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# A CHECKLIST FOR DRAFTING A PETITION FOR LUMP-SUM CONVERSION OF PERMANENT PARTIAL WORKERS' COMPENSATION BENEFITS

Teresa Thompson\*

## I. INTRODUCTION

The Montana Legislature amended the Workers' Compensation lump-sum conversion statute in 1985.<sup>1</sup> The amended statute sets forth the presumption that biweekly payment of benefits best serves the interests of Workers' Compensation recipients.<sup>2</sup> It requires that conversions of biweekly benefits to lump-sum settlements be the exception rather than the rule for disbursement of compensation benefits<sup>3</sup> and defines the criteria utilized to determine whether a lump-sum settlement should be approved.<sup>4</sup>

The statute requires the submission of a written request for conversion of biweekly benefits.<sup>5</sup> The written request is a specialized petition. It must persuasively delineate the petitioner's need for the lump-sum conversion.<sup>6</sup> Approval of the petition "rests within the discretion of the division,"<sup>7</sup> and can be granted only

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1. MONT. CODE ANN. § 39-71-741 (1985), as amended, became effective April 15, 1985. *But see* *Stelling v. Rivercrest Ranches, Inc.*, No. 8412-2757 (Workers' Comp. Ct. June 27, 1985) (substantive sections which attempt to accomplish a retroactive reduction of benefits found unconstitutional). *See also* *Rivera v. Home Land, Inc.*, No. 8503-2978 (Workers' Comp. Ct. July 5, 1985) (retroactive reduction of benefits not allowed).

2. MONT. CODE ANN. § 39-71-741(2) (1985) provides in part: "It is presumed that biweekly payments are in the best interest of the worker or his beneficiary."

3. MONT. CODE ANN. § 39-71-741(2) (1985) provides: "The approval or award of a lump-sum conversion by the division or the workers' compensation judge must be the exception, not the rule . . . ."

4. MONT. CODE ANN. § 39-71-741(2), (3), and (4) (1985).

5. MONT. CODE ANN. § 39-71-741(2) (1985) provides: "The conversion can only be made upon the written application of the injured worker or the worker's beneficiary . . . ." *E.g.*, *Moilanen v. Marbles*, \_\_\_ Mont. \_\_\_, 694 P.2d 485 (1985).

6. MONT. CODE ANN. § 39-71-741(2) (1985) provides: "[A]pproval . . . may be given only if the worker or his beneficiary demonstrates that his ability to sustain himself financially is more probable with a whole or partial lump-sum conversion than with biweekly payments and his other available resources." *See, e.g.*, *Rivera*, No. 8503-2978 (Workers' Comp. Ct.); *Moilanen*, \_\_\_ Mont. \_\_\_, 694 P.2d 485; *Bundtrock v. Duff Chevrolet*, 199 Mont. 128, 647 P.2d 856 (1982); *Krause v. Sears Roebuck & Co.*, 197 Mont. 102, 641 P.2d 458 (1982); *see also* *Utick v. Utick*, 181 Mont. 351, 355, 593 P.2d 739, 741 (1979) (where the court stated: "Each case for a lump-sum payment stands or falls on its own merits.").

7. MONT. CODE ANN. § 39-71-741(2) (1985). *E.g.*, in *Kuehn v. National Farmers Union Co.*, 164 Mont. 303, 307, 521 P.2d 921, 923 (1974), the court stated, "That the Board's discretion in granting or denying lump-sum settlements will not be interfered with on appeal

when the "worker . . . demonstrates that his ability to sustain himself financially is more probable with a whole or partial lump-sum conversion than with the biweekly payments and his other available resources."<sup>8</sup>

This drafting guide focuses on petitions for lump-sum conversions of permanent partial benefits.<sup>9</sup> It discusses neither the entire amended statute,<sup>10</sup> nor all varieties of lump-sum conversion petitions. Rather, it provides an organizational outline and drafting checklist for writers of petitions for lump-sum conversions of permanent partial benefits.

unless there is an apparent abuse of discretion is well established."

8. MONT. CODE ANN. § 39-71-741(2) (1985). Claimant must demonstrate a pressing need for a lump-sum settlement. *See, e.g., Krause*, 197 Mont. at 105, 641 P.2d at 459; *cf. Kent v. Sievert*, 158 Mont. 79, 81, 489 P.2d 104, 105 (1971) (Claimant failed to establish need when his only anticipated use of the lump sum was "to put it 'on interest.'"). *See Kuehn*, 164 Mont. at 307, 521 P.2d at 924 (where the court stated: "The criteria determinative of the advisability of conversion to a total or partial lump-sum award have generally been held to be 'the best interests of the claimant, his family and for the best interests of the public.'"); *see also Kustudia v. Industrial Accident Bd.*, 127 Mont. 115, 123, 258 P.2d 965, 969 (1953); *Legowick v. Montgomery Ward*, 157 Mont. 436, 486 P.2d 867 (1971) (existence of a pressing need and/or outstanding indebtedness were likewise considered relevant criteria).

9. MONT. CODE ANN. § 39-71-116(12) (1985) defines permanent partial disability as a condition resulting from injury as defined in this chapter that results in the actual loss of earnings or earning capability less than total that exists after the injured worker is as far restored as the permanent character of the injuries will permit. Disability shall be supported by a preponderance of medical evidence.

The court in *Dosen v. East Butte Copper Min. Co.*, 78 Mont. 579, 254 P. 880 (1927), defined permanent partial disability by comparing it to the other types of disabilities:

If a man who has a broken leg is confined to his bed for a period of two months, during that time he is *temporarily totally* disabled. If the leg is so badly injured that a good recovery never ensues, or if complications from the injury set in so he never makes a good recovery he has a *permanent partial disability*. The period of total disability has ceased and a period of partial disability has succeeded.

(emphasis supplied). A permanent partial disability arises when a "claimant's earning power is not wholly destroyed and . . . he is still capable of performing remunerative employment." *Id.* at 608, 254 P. at 887.

10. In *Willis v. Long*, \_\_\_ Mont. \_\_\_, 690 P.2d 434 (1984), the court determined that MONT. CODE ANN. § 39-71-741 (1983) did not contemplate the discounting of lump-sum payments to present value and held that lump-sum payments could not be discounted. The 1985 Legislature amended the statute with specific language to allow the discounting of lump-sum settlements of permanent total, or death benefits. It enumerates specific criteria which must be satisfied before the division grants the lump-sum conversion. MONT. CODE ANN. § 39-71-741 (1985). *See also Minutes of the Meeting of the Labor and Employment Committee of the Montana State Senate*, February 14, 1985, at 7, where Mr. Blewett informed the committee that "the division reviews [the petition] to make sure that it fits within [the] . . . parameters, and . . . would deny a lump sum that didn't have all the criteria." The intent of the criteria is to limit the volume of lump-sum conversions. *Id.* at 8.

## II. PETITION HEADING, INTRODUCTORY FACTS AND INITIAL CONTENTIONS

The first page of the petition may consist of a standard cover sheet.<sup>11</sup> The insurer must agree to the proposed conversion.<sup>12</sup> Both the petitioner and the insurer's representative sign this cover sheet.

The second page initiates the formal written application for the lump-sum conversion. The heading might read: "Petition and Affidavit in Support of Full and Final Compromise Settlement on a Lump-sum Basis."

This section, introductory in nature, contains general facts and contentions. In it, the petitioner avers that she has been duly sworn and that the insurer concurs with the proposed lump-sum conversion.<sup>13</sup> The petitioner states that the subject workers' compensation claim arose out of an injury which occurred while she acted within the course and scope of her employment.<sup>14</sup> She lists the dollar amount of the proposed lump-sum conversion and reserves all medical and hospital benefits.<sup>15</sup> If the petitioner and her insurer have made any agreements which may affect the dollar amount of the lump-sum conversion, then the petitioner characterizes these agreements in this section of the petition.<sup>16</sup>

### CHECKLIST

1. The petitioner has been duly sworn;

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11. Form: DWC-MISLF 807 (Rev. 2/85), DS 269/270.

12. MONT. CODE ANN. § 39-71-741(2) (1985) provides that the written application must demonstrate "the concurrence of the insurer." It empowers the division to approve settlements and compromises of claims. MONT. CODE ANN. § 39-71-714(4) (1985). The lump-sum petition is usually submitted after petitioner, through her lawyer, has negotiated a compromise with her insurers. The compromise generally includes a discount of the total dollar amount which claimant would receive if she collected the biweekly benefits for a period of 500 weeks or less. MONT. CODE ANN. §§ 39-71-703, -705 (1985). See *Minutes of the Meeting of the Labor and Employment Committee* 5 (Feb. 14, 1985).

13. MONT. CODE ANN. § 39-71-741(2) (1985).

14. MONT. CODE ANN. ch. 71, Workers' Compensation.

15. The reservation of medical and hospital benefits protects petitioner in the event that she incurs additional medical or hospital expenses which result from the subject injury. The petitioner's biweekly benefits are meant to substitute for the wages she has lost because of her injury. "[T]he monthly payment is a substitute for the pay check." *Laukaitis v. Sisters of Charity*, 135 Mont. 469, 472, 342 P.2d 752, 754 (1959). Appropriately, a lump-sum conversion of biweekly benefits represents a compromise regarding only those benefits; the petitioner reserves her right to make future claims against her insurer for future payment of related medical and hospital expenses.

16. For example, the petitioner and the insurer may have agreed that insurer will continue to pay biweekly benefits while the petitioner is awaiting approval of her lump-sum petition. She may agree that the continued benefits will be subtracted from the total amount of the lump-sum conversion when the petition is approved by the division.

2. The insurer concurs with the proposed conversion;
3. The subject claim arose out of an injury which occurred while the petitioner acted within the course and scope of her employment;
4. Dollar amount of the proposed conversion;
5. Reservation of all medical and hospital benefits;
6. Description of any agreements with the insurer which may affect the dollar amount of the conversion.

### III. DESCRIPTION OF INJURY

In this section, the petitioner provides a first-person narrative account of the location, date, and circumstances of her injury.<sup>17</sup> She may describe both her former employment and the events which precipitated the industrial accident. Within the narrative account, the petitioner may list the names of any witnesses to the accident. Additionally, the petitioner may appropriately provide a description of the type of injury suffered and the medical treatment rendered immediately after the accident. The petitioner must document each fact with exhibits.<sup>18</sup>

#### CHECKLIST

1. General summary of the injury, including location and date of occurrence;
2. Description of the petitioner's former employment;
3. Specific description of the industrial accident and injury;
4. List of witnesses to the accident and supervisors notified after the accident occurred;
5. Descriptive account of immediate medical treatment;
6. Documentation such as Employer's First Report of Injury, emergency room reports, physician's office notes, and witnesses' statements.

### IV. MEDICAL HISTORY

The medical history segment of the petition includes the petitioner's detailed account of her physical and psychological condition and chronologically describes the medical treatment, physical therapy, and psychological counseling rendered. In this section, the petitioner describes her symptoms, progress and course of treatment. She may specify her efforts to return to work or the reasons for her inability to do so. She may explain her present status, an-

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17. The petitioner documents this account with exhibits such as an Employer's First Report of Injury, an emergency room report, and the attending physician's notes.

18. *Id.*

anticipated rate of recovery and impairment rating.<sup>19</sup> Generally the longest section of the petition, this segment must include carefully detailed documentation.<sup>20</sup>

### CHECKLIST

1. Descriptive account of physical and psychological condition including symptoms and progress;
2. Chronological description of medical treatment, physical therapy, and psychological counseling;
3. Efforts to return to work or details of physical limitations on the petitioner's ability to return to work;
4. Present status and anticipated rate of recovery;
5. Impairment rating;
6. Documentation may include medical records, physical therapist's report, letters, and hospital records.

### V. PRESENT STATUS OF EARNING CAPACITY

This portion of the petition may continue in the form of a first person narrative. Here, the petitioner states her age, current family and marital status, educational background and the highest level of formal education attained.<sup>21</sup> She describes her employment history and work experience and lists dates and names of employers.<sup>22</sup> The petitioner must also describe her financial condition including her total income and its sources.<sup>23</sup> If the petitioner enjoys indirect sources of income such as a large vegetable garden or animals for butchering, then these benefits should be enumerated so that the petition accurately reflects her income.<sup>24</sup>

The petitioner may use this portion of her petition to lay the ground work for her lump-sum conversion justification and rationale. She may explain her wage history, employment capabilities, and special training and certification. The petitioner may characterize her employment disabilities and create an outline to delineate her need for debt reduction or rehabilitation through a busi-

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19. MONT. CODE ANN. § 39-71-122 (1985) provides in pertinent part: "Impairment refers to functional use of the body and is a purely medical condition . . . . An impairment rating is a . . . medical determination." It is made by a physician when the claimant's condition is stable.

20. Documentation should include doctor's notes, hospital records, physical and/or psychological reports, pertinent correspondence, evaluative studies and reports.

21. MONT. ADMIN. R. 24.29.1202(7)(a) (1985).

22. This information pertains to the petitioner's inability to financially sustain herself on the biweekly benefits. This data may demonstrate that the petitioner's employment prospects are diminished because of the accident.

23. MONT. ADMIN. R. 24.29.1202(1), (2), and (3)(a) (1985).

24. *Id.* at 24.29.1202(3) (requires a listing of all of the petitioner's available resources).

ness venture.

### CHECKLIST

1. Age, family and marital status;
2. Education, special training and certification;
3. Employment history;
4. Total household income including social security benefits;
5. Indirect sources of income;
6. Documentation which may include statements from past employers, rehabilitation therapist's notes, physician's notes, and special diplomas or certificates.

### VI. FINANCIAL DATA

The petitioner must provide a detailed analysis of her current financial condition. This analysis must list the temporary total and permanent partial disability benefits paid to the petitioner and should provide the dates of receipt.<sup>25</sup> The petitioner should indicate whether the benefits have been terminated and denote any agreement with her insurer to deduct additional benefits from the lump-sum conversion payment. This portion of the petition should contain a statement regarding the petitioner's agreement with her attorney. The statement must include the name of the attorney, the percentage figure to which the attorney is entitled,<sup>26</sup> a computation of the attorney fees and the net settlement amount which the petitioner expects to obtain. If the petitioner retained her attorney after her insurer offered an initial settlement amount or if her attorney agreed to accept a smaller percentage for his fee, then the petitioner appropriately reports such facts in this section.

The petitioner also must list and document her assets<sup>27</sup> and debts.<sup>28</sup> She should detail her monthly living expenses and the circumstances which render the biweekly benefit distribution scheme unsuitable for her particular situation.

### CHECKLIST

1. Listing of workers' compensation benefits received;

25. Usually documented with a worksheet copied from the insurer's records.

26. The fee is typically a percentage of the lump-sum settlement. MONT. CODE ANN. § 39-71-613(1) (1985) requires the attorney to submit to the division a copy of the contract and fee arrangement. *See also* MONT. ADMIN. R. 24.29.1202(3)(d)(v) (1985).

27. MONT. ADMIN. R. 24.29.1202(3) (1985) provides that the petition should "include a list of all the worker's . . . assets . . . including but not limited to: . . . (b) monetary assets . . . [and] (c) fixed assets."

28. MONT. ADMIN. R. 24.29.1202(3)(d) (1985) requires a listing of claimant's liabilities including "monthly living expenses," "delinquent outstanding debts," "periodic payments on debts," "long-term liabilities," and "attorney fees and costs."

2. Description of any additional agreements with the insurer;
3. Attorney's name and fee computation;
4. Calculation of the petitioner's anticipated net settlement;
5. Listing of assets, debts and monthly expenses;
6. Documentation such as copies of outstanding bills, loan agreements, and contracts for deed.

## VII. REHABILITATION

Here the petitioner sets forth her plan for rehabilitation through either debt reduction<sup>29</sup> or a business venture.<sup>30</sup> The plan properly incorporates factual references to limitations imposed upon the petitioner by her impairment. The petitioner advances her intent to restructure her financial liabilities or employment to accommodate the loss of function or disability caused by her injury.

The rehabilitation section also demonstrates the petitioner's belief in and enthusiasm for the debt reduction or business venture proposal. A debt-reduction rehabilitation section delineates a plan which will accomplish the partial or total elimination of existing debts; it presents a strategy for application of the proposed lump sum to the petitioner's outstanding debts and explains how the conversion will enable the petitioner to be financially sustained during the course of the debt management plan.<sup>31</sup>

A business venture proposal describes the particular business and its desirability with regard to the petitioner's physical limitations. The petitioner should analyze her ability to succeed in the venture by discussing her education, work history, specialized training, or knowledge of the business.<sup>32</sup> This section also includes a narrative of any employment rehabilitation guidance provided to the petitioner. It should document that the petitioner is suited to,

29. MONT. CODE ANN. § 39-71-741(2)(c) (1985) addresses debt reduction as a justification for a lump-sum conversion and provides: "If the existing delinquent or outstanding debts are used as grounds for a lump-sum conversion, the worker or his beneficiary must demonstrate through a debt management plan that a lump sum for that purpose is necessary to sustain himself financially."

30. MONT. CODE ANN. § 39-71-741(2)(d) (1985) provides in part: "If a business venture is used as grounds for a lump-sum conversion, the worker or his beneficiary must demonstrate through a business plan that a lump sum for that purpose is necessary to sustain himself financially."

31. MONT. ADMIN. R. 24.29.1202(5)(b) (1985) (while this portion of the rule does not, on its face, specifically address requirements for permanent-partial lump-sum petitions, the rule provides guidelines to assist the petitioner in her attempt to meet the guidelines of MONT. ADMIN. R. 24.12.1201 (1985)).

32. MONT. ADMIN. R. 24.29.1202(6)(a) (1985) (provides guidelines).



and likely to succeed in, the proposed business venture.<sup>33</sup>

If the rehabilitation plan involves a new business venture, then the petitioner describes the business. She estimates the purchase price, start-up costs and expenses, and provides a forecast of net income and cash flow.<sup>34</sup> The petitioner demonstrates that the plan is realistic by presenting documentation, in the form of feasibility studies, of the market conditions in the market area where she intends to establish her new business.<sup>35</sup>

When the rehabilitation plan deals with an existing business, the petitioner provides information similar to that outlined above. Additionally, the petitioner furnishes and analyzes documentation of the proposed sale agreement, the purchase price, conditions on the sale, income tax statements and balance sheets for the two years prior to the sale.<sup>36</sup>

### CHECKLIST

1. General description of the rehabilitation plan and explanation of its suitability in light of the petitioner's particular impairment;
2. Justification and demonstration of the plan's desirability including information regarding the petitioner's education, work history and special abilities;
3. Evidence of the likelihood that the petitioner will improve her financial condition through implementation of the plan;
4. Description of rehabilitation counseling including relevant test results, evaluations and recommendations;
5. Debt management justification:
  - a. description of the proposed use of the lump-sum conversion;
  - b. analysis which demonstrates that the petitioner will be better financially sustained through implementation of the plan than if she continues to receive biweekly benefits;
  - c. list of debts to be paid and calculations demonstrating reduced monthly expenses;
  - d. explanation of how the petitioner will be financially sustained during, and after, the debt management plan.
6. New business venture:
  - a. description of business;

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33. MONT. ADMIN. R. 24.29.1202(6) (1985) (provides guidelines).

34. MONT. CODE ANN. § 39-71-741(2)(d) (1985) provides in part: "The business plan must show the feasibility of the business, given the market conditions in the intended market area, and the cash that will be available to him on a biweekly basis after start-up costs and other business expenses are considered . . . ." See MONT. ADMIN. R. 24.29.1202(6)(b) and (d) (1985) (provides guidelines).

35. MONT. CODE ANN. § 39-71-741(2)(d) (1985).

36. MONT. ADMIN. R. 24.29.1202(6)(c) (1985) (provides guidelines).

- b. estimates:
    - (1) purchase price;
    - (2) income sources;
    - (3) start-up costs;
    - (4) projected expenses;
    - (5) net income forecast;
    - (6) cash flow.
  - c. feasibility study tailored to the intended market area;
  - d. analysis which demonstrates that the petitioner will be better financially sustained through implementation of the plan than she will be if she continues to receive biweekly benefits.
7. Existing business venture:
- a. description of business;
  - b. estimates:
    - (1) purchase price;
    - (2) income sources;
    - (3) start-up costs;
    - (4) projected expenses;
    - (5) net income forecast;
    - (6) cash flow.
  - c. copy of the agreement indicating the intent to sell the business, and a description of limitations on the sale;
  - d. income tax statements and balance sheets from two previous years;
  - e. market analysis of conditions in the market area of the existing business;
  - f. analysis which demonstrates that the petitioner will be better financially sustained through implementation of the plan than she will be if she continues to receive biweekly benefits.
8. Statement and supporting documentation to demonstrate the petitioner's enthusiasm and intent to succeed through implementation of the plan;
9. Documentation, including counselling reports, rehabilitation therapist's test results and evaluations, doctor's office notes to support contentions regarding physical limitation and capabilities, business worksheets, contracts and market analysis.

## VIII. SETTLEMENT RATIONALE AND LUMP-SUM JUSTIFICATION

This portion of the petition provides the petitioner with a forum in which she may summarize her earlier analysis and persuasively restate her major contentions. Her discussion should touch on every facet of her need for the lump-sum conversion. She may use this section to unify and amplify her assertion that she cannot

financially sustain herself with her biweekly benefits and other income. She should justify each contention with documented facts to override the statutory presumption that biweekly benefits are in her best interest and convincingly recount her rationalization for the lump-sum conversion. The petitioner may conclude with an assertion of anticipated results such as increased self esteem, reduction of stress, and greater feeling of accomplishment. She should close this section with an assertion of her belief that the lump-sum conversion settlement is fair and in her best interest.

#### CHECKLIST

1. Reference to injury, impairment, and hardships suffered;
2. Summary of present earning capability;
3. Condensed review of financial situation;
4. Brief analysis to reiterate desirability of the debt reduction or new business plan;
5. Expression of personal reasons for seeking the conversion;
6. Documentation which may include evaluations of the petitioner's psychological condition, medical records, or physician's notes and letters.

#### IX. MISCELLANEOUS DATA AND INFORMATION

The petitioner may restate the details of her agreement with her attorney and recount the figures which reflect the attorney's fee and her net conversion amount. In this portion of the petition, she should provide a synopsis of the intended application of the settlement funds and urge the approval of her petition. The petitioner and her attorney must sign and date the document. Their signatures must be notarized.

#### CHECKLIST

1. Recounting of attorney agreement, net settlement amount and its application;
2. Statement that settlement is fair and in the best interest of the petitioner;
3. Signatures;
4. Notary signature and seal.

#### X. CONCLUSION

The amended lump-sum conversion statute imposes substantially new criteria for the approval of such conversions. A petitioner must present a thoughtful and accurate analysis to demon-

strate her inability to sustain herself financially with a combination of biweekly benefits and her other resources. Further, the petitioner must offer convincing proof to overcome the statutory presumption that the biweekly benefits are in her best interest. The Division may require further studies<sup>37</sup> if it considers the initial petition inadequate.

A recipient of permanent partial workers' compensation benefits must carefully draft her initial settlement petition. A carefully drafted petition will satisfy the requirements of the lump-sum conversion statute, meet the requirements set forth in the newly adopted Administrative Rules of Montana and gain Division approval.

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37. MONT. ADMIN. R. 24.29.1204 (1985).

