

## **BIBLIOGRAPHY**

1. Larson, Alex and Lex. 1952. *Larson's Workers' Compensation Law*. Vols 1 & 10. New York: M. Bender.
2. US Chamber of Commerce, Statistics and Research Center. *2002 Analysis of Workers' Compensation Laws*.
3. American Law Firm Association. 1999. *Workers' Compensation Law: A State-by-State Analysis*.

Appendix A - Survey

**Thank you for your assistance in responding to this survey. Responses may be returned by e-mail to Laurence Hubbard, President/CEO of the Montana State Fund at [lhubbard@montanastatefund.com](mailto:lhubbard@montanastatefund.com), faxed to 406.444.7796, or mailed to Mr. Hubbard at Montana State Fund, P.O. Box 4759, Helena, MT 59604-4749. If you have any questions or comments about the survey, please contact Curt Larsen, staff attorney in our general counsel's office, at 1.800.332.6102, x7772, or 406.444.7772.**

**Please return the completed survey by October 26, 2004.**

---

---

Montana law contains separate statutory schemes for occupational injuries and occupational diseases, with separate, though similar, benefits. The Montana Supreme Court has declared certain of the differences in benefits to be unconstitutional, as a denial of equal protection of the laws. We are examining ways to eliminate the constitutional infirmities in the separate statutory schemes, as well as the feasibility of combining the two acts. As a part of this effort, we are researching other states' statutory treatment of occupational disease. To that end, we would appreciate your help by completing the following survey.

1. Does your state's workers' compensation law contain separate laws for occupational injuries and occupational disease?  
  
Yes \_\_\_\_ No \_\_\_\_
  
2. If the answer to #1 is yes, have there been any legal challenges based on the differences in these laws?  
  
Yes \_\_\_\_ No \_\_\_\_ Not Applicable \_\_\_\_
  
3. If the answer to #2 is yes, please briefly describe the nature of the legal challenge, and the outcome, and include a citation to any case report.

---

---

---

---

---

4. Please provide the statutory citation(s) to your state's definitions of occupational injury and occupational disease.

---

---

5. Please briefly describe your state's notice of injury and notice of disease requirements, along with the statutory citations.

---

---

---

---

6. Please briefly describe your state's claim filing deadlines for occupational injuries and diseases, along with the statutory citations.

---

---

---

---

7. Please describe any benefit differentials between occupational injury and occupational disease, along with statutory citations.

---

---

---

---

8. Does your statute provide apportionment for:

occupational injury?	Yes _____	No _____
occupational disease?	Yes _____	No _____

statutory citations, if applicable \_\_\_\_\_

9. Please briefly describe your state's causation standard, along with statutory or case citations, for:

occupational  
injury: \_\_\_\_\_

occupational disease:  
\_\_\_\_\_

10. Have constitutional issues been raised concerning:

a. Equal protection questions concerning differences in benefits?

Yes \_\_\_\_ No \_\_\_\_ Not Applicable \_\_\_\_

Case

Citations: \_\_\_\_\_

- b. Equal protection questions or other issues concerning notice and filing of claim requirements?

Yes \_\_\_\_ No \_\_\_\_ Not Applicable \_\_\_\_

Case citations: \_\_\_\_\_

- c. Equal protection or other issues concerning the causation standard?

Yes \_\_\_\_ No \_\_\_\_ Not Applicable \_\_\_\_

Case citations: \_\_\_\_\_

- d. Equal protection or other issues concerning apportionment?

Yes \_\_\_\_ No \_\_\_\_ Not Applicable \_\_\_\_

Case citations: \_\_\_\_\_

- 11. Please provide any other noteworthy information concerning your state's treatment of occupational injury and occupational disease.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 12. Would you like to receive a copy of the survey results?

Yes \_\_\_\_ No \_\_\_\_

## Appendix B - Summary of Survey Responses

1. Does your state's workers' compensation law contain separate laws for occupational injuries and occupational disease?

Yes: 10                  No: 6

2. If the answer to #1 is yes, have there been any legal challenges based on the differences in these laws?

Yes: 1                  No: 9                  Not Applicable: 6

3. If the answer to #2 is yes, please briefly describe the nature of the legal challenge, and the outcome, and include a citation to any case report.

AZ:        Different OD causation standard upheld as constitutional.

4. Please provide the statutory citation(s) to your state's definitions of occupational injury and occupational disease.

State	Occupational Injury	Occupational Disease
Arizona	ARS 2-901.05	ARS 2-901.05
California	Labor Code § 3208	Labor Code § 3208
Colorado	CRS § 8-40-201(14)	CRS § 8-40-201(14)
Idaho	Idaho Code § 72-102(17)	Idaho Code § 72-102(21)
Kentucky	KRS 342.0011(1)	KRS 342.0011(2 & 3)
Louisiana	La Rev. Stat. § 23:1031	La. 23:1031.1
Maine	39A-5-201	39A-15-603
Maryland	LE Art. 9-101(b)	LE Art. 9-101(g)
Minnesota	MS 176.011(16)	MS 176.011(15)
New Mexico	52-1-28	52-3-33
North Dakota	NDCC 65-01-02	NDCC 65-01-02
Ohio	Ohio Rev. Code § 4123.01(C)	Ohio. Rev. Code § 4123.01 (F)
Oklahoma	85 Ok. Stat. § 3(12)	85 Ok. Stat. § 3(15)
Oregon	ORS 656.005(7)	ORS 656.802
Texas	Labor Code § 401.011(10)	Labor Code § 401.011(10)
Wyoming	Wyo. Stat. Ann. § 27-14-102(a)(xi)	Wyo. Stat. Ann. § 27-14-102(a)(xi)

5. Please briefly describe your state's notice of injury and notice of disease requirements, along with the statutory citations.

State	Occ. Injury- from date of injury unless otherwise indicated	Occupational Injury Statute	Occ. Disease - from first manifestation or knew or should have known of occupational disease	Occupational Disease Statute
Arizona	Forthwith	ARS § 23-908(D)	Forthwith	ARS § 23-908(D)
California	30 days	Cal. Labor Code § 5400	30 days	Cal. Labor Code § 5400
Colorado	4 days	CRS § 8-43-102(1)(a)	30 days	CRS § 8-43-102(2)
Idaho	60 days	Idaho Code § 72-701	60 days	Idaho Code § 72-448
Kentucky	As soon as practicable	KRS § 342.185	As soon as practicable from first manifestation	KRS § 342.316
Louisiana	30 days	LRS § 23:1301	None	None
Maine	90 days	MeRSA 39-A, § 301	90 days from date of incapacity	MeRSA 39-A, § 301
Maryland	10 days	Md LE § 9-704	1 year	Md LE § 9-705
Minnesota	180 days	MS 176.141	3 years from date of knowledge	MS 176.151(4)
New Mexico	15 days	NM Stat. Ann. 52-1-29	15 days	NM Stat. Ann. 52-3-19
N. Dakota	7 days	NDCC § 65-05-01.2	None	
Ohio	No formal notice req.	None	No formal notice req.	None
Oklahoma	30 days	85 Ok. Stat. § 24.2	2 years or 90 days of separation	85 Ok. Stat. § 43
Oregon	90 days	ORS 656.265	None	None
Texas	30 days	Texas Labor Code § 409:001	30 days	Texas Labor Code § 409:001
Wyoming	72 hours	Wyo. Stat. § 27-14-502	30 days	

6. Please briefly describe your state's claim filing deadlines for occupational injuries and diseases, along with the statutory citations.

State	Occ. Injury - Time in years from date of injury, unless otherwise indicated	Occupational Injury - Statute	Occ. Disease - Time in years from date of last injurious exposure, unless otherwise indicated.	Occupational Disease - Statute
Arizona	1 - injury becomes manifest, or claimant knew or should have known	ARS § 23-1061(A)	1 - from date claimant knew or should have known	ARS § 23-1061(A)
California	1	Cal. Labor Code § 5405	1	Cal. Labor Code § 5405
Colorado	2	CRS § 8-43-103(2)	2	CRS § 8-43-103(2)
Idaho	1	Idaho Code § 72-701	1 - from first manifestation	Idaho Code § 72-448
Kentucky	2	KRS 342.185	3	KRS 342.316
Louisiana	1	LRS § 23:1209	1 - from date claimant knew or should have known	LRS § 23:1031.1F
Maine	2	MeRSA 39-A, § 306	2	MeRSA 39-A, § 306
Maryland	2	Md. LE § 9-709	2 - from actual knowledge	Md. LE § 9-711
Minnesota	3	MS 176.151(4)	3 - from date of knowledge	MS 176.151(4)
New Mexico	1	NM Stat. Ann. 52-1-31	1 from date of disability	NM Stat. Ann. 52-3-42
North Dakota	1 - from date claimant knew or should have known	NDCC § 65-05-01	1 - from date claimant knew or should have known	NDCC § 65-05-01

Ohio	2	Ohio Rev. Code § 4123.84	2 - from date disability began, or 6 months after medical diagnosis	Ohio Rev. Code § 4123.85
Oklahoma	2	85 Ok. Stat. § 43	2	85 Ok. Stat. § 43
Oregon	90 days	ORS 656.265	1 - from date of discovery or medical diagnosis	ORS 656.802
Texas	1	Texas Labor Code § 409-003	1 - from date claimant knew or should have known	Texas Labor Code § 409-003
Wyoming	1	Wyo. Stat. § 27-14-503	3	Wyo. Stat. § 27-14-503

7. Please describe any benefit differentials between occupational injury and occupational disease, along with statutory citations.

None: 13

Kentucky: OD benefits based on level of disability.

New Mexico: OD benefits for length of disability, OI benefits limited to 500 weeks, or 700 weeks if 80% disability.

Ohio: Restrictions on benefits for some occupational diseases (4123.57, 4123.61, 4123.68).

8. Does your statute provide apportionment for:

occupational injury? Yes: 10 No: 6  
occupational disease? Yes: 8 No: 8

statutory citations, if applicable:

State	Occupational Injury	Occupational Disease
California	L.C. 4663, 4664	L.C. 4663, 4664
Colorado	CRS 8-42-104(2)	CRS 8-42-104(2)
Idaho	Idaho Code 72-406	Idaho Code 72-406
Maine	39A-5-354	Not applicable
Maryland	2E 9-656	LE 9-608
Minnesota	Case law	Not applicable
New Mexico	52-1-47	52-3-43
North Dakota	NDCC 65-05-15	NDCC 65-05-15

Ohio	Ohio. Rev. Code § § 4123.56, 4123.57, 4123.58, 4123.59, 4123.60, 4123.61, 4123.68, and 4123.69	
Wyoming	27-14-201(d)	27-14-201(d)
All Others	No apportionment	No apportionment

9. Please briefly describe your state’s causation standard, along with statutory or case citations, for:

State	Part of Statutory Definition for Injury and Disease	Specific Provisions	Case Law
Arizona		X	
California		X	
Colorado	X		
Idaho	X		
Kentucky	X		
Louisiana	X		
Maine	X		
Maryland			X
Minnesota			X
New Mexico	X		
North Dakota	X		
Ohio	X		
Oklahoma	X		
Oregon		X	
Texas	X		
Wyoming	X		

10. Have constitutional issues been raised concerning:

a. Equal protection questions concerning differences in benefits?

Yes: 2                      No: 10                      Not Applicable: 4

NM: Peculiar statutory provision declared unconstitutional.

OK: Use of AMA guide upheld.

b. Equal protection questions or other issues concerning notice and filing of claim requirements?

Yes: 1                      No: 11                      Not Applicable: 4

OK: Statute of limitations upheld.

c. Equal protection or other issues concerning the causation standard?

Yes: 2                      No: 7                      Not Applicable: 4

AZ: Causation standard for OD claims upheld.

OR: Challenge to exclusive remedy provision.

MN: Special legislation for peace officers upheld.

d. Equal protection or other issues concerning apportionment?

Yes: 0                      No: 11                      Not Applicable: 5

11. Please provide any other noteworthy information concerning your state's treatment of occupational injury and occupational disease.

CO: Apportionment in ODs by case law.

KY: Consensus process for determination of ODs.

OR: If benefits denied because no major contributing cause, may sue in tort.

12. Would you like to receive a copy of the survey results?

Yes: 16                      No: 0

**Appendix C - Codification Bill**

BILL NO.

INTRODUCED BY \_\_\_\_\_  
(Primary Sponsor)

BY REQUEST OF THE ECONOMIC AFFAIRS INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING PORTIONS OF THE OCCUPATIONAL DISEASE ACT TO COMPLY WITH DECISIONS BY THE MONTANA SUPREME COURT; CLARIFYING PAYMENT OF ATTORNEY FEES, COMPROMISE SETTLEMENTS, AND LUMP-SUM PROVISIONS; AMENDING SECTIONS 39-72-402 AND 39-72-701, MCA; REPEALING SECTIONS 39-72-405, 39-72-703, 39-72-706, 39-72-707, 39-72-711, AND 39-72-712, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, as part of the 1987 overhaul of the Workers' Compensation Act, the Montana Legislature specified its governmental interest by adopting a declaration of public policy, codified at section 39-71-105, MCA, which declared that for purposes of interpreting and applying both the Workers' Compensation Act and the Occupational Disease Act of Montana, the objective of the Montana workers' compensation system was to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease, that wage-loss benefits should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease, and that the objective of the workers' compensation system was to return a worker to work as soon as possible after a work-related injury or disease; and

WHEREAS, in addition to adopting a declaration of public policy, the 1987 Legislature also substantially revised the definitions of "injury" and "occupational disease" by creating two classes of workers whose afflictions were classified as

either "injuries" or "occupational diseases" based solely upon the number of work shifts over which the afflictions occurred; and

WHEREAS, after the 1987 revision, the Montana Supreme Court began considering challenges from claimants alleging that the disparate legislative treatment of those workers with "injuries" and those workers with "occupational diseases" violated the equal protection guarantee of Article II, section 4, of the Montana Constitution, which requires that all persons be treated alike under like circumstances; and

WHEREAS, in 1999, the Montana Supreme Court held in *Henry v. State Compensation Insurance Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456 (1999), that the elimination of workers suffering from occupational diseases from access to rehabilitation benefits that are available to injured workers violated the equal protection guarantee because it bore no rational relationship to the state's declared policy of returning workers to work as soon as possible; and

WHEREAS, in 2003, the Montana Supreme Court held in *Stavenjord v. Montana State Fund*, 2003 MT 67, 314 Mont. 466, 67 P.3d 229 (2003), that the disparate treatment of disabled workers based simply on the length of time over which the workers' injury or disease is sustained violated the equal protection guarantee because it was not rationally related to the Legislature's declared policy of providing a wage loss benefit that bears a reasonable relationship to the workers' actual wage loss; and

WHEREAS, based on its *Stavenjord* decision, the Montana Supreme Court in *Schmill v. Liberty Northwest Insurance Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (2003), held that apportioning or reducing a worker's permanent impairment award for the worker's occupational disease while providing full benefits for a similarly injured worker under the Workers' Compensation Act violated the equal protection guarantee because it was not rationally related to the Legislature's declared policy that compensation was intended only for work-related injury or disease; and

WHEREAS, because the Montana Supreme Court has ruled that workers suffering a work-related injury on one shift and workers suffering a work-related

injury on more than one shift are similarly situated for purposes of equal protection and because the Legislature has shown no rational reason to treat these workers differently, it is necessary that the Legislature, at a minimum, address the equal protection problems identified by the Montana Supreme Court in the Henry, Stavenjord, and Schmill decisions.

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

**Section 1.** Section 39-72-402, MCA, is amended to read:

**"39-72-402. Practice and procedure -- applicability of Workers' Compensation Act.** (1) Except as otherwise provided in this chapter, the practice and procedure prescribed in the Workers' Compensation Act ~~applies~~ apply to all proceedings under this chapter.

(2) Sections 39-71-304, 39-71-403, 39-71-406, 39-71-409, 39-71-411 through 39-71-413, 39-71-611 through 39-71-614, 39-71-741, 39-71-742, and Title 39, chapter 71, part 9, which are contained in the Workers' Compensation Act, specifically apply to and are incorporated as part of this chapter."

**Section 2.** Section 39-72-701, MCA, is amended to read:

**"39-72-701. Compensation for total disability, temporary or permanent partial disability, vocational rehabilitation, or death ~~due to~~ because of occupational disease other than pneumoconiosis.** (1) The compensation ~~to which an~~ that is payable to an employee with an occupational disease must be paid in the same amount and for the same time period under this chapter:

(a) to an injured employee who is:

(i) temporarily totally disabled or permanently totally disabled;

(ii) temporarily or permanently partially disabled; or

(iii) eligible for rehabilitation benefits by ~~because of~~ an occupational disease other than pneumoconiosis; or

(b) to the beneficiaries and dependents of the employee in the case of death caused by an occupational disease other than pneumoconiosis, ~~are entitled under this chapter shall be the same payments which are payable to an injured employee, and such payments shall be made for the same period of time as is provided in cases of temporary total disability, permanent total disability, and in cases of injuries causing death under the Workers' Compensation Act.~~

(2) In cases ~~where~~ in which it is determined that periodic disability benefits granted by the Social Security Act are payable because of the disease for which temporary total and permanent total disability benefits are payable, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal as nearly as practical to one-half the federal periodic benefits for ~~such~~ that week, ~~which~~ The amount ~~is to~~ must be calculated from the date of the disability social security entitlement."

NEW SECTION. Section 3. Repealer. Sections 39-72-405, 39-72-703, 39-72-706, 39-72-707, 39-72-711, and 39-72-712, MCA, are repealed.

NEW SECTION. Section 4. Effective date -- applicability. [This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005.

- END -

## Appendix D - Proposed Legislative Changes

### **Proposed Montana Law Changes (New language underlined, deleted language struck through)**

**39-71-119(1)** "Injury" or "injured" means:

(a) internal or external physical harm to the body that is established by objective medical findings;

(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

(c) death.

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

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event ~~on a single day or during a single work shift.~~

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

(a) emotional or mental stress; or

(b) a nonphysical stimulus or activity.

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

(5) (a) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition.

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

**39-72-102(10)** "Occupational disease" means ~~harm, damage, or death as set forth in 39-71-119(1)~~ a disease arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift due to the nature of an employment in which the hazards of such disease actually exist, and are characteristic of, and peculiar to the trade, occupation, process, or employment. The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity.

**39-71-603. Notice of injuries or occupational diseases to be submitted within thirty days.** (1) A claim to recover benefits ~~under the Workers' Compensation Act~~ under this chapter for injuries not resulting in death may not be considered compensable unless, within 30 days after the occurrence of the accident that is claimed to have caused the injury, notice of the time and place where the accident occurred and the nature of the injury is given to the employer

or the employer's insurer by the injured employee or someone on the employee's behalf. Actual knowledge of the accident and injury on the part of the employer or the employer's managing agent or superintendent in charge of the work in which the injured employee was engaged at the time of the injury is equivalent to notice.

(2) A claim to recover benefits for an occupational disease that is compensable under this chapter that does not result in death may not be considered compensable unless, within 30 days of the occupational disease's first manifestation, notice of the occupational disease is given to the employer or the employer's insurer by the employee or someone on the employee's behalf.

(23) If a sole proprietor, partner, manager of a manager-managed limited liability company, member of a member-managed limited liability company, or corporate officer covered under this chapter is injured in an accident, the sole proprietor, partner, manager, member, or corporate officer or an appointed designee shall, within 30 days, notify the insurer of the time and location of the accident and the nature of the injury.

(4) If a sole proprietor, partner, manager of a manager-managed limited liability company, member of a member-managed limited liability company, or corporate officer covered under this chapter has a manifestation of an occupational disease, the sole proprietor, partner, manager, member, or corporate officer or an appointed designee shall, within 30 days of the first manifestation of the occupational disease, notify the insurer of the time and location of the accident and the nature of the injury.

**New Section, based on 39-72-706. AggravationApportionment.** (1) If an injury or occupational disease is aggravated by any other disease or infirmity not itself compensable or if disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an injury or occupational disease, the compensation payable under this chapter must be reduced and limited to such proportion only of the compensation that would be payable if the injury or occupational disease were the sole cause of the disability or death as such injury or occupational disease as a causative factor bears to all the causes of such disability or death.

(2) If compensation is reduced a proportionate amount as in subsection (1) and the worker receives disability social security benefits, the offset entitlement granted to the insurer must be reduced in the same proportionate amount as the compensation as long as the worker continues to receive disability social security benefits.