INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/ALL OFFICES

FROM: W. JOSEPH TRUCE

DATE: November 14, 2001

RE: **COMPUTING AVERAGE WEEKLY EARNINGS UNDER LABOR CODE §4453**

In the case of a full-time permanent employee this is usually fairly simple. If the employment is for 30 or more hours per week and for five or more days a week, average weekly earnings are determined by multiplying the injured worker's actual daily earnings at the time of injury by the number of working days in a week (Labor Code §4453(c)(1)).

In a minority of our cases determining the average weekly earnings of an employee is complicated because the applicant is a part-time and/or temporary employee or works less than 30 hours per week.

Therefore in determining the applicant's average weekly earnings for a temporary and/or part-time employee due consideration must be given to the worker's actual earnings from all sources and employments and other factors to be considered are the worker's age, health, skill, education, willingness to work and employment opportunities.

This determination usually comes down to a **"but for"** test as to the applicant's earning capacity if the injury had not occurred. The landmark cases are **Argonaut Insurance Company v. IAC (Montana) (1962) 57 Cal 2d 589; 27 CCC 130** and **Pasco v. WCAB (Alta Vista Convalescent Hospital) (1975) 46 Cal App 3d 146; 40 CCC 191.**

This issue usually comes up in the cases of temporary employment agencies (such as Helpmates which is a new account) or farm workers.

Mr. Sam Smith of Coast Diversified Consulting Services is the insurance consultant for Helpmates and has kindly provided us with the enclosed analysis of the landmark case of **Montana** prepared by an attorney by the name of Tom Condas, Esquire (enclosed).

For those of you that have Helpmates' cases on your diary please **double check** to see whether or not your case involves a **Montana** issue as this has specifically been requested by Mr. Sam Smith.

WJT:wf

Enclosure: memo from Sam Smith 10/23/01

cc: Sam Smith/Coast Diversified Consulting Services

Subj: **FW: Montana case.**
Date: 10/23/2001 2:52:23 PM Pacific Daylight Time
From: mdeboer@unitedriskmanagement.com (Marie DeBoer)
To: cdcs2win@aol.com ('Sam Smith (cdcs2win@aol.com)')
CC: Danstruve@aol.com ('Danstruve@aol.com')
File: **Firemansfund.zip** (125589 bytes) DL Time (28800 bps): < 1 minute

Mr. Smith:

In our last meeting you asked for a legal opinion on the Montana decision. Attached you will find an opinion and synopsis of the Montana decision as presented by Tom Condas, Esq.

-----Original Message-----
From: condas [mailto:condas@mindspring.com]
Sent: Monday, October 22, 2001 6:48 PM
To: mdeboer@unitedriskmanagement.com
Cc: mreese@unitedriskmanagement.com
Subject: Montana case.

Marie,

Madalynne asked me to forward to you a brief statement on the issue of earnings for temporary employees. This issue always seems to invite a review of the courts holding in Argonaut vs. IAC (Montana) 57 C2d 589, 27 CCC 130.

In Montana, the court addressed the issue of how to determine average weekly wages, distinguishing between AWE for temporary disability and permanent disability.

In assessing AWE for purposes of PD, the court identified the factors to be looked at when the worker works less than 30 hours or where the other methods of calculating the AWE contained in the Labor Code section 4453 cannot be "fairly and reasonably" applied. (Whatever that means). The court is then allowed to look at the workers earning capacity. "An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured. In making a permanent award, long-term earning history is a reliable guide in predicting earning capacity, although in a variety of fact situations earning history alone may be misleading. . . . [A]ll facts relevant and helpful to making the estimate must be considered. The applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant".

What the term "earning capacity" means when a temporary employment situation exists has been the subject of several CCC cases.

Under Montana, the court looked to the intermittent employment that applicant had over an extended period of time. However, the court went on to strengthen the applicants cause by opining that applicants sporadic and low earnings were due to hard economic times, not a reflection of his earning capacity.

Subsequent use of this case has led many judges to look at a workers claimed "willingness to work" as a means of determining AWE, using the "but for" test instead of a rational reflection on what the individual worker did with his life during the years preceding the injury.

In 1997, the court used the Montana formula to determine the AWE of a **temporary** employee

in the case of Laytonville USD vs. WCAB (Lockett) 62 CCC 1300.

In Laytonville, the court determined the amount that applicant had earned and divided that amount by the number of days worked to get an average daily wage. He then ascertained the number of days that applicant would have worked "but for" the industrial injury. The judge multiplied the number of days that applicant would have worked. but for the accident, added the amount to the admitted to earnings, and divided the total by 52 to get an average weekly wage. This method gave applicant the full benefit of the "earning capacity" theory without consideration as to the "temporary" aspect of his employment.

In January 2001, the court in the case of Fireman's Fund vs. WCAB (Moore) 66 CCC 219 opined that applicants history of not working **should** be considered when determining AWE for permanent disability, citing the courts holding in Montana. Although Fireman's Fund was on the right track, it did not go far enough, failing to ask the court to allow applicants work history to be included in determining AWE when dealing with a temporary employment issue. (Note however that the holding in Montana itself addressed the issue of AWE for PD purposes, and that the courts have relied on the opinion in determining AWE for TD.) See also Garza vs. WCAB (2001) 66 CCC 1213 and City of Eureka vs. WCAB (1995) 60 CCC 1019.

I have attatched copies of the cases cited for your review.

Although there are other cases discussing the AWE issue, these are the ones that are being cited the most. I hope that this short synopsis is of use, and if we can provide further information, or an analysis based on actual facts, please do not hesitate to contact our offices at your convenience.

Regards,

Tom Condas
tcondas@hollings-law.com

---------- Headers ----------
Return-Path: <mdeboer@unitedriskmanagement.com>
Received: from rly-xe04.mx.aol.com (rly-xe04.mail.aol.com [172.20.105.196]) by air-xe03.mail.aol.com (v81.9) with ESMTP id MAILINXE38-1023175223; Tue, 23 Oct 2001 17:52:23 -0400
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Message-ID: <8BFEBDE3145DD511B44A0003470D455D104782@BIGBEN>
From: Marie DeBoer <mdeboer@unitedriskmanagement.com>
To: "'Sam Smith (cdcs2win@aol.com)'" <cdcs2win@aol.com>
Cc: "'Danstruve@aol.com'" <Danstruve@aol.com>
Subject: FW: Montana case.
Date: Tue, 23 Oct 2001 14:54:10 -0700
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