HOUSE LABOR AND EMPLOYMENT RELATIONS COMMITTEE MINUTES
February 17, 1981

The House Labor and Employment Relations Committee convened at 12:30 p.m., on February 17, 1981, in Room 129 of the State Capitol with Chairman Ellerd presiding and all members present.

Chairman Ellerd opened the meeting to a hearing on SBs 132, 128 and 32.

SENATE BILL 132

SENATOR THOMAS F. KEATING, District 32, chief sponsor, said the bill would exempt agents of professional athletes from the provisions governing employment agencies. He said professional teams are growing in number. He said now anyone who assists a professional athlete for a fee is considered an employment agency. The Employment Agency Act has a number of requirements. It has requirements on advertising and in most cases no advertising takes place. The Act has certain restrictions on commissions and charges that can be made. All of these restrictions interfere with the right of people to come together and negotiate a contract to engage one of the parties for the service. He said it is not reasonable to require that these two individuals be restricted in this manner. Also the agent would have to apply for a license for the purpose of being in business. Since lawyers and accountants are already licensed, this would mean another license.

There were no other proponents and no opponents. Senator Keating had no closing statement.

SENATE BILL 128

SENATOR BILL NORMAN, District 47, chief sponsor, said the bill relates to Workers' Compensation Court. As you recall back over the years, a series of bills were introduced and finally the legislature did very well getting a lot of those settled, and established a Workers' Comp Court. It has the same standing as a District Court and cases can go directly to the Supreme Court from it. This bill talks about disability which often constitutes most of the work of this court. It is necessary to understand the concept of impairment. This is a medical determination. If you have no impairment you have no disability. The disability takes many things into consideration besides impairment. Can the worker be retrained and other factors. Disability can't be resolved in court until you resolve impairment. The court must use what is called preponderance of evidence. This is nothing new - as old as laws itself. In other words you would say the evidence is more probable, more credible, more convincing - it has preponderance You have to reflect from testimony presented by witnesses - which is more closely associated, has made better observations, is more satisfactory. Why doesn't a court just do this? It hasn't. That is why this bill. It directs the comp courts to do as the other courts do. To clear up impairment - if a musician and a truck driver looses the tip of his finger - the impairment would be the same but not the disability.

GEORGE WOOD, Montana Self-Insurers Association, Missoula, spoke in support of the bill and a copy of his testimony is EXHIBIT 1 and part of the minutes.

ALBERT G. PILLEN, State Compensation Insurance Fund Bureau, Labor and Industry Dept., said they stand in support of the bill. He said he was very much in favor of having these definitions in the Act.

JIM MURRY, Ex. Secretary of the Montana State AFL-CIO, said he was serving as a member of the Workers' Compensation Advisory Board. He said he would like to go on record as supporting the bill.

GREG GROEPPER, Department of Labor, said this is administratively attached under their department. They are in support of the bill.

There were no opponents. Chairman Ellerd opened the hearing to questions from the committee. Rep. Dozier questioned the words on page 6, lines 5 and 6 - definition of disability. Why not the words "in his normal employment." Couldn't this push the guy into pushing pencils as he could be gainfully employed out of his usual work. Mr. Wood responded he might not have been doing his normal work at the time of his injury. Even with rehabilitation he might not be able to return to the work he was doing before. He said this is defined elsewhere in the act.

Rep. Keedy asked concerning the definition of partial disability on page 4, line 3. Is it necessary to further enumerate definitions that seem to have been covered in other parts of the law and so have clutter. Senator Norman said it puts in permanent partial disability and temporary total disability. He asked Rep. Keedy if it was his understanding that it is now in the books. Rep. Keedy asked why in light of what seems to be quite detailed explanation of different kinds of disability, come in with a new section that defines disability itself. Mr. Pillen said the definitions need to be in there to clarify. In the course of handling these cases the definitions are important to be in there. So many adjustors don't read the court cases and without these definitions they don't understand the difference between disability and impairment. They tend to settle on the impairment rather than the disability.

Senator Norman just closed.

SENATE BILL 32

SENATOR BILL NORMAN, District 47, chief sponsor, said this is also a work comp bill. This bill relates to the workers' comp court and the adjustor. If an employee is injured on the site he has virtually no difficulty establishing that the employer is liable. He said what they are trying to do with the bill is to keep workers' comp cases in the workers' comp court. If an adjustor is not doing a good job a charge should be brought against him in the workers' comp court. What is happening is the employee is trying to get into district court

and suing the agent. This bill will say if you have a gripe against the adjuster get him into workers' comp court or into criminal court.

GEORGE WOOD, Montana Self-Insurers Association, spoke next in support and a copy of his testimony is EXHIBIT 2 of the minutes.

LAURY LEWIS, Adm., Workers' Compensation Division, said the bill was not at the request of the Workers' Compensation Advisory Council. He said that group is appointed by the Governor and represent employers and employees. A single veto is all that is needed to keep a bill from being a Workers' Comp Advisory Council bill. The testimony you previously heard that the authority of the Division is quite extensive is true. If an adjustor is not complying with the law, the first level is the Division. My job is to see that the worker is treated with a fair and equitable treatment by the adjustor. There is adequate provision for the Division to see that the worker is properly taken care of.

MIKE MELOY, Montana Trial Lawyers Association, testified against the bill. Mr. Wood has testified that the bill was introduced to change what the courts have done. Two cases were decided recently by the Montana Supreme Court. In both cases the separate claimants went to district court saying the adjustor is acting intentionally to thwart the proper proceeding of the case. Mr. Wood was the adjustor in both cases. The Supreme Court decided that it was permissive to bring a separate action against the insurer. Workers' Comp Court is designed to handle claims arising out of employment. This course of action against the insurer's company is not work related - has nothing to do with the act done by an adjustor in settling a claim and so not proper to have it done in the Workers Comp Court. Secondly, the court said that the penalty which presently exists is not designed to get at intentional acts. Twenty percent penalty can be applied to a claim if there is some mismanagement. The Supreme Court said the remedy is to go to an intentional tort. New language in this bill simply places with the administration any act of the adjustor which includes intentional act and that is precisely what this bill does. No remedy within comp court is permissive to bring the thing outside. Not a good bill. It is interesting that some of the testimony is to the effect that this collataral suit can threaten the adjustor into settling a claim. Happens very seldom. District court can dismiss anything that has no merit. He would oppose and move a do not pass.

TERRY TRIEWELLER, Whitefish, representing self, spoke in opposition. He said one thing most injured workers have in common is they know little of the Act and so are very vulnerable to be taken advantage of by the claims adjustor for the insurance company. The agents misrepresent the amount of benefits they are entitled to. They tell them if they settle for this amount, the company will continue to pay their medical bills. They warn them if they go to an attorney whatever they will get will be taken up by lawyers and court costs. The insurance company is responsible for the attorneys' fees. A 20% penalty has been no deterrent as it only applies to the benefits that have been accrued by the time you go to court and is insignificant to the company.

as each one that goes to court ten never do so the amount saved by the company is very profitable. The only deterrent to an insurance company and its agents is the workman's ability to go into district court. Setting up a special class of legislation to violate people's rights with impunity.

Questions were asked by the committee. Rep. Seifert asked if this was the same bill as last year. Mr. Wood said a similar bill passed but it wasn't intended to cover this problem.

Senator Norman closed. He said if it is felt that the Workmen's Compensation Division does not have enough authority to tightly supervise these insurance companies we should be writing legislation to give them more authority instead of going into District Court. He said the case cited was taken into District Court rather than the Workman's Compensation Court so the adjuster could be sued on a personal liability basis. If you did that in the Workmen's Compensation Court the judge would wonder what was going on. So it is of benefit to go into District Court if you are after the adjustor. Don't know of any adjustors that have been convicted for fraud but know of some attorneys that have reputations that are not in a firm position. If the agents are misrepresenting and doing things that are questionable, why doesn't the Workers Comp get after them.

Chairman Ellerd closed the hearing on the bills and opened the meeting to a consideration of the following bills:

EXECUTIVE SESSION

HOUSE BILL 577 - Rep. Dozier moved DO PASS. Rep. Seifert moved the amendments which are EXHIBIT 3 of the minutes. He said this would be a 30% increase on a minimum wage. There would be a 20% tip credit. He went through the amendments. He said he added the last item because there are a lot of young people who want to work, and no one wants to pay them minimum wage.

Rep. Harrington said he has a problem with the amendments. He said waitresses get put back to $2 an hour with $2.25 the second year and it gives credence to the tip credit within the state of Montana. He said we have a poor minimum wage and this would make it poorer.

Rep. Keedy said he felt the tip credit should be applied to the federal and the language put within that the tip is the employees to keep.

Rep. Harper moved a substitute motion to delete the first four of the amendments and that it be then back to the original dollar figures in Brown's bill, and have the same tip credit as the federal law - 40%. His motion also included deleting amendment no. 7. The tip credit can be used up to the point where the wage is correct.

Rep. Keedy said make it $3.35 with a 40% tip credit as long as the waitress gets to or above that wage. He said he was interested in seeing that the waitress gets to keep her coins.

Rep. Seifert said he was trying to put some wording in to cover banquets and credit cards - to protect the waitresses in those cases.

Rep Menahan asked if it were kosher to put a tip credit into a minimum wage bill. Is the sponsor willing that this be done. Rep. Thoft asked if this wouldn't need to be mentioned in the title. Rep. Harrington questioned if adding the amendment would change the meaning of the bill.

Rep. Keedy said he had requested at the last meeting to have language drawn up dealing with this. He had this portion of the last meeting's minutes read by the secretary. (Do to an oversight these directions had not been done). He said he would move the creation of a committee bill to incorporate that the tips are the sole property of an employee with the Montana minimum wage pegged to the federal law which would allow the wage thing to float with the federal and to have the 40% federal tip credit.

Rep. Schultz asked concerning the agriculture worker. Agriculture workers between 16 and 18 will not get these kind of wages - they will hire a man instead. These kids need an opportunity to learn. Ms. Brodsky responded on request that 39-3-406 list exclusions and agricultural learners under the age of 18 are excluded for 180 days. Rep. Harrington said they do not have an exclusion for city young people and the amendment no. 7 would exclude all young people from the minimum wage. Rep. Sivertsen asked if it weren't better to have some jobs for the young people in these cities. Rep. Dozier said his four kids have always had jobs at minimum wage.

Rep. Seifert said on Rep. Keedy's motion, his problem with having a bill drafted is that it would raise the minimum wage to $3.35, which is quite a jump and that is why he reduced the tip credit to 20%. Rep. Keedy said under Montana law the tip credit was revoked and this was an attempt to work out a compromise. He said the committee bill would have the Montana minimum wage float with the federal wage.

Rep. Harper suggested a straw vote be taken to see if there is enough support to get this kind of a committee bill through. He then moved a motion for all motions pending to expand the amendments presented to do what Rep. Keedy planned to do with a committee bill.

Rep. Keedy said this would at least give them a working draft to look at. Going to the full $3.35 can get the bill defeated. The including of the federal tip credit could also cause problems. Then there will not be a vehicle to use to compromise.

Rep. Harper felt the title was broad enough to do this. He suggested Ms. Brodsky prepare these amendments to be presented to the committee at the next meeting.

The question was called on Rep. Harper's motion and the motion failed with Reps. Pavlovich, Menahan, Harper, O'Connell, Harrington, Dozier, and Keedy voting for the motion.

Rep. Sivertsen said Rep. Keedy had made a legitimate request and it was unfortunate there was a misunderstanding. He said he wanted to see him treated fairly. He said he would be willing to stay after the evening meeting and take action. This was the feeling of the committee so Chairmam Ellerd said action would be taken following the hearing on HB 645. This was to give Rep. Keedy an opportunity to suggest other amendments.

HOUSE JOINT RESOLUTION 25 - Rep. Seifert moved DO PASS. This motion carried unanimously with all present.

HOUSE BILL 430 - Rep. Menahan moved DO NOT PASS. Rep. Seifert moved a substitute motion of DO PASS.

Rep. Keedy said he thought there is a lot more to the bill than meets the eye. He said there are some real problems with the administration of the Act as it is now applied. He said he was grateful to the sponsor for bringing those things to the committee's attention.

Rep. Keyser said the Division made all kinds of promises last year and nothing has been done. We are just playing games. The same thing will happen again.

Rep. Dozier said it does protect some of the people that need the protection and would be left holding the bag. The Act is there and does some good.

Rep. Underdal said it was discriminatory as it applies to only a few people. It all depends on whether you have title to the building or not. Very unfair.

Rep. Menahan said we are looking at one side of the discrimination thing. Without the bond there is no way to recoup the wages. Before the property owner had to provide the bond and maybe we could look into that again.

Rep. Harrington said we are protecting a certain group of people that need the protection. Won it in 77 and again in 79. The battle is going to be won upstairs again.

The question was called and the motion carried with 10 voting for and 7 against (Dozier, Harper, Menahan, Pavlovich, O'Connell, Keedy and Harrington).

Rep. Keedy said he felt the bill would be killed on the floor and will be back in 1983. He moved that the committee come up with a bill that will apply uniformly to owned and rented buildings and that we also grant authority to pull liquor licenses when the owner is not in compliance, and that either we find security through the liquor license or apply bonding to all employers.

Chairman Ellerd said it has never been worked out in the interim or any other time. It is not enforceable the way it is written. They don't have the money to enforce.

Rep. Keedy amended his motion to provide in the bill to grant power to the Department of Revenue to pull licenses when an employer is not in compliance.

Rep. Seifert said he believed that was discussed and the licenses were usually put up for collateral.

Rep. Underdal said he realizes what Rep. Keedy is trying to do. He felt there was no way to amend this bill. He said he was not against regulations that make sense. He also felt it was fairly late in the session to put in a bill. Another session perhaps.

Rep. Keedy withdrew his motion.

SENATE BILL 132 - Rep. O'Connell moved BE CONCURRED IN. This motion carried unanimously. Rep. Underdal moved it be placed on THE CONSENT CALENDAR. This motion carried unanimously.

SENATE BILL 128 - Rep. Harper moved BE CONCURRED IN. Rep. Keedy moved to amend by inserting "A claim of" before "disability" in the new language of the bill and in the title. Rep. Harper felt this would change the intent of the Act. This deals with disability and not a claim. Prove a certain degree of disability and not a claim of disability. Rep. Keyser felt Rep. Harper was correct. We are talking on what disability is and how to prove it. Rep. Keedy withdrew his motion.

Chairman Ellerd said due to a lack of time the bill would be held until the next meeting.

Meeting adjourned at 2:40 p.m.

Respectfully submitted,

Robert Ellerd

ROBERT ELLERD, CHAIRMAN

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Ex. 1

GEORGE WOOD
Executive Secretary

# MONTANA SELF-INSURERS ASSOCIATION

Box 2899
MISSOULA, MONTANA 59806
(406) 543-7195

MY NAME IS GEORGE WOOD AND I ARISE IN SUPPORT OF SENATE BILL 128.

SENATE BILL 128 DEFINES TWO TERMS COMMONLY USED IN THE ADMINISTRATION AND ADJUDICATION OF WORKERS' COMPENSATION CLAIMS. THE TERMS ARE NOT PRESENTLY DEFINED IN THE ACT AND ARE SOMETIMES USED SYNONYMOUSLY AND INCORRECTLY.

IMPAIRMENT IS PURELY A MEDICAL CONDITION WHICH MEANS ANY ANATOMIC OR FUNCTIONAL ABNORMALITY OR LOSS OF BODY FUNCTION AFTER MAXIMUM MEDICAL REHABILITATION HAS BEEN ACHIEVED. AN IMPAIRMENT RATING IS STRICTLY A MEDICAL DETERMINATION. IMPAIRMENT MAY OR MAY NOT RESULT IN DISABILITY.

DISABILITY IS A LEGAL OR ADMINISTRATIVE TERM. DISABILITY MEANS A REDUCTION IN THE ABILITY OF THE INJURED WORKER TO ENGAGE IN GAINFUL EMPLOYMENT, AS A RESULT OF IMPAIRMENT CAUSED BY AN ON THE JOB INJURY WHEN THE IMPAIRMENT IS CONSIDERED WITH OTHER FACTORS AFFECTING THE WORKER'S ABILITY TO ENGAGE IN GAINFUL EMPLOYMENT. SOME OF THESE OTHER FACTORS WOULD BE AGE, EDUCATION, AND WORK HISTORY.

THE BILL REQUIRES THAT DISABILITY BE SUPPORTED BY A PREPONDERANCE OF MEDICAL EVIDENCE. JURY INSTRUCTION NUMBER 21 OF THE MONTANA JURY INSTRUCTION GUIDE IS AS FOLLOWS: " BY A PREPONDERANCE OF THE EVIDENCE IS MEANT SUCH EVIDENCE AS, WHEN WEIGHED WITH THAT OPPOSED TO IT, HAS MORE CONVINCING FORCE AND FROM WHICH IT RESULTS THAT THE GREATER PROBABILITY OF TRUTH IS THEREIN."

THE BILL WOULD REQUIRE THE SAME STANDARDS FOR DETERMINING THAT A DISABILITY EXISTS, FROM THE MEDICAL EVIDENCE, AS IS REQUIRED IN CIVIL JURY CASES IN MONTANA.

I, THEREFORE, RESPECTFULLY REQUEST THAT WHEN THIS COMMITTEE DOES ARISE THAT IT WILL REPORT SENATE BILL 128 - DO PASS.

GEORGE WOOD
Executive Secretary

Ex. 2

GEORGE WOOD
Executive Secretary

# MONTANA SELF-INSURERS ASSOCIATION

Box 2899
MISSOULA, MONTANA 59806
(406) 543-7195

MY NAME IS GEORGE WOOD AND I ARISE IN SUPPORT OF SENATE BILL 32.

THIS BILL WILL CLARIFY THE "EXCLUSIVE REMEDY" OF A WORKER FOR INJURIES THAT OCCUR ON THE JOB.

IN 1915 WHEN THE WORKERS' COMPENSATION ACT WAS ORIGINALLY ENACTED, THE WORKER GAVE UP HIS RIGHT UNDER COMMON LAW TO SUE HIS EMPLOYER FOR AN ON THE JOB INJURY. THE EMPLOYER GAVE UP HIS DEFENSES: (1) THAT THE EMPLOYEE WAS NEGLIGENT; (2) THAT THE INJURY WAS CAUSED BY THE NEGLIGENCE OF A FELLOW EMPLOYEE; (3) THAT THE EMPLOYEE HAD ASSUMED THE RISKS INHERENT IN, INCIDENT TO, OR ARISING OUT OF HIS EMPLOYMENT, OR ARISING FROM THE FAILURE OF THE EMPLOYER TO PROVIDE AND MAINTAIN A REASONABLY SAFE PLACE TO WORK, OR REASONABLY SAFE TOOLS OR APPLIANCES. THE EMPLOYER AGREED TO PROVIDE, ON A "NO FAULT" BASIS, THE BENEFITS PROVIDED BY STATUTE. THE LEGISLATURE PROVIDED A FORUM FOR ADJUDICATING OF DISPUTED CLAIMS, THE WORKERS' COMPENSATION COURT. THE LEGISLATURE PROVIDED PENALTIES FOR IMPROPER HANDLING OF CLAIMS, ATTORNEYS FEES, AND A 20% INCREASE IN COMPENSATION BENEFITS THAT WERE UNPAID.

THE EMPLOYER HAS FELT THROUGH ALL THESE YEARS THAT THE PROVISIONS OF THE WORKERS' COMPENSATION ACT PROVIDED THE EXCLUSIVE REMEDY FOR EMPLOYEES INJURED ON THE JOB AND THAT COLLATERAL ATTACK UNDER COMMON LAW WAS PROHIBITED.

RECENT SUPREME COURT DECISIONS INDICATE THAT COLLATERAL ATTACK WAS PERMITTED. THE EXCLUSIVE REMEDY WOULD SEEM TO BE LIMITED TO THE ACCIDENT ONLY.

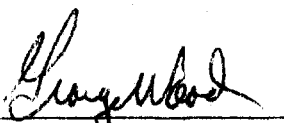
THIS BILL WOULD CORRECT THE DECISIONS. THE BILL STATES THAT, "AN EMPLOYER IS NOT SUBJECT TO ANY LIABILITY WHATEVER FOR THE DEATH OR OF PERSONAL INJURY TO AN EMPLOYEE CAUSED BY AN ACCIDENT, OR FOR ANY ACTS OF THE EMPLOYER OR HIS SERVANT OR AGENT DURING THE INVESTIGATION OR DURING THE COURSE OF MANAGEMENT OF A CLAIM COVERED BY THE WORKERS' COMPENSATION ACT.

IT DOES NOT PREVENT THE INJURED WORKER FROM BRINGING A COMMON LAW ACTION FOR INTENTIONAL TORTS, FRAUD - COERCION AND THE LIKE.

IT DOES PREVENT THE INJURED WORKER FROM FILING AN ACTION, EXCEPT IN THE WORKERS' COMPENSATION COURT, FOR MISUNDERSTANDINGS, MISMANAGEMENT, AND DISAGREEMENTS OVER THE AMOUNT OF THE BENEFITS.

IT RETURNS THE "EXCLUSIVE REMEDY" PROVISIONS OF THE WORKERS' COMPENSATION ACT TO THE STATUS OF THAT WHICH WAS UNDERSTOOD TO EXIST SINCE 1915.

I, THEREFORE, RESPECTFULLY REQUEST THAT WHEN THIS COMMITTEE DOES ARISE THAT IT WILL REPORT SENATE BILL 32 - DO PASS.



GEORGE WOOD
Executive Secretary

PROPOSED AMENDMENTS - HB 557

1. Page 1, line 14.
Strike: "$2.95"
Insert: "$2.50"

2. Page 1, line 16.
Strike: "$3.25"
Insert: "$2.75"

3. Page 2, line 11.
Strike: "$680"
Insert: "$575"

4. Page 2, line 13.
Strike: "$750"
Insert: "$635"

5. Page 2
Following: line 14
Insert: "(3)(a) An employer may apply a credit against the wages due a tipped employee by an amount not to exceed 20% of the state minimum wage, except that an employer subject to the federal fair labor standards act, 29 U.S.C. 201 through 219, may apply a credit in an amount as defined in section 203 of that act.

(b) such a credit may not be taken by an employer against the wages due a tipped employee unless:

(i) the employee receives tips equal to or in excess of the amount of credit;

(ii) the employee has been informed by the employer of the provisions of this section; and

(iii) all tips received by such employee or deposited in or about a place of business for services rendered by the employee have been retained by the employee.

(c) no employer may require an employee to share a tip with the employer or other employees. However, nothing contained in this subsection prevents an employee from voluntarily and on an individual basis sharing his tips with other employees."

6. Amend 39-3-402, the definition section of this part to read:
"(8) "Tipped employee" means an employee engaged in an occupation in which he customarily and regularly receives tips, on a monthly basis, at an amount as defined in the federal fair labor standards act, 29 U.S.C. 203 (t), as amended."

7. Amend 39-3-406, which defines those employees excluded from the provisions of 39-3-404 and 39-3-405 (minimum wage and overtime compensation sections). Add another exclusion which reads:
"(1) an employee who is under 16 years of age."