MINUTES

MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION

SELECT COMMITTEE ON WORKERS' COMPENSATION

Call to Order: By **CHAIRMAN CHASE HIBBARD**, on February 8, 1993, at 3:00 P.M.

ROLL CALL

Members Present:
Rep. Chase Hibbard, Chairman (R)
Rep. Jerry Driscoll, Vice Chairman (D)
Rep. Steve Benedict (R)
Rep. Ernest Bergsagel (R)
Rep. Vicki Cocchiarella (D)
Rep. David Ewer (D)

Members Excused: None

Members Absent: None

Staff Present: Susan Fox, Legislative Council
Evy Hendrickson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing: HB 361, HB 347
Executive Action: None

HEARING ON HB 347

Opening Statement by Sponsor:

REP. STELLA JEAN HANSEN, House District 57, Missoula, presented HB 347 as simply a repealer. It deletes away with lump sum payments for workers' comp. Business people in her district name doing away with lump sum payments as the major answer to the workers' comp problem. Employers paying the premiums believe this is what is getting our fund into problems. A survey she conducted of 36 different businesses showed 22 giving this as their first complaint. After that they had a variety of different reasons why workers' comp should be changed, sold, etc.

One of the things that has to be done to maintain the fund is to manage the cash flow, and lump sum payments do not manage the cash flow of the workers' comp fund. She also has talked to people who received lump sum payments but were not provided the

security that were supposed to receive along with that.

Proponents' Testimony: None

Opponents' Testimony:

George Wood, Executive Secretary of the Montana Self Insurers Association, rose in opposition to the bill. A lump sum has been a provision expected historically by both employers and injured workers in Montana. He mentioned previous legislation known as the "blue light special" which accelerated lump sums as a benefit to the fund and to the claimant. This bill eliminates lump sum payments.

Russell Hill, representing the **Montana Trial Lawyers Association (MTLA)**, said he believes that lump sum settlements in appropriate circumstances can provide significant benefits both to impoverished workers and to insurers. They allow for flexibility and voluntary agreements. They oppose the bill.

Oliver Goe, representing **Montana Municipal Insurance Authority (MMIA), Montana School Groups Insurance Authority (MSCIA) and Montana Association of Counties (MACO),** all self insurers providing workers' compensation coverage, opposed this bill and echoed comments already made.

James Tutwiler, representing the **Montana Chamber of Commerce,** represents over 1,000 businesses across the state, 85% of which are small businesses. It is the consensus of the employers they deal with that lump sums probably are a management tool that has been used in the past and should be continued. From their perspective, lump sum money gives claimants the flexibility to use that money as they see fit. They also believe this management tool works to the benefit of the employer and the insurer, which is the State Fund for most of their members.

This specific management tool should not be taken away at this time when the State Fund must look to every reasonable alternative to contain costs and make the system workable. Lump sums are a vital part of that process and should be continued.

Jacqueline Lenmark, representing the **American Insurance Association (AIA),** said the association opposes the repeal of lump sums. Typically, insurers would support this type of legislation but in workers' compensation where the tail is so long and the risk of adverse development so great, this is an important management tool that should be left available to insurers, especially for the State Fund.

Questions From Committee Members and Responses:

No questions

Closing by Sponsor:

REP. HANSEN said she thought this bill would also be a management tool because when a fund is stretched out over 500 weeks, that's almost ten years in which they would still be eligible. It would certainly make the fund easier to manage. It might be easier to make the lump sum payment and get that person off the books, but if you don't have the money it would be easier to make that $159.00 payment than to stretch it out over ten years. She said her constituents feel this is what is driving the fund so high.

HEARING ON HB 453

Opening Statement by Sponsor:

REP. BRAD MOLNAR, House District 85, Laurel, said he had spoken with **REP. DRISCOLL** after he had returned from an interim committee on workers' comp in Billings and he said the committee dealt with what they called "Monday morning injury." This means that when an accident happens outside of work, an employee pretends it happened at work, has a friend verify it, and receives workers' comp. End-of-job injury also is fairly common in construction. Fraud is hurting both employers and employees.

REP. MOLNAR then reviewed his bill section by section and the amendments.

Proponents Testimony: None

Opponents Testimony:

Don Judge, representing the **Montana State AFL-CIO,** said that the AFL-CIO does not condone fraud and think that individuals who abuse the system ought to be caught and appropriately punished. They are concerned at the implication that workers are the only people who defraud the system. This legislation provides no penalty for medical providers who defraud the system unless they are knowingly providing the benefits or assisting someone in getting those benefits; there's no penalty against insurers who fail to pay benefits on time to injured workers who deserve those benefits or who fail to address the injury; there is no penalty applied to employers who fail to pay their taxes on time, or fraudulently pay those taxes, or don't pay on the appropriate people; there is no reimbursement to individuals charged with theft who must hire a lawyer to successfully defend themselves against those fraud claims; there is no penalty to the individual who fraudulently claims that someone else has fraudulently claimed benefits; and there are no standards outlined for how fraud will be determined and the meaning of fraud.

He noted that the Senate Labor committee has legislation dealing

with the fraud issue that they support with some amendments. However, they ask for a do not pass consideration on HB 453.

Questions From Committee Members and Responses:

REP. BENEDICT said this bill would apply to anyone who has ever defrauded the workers' compensation system. He asked **REP. MOLNAR** if he would have any problem with expanding the scope of this bill to medical providers and employers who defraud the system?

REP. MOLNAR said that is already in the bill. It states if a person knowingly gives false testimony, that is fraud.

Closing By Sponsor

REP. MOLNAR addressed some of the concerns of **Mr. Judge**, saying that this bill does go after business people who file false claims. Failure to pay the premium on time is covered in another statute. There is no attempt to make this a white collar/blue collar bill. It's clear what the intent of this bill is and he asked the committee to give it a do pass recommendation.

CHAIRMAN HIBBARD turned the meeting over to **VICE CHAIRMAN DRISCOLL.**

HEARING ON HB 361

Opening Statement by Sponsor:

REP. CHASE HIBBARD, House District 46, Helena, presented HB 361 as one of many necessary to help contain the increasing cost of the workers' compensation system. The bill expresses the benefit provisions of the workers' compensation act; however, its primary focus is on access to benefits and not writing another version for workers' compensation benefits. As major changes were made to those benefits in 1987, and again in 1991, there were a lot of benefit reductions at that time. Some of the amendments are based on changes Oregon made to its workers' compensation act.

CHAIRMAN HIBBARD reviewed the amendments and the bill section by section.

Proponents' Testimony:

Terry Mitton, Montana Work Comp Reform Coalition, which has over 200 members and represents almost 30,000 employees and employers in the state, endorsed HB 361 with various comments. The Coalition recommends that a stricter definition of the proposed exclusion of benefits for alcohol consumption be used; they will

be presented in an upcoming bill.

Regarding rehabilitation, the medical committee believes there needs to be a cost effective and common sense approach; they feel that HB 361 has proposed what is now a gray area. If it isn't done, the courts will make that decision. They don't want that to happen.

Pat Sweeney, representing the **State Fund,** gave oral and written testimony. **EXHIBIT 1** The State Fund supports this bill and the sponsor's proposed amendments.

John W. Strizich, M.D., of Helena, has been practicing internal medicine for 30 years and has been a consultant for workers' compensation and social security disabilities periodically during that time. He is now the chief medical consultant for social security disability for the state of Montana. He appeared as a concerned citizen to address the portion of this bill dealing with objective medical evidence.

The social security disability program operates under objective medical evidence. It has been established throughout many years and is now federal law. Pain may be an important factor in causing functional loss, but it must be associated with relevant and abnormal physical findings. The physical findings must be determined on the basis of objective observations during the examination and not simply an individual allegation. Alternating testing methods should be used to verify the objectivity of the abnormal finding. He advocated having in this bill a way to determine objective medical evidence.

Oliver Goe, appeared on behalf of **Montana Municipal Insurance Authority (MMIA), Montana School Groups Insurance Authority (MSCIA), and the Montana Association of Counties (MACO)** to support HB 361. **Mr. Goe** reviewed his amendments to HB 361 section by section. **EXHIBIT 2**

Mr. Bill Crivello, representing **Rehabilitation Association of Montana,** reviewed his proposed amendments.

George Wood, Executive Secretary of the Montana Self Insurers Association, supported the concepts of the bill; however, because multiple amendments are being proposed, he suggested that the bill be placed in a subcommittee to work on incorporating those amendments and making the bill more readable.

James Tutwiler, Montana Chamber of Commerce, supported HB 361 and said it addresses a critical part of workers' comp problems.

Riley Johnson, National Federation of Independent Businesses, (NFIB), commended the sponsor but would also like to see the bill go into a subcommittee to work on the amendments.

Jacqueline Lenmark, representing the **American Insurance**

Association (AIA), said the association strongly supports HB 361 and views the bill as a giant step forward in solving the system problems. They do have some concerns about the technical aspects of the bill, particularly the repeal of any wage loss criteria used in permanent, partial disability ratings. They also requested subcommittee review.

CHAIRMAN HIBBARD said he has some amendments to the bill dated February 8, 1993. **EXHIBIT 3**

Opponents' Testimony:

Norm Grosfield, an attorney with the Helena law firm of Utick and Grosfield and the administrator of the Division of Workers' Compensation until 1979, said his firm does both claimant and defense work for workers' compensation. Having been involved in writing legislation for workers' compensation since 1973: (1) Definition of injury attempts to exclude injuries involving conditions that do not have objective medical findings. This would result in a great deal of litigation over questions of whether injuries are compensable. Whether or not an injury is a compensable or disabling condition should be the call of the treating physician, not the legislature trying to write medical requirements into statute. (2) Deleting the late injury rule and the lack of knowledge of the disability rule hurts the worker who doesn't complain about every ache and pain. There are conditions that don't manifest themselves until sometime after the injury. (3) In 1991, most interested groups, including the State Fund, saw the problems with the rehab system; they came to an agreement whereby workers' comp would provide a bona fide rehab program and give up to 150 weeks of permanent partial benefits. What this system does is reinstate the notorious system that we had prior to 1991 which resulted in rehabilitation counselors coming in at the behest of the insurance industry and finding any theoretical job that exists in the state of Montana. If that job existed, no one was entitled to rehab. That system was eliminated; the 1991 legislature provided a bona fide rehab program; and injured workers gave away 150 weeks of permanent partial benefits for it. If the old, notorious Option C system is going to be reinstated, so should the 150 weeks of permanent partial benefits.

Don Judge, representing the **Montana State AFL-CIO,** stated this legislation seems to make some presumptions about workers, one of which is that workers are receiving benefits they're not entitled to and are getting rich off the system. The system currently limits the worker to 66 2/3% of his own wage, not to exceed the state's average weekly wage. The workers don't injure themselves on purpose, and workers are not the sole cause of the problems of the state workers' comp system. We concur with **Mr. Grosfield;** that workers have sacrificed since 1985 when we first began to address the problem of the state workers' comp system. Workers have received a much more limited access to the system and have received much lower benefits as a result of the so-called

compromising taking place throughout those years.

He suggested that perhaps an amendment is needed whereby workers who are injured and can prove that the injury is not compensated for by statute should have full right to redress under the state's laws and constitution. This bill does not say that insurers will hold their profit levels at a rate no higher than the current level.

What this legislation does is tell injured workers that they will take the risks for being injured on the job, and they will not be compensated for those injuries. The worker needs the incentive to go back to work. The injured worker should not be limited to a lifetime benefit of 350 weeks. He said that he would work with the committee on addressing the problems of the workers' compensation system, but this legislation should go to a subcommittee. There are a number of other areas in this bill which are unfair to injured workers in the state.

Russell Hill, representing the **Montana Trial Lawyers Association,** submitted written testimony. **EXHIBIT 4**

Jan VanRiper, attorney at law, specializing in the representation of injured workers under the Montana Workers' Compensation and Occupational Disease Acts, worked for six years for the division of workers' compensation and the State Fund and served on the Governor's Task Force on Workers' Compensation in the mid-1980's. She presented written testimony in opposition to HB 361. **EXHIBIT 5**

Bill Egan, representing the **Montana Conference of Electrical Workers, MCEW,** opposed the bill, saying the legislature needs to look at what's wrong with America's medical system and Montana's system which allows adverse selectivity against clients.

Pat Sheehy, President of the Yellowstone County Trial Lawyers Association, said the emphasis of their practice is on workers' compensation matters representing both claimants and some workers' compensation insurance. Since 1985, injured workers have borne the full brunt of workers' compensation reform. Before 1987, when major changes in the Workers' Compensation Act were enacted, an injured worker who had been earning $15 per hour and was unable to earn anything more than $5 per hour on partial disability settlement was entitled to a maximum of $75,000. With 1987 changes, people who were injured between 1987 and 1991 saw their workers' comp settlement for partial disability benefits drop to $50,000.

The workers' comp act was reformed in 1991, and the average workers' settlement dropped from $50,000 to $25,000. Under this proposed bill, those permanent partial disability benefits would be restricted even more. The injured worker is being asked to bear the brunt of the entire workers' compensation reform.

Rick Pyfer, a trial lawyer who represents businesses, said this bill denies access for the claimant and the employer. The majority of claimants are not union wage people but minimum wage people such as waitresses, nursing home nurses, etc. This bill gives a vocational rehabilitation evaluator the right to be the doctor and eliminates an injured worker's right to compensation. He agreed the bill should be placed in a subcommittee.

Lars Erickson, Secretary for the Montana State Council of Carpenters and also a member of the **Coalition for Workers' Compensation System Improvement,** said he opposes this bill for the same reasons stated previously and asked that the committee defer any action until some other legislation is introduced that will address the concerns raised today.

Questions From Committee Members and Responses:

REP. DRISCOLL asked what would happen if an employee refused to take the breathalyzer test. **Mr. Wood** said there is nothing in the bill regarding that.

REP. EWER said **Mr. Pyfer** talked about how unfair this bill is and suggested there could be the full right of redress under the constitution. He asked him if he was prepared to accept the risks of going back to the 1915 situation.

Mr. Pyfer said his organization did not advocate legislation which would provide immunity for the employer if the work place resulted in injuries to workers.

REP. BENEDICT said attorney settlements in 1989 to 1991 reached almost $20 million. **Mr. Pyfer** said he didn't know the total but adding up the settlements with and without attorneys would show a tremendous decline in attorney-represented settlements. The legislature has reduced benefits, which isn't fair, and now it's trying to deny access to the system. This would deny workers' comp insurance to people who are entitled to it.

REP. EWER asked **Dr. Strizich** if he believed there are pain syndromes that a physician cannot determine through objective findings. **Dr. Strizich** said the social security program has attempted to establish objective findings; they have addressed 13 different groups of disease problems, including neurological and orthopedic problems. The law on social security states that in order to establish an impairment, there must be objective findings to even begin to understand and establish impairment.

If a person tells the doctor that he has a bad back and backaches and the physician finds no objective findings, he will not meet the listings of social security disability. There are two billion people on social security disability. After two years on disability they are entitled to medicare. Hundreds of billions of dollars are being spent on this. Without some kind of

objective standards, about one-third of the people who attempt to get disability on social security are approved. About two-thirds fail to meet the requirements of the law that states very clearly the impairment must be established by objective benefit standards. **Dr. Strizich** again reviewed what the doctor looks for when he examines a patient.

REP. COCCHIARELLA asked **Pat Sweeney** where the alcohol language came from and why it is in the bill. Who does the testing, who has the right to test, and why aren't drugs included? **Mr. Sweeney** said this information came from the Governor's task force and was placed in the bill in regard to compensability regarding injuries where there has been alcohol or drug consumption. The committee had asked if there were instances where the State Fund or any other insurer compensated an individual when in fact he was intoxicated at the time of injury; there were instances. If a person is injured, he would be tested when he arrives at the hospital through a blood analysis.

REP. COCCHIARELLA asked if this language would lead to more attorney involvement in the process. **Mr. Sweeney** said he had no idea.

Closing by Sponsor:

CHAIRMAN HIBBARD said he is sympathetic to the opponents' testimony and knows how difficult these issues are. The last major interim committee dealt with these issues and spent almost two years talking about the 1987 reforms. It's not going to be easy, but the workers' compensation situation in Montana is out of control. He reiterated that it is not fair to balance the effort on the backs of workers. There has to be reform somewhere, and the amendments make some substantial changes. Everyone who testified has not had an adequate opportunity to consider them. In regard to the rehab amendments, in 1987 rehab was changed greatly; in 1991 all of that was thrown out; this proposal reinstates the 1987 situation; the amendments take it out again.

CHAIRMAN HIBBARD said he will open the discussion on the amendments and have the State Fund explain the effects of the amendments at the next meeting.

ADJOURNMENT

Adjournment: 6:00 p.m.

REP. CHASE HIBBARD, Chairman

EVY HENDRICKSON, Secretary
by Marilyn Miller

CH/eh

HOUSE OF REPRESENTATIVES

Select Water Comm COMMITTEE

ROLL CALL VOTE

DATE 2-8-93 BILL NO. _____ NUMBER _____

MOTION: _____

(Adopt)

NAME	AYE	NO
Rep Hibbard ✓		
Rep Bunker ✓		
[illegible] ✓		
[illegible] ✓		
[illegible] ✓		
[illegible]		
[illegible] ✓		
[illegible]		

EXHIBIT 1
DATE 2-8-93
HB 361

Pat Sweeney #1
STATE FUND

TESTIMONY ON HB 361

THE STATE FUND SUPPORTS THIS BILL AND THE SPONSOR'S PROPOSED AMENDMENTS. THIS BILL CONTAINS MANY OF THE SUGGESTIONS PRESENTED IN THE PAST TO THE GOVERNOR'S TASK FORCE ON WORKERS' COMPENSATION.

WE BELIEVE COST CONTAINMENT IN THE AREA OF BENEFITS IS JUST AS IMPORTANT AS COST CONTAINMENT IN OTHER AREAS OF THE SYSTEM, SUCH AS FRAUD, SAFETY AND MEDICAL EXPENSES.

THIS BILL, WHILE PROMOTING A REDUCTION IN COSTS, IS UNIQUE IN THAT IT PRIMARILY ADDRESSES ACCESS TO BENEFITS, RATHER THAN MAKING A SUBSTANTIAL CHANGE TO THE TYPE AND DURATION OF BENEFITS AVAILABLE TO AN INJURED WORKER.

WE URGE THE COMMITTEE TO GIVE THIS BILL CAREFUL CONSIDERATION.

CS/4030

Olson-Doal #2

EXHIBIT 2
DATE 2/8/93
HB 361

AMENDMENTS TO HOUSE BILL 361

1. Title: Line 8
Following: "Wages"
Insert: "Clarifying the Calculation of Wages for Seasonal Employment"

2. Title: Line 11
Following: "Benefits"
Insert: "Limiting Entitlement to Temporary Total Disability Benefits for Seasonal Employees"

3. p. 5, line 24
Strike: "and"
Insert: "(b) is unable to return to work at time of injury employment; and"

4. p. 10, line 18
Following: "claimant,"
Insert: "employer or insurer,"

5. p.10, line 21
Following: "periods"
Insert: "(4) For the purposes of calculating compensation benefits for an employee employed in seasonal employment which cannot or is not carried on throughout the year, the average weekly wage shall be calculated by dividing total wages received or to be received for such seasonal employment by 52. For purposes of this subsection "wages received or to be received" means

(a) the amount specified in the employment contract in effect at the time of injury; or

(b) the salary agreed to between the employer and the employee in effect at the time of injury; or

(c) the hourly wage in effect at the time of injury agreed to between the employer and employee multiplied by the usual hours worked in a day and the number of days in the season; or,

(d) where wages are dependent on output, the average daily wage received as of the time of injury multiplied by the number of days in the season."

EXHIBIT 2
DATE 2-8-93
HB 361

6. p. 13, line 9
Strike: "the"
Insert: "a"

7. p. 13, line 10
Strike: "major"

8. p. 13, line 16
Strike: "the major"

9. p. 13, line 21
Following: "injury"
Insert: "(d) nothing contained within this subsection is meant to alter the provisions of (1), (2) and (3) including the requirement that before an injury is compensable it must arise out of and in the course of employment"

10. p. 16, line 3
Following: "39-71-116"
Insert: "(5) A worker who suffers an injury resulting in a temporary total disability while employed in seasonal employment which cannot or is not carried on throughout the course of a year, remains eligible for temporary total disability benefits only so long as the seasonal employment would have remained available."

EXHIBIT # 2
DATE 2/8/93
HB 361

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MARCIA D. MORTON
SHARON A. O'LEARY**
LEO S. WARD

*MEMBER OF WASHINGTON STATE AND OREGON STATE BARS ONLY
**MEMBER OF NEW YORK STATE BAR ONLY

Sent after meeting date.

February 10, 1993

HAND-DELIVERED

Rep. David Ewer
Capitol Station
Helena, MT 59620

RE: House Bill 361

Dear Rep. Ewer:

I am writing on behalf of the Montana Municipal Insurance Authority (MMIA), Montana School Groups Insurance Authority (MSGIA), and Montana Association of Counties (MACO) regarding HB 361. Each is a Plan 1 insurer providing workers' compensation coverage for cities and towns, school districts, and counties throughout the state of Montana. The success of these programs, with their emphasis on risk management, safety and fair and prompt claims management, have benefitted both employee and employer as well as the taxpayers of the state of Montana.

At the hearing on House Bill 361, you were inundated with proposed amendments. Some of the proposed amendments were presented during my testimony on behalf of the MMIA, MSGIA, and MACO. I know that those in attendance at the hearing were confused as to the impact of the various proposed amendments and how they might affect the overall intent, structure, and provisions of House Bill 361. I assume that there is likewise some confusion among the committee members regarding the various proposed amendments.

Attached hereto are the amendments proposed by the MMIA, MSGIA, and MACO. They address three major areas, entitlement to permanent partial disability benefits, entitlement to temporary total disability benefits for seasonal workers, and how the use of alcohol and/or drugs should impact on the compensability of an injury. The amendments relative to seasonal employment differ to some degree from those presented at the time of hearing. However, by limiting entitlement to temporary total disability benefits to the period for which seasonal employment was to be available, the intent remains the same, i.e., to keep benefits consistent with lost wages. For your information I have summarized each proposed amendment below.

1. The first amendment is merely a change in the title of the bill to reflect the proposals regarding seasonal employment.

2. Amendment No. 2 provides that an injured worker who, following maximum medical improvement, returns to work at the time-of-injury position, is not eligible for permanent partial disability benefits. Currently, to qualify for permanent partial disability benefits, an injured worker must have a medically determined physical restriction as the result of an injury and, while able to return to work in some capacity, physical restrictions which impair the worker's ability to work. A worker who returns to time-of-injury employment is eligible for permanent partial disability benefits if he or she can meet the aforementioned two-prong test. The amendment will eliminate any entitlement to permanent partial disability benefits for workers who have returned to their time-of-injury employment.

3. Amendment No. 3 allows a claimant, insurer, and employer, for good cause shown, to use additional pay periods for purposes of calculating wages at the time of injury. Currently, under § 39-71-123, preinjury wages are calculated by reference to the four pay periods immediately preceding the injury. However, "for good cause shown by the claimant, the use of four pay periods does not accurately reflect the claimant's employment history with the employer, in which case the insurer may use additional pay periods." § 39-71-123(3)(b). As such, a claimant may look beyond the four pay periods immediately preceding the injury for purposes of calculating preinjury wages where, for whatever reason, wages were lower than normal. However, in those instances where wages are higher than normal, for example where a claimant has worked an extensive amount of overtime immediately preceding the injury, even though not truly reflective of overall employment history, benefits are calculated based on this inflated wage. As amended, insurers and employers will have the same flexibility to look beyond the four pay periods immediately preceding the injury where they do not accurately reflect an injured worker's overall employment history.

4-7. Amendments 4 through 7. House Bill 361 precludes compensability only where the use of alcohol is the "major contributing cause" to the accident. However, in most instances where alcohol or drugs are involved, while they may play a role in bringing about the accident and resulting injury, there are other contributing factors. Trying to identify which factor is the major contributing factor may be difficult if not altogether impossible. The amendment will eliminate from compensability those accidents where a contributing cause is the use of alcohol or drugs.

8. The MMIA, MACO, and MSGIA hire many employees on a seasonal basis. They include teachers, parks and recreation workers, maintenance workers, cafeteria workers, and a number of other positions. Under the current statutory scheme, a seasonal

EXHIBIT 2
DATE 2/8/93
HB 361

employee remains eligible for temporary total disability benefits irrespective of the seasonal nature of the employment. For example, assume a temporary worker is hired to work in the parks starting on May 1st, the position to terminate on September 1st. If that worker is injured on July 1st, and is incapable of continuing such employment, he or she is eligible for temporary total disability benefits. Benefits are calculated on the basis of the last four pay periods. Assuming a 40-hour work week and a wage of $7.00 an hour, benefits are paid at the rate of $186.76 a week. Employer and insurer remain responsible for payment of temporary total disability benefits even though the employment itself was only going to be available for a limited time. As such, the worker may remain eligible for temporary total disability, well beyond September 1st, actually receiving more in temporary total disability benefits than could have been anticipated in wages from the seasonal employment. The proposed amendment limits payment of temporary total disability benefits to the period for which seasonal employment would have remained available. This amendment is consistent with the intent of the Montana Workers' Compensation Act which states in part that "...the wage loss benefits should bear a reasonable relationship to actual wages lost as a result of a work related injury or disease." § 39-91-105, MCA. This amendment does not affect entitlement to permanent total disability benefits, rehabilitation benefits or permanent partial disability benefits.

I hope that I have been able to shed some light on the amendments proposed by the cities and towns, school districts, and counties. We believe that the issues addressed are also of concern to other insurers and employers throughout the state of Montana. We believe the amendments are equitable and do not unfairly impact upon workers who are injured during the course and scope of their employment. I hope you will give each of the proposed amendments consideration.

Sincerely,

BROWNING, KALECZYC, BERRY & HOVEN, PC

By: _____
Oliver H. Goe

/slb

Enc.

EXHIBIT 2
DATE 2/8/93
HB 361

AMENDMENTS TO HOUSE BILL 361

Proposed by the Montana Municipal Insurance Authority, Montana School Groups Insurance Authority and Montana Association of Counties

1. Title: Line 11
   Following: "Benefits"
   Insert: "Limiting Entitlement to Temporary Total Disability Benefits for Seasonal Employees"

2. p. 5, line 24
   Strike: "and"
   Insert: "(b) is unable to return to work at time of injury employment; and"

3. p. 10, line 18
   Following: "claimant,"
   Insert: "employer or insurer,"

4. p. 13, line 9
   Strike: "the"
   Insert: "a"

5. p. 13, line 10
   Strike: "major"

6. p. 13, line 16
   Strike: "the major"

7. p. 13, line 21
   Following: "injury"
   Insert: "(d) nothing contained within this subsection is meant to alter the provisions of (1), (2) and (3) including the requirement that before an injury is compensable it must arise out of and in the course of employment"

8. p. 16, line 3
   Following: "39-71-116"
   Insert: "(5) A worker who suffers an injury resulting in a temporary total disability while employed in seasonal employment which cannot or is not carried on throughout the course of a year, remains eligible for temporary total disability benefits only so long as the seasonal employment would have remained available."

#3

EXHIBIT 3
DATE 2/8/93
HB 361

Amendments to House Bill No. 361
First Reading Copy

Requested by Representative Hibbard
For the Select Committee on Workers' Compensation

Prepared by Paul Verdon
February 8, 1993

1. Title, line 18.
Following: "WORKER;"
Strike: remainder of line 18

2. Page 4, lines 24 and 25.
Strike: "diagnostic evidence, substantiated by clinical findings"
Insert: "verifiable findings demonstrated by accepted diagnostic procedures"

3. Page 5, line 1.
Strike: "clinical"
Insert: "verifiable"

4. Page 14, line 25.
Strike: "subsection"
Insert: "subsections"
Following: "(4)"
Insert: "and (5)

5. Page 15, line 16.
Following: line 15
Insert: "(4) If the treating physician releases a worker to return to the same position, the worker is no longer eligible for temprary total disability, regardless of availability of employment."
Renumber: subsequent subsections

6. Page 15, lines 17 and 18.
Following: "the" on line 17
Strike: remainder of line 17 through "the" on line 18

7. Page 17, line 13 and 14.
Strike: ", as determined after a vocational rehabilitation evaluation"

8. Page 22, lines 12 and 13.
Strike: "wage supplement,"

9. Page 22, line 16.
Following: "~~award,~~"
Insert: ", any impairment award,"

10. Page 24, line 20.
Following: "~~less~~"
Insert: "or $20,000, whichever is less"

EXHIBIT 3
DATE 2/8/93
HB 361

11. Page 25, lines 4 through 7.
Strike: subsection (3) in its entirety
Renumber: subsequent subsections

12. Page 26, line 2.
Strike: "subsection"
Insert: "subsections"
Strike: "(4)"
Insert: "(2) and (3)"

13. Page 26, line 11.
Strike: "or 7%, whichever is greater"

14. Page 29, lines 4 through 16.
Strike: subsection (7) in its entirety

15. Page 30, lines 10 and 11.
Strike: "in the worker's local or in the statewide job pool"

16. Page 32, lines 7 through 11.
Strike: subsection (2) in its entirety
Renumber: subsequent subsections

EXHIBIT #4
DATE 2/8/93
HB 361

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February 8, 1993

Rep. Chase Hibbard, Chair
House Select Committee on Workers Compensation
Room 325, State Capitol
Helena, MT 59620

RE: HB 361

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to HB 361, which generally revises workers compensation benefits. MTLA opposes the bill on the basis of several concerns, including:

1. The definition in Section 1 of "objective medical findings" (beginning at page 4, line 22) conflicts with the recommendation of the subcommittee of the Governor's Task Force on Workers Compensation, which debated this issue and reported that the last sentence regarding complaints of pain be deleted "to protect a worker who suffers genuine pain." The workers compensation court, which is in the best position to evaluate the credibility of witnesses, currently determines whether pain is genuine and whether it causes physical restrictions. This bill, however, presumes to remove the issue from claimants, doctors, and the workers compensation court and submit it instead to some unspecified marvel of modern medicine tantamount to a Pain-O-Meter. Like headaches, other pain can be very real and debilitating yet resist objective clinical findings.

2. HB 361 apparently proposes to require "objective medical findings" in order to detect and deter benefits which are awarded on the sole basis of complaints of pain. Yet without articulating what percentage of workers compensation claims this amendment addresses, and without addressing the additional expense which the amendment will impose on all other claims, HB 361 virtually guarantees increased health-care costs. For example, even if 10 percent of claims currently involve complaints of pain alone without supporting medical evidence, and even if HB 361 prevents improper awards of benefits in those 10 percent of claims, the savings might well be overwhelmed by the added

expense of obtaining "objective medical findings" in cases where benefits would otherwise be properly awarded without "objective medical findings" and in cases where claimants obtain excessive "objective medical findings. Note, too, that injured workers in rural areas without sophisticated clinical equipment will incur additional travel expenses. Finally, in light of other provisions of HB 361 requiring claimants to prove that workplace injuries are the major contributing cause or primary cause of resulting conditions, insurers which seek to introduce evidence of non-work-related injuries will be forced at times to produce "objective medical findings" as well.

3. By limiting the definition of "injury" in Section 2 to physical harm established by "objective medical findings," the bill expands the circumstances under which an injured worker can sue an employer for civil damages. Workers who cannot obtain "objective medical findings" are not injured within the scope of workers compensation law. Similarly, employers and insurers may face enormous problems in connection with workers who for precisely that reason prefer not to obtain "objective medical findings."

4. The amendment to in Section 2 to 39-71-119(5), MCA (page 8, line 22) directly contradicts the Montana Supreme Court's holding in the 1990 Gaumer case (795 P.2d 77). The facts of that case vividly illustrate not only the dangers of this amendment but also, perhaps, the motivation behind it. The State Fund initially denied liability for the claim, not because of any contention based on cumulative physical harm, but instead because it claimed it could not identify the exact chemical agent responsible for the injury. The hearings examiner, workers compensation court, and Montana Supreme Court each declared the State Fund's denial of liability unreasonable and imposed a 20 percent penalty on all benefits because the State Fund made no effort to investigate the cause of the injury, even after a physician's report linking the injury to exposure to workplace chemicals.

5. Section 4 of the bill regarding pre-existing conditions (page 12, lines 8-16) requires doctors to do the impossible: determine whether an aggravation of a pre-existing condition is responsible for more than 50 percent of the resulting condition. Worse, the amendment potentially requires doctors to do so repeatedly in order to determine whether the aggravating injury remains the major contributing cause. Finally, introducing the element of "major contributing cause" will necessarily increase litigation expenses, as the parties dispute the significance of health conditions completely unrelated to the workplace accident.

6. Section 5 of the bill penalizes precisely those claimants who avoid unnecessary medical care, who struggle to overcome pain and injuries without medical treatment and without claiming workers compensation benefits.

7. Section 6 of the bill allows an insurer to terminate temporary total disability benefits on the basis of a wholly hypothetical job (page 15, line 17-18).

Thank you for considering these comments. If I can provide additional information or assistance, please contact me.

With best regards,

Russell B. Hill
Executive Director

EXHIBIT 4
DATE 2/8/93
HB 361

My apologies for the shape of this in the interests of time it was not proofread.

EXHIBIT 5
DATE 2-8-93
HB 361

TESTIMONY OF JAN VANRIPER BEFORE THE HOUSE SELECT COMMITTEE ON WORKERS' COMPENSATION
RE: HB361
2/8/93

BY: Jan Vaniper, Attorney at Law, speciallizing in the representation of injured workers under the Montana Workers' Compensation and Occupational Disease Acts. This testimony is offered in opposition to HB361.

BACKGROUND:

- The costs of workers' compensation are indeed a legitimate and grave concern for this state. However, many of the current bills and rumored proposals are based on the assumption that the correct way to control costs are by reducing benefits to injured workers, further limiting their access to legal representation, and making sure that workers don't defraud the system or act in unsafe manners in the workplace.

- E.g. Fraud bill drafted solely to get at injured worker fraud, while even the primary sponsor admitted in his opening remarks that the "real fraud" in this state was that of employers misreporting workers and payroll; Safety bill drafted to focus almost solely on workers' safety practices, while ignoring employer worksite safety practices; bills to exempt out more kinds of workers; and, now, we have the "benefits bill" which purports to chop benefits even more, and to yet again eliminate from coverage whole classes of injured workers.

- These bills should all be looked at in the context of the total reality:

  - "Old Fund Liability" cannot be changed with benefit legislation;

  - New Fund apparently running in the red. Can't possibly be from grossly increased benefits. Legislature has consistently reducing benefits and coverage since 1987: (A) coverage reduced, eliminating certain kinds of injuries, and throwing many more over into the archaic Occupational Disease Act; (B) Permanent total disability has gone from lifetime benefits, to age 65 plus 500 weeks of partial, and now down to age 65; (C) Partial benefits rehabilitation have been affected the most, moving from a 500 week maximum partial disability award with retraining options, to 500 week maximum bases on an assumed actual wage loss and

practically no retraining options; to a percentage of 350 weeks, with a retraining option that the insurers hardly ever provide.

-How can benefits, given this history, possibly be the main driving factor in increasing costs? And yet, benefits are what this bill proposes to chop even further.

- See figures in latest issues of Law Week to compare value of pre-1992 cases and those after. Have the State Fund projections caught up with that reality yet?

WHAT'S DRIVING COSTS?

- Medical costs soaring. Does this mean that injured workers are getting more medical services, and unwarranted ones at that as this bill presumes? No. Look at: (1) Medical services costs soaring; (2) Unawarranted utilization of medical services by insurers in the form of grossly expensive "IME's" and unspeakably expensive medical panels. (Information regarding these previously provided to this Committee).

- Rehabilitation costs soaring. How much is going to injured workers? Mighty little. But the rehabilitation companies are growing and prospering under our current system.

- Other areas where costs are not related to benefits provided earlier.

LOOK AT WHAT'S REALLY DRIVING COSTS, AND LEAVE THE INJURED WORKERS ALONE:

This whole bill is rotten. It ignores the real problems. It penalizes workers who are hurt and scared. It takes the worst part of Oregon's famous system, and leaves the best parts (from workers' perspectives) unmentioned. Committee urged to review the Oregon law. It is not worthy of your serious consideration.

Three major problems with this bill are discussed here, and others mentioned.

COMMENTS ON SPECIFIC PORTIONS OF HB361

"OBJECTIVE MEDICAL FINDINGS" (P. 4, line 13; p. 8, line 1; p. 15, line 4; p. 16, line 25; p. 17 lines12; p. 19, line 8):

- Apparently designed to get at "fakers". Mean and unwarranted.
- Most doctors agree that not all medical conditions are objectively identifiable. E.g. soft tissue injuries, pain after operations.

- Other examples. See Dr. Cooney letter of September 2, 1992 on this subject. See AMA statement in the *AMA Guides to the Evaluation of Permanent Impairment, 3rd ed.*
- Chronic pain sydromes well recognized medical condition. Treatable, if identified and treated early on.
- Uncessary legislation, because "fakers" or malingers can be screened by numerous types of tests. AMA has stament regarding malingering:

> Malingering. Defined as the conscious and deliberate feigning of an illness or disability, malingering invloves the fabrication of symptoms and complaints in order to achieve a specific goal. There is consensus among algologists that malingering is readily detected with appropriate medical and psychological tests. It is an infrequent occurrence amoung the population of chronic pain patients.

(Exerted from *AMA Guides...., supra,* at page 250.)

- Tests given by doctors (briefly in offices), physical therapists (symptom exagerations and pain behaviors), and psychologists.
- What would this do in practice? E.g. A woman who had worked for most of her life doing waitress or laundry work seriously strains her back at work, suffering a painful and disabling back injury. No compensation as this is drafted.

FURTHER REDUCTION OF PARTIAL DISABILITY BENEFITS (p. 21, lines 8-17):
- Under current law, apparently possible to get more than 350 weeks of partial benefits with multiple and separate injuries. Under suggested language, 350 weeks a lifetime total.
- First, recognize that to get 350 weeks under the current system a worker would have to receive a huge impairment rating, go from heavy labor capacity down to light or sedentary, and suffer a wage loss of of more than $2.00 per hour.
- Eg. effect of this law: construction worker injures leg, back, and hand in three separate accidents, rendering him capable only of being a keno-caller and a parking-lot attendant (currently some of the insurers favorite return-to-work options). He made $13.00 per hour, but now is capable only of minimum wage. For all separate injuries, he would be able to collect a maximum total of $61, 075.

Reduced by this bill's proposed %7 discount, he would be entitled to $48,596, in lifetime compensation for his current wage loss of $8.65per hour ($346 per week), and his various impaiments. He would be entitled to no retraining. And would be terminated from benefits if these great jobs existed anywhere in the state (under the proposed amendments), even if his lifetime home were in Troy or Glendive, where they may not be available.

REHABILITATION BENEFITS GONE: (p. 28, lines 6 through p. 33, line 25):
- Currently the law provides, in theory at least, up to 104 weeks of rehabilitation benefits and services in cases where an injured worker cannot return to the time-of-injury job. Quid pro quo for reducing partial benefits last session to 350 weeks.
- This bill seeks to go back to the harsh provisions of the 1987 law under which true rehabilitation was not an option. It requires that an injured worker be completely unable to work before becoming eligible for retraining benefits. It limits those initally to 12 months. It dredges up from the grave the concept of "workers' job pool" and again says that an injured worker must take a job anywhere in the state, regardless of residence. And that job may be something the worker is completely ill-suited to do.
- E.g. Two sessions ago this legislature held open hearings and invited injured workers to tell of their experiences under the 1987 Act. Some may recall the injured laborer who was terminated from compensation benefits because the vocational expert said he could be a daycare worker. And some of the other stories. The rehabilitation provisions of this act call those days back to us.

MAJOR CONTRIBUTING CAUSE: (p. 14, lines 2-5)
Certainly not "self-enforcing". Invites litigation and may operate to reduce further the number of doctors willing to accept workers' compensation claimants.

ALCOHOL RESTRICTIONS: (p. 13, lines 10-21)
-Again, major contributing cause language.
- .10 blood alcohol conclusive presumption. Should be rebuttable. What if accident occurs due to gross safety violation of employer?
-Employers permission or encouragement not to be considered. Makes no practical sense. Why should the employer get away with this.

LATENT INJURY RESTRICTIONS (P. 14, LINES 16-21)

-What is the rationale for this? It's already limited to 2 years, and the exceptions make sense.

RETURN TO WORK BEFORE MAXIMUM HEALING WITHOUT A JOB AVAILABLE (p. 15, lines 17, 18)
This again makes no sense. An injured worker who is still healing gets cut off compensation, even though he has no job to return to??

SOCIAL SECURITY OVERPAYMENT (p.18, lines 15-20)
Claimant should not be cut off benefits until he/she actually receives the retroactive social security award.

DISALLOWING IMPAIRMENT AWARDS UPON RETIREMENT AGE (p. 22 line13)
There is no rational reason not to grant an injured worker an impairment award under this circumstance. The impairment award is solely for loss of bodily function, unrelated to disability. The worker will have to live with this for the rest of his/her life.

LUMP SUM DISCOUTING PROVISIONS (p. 25, lines 4-7, p. 26, line 11)
This sections applies the mandatory lump sum discount to partial benefits, which are already precariously low. It also allows insurers to disocunt by %7, even though their interest earnings may drop substantially below that.

5
2/8/93
HB 361

labor market. He has for the past 4 years lived in Lake Co. and been employed there for the past 3 years. This Court has held that pre-87 labor market is the area of residence, not of injury. Morrison's expert Randy Kenyon's testimony is accepted; he recently evaluated Morrison based on Lake Co. Testimony of Buttrey's expert Bruce Carmichael is not accepted; he used Great Falls where the injury occurred 8 years ago and where Morrison was living at the time of the assessment and has not brought his labor market information current for 5 years, and his projection that Morrison could earn up to $25,000/yr as an auto salesman is not supported since his 5-month attempt at auto sales ended in termination for failure to produce.

He was earning $9.29/hr at time of injury, which is $12.10 present value. He is earning $6.07 as a full-time habilitation tech. Kenyon testified to a 15-20% loss of labor market. The Court finds that post-injury capacity is $6.07. The wage differential in combination with other factors support loss of earning capacity which is above the statutory maximum.

He is not entitled to the remainder of his benefits ($33,976) in a lump sum. He lists $67,925 debts including $16,931 fees. He has 2 cars which he has not paid for, a motorcycle, a camper, a boat, and a computer. Before his injury he owned a Porsche, 3 snowmobiles, 2 boats, a motor home, a Cadillac, and a Jacuzzi. He has sold most of his assets to sustain himself. He and his wife earn $1,418/mo; with one child they have expenses of $2,168. With the award of $33,800 retroactive benefits his current debts will be paid and he will be able to live within the family income. He has not shown why it would be in his best interest to remove all of his permanent partial benefits when he has shown a preference for expensive recreational vehicles rather than family stability. Only after payment of his debts with the retroactive benefits can his financial condition be clarified.

Morrison v. Buttrey Foods, 1/13.

David Lauridsen, Columbia Falls, for Morrison; Sara Sexe, Great Falls, for Buttrey.

Work Comp Settlements

(Total settlement amounts. Year of injury in parenthesis.)

Plans I & II.
(ERD has declined to identify claimants.)
1. Back (87), $32,334, D. Lauridsen
2. Back (91), $72,763, M. Beck
3. Back (85), $71,500, L. Hartford
4. Leg/back (79, total), $44,905, J. Hennessey
5. Back (90), $17,000, C. Ferguson
6. Shoulder (90), $52,600, D. Lind
7. Nerve breakdown (92, disputed), $11,000, J. Edmiston
8. Knee (92, disputed), $6,621
9. Foot (91), $7,500

Plan III.
PEDERSON, r. hand (90), $46,636, L. Haxby
WARNEKE, knee/hands (82, 82, 91, 91, 92), $49,500, B. Everett
BEMENT, back (90), $44,651, T. Lynaugh
BOURNE, back (86, total), $60,251, E. Thueson
KIDD, back (82, 91), $21,684, C. Ferguson
BEIBER, leg/hip (87), $70,564, G. Drake
CARNES, r. hand/arm/elbow (90), $18,684, R. Pyfer
ROBERTSON, back (86), $25,000, R. Skaggs
VANDERSLOOT, neck/l. shoulder (91), $17,000, T. Spear
HARDGROUND, r. hand (92), $13,255, V. Halverson
SPOON, wrist (91), $32,568, D. Lauridsen
MELTON, r. shoulder/wrist (89, total), $35,000, R. Buley
ANDREWS, back (91), $21,000, R. Melcher
BIG MAN, back (92, disputed), $22,500, R. Plath
LARSEN, arm/hand (87), $10,000, J. Bothe
SAYLER, toe (86), $26,370, B. Everett
THAO, arm/shoulder (89, total), $21,615, T. Lynaugh
HILE, back (90), $40,000, B. Bulger
WOODS, back (82, 82, 87, 87, 89, total), $72,666, B. Olson
FRAZIER, low back (87, 87, 88, 88, 89, 90, 90, 91), $40,000, M. Datsopoulos
KIEDROWSKI, low back (83, 84, 91, total), $60,000, J. Edmiston
BEAN, low back (84, 87, 89, 90, total), $31,243, D. Lauridsen
JOHNSON, back/neck (86, 87, 87, 88, 89), $31,500, J. Bothe
HUNGEFORD, back (91), $13,862, D. McLean
DURBIN, knee/l. wrist (78, total), $10,000, P. McKittrick
HOVLAND, back (84), $29,733, A. Clark
JENKINS, back/neck (91), $52,154, T. Lewis
HAUFF, back (89, 89, total), $40,500, T. Lynaugh
DEES, back (82, 91), $40,502, B. Asselstine
TURNER, low back (90), $48,396, T. Bulman
VINCENT, back (86), $73,250, M. Beck
MATTOON, l. hand (89), $15,600, G. Wolfe
JONES, back (92), $24,696, R. Buley
LANE, back (90, total), $50,000, T. Lynaugh
DREYER, back (91, 92), $28,812, M. Beck
McCROREY, neck (91), $53,664, S. Pohl
MORALES, neck (91), $5,000, J. Vidal
ECONOMU, back (88, 90, 91), $47,245, R. Skaggs
LARSEN, back (89), $4,000, T. Oaas
GUMESON, back (93, disputed), $3,000
GEORGE, back (93, total), $4,886
BARTON, knee (92), $4,704
BECHLER, back (92), $11,172
HANCE, hands (92), $2,000
PEAK, fingers (92), $5,216
DEVINE, neck/back/shoulder (82, 90), $21,153
LAWRENCE, multiple (81), $43,800
BLAIR, back (92), $8,904
ASBURY, knee (83, 87, 88, 88, 89, 90, 91), $8,600
HERAUF, low back (91), $14,594
NICHOLLS, low back (89), $12,000
HALL, back (91), $48,170
MAIER, neck/shoulders/back (92), $10,000
ETHERIDGE, back (92), $4,000
SHERRARD, eye (93, disputed), $81
EVANS, neck (92, disputed), $1,100
SEITZ, knees (92, disputed), $1,000
DIBBLE, r. hand (92), $1,246
STOILOV, back (92), $10,413
WIMSETT, cervical/thoracic spine/shoulders (91, 92), $22,000
UPHAM, knee (91, total), $12,758
HANSON, arm (93, disputed), $200
BUCKLEY, ankle (92), $625

EXHIBIT 5
2/8/93
HB 361

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Federal Trial Courts

INSURANCE: No liability stacking... Shanstrom.

Shawn Skorupa was driver of a Jeep that plunged over an embankment in 2/91, killing 4 students and injuring 2 others. Skorupas had 2 Allstate liability policies; one listed the Jeep and a Mustang, the other listed a Subaru and other vehicles. Defendants contend that they are entitled to stack the policies.

Tuells allege ambiguity in the Subaru policy by referring to the "Combining Limits of Two or More Autos Prohibited" provision: (1) "If you have two or more autos insured in your name and one of these autos is involved in an accident, only the coverage limits shown on the declaration page for that auto will apply." (2) "When you have two or more autos insured in your name and none of them is involved in the accident, you may choose any single auto shown on the declarations page and the coverage limits applicable to that auto will apply." (3) "The limits available for any other auto covered by the policy will not be added to the coverage for the involved or chosen auto."

Tuells argue that the second sentence may be read to refer to all autos insured by Allstate in the insured's name and/or to just those insured under the Subaru policy. However, the provision suggests 2 possible situations in which coverage may be available and clearly prohibits stacking. The first sentence prohibits stacking when the insured has 2 or more autos insured by Allstate in his name and one is involved in an accident. In that situation the insured is entitled only to the limits shown on the declarations page for the auto involved in the accident; that is the situation of the accident at issue. The second sentence prohibits stacking when the insured has 2 or more autos insured in his name and none is involved in the accident (a situation usually involving a non-owned vehicle). Liability coverage remains available but is limited to that of any single auto chosen by the insured and shown on a declarations page of a policy; this was not the situation in the underlying accident; the Jeep was involved in the accident and therefore the coverage limits attached to that vehicle applied.

Defendants object to this reading on grounds that separate premiums were charged for each vehicle for bodily injury and property damage liability. Tuells make much of case law allowing stacking of *uninsured* and *underinsured* motorist coverage, but there are no Montana cases allowing stacking of liability coverage. Further, their interpretation gives no effect to the "Limits of Liability" section which states that liability limits will not be increased if the insured has other auto policies that apply.

The Montana Supreme Court has not addressed whether an injured party may recover under 2 policies when the vehicle involved in the accident does not qualify as an "insured auto" under one of the policies. However, other courts have consistently held that policy limits are unavailable and therefore that stacking need not be addressed. Summary judgment for Allstate.

Allstate Ins. v. Skorupa et al, 13 MFR 355, 1/15.

Susan Roy (Garlington, Lohn & Robinson), Missoula, for Allstate; W.A. Forsythe (Moulton, Bellingham, Longo & Mather), Billings, for Skorupas; Kenneth Peterson (Peterson & Schofield), Billings, for Kuchinskis; John Mohr, Laurel, for Taylor; Clifford Edwards, Billings, for Boyer.

Workers' Compensation Court

"Available" suitable positions preclude permanent total finding under old law... Campbell, Hearing Examiner.

Arlene Meagor, 50, suffered disk herniation in 6/86 while working as a surgical nurse at St. James Hospital. James Murphy treated her without surgery and released her in 3/87 to restricted part-time work. She worked part-time in the Chemical Dependency & Psyche Unit until it closed in 11/91. She has not actively sought suitable part-time employment since, and is unable to return to full-time work as a registered nurse, her normal labor market. The employer's expert Patricia Schendel identified 7 part-time positions with duties consistent with Murphy's restrictions, with one opening available at a nursing home.

She is not permanently totally disabled as a result of her 6/86 injury. Although she satisfied the first 3 elements of §116(13), the employer provided credible evidence that she can return to suitable available employment. At the time of her injury the test was whether positions were *available* in the normal labor market. The fact that some positions may not be open at this time does not mean they are not in her normal labor market.

Meagor v. Hartford Accident & Indemnity Ins./Sisters of Charity of Leavenworth, 1/14.

Bernard Everett, Anaconda, for Meagor; David Slovak, Great Falls, for Hartford.

Work Comp Settlements

(Total settlement amounts. Year of injury in parenthesis.)

Plans I & II

(ERD is not disclosing names of claimants.)

1. Back (90), $45,000, M. Beck
2. R. wrist (93, disputed), $5,000, J. Nye
3. Back (84), $80,000, J. Hunt
4. Hernia (93, disputed), $7,000
5. Back (91), $36,238, J. Harrington
6. Back (87, total), $67,500, J. Bothe
7. Back (91), 45,000, M. Datsopoulos
8. Spinal cord (91, disputed), $30,000, J. Seidlitz
9. Back, (90), $12,981, I. Eakin
10. Electrical shock (91), $63,187, M. Beck
11. Low back (91), $9,000
12. R. hand (92), $3,000
13. Wrist (91), $15,000

Plan III

WOODS, back (82, 82, 87, 87, 89, total), $72,666, B. Olson
GARDINER, back (92), $16,621, J. McKeon
TIFFANY, r. arm (92, disputed), $2,000, T. Bulman
SCHERM, back (92, disputed), $6,000, E. Duckworth
TROUPE, back (92, total), $17,266, T. Lewis
GAGNON, low back (89), $47,791, J. Bothe

EXHIBIT 5
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Simons v. State Fund/Reserve St. Pet, 1/26.
Morgan Modine, Missoula, for Simons; Asst. AG Kristi Blazer.

Permanent partial benefits for forklift operator with subsequent injuries... Campbell, Hearing Examiner.

Craig Steichen, 42, hurt his left shoulder while operating a forklift in 6/82. Orthopedist Thomas Power, who saw him at the request of the insurer, diagnosed muscle strain/fibrositis. Repeated chiropractic treatments failed to eliminate shoulder pain which disturbed his sleep. He consulted with Susan Effertz in 1/84 but did not seek other medical attention for his shoulder until he saw orthopedist Mark Rotar in 10/89. Rotar and orthopedist John Avery diagnosed mild chronic rotator cuff tendinitis. Orthopedist John Diggs, who examined him in 7/91 at the request of the insurer, determined that his shoulder had worsened since Rotar's exam. He assessed 12% permanent impairment to the left upper extremity, which is a 7% whole person impairment. He suffered other disabling job injuries including back in 1984, right shoulder in 7/85, and right knee in 10/85. His vocational expert Clifford Larsen testified that his left shoulder alone would have prevented him from returning to his warehouse job. The insurer's expert William Goodrich reluctantly agreed because of inability to lift above 7'.

He is permanently partially disabled from the 6/82 injury and entitled to 280 weeks at $120.50 pursuant to §703. Even had he not suffered additional injuries, his left shoulder would have prevented him from working at his old job. This injury has restricted him to light work and as a result he has lost a substantial part of his labor market. The wage he was earning at time of injury would be $12 today. His earnings as part-time janitor and self-employed office cleaner have averaged $5 for the past 4 years. The evidence does not support a whole man injury; the 12% impairment to upper left arm and shoulder is a scheduled injury with maximum 280 weeks. Considering the other factors he is limited by the maximum rate for the maximum weeks.

The insurer argues that the subsequent injuries caused him to become disabled and should be considered before calculating loss of earning capacity attributable to the left shoulder. But its vocational witness was directed to consider the left shoulder in combination with the other injuries. *Tiedeman* (Mont. 1985) held that "each new compensable injury, though successive, begins a new benefit consideration beginning at zero."

Steichen is not entitled to a penalty; there was a legitimate dispute and the insurer did not unreasonably refuse to provide benefits. He is entitled to fees pursuant to §611 (1981).

Steichen v. Travelers Ins./Super Valu Stores, 1/28.
James Regnier, Missoula, for Steichen; Michael Prezeau, Missoula, for Travelers.

Benefits pending trial over OD/injury dispute denied.

Edward Bott contends that he was injured as defined in the Comp Act; the insurer contends that he suffers OD. The insurer has paid some 49 days of benefits pursuant to §39-71-610. Bott seeks an order that OD benefits be continued pending trial, as he is without income.

Bott provides no persuasive authority for his position. Further, OD benefits were paid on a non-acceptance basis. Thus, contrary to Bott's assertion, it does not appear that under one act or the other. Payment on a non-acceptance basis raises some doubt as to liability. Payment pending trial denied.

Bott v. Lumbermen's Mutual Casualty/Kemper Group/Interstate Brands, 1/27.
Thomas Lynaugh, Billings, for Bott; Michael Heringer, Billings, for Lumbermen's.

Work Comp Settlements

(Total settlement amounts. Year of injury in parenthesis.)

(ERD is not disloging names of claimants.)
1. Back (92), $17,222, J. Ellingson
2. Back (89), $5,000, W. Hennessey

Plan III
LANDE, wrists (89), $15,000, E. Duckworth
GODIN, hip/foot (83, 84, 85, 87, 88, 88, 89), $52,015, D. Lauridsen
KELLEY, r. hip (92), $2,000, D. Hawkins
SEPEDA, back (91), $4,000, R. Plath
FRY, wrists/elbows (90), $8,000, D. Lauridsen
RALLS, multiple (85, 90), $24,660, D. Lauridsen
GODFREY, low back (92), $3,000, D. Lauridsen
DAYTON, r. shoulder (91, total), $21,155, D. Lauridsen
PETERSON, neck/low back (90, 92, 92), $38,220, T. Lynaugh
KENNEDY, knees (92), $4,098
NELSON, low back (89), $12,000
LaFORGE, ankle/knee (92), $11,164
REMMICK, cognitive (92), $10,000
HANEY, l. hand/shoulder (88, 92, 93), $3,700
OLDENBURGER, arm/shoulder/face (90), $1,500
MILLER, neck/low back (89, 90, 91, 91, 92), $10,888
MORRISON, CTS (86, 87, 87, 89, 91, 92, total), $10,000
WISTI, leg (90, 90), $52,936
WILLINGHAM, hand (87), $5,000
HOWARD, finger (92), $3,752
WEIDINGER, r. shoulder (92), $2,100
CONKLIN, back (89), $3,800
AHLIN, knee (92), $1,373
HOUSEL, low back (89, 92, 92), $4,519
SUTHERLAND, back (92, total), $14,990
CHAPMAN, knee (92), $832
FERGUSON, ankle/hand/cheek (88), $8,210
McMILLAN, r. shoulder/back (84, 91, 91), $50,022
TESKE, back (82, 83, 84, 86), $6,500
ANDERSON, leg (88, 89, 89, total), $27,881
BAUER, ribs/back (92), $16,464
McCAFFREY, back (92), $28,244
KIMMET, back (92, total), $17,640
KRUGER, bilateral clavicle/ribs (90), $49,658
CHARLAND, eyes (93, disputed), $1,000
SMITH, leg (92), $3,798
KRANK, back (92), $37,044

EXHIBIT 5
DATE 2/8/93
HB 361

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[redacted] complaint that he is experiencing low back pains which are of disabling severity is valid. Unhappily, there appears to be a notion that patients complaints of pain in the absence of corroborating physical, laboratory, or radiographic abnormalities is fained, imaginary, or of exaggerated severity. There are numerous painful medical conditions which occur in the absence of such objective findings (migraine headaches, tic douloureux, post herpetic neuralgia, and tennis elbow immediately come to mind). I hope this information is useful to you.

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Select Wages Comp COMMITTEE BILL NO. HB361

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NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Rick Pyfer Helena			X
Jacqueline Lynnark	American Ins. Assoc.		
Mike Micone	MHCA	X	
Kent Kleinkopf	self		X
Jan VanRiper	self		X
George Wood	MT Self Insurers Assoc.	X with amendments	
Bill Crivello	Rehab Assn of MT.	X	
Jim Tutwiler	MT CHAMBER	w/ amds X	
Wm Egan	M - Comp IBEW	[redacted]	X
Russell B Hill	MTLA		X
TERRY MITTON	MT WORK COMP REFORM COALITION	X	
Don Judge	MT STATE AFL-CIO		X
Don Allen	CWCSE	X	
Oliver Cox	MMIA, MSCIA, MACO	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

Riley Johnson	NFIB	X
Patrick Tierney	STATE FUND	X

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SELECT WORKERS' COMPENSATION COMMITTEE BILL NO. ~~HB 361~~

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NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Jean T Dooley	Mt Med Comm	✓	
LARS ERICSON	CARPENTERS HB361		↘
Rep Jim Whalen HD93			X
Norma Crosfield	Self		X

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DATE 2-8-93

SENATE COMMITTEE ON SELECT WORKERS' COMPENSATION

BILLS BEING HEARD TODAY: 347.

Name	Representing	Bill No.	Check One: Support	Oppose
George Weed	MT. Self Insurers Assn	347		✓
Mike Micone	MRCA			✓
Jim Tillotson	MT Chamber			✓
Riley Johnson	NFIB		✓	
Don Judge	MT STATE AFL-CIO	HB 453		X
Dave Cole	MMIA, MSGIA, MACO			✓

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