

MEMORANDUM

TO: Economic Affairs Interim Committee

FROM: Larry W. Jones, Attorney at Law

DATE: June 22, 2016

RE: Workers Compensation Post Traumatic Stress Disorder and Mental-Mental Claims

I was asked by the Committee, through Pat Murdo, to appear as an informational witness before the Committee. Although I have lobbied legislators in the past regarding workers' compensation issues (and currently advise and represent workers' compensation insurers), I am appearing before the committee in my individual capacity and not as a lobbyist; I am not registered as a lobbyist. I do not appear before the Committee to promote or oppose the introduction or enactment of legislation before the legislature or legislators or promote or oppose any official action of any any public official or the Legislature.¹

HISTORY

The benefits to which an injured worker may be entitled are determined by the statutes in effect on the date of the injury or occupational disease (OD). If a worker is injured in the course and scope of his employment his exclusive remedy is to claim benefits under the Workers' Compensation Act (Act). Prior to 1987 the Act did not have an express provision excluding from compensability injuries or ODs that were caused by emotional or mental stress or activity or a nonphysical stimulus or activity.

All workers' compensation claims can be categorized into one of four categories in terms of cause and effect.

- Mental-mental (e.g., stress in the office causing anxiety or depression)
- Mental-physical (e.g., stress in the office causing gastrointestinal problems)
- Physical-physical (e.g., cutting a hand while cutting meat)
- Physical-mental (e.g., a back injury resulting in depression)

¹ MCA 5-7-102 (11) (2015)

The 1987 legislation excluded from coverage under the Act the first two categories of claims. The Montana Supreme Court held in 1993 the Legislature had the authority to exclude the first two categories from coverage under the Act.² In 1996 it held that an injured worker whose claim was excluded under the Act (mental-mental or mental-physical) could sue his employer directly under any liability theory available to him.³

In 1993 the Legislature added to the Declaration of Public Policy in the Act the following regarding claims for an injury or disease caused by emotional or mental stress or a nonphysical stimulus or activity:

It is the intent of the legislature that stress claims, often referred to as “mental-mental claims” and “mental-physical claims”, are not compensable under Montana’s workers’ compensation and occupational disease laws. The legislature recognizes that these claims are difficult to objectively verify and that the claims have a potential to place an economic burden on the workers’ compensation and occupational disease system. The legislature also recognizes that there are other states that do not provide compensation for various categories of stress claims and that stress claims have presented economic problems for certain other jurisdictions. In addition, not all injuries are compensable under the present system, as is the case with repetitive injury claims, and it is within the legislature’s authority to define the limits of the workers’ compensation and occupational disease system.⁴

In 1993 the Legislature added the following to the insurer liability statute in the Act.

(2) (a) An insurer is liable for an injury, as defined in 39-

² *Stratemeyer v. Lincoln County*, 259 Mont. 147, 855 P. 2d 506 (1993).

³ *Stratemeyer v. Lincoln County*, 276 Mont. 67, 915 P. 2d 175 (1996) (deputy sheriff could sue under the Montana Safety Act his employer for PTSD (mental-mental) contracted in the course and scope of his employment in responding to an incident based on his employer’s failure prior to the incident to train and supervise properly and after the incident its failure to treat and debrief him.

⁴ MCA 39-71-105 (1993)

71-119, if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:

- (i) a claimed injury has occurred; or
- (ii) a claimed injury aggravated a preexisting condition.⁵

The Legislature in 1995 defined “objective medical findings” thusly:

"Objective medical findings" means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.⁶

In 2005 the Legislature repealed the OD Act and placed the liability provisions for an OD in the insurer liability statute in the ACT.

(12) An insurer is liable for an occupational disease only if the occupational disease:

- (a) is established by objective medical findings; and
- (b) arises out of or is contracted in the course and scope of employment. An occupational disease is considered to arise out of or be contracted in the course and scope of employment if the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease.⁷

The Legislature then defined major contributing cause thusly”

(16) As used in this section, "major contributing cause" means a cause that is the leading cause contributing to the result when compared to all other contributing causes.⁸

Joe Yarborough was a firefighter for the City of Billings when on October 22, 1987, and while approaching a burning home a fireball exploded from the home

⁵ MCA 39-71-407 (1993)

⁶ MCA 39-71-116 (18) (1995)

⁷ MCA 39-71-407 (2015)

⁸ *Id.*

striking and injuring him.⁹ After this accident his psychiatrist diagnosed him with PTSD as a result of the accident. The Workers' Compensation Court denied his claim for benefits finding that his PTSD because it was a mental-mental claim and therefore excluded from coverage. The Montana Supreme Court affirmed the lower Court reasoning the evidence showed his physical injuries resolved after the accident and that his PTSD was the result of the mental shock or mental stress caused by the incident as proven by the medical evidence in the case.

In 2005 Rep. D. Gallick (D-Helena) introduced HB 534 which would have amended the declaration of policy quoted above and the definition of injury enacted in 1987. A copy of the bill is attached. The bill would have removed the exclusion of mental-mental and mental-physical claims from coverage under the Act, required the condition be proved by being "medically verified" and apparently would provide the new coverage to "Law enforcement, emergency responders, firefighters, and other public safety workers" The bill would have modified the above quoted statute with the following language.

(2) (a) An insurer is liable for an injury as defined in 39-71-119 if the injury is established by objective medical findings in the case of a physical injury or medical findings made in accordance with the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders in the case of a mental injury and if the claimant establishes that it is more probable than not that:¹⁰

In summary the current status of mental-mental and mental-physical claims under the Act is that they are excluded from coverage and workers who have these types of claim can sue their employer directly under any liability theory available to them.

PRE 1987 CLAIMS

Prior to the 1987 amendments to the Act the definition of injury was defined as "a tangible happening of a traumatic nature from an unexpected cause or unusual

⁹ *Yarborough v. Montana Municipal Insurance Authority*, 282 Mont. 475, ___ P.2d ___ (1997).

¹⁰ HB 534, Section 3.

strain resulting in either external or internal physical harm.”¹¹ In turn the Supreme Court defined that provision thusly:

A tangible happening must be a perceptible happening, Webster’s Third New International Dictionary. Some action or incident, or chain of actions or incidents, must be shown which may be perceived as a contributing cause of the resulting injury. This Court has found neuroses compensable, but a tangible, real happening must be a cause of the condition. *O’Neil v. Industrial Accident Board*, 107 Mont. 176, 81 P.2d 688; *Best v. London Guarantee & Acc. Co.*, 100 Mont. 332, 47 P.2d 656; *Sykes v. Republic Coal Co.*, 94 Mont. 239, 22 P.2d 157. Even in *Murphy v. Anaconda Company*, 133 Mont. 198, 321 P.2d 1094, while we rejected the common law unusual strain test, a tangible happening (usual exertion in pushing a mail cart) was required before death from a pulmonary embolism could be found compensable. In the recent case of *Love* where a gradual buildup of back pain was found compensable, this Court emphasized two specific incidents of strain were perceptible from the record.¹²

The cases that pre-dated the 1987 change typically dealt with the industrial injures that were physical-physical, although the above quote does reference a physical-mental claim (neuroses) as compensable prior to the 1987 change. But what you find in examining the pre 1987 case law is captured by Justice Sheehy’s dissenting opinion in a worker’s compensation case; “In determining what is an “injury” (section 39-71-119(1), MCA), under the Workers’ Compensation Act, this Court has demonstrated a quixotic ability to mount its horse and ride off in all directions.”¹³

Prior to the 1987 changes the Supreme Court had held that mental stress could be part of a compensable heart attack.¹⁴ It also held that mental stress that caused an aneurysm to rupture was compensable under the Act.¹⁵

¹¹ MCA 39-71-119 (1985)

¹² *Erhart v. Great Western Sugar Company*, 169 Mont. 375, ___ P.2d ___ (1976)

¹³ *Hoehne v. Granite Lumber Co.*, 189 Mont 221, ___P.2d ___ (1980)

¹⁴ *Tocco v. City of Great Falls*, 220 Mont. 221, ___ P.2d ___ (1986) (date of injury March 9, 1984)

¹⁵ *Snyder v. San Francisco Feed & Grain Co.*, 230 Mont. 16 (1987) (date of injury December 13, 1984)

But as Justice Sheehy wrote, what was a compensable injury under the Act was subject to different interpretations. The 1987 legislation was a step toward clarifying what was and was not a compensable injury or OD.

COSTS

The Supreme Court has held that the Legislature's concerns over the cost to employers of workers' compensation insurance is a legitimate concern that may be one of the bases for legislative changes to the Act. It is one of the concerns in the declaration of public policy the Legislature enacted in 1987.¹⁶ The fiscal note attached to HB 534 notes that the NCCI (National Council of Compensation Insurers, a neutral trade organization that classifies occupations and files rates with the Montana Commissioner of Insurance), estimated that the bill would increase system costs up to 6 percent. A copy of the note is attached.

DSM

“The DSM-5 “is a classification of mental disorders with associated criteria designed to facilitate more reliable diagnoses of these disorders. . . . intended to serve as a practical, functional, and flexible guide for organizing information that can aid in the accurate diagnosis and treatment of mental disorders. ”¹⁷

What mental disorders have diagnostic criteria in the DSM? They include but are not limited to depressive and anxiety disorders.

The diagnostic criteria for PTSD are found at p. 271 (code 309.81) of DSM-5 and committee members can make their own determination.

¹⁶ MCA 39-71-105 (1987)

¹⁷ DSM-5 at p. xli

1 HOUSE BILL NO. 534

2 INTRODUCED BY D. GALLIK

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE DEFINITION OF "INJURY" IN WORKERS'
5 COMPENSATION AND OCCUPATIONAL DISEASE CLAIMS TO INCLUDE MENTAL INJURIES; REVISING
6 THE STATEMENT OF PUBLIC POLICY TO RECOGNIZE JOB-RELATED MENTAL INJURIES; AMENDING
7 SECTIONS 39-71-105, 39-71-119, 39-71-407, AND 39-72-102, MCA; AND PROVIDING AN EFFECTIVE DATE
8 AND AN APPLICABILITY DATE."

9

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11

12 **Section 1.** Section 39-71-105, MCA, is amended to read:

13 **"39-71-105. Declaration of public policy.** For the purposes of interpreting and applying Title 39,
14 chapters 71 and 72, the following is the public policy of this state:

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

20 (2) A worker's removal from the work force due to a work-related injury or disease has a negative impact
21 on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the
22 workers' compensation system to return a worker to work as soon as possible after the worker has suffered a
23 work-related injury or disease.

24 (3) Montana's workers' compensation and occupational disease insurance systems are intended to be
25 primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able
26 to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to
27 minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

28 (4) Title 39, chapters 71 and 72, must be (4) construed according to their terms and not liberally in favor
29 of any party.

30 (5) It is the intent of the legislature that ~~stress~~ mental harm claims, often referred to as "mental-mental

1 claims" and "mental-physical claims", are ~~not~~ compensable under Montana's workers' compensation and
 2 occupational disease laws. The legislature recognizes that although these claims are, at times, difficult to
 3 objectively verify ~~and that the claims have a potential to place an economic burden on the workers'~~
 4 ~~compensation and occupational disease system,~~ they can be medically verified. The legislature is appreciative
 5 of the services provided the people of Montana by law enforcement, emergency responders, firefighters, and
 6 other public safety workers and is cognizant that these workers do sometimes suffer from mental harm as a
 7 result of their work. The legislature also recognizes that there are other states that ~~do not~~ provide compensation
 8 for various categories of stress mental harm claims ~~and that stress claims have presented economic problems~~
 9 ~~for certain other jurisdictions. In addition, not all injuries are compensable under the present system, as is the~~
 10 ~~case with repetitive injury claims, and it is within the legislature's authority to define the limits of the workers'~~
 11 ~~compensation and occupational disease system."~~

12

13 **Section 2.** Section 39-71-119, MCA, is amended to read:

14 **"39-71-119. Injury and accident defined.** (1) "Injury" or "injured" means:

15 (a) internal or external physical harm to the body that is established by objective medical findings;
 16 (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses,
 17 dentures, or hearing aids; ~~or~~

18 (c) death; or

19 (d) mental harm that is established by medical findings made in accordance with criteria set forth in the
 20 Diagnostic and Statistical Manual of Mental Disorders.

21 (2) An injury is caused by an accident. An accident is:

22 (a) an unexpected traumatic incident or unusual strain;
 23 (b) identifiable by time and place of occurrence;
 24 (c) identifiable by member or part of the body affected; and
 25 (d) caused by a specific event on a single day or during a single work shift.

26 ~~(3) "Injury" or "injured" does not mean a physical or mental condition arising from:~~

27 ~~—— (a) emotional or mental stress; or~~

28 ~~—— (b) a nonphysical stimulus or activity.~~

29 ~~(4)~~(3) "Injury" or "injured" does not include a disease that is not caused by an accident.

30 ~~(5)~~(4) (a) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or

1 myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical
2 condition in relation to other factors contributing to the physical condition.

3 (b) "Primary cause", as used in subsection ~~(5)(a)~~ (4)(a), means a cause that, with a reasonable degree
4 of medical certainty, is responsible for more than 50% of the physical condition."
5

6 **Section 3.** Section 39-71-407, MCA, is amended to read:

7 **"39-71-407. Liability of insurers -- limitations.** (1) Each insurer is liable for the payment of
8 compensation, in the manner and to the extent provided in this section, to an employee of an employer that it
9 insures who receives an injury arising out of and in the course of employment or, in the case of death from the
10 injury, to the employee's beneficiaries, if any.

11 (2) (a) An insurer is liable for an injury, as defined in 39-71-119, if the injury is established by objective
12 medical findings in the case of a physical injury or medical findings made in accordance with the criteria set forth
13 in the Diagnostic and Statistical Manual of Mental Disorders in the case of a mental injury and if the claimant
14 establishes that it is more probable than not that:

- 15 (i) a claimed injury has occurred; or
- 16 (ii) a claimed injury aggravated a preexisting condition.

17 (b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury
18 aggravated a preexisting condition is not sufficient to establish liability.

19 (3) (a) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:

- 20 (i) the employer furnishes the transportation or the employee receives reimbursement from the employer
21 for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement and the
22 travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or
- 23 (ii) the travel is required by the employer as part of the employee's job duties.

24 (b) A payment made to an employee under a collective bargaining agreement, personnel policy manual,
25 or employee handbook or any other document provided to the employee that is not wages but is designated as
26 an incentive to work at a particular jobsite is not a reimbursement for the costs of travel, gas, oil, or lodging, and
27 the employee is not covered under this chapter while traveling.

28 (4) An employee is not eligible for benefits otherwise payable under this chapter if the employee's use
29 of alcohol or drugs not prescribed by a physician is the major contributing cause of the accident. However, if the
30 employer had knowledge of and failed to attempt to stop the employee's use of alcohol or drugs, this subsection

1 does not apply.

2 (5) If a claimant who has reached maximum healing suffers a subsequent nonwork-related injury to the
3 same part of the body, the workers' compensation insurer is not liable for any compensation or medical benefits
4 caused by the subsequent nonwork-related injury.

5 (6) An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits
6 is established by objective medical findings in the case of a physical injury or medical findings made in
7 accordance with the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders in the case of
8 a mental injury that contain sufficient factual and historical information concerning the relationship of the worker's
9 condition to the original injury.

10 (7) As used in this section, "major contributing cause" means a cause that is the leading cause
11 contributing to the result when compared to all other contributing causes."

12

13 **Section 4.** Section 39-72-102, MCA, is amended to read:

14 **"39-72-102. Definitions.** As used in this chapter, unless the context requires otherwise, the following
15 definitions apply:

16 (1) "Beneficiary" is as defined in 39-71-116.

17 (2) "Child" is as defined in 39-71-116.

18 (3) "Department" means the department of labor and industry.

19 (4) "Disablement" means the event of becoming ~~physically~~ incapacitated by reason of an occupational
20 disease from performing work in the worker's job pool. Silicosis, when complicated by active pulmonary
21 tuberculosis, is presumed to be total disablement. "Disability", "total disability", and "totally disabled" are
22 synonymous with "disablement", but they have no reference to "permanent partial disability".

23 (5) "Employee" is as defined in 39-71-118.

24 (6) "Employer" is as defined in 39-71-117.

25 (7) "Independent contractor" is as defined in 39-71-120.

26 (8) "Insurer" is as defined in 39-71-116.

27 (9) "Invalid" is as defined in 39-71-116.

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

1 ~~stress or from a nonphysical stimulus or activity.~~

2 (11) "Order" is as defined in 39-71-116.

3 (12) "Pneumoconiosis" means a chronic dust disease of the lungs arising out of employment in coal
4 mines and includes anthracosis, coal workers' pneumoconiosis, silicosis, or anthracosilicosis arising out of ~~such~~
5 the employment.

6 (13) "Silicosis" means a chronic disease of the lungs caused by the prolonged inhalation of silicon
7 dioxide (SiO₂) and characterized by small discrete nodules of fibrous tissue similarly disseminated throughout
8 both lungs, causing the characteristic x-ray pattern, and by other variable clinical manifestations.

9 (14) "Wages" is as defined in 39-71-123.

10 (15) "Year" is as defined in 39-71-116."

11

12 NEW SECTION. **Section 5. Effective date -- applicability.** [This act] is effective July 1, 2005, and
13 applies to claims arising on or after July 1, 2005.

14 - END -

Fiscal Note Request HB0534, As Introduced

(continued)

6. With the exception of establishing the Diagnostic and Statistical Manual of Mental Disorders as the manual needed to prove that a claimant is mentally disabled, this legislation has no other restrictions on compensation for mental injuries. Given the broad nature of the proposal, system costs in Montana could increase significantly due to an increase in mental injury claims. For example, claimants who suffer from everyday job-related stress could receive workers' compensation benefits if their "stress" qualifies as a mental injury under the criteria set forth in Diagnostic and Statistical Manual of Mental Disorders.
7. In August 2003, the Montana Supreme Court (Hiatt vs. Missoula County Public Schools) ruled that workers' compensation claimants are entitled to primary medical services to sustain medical stability beyond maximum medical improvement (MMI). To sustain medical stability, most mental injury patients are required to take expensive prescription drugs for long periods of time. In some cases, patients take these prescription drugs for their entire lifetime. Providing workers' compensation medical coverage for these costly prescription drugs could result in a significant increase in medical costs. Assuming that a 40-year old mental injury claimant qualifies for a lifetime of antidepressants and monthly psychiatric visits, medical benefits, adjusted for inflation, may cost up to \$260,000 per claimant.
8. It is assumed 300 mental claims are filed following the enactment of this bill and of these 300 claims and 10 percent – 20 percent are denied. An average litigation expense of \$5,000-\$10,000 per claim denied would amount to \$150,000 to \$600,000 in costs. An average cost of \$40,000 to \$60,000 per accepted claim would increase costs by \$9.6 million to \$16.2 million, for a total estimated increase of \$10 million to \$16.5 million.
9. This bill will impact Plan 1, Plan 2, and Plan 3 workers' compensation insurance carriers in Montana.
10. This legislation will increase policyholder premiums and increase injured employee benefit payments.
11. The fiscal impact on state agencies, as policyholders of the State Fund, would be increased premium payments of roughly 6 percent.
12. State Fund estimates the workers' compensation premium paid by state agencies will be \$14,396,612 in FY 2006. A 6 percent increase in premium correlates to an \$863,800 increase in premium.
13. State Fund estimates the workers' compensation premium paid by state agencies will be \$15,404,262 in FY 2007. A 6 percent increase in premium correlates to a \$924,255 increase in premium.
14. Funding splits are based on personal services expenditures for FY 2004. The percentage splits are: general fund – 40.4 percent; state special revenue – 33 percent; federal special revenue – 15 percent; and proprietary funds – 11.6 percent.

Department of Labor and Industry

15. The Department of Labor and Industry assumes that inclusion of mental injuries as compensable claims will result in an increase of workers' compensation premiums to all insured employers, including the department and all other state agencies. However, the department has no data or history to quantify the increase.
16. The department assumes that Uninsured Employers' Fund program will have increased claims costs through the payment of mental injuries claims, but has no data to estimate the cost.
17. The department assumes it can absorb the increased administrative and legal workload increases that may result from this bill

Fiscal Note Request HB0534, As Introduced

(continued)

FISCAL IMPACT:

	<u>FY 2006</u> <u>Difference</u>	<u>FY 2007</u> <u>Difference</u>
<u>Expenditures:</u>		
Personal Services	\$863,800	\$924,255
<u>Funding of Expenditures:</u>		
General Fund (01)	\$348,975	\$373,399
State Special Revenue (02)	\$285,054	\$305,004
Federal Special Revenue (03)	\$129,570	\$138,638
Other	<u>\$100,201</u>	<u>\$107,214</u>
TOTAL	\$863,800	\$924,255

Net Impact to Fund Balance (Revenue minus Funding of Expenditures):

General Fund (01)	(\$348,975)	(\$373,399)
State Special Revenue (02)	(\$285,054)	(\$305,004)
Federal Special Revenue (03)	(\$129,570)	(\$138,638)
Other	(\$100,201)	(\$107,214)

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES

Workers' compensation insurance premiums will increase 6 percent. Local governments (i.e., cities, counties and school districts) will experience increased premiums as a result of workers' compensation insurers passing on the costs of increased benefits.