provide information to potential claimants, and the EAIC agreed to draft legislation regarding clarification and other revisions recommended by the ad hoc working group.

¹For at least the past two interims, the Economic Affairs Interim Committee and the State Administration and Veterans' Affairs Committee have exchanged letters in which the Economic Affairs Interim Committee agrees to exercise monitoring functions for the Montana State Fund. For more details, see footnote No. 1 in the EAIC work plan at the EAIC web site: http://leg.mt.gov/css/committees/interim/2003_2004/econ_affairs/default.asp.

I. History and Workplan

In asking for a study to clarify workers' compensation laws in Montana, Senate Joint Resolution No. 17 listed a series of concerns regarding the costs of compliance with confusing, complicated workers' compensation laws and the increasing list of exemptions from the laws.² As used in this report and unless otherwise stated, the general reference to workers' compensation laws or statutes will include both the Workers' Compensation Act and the Occupational Disease Act of Montana (Title 39, chapters 71 and 72, respectively), because under 39-72-301, MCA, those who are subject to the Occupational Disease Act of Montana are "all employers and employees who now are or hereafter will be subject to the provisions of the Workers' Compensation Act of the state of Montana". Similarly, 39-72-310, MCA, states that the compensation plans provided under the Workers' Compensation Act are considered to also provide full coverage for claims under the occupational disease statutes. However, discussions of Montana Supreme Court decisions in the report delineate whether the subject is workers' compensation (injury) or occupational disease.

Constitutional Attention -- Workers' compensation laws have special recognition in Article II, section 16, of the Montana Constitution, which provides Montana workers covered by workers' compensation laws with an "exclusive remedy" in exchange for the constitutional right of "full legal redress for injury incurred in employment". The exclusive remedy means that in exchange for prompt, no-fault medical and wage-loss assistance, a worker agrees not to pursue a lawsuit against an employer for a workplace injury or occupational disease.

Differences Between Injury and Disease -- Workers' compensation laws have existed since 1915. The original act distinguishes between an injury caused by a "fortuitous event" and one contracted by disease.³ In 1937, the Legislature created a separate chapter under Title 39, MCA, to address benefits for one type of occupational disease, silicosis, defined as a "fibrotic condition of the lungs due to inhalation of silica dust".⁴ The 1959 Legislature created a separate chapter for occupational disease, which it defined as "all diseases arising out of or contracted from and in the course of employment". This retained the 1915 workers' compensation distinction between an identifiable event resulting in injury and multiple events that cause what

²Appendix A: Senate Joint Resolution No. 17.

³For more information on workers' compensation and occupational disease history and Montana Supreme Court decisions regarding differences in the workers' compensation and occupational disease statutes, see Eddy McClure, "Senate Joint Resolution No. 17 and the Occupational Disease Act", Legislative Services Division, February 2004, and Eddy McClure, "Legislative History of Major Workers' Compensation Legislation Affecting Benefits Levels and Claim Frequency, 1987-99", Legislative Services Division, January 2000.

⁴Title 39, chapter 73, part 1, MCA, addresses silicosis. Definitions are contained in 39-73-101, MCA.

is termed "disease". The 1987 Legislature later revised the 1959 definition to the current version contained in 39-72-102, MCA:

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

Frustrations Expressed in SJR 17 -- Confusion associated with workers' compensation statutes costs time and money for employers and claimants trying to understand the laws, according to the Independent Insurance Agents of Montana, who asked Senator Jon Tester to sponsor SJR 17 in the 2003 Legislature. The confusion has developed from several fronts. For example, one frequent question concerns who must be covered by workers' compensation. Over the years, the Legislature has passed an expanding number of exemptions to the general rule stated in 39-71-401(1) that "the Workers' Compensation Act applies to all employers, as defined in 39-71-117, and to all employees, as defined in 39-71-118". The definition of employee in 39-71-118, MCA, excludes certain people. In 39-71-401(2) at least 22 occupations are exempt from obtaining workers' compensation coverage. Another perceived need, outlined in SJR 17, is the clarification and simplification of the workers' compensation statutes, which would help with administration of the laws. SJR 17 specifically excluded changes in benefits but not changes in terms or concepts. Clear, concise, and understandable laws were the objectives sought for the workers' compensation statutes under SJR 17. Key to understandability is the recognition that some Montana Supreme Court decisions in 2003 had declared portions of the laws unconstitutional. This inconsistency between case law and statutory law contributes to confusion, particularly in a system intended to be "primarily self-administering" with minimal need for lawyers and the courts.⁵

SJR 17 Workplan -- After the Legislative Council assigned SJR 17 to the EAIC in May 2003, the EAIC at its first meeting of the interim on June 11, 2003, reviewed a workplan that called for examining:

- statutes and administrative rules
 - for clarity or duplication; and
 - for reasons underlying adoption and whether they meet workers' compensation

⁵The declaration of public policy for the Workers' Compensation Act includes the provisions in 39-71-105(3), which states: "Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities".

- policies;
- recent decisions from workers' compensation/occupational disease court cases
 - differences between workers' compensation and occupational disease;
 - exclusive remedy; and
 - types of cases/sections of law or administrative rule being challenged;
- exemptions, terms, and definitions
 - rationale (judicial decisions, statutes, changes in work practices); and
 - needs, based on input from stakeholders; and
- treatment of workers' compensation and occupational disease in other states.

Stakeholder Input -- The first EAIC meeting also featured observations from Workers' Compensation Court Judge Mike McCarter, representatives of each of the insurance plans offering workers' compensation insurance (Plans 1, 2, and 3), and representatives from the Montana Trial Lawyers' Association, the Montana AFL-CIO, and the Independent Insurance Agents of Montana. Among their recommendations for the SJR 17 review were to recognize the importance of:

- changes that will last, because frequent alterations increase confusion;
- conciseness, which reduces the need or opportunity for courts to interpret statutory language;
- impacts on existing statute coordination, which needs to be considered for recommended changes;
- the limited nature of SJR 17, which excluded impacts on benefits;
- simplicity in helping employers and employees understand a system that statute says should "minimize reliance upon lawyers and the courts"; and
- a common reference for claimants who are faced with different applicability dates, depending on when their injury occurred or which Supreme Court cases provided retroactivity, as well as different treatments under occupational disease laws and workers' compensation laws.⁶

Three Main Tasks -- With the EAIC's approval, Eddy McClure, staff attorney for SJR 17, convened an ad hoc working group of insurance representatives, claims adjusters, trial attorneys, and DOLI workers' compensation staff. Their charges were to address solutions for the three main components of the SJR 17 study:

- simplification and clarification of statutes and administrative rules;
- review of workers' compensation exclusions and exemptions and their history; and

⁶See June 11, 2003, Minutes. All Minutes are available at the following website: http://leg.mt.gov/css/committees/interim/2003_2004/econ_affairs/agenda_minutes.asp.

- consideration of how to address Montana Supreme Court decisions declaring certain portions of statutes to be unconstitutional.

Other Parallel Studies -- Over the course of the EAIC's seven meetings, the members heard recommendations from the ad hoc working group and received updates on two studies related to workers' compensation:

- one by DOLI on independent contractors, under SB 270; and
- one by the Montana State Fund on the role of the State Fund and whether to sell all or part of the old or new funds and create an assigned risk pool, a study required by SB 304.

Related Business -- The EAIC also heard from representatives of the downhill ski industry at two meetings. They asked that language be made more concise for an exclusion under the definition for employees--39-71-118(2)(a), MCA--that was intended to prevent ski instructors from receiving workers' compensation if they are injured while "not performing prescribed duties". (The EAIC took no action on this request.)

II. Ad Hoc Working Group

To help address the SJR 17 study in a manner that reflected concerns of stakeholders, Eddy McClure, as staff attorney for the SJR 17 study, convened an ad hoc working group of insurer representatives, including representatives of Plan 1 "self-insureds"; workers' compensation attorneys for claimants and insurance companies; staff from DOLI's Employment Relations Division, which includes workers' compensation units; and claims adjusters.⁷ Their first meeting as a group took place on September 29, 2003, and featured a review of SJR 17 and updates on meetings that DOLI and claims adjusters had been having separately to review workers' compensation statutes. Prior to the working group's meeting, DOLI staff met almost weekly from June until late September 2003 for reviews, one by one, of the workers' compensation statutes and the accompanying administrative rules. Similarly, a group of claims adjusters, called together by Senator Vicki Cocchiarella (who is a claims adjuster and not a member of the EAIC), met in Missoula at various times during the summer of 2003 to review the workers' compensation statutes and to make recommendations for changes. At the September 29 meeting both groups presented their recommendations to the broader group of stakeholders. The outcome of that meeting resulted in an overall recommendation to the EAIC at its October 23 meeting for three different presentations and possible legislative approaches:

- workers' compensation statutes that are redundant or in need of revision for clarity or simplification;
- reports on exemptions and their background; and
- court decisions on occupational disease and workers' compensation.

Chapters III through VI of this report address each of these topics, along with the legislation proposed in relation to them.

The ad hoc advisory group continued to meet over the interim, convening on February 23, April 14, June 10, and July 15 of 2004 to address one or another of the issues. The group also corresponded and reviewed proposed legislation by e-mail.

⁷The e-mail list for the workers' compensation ad hoc working group, which includes people who had an interest in the study but did not always attend each meeting, consisted of: Plan 1 representative Shawn Bubb; Plan 2 representatives Jacqueline Lenmark and Larry Jones; Plan 3 representative (State Fund) Nancy Butler; claims adjusters Sen. Cocchiarella, Chuck Driscoll, Michelle Fairclough, and Mike Marsh; claimants' attorneys Dean Blackaby and Dick Martin; union representatives Jerry Driscoll and Don Judge; independent insurance agent representative Roger McGlenn; and DOLI staff Kevin Braun, Karen Doig, David Elenbaas, Diana Ferriter, Carol Gleed, Barb Gullickson, Jeanne Johns, Jerry Keck, Keith Messmer, Nikki Noland, and Charlotte Payne. Claims adjusters Susan Lake and Joyce Blatherwick, along with vocational rehabilitation counselor Deb Peterson, CRC, CCM, CDMS, of Missoula, also attended some of the meetings of the ad hoc working group as well as all the claims adjusters' meetings in Missoula.

Despite efforts by EAIC staff, including telephone calls to selected claimants who contacted the Workers' Compensation Court along with requests that claims adjusters or workers' compensation attorneys ask their clients to testify, only one claimant testified at an EAIC meeting. He commented on the length of time involved in processing his case, which meant that he had to file bankruptcy while he was unable to work.⁸ One claimant responded by e-mail with papers he had written for classes at the University of Montana and with briefs filed before the Montana Supreme Court.⁹ His materials focused primarily on benefits, which was a subject outside the scope of the SJR 17 study, but his e-mail included the following recommendations:

- provide claimants with better access to legal help;
- guarantee truly independent medical exams and examiners by having DOLI appoint independent medical examiners;
- guarantee independent vocational rehabilitation counselors by having DOLI appoint the vocational rehabilitation counselors; and
- avoid setting goals for DOLI mediation units because the goals can encourage settlements and influence outcomes.

⁸See Minutes for January 23, 2004, meeting.

⁹E-mail from Lennie Thompson, February 3, 2004. Also, see Thompson v. Liberty Northwest Insurance Corporation, 2004 MT 166N (2004), in which the Supreme Court supported the Workers' Compensation Court ruling against Thompson.

III. Simplification: Revising References and Repealing Redundancies

At the October 23, 2003, EAIC meeting, Jerry Keck, administrator of DOLI's Employment Relations Division, presented one informal and one formal set of recommendations.

The Informal Approach -- The informal changes represented what DOLI could do without legislative action, including the use of a cross-referenced index in materials that DOLI provides to the public. This recommendation came from the claims adjusters, one of whom provided an index for DOLI to use as a template for indexing its website or "blue book" compilation of workers' compensation statutes and administrative rules.¹⁰ Mr. Keck also said that, as a result of working group recommendations, the Department would put definitions in bold lettering to help those unfamiliar with workers' compensation statutes identify definitions outside of the usual definition sections. The DOLI staff review of administrative rules recommended deleting two administrative rules, ARM 24.29.607 and ARM 24.29.1408, which overlapped or conflicted with 39-71-1106, MCA. The code section specifies that an insurer may terminate compensation benefits if a claimant is "unreasonably refusing" to cooperate with medical treatment procedures.

The Formal Approach -- The formal recommendations for legislative action were:

- changes that had the general, immediate consensus of the ad hoc working group, such as repealing redundant statutes or those directing the state to undertake activities intended only for the federal government (as in negotiating with Canada on workers' compensation reciprocity under 39-71-426 through 39-71-428, MCA); and
- changes on which the ad hoc working group would continue to meet in an effort to obtain consensus.

Both groups of statutes resulted in proposed legislation advanced by the EAIC as committee bills. (See Chapter VI for descriptions of LC 188 and LC 189.)

¹⁰Exhibits at the October 23, 2003, meeting include the lists containing the ad hoc working group's agreed-on changes and those statutory changes needing more comment (Exhibit No. 14) plus the index (Exhibit No. 15). These are available for review at the Legislative Services Division offices.

IV. Reviewing Workers' Compensation Exclusions and Exemptions

The January 23, 2004, meeting of the EAIC featured a review of the 22 occupations that the Legislature has exempted from the requirement under 39-71-401(1) for workers' compensation coverage. Staff Research Analyst Pat Murdo reviewed the history of exemptions under 39-71-401(2), MCA, and how other states handled similar exemptions.¹¹ Her summary stated that exemptions generally received legislative approval in one of two ways--either as a result of direct advocacy by proponents or as part of major revisions to the Workers' Compensation Act. Her research indicated that when major revisions to the Act also included new exemptions, the sponsor concentrated on the nonexemption aspects of the bill and rarely included witnesses testifying in favor of the exemption. Some exemptions also exist because federal laws control certain occupations, such as railroad workers, or situations, such as workers for businesses owned primarily by Indian tribal members and operating on a federally recognized reservation.

What Insurance Applies for Exempt Workers? -- At the January meeting, Bob Biskupiak, president-elect of the Independent Insurance Agents of Montana, reviewed a letter from the organization's executive director. That letter pointed out to EAIC members the importance of considering exemptions under the public policy declaration of 39-71-105, MCA, as well as the confusion that can arise for employers seeking to comply with 39-71-401, MCA. The letter stated:

The Independent Insurance Agents' Association of Montana believes that over the years the Montana Legislature has gotten away from the original public policy by passing numerous exemptions to the Workers' Compensation laws. We believe these exemptions have been in conflict with the statutory Public policy stated in 39-71-105(1). These exemptions we believe create unintended problems, concerns and costs to the employer and employees.¹²

Among the concerns and costs cited in the letter were the loss of the no-fault (exclusive remedy) system if an injured employee can sue for damages and the concern that general liability policies do not cover employers of exempt employees without an amendment to the policy. The letter also noted that independent insurance agents "may also have to advise them [employers] that coverage may not be available in any form for these exposures".¹³

¹¹See Appendix B.

¹²Letter from Roger McGlenn, executive director of the Independent Insurance Agents of Montana, Inc., "Comments in Regard to Senate Joint Resolution 17", January 21, 2004. Exhibit No. 6 at January 23, 2004, EAIC meeting.

¹³*Ibid.*

Options for Exemptions -- At the May 5, 2004, meeting, the EAIC reviewed a list of options for dealing with exemptions, which were presented in a report entitled "Exemptions: Do They Make Sense In A No-Fault Workers' Compensation System?".¹⁴ Participants in the working group made no recommendations for changing the exemption list and noted that such a decision was a political one, better left to EAIC members to address. To comply with SJR 17's focus on exemptions, EAIC staff supplied the members with six options:¹⁵

- Option 1: Remove all exemptions (except those for which federal law supersedes state law) and require coverage.
- Option 2: Retain exemptions selectively.
- Option 3: Require coverage for all but independent contractors and federally exempted employees.
- Option 4: Move all nonfederal exemptions, except for independent contractors, from 39-71-401, MCA, into definitions of workers and volunteers in 39-71-118, MCA.
- Option 5: Consolidate exemptions that are similar, but keep all exemptions.
- Option 6: Make no change.

After the EAIC requested draft legislation on Options 4 and 5, discussions by EAIC staff and DOLI workers' compensation staff resulted in questions about the feasibility of Option 4. The reason for the difficulty was that many, if not most, of the occupations exempted in 39-71-401(2) are employee types of occupations. Excluding the people who work in those occupations from the definition of "worker" or "employee" by moving the references to 39-71-118 could result in unintended consequences under other statutes.

Work proceeded on Option 5, with staff preparing LC 9899 by taking language regarding elections for coverage from 39-71-118, MCA, and consolidating that language with similar, related references to elections for coverage in 39-71-401, MCA. LC 9899 also moved the definition of "volunteer", "volunteer firefighter", and "volunteer hours" into the definition section, 39-71-116, MCA. LC 9899 also proposed creating a separate notification section from a subsection of 39-71-401, MCA, that requires employees to post notice about workers' compensation insurance.

Despite concerns about the workability of Option 4, EAIC staff put together LC 9896, because the EAIC had asked for two options. LC 9896 selectively removed from 39-71-401(2) and transferred to 39-71-118, MCA, only the references to sole proprietors, direct sellers, and real estate, securities, or insurance sales persons paid solely by commission and without a

¹⁴Pat Murdo, "Exemptions: Do They Make Sense In A No-Fault Workers' Compensation System?", Legislative Services Division, April 2004.

¹⁵See Exemption Options Worksheet, Exhibit No. 11, May 5, 2004.

guarantee of minimum earnings. Although DOLI staff made suggestions for changes to LC 9899 prior to the EAIC's June 30-July 1, 2004, meeting, the draft of LC 9896 was not available for comment by the full ad hoc working group prior to the EAIC meeting.

At its June 30-July 1, 2004, meeting, the EAIC heard concerns from representatives of Plan 2 and Plan 3 that LC 9896 and LC 9899 could possibly result in unintended consequences. They asked for more time to consult on the bill drafts. The EAIC asked for the bill drafts to be consolidated. At the September 7, 2004 meeting, the EAIC

V. Addressing Montana Supreme Court Decisions on Occupational Disease

Reference to recent Supreme Court rulings is indirectly required by SJR 17's directive to clarify workers' compensation laws because these laws cannot now be understood without taking into account Montana Supreme Court decisions. The need to reference court decisions as well as statutes before being fully informed of the meaning of the law means that a claimant or an employer who does not realize the implications of case law is unlikely to be served sufficiently by workers' compensation laws without receiving assistance from an attorney. Minimizing the use of attorneys is one of the stated policy objectives in 39-71-105(3), which suggests the need to address Montana Supreme Court decisions if the laws are to be "self-administering" as described in the policy statement.

As staff attorney for SJR 17, Eddy McClure presented a report to the EAIC at the March meeting addressing the history of the Workers' Compensation Act and the Occupational Disease Act of Montana.¹⁶ In her review of Montana Supreme Court decisions that found that certain occupational disease statutes unconstitutionally violated the equal protection guarantees of Article II, section 4, of the Montana constitution,¹⁷ Ms. McClure noted that the changes in definitions regarding when a condition developed took the emphasis away from the worker's medical condition. For example, Ms. McClure noted that in Henry v. State Fund, "According to the Court, there was no rational basis for treating a worker who contracted a herniated disc during one shift differently than a worker who contracted a herniated disc over more than one shift."¹⁸ Similarly, the Court stated that the Legislature's policy of getting people back to work as soon as possible meant there was no rational basis for providing higher benefits, including access to rehabilitation, under one type of compensation than under another.

The report provided pros and cons of options identified to address the Court decisions. Among the options were:

- Option 1: Making no changes in the Occupational Disease Act.
- Option 2: Merging all or a portion of the Occupational Disease Act into the Workers' Compensation Act.
- Option 3: Addressing only those parts of the Occupational Disease Act identified by the

¹⁶Eddy McClure, "Senate Joint Resolution No.17 and the Occupational Disease Act", Legislative Services Division, February 2004.

¹⁷These include equal protection cases raised in Eastman v. Atlantic Richfield Co., 237 Mont. 332, 777 P.2d 862 (1989), Henry v. State Fund, 1999 MT 126, 294 Mont. 449, 982 P.2d 456 (1999), Stavenjord v. State Fund, 2003 MT 67, 314 Mont. 466, 67 P.3d 229 (2003), and Schmill v. Liberty Northwest Ins. Corp., 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (2003).

¹⁸McClure, *op. cit.*, 2004, p. 8.

Montana Supreme Court as having legal problems.

- Option 4: Rewrite and simplify the Occupational Disease Act prior to merging the Act with the Workers' Compensation Act.

Opinions on Merger Option -- Based on straw polls taken at a February 23, 2004, meeting of the ad hoc working group, development of Option 2 had more votes than other options, with Option 3 the runner-up. Members of the ad hoc working group gave descriptions of each option at the EAIC's March 11, 2003, meeting. Larry Jones of Liberty Northwest Insurance captured the EAIC's attention by saying that a lay person could not possibly understand the workers' compensation system by reading just the statutes and that an attorney relying just on statutes would be committing "malpractice". Mr. Jones noted that the Montana Supreme Court's rulings on occupational disease found that those claimants were to have the same procedural safeguards and the same benefit entitlements as claimants under the Workers' Compensation Act.¹⁹ He said Option 2 would avoid unintended tort liability issues for employers by incorporating references to occupational disease into the Workers' Compensation Act. Among his other suggestions were to deal with filing period differences between workers' compensation and occupational disease claims and to extend the provisions of the "employer responsibility" statute under the occupational disease chapter of law to the workers' compensation chapter. Treating everyone with the same procedural requirements and same benefit levels, he said, would greatly reduce the likelihood of litigation.

Opinions on Restricted Response -- Jacqueline Lenmark of the American Insurance Association, in presenting the option for a limited recognition of the court rulings, said Option 3 would affect only those statutes targeted as unconstitutional by the Supreme Court.²⁰ For example, 39-72-701, MCA, could be expanded to include compensation for permanent partial disability and vocational rehabilitation, which currently is allowed under the Workers' Compensation Act but not under the statutes governing occupational diseases. Another change described by Ms. Lenmark would allow lump-sum payments under the occupational disease statutes, matching the permission offered under the workers' compensation statutes. Ms. Lenmark noted that the National Council on Compensation Insurance (NCCI), which sets workers' compensation rates in Montana and many other states, already had accounted for changes in rates based on the Supreme Court decisions. The major impact was from the decision in Stavenjord v. State Fund, which resulted in a 1.1% overall price increase recommendation from NCCI.

¹⁹See Minutes from March 11, 2004, EAIC meeting.

²⁰Ms. Lenmark noted that, although she had agreed to present Option 3, she supported no change in the statutes. The American Insurance Association, which she represented, supported first Option 1 (no change) and then Option 3 (minimal change).

More Information Needed -- Recognizing that the ad hoc working group had not reached consensus on how to handle the Supreme Court decisions on occupational disease, the EAIC asked for further information, including costs, and bill drafts for Options 2 and 3. At the EAIC's May meeting, Nancy Butler of the Montana State Fund distributed an actuarial analysis of projected compliance costs for Option 2 or 3. The analysis prepared by NCCI stated:

- without changes to current laws, awards for occupational disease could continue to be higher than statutes currently allow as a result of the court decisions;
- with codification of the court decisions in the occupational disease statutes, a "minor decrease in litigated cases" could occur; or
- with merger of the occupational disease and workers' compensation statutes, litigation might increase 10% to 20%, which could increase system costs by 0.2% to 0.8% or roughly \$0.4 million to \$1.8 million.²¹

At its May 5, 2004, meeting the EAIC voted to pursue draft legislation on two bills. Option 1 would merge the two relevant portions of the occupational disease and workers' compensation statutes. Option 2 would codify the Supreme Court decisions into the occupational disease statutes. Senator Anderson, saying he preferred no change, voted against both options because of his concern that changes to the laws might not adequately address the differences between occupational disease and injury. At the June 30-July 1 meetings of the EAIC, the ad hoc working group asked for more time to see if a consensus could be developed in the group for addressing Options 1 and 2.

At the September 7 meeting, the ad hoc advisory group recommended...

²¹National Council on Compensation Insurance, Inc., "Analysis of Montana Occupational Disease Draft Proposals", undated. Presented to the May 5, 2004, EAIC meeting, Exhibit No. 9.

VI. Proposed Legislation

Simplification and Clarification -- The EAIC agreed at its June 30-July 1, 2004, meeting to request draft legislation recommended by the ad hoc working group for simplifying and clarifying certain workers' compensation statutes based on two criteria: those that were confusing because of terminology and those that clarify and consolidate operational criteria in the statutes and remove redundancies. The reason for the two bills is that support for one approach may not mean support for the other.

LC 188 (Previously known as LC 5555)

Seeks to make Workers' Compensation Act terminology consistent and also repeals the occupational deafness compensation statutes (Title 39, chapter 71, part 8).

Among the proposed terminology changes are changes to specifically state indemnity or medical benefits in an effort to avoid confusion that the general term "compensation" created. This bill also standardizes the reference to the state's average weekly wage.

The rationale for repealing the occupational deafness compensation statutes is to pay the same benefits for occupational deafness whether the deafness is the result of prolonged exposure to noise in employment or the result of a traumatic hearing loss. This rationale is consistent with recent Montana Supreme Court cases concerning occupational disease benefits.

LC 189 (Previously known as LC 5560)

Removes moot or redundant statutes. For example, statutes that say Montana should negotiate with Canada for reciprocal workers' compensation coverage are moot because only the federal government can negotiate with a foreign country.

This bill also seeks to clarify how lump-sum payments are addressed and who pays benefits when there is a dispute among insurers, along with various other clarifications. Explanations of the changes are available on the Economic Affairs Committee website as are drafts of both bills.²²

Dealing With Exemptions -- At the EAIC's September 7 meeting, members ...

Addressing Court Decisions -- Also proposed for Committee legislation at the September 7, 2004, meeting were the following: ...

²²For more details regarding each bill draft, see explanations posted for LC 5555 or LC 5560 under June 30-July 1, 2004, meeting materials on the EAIC web site: http://leg.mt.gov/css/committees/interim/2003_2004/econ_affairs/meeting_materials/6_30.asp.

VII. Other Areas of Interest -- State Fund and Independent Contractor Studies

Workers' compensation and occupational disease issues are like pressing on a balloon -- pushing on one side just moves the air around inside and creates a bulge elsewhere. While the EAIC undertook a simplification study of workers' compensation and occupational disease statutes, another group, created by SB 270, undertook a study related to independent contractors. Yet another group, created under SB 304, began studying the role of the Montana State Fund, including whether to sell all or part of the State Fund and create an assigned risk pool. Whether the separate approaches were more effective than a combined study is not clear, although the scope of each study occupied multiple meetings in the interim and meant that many of the same members of the EAIC's ad hoc working group spent time--often volunteer time--attending meetings and reviewing material for each study.

SB 270 Study -- This study of independent contractors, assigned to DOLI by SB 270 in the 2003 Session, produced a bill draft after much debate by a 17-member group composed of representatives of business and labor, contractors, workers' compensation insurers, and two DOLI staff. The group debated between making workers' compensation insurance mandatory for independent contractors and setting criteria that would withstand court review and also serve as conclusive proof that the worker was an independent contractor and not an employee.²³

The group labored under the Montana Supreme Court's dismissal of language in 39-71-401(3)(c) that stated that an independent contractor's exemption certificate was conclusive to the contractor's status. In that court decision, Justice James Nelson wrote for the majority that the claimant appropriately referred to his employee status, despite being hired as an independent contractor, using the definition of "a duck" looking, walking, and quacking like a duck. Even if the claimant held a piece of paper saying he was an independent contractor, he was still an employee--just like the duck would still be a duck, in Justice Nelson's words, "even if it is holding a piece of paper that says it is a chicken".²⁴

SB 304 Study -- This study to determine the State Fund's role and whether to sell all or part of the State Fund and create an assigned risk pool has involved a committee of four legislators, a representative of the Governor's Office, an employer who is also on the State Fund Board of Directors, representatives of Plan 1 and Plan 2 insurers, and a representative of the State Auditor's Office. The SB 304 Committee decided against selling the State Fund and creating an assigned risk pool. At its August 20 meeting, the SB 304 Committee also decided to have the

²³See Final Report for SB 270, pending.

²⁴Wild v. Fregein Construction and Montana State Compensation Insurance Fund, 2003 MT 115, 315 Mont. 425, 68 P.3d 855 (2003).

state retain control over the Old Fund. For further details see the SB 304 Report.²⁵

DRAFT

²⁵The final report will be posted to <http://www.sb304.com>.

VIII. Summary and Conclusions

Workers' compensation issues are complex and cumbersome, as perhaps only a system designed to address many types of benefits and concerns can be. In seeking to minimize costs to employers and costs to employees, the Legislature has put into place a system that few see as perfect but most see as workable. Yet the Legislature also has decided to allow exemptions or exclusions for certain groups of people from the state's Workers' Compensation Act and the Occupational Disease Act of Montana. No one is entirely certain if the exemptions and exclusions result in lawsuits, one remedy, or greater costs to society (than costs for coverage) because exempt workers might go untreated until their medical condition becomes more complicated or they might become jobless or less than fully employed.²⁶

As the EAIC reviewed the three components of the SJR 17 workplan--simplification and clarification of general statutes; exemptions; and codification of court cases affecting occupational disease--the members saw that their efforts would not necessarily resolve the complexity of the system. For issues on which the ad hoc working group could reach agreement, the EAIC accepted recommendations for change. Where the people who deal with workers' compensation issues on a daily basis could not come to agreement, particularly with respect to exemptions made in past legislative sessions in response to constituent requests, the EAIC duly noted the difficulties and decided not to call for changes. The EAIC took the following action to address the Montana Supreme Court's decisions on occupational disease ...

The following bill drafts were agreed to as requests by the EAIC for committee bills:

- two workers' compensation clarification and simplification bill drafts, which the EAIC agreed to sponsor, LC 188 and LC 189.
- (any additional action taken at September 7 meeting)

²⁶Committee staff asked trial attorneys who deal with workers' compensation cases if they knew of workers who either were unserved or who sued under tort liability laws. Only one attorney, Sydney McKenna, responded. She noted that the exclusion of mental or stress-related damages from the workers' compensation and occupational disease statutes has meant that law enforcement officers and other first responders have had to sue their employers to obtain assistance if traumatic incidents result in their inability to continue working. See Appendix F.

Appendix A

SENATE JOINT RESOLUTION NO. 17

INTRODUCED BY TESTER

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THE LEGISLATIVE COUNCIL TO DESIGNATE AN APPROPRIATE INTERIM COMMITTEE OR DIRECT SUFFICIENT STAFF RESOURCES TO STUDY METHODS OF SIMPLIFYING LAWS RELATED TO WORKERS' COMPENSATION AND OCCUPATIONAL DISEASES.

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THE LEGISLATIVE COUNCIL TO DESIGNATE AN APPROPRIATE INTERIM COMMITTEE OR DIRECT SUFFICIENT STAFF RESOURCES TO STUDY METHODS OF SIMPLIFYING LAWS RELATED TO WORKERS' COMPENSATION AND OCCUPATIONAL DISEASES.

WHEREAS, Montana's workers' compensation laws were first enacted in 1915 and have been amended in virtually every legislative session since that time; and

WHEREAS, the significant impact on Montana's economy from workers' compensation premiums and benefits often overshadows the economic costs of understanding arcane provisions of a patchwork of workers' compensation laws; and

WHEREAS, the Montana Legislature has the ability to simplify and clarify regulations by directing a study committee to review, in conjunction with administrative rules, all of the provisions related to administration of the Workers' Compensation Act and the Occupational Disease Act of Montana, excluding benefits; and

WHEREAS, the Montana Legislature believes that the traditional workers' compensation system of compensating injured workers without regard to fault should continue into the future; and

WHEREAS, terms and concepts, such as which employers, employees, and independent contractors are covered by the workers' compensation laws, have become confusing in current statutes; and

WHEREAS, the list of exempted employments of current law may be discriminatory and may undermine a public policy that calls for all employment to be covered by the principles of workers' compensation coverage; and

WHEREAS, Montana employers and employees deserve to have workers' compensation laws

that are clear, concise, and understandable.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the Legislative Council be requested to designate an appropriate interim committee, pursuant to section 5-5-217, MCA, or direct sufficient staff resources to examine the workers' compensation laws and related administrative rules of the State of Montana and provide any suggested changes for laws to clarify the language and intent for all who are governed by workers' compensation laws of this state.

BE IT FURTHER RESOLVED, that, if the study is assigned to staff, any findings or conclusions be presented to and reviewed by an appropriate committee designated by the Legislative Council.

BE IT FURTHER RESOLVED, that all aspects of the study, including presentation and review requirements, be concluded prior to September 15, 2004.

BE IT FURTHER RESOLVED, that the final results of the study, including any findings, conclusions, comments, or recommendations of the appropriate committee, be reported to the 59th Legislature.

- END -

Appendix B

ATTACHMENTS TO COME

Draft