

## **Overview of Montana Workers' Compensation Law and Practice**

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### 1. Overview

Montana was one of the first states in the country to enact workers' compensation legislation. The new act was immediately challenged and survived. It has been the subject of extensive litigation and reform movements over the years. As a result, any lawyer handling workers' compensation cases in Montana must be well versed in the legal and precedential history of the system.

The granddaddy of all workers' compensation cases not only upholds its viability but outlines its purposes:

- *SHEA v. NORTH-BUTTE MIN. CO., et al.*, 55 Mont. 522, 179 P. 499 (1919)
  - “The only question involved in this case is the constitutionality of the Workers' Compensation Act.”
  - “In other words, the theory of such legislation is that loss occasioned by reason of injury to the employee shall not be borne by the employee alone--as it was under the common-law system--but directly by the industry itself and indirectly by the public, just *as* is the deterioration of the buildings, machinery and other appliances necessary to enable the employer to carry on the particular industry.
  - “To every thinking person the object sought commends itself not only as wise from an economic point of view, but also as eminently just and humane.”
  - “Under these circumstances, the rule that an Act of the legislature will not be declared invalid because it is repugnant to some provision of the Constitution unless its invalidity is made to appear beyond a reasonable doubt, applies with peculiar force.”
  - “But at this late day it cannot be controverted that the remedies recognized by the common law in this class of cases, together with all rights of action to arise in future may be altered or abolished to the extent of destroying actions for injuries or death arising from negligent accident, so long as there is no impairment of rights already accrued.”

In the history of Montana workers' compensation law the period 1970-1985 saw dramatic increase in coverage. Benefits during this period were generous as compensation rates increased dramatically with increasing wages and lifetime medical benefits were available. Occupational disease coverage was also expanded. During this period the Workers' Compensation Court was established after the failure of an administrative benefit determination process.

In the mid-80's mediation, coordination of benefits from the various systems, an emphasis on vocational rehabilitation and safety came into play.

## 2. The Evolution of the Montana System

- State Workers' Compensation Acts (*see* Mont. Code Ann. §§ 39-71-101, et seq.)
  - Admin. R. Mont. (24.29.101, et seq.)
- System structure and adjudication
  - Uneventful progression for about 50-60 years
  - Began with elective participation—widespread
  - Excluded occupational diseases—1959
  - Benefits were low as were wages—totally administrative program
  - No incentive to overstay participation—proper traditional safety net
  - Overseen and adjudicated by administrative board—overseer and adjudicator
  - Inherent conflict—ultimately lead to claims of fraud and favoritism
  - No proper oversight
  - Lawyers too close to administrators who also awarded benefits
  - Huge legal turmoil with Attorney General Investigation
  - No convictions for problems related to the work comp system
- Court created in 1975—Helena
  - Began split of oversight and benefit determination
  - New Era in Workers compensation
  - Coincided with the expansion of systems nationally
  - The Montana system began to change dramatically
- Court—one judge travelled around the state (Hunt, Reardon, McCarter and Shea)
  - Hearing examiners—appointed by court as needed
  - Rules of Evidence utilized
  - Trials in venues across the state
  - Findings of fact and conclusions of law process utilized
- Things changed dramatically between 1975 and 1987
  - Principally driven by increased litigation and court decisions
  - Between 1977 and 1986 the cost of claims to the State Fund increased 577%—from 9.4M to 64.3M
    - During this period the number of claims only increased 67%
    - WCC Petitions in 1981-211
      - 1982-351
      - 1983-405
      - 1984-437
      - 1985-646
    - Loss ratios (benefit costs over premium received) all private carriers in MT
      - 1985-125%
      - 1986-161%

- 1984-1987—largest state carrier—157%
- Cause of inflated costs in the system
  - Increased expenses
  - Medical and other services
  - Vocational rehabilitation
  - Increased wages which increased benefit rates tied to average weekly wage
- More dramatic was the expansion by court decisions
  - Much more expensive with premium collected on prior entitlement stds.—not judicially created ones
  - Some of the bigger areas of change
    - Principle of liberal construction of the Act
    - What was an injury—tangible happening or unusual strain--repetitive trauma over long periods of time
      - *Hoehne*—green chain repetitive trauma was an injury not OD
      - *Wise*—walking too much in overtime—phlebitis--injury
      - Aggravation and acceleration compensable—std—was it possible (*Viets*)
      - Impairment award paid without contest as minimum entitlement (*Holton*)
      - Course and scope of employment expanded—travel—teacher driving back from taking summer classes found to be in the course and scope (*Courser*)
        - Drunk salesman coming back from Seeley Lake in course and scope
  - Permanent Total Disability—PTD—based on normal labor market—age, educ. wk. exp.—local—commuting distance
  - Lump sum awards—best interests—huge outlays for businesses
  - Permanent partial Disability—PPD—format simple
    - Scheduled injuries subject to maximum
    - Whole body 500 weeks
  - Ultimately—earning capacity had little to do with it—in the late 70's and early 80's nonscheduled injuries were subject only to the 500 week maximum and typically paid that out = \$74,750
  - Attorney fees—on top of benefit award at first—net award concept
    - Fees payable if conflict
    - Many cases required maximum benefit entitled with a contingency fee on top of that
- 1987 Reforms—Governor's Council appointed by Governor
  - Understandably, politics came into play
  - System changed dramatically
  - Definition of injury—one shift
  - Occupational disease—more than one shift
  - Benefits
    - Normal labor market always a part—but local



MMI	Maximum Medical Improvement, medical stability ( <i>see</i> statutory definition of medical stability at § 39-71-116).
DOI/TOI	Date of injury/time of injury
OD	Occupational Disease
Impairment	A medical rating issued by a doctor per the standards of the current AMA Guide to Permanent Impairment.
Holton	The name case establishing that the payment of an impairment award is mandatory and undisputed.
Disability	The effect of permanent restrictions on the ability to work.
710	Reference to § 39-71-710 which terminates most benefits upon receipt of eligibility for Social entitlement).
WCA	Workers' Compensation Act
ODA	Occupational Disease Act
Old Law	Statutes in effect before July 1, 1987.
New Law	Post 1987 WCA.
Actual Wage Loss	The wages a worker earns or is qualified to earn after reaching maximum medical improvement which are less than the actual wages received at the time of injury. (Note capacity to earn after compared to actual earnings before.)
608 Benefits	Benefits paid under § 39-71-608 without admitting liability. Paid under reservation of rights. Not an admission of liability by the insurer.
IME	Independent Medical Exam
Public Policy	<i>See</i> § 39-71-105
Penalty	Court imposed sanction of 20% against the insurer on benefits withheld unreasonably.
Notice	The injured worker advising his employer of an injury or disease.
Claim for Compensation	Application for benefits filed by injured worker.

Vocational evaluation	A process of evaluating the vocational effects of an injury or disease (vocational evaluation of a disability).
Restrictions	The limitations on a worker's physical ability as a result of an injury or disease or other disability. Typically noted in terms of abilities in relation to standing, bending, twisting, lifting, walking, reaching, use of extremities, etc.
FCE	Functional Capacity Evaluation. A test done following an injury by a physical therapist or other medical professional to determine physical capabilities and restrictions (typically notes limits on bending, twisting, lifting etc.).
JA's	Job analyses. These are prepared by a vocational consultant and outline all job tasks and physical requirements of a particular work position. They can be correlated with the results of an FCE and a medical doctor will review both and determine whether the injured worker can perform the job with or without restrictions.
Light duty/modified duty/ accommodation	Terms relating to temporary or permanent modification of job requirements due to condition (pre MMI) or disability (post MMI).
RTW	Return to work
Subsequent injury	An injury that occurs after an injury has previously occurred or a disease is present.
Natural progression	The expected progression of a condition. Not caused by the compensable injury or disease.
Belton	The name case beginning the progression of the law on obligations of employers in subsequent injury cases.
Common Fund	Transforming a single benefit determination which changes the law into a class action type proceeding requiring remediation of all claims in the same category and appropriate time frame.
Common Fund atty fees	Granting of fees to counsel in the original proceeding that gave rise to the common fund and remediation. The fees are assessed against the benefits all claimants that benefit from the common fund.
Lockhart lien	An attorney fee lien against medical benefits secured by counsel for a medical provider where the insurer previously denied liability (i.e. the claimant's attorney gets a fee out of medical benefits paid based on his or her efforts after denial by the insurer).

Old law (pre 1987) PPD	Section 703—actual present loss of earning capacity Section 705—possible future loss of earning capacity
Liberal construction	Pre 1987 statutory direction for interpretation. Negated by 1987 reforms ( <i>see</i> § 39-71-105(5)).
Quid pro quo	“This for that.” The balance of the bargain between employers and employees to create the no fault comp system.
Coverage formula	Arising out of and in the course and scope of employment—the basic outline of w. comp entitlement.
Normal labor market	Basic workers’ compensation concept outlining a person’s residual earning potential. Takes into account the persons age, education and work experience and then factors in the disability (limitations) caused by the injury and a determination of ability to work is made. The geographic parameters of the work area considered can vary from local to statewide. The basic concept has also been described in various versions of the Act and the progression of the law as job pool, residual normal labor market and similar terms.
Earning capacity	Basic workers’ compensation concept referring to a worker’s ability to earn wages. It is broader than the actual receipt of wages because someone could be earning below their capacity.
Biweekly benefits	Typical method of payment of disability and wage loss benefits under the Act.
AWW	Montana average weekly wage
Biweekly benefit rates	Calculated based on percentage of Montana average weekly wages. Changes annually.
Lump sums	Method of paying benefits in one payment. Typically the payments are reduced to present value.
Attorney fees	A small reward for work well done.
Ins. Co. loss ratios	Benefit costs over premiums received.
DOL	Department of Labor
ERD	Employment Relations Division at DOL. Top of the chart of administrative functions in the system.

WCC

Workers' Compensation Court

Insurance Plans

Plan I—self-insured employers and groups

Plan II—employers purchase insurance policies from named insurers

Plan III—The Montana State Fund

- **39-71-105. Declaration of public policy.** For the purposes of interpreting and applying this chapter, the following is the public policy of this state:

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

(2) It is the intent of the legislature to assert that a conclusive presumption exists that recognizes that a holder of a current, valid **independent contractor** exemption certificate issued by the department is an independent contractor if the person is working under the independent contractor exemption certificate. The holder of an independent contractor exemption **certificate waives the rights**, benefits, and obligations of this chapter unless the person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3.

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

(4) 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.

(5) This chapter must be construed **according to its terms and not liberally in favor of any party**.

(6) It is the intent of the legislature that:

(a) **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, and it is within the legislature’s authority to define the limits of the workers’ compensation and occupational disease system.**

(b) for **occupational disease claims, because of the nature of exposure**, workers should not be required to provide **notice to employers of the disease as required of injuries and that the requirements for filing of claims** reflect consideration of when the worker knew or should have known that the worker’s condition resulted from an occupational disease. The legislature recognizes that occupational diseases in the workplace are caused by events occurring on more than a single day or work shift and that it is within the legislature’s authority to define an occupational disease and establish the causal connection to the workplace.

- Montana Workers’ Compensation Insurance system
  - Insurance structure
    - Plan I—Self Insured entities. Mont. Code Ann. §§ 39-71-2101, et seq.
      - Associations and groups added
    - Plan II—Private Insurance. Mont. Code Ann. §§ 39-71-2201, et seq.
    - Plan III—Montana State Fund. Mont. Code Ann. §§ 39-71-2311, et seq.
- Who Must Be Covered
  - Coverage Formula
    - The Workers’ Compensation Act applies to all employers and employees. Every employer will elect to be bound by the provisions of one of the coverage plans. Mont. Code Ann. § 39-71-401. Insurers are liable for all benefits under the Act for injuries arising out of and in the course and scope of employment. Mont. Code Ann. § 39-71-407(1).
    - “Employee,” for purposes of the Workers’ Compensation Act, includes every working person other than independent contractors. *See* those included at Montana Code Annotated § 39-71-118.
    - *See* exceptions for volunteers at Montana Code Annotated § 39-71-118(2).
    - *See* employments exempted at Montana Code Annotated § 39-71-401(2).
  - Casual employment
    - Traditionally irregular, sporadic, unpredictable and brief
    - Even if casual it is not exempt unless outside the business of the employer
  - Others excluded as the result of practical or political considerations:
    - Household and domestic
    - Those covered by federal programs
    - Officials, timers, referees, umpires and judges at amateur athletic events
    - Newspaper carriers

- Cosmetologists and barbers
  - Horseracing employees
  - Petroleum land professionals—land men
  - Ministers
  - Athletes in contact sports
- Independent Contractors—an area of the law constantly litigated over the years now with some certainty
  - A sole proprietor, working member of a partnership, working member of a limited liability partnership, or working member of a member-managed limited liability company who customarily performs services at a location other than the person’s own business location must apply to the Department of Labor and Industry for an independent contractor exemption certificate unless he has elected coverage. After receiving the certificate, the certificate holder: (i) is conclusively presumed to be an independent contractor, (ii) waives all benefits under the Act, and (iii) is precluded from receiving benefits. Mont. Code Ann. § 39-71-417.
  - Procedures for certification are at Administrative Rules of Montana 24.25.111, et seq. The person must be engaged in an independently established trade, occupation, profession or business based on an application point system.
  - Common law test
    - 4 factors—balance—convincing accumulation
      - Right to exercise control
      - Method of payment
      - Furnishing equipment
      - Right to fire
  - Type of facts considered in everyday life
    - Written contract
    - Who can terminate and how
    - Paid by the hour
    - Completed task
    - commissions
    - Hours of work set by whom
    - Who buys supplies and equipment
    - Tell you what to do or how to do it
    - Employees
    - Tax treatment
    - Travel reimbursement
    - Letter head and business cards
- Extra Territorial Coverage
  - Worker employed in state who temporarily leaves the state incident to employment and suffers an injury arising out of and in the course of their employment is treated as though injured in the state. Mont. Code Ann. § 39-71-402(1).

- Out-of-state workers temporarily working in Montana are not covered by the Act if they are covered in their home state and that state recognizes Montana reciprocity. Mont. Code Ann. § 39-71-402(2). Does not apply to construction workers as defined.
- Uninsured Employers
  - Exclusive remedy not available to uninsured employer. In fact, several additional remedies available to injured employees. Mont. Code Ann. § 39-71-508. Consequences include:
    - Employee may claim benefits under the Act from Uninsured Fund;
    - Action against the employer under Montana Code Annotated § 39-71-509;
      - Employer may not interpose defense of comparative negligence, that injury was caused by the negligence of a co-employee or employee assumed the risk of unsafe work place.
    - Independent action against employer under Montana Code Annotated § 39-71-515;
      - Claim for benefits under the Act. It is not a defense that employee was aware of the lack of insurance.
        - Attorney's fees are recoverable
    - Any other civil remedy
- Exclusive Remedy
  - The Act is the exclusive remedy against properly insured employers.
  - § 39-71-411. Provisions of chapter exclusive remedy—non liability of insured employer. 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 the injuries or death. The Workers' Compensation Act binds the employee and, in case of death, binds the employee's personal representative and all persons having any right or claim to compensation for the employee's injury or death, as well as the employer and the servants and employees of the employer and those conducting the employer's business during liquidation, bankruptcy, or insolvency.
  - Article II, section 16 of the Montana Constitution. [C]ourts 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.
  - *Raisler*, 717 P.2d 535: You can't sue the employer indirectly and recover.

- Third-Party Actions
  - § 39-71-412. Liability of third party other than employer or fellow employee – additional cause of action. The right to compensation and medical benefits as provided by this chapter is not affected by the fact that the injury, occupational disease, or death is caused by the negligence of a third party other than the employer or the servants or employees of the employer. Whenever injury, occupational disease, or death occurs to an employee while performing the duties of employment and the event is caused by the act or omission of some persons or corporations other than the employee’s employer or the servants or employees of the employee’s employer, the employee or in case of death the employee’s heirs or personal representative, in addition to the right to receive compensation under this chapter, has a right to prosecute any cause of action that the employee or heirs may have for damages against the persons or corporations.
  
- Exclusive Remedy—Development of the Intentional Acts Exception.
  - *Great W. Sugar Co. v. Dist. Ct.*, 610 P.2d 717 (1980)
  - Court continued “true intent” tests articulated in *Enberg*.
  - Exclusivity is abrogated only where intentional acts are specifically intended to cause injury.
  - “The ‘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.”
  - *Sherner v. Conoco, Inc.*, 2000 MT 50, 298 Mont. 401, 995 P.2d 990
    - i. 1995 injury
    - ii. “A review of the body of case law addressing the exclusive remedy clause reveals that there have indeed been inconsistencies in our interpretation of the statutory requirements.”
    - iii. “After our holding in *Enberg*, the Montana Legislature repealed 92-204, RCM 1947 and enacted 92-204.1 RCM 1947, making a significant change by providing that a worker could sue a fellow employee if the worker’s injuries were caused by the ‘intentional and malicious act or omission’ of a co-worker. 92-204.1 RCM 1947 (today codified at § 39-71-413, MCA).” Section 413’s exclusive remedy exception provides:

[i]f 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 the intentional and malicious act or omission of a servant or employee of his employer, then the employee or in case 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.

Mont. Code Ann. § 39-71-413 (emphasis added).

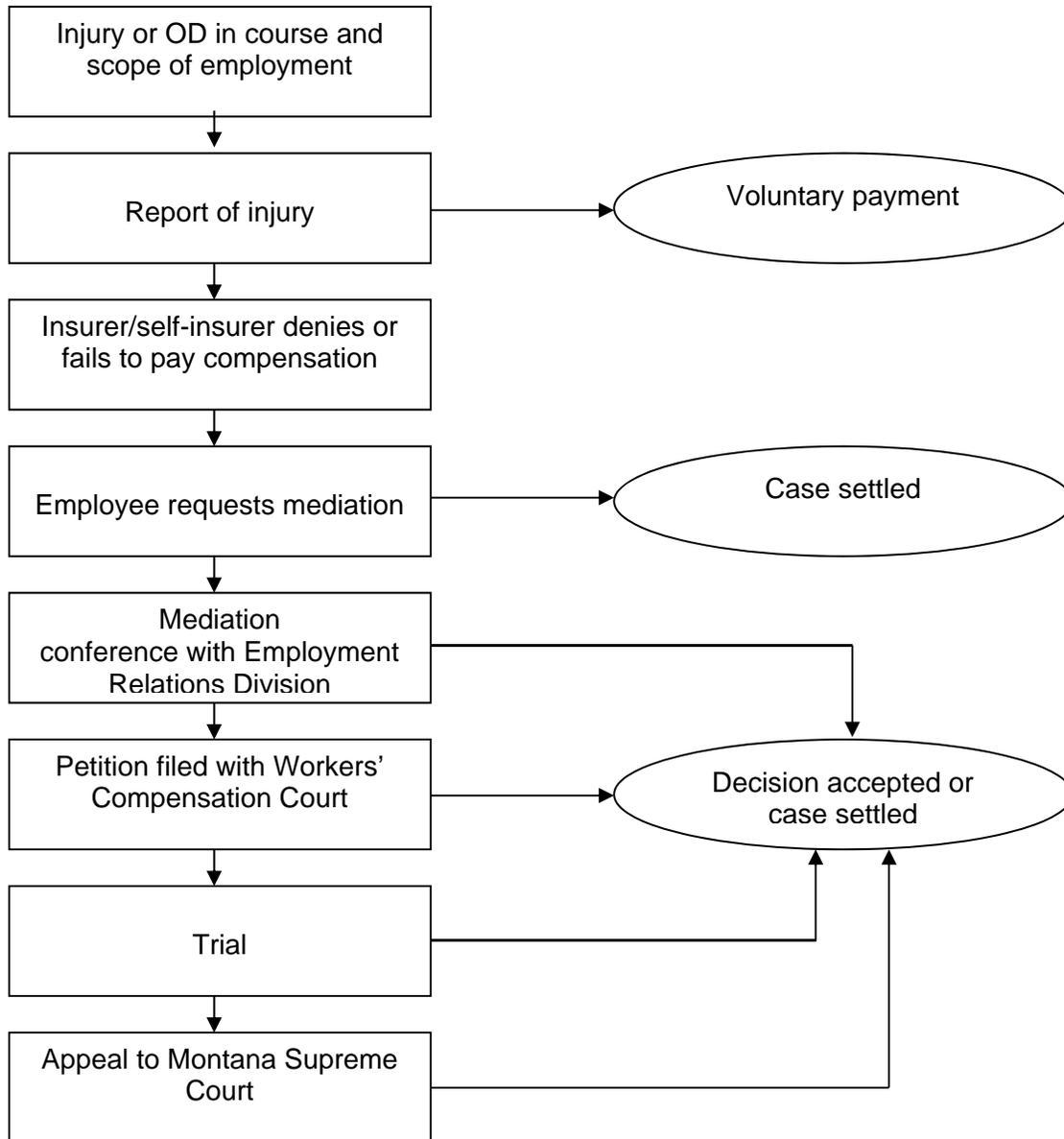
Despite this legislative change, we held that where a complaint fell short of alleging an intentional tort, it did not state a claim that would override the exclusivity provision of the statute. *Great W. Sugar Co.*, 610 P.2d at 719.

i. Court held:

1. Employer acts with “malice,” for purposes of exception to exclusive workers’ compensation remedy for cases involving an intentional and malicious act or omission, if employer has knowledge of facts or intentionally disregards facts that create high probability of injury to employee and (a) deliberately proceeds to act in conscious or intentional disregard of high probability of injury to employee, or (b) deliberately proceeds to act with indifference to high probability of injury to employee; and
  2. Terms “intentional,” “act,” and “omission,” as used in exception to exclusive remedy provision, should be construed according to their plain meaning.
- 2001:39-71-413 (2000). Liability of employer or fellow employee for intentional and deliberate acts -- additional cause of action -- intentional injury defined. (1) If an employee is intentionally injured by an intentional and deliberate act of the employee’s employer or by the intentional and deliberate act of a fellow employee while performing the duties of employment, the employee or in case of death the employee’s heirs or personal representatives, in addition to the right to receive compensation under the Workers’ Compensation Act, have a cause of action for damages against the person whose intentional and deliberate act caused the intentional injury.  
(2) An employer is not vicariously liable under this section for the intentional and deliberate acts of an employee.  
(3) As used in this section, “intentional injury” means an injury caused by an intentional and deliberate act that is specifically and actually intended to cause injury to the employee injured and there is actual knowledge that an injury is certain to occur.
  - Subrogation—made whole doctrine---workers’ compensation insurer does not have a right to subrogation unless the claimant is made whole. A claimant who retains and pays and attorney cannot be made whole
  - Overview of claim process

# Compensation Claim Flow

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## APPROACH TO ANALYZING WORKERS' COMPENSATION CLAIMS

Any workers' compensation claim analysis should consider at least the following:

### 1. Injury or OD:

- a. For injury claims, the statute in effect on the date of injury is used to determine benefits.
- b. To determine if work related—consider these in total
  - i. Whether the activity was undertaken at the employers request
  - ii. Whether the employer, directly or indirectly compelled the employees attendance in the activity
  - iii. Whether the employer controlled or participated in the activity
  - iv. Whether the employer and employee mutually benefited by the activity.
- c. Course and scope—now restricted by statute
- d. Same for breaks

### 2. Changes in Act:

- a. Liberal construction was deleted in 1987. Significant reforms were enacted in the same year.
- b. Occupational diseases were merged into the Workers' Compensation Act on July 1, 2005. Analyze all claims for benefit purposes the same whether the condition is caused by an accident or over time (but note whether you are dealing with an injury or OD claim). There are differences between OD and injury notice, claim filing requirements and subsequent injury considerations.
- c. Procedural *statutory* changes apply retroactively; substantive changes do not unless specified by the Legislature. All benefit changes are substantive.
- d. Decisions by the courts on benefit issues are retroactive for all claims except those that are settled or final. Most recent decision expands "final" to include all claims paid in full based upon the law at the time.

### 3. Status of Parties:

- b. Employer must provide insurance or be subject to significant penalties. Penalties for an uninsured employer.
  - i. Exclusive remedy not available
  - ii. Claim for benefits from uninsured fund
  - iii. Damage action
  - iv. Independent action
  - v. Employer liable for unpaid meds
  - vi. Employer may not interpose defense of comparative negligence, that injury was caused by the negligence of a co-employee or employee assumed the risk of unsafe work place.

- vii. Claim for benefits under the Act. It is not a defense that employee was aware of the lack of insurance.
- viii. Attorney's fees are recoverable
- ix. Remember this requires negligence for third party action
- x. Remember the uninsured employer fund
- c. Employee's claim for benefits under the Workers' Compensation Act is generally his exclusive remedy against his employer and co-employees, and his wages determine his compensation. Exclusivity does not apply for intentional injury by the employer or for conditions not within the coverage of the Act.
- d. A worker with an independent contractor exemption certificate waives all benefits under the Act. A worker without the certificate can be considered an IC if engaged in an independently established trade or profession and is free from the control of the employer. Know the control standards.

#### **4. Injury and Occupational Disease:**

- a. To be compensable, a disease or injury must arise out of and in the course and scope of employment. This involves consideration of employment status, employment duties, traveling and deviation.
- b. An injury is physical harm caused by an accident in the course and scope of employment on a single day or shift.
  - i. Accident—unexpected incident or strain
    - 1. Identifiable by time and place of occurrence
    - 2. By part of the body
    - 3. Caused by a specific event on a single day or during a single work shift
- c. An occupational disease is harm contracted in the course and scope of employment caused by events occurring on more than a single date or shift.
- d. Neither term includes a condition arising solely from emotional or mental stress.
  - i. Physical—physical
  - ii. Physical—mental
  - iii. Mental—mental
  - iv. Mental—physical
- e. Cardiovascular, pulmonary, respiratory, or other disease is included only if an accident is the “primary cause” (more than 50%) of the physical harm.
  - i. Does not mean a physical or mental condition arising from
    - 1. Mental or emotional stress
    - 2. Or non-physical stimulus
  - ii. Cardiovascular, pulmonary and respiratory only if the accident is the primary cause of the physical condition in relation to all other factors
    - 1. Primary cause-reasonable degree of medical certainty of more than 50%

#### **5. Formal Requirements:**

- a. Notice of an injury must be given within 30 days of the accident.

- b. Claims for personal injury or death due to an accident must be presented within one year, but that period may extend this for an additional 24 months upon a showing of latent injury, lack of knowledge of disability, or equitable estoppel.
- c. Claims for an occupational disease must be presented within one year from the date the claimant knew or should have known that his condition resulted from an occupational disease.
- d. Insurer's failure to take action within 30 days of receiving a claim may result in penalty.

**6. Benefits:**

- a. Date of injury controls.
- b. Status is determined by medical stability.
- c. Weekly rates are determined by wages and are subject to maximum of state's average weekly wage (total disability) or one-half of state's average wage (partial disability).
- d. Temporary total benefits are paid while claimant suffers a total wage loss and until he reaches maximum healing or until he has been released to return to the work in which he had been engaged or work with similar physical requirements.
- e. Temporary partial benefits are paid if claimant is returned to work with a loss of wages before maximum healing.
  - 1. TTD basic entitlement—not at maximum medical improvement and worker suffers total wage loss.
    - a. Total rate— $66 \frac{2}{3}$  of wages subject to maximum of states average weekly wage.
  - 2. No longer entitled to TTD (subject to notice requirements of § 39-71-609) if attain medical stability.
  - 3. No longer entitled to TTD if not at MMI but released to return to time of injury employment or to employment with similar physical requirements. This calls TPD into play.
    - a. If released to a position (TOI, modified or alternative) with employer at time of injury at equivalent or higher wage no benefits due.
      - i. Re-qualifies if position no longer available unless unavailability the fault of the worker (incarceration, termination for disciplinary reasons).
    - b. If position with TOI employer does not pay the same or higher wage benefits=difference between workers average pre injury wage based on a maximum of 40 hour week and the actual wages earned in temporary position. (May no exceed TTD rate.)
  - 4. Worker not eligible for TTD or TPD if:
    - a. Released by *treating physician* to return to modified or alternative position within the workers abilities and qualifications; and
    - b. The wages, combined with TPD, would negate a wage loss compared to TOI; and
    - c. The worker refuses to accept the modified position.

- d. (Worker re-qualifies for TTD if position no longer available—except if due to incarceration, resignation or termination for cause)
- 5. Special provisions for worker released to work by a *physician* to position with different employer prior to MMI. There is no penalty for the worker not accepting these positions.
- 6. § 39-71-609 termination requirements
  - a. All benefits can be terminated if the employer/insurer has knowledge the claimant has returned to work (terminated as of time of return to work).
  - b. If all biweekly benefits are terminated after acceptance of a claim, 14 days' notice of termination must be sent to the claimant, the claimant's representative and the DOLI.
    - i. Pre July 1, 1987 claims: 14 days' notice of reduction from total to partial.
  - c. TTD may be terminated as of the time the claimant has been returned to work in some capacity. Consider the following, however:
    - i. If the claimant is at MMI and has no impairment notice may be provided without other documentation.
    - ii. If there is an impairment at MMI, notice must include a copy of a report that verifies:
      - 1. A physicians determination of MMI;
      - 2. A physicians determination of work restrictions due to injury;
      - 3. A physician's approval of proper job analyses prepared by voc. Rehab consultant.
- f. Permanent total benefits are paid after claimant reaches maximum healing and has no reasonable prospect of physically performing regular employment. Apply the definition of regular employment.
- g. Permanent partial benefits are paid if claimant: has a permanent impairment; is able to work in some capacity, but the impairment impairs his ability to work; and has an actual wage loss due to the injury. If there is no impairment no PPD is due. If there is no actual wage loss the remainder of the § 703 calculation is not applicable.
- h. Death benefits are paid to a spouse for up to 500 weeks or until remarriage, and to children up to age 22 if in an accredited school, otherwise to age 18. Death benefits require a separate claim by beneficiaries. Rates and statutes apply as of the date of the initial injury.
- i. Up to 104 weeks of rehabilitation benefits are paid if the worker meets the definition of a disabled worker or has, as a result of the work-related injury, a whole person impairment rating of 15% or greater and has no actual wage loss. Benefits require that a rehabilitation provider certify that the worker has reasonable vocational goals and re-employment opportunity and the worker and the insurer agree on a rehabilitation plan. Enhanced ability to earn wages must be a part of any plan.

## 7. Medical Benefits:

- a. The insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires.
- b. “Primary medical services” means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability.
  1. *Hiatt*: a claimant is entitled to such ‘primary medical services’ as are necessary to permit him or her to *sustain* medical stability.”
- c. The insurer shall furnish secondary medical services only upon a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment.
  1. “Secondary medical services” means those medical services or appliances that are considered not medically necessary for medical stability. The services and appliances include but are not limited to spas or hot tubs, work hardening, physical restoration programs and other restoration programs designed to address disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation facilities.
  2. As used in this subsection, “disability” means a condition in which a worker’s ability to engage in gainful employment is diminished as a result of physical restrictions resulting from an injury. The restrictions may be combined with factors, such as the worker’s age, education, work history, and other factors that affect the worker’s ability to engage in gainful employment.
  3. Disability does not mean a purely medical condition.
- d. The insurer may not be required to furnish, after the worker has achieved medical stability, palliative or maintenance care except:
  1. When provided to a worker who has been determined to be permanently totally disabled and for whom it is medically necessary to monitor administration of prescription medication to maintain the worker in a medically stationary condition;
  2. When necessary to monitor the status of a prosthetic device; or
    - i. When the worker’s treating physician believes that the care that would otherwise not be compensable under subsection (1)(g) is appropriate to enable the worker to continue current employment or that there is a clear probability of returning the worker to employment.
      1. “Maintenance care” means treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status.
      2. “Palliative care” means treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms.

## 8. Limitation on Benefits:

- a. Social Security disability benefits reduce temporary total or permanent total compensation payments.

- b. When a claimant becomes eligible for Social Security retirement payments, temporary total disability benefits, permanent partial disability benefits (if the claimant is permanently partially disabled), impairment awards, and medical benefits continue; other compensation (permanent total, total rehabilitation benefits) terminate.
- c. A permanently totally disabled person receives their impairment award even though on PTD benefits.

## 9. Subsequent Injuries:

- a. Words
  - i. MMI—maximum medical improvement, medical stability
  - ii. Temporary aggravation
    - 1. Return to base line
    - 2. Return to pre injury status
    - 3. Exacerbation vs. aggravation
    - 4. Aggravation of symptoms vs. condition
    - 5. With temporary aggravation in new claim, the new claim pays benefits until there is a return to pre injury status
  - iii. Permanent aggravation
    - 1. *Belton*—permanent change in condition
    - 2. *Caekert*—injury or exposure that materially or substantially contributed to claimants symptoms
      - a. Independent intervening cause attributable to the claimant
    - 3. Inherent in this is that you don't return to pre injury status—new entitlement
  - iv. Natural progression
    - 1. Recurrence
- b. General rules:
  - i. If there is a dispute between two or more insurers in a claim for an injury, the insurer for the most recently filed claim must pay benefits until that insurer proves that another insurer is responsible for paying the benefits or another insurer agrees to pay the benefits.
  - ii. Maximum medical improvement/medical stability is a key to determining liability in a successive injury or multiple employer setting.
  - iii. Absent MMI no new entitlement can occur.
  - iv. After MMI a permanent aggravation on the job creates a new entitlement.
  - v. After MMI a permanent aggravation off the job to the same part of the body negates entitlement on the claim.
  - vi. After MMI a temporary aggravation creates a new entitlement only until the time the worker returns to pre injury status.  
After MMI the worsening of the condition by a natural progression does not create a new entitlement.

- vii. In the case of a first diagnosis of an OD where there are multiple employers potentially liable, the last employment in which the kind of conditions which could have caused the OD are present is responsible for the claim.
- viii. If an employee has an OD, works for the same employer but the insurers change, the insurer on the risk is the one at the time of the earlier of a) first diagnosis of OD or b) when the worker knew or should have known of the OD.

**10. Dispute Resolution:**

- a. A claimant with a dispute concerning benefits must first attempt informal resolution and then seek formal mediation of the dispute with the Department of Labor and Industry. If mediation does not resolve the dispute, the claimant may petition the workers' compensation judge, who has exclusive jurisdiction to make determinations concerning these disputes.
- b. Non-benefit issues are heard by Department of Labor and Industry hearing examiners.
- c. Actions against uninsured employers are brought in district court, with some claims allowed in the WCC.

**11. Subrogation:**

- a. An employee may sue a third party for negligence or may sue his employer or a fellow employee for an intentional and deliberate act causing an intentional injury.
- b. The workers' compensation insurer may be entitled to subrogation.
- c. The workers' compensation insurer is not entitled to subrogation rights until the claimant has been made whole. If there are fees or costs associated with the third party recovery the claimant is not made whole.

**12. Practical Considerations and Suggestions:**

- a. The first consideration of any evaluation is the date of injury to note the law that controls.
- b. At the outset, always consider the coverage formula (arising out of and in the course and scope of employment) and its many facets that might apply to a factual situation.
- c. Always review for considerations of when and if the claimant has reached medical stability and understand and explain the consequences. This will bear on type of benefits available and also be critical if there are aggravations by some subsequent injury, OD or non-work related activity.
- d. Always pay attention to all parts of the body injured and determine the compensability of each for all known industrial and nonindustrial injuries or diseases.
- e. Consider the interworking of proceedings and benefits under the WCA with other actions available to an injured worker.
- f. Stay Current. The Workers' Compensation Court website (<http://wcc.dli.mt.gov/>) is a valuable resource and tool.