RAM
Rehabilitation Association of Montana

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July 7, 2010

Dear Chairman and Economic Affairs Interim Committee Members:

On 6/29/10, our organization the Rehabilitation Association of Montana (RAM) had the opportunity to address you. Thank you for that opportunity. We felt it would also be helpful to provide you our comments in writing.

RAM wants to thank the Labor Management and Advisory Council for their tireless efforts in identifying changes needed to the Montana Workers' Compensation system. RAM supports the proposed legislation encouraging employers to develop return-to-work/stay-at-work programs for their employees in the event they experience a work-related injury or diagnosis. According to the research that has been done to date for LMAC by the Montana Department of Labor and Industry, diminishing time a worker spends away from work due to a work-related injury or occupational disease has a corresponding positive impact on that injured worker's efforts to maintain employment, benefits and their livelihood.

The proposed legislation outlines rehabilitation benefits and assistance that can be made available to injured workers. As professional rehabilitation counselors who have worked with injured workers, we must respectfully offer concerns regarding the proposed legislation in three specific areas:

1. **Requesting Rehabilitation Benefits-** The proposed statute indicates rehabilitation benefits and/or return-to-work assistance must be requested by the injured workers, employers, medical providers or other involved parties. Our utmost concern in this regard is how would injured workers or other involved parties be made aware of their ability to request vocational rehabilitation benefits and/or assistance at any point in the process? In the past, the process developed by Montana DOLI for informing injured workers of their benefits was a pamphlet discussing their workers' compensation benefits. It has been our experience, however, that many injured workers never received this information. Our experience has been that the injured worker and employer have little knowledge of the workers' compensation system prior to our initial contact with them. Vocational rehabilitation counselors have typically been in the position of providing the first information that injured workers and employers have had regarding the return-to-work and workers' compensation process.

We are involved primarily with claims where the injured worker is unable to work or is disabled in some way from their usual work. However, we do not meet with some 75-80% of workers' compensation claimants. The recent 2009 Annual Workers' Compensation Report from the Montana Department of Labor & Industry indicated there were 4,048 time loss injuries in fiscal year 2009 (claims where the person is not able to work). Less than 1,000 of these claims were referred for vocational rehabilitation services. As you can see, there are many injured workers who do not work with vocational rehabilitation counselors. Thus our concern about how injured workers and employers would be made aware of their ability to request vocational rehabilitation benefits and/or assistance when they currently receive little or no information about the workers' compensation process.

The proposed legislation "hopes" that people will do the "right thing" and notify injured workers of their benefits if they experience a work-related injury. The language of the statute proposes no mandates for informing workers and no penalties for failing to inform injured workers of their rights and benefits. We see real problems with a system that is purely voluntary without a mechanism for ensuring that workers are informed of their rights under the law.

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Essentially, the way this legislation is written, there is no compelling obligation to ensure that injured workers will be made aware of their rights and benefits. The language of the statute allows the insurer and employer a great deal of latitude as to how much information they provide injured workers and provides no structure for ensuring that injured workers are properly and expeditiously informed of their rights.

Recommendation

We recommend that a formal process be specified in the statute for informing injured workers of their rights. One possible method for ensuring injured workers have been informed of their rights and benefits would be to mandate an interview process, possibly with a rehabilitation counselor not concerned with mitigating the claim. This type of formal process should likely be a requirement for any workers' compensation injury involving any level of permanent injured worker disability.

2. **Impairment Ratings as a Means to Compensate Wage Loss as a Result of a Compensable Injury-** The next concern we have is the manner in which injured workers will be compensated for wage loss. The proposed legislation is mandating that injured workers be compensated for wage loss resulting from their injury based on their American Medical Association (AMA) Impairment Rating. It is our opinion that an impairment rating has no relationship to actual wage loss. This opinion is based on our understanding of how impairment ratings are typically utilized in the disability determination process. Two definitions inform us on this matter:

   An impairment rating is, "a rating provided by the treating physician and/or independent medical examiner after their examination of a patient. It is usually based on the American Medical Association's Guide to Permanent Impairments and is not to

be interpreted as a functional disability, but is only a level of anatomical dysfunction based on the AMA guide." (Blackwell, T., Field, T., Johnson, C., Kelsay, M., Neulicht, A. (2005). The Vocational Expert: Revised and updated. Athens, GA: Elliott & Fitzpatrick, Inc., p. 116).

According to the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, (Cocchiarella, Linda MD, MSc, AMA Medical Editor, Andersson, Gunnar B.J., MD, PhD, Senior Medical Editor, p. 13), "Impairment percentages derived from the *Guides* criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary *first step* for determining disability."

Recommendation

Instead of doubling the medical impairment rating for the permanent partial disability (PPD) award, we propose increasing the compensation for actual loss of work capacity in the statute. The percentages in 39-71-703 for compensating loss of strength or exertional capacity could be changed as follows: heavy to light restrictions to 10%, heavy to medium to 7%, and medium to light to 5%. This would attribute wage loss to actual "functional disability," rather than an arbitrary standard that has no relationship to disability.

3. **Definition of Permanently Totally Disabled** - One last concern we would like to offer to the Committee is the statutory definition of Permanent Total Disability, as defined in 39-71-116.

Under the proposed statutory language, an injured worker who reaches maximum medical improvement, has a permanent impairment, and is not able to return to work in the time of injury job or another job with the employer of injury or another employer, must declare him/herself to be "Permanently Totally Disabled," in order to initiate rehabilitation services. Since most of the workers who make this declaration will in fact **be able to work** and will technically not be permanently disabled from any work, this definition seems premature and with unintended consequences. Declaring someone permanently totally disabled labels them. Once someone hears this label, there is a whole series of thinking/behavior that goes along with it and may be difficult to reverse when time to look at return-to-work functions.

Recommendation

An alternative to someone declaring himself/herself to be permanently totally disabled would be to declare himself/herself a "disabled worker". We suggest defining "Disabled Worker" to mean a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the

injury. In order to meet this definition, this worker must also (a) be receiving or have received Permanent Partial Disability Benefits; (b) not have been offered an alternative or modified job with the employer of injury as specified in 39-71- (new section), and (c) not have returned to work with a different employer. At this point, we recommend an assessment be made to determine if there are vocational options for this claimant or if the claimant is truly permanently and totally disabled.

Thank you for allowing us to provide input into this process. We welcome an opportunity to discuss our proposals with your committee.

Sincerely,
The Rehabilitation Association of Montana

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Cc: Labor Management Advisory Council