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# COMMENT

## 1987 CHANGES TO LUMP SUM PAYMENT PROVISIONS IN THE MONTANA WORKERS' COMPENSATION ACT

Cynthia Kegley Smith\*

In reaction to real and perceived problems in the workers' compensation system, Montana's 1987 legislature dramatically revised the provisions for lump sum payments to injured workers.<sup>1</sup> The revisions place claimants at the whim of insurers, drastically reducing the availability of benefit conversions. This comment examines the history of lump sum payments in Montana, the changes wrought by the 1987 legislature, and the effect of the changes on claimants. It then attempts to offer suggestions for other, less harsh solutions to problems with lump sum payments.

### I. BACKGROUND

Nearly every state allows injured workers to receive their workers' compensation benefits in lump sum payments<sup>2</sup> in either of two ways. Workers may receive payment for the entire amount of their employers' liability in a lump sum settlement, or they may receive partial payment in a lump sum advance.<sup>3</sup> However, pay-

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\* The comments of David J. Patterson, Professor of Law, University of Montana School of Law; Gregory S. Munro, Visiting Assistant Professor of Law, University of Montana School of Law; Norman H. Grosfield, Attorney at Law, Helena, Montana; and Thomas C. Bulman, Attorney at Law, Missoula, Montana, were most helpful to the author of this comment. Any errors or omissions, however, are the author's alone.

1. For a thorough discussion of the background of the legislative changes see Luck, *The 1987 Amendments to the Montana Workers' Compensation Act—From the Employer's Perspective*, this issue, and Trieweler, *The New Workers' Compensation Act—Something for All Montanans to Be Ashamed of*, this issue.

2. The only state which does not allow lump sum conversions is Vermont. Vermont's statute authorizing lump sum payments was repealed on May 3, 1978. VT. STAT. ANN. tit. 21 § 653 (1974 & Supp. 1988).

3. See 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH

ments in one or several lump sums contravene the underlying purpose of workers' compensation systems, to replace wages.<sup>4</sup> Workers' compensation was designed as a method of income protection.<sup>5</sup> State systems, therefore, provide for weekly<sup>6</sup> or biweekly benefits.<sup>7</sup> Legislatures fashioned these periodic benefits because they recognized that unsupervised spending of lump sum payments often results in dissipation, leaving the claimant with no support other than public assistance.<sup>8</sup> Because of this recognition, most states require the injured worker to demonstrate that a lump sum payment is in his or her "best interest."<sup>9</sup>

In deciding whether to affirm lump sum payments, the Montana Supreme Court has followed this national best interest standard, holding that lump sum payments must be the exception rather than the rule.<sup>10</sup> The court, however, has indicated that lump sum payments should not be denied when they are clearly in the claimant's best interest.<sup>11</sup> Because the best interest standard is vague, state courts have had to decide significant numbers of cases defining the standard.<sup>12</sup> The Montana Supreme Court has held that judges must examine each claimant's circumstances, and that each case "stands or falls on its own merits."<sup>13</sup> The court has further held that the Workers' Compensation Court is the most qualified forum to determine the best interest of the claimant.<sup>14</sup> The determination should turn on whether the lump sum payment best serves the claimant, his or her family, and the public.<sup>15</sup>

Factors used to determine the claimant's best interest include physical or financial need,<sup>16</sup> preexisting debts,<sup>17</sup> opportunity for

§ 82.71 (Desk Ed. 1988) [hereinafter LARSON, WORKMEN'S COMPENSATION].

4. *Id.*

5. *Id.*

6. *Id.*

7. Montana's Workers' Compensation Act provides for biweekly wage replacement benefits. MONT. CODE ANN. §§ 39-71-701, -703 (1987).

8. 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 82.72(d).

9. LARSON, WORKMEN'S COMPENSATION, *supra* note 3, at § 82.72. See also, Comment, *Workers' Compensation, An Analysis of Tennessee's Lump Sum Provisions*, 14 MEM. ST. U.L. REV. 579, 585 (1984).

10. *Kuehn v. Nat'l Farmers Union Property & Gas Co.*, 164 Mont. 303, 307, 521 P.2d 921, 923 (1974).

11. *Landen v. Toole County Ref. Co.*, 85 Mont. 41, 47, 277 P. 615, 617 (1929).

12. See LARSON, WORKMEN'S COMPENSATION, *supra* note 3, at § 82.72.

13. *Utick v. Utick*, 181 Mont. 351, 355, 593 P.2d 739, 741 (1979).

14. *Willoughby v. Arthur G. McKee & Co.*, 187 Mont. 253, 261, 609 P.2d 700, 704 (1980).

15. *Kustudia v. Indus. Accident Bd.*, 127 Mont. 115, 123, 258 P.2d 965, 969 (1953).

16. *Ruple v. Bob Peterson Logging Co.*, \_\_\_ Mont. \_\_\_, \_\_\_, 679 P.2d 1252, 1254 (1984) (claimant's other income sources are properly considered in determining need). See also *Krause v. Sears Roebuck and Co.*, 187 Mont. 102, 104-05, 641 P.2d 458, 459 (1982)

self-employment,<sup>18</sup> and the purchase of items which will improve general living conditions<sup>19</sup> or assist in living with handicaps.<sup>20</sup> The court does not consider certain other reasons valid, such as the opportunity to collect interest on the lump sum,<sup>21</sup> the ability to purchase a home and thus avoid future rent increases,<sup>22</sup> or the desire to obtain the lump sum because the claimant probably will not live long enough to receive all the future benefits.<sup>23</sup>

After the 1987 statutory changes, Montana joined a small minority of states<sup>24</sup> requiring that the injured worker and the insurer must agree to convert the future benefits to a lump sum.<sup>25</sup> Prior to the 1987 legislative changes, the failure of these parties to agree was a dispute over which the Workers' Compensation Court had jurisdiction.<sup>26</sup> The 1987 provisions remove this jurisdiction except in cases where permanently totally disabled workers seek lump

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(claimant must show pressing need in order to obtain a lump sum payment for the purchase of a mobile home park); *Belton v. Carlton Transp.*, \_\_\_ Mont. \_\_\_, \_\_\_, 714 P.2d 148, 150 (1986) (claimant must show pressing need for fuel efficient car). *But see Utick*, 181 Mont. at 356, 593 P.2d at 741-42 (lack of pressing need can be disregarded when claimants are able to demonstrate unquestionably that their ability to support themselves will be enhanced by the lump sum payment and that they have previously suffered ill treatment at the hands of the Division of Workers' Compensation).

17. *See, e.g., Byrd v. Ramsey Eng'g*, \_\_\_ Mont. \_\_\_, \_\_\_, 701 P.2d 1385, 1387 (1985) (exception allowed where claimant acquired debt after injury, when the debt was a loan secured to pay a large balloon payment, and the anticipated lump sum payment was used as collateral for the loan).

18. *See, e.g., Malmedahl v. Indus. Accident Bd.*, 135 Mont. 554, 558, 342 P.2d 745, 747 (1959) (claimants must show ability and capacity to rehabilitate themselves through the self-employment venture).

19. *See, e.g., Willoughby*, \_\_\_ Mont. at \_\_\_, 609 P.2d at 703 (desire to purchase more fuel efficient car was sufficient reason).

20. *Willis v. Long Constr. Co.*, \_\_\_ Mont. \_\_\_, \_\_\_, 690 P.2d 434, 435 (1984).

21. *Kent v. Sievert*, 158 Mont. 79, 80-81, 489 P.2d 104, 105 (1971).

22. *Belton*, \_\_\_ Mont. at \_\_\_, 714 P.2d at 150.

23. *See Laukaitis v. Sisters of Charity of Leavenworth*, 135 Mont. 469, 474, 342 P.2d 752, 755 (1959).

24. States requiring employer or insurer agreement include: Alabama, ALA. CODE § 23-5-83 (1986 & Supp. 1988); Alaska, ALASKA STAT. § 23.30.012 (1984); Arizona, ARIZ. REV. STAT. ANN. § 23-1067(B) (1987) (workers with permanent partial disabilities may not receive lump sum payments without insurer's agreement); *but see* ARIZ. REV. STAT. ANN. § 23-1067(A) (allowing lump sum payments in the absence of insurer's agreement to workers with permanent total disabilities); Indiana, IND. CODE ANN. § 23-3-3-25 (Burns 1987 & Supp. 1988); Kentucky, KY. REV. STAT. ANN. § 342.150 (Baldwin 1988); Louisiana, LA. REV. STAT. ANN. § 23:1274 (West 1985 & Supp. 1988); Massachusetts, MASS. GEN. LAWS ANN. ch. 152, § 48 (West 1976 & Supp. 1988); Michigan, MICH. STAT. ANN. § 17.237(835) (Callaghan 1981 & Supp. 1988); Texas, TEX. REV. CIV. STAT. ANN. art. 8306, § 15 (Vernon 1966 & Supp. 1988); and Virginia, VA. CODE ANN. § 65.1-74 (1987).

25. MONT. CODE ANN. § 39-71-741 (1987).

26. MONT. CODE ANN. § 39-71-741(5) (1985), *amended by* MONT. CODE ANN. § 39-71-741 (1987).

sum advances.<sup>27</sup> If the parties agree to convert the benefits, such agreements are subject to the approval of the Division of Workers' Compensation.<sup>28</sup> Because lump sum payments convert tomorrow's dollars into one current payment, the insurers usually discount payments to present value.<sup>29</sup>

## II. THE 1987 CHANGES IN MONTANA'S LUMP SUM PROVISIONS

In an effort to reduce litigation in workers' compensation cases and to reduce workers' compensation insurance rates,<sup>30</sup> the 1987 Montana legislature completely rewrote the statutory provision authorizing lump sum payments for lost wages.<sup>31</sup> The legislature

27. MONT. CODE ANN. § 39-71-741(1) (1987).

28. MONT. CODE ANN. § 39-71-741(1), (2), (3), (4) (1987).

29. LARSON, WORKMEN'S COMPENSATION, *supra* note 3, at § 82.71, n.29. In 1984, the Montana Supreme Court held that the Montana legislature did not intend that workers' compensation lump sum payments be discounted to present value. *Willis*, \_\_\_ Mont. at \_\_\_, 690 P.2d at 438. The 1985 legislature responded by specifically providing that all lump sum payments must be discounted to present value. MONT. CODE ANN. § 39-71-741(1) (1985), *amended by* MONT. CODE ANN. § 39-71-741 (1987). Although the present version of MONT. CODE ANN. § 39-71-741 contains no provision regarding discounting lump sum payments to present value, such a provision is unnecessary because lump sum advances for permanent total disability are capped at \$20,000. All other forms of lump sum payments under MONT. CODE ANN. § 39-71-741 are subject to agreement of the employer or insurer who, presumably, will not offer an amount exceeding the present value of future benefits.

30. *See*, Luck, *supra* note 1; Trieweiler, *supra* note 1.

31. MONT. CODE ANN. § 39-71-741 (1987) provides:

(1)(a) Benefits may be converted *in whole* to a lump sum:

(i) if a claimant and an insurer dispute the initial compensability of an injury;

and

(ii) if a claimant and an insurer agree to a settlement.

(b) The agreement is subject to division [of Workers' Compensation] approval. The division may disapprove an agreement under this section only if there is not a reasonable dispute over compensability.

(c) Upon approval, the agreement constitutes a compromise and release settlement and may not be reopened by the division or by any court.

(d) *The parties' failure to reach an agreement is not a dispute over which a mediator or the workers' compensation court has jurisdiction.*

(2)(a) If an insurer has accepted initial liability for an injury, permanent total and permanent partial wage supplement benefits may be converted *in whole* to a lump-sum payment.

(b) The conversion may be made only upon agreement between a claimant and an insurer.

(c) The agreement is subject to division approval. The division may approve an agreement if:

(i) there is reasonable dispute concerning the amount of the insurer's future liability or benefits; or

(ii) the amount of the insurer's projected liability is reasonably certain and the settlement amount is not substantially less than the present value of the insurer's liability.

(d) *The parties' failure to reach agreement is not a dispute over which a mediator or the workers' compensation court has jurisdiction.*

made major changes in two areas: access to the Workers' Compensation Court, and the allowable amount of lump sum advances.

In the first area, access to the courts, the pre-1987 statute granted jurisdiction to the Workers' Compensation Court over any

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(e) Upon approval, the agreement constitutes a compromise and release settlement and may not be reopened by the division or by any court.

(3)(a) Permanent partial wage supplement benefits may be converted to a lump-sum *advance*.

(b) The conversion may be made only upon agreement between a claimant and an insurer.

(c) The agreement is subject to division approval. The division may approve an agreement if the parties demonstrate that the claimant has financial need that:

(i) relates to the necessities of life or relates to an accumulation of debt incurred prior to injury; and

(ii) arises subsequent to the date of injury or arises because of reduced income as a result of the injury.

(d) *The parties' failure to reach an agreement is not a dispute over which a mediator or the workers' compensation court has jurisdiction.*

(4) Permanent total disability benefits may be converted to a lump-sum *advance*. *The total of all lump-sum advance payments to a claimant may not exceed \$20,000.* A conversion may be made only upon the written application of the injured worker with the concurrence of the insurer. Approval of the lump-sum advance payment rests in the discretion of the division. The approval or award of a lump-sum advance payment by the division or court must be the exception. It may be given only if the worker has demonstrated financial need that:

(a) relates to:

(i) the necessities of life;

(ii) an accumulation of debt incurred prior to the injury; or

(iii) self-employment venture as set forth in 39-71-1026; and

(b) arises subsequent to the date of injury or arises because of reduced income as a result of the injury.

(5)(a) An insurer may recoup any lump-sum advance amortized at the rate established by the division, prorated biweekly over the projected duration of the compensation period.

(b) The rate adopted by the division must be based on the average rate for United States 10-year treasury bills in the previous calendar year, rounded to the nearest whole number.

(c) If the projected compensation period is the claimant's lifetime, the life expectancy must be determined by using the most recent table of life expectancy as published by the United States national center for health statistics.

(6) The division has full power, authority, and jurisdiction to allow, approve, or condition compromise settlements or lump-sum advances agreed to by workers and insurers. All such compromise settlements and lump-sum payments are void without the approval of the division. Approval by the division must be in writing. The division shall directly notify a claimant of a division order approving or denying a claimant's compromise or lump-sum payment.

(7) *Subject to 39-71-2401, a dispute between a claimant and an insurer regarding the conversion of biweekly payments into a lump-sum advance under subsection (4) is considered a dispute, for which a mediator and the workers' compensation court have jurisdiction to make a determination. If an insurer and a claimant agree to a compromise and release settlement or a lump-sum advance but the division disapproves the agreement, the parties may request the workers' compensation court to review the division's decision.*

(Emphasis added.)

claimant, regardless of the extent of the injury, when an employer or insurer refused to convert benefits to a lump sum or refused to agree to an acceptable payment amount.<sup>32</sup> The 1987 provision severely limits this jurisdiction to a small group of injured workers. Only claimants who suffer permanent total disability may litigate an insurer's refusal to pay a lump sum.<sup>33</sup> Moreover, these claimants have the right to litigate for only a lump sum advance, and not for conversion of the total benefits to which they are entitled.<sup>34</sup> The new statute thus denies access to the courts to all other injured workers desiring a lump sum advance or settlement.

Any apparent advantage to permanently totally disabled workers seeking lump sum advances is limited, however, by the second major area of statutory change. The pre-1987 statute contained no limits on the number and amount of lump sum payments.<sup>35</sup> With the 1987 changes, Montana joined a handful of states which place a cap on the monetary amount of lump sum advances or settlements in workers' compensation claims.<sup>36</sup> The Montana statute now provides that the total of all lump sum advances to a permanently totally disabled worker may not exceed

32. MONT. CODE ANN. § 39-71-741(5) (1985), amended by MONT. CODE ANN. § 39-71-741 (1987).

33. MONT. CODE ANN. § 39-71-741 (1987). For full text of the statute, see *supra* note 31.

34. *Id.*

35. MONT. CODE ANN. § 39-71-741 (1985), amended by MONT. CODE ANN. § 39-71-741 (1987).

36. Eight other states limit the amount of money available in a lump sum payment. They are: Arizona, ARIZ. REV. STAT. ANN. § 23-1067 (1987) (providing a cap of \$25,000 in the case of permanent partial disability, and of \$50,000 in the case of permanent total disability); Colorado, COLO. REV. STAT. § 8-52-103 (1986), amended by COLO. REV. STAT. § 8-52-103 (Supp. 1987) (setting the limits at \$37,560 for permanent partial disability and \$26,292 for permanent total disability); Florida, FLA. STAT. ANN. § 440.20(13)(d) (West 1983), amended by FLA. STAT. ANN. § 440.20(13)(d) (Supp. 1988) (providing a cap on advances in the amount of \$7,500 or 28 weeks of benefits in any 48-month period); Illinois, ILL. REV. STAT. ch. 48, para. 138.7(g) (1986 & Supp. 1988) (providing that lump sum payments to the beneficiaries of a worker killed on the job not exceed 100 weeks of compensation); Nevada, NEV. REV. STAT. § 616.07 (1987) (in cases of permanent partial disabilities which do not exceed 25% of the "whole man," lump sum payments are limited to 25% of the future payments, discounted to present value; except in cases of permanent partial disability or death of the worker, lump sum payments are not allowed); Oklahoma, OKLA. STAT. ANN. tit. 85, § 41 (West 1970), amended by OKLA. STAT. ANN. tit. 85 § 41 (Supp. 1988) (providing that no lump sum payment may exceed \$4,000 or 25% of the total award, whichever sum is larger); and Washington, WASH. REV. CODE ANN. § 51.32.130 (1962 & Supp. 1988) (providing that no lump sum may exceed \$8,500). At least two states had such statutory provisions and then later repealed them. They are: Alaska, ALASKA STAT. § 23.30.190(b) (1984) (providing that total compensation under this section may not exceed \$60,000), repealed by § 48, ch. 79, SLA 1988 (Supp. 1988); and South Carolina, S.C. CODE ANN. § 42-9-100, repealed by Act of May 19, 1978, 1978 S.C. Acts 500 § 1; see also Comment, *Workers' Compensation Law*, 39 S.C.L. REV. 231 (1987).

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\$20,000.<sup>37</sup>

### III. THE EFFECTS OF THE 1987 REVISIONS

The effects of the 1987 changes are not yet entirely clear because most workers injured after the new statute took effect have not healed enough<sup>38</sup> to request an advance or settlement. However, future effects of the 1987 changes will be profound. In addition to restricting access to the Workers' Compensation Court, the new statute will impair claimants' ability to obtain legal representation and will reduce claimants' potential benefits.

#### A. Legal Representation

For at least two reasons, several Montana claimants' attorneys predict a drastic reduction in the number of attorneys willing to handle workers' compensation claims arising from injuries occurring after July 1, 1987,<sup>39</sup> the effective date of the 1987 amendments.<sup>40</sup> First, new administrative rules reduce the rates attorneys may charge claimants.<sup>41</sup> Moreover, the 1987 statutory changes make contingency fee arrangements unusually tenuous because of the uncertainty that insurers will agree to pay lump sum advances for permanent partial disabilities, or pay settlements for any type of injury. The \$20,000 cap on lump sum advances for permanent total disabilities further limits the possible fee in a contingency fee arrangement. Therefore, claimants' attorneys' only alternative will be to accept their fees from their clients' biweekly benefits, an arrangement which could result in collecting payments over several years.

Pursuing a request for a lump sum payment is not easy to ac-

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37. MONT. CODE ANN. § 39-71-741(4) (1987). For full text of statute, see *supra* note 31.

38. According to MONT. CODE ANN. §§ 39-71-701, -703(1), permanent partial and permanent total disabilities cannot be determined until the injured worker reaches "maximum healing."

39. Act of April 14, 1987, ch. 464, 1987 Mont. Laws 1092.

40. Telephone interviews with John Whiston, Whiston and Rossbach, Missoula, Mont. (Aug. 11, 1988); Norman H. Grosfield, Attorney at Law, Helena, Mont. (Aug. 2, 1988); Mark Connell, Connell, Beers and McDonald, Missoula, Mont. (Aug. 10, 1988); Thomas C. Bulman, Bulman Law Associates, Missoula, Mont. (June 28, 1988); Terry N. Trieweiler, Attorney at Law, Whitefish, Mont. (Aug. 8, 1988).

41. MONT. ADMIN. R. 24.29.3801 (1987), Div. of Workers' Comp., provides that when the claimant receives a settlement without a court order, the claimant's attorney may not charge more than 20% of the amount the claimant receives through the efforts of the attorney. If the case is heard before a judge, the claimant's attorney may not charge more than 25% of the amount the claimant receives. An attorney may charge an hourly fee not to exceed \$75 per hour. It is interesting to note that none of these provisions apply to respondents' attorneys.



comply. The Montana Supreme Court noted in *Wight v. Hughes Livestock*<sup>42</sup> that the workers' compensation area is a "specialized practice, requiring training and experience if the claims are to be successfully negotiated."<sup>43</sup> Workers will find it extremely difficult to file a claim and to negotiate a settlement without an attorney's representation. Yet, because of the 1987 changes, workers may have to represent themselves.

Without attorney representation, claimants will be forced to deal directly with insurers who may not be willing to settle claims fairly. Without an advocate to fight for a claimant's entire entitlement, the injured worker will receive whatever amount the insurer decides to offer. Since insurers no longer risk litigation when they refuse a request for a lump sum settlement, they have no incentive to offer even the present value of the future benefits. The new statute does provide that if settlement offers are "substantially" less than the present value of their entire entitlement, the Division of Workers' Compensation may withhold approval.<sup>44</sup> However, Montana's Workers' Compensation Act does not define "substantial," and so the law hardly limits the Division's discretion.

### B. Lack of Access to the Courts and Equal Protection

Because the new statute grants jurisdiction to the courts over only those disputes between insurers and permanently totally disabled claimants seeking lump sum advances, other injured workers seeking lump sum payments have no access to the judicial process. This denial of access raises a serious equal protection concern. The Montana Constitution provides that "No person shall be denied the equal protection of the laws."<sup>45</sup> Under the new law, however, the workers' compensation system treats workers who suffer permanent total disability and who desire lump sum advances differently from all other injured workers. In order to infringe the fundamental right of equality among injured workers before the courts, Montana must show a compelling reason for the unequal treatment.<sup>46</sup> The Montana Supreme Court should not hold that the legislature's desire to reduce litigation<sup>47</sup> compels the unequal treatment of classes of injured workers.

42. 98 Mont. 98, 664 P.2d 303 (1983).

43. *Id.* at 109, 664 P.2d at 309.

44. MONT. CODE ANN. § 39-71-741(2) (1987).

45. MONT. CONST. art. II, § 4.

46. See *Pfost v. State*, \_\_\_ Mont. \_\_\_, \_\_\_, 713 P.2d 495, 500 (1985).

47. See *Luck*, *supra* note 1; and *Trieweiler*, *supra* note 1, for a discussion of the legislature's rationale.

### C. *Effective Abolition of the Best Interest Standard*

Under the new statute the insurer unilaterally decides whether to grant a claimant's request for a lump sum settlement.<sup>48</sup> The new statute abandons the Montana standard that courts must fairly determine whether lump sum payments serve a claimant's best interest.<sup>49</sup> Now, in most cases, insurers alone make the determination of whether claimants will receive a lump sum payment. Under the new provisions, only workers who seek advances in their permanent total disability benefits qualify for judicial, and thus impartial, application of the best interest standard.<sup>50</sup> Perhaps the Montana legislature excepted advances, realizing that claimants would need advances to pay the heavy debts which often accrue when a worker is first injured and faces drastically reduced income.<sup>51</sup> However, claimants with permanent partial disabilities also face a debt accumulation, and not all will have the ability to pay the debts. These workers may try to convince insurers of their need for advances. Unlike the courts, however, insurers need not consider all of a claimant's needs, and can therefore refuse to grant lump sum payment requests, regardless of whether they are in the claimant's best interest.

### D. *Inability to Obtain Adequate Lump Sum Payments*

Prior to the 1987 changes, Montana courts found that lump sum payments were in claimants' best interests for the purposes of debt management,<sup>52</sup> self-employment,<sup>53</sup> relocation,<sup>54</sup> and disassociation from the circumstances of injury.<sup>55</sup> Now, under the new statute, none of these reasons can compel an insurer to convert the future benefits to lump sum payments. Comparison of treatment of cases before and after the 1987 amendments illustrates the harshness of the new lump sum statute.

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48. MONT. CODE ANN. § 39-71-741(1), (2), and (3). For full text of statute, *see supra* note 31.

49. *Willoughby*, \_\_\_ Mont. at \_\_\_, 609 P.2d at 704.

50. MONT. CODE ANN. § 39-71-741(4) (1987).

51. Telephone interview with Robert J. Robinson, Administrator, Mont. Div. of Workers' Comp., Helena, Mont. (Aug. 8, 1988).

52. *Kuehn*, 164 Mont. at \_\_\_, 521 P.2d at \_\_\_.

53. *Lauderdale v. State Compensation Ins. Fund*, \_\_\_ Mont. \_\_\_, 745 P.2d 690 (1987).

54. *Polich v. Whalen's O.K. Tire Warehouse*, \_\_\_ Mont. \_\_\_, 634 P.2d 1162 (1981) [hereinafter *Polich I*].

55. *Legowik v. Montgomery Ward Co.*, 157 Mont. 436, 486 P.2d 867 (1971).

### 1. Debt Management

Even if settlements and advances were available to all claimants, in some circumstances the \$20,000 available under the cap is not enough to pay off pressing debts. Many workers have substantial car and mortgage payments. Biweekly benefits may not be sufficient to pay those monthly debt obligations and other monthly living expenses. Under these circumstances, claimants will fall behind in debt obligations. In the past, claimants' attorneys prevented foreclosures by contacting creditors and advising them of the possibility of a lump sum payment enabling the claimant to pay off the debts.<sup>56</sup> The current limit of \$20,000 in total advances in the case of permanent total disability may not always suffice to pay off the accumulated debts of those workers now entitled to lump sum advances. Even where adequate for those purposes, \$20,000 may be insufficient for both debt management and purchasing the special equipment often necessary for claimants to adjust to a physical handicap.

### 2. Self-Employment

The possibility of self-employment is perhaps the most compelling reason for a lump sum payment. A claimant who can successfully operate a business can become self-sufficient. Comparison of the 1985 case of *Rivera v. Home Land, Inc.*<sup>57</sup> and the treatment the case would now receive under the new statute illustrates the new law's probable effect on self-employment possibilities. Rivera was injured on the job when the boom of a backhoe struck him, causing him to bend over backwards from the waist.<sup>58</sup> Because of the severe and permanent back injuries he sustained, he was unable to lift heavy objects and he could not stand, sit, or bend normally.<sup>59</sup>

The Workers' Compensation Court found that Rivera was incapable of returning to any type of employment for which he was qualified.<sup>60</sup> However, Rivera found a self-service laundromat and meat locker business which he could purchase and operate, even with his disability, for \$81,728.<sup>61</sup> The court approved a settlement in that amount, together with enough money to pay off \$24,000 in

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56. Interview with Mark Connell, Connell, Beers and McDonald, Missoula, Mont. (Aug. 10, 1988).

57. No. 8503-2978, slip op. (Workers' Comp. Ct. Sept. 5, 1985).

58. *Id.* at 6.

59. *Id.*

60. *Id.* at 7.

61. *Id.* at 8-9.

debts.<sup>62</sup> The court further found that the lump sum payment to Rivera met the standard that it would not improve his financial condition over that which he could reasonably have expected had he not been injured.<sup>63</sup>

Under the 1987 revisions, Rivera could not have received an advance large enough to pay off his debts, let alone large enough to purchase a business. If he wished to receive a lump sum settlement, he would have had that option only if the insurer agreed. Moreover, he would have received only the amount the insurer was willing to pay. In either circumstance, he probably would not have received enough money to operate his own business.

Controversy exists over disabled workers seeking self-employment. The Division of Workers' Compensation administration<sup>64</sup> cites the argument advanced by Professor Larson in his authoritative treatise on workers' compensation.<sup>65</sup> A lump sum payment often is not in a claimant's best interest because the money frequently goes to the claimant's family and attorney, leaving little for the actual claimant. Further, the Division sees a contradiction in the proposition that totally disabled workers can be self-employed. The Division argues that people unable to work at a job for someone else must be equally unable to work at a job for themselves.<sup>66</sup> The employer in *Rivera* argued that the term "self-employment" was a misnomer in Rivera's case. Because of his disability, Rivera would manage the business by giving orders to subordinates rather than by "working" in any real sense of the term.<sup>67</sup> The employer thus argued that in purchasing a business Rivera was, in effect, purchasing an annuity,<sup>68</sup> an inappropriate reason for a lump sum payment.<sup>69</sup> These arguments, however, ignore the fact that workers' physical disabilities do not impair their intellectual capacity to make business decisions. It is consonant with the purposes of workers' compensation that workers use their benefits to enable them to work in self-employment when physical disability prevents employment requiring physical capability.

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62. *Id.*

63. *Id.* at 10.

64. Telephone interview with Robert J. Robinson, Administrator, Mont. Div. of Workers' Comp., Helena, Mont. (Aug. 8, 1988).

65. LARSON, WORKMEN'S COMPENSATION, *supra* note 3, at § 82.71.

66. Telephone interview with Robert J. Robinson, Administrator, Mont. Div. of Workers' Comp., Helena, Mont. (Aug. 8, 1988).

67. Defendant's Reply Brief in Support of Motion for New Trial at 14-15, *Rivera*, No. 8503-2978 (available at the Workers' Comp. Ct., Helena, Mont.).

68. *Id.* at 14.

69. LARSON, WORKMEN'S COMPENSATION, *supra* note 3, at § 82.73.

### 3. Relocation

Claimants often use lump sum payments for relocation in order to improve their living conditions. For example, in *Polich v. Whalen's O.K. Tire Warehouse*,<sup>70</sup> the claimant was in his sixties.<sup>71</sup> Polich suffered chronic back pain from a work-related injury and was totally disabled.<sup>72</sup> Montana's cold winter climate aggravated the pain.<sup>73</sup> The Montana Supreme Court held that it was in Polich's best interest to have his benefits converted to a lump sum settlement so that he could move to a warmer climate and avoid Montana's severe winters.<sup>74</sup> Even though Polich owned his home and could sell it to obtain funds to help with the move, he was unable to secure a good price for it in the depressed housing market in his community.<sup>75</sup> Noting that Polich was obviously able to manage money,<sup>76</sup> the court approved the conversion so that he could make the move.<sup>77</sup> Under the 1987 amendments Polich could have received at maximum only \$20,000 had he requested an advance, and possibly no other lump sum payments had the insurer refused a lump sum settlement request.

### 4. Disassociation from the Circumstances of Injury

In a number of cases the Montana Supreme Court has found it in a claimant's best interest to receive a lump sum settlement in order to disassociate mentally from the circumstances of the injury. For example, in *Legowik v. Montgomery Ward Co.*,<sup>78</sup> the claimant suffered permanent total disability after a heavy boat which he was loading onto a trailer suddenly fell.<sup>79</sup> Legowik's injury resulted in adhesive capsulitis, an affliction which limits motion and causes severe pain to the arms and hands.<sup>80</sup> The pain resulted in depression which exacerbated a preexisting emotional problem. The exacerbated emotional problem in turn caused Legowik's physical problems to worsen.<sup>81</sup> The Montana Supreme

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70. \_\_\_ Mont. \_\_\_, 634 P.2d 1162 (1981) [*Polich I*].

71. *Id.* at \_\_\_, 634 P.2d at 1163.

72. *Id.*

73. *Id.* at \_\_\_, 634 P.2d at 1165.

74. *Id.*

75. *Id.* at \_\_\_, 634 P.2d at 1163-64.

76. *Id.* at \_\_\_, 634 P.2d at 1165.

77. *Polich v. Whalen's O.K. Tire Warehouse*, 203 Mont. 280, 283, 661 P.2d 38, 39 (1983) [hereinafter *Polich II*].

78. 157 Mont. 436, 486 P.2d 867.

79. *Id.* at 437, 486 P.2d at 867.

80. *Id.*

81. *Id.* at 438, 486 P.2d at 868.

Court held that a lump sum settlement was in Legowik's best interest because with a settlement he could become "completely divorced from the circumstances" that created the emotional problems and proceed with his rehabilitation.<sup>82</sup> Under the new provisions, Legowik would not have been able to convince a court that a lump sum settlement was in his best interest because no court can accept jurisdiction over a settlement dispute. If the insurer refused a lump sum settlement request, the new statute would force Legowik to receive biweekly benefits and thus face biweekly reminders of the circumstances of his injury.

#### IV. POSSIBLE SOLUTIONS TO THE LUMP SUM PROBLEM

As this examination of prior case law illustrates, lump sum payments best serve claimants in some circumstances. Montana should therefore make lump sum payments available to all claimants who need them. In its drive for efficiency, the legislature should consider other options which will also adequately provide for claimants' needs.

One solution starts with the recognition that workers' compensation benefits already fall far short of actual wage replacement. Under the Workers' Compensation Act, workers may receive in benefits only a *fraction* of the wages they previously earned.<sup>83</sup> Courts have renounced awarding lump sums for purchase of annuities or other investments on the ground that these investment vehicles would yield claimants more than their statutory benefits.<sup>84</sup> In fact, however, yields from such investments often more nearly approximate actual wage replacement. Thus, if claimants can improve their lives by using the entire amount of an entitlement to purchase annuities or to invest at interest rates higher than the percentage rate used to convert the benefits to present value, they should be permitted to do so. There is no reason to maintain the legal fiction that through investment workers might gain some undeserved windfall from their injuries.

The most effective solution is for the legislature to repeal the 1987 revisions and enact new measures to prevent abuses. For example, the legislature could require that courts or insurers monitor

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82. *Id.* at 441, 486 P.2d at 869.

83. MONT. CODE ANN. § 39-71-702 (1987) limits weekly benefits for permanent total disability to two-thirds of the worker's former weekly wage, with an upper limit of the amount of the average state weekly salary, which the statute sets at \$299. Any worker with a net income of more than \$600 will have his or her income reduced by at least half, rather than by two-thirds.

84. LARSON, WORKMEN'S COMPENSATION, *supra*, note 3, at § 82.73.

the claimant's use of the lump sum payments, ensuring that the funds are used for the purpose for which they are requested. This solution would overcome the more thoughtful objections<sup>85</sup> to lump sum payments. The insurer in *Polich*<sup>86</sup> suggested this approach, and the court rejected the suggestion.<sup>87</sup> However, Professor Larson, the leading scholar on workers' compensation, believes that "conscientious administration" is the "only solution."<sup>88</sup>

## V. CONCLUSION

The changes to the lump sum provisions in the Montana Workers' Compensation Act were abrupt and ill-considered, with harsh consequences to injured workers and their families. Most claimants will not be severely affected. For most claimants, weekly payments are appropriate. Certain claimants, when faced with the largest sum of money ever to enter their hands, may be tempted to squander the money, leaving nothing to replace their lost wages and no way to return to work and earn a living. Other claimants, however, have both the ability and the actual need to obtain and utilize the present value of their future benefits. Since this is no more than the amount to which the claimants are fairly entitled in all events, those who need and could benefit from lump sum payments should not be denied.

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85. See LARSON, *THE LAW OF WORKMEN'S COMPENSATION*, *supra* note 8 and accompanying text.

86. *Polich II*, 203 Mont. at 281-82, 661 P.2d at 39.

87. *Id.* at 283, 661 P.2d at 40.

88. LARSON, *WORKMEN'S COMPENSATION*, *supra* note 3, at § 82.71.