BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULE I, pertaining to the value of housing furnished by an employer for workers' compensation purposes	))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On December 22, 2017, the Department of Labor and Industry (department) published MAR Notice No. 24-29-330 regarding the public hearing on the proposed adoption of the above-stated rule, at page 2391 of the 2017 Montana Administrative Register, Issue Number 24.

2. On January 12, 2018, a public hearing was held in Helena on the proposed new rule. Several persons commented on the proposed new rule during the public comment period.

3. The department has thoroughly considered the comments received. A summary of the comments, and the department responses, are as follows:

Comment 1: A commenter stated that 39-71-105, MCA, establishes as Montana's public policy that wage loss benefits should bear a reasonable relationship to the actual wages lost. The commenter stated that the proposed rule ignores any determination of actual rent values and therefore ignores actual wages.

Response 1: The department agrees 39-71-105, MCA, requires that wage loss benefits bear a reasonable relationship to actual wages lost as a result of a covered injury. However, the department disagrees that the proposed rule ignores any determination of rent value and wages lost related to that value. Previous to the enactment of Chapter 329, Laws of 2017, 39-71-123, MCA, required that remuneration in the form of lodging be based on the "actual value" of the lodging. However, the testimony on the bill and legislative intent indicates the legislature determined the actual values being used in practice were in fact arbitrary and inconsistent. So, despite the language requiring "actual value," what ended up being the "actual value" for premium charges and claims was so varied and subjective that it was not a fair basis for either purpose. Therefore, the language in the statute for purposes of lodging was not resulting in a system in which wage loss benefits always bore a reasonable relationship to actual wages. To address this problem, the legislature determined that it would be less arbitrary for purposes of lodging for the department to determine the value of housing by administrative rule.

The department believes that the proposed rule is a rational approach to implement the provisions of Chapter 329, Laws of 2017 (HB 449). The department concludes that the proposed rule balances the legislative goal of administrative ease of application of the rule with the legislative goal of accuracy of valuation of housing

costs. HB 449 directs the department to establish a rule by which to assign housing value for the purposes of determining insurance premiums and compensation benefits. The department concludes that the proposed rule makes a reasonable effort to establish rental values of various size dwellings in each of the counties of Montana based on published federal survey data. The department recognizes that county-by-county valuations are not likely to exactly match the actual market rental value of any specific dwelling, but concludes that it provides a reasonable approximation of the value. The department further presumes that the legislature was aware of the provisions of 39-71-105, MCA, when enacting HB 449. The department concludes that the intent of the legislature was to make more certain, through a department administrative rule, the way that wages are calculated both for benefit purposes as well as insurance premium purposes. The department concludes that has been accomplished by using published federal survey data, identified as a statistically valid methodology for the valuation of housing, geographically down to the county level. The rule does not ignore actual value because it is based on average values as determined by the U.S. Department of Housing and Urban Development, Office of Policy Development and Research. Therefore, the rule does provide for a reasonable relationship between benefits paid and actual wages lost.

Comment 2: Several commenters questioned the 50% reduction in the lodging value for housing provided in agriculture, and stated that the discount appears arbitrary.

Response 2: The department disagrees that the reduction is arbitrary. The original issue that gave rise to the legislation involved agricultural housing. The legislative intent indicates the legislature's belief that inaccurate and arbitrarily high values were being assigned for purposes of agricultural housing in particular. In those situations, normal real estate valuation processes use the closest comparable housing to determine a value. In agriculture, this can result in using a "comparable property" 50 miles away in the closest town. That in turn results in using a comparable real estate value that is not valid. In addition, the actual value of lodging included in employment remuneration in agriculture is not comparable to the rental value of rural property, because agricultural lodgings used for employees are usually not for rent. The department recognizes that in Montana, housing related to agricultural operations, where that housing is provided by an employer as part of the employee's compensation package, will more likely be located in a generally more remote setting, as opposed to in more urbanized areas. The department recognizes that rental housing in a remote agricultural setting is not as common as rental housing located in more urbanized areas, and that the market value of such housing is more difficult to value. The valuation problem stems from the fact that provided housing in an agricultural setting is not generally part of the normal rental housing inventory for which a market value can be more readily established. The department notes that agricultural property is taxed by the state of Montana at a significantly lower rate than property not used in agriculture. The department concludes that it is reasonable to assume that remote rural agricultural housing has a lower market value than rental housing in a more urbanized area, but is greater than a zero value

(based on not being on the rental market). In the absence of any statistically valid, definitive study or survey of the value of housing that is not part of the normal rental market, the department concludes that a 50% discount of the value of a similar dwelling located "in town" constitutes a reasonable approximation of value of provided agricultural housing.

Comment 3: A commenter expressed concern that the 50% reduction in the lodging value for housing provided in agriculture unfairly targets a specific class of injured workers and raises the question of equal protection.

Response 3: Please see Response 2, above.

Comment 4: A commenter provided two examples of advertisements for rental residential property located in a rural setting that had a higher rental value than the rate provided by the rule, and argued that the commenter's evidence demonstrated that the proposed 50% value reduction for agricultural housing was inappropriate because rentals with acreage had high values.

Response 4: The department concludes that the examples provided are highly unlikely to be representative of housing provided by an agricultural employer to an employee. For example, in a rural rental with acreage, the renter can use the acreage as they see fit; in an agricultural employment situation, the employee does not have discretion to use the acreage as they wish. The department acknowledges that the proposed rule does not, cannot, perfectly value each individual rental housing unit furnished by an employer to an employee. See also Response 2, above.

Comment 5: A commenter stated that the proposed rule was further evidence of the department's bias against the interests of injured workers.

Response 5: The department acknowledges the comment and recognizes the perspective of the commenter's sentiments. The department respectfully disagrees with the commenter's premise that the department is biased against injured workers. The department is implementing the legislature's intent to provide certainty for employees, employers, and insurers, thereby reducing the previous confusion that occurred from the statute. The department further recognizes that some other states exempt agriculture from workers' compensation coverage requirements. By establishing reasonable and predictable housing valuation, the rule supports coverage for agricultural workers.

Comment 6: A commenter suggested that the value of housing should be either agreed to by the employer and employee; represented to the employee by the employer; or be the actual cash value of comparable housing in the same locale, if available. If no value is determined, it would then revert to the value set by administrative rule.

Response 6: The department disagrees that the commenter's approach will result in actual value or a better value than what occurred under the previous statute. Rather, the suggestion will continue to result in arbitrary values, the problem HB 449 is intended to address. HB 449 specifically changed the definition of "wages" in 39-71-123 (1)(g), MCA. The definition now includes lodging, rent, or housing, if it constitutes a part of the employee's remuneration and is based on a value as set by administrative rule. HB 449 does not allow the employer and employee to determine lodging value by agreement, allow for the value to be determined by the employer to be represented to the employee, or allow for the value to be based on a comparison to housing available in the same locale, as suggested by the commenter. The department believes that the language of HB 449 requires the department to set by administrative rule the value of lodging, rent, or housing if it constitutes part of the employee's remuneration.

Comment 7: A commenter suggested that because employers are able to set the value of housing they use to entice workers, employers should be required to inform prospective employees "up front" of the value used when considering employment, and the rule should be amended accordingly.

Response 7: Please see Response 6, above.

Comment 8: One commenter suggested providing a carveout in the rule for the Montana University System (MUS), to allow MUS the flexibility to set the value at usual and customary rates charged by MUS to non-employee renters.

Response 8: While the department recognizes that dormitory and other university housing might be priced at easily determined rates, the department concludes that allowing only one Montana employer to unilaterally establish the value of employer-provided housing would not be efficient administration of the workers' compensation act. The department concludes that establishing "usual and customary" as the value of a dwelling is not consistent with the legislative goal of valuation of housing costs by rule. Please also see Response 6, above.

Comment 9: A commenter stated that whenever the employer uses barter to compensate the employee, the stage is set for an argument unless the parties agree on value prior to an injury. The commenter expressed support for the proposed rule because it is rational and it solves what the commenter described as a "never ending" problem for workers and employers.

Response 9: The department acknowledges the comment. The department notes the certainty and predictability of this rule will further the public policy in 39-71-105, MCA, to minimize reliance on lawyers and the courts for administration of the workers' compensation act.

Comment 10: The one commenter at the public hearing testified in support of the rule.

Response 10: The department acknowledges the comment.

4. The department has adopted NEW RULE I (ARM 24.29.721) as proposed.

5. The effective date of the new rule is April 1, 2018.

/s/ Mark Cadwallader	/s/ Galen Hollenbaugh
Mark Cadwallader	Galen Hollenbaugh, Commissioner
Alternate Rule Reviewer	DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State March 20, 2018.