MINUTES OF THE MEETING
BUSINESS AND LABOR COMMITTEE
50TH LEGISLATIVE SESSION

March 9, 1987

The meeting of the Business and Labor Committee was called to order by Chairman Les Kitselman on March 9, 1987 at 8:00 a.m. in Room 312-F of the State Capitol.

ROLL CALL: All members were present.

SENATE BILL NO. 315 - Generally Revise Workers' Compensation Laws; Abolish Workers' Comp. Court, sponsored by Sen. Bob Williams, Senate District 15, Hobson. Rep. Williams stated the bill would not lower rates and would not address the unfunded deficit. He said the bill would be the proper tool the Workers' Compensation Division could work with to insure the survival of the system and employers in the state. He commented the importance of ensuring fair and equitable settlements for all the deserving workers.

Bob Robinson, Administrator of the Workers Compensation Division, gave an overview of SB 315. He said the bill should restore balance and predictability to the system that is intended to insure that the workers' benefits are provided swiftly and surely with a minimum of necessity for attorney involvement and litigation. He commented that if major reform is not enacted that the state fund could not continue to pay benefits. He mentioned that the recent increase in workers' compensation rates for the state fund that went into effect in January was paid for through reductions in salaries to the employees.

Mr. Robinson stated that the Governor's Workers' Compensation Advisory Council recommendations provide the basis for the reforms contained in SB 315 and the bill went beyond the recommendations in order to provide true and lasting reform. He added that the bill would return the workers' compensation philosophy that it was intended to pay the medical expenses and wage replacement while the individual is unable to return to work. He pointed out incentives for the insurer to provide better service and additional benefits provided to the workers in addition to some other changes. He said in addition to costs, lump sum settlements are addressed. He commented that an analysis conducted by the Division on lump sum settlements for education or establishing a business between January and May of 1985, were found that 64 percent of those lump sums were never used for the intended purpose. He said lump sums in the bill would be provided for impairment awards and in the case of permanent total injuries up to $20,000 and primarily for debt restructuring. He said concerns presented by opponents were taken into consideration when drafting the bill. He commented that major sections of SB 330 that establish rules

and guidelines for the procedures before the workers' compensation court are included in this bill. He added limiting lump sums, even though there was a strict limitation in SB 315 which was somewhat loosened in the Senate, but there is prohibition against the court ordering lump sum settlements. He commented these compromises have addressed all the important concerns of the trial attorneys, and of other opponents of the bill. He said administration believes this bill is workable in its present state, and is a humane solution to the workers' comp situation without complete elimination of major benefits from the injured workers.

Gene Huntington, of the Governors Office. He said that this bill was requested by the administration and would address the workers' compensation problem.

PROPONENTS

Sen. Gene Thayer, District 19, Great Falls. Senator Thayer stated there is a problem of the $100 million plus unfunded liability that has to be solved. He pointed out the chief difference from the advisory council and the original SB 315 was in the area of the comp court which would have been eliminated through that bill. He said through negotiations the court was left in the bill, but put in a mandatory mediation ahead of the court. He said the bill clarifies the language in existing law and removes the liberal construction language. He commented that many employers were ready to close down or leave the state due to these high costs. He said this bill still does not address the unemployment liability, but will keep from raising rates in the future, and has accomplished some of the goals of the Advisory Council which was to take care of the truely injured person in an expeditious manner to eliminate some of the fraud and abuses of the system, and eliminate some of the attorney involvement, and get people off the system and back to work sooner.

Dave Patterson, professor of law at the University of Montana Law School. Mr. Patterson stated the compensation court was the best independent judicial processes available in workers' compensation. He said the court was not a problem in terms of the money, but the mediation process adds another layer of expensive bureaucracy where efforts are duplicated. He said the new section 52 needs to be looked at in the interest of efficiency and money where the process is repeated in dispute situations.

Rep. Paula Darko, House District 2, Libby. Rep. Darko stated this problem has an impact on her area. She said the bill would benefit the workers and be in the best interest of the state.

Bruce Vincent, representing the WCAC, Libby. Mr. Vincent stated the WCAC represented three victims of the current system. He said these were the truly injured worker that try to use the system, the employer, and the non-injured worker that try to pay for the system. He commented that this bill is the answer, it is an amended version and they know that it is a compromise bill, and this will work. He pointed out the difference in rates from the neighboring state of Idaho which was 30 miles away. He said what the outcome of this bill will dictate what logging will do next year, because they cannot continue with the rates they are paying.

Dawn DeWolf, representing the Montana Association for Rehabilitation and the Montana Association for Rehabilitation Facilities. Ms. DeWolf stated the facilities are providing vocational evaluations for injured workers. She said the organization supports the bill because it provides for early, timely intervention and rehabilitation of the injured worker. She explained rehabilitation and described a referrals. She said the function of the rehab process was to coordinate the work of the insurance claims representative, medical and legal teams on both sides, vocational evaluators, physical therapists, psychologists etc. She said this bill provides options, directions, and choices for all those disciplines and results in producing the real product of workers compensation, which is a restored and working exclaimant who is independent, a taxpayer and a member of the community. She commented the bill brings into focus the critical element of rehabilitation in workers compensation, and will change the role of rehab as it is today.

Doug Crandell, Manager of Brand S Lumber, and Chairman of Montana Wood Products Association, Livingston. Mr. Crandell said they employ 120 people year around and are privately insured for workers' comp with rates costing over $300,000 a year, which is a 240 percent increase in the last four years. He said safety is important, and at Brand S they have practiced safety. He said there were no lost time injuries for the last eight months even at the success of the safety program, rates were still going up. He commented that other states surrounding Montana have substantially lower rates, which is a competitive disadvantage in the national lumber market. He added that everything he read such as the National Council and Compensation Insurance, which ranked Montana system the third worst, and basically found that the system is easy to take advantage of and it is over litigated. The reason for this problem mostly stems from the law itself.

Dr. Jack McMahon, co-legislative chairman for the Montana Medical Association, practicing physician, and medical director for the Montana Foundation for Medical Care,

Helena. Dr. McMahon stated their group was a key element in workers' compensation. He said some cases were not workers compensation injuries to start with, and commented on one case which was one of the state paying for a man to live the way he wanted to for the rest of his life. He said the current bill should be utilized to insure that physicians with integrity, experience and skill help the Division in making decisions.

Mike Micone, representing the Western Environmental Trade Association. Mr. Micone stated they supported this bill in its original form, but the present bill is a reasonable compromise. He said it was necessary for reform in order to have stability in the system. He commented that the labor organization believes that continuation of the present system will cause a loss of jobs in Montana. He said that fraud should be prosecuted, but if all fraud was to be eliminated in the system, it still wouldn't correct all the problems in workers compensation.

Michael Amstadter, representing the Rehabilitation Association of Montana. Mr. Amstadter stated the Association recognizes the need for extensive reform. He said rehabilitative services provide a defined return to work and retraining priorities are beneficial for the worker and represent a cost savings to the employer and insurer. He submitted written testimony. Exhibit No. 1.

Bill Leary, past president of the Montana Hospital Association. Mr. Leary explained that hospitals and nursing homes are service organizations and are labor intensive. He said that collectively they are one of the major employers in Montana, and the Montana Hospital Association supports the goals and reforms embodied in SB 315. He said hospitals are major employers and pay millions of dollars in wages and salaries and thousands of dollars of workers' compensation fees. He commented that the hospitals are concerned about the financial viability of the workers' compensation system, and that the Montana Hospital Association was in opposition to governmental non-negotiated rate setting. He submitted written testimony. Exhibit No. 2.

Chadwick Smith, attorney in Helena representing the Montana Medical Association, proposed an amendment. Exhibit No. 3. He said that the amendment does not address employer rates or benefits. He commented that they are addressing in this amendment with the matter of rate setting of medical provider fees and a rate freeze that is prescribed in the bill as it is presently written. He stated that hospitals are non-profit, and hospital rates cannot be cut unless the cost is shifted to someone else. He commented that costs can only be cut by reducing service.

Stewart Doggett, representing the Montana Chamber of Commerce. Mr. Doggett stated the Chamber polled its members and they rated reform of the workers' comp program as an important issue. He said they felt that this bill was fair and reasonable legislation, and hopes it gets the workers compensation program on to recovery. He added the bill addresses their concerns and concerns of the members to reform the lump sum payment provision and the liberal construction clause and encourages a return to work system.

Alec Hansen, general manager of Montana Municipal Insurance Authority. Mr. Hansen stated they provide workers' compensation insurance for 74 cities and towns in the state. He said the problem was the cost of reinsurance. He said that they were required by law to have both specific and aggregate reinsurance coverage. He said it was difficult to secure this coverage in the market. He said the bill would balance the right of injured workers with the necessity of controlling the cost of providing insurance. He submitted written testimony. Exhibit No. 4.

Bonny Tippy, representing the Montana Chiropractor Association, spoke in support of the concept of reformation of workers' compensation laws in the state. She offered one amendment to allow impairment ratings by other types of health care professionals. She submitted written testimony. Exhibit No. 5.

Norm Grosfield, attorney in Helena and former administrator of the Workers' Compensation Division. Mr. Grosfield stated he primarily represented injured workers. He presented a summary of SB 315. Exhibit Nos. 6 and 7.

George Wood, representing the Montana Self Insurers Association. Mr. Wood stated the bill should be passed as presented, with no amendments.

Robert N. Helding, representing the Montana Motor Carriers Association. Mr. Helding stated they support this compromise bill and was economic in view of the fact of truckers le ing the state of Montana.

Mons Teigen, representing the Montana Stockgrowers and Cattlemens Association, spoke in support of the bill without amendment.

Steve Seiffert, representing Columbia Falls Aluminum Company, recommended passage of SB 315 without amendment.

Irv Dillinger, representing the Montana Home Builders Association and the Montana Building Material Dealers Association, recommended passage of SB 315.

Keith Olson, Executive Director, of the Montana Logging Association. Mr. Olson stated they are in reluctant support of the bill. He said they are reluctant from the perspective that he has to tell the Independent Logging Contractors in the state that the current $7,000 a year premiums they are currently paying per employee are not going down even with passage of this bill, and a good chance of a rate increase this year.

OPPONENTS

Terry Trewiler, attorney from Whitefish. Mr. Trewiler stated he represents people who have been injured and as a result of their injuries have been disabled. He said he also represents a few families whose primary wage earner has been killed during the course of his employment and who are dependent on the death benefits. He discussed the problems with the current benefits and the effects on the lives of people. He felt that SB 315 was a product of the worst misinformation campaign ever conducted at the public's expense. He pointed out areas where people had been misled on the current state of affairs in the workers' compensation practice.

Mr. Trewiler stated it seemed that workers' compensation benefits were some type of welfare or gratuity bestowed on injured workers by the state, which was not true. He commented that when workers go to work they enter into a contract with their employer, in return for what they receive in workers' compensation benefits they give up rights. He said they give up the right of common law for full compensation for their injuries or their deaths. He added regardless of how negligent their employer is or unsafe their work environment, injured workers , until the recent amendment to the constitution, were the only people in the state of Montana who did not have a right to full legal redress.

Mr. Trewiler said the public has been told that the state insurance fund and the Workers Compensation system are in the terrible condition because of the liberal court decisions, which is not true, he said. He said the difference between claimants' attorneys and the defense attorneys is that claimants' attorneys only get paid when they are right. He added that the biggest reason that Montana loggers pay higher premiums than Idaho loggers is not because the benefits in Montana are higher, it is because Montana loggers are in a narrower rate pool. He commented that this bill would detract from the quality of life in Montana, and would impose further hardship on the people that can least afford it.

Ben Everett, an attorney from Anaconda. Mr. Everett commented on his membership on the Workers' Comp Advisory Council. He felt the legislation was repressive, costly and will deprive workers of benefits. He pointed out there was

no inflation factor included in the bill. He said the bill was not a compromise bill, and takes benefits away from the injured worker, and gives the Workers' Comp Division control.

Jim Murry, Executive Secretary of the Montana State AFL-CIO. Mr. Murry stated that the bill was trying to balance the need to reform the current system with needs of injured workers. He felt that the injured workers were the ones being compromised. He said that under the new bill, total workers' compensation benefits would be reduced 25-30 percent. He submitted written testimony and a letter to the editor, written by an injured worker in Missoula, that expressed problems workers have to deal with. Exhibit Nos. 8 and 9.

Jay Reardon, President of Local 72, United Steelworkers of America, representing 225 workers at ASARCO in East Helena. Mr. Reardon stated he was concerned about the substantial change in the definition of injury. He pointed out the pay cuts taken by employees in the name of corporate survival. He said with the bill the employees would not have protection against long-term exposure of toxic gases and industrial poisons. He submitted written testimony. Exhibit No. 10.

Willis Bickle, an injured worker. Mr. Bickle explained how his injury occurred through gross negligence of an employer that was unconcerned about safety of his employees. He commented a year that a law had been enacted by Workers' Compensation that stated that an employer is not subject to any liability for the death or personal injury to an employee covered by Workers' Comp. He said this is interpreted to mean that an employer is protected by law but the worker has no protection. He submitted a written explanation and testimony. Exhibit No. 11.

Gene Fenderson, representing the Montana State Building Construction Trade Union. Mr. Fenderson stated the new section 7 in the bill covered fraud in the system and he had no problem with that. However, employers should be treated under the same circumstances, he said. He commented on the underground economy in logging and construction and submitted written testimony. He also submitted an amendment that would bring the employers under the same penalty as fraudulent workers. Exhibit No. 12 and 12 (a).

Joe Bottomly, attorney from Great Falls. Mr. Bottomly stated that there were problems with the bill, and one was the definition of an injury. He commented that the employers' liability was going to increase. He said that other jurisdictions that have restrictive definitions have held that if it is not covered under workers' compensation, there are ways to bring them under general liability laws. He

commented that the exclusivity rule in Montana has always protected the employer, not the employee, and the restriction of the definition of injury will cause problems. He said taking away the jurisdiction of the workers' compensation court the ability to award the worker a lump sum and rehabilitation will cause another problem, which would cause a distress situation for the worker. He commented that the layers of panels for the rehabilitation will not reduce litigation, but the effect will be the opposite. He said the worker will hire an attorney because of the layers of bureaucracy that have been created. He proposed to strike the rehabilitation panel to allow the worker to choose his own doctor, and allow the insurer to choose the rehabilitation panel expert.

Rep. Jerry Driscoll, House District 92, Billings. Rep. Driscoll commented that there is about $100 million a year spent by a the Workers' Compensation Division and less than half goes to the injured worker. He said the money goes to the medical community, the rehabilitation, defense and plaintiff attorneys, and administration. He pointed out the fiscal note stated that $900,000 is defense attorney costs, and said this was not a benefit to injured workers, when the fund could hire expert attorneys.

QUESTIONS

Rep. Driscoll asked Sen. Williams whether the bill could save money. Sen. Williams said it would not lower rates and would not address the unfunded deficit.

Rep. Cohen asked about the cardiovascular pulmonary diseases that were excluded specifically in the new language. Mr. Robinson replied that this was not covered unless a doctor can attribute them to an event at the work place. Vern Erickson, representing Montana State Fire Fighters Association, said that was one of the most feared occupational hazards: the accumulation that affects cardiovascular respiratory health problems for the person in the fire service. He said this was an important point that was deleted in the bill and if a subcommittee is appointed he would like to be involved in the discussion. Bob Robinson said that accumulation was covered. He said if there was a question as to whether it was caused by a particular accident, it would be covered under occupational disease, and section 72 had language that covered a repetitive situation.

Rep. Cohen asked if repetitive trauma would be excluded. Bob Robinson said it was covered and included medical, temporary total, and permanent benefits, but no partial benefits.

Rep. Wallin asked Jim Murry about the mismanagement of funds and asked why the private companies were pulling out of

Montana. Jim Murry responded there are many things that are contributing to the problems with the workers' compensation system, and they think so many of the areas have been ignored. He said the area of employers not paying their premiums as required by law, and what the full impact of the deficit to the system because of this, is one example. He added there are problems of workers having to go to attorneys because they can not get a response from the Division, and the cost to the Division. He said the bill would make significant changes in the law that would affect private insurers also.

Mr. Trewiler said that private carriers have pulled out of the state because they cannot compete with the artificially low premiums being charged by the state fund. He pointed out from 1975-1985 when medical expenses were skyrocketing and wages were going up, the state fund premium dropped 10-12 percent and were paying back dividends. He said the private industry could not compete with that so their share of the market kept shrinking until they were left with high risk cases.

Rep.Grinde asked Mr. Everett what the average time was spent on the workers' comp cases. Mr. Everett replied that it sometimes took about 2-4 years before a case was resolved. Rep. Grinde asked about the charges to clients. Mr. Everett replied that he charged on a contingency fee basis that was approved by the Division of Workers' Compensation. He said his attorney retainer agreement is submitted to the Division and based on a sliding scale. He said it was 25 percent of settlement or award if settled without a hearing or 30 percent if a hearing is required or 40 percent if it goes to the Montana Supreme Court.

Rep. Grinde asked who sets the percent. Mr. Everett replied that it was set by the Division of Workers' Compensation as the maximum as a rule making authority. He said the Division has changed their rules and restricted it even more.

Rep. Grinde stated that they all knew there was a problem with the system and all would have to compromise or the whole system would crumble, and asked, if the greatest concern was for the worker, have the trial attorneys or other attorneys ever approached the Division and told them they would be willing to take less and have the rates lowered. Mr. Everett replied that they had not, but they had gone to the Division and met with the Administrator and said if there was a problem with attorneys, expertise would be provided to stop any abuses. Rep. Grinde commented that a compromise was needed even on the attorney side.

Rep. Driscoll asked Bob Robinson about the lump sum settlements being reduced dramatically. Mr. Robinson replied that it was a decision between the insurer and the claimant.

Rep. Driscoll asked about the plan to keep the unfunded liability from getting worse. Mr. Robinson said the bill only addressed the benefits and costs from this point forward.

Rep. Brandewie asked if this would make non-conforming employers liable for criminal penalties. Mr. Robinson said that was not proposed but that fraudulently obtained benefits should be caught in the language in the bill.

Rep. Simon asked Mr. Robinson about model legislation in other states. Mr. Robinson pointed out the 1970 Presidential Commission that identified the points that needed to be included in every state workers' compensation system. He pointed out that Montana was a leader in that. He said the bill was refining the law and addressing major loopholes caused by imperfect language and court decisions that have eroded that.

Rep. Simon asked what the differences of this law, if enacted, would be compared to other states. Mr. Robinson responded they are not drastically different, Montana's has more emphasis on rehabilitation.

Rep. Simon questioned that only half the benefits paid out go to injured workers and the other half to administration, lawyers and medical. He asked what portion went to medical providers. Bob Robinson responded that in 1985, $29.7 million of $101 million was for medical expenses which is actually a benefit to the worker.

Rep. Simon asked about the follow up the Division has on cases. Mr. Robinson responded they did not have much follow up. He said there was an obligation by the medical provider to identify whether the individual could go back to work, and the claims examiner has the responsibility to contact the person. He said the state fund does have some field examiners that can make contact, but the Division did not have the time to follow up to the detail that a good claims examination management process would provide.

Rep. Simon asked about lump sums being awarded to accomplish a specific purpose, and if there was protection to the Division to make sure the lump sum is used for that purpose. Mr. Robinson replied that there hasn't been much follow up on that, and that the Division had a regulatory responsibility in the Compliance Bureau to make sure that the claimant is not being taken advantage of by the insurer.

Rep. Thomas asked Bruce Vincent about the work comp rate for loggers. Bruce Vincent replied that it was $34.39. He said the rate for Idaho was at $18 and would be reduced to $16.

Rep. Thomas asked Mr. Trewiler about the rates being artificially low. Mr. Trewiler said they were low for some industries, but are starting to increase and that was the reason for the uproar.

Rep. Glaser asked Bob Robinson about the $32,000 a day negative cash flow, and why the rates weren't increased. Mr. Robinson responded the rates were raised at 10.5 percent the first of July and an additional 17 percent on the first of January for a cumulative 27 percent higher than was in effect last June.

Rep. Glaser asked if the projections for 1987 are that there will be a negative cash flow of $52,000 a day, which means the rates would have to be raised 30%, why haven't the rates been increased. Mr. Robinson responded that in November when they realized they would need a rate increase, they placed a rate increase of about $5.5 to $6 million, which should have been about $10 million. He said this was an attempt to keep the rates somewhat under control for the employers that are having difficulties, but the Division knows that their rates are too low.

CLOSING

Sen. Williams commented that there are a lot of different areas to address in the workers' compensation issue. He said some of the self insurers do have good programs. He suggested that the bill stress the need to hold the line on the proposed increased rates of about 23 percent that would make the bill pass the way it is, not addressing the unfunded balance or the increase. He said this bill would not decrease the rates at this time, nor fund the unfunded balance, but is a start in the right direction. He said if there was a need to amend, he asked that the rates not be increased. He suggested evaluating the report presented by Norm Grosfield.

Chairman Kitselman referred Senate Bill No. 315 to a subcommittee composed of Reps. Smith, Glaser, Grinde, Nisbet, and Driscoll, with Rep. Glaser as chairman.

ADJOURNMENT

The meeting was adjourned at 12:00 noon.

REP. LES KITSELMAN, Chairman

DAILY ROLL CALL

BUSINESS & LABOR COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date MARCH 9, 1987

NAME	PRESENT	ABSENT	EXCUSED
REP. LES KITSELMAN, CHAIRMAN	✓		
REP. FRED THOMAS, VICE-CHAIRMAN	✓		
REP. BOB BACHINI	✓		
REP. RAY BRANDEWIE	✓		
REP. JAN BROWN	✓		
REP. BEN COHEN	✓		
REP. JERRY DRISCOLL	✓		
REP. WILLIAM GLASER	✓		
REP. LARRY GRINDE	✓		
REP. STELLA JEAN HANSEN	✓		
REP. TOM JONES	✓		
REP. LLOYD MCCORMICK	✓		
REP. GERALD NISBET	✓		
REP. BOB PAVLOVICH	✓		
REP. BRUCE SIMON	✓		
REP. CLYDE SMITH	✓		
REP. CHARLES SWYSGOOD	✓		
REP. NORM WALLIN	✓		

EXHIBIT 1
DATE 3-9-87
HB SB315

REHABILITATION ASSOCIATION OF MONTANA
P.O. Box 8415
Missoula, Montana 59806

Testimony of the Rehabilitation Association of Montana

Senate Bill 315

House, Business & Labor Committee

March 9, 1987

Mr. Chairman, members of the committee, my name is Michael Amstadter, and I have been asked to speak on behalf of the Rehabilitation Association of Montana. The Rehabilitation Association of Montana represents private sector professional counselors who provide rehabilitation services to industrially injured workers. Private rehabilitation has been available in Montana since 1979, and is currently utilized in most states nationwide. Our services are requested by plans I, II, and III Workers' Compensation Insurance carriers, United States Department of Labor (OWCP), Long-term Disability, and Personal Injury carriers. The Rehabilitation Association of Montana recognizes the need for extensive reform of the Workers' Compensation system in the state of Montana and we support S.B. 315.

We believe that rehabilitation services to assist the industrially injured worker's expedited return to productive employment is a cost-containment measure that is an integral part of the Workers' Compensation system. Rehabilitation services provided within a structured system, with defined return-to-work and re-training guidelines, are beneficial for the worker and represent a cost savings to the employer and insurer. Mr. Laury Lewis, the former Administrator of Montana Workers' Compensation Division and the current Administrator of the Nevada Industrial Commission, noted in his February 14, 1987, presentation before the Senate Labor Committee, that rehabilitation services are a cost-containment measure which is central to the Workers' Compensation system.

Industrially injured workers in the state of Montana have a right to rehabilitation. Not only is it beneficial to help get them back into the mainstream of life as productive individuals, but if it is provided early, within sixty to ninety days post-injury, and has definitive parameters with regard to services and length of service provision, it is cost effective for both the employer and insurer while benefiting the injured worker. However, in order for rehabilitation services to be effective, both the injured worker's rights as well as his responsibilities in the system must be clearly defined.

The current Workers' Compensation system regarding rehabilitation for industrially injured workers was developed from a myriad of case law. There is not a satisfactory statutory structure or defined rehabilitation process. The current system does not promote

accountability. The injured worker has, at best, a vague understanding of both his benefits and responsibilities. The employer and insurer are also equally at a loss regarding the rehabilitation process. There is considerable ambiguity and confusion in the current Workers' Compensation system regarding when rehabilitation services should begin, the scope of required rehabilitation services including the injured worker's responsibilities, and equally as important, when rehabilitation services are completed. These factors are central to the escalating cost of the current Workers' Compensation system because time-loss benefits continue throughout this loosely defined process.

The Rehabilitation Association of Montana is very pleased to note that Senate Bill 315 recognizes the need for a structured system of rehabilitation services for Montana's industrially injured workers. The proposed legislation addresses the following rehabilitation issues:

1. Clarification of the rights and responsibilities of both the injured worker and the insurer in the rehabilitation process.

2. Statutorially defined time-lines for rehabilitation referral, including incentives for both the insurer and the injured worker.

3. Provision of rehabilitation services by qualified professionals certified by the Board for Rehabilitation Certification.

4. A structured set of defined return-to-work and retraining priorities.

5. The injured worker's right to a clearly defined grievance process.

6. Continuation of compensation benefits during rehabilitation, so that the disabled worker can maintain his dignity and provide for his family during the return-to-work process.

The rehabilitation process outlined in S.B. 315 clearly delineates the rehabilitation benefit provided by the insurer, as well as the worker's defined rights and responsibilities in his own rehabilitation, and serves to establish Montana's Workers' Compensation as a return-to-work system as opposed to an unemployment program.

The Rehabilitation Association of Montana endorses passage of S.B. 315. Thank you for your consideration.

EXHIBIT 2
DATE 3-9-87
HB SB 315

March 9, 1987

MONTANA HOSPITAL ASSOCIATION

Testimony Before House Business and Labor Committee on Senate Bill 315

Chairman Kitselman, Members of the Committee, for the record I am Bill Leary, the Immediate Past President of the Montana Hospital Association, appearing here today on behalf of the fifty-five hospital members and their thirty-three attached nursing homes.

Hospitals and nursing homes are service organizations and by the very nature of the services they provide are labor intensive and are collectively one of the major employers in Montana. In many of our cities and communities, the hospital is the major employer.

The Montana Hospital Association supports the goals and reforms embodied in Senate Bill 315 - The Workers' Compensation Reform Act. Hospitals, as major employers in the state, pay millions of dollars in wages and salaries and thousands of dollars in workers' compensation fees. Thus we are concerned about the financial viability of the workers' compensation system. While we have been able, through our rigorous safety programs, to minimize accidents, we will admit to adding to the occupational injury statistics, perhaps not in the number of accidents as the logging, construction or other industries, but we have certainly had our share.

Hospitals also want to work with the Workers' Compensation Division to save money on hospital claims, or for that matter any group that is committed to true health care cost containment. Our efforts in hospital cost containment, which does reflect on lower increases in charges for all the people we serve has not gone unnoticed. Montana hospitals still rate 46th in the nation in terms of average costs and average charges per stay.

Unfortunately, the kind of patients we receive as a result of an industrial accident cannot be considered average. Most of the patients are critically injured, in severe trauma condition, and the physicians, surgeons and hospital staff must exert tneir combined talents and use a high amount of resources just to save the life of the injured worker - thus the first several days of treatment can mean a bill of $5,000 to $10,000 or more. I'm sure that both management and labor, and certainly the family of the injured worker would not want us to do otherwise.

I refer you to page 42, section (3), lines 20-25. This section would allow the division to arbitrarily set hospital rates for services provided to the injured worker. Chad Smith will explain in more detail our problem with this section and will request your consideration for an amendment, however, I must once again state the hospital industry's adament opposition to governmental non-negotiated rate setting of any kind.

Earlier in the session, a rate setting bill, House Bill 128, was tabled by you and your colleagues on the House Human Services Committee. Chairman Kitselman, Representatives Brown, Grinde, Hanson, McCormick and Simon all voted to table House Bill 128.

We do not believe, and I am sure the division will confirm this, that the division has the resources to establish a rate setting methodology. You will note in the fiscal note to SB 315, page 7-B,

DWC - Regulate Hospital Costs

An appropriation request for $55,903 (FY 88) and $47,397 (FY 89).

Ladies and Gentlemen, I propose that if the division were serious about setting hospital rates or regulating hospital rates, they will need three to four times more than that. Setting hospital rates is a very complex matter. The age and mix of fixed assets, utilization, purchasing and warehousing practices are among some of the problems that must be faced. If rates are merely set at statewide averages, it is almost certain that half the hospitals would gain and half would lose.

The fairest and most responsible method of setting hospital rates is to continue to allow local, uncompensated, not-for-profit Boards of Trustees to use their knowledge to establish hospital charges for their own hospitals. These Boards protect the interests of <u>all</u> the people utilizing the services of the hospital.

If the division cannot set rates because of the complexity of the rate setting methodologies, it is permitted by section 3, page 42 of the bill to piggyback on the "ratesetting" function of other public agencies. In this case, it would likely be the Medicaid Bureau. The Medicaid Bureau intends to implement a DRG-based prospective payment system sometime in 1987. DRGs or diagnostic related groups in the reimbursement scheme have been used since October 1983 for Medicare. It assigns all medical conditions to one of 370 DRGs and reimburses

hospitals for the care of patients on a predetermined basis. DRGs are not without flaws - serious flaws. They were designed primarily to address the medical conditions of Medicare-aged patients. DRGs focus on average medical and surgical conditions for the elderly. Most of the inpatient workers' compensation claims will be for trauma and the balance for rehabilitation. DRGs are not designed to deal with trauma. There is too much variability among trauma cases to say that any one case is typical or represents an average. DRGs are an unacceptable basis of reimbursement for trauma cases and could put hospitals in serious financial jeopardy.

In summary, let me say again, we support the bill. We want to work with workers' compensation to reduce its expenses and hopefully, achieve a leveling off or reduction in future premiums paid by all employers, but we cannot tolerate a reimbursement system that would lower the quality of care and the intensity of services that we must provide to the injured workers.

I now ask Chad Smith to present the amendments that the hospitals of Montana wish the committee to consider.

I would urge your concurrance of SB 315 with the Montana Hospital Association amendments.

EXHIBIT 3
DATE 3-9-87
SB SB 315

SENATE BILL NO. 315

Third Reading Copy

Amend as follows:

1. On page 42, strike lines 20 through 25 in their entirety;

2. On page 43, strike lines 1 through 7 in their entirety.

Offered by

MONTANA HOSPITAL ASSOCIATION
Chadwick H. Smith,
Registered Lobbyist

EXHIBIT 4
DATE 3-9-87
HB SB 315

MONTANA MUNICIPAL INSURANCE AUTHORITY
Post Office Box 1704
Helena, MT 59624

March 6, 1987

The Honorable Les Kitselman
Montana Representative
Business & Labor Committee
Capitol Station
Helena, MT 59620

Re: SB 315--Workers' Compensation Revision

Dear Chairman Kitselman:

On behalf of the Montana Municipal Insurance Authority (Authority), the administrative arm of the self-insurance pool created by various cities and towns in Montana, I am writing this letter in support of SB 315 which is an Act to generally revise the workers' compensation laws in Montana.

The Authority's workers' compensation program presently has 74 participating cities and towns across Montana, and additional members are continuing to join for the 1987-88 fiscal year. Due to the ever increasing expansion of benefits and coverage for injured workers the premiums these cities and towns were required to pay the State Compensation Insurance Fund became prohibitive and they were forced to form their own self-insurance program. However, even the presently existing self-insurance program continually feels the pressure to raise premiums. Furthermore, self-insurance pools are required to carry reinsurance for excess coverage, and the premiums being charged by reinsurance companies are literally skyrocketing. Those reinsurance companies perceive a large risk under the present state of Montana workers' compensation law.

SB 315 is a responsible and fair piece of legislation not only for employers and insurers, but it also continues to protect the working men and women of this state. SB 315 eliminates the required liberal construction of workers' compensation law in favor of the claimant, and imposes an interpretation which favors neither party to a dispute under Montana's workers' compensation law. SB 315, unlike present law, provides for permanent partial disability benefits only if a worker shows that an injury has resulted in a demonstrable actual wage loss. This eliminates speculative awards and is only fair. SB 315 allows lump sums only if the insurer and the claimant agree that it is the best method to resolve a dispute, as opposed to existing law where lump sums appear to be the rule rather than the exception. SB 315 provides an extensive rehabilitation package in an attempt to get injured workers back to their job markets. Finally, SB 315 takes a substantial step toward reducing litigation as it requires all

parties to a dispute to first submit to mandatory non-binding mediation prior to availing themselves of the procedures of the Workers' Compensation Court. Certainly an alternative dispute resolution mechanism cannot be adverse to either the interests of the employer or claimant.

Montana's cities and towns, like other employers in Montana, face the heavy burden of increasing workers' compensation premiums. An attempt to stem the expansion of coverage, benefits and litigation in this area surely is a step in the right direction for not only Montana's cities and towns, but all citizens of Montana. The Authority supports passage of SB 315.

Sincerely,

MONTANA MUNICIPAL INSURANCE AUTHORITY

By Alec Hansen
Alec Hansen, Executive Director

cc: All Members of House Business & Labor Committee

MONTANA CHIROPRACTIC ASSOCIATION

EXHIBIT 5
DATE 3-9-87
SB 315

TESTIMONY, SENATE BILL 315
MARCH 9, 1987
SUBMITTED BY: BONNIE TIPPY, LOBBYIST, THE MONTANA CHIROPRACTIC ASSOCIATION

We support the concept of reformation of the worker's compensation laws in the state of Montana. We know that a Senate subcommittee has worked very hard to come up with a good bill for your consideration, but hope that this committee would consider a technical amendment.

The problem we have with the bill as it is written is that it only allows impairment ratings to be done by medical doctors. Many other types of health care professionals are the primary treating providers in cases of injured workers. Examples would be audiologists, physical therapists, and, of course chiropractors. Chiropractors treat many, many injured workers. Is it really fair that an impairment rating be done by a medical doctor in these cases? We believe that this is unfair both to the treating providers as well as to the injured worker.

The amendment I am offering for your consideration today will not change the fact that the department is going to be able to appoint all of the people who do impairment ratings. We have no quarrel with that at all. The only thing this amendment does is require that that appointed person be of the same discipline as the treating health care provider. This amendment in no way changes the process by which impairment ratings are done. The American Medical Association has established guides for doing impairment ratings, and any of the many types of health care providers can and do use this guide. I would ask this committee to accept this amendment, and realize that in comparison to the overall scope of this bill it is very small indeed. But please do not overlook its importance to our association.

AMENDMENTS, SENATE BILL 315
SUBMITTED BY: THE MONTANA CHIROPRACTIC ASSOCIATION
March 9, 1987

Amend SB 315, third reading bill, as follows:

Page 13, line 4
Following: line 3
Insert: "NEW SECTION. Section 20. Medical evidence defined. "Medical evidence" means the testimony of a physician or other licensed practitioner of one of healing arts.

Renumber: following sections

Page 40, line 22
Following: line 21
Strike: "physician"
Insert: "primary health care provider"
Following " Title 37"
Strike: "chapter 3"
Insert: "of the same discipline or specialty as the claimant's treating physician"

Page 40, line 23
Following: "from the"
Strike: "board of medical examiners"
Insert: "licensing board for the profession involved"

EXHIBIT 6
DATE 3-9-87
SB 315

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March 5, 1987

RE: STATUS OF MONTANA WORKERS' COMPENSATION "REFORM LEGISLATION" - SUMMARY OF SENATE BILL 315, AS AMENDED AND PASSED BY THE STATE SENATE

Senate Bill 315, as amended by the Senate Labor and Employment Relations Committee, would make many changes to the provisions of the current Workers' Compensation Act. Primarily, the changes would result in a reduction of types of injuries covered and benefit levels in order to reduce the high cost of workers' compensation insurance for Montana employers. An analysis of the major proposed changes is set forth below.

Benefit Reductions, Restrictions on Covered Injuries, and Other Restrictions

Injury Definition [39-71-119] - changes would result in a stricter definition of injury. It would preclude coverage for repetitive trauma and would put restrictive language in for cardiovascular, pulmonary, respiratory, stroke, and heart conditions. It would also specifically preclude coverage for emotional or mental stress. Repetitive trauma would now be covered under the Occupational Disease Act.

Aggravation of Preexisting Conditions, Proof of [39-71-407] - a stricter proof requirement would be placed in the law in relation to injuries involving aggravation of preexisting conditions. Currently, the proof requirement regarding an aggravation is a medical "possibility". The new proof requirement would require a "probable" medical test.

Subrogation [39-71-414] - currently, in cases in which a third party has caused an injury, the workers' compensation insurer is entitled to a certain percentage against any third party recovery. However, through court decisions, such a recovery can take place only when a claimant has been 'made whole'. The new law would not require a claimant to be made whole, and would allow an insurer to recover the full amount set forth in statute against a third party recovery or settlement.

Attorney Fee Assessment Against Insurer [39-71-611 and 612] - restrictions would be placed on the recovery of attorney fees against an insurer, should a case go to hearing before the Workers' Compensation Court. Currently, if an insurer loses a case, attorney fees are automatically paid to the successful claimant. Under the proposal, a claimant could recover only if it was found that an insurer was unreasonable in the adjusting of a claim. However, costs of litigation would be assessed as previously allowed.

Maximum Benefit Level Freeze [39-71-701, 702, 703, and 721] - maximum weekly benefit amount would be frozen at the current level until June 30, 1989, which would limit the annual increases based on increases in the State's average weekly wage as set forth in current law.

Partial Disability [39-71-703] - there would be a substantial revision in permanent partial benefit awards. Currently, a claimant may recover a "wage loss award" for establishing a true wage loss as a result of an injury, or can recover an "indemnity award" for prospective loss of future earning capacity, which takes into consideration several different factors in addition to a medical impairment rating. Also, claimants are entitled to automatic impairment (Holton) awards based on uncontested impairment ratings issued by physicians, although such impairment awards are included in the calculation of either a wage loss or indemnity award and are not in addition thereto. Indemnity awards will be eliminated, and a claimant would be entitled to only an actual wage loss award, entitled "wage supplement benefits," or an impairment award, or both. Impairment awards are generally relatively small, in that they relate only to medical evaluations regarding anatomical limitations, and do not address the effect an injury has on a worker's future ability to compete in the normal labor market. Wage supplement benefits would be limited to 500 weeks from the date of maximum healing, minus any weeks paid for an impairment award, and failure to sustain a wage loss would not extend the period of eligibility.

Termination of Certain Benefits Upon Retirement [39-71-710] - the change would result in a termination of permanent partial wage loss (wage supplement) benefits to a worker who begins receiving or becomes eligible for Social Security retirement benefits. Currently, workers can receive such benefits for up to 500 weeks, even though they are on Social Security retirement benefits.

Incarcerated, Benefits Not Due While [NEW SECTION] - Except for medical costs, no benefit payments would be due while a claimant is incarcerated for a felony.

Death Benefits [39-71-721] - currently, death benefits are paid to a surviving spouse until death or remarriage, and to children until the age of 18, or 25 if in an accredited school. A two-year lump sum payment is also due upon remarriage of the spouse. The proposed law would restrict payments to a maximum of 500 weeks, or until the youngest child reaches age 18, or 22 if in an accredited school, and would eliminate the two-year lump sum amount upon remarriage.

Temporary Total Benefits - Starting Date [39-71-736] - temporary total disability benefits are currently paid from the first date of disability as long as a claimant is off work more than five days. The new law would change benefit payments so that such payments would be made starting with the 7th day of wage loss, as opposed to the 1st day.

Settlements and Lump Sum Payments [39-71-741] - lump sum payments and settlements would be restricted to only those cases in which a claimant and an insurer can agree to the settlement. Except for some limited authority in the permanent total area up to a maximum of $20,000, the Workers' Compensation Court would not have authority to grant lump sum payments. Should a claimant and insurer agree to a settlement, it would still be subject to Division approval, although much of the restrictive and complex language passed in 1985 regarding approval would be eliminated.

Benefits While on Rehabilitation Program - Reduction [39-71-1003 and NEW SECTION] - currently, temporary total disability payments are made to a claimant undergoing vocational rehabilitation. The new proposal would reduce payments to the maximum permanent partial rate and would require a claimant to contribute a portion of his permanent partial wage loss (wage supplement) benefits to the rehabilitation effort.

Liberal Construction Mandate - Elimination of [39-71-104 and 39-72-104] - the statutes providing that the Workers' Compensation and Occupational Disease Acts be liberally construed, and through case law meaning that they be liberally construed in favor of the claimant, will be repealed. The effect of such repeals will

presumably be that on close questions of law, the claimant will not prevail unless the claimant has clearly met the burden of proof test.

Benefit Increases Or Other Added Protections

Protection for Filing Claim and Job Preference [NEW SECTION] - a provision would be added preventing employers from terminating a worker for merely filing a claim. Further, there would be a preference placed in the law for workers who are capable of returning to work, assuming there are positions open for the worker.

Permanent Total Cost-of-Living Allowance [39-71-702] - a cost-of-living increase would be placed in the law for permanent total disability cases. Such cost-of-living increase would provide for up to a 3% annual increase and no more than ten yearly adjustments. Currently, there are no cost-of-living adjustments in the law.

Permanent Partial - Elimination of Schedule [39-71-703] - there would be some increase in permanent partial wage loss (wage supplement) and impairment awards for workers suffering extremity injuries (arms, hands, legs, and feet), due to the elimination of the schedule and placing all injuries on a 500-week maximum recovery potential.

Changes In The Structure And Administration Of The Act

Mandatory, Nonbinding Arbitration for Initial Dispute Resolution [NEW SECTION] - Before one can take a case to the Workers' Compensation Court, the party will have to proceed through a mandatory nonbinding mediation system, whereby the parties will have to, in good faith, attempt to resolve the case outside of the formal litigation arena.

Uninsured Employer Fund Payout [39-71-503] - the uninsured employers' fund would be structured in such a way that surpluses and reserves would not have to be kept and the fund could be administered on a cash-in, cash-out basis. Currently, there are amounts in the fund, but the present language in the law prevents payment from the fund because of the surplus and reserve requirement. At least some uninsured employees will receive a percentage of their benefits under the new proposal, although there are no new provisions adding additional revenue sources.

Impairment Panels [NEW SECTION] - Impairment panels will be established whereby physicians will be appointed to the panels for the evaluation of permanent impairment. Such a system will exist only if the claimant and the insurer cannot agree to the degree of an impairment.

Rehabilitation Procedure [NEW SECTION] - A detailed rehabilitation system is being proposed whereby workers will be required to proceed through a rehabilitation analysis and program, with various remedies provided in the law should a worker not cooperate with the system.

Workers' Compensation Court [39-71-2901, 2903, and NEW SECTION] - the Workers' Compensation Court has been given greater powers over proceedings and enforcement of orders, and will be bound by the common law and statutory rules of evidence. In addition, a rule 11, M.R.Civ.P. requirement is placed in the law for signing of pleadings filed with the Court. [Lawyers beware]

Effective Date

After July 1, 1987, the disputed resolution provisions would apply to all injuries, regardless of date of occurrence. All other changes would apply only to injuries and diseases occurring after June 30, 1987.

EXHIBIT 7
DATE 3-9-87
SB 315

the assault was intentional from the standpoint of the employer.[301]

The employer is protected from actions by injured workers for injuries covered under the Workers' Compensation Act, i.e., injuries arising out of and in the course of employment. However, no protection is provided for negligent or malicious acts towards an employee having no connection with the employment. Thus, when an employer renders medical aid or attention to a claimant on a voluntary and gratuitous basis, even though such action is not required, the employer is bound to exercise reasonable care in the selection of a competent physician, and failure to do so subjects the employer to a damage action.[302] Also, an employer is not protected from intentional injury. However, "intentional" is not to be construed as gross, willful, deliberate, intentional, reckless, culpable, malicious negligence, breach of statute, or other misconduct of an employer short of "genuine intentional injury".[303]

§ 10.20 Against Uninsured Employer

Prior to the creation of the Uninsured Employers Fund, an injured worker could file a common law action against an employer that was uninsured,[304] and uninsured employers were subject to a misdemeanor charge.[305] Such remedies, however, proved inadequate.

In 1977, the Montana Legislature created the Uninsured Employers Fund. The purpose of the Fund is to pay injured employees of uninsured employers the same benefits that such employees would receive if

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301. McGrew v. Consolidated Freightways, Inc., 141 Mont. 324, 377 P.2d 350 (1963).

302. Vesel v. Jardine Mining Co., 110 Mont. 82, 100 P.2d 75 (1940).

303. Enberg v. The Anaconda Co., 158 Mont. 135, 489 P.2d 1036 (1971). The distinction is between intentional versus the accidental quality of the precise event producing the injury. The intentional removal of a safety device or toleration of a dangerous condition, resulting in a subsequent injury, cannot be said to be a deliberate infliction of harm comparable to a deliberate assault.

304. Laws of Montana (1915), Ch. 96, Sec. 3 (repealed 1977).

305. Id.

From Workers Comp Manual
By Norman Grosfield

EXHIBIT 9
DATE 3-9-87
SB SB315

MONTANA STATE AFL-CIO
APRIL 29 1956

Box 1176, Helena, Montana

JAMES W. MURRY
EXECUTIVE SECRETARY

ZIP CODE 59624
406/442-1708

TESTIMONY OF JIM MURRY ON SENATE BILL 315 BEFORE THE HOUSE BUSINESS AND LABOR COMMITTEE, MARCH 9, 1987

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, FOR THE RECORD MY NAME IS JIM MURRY AND I AM THE EXECUTIVE SECRETARY OF THE MONTANA STATE AFL-CIO. WE ARE HERE TODAY TO TESTIFY IN OPPOSITION TO SENATE BILL 315.

THIS MEASURE IS BEING TOUTED AS A WORKERS' COMPENSATION COMPROMISE BILL THAT BALANCES THE NEED TO REFORM THE CURRENT WORKERS' COMPENSATION SYSTEM WITH THE NEEDS OF INJURED WORKERS. HOWEVER, IT IS OUR OPINION THAT THE PRIMARY PARTY BEING COMPROMISED BY SENATE BILL 315 ARE THE INJURED WORKERS THEMSELVES.

WE OPPOSE SENATE BILL 315 BECAUSE UNDER ITS PROVISIONS TOTAL WORKERS' BENEFITS WILL BE REDUCED BY APPROXIMATELY 30 PERCENT. THE REDEFINITION OF INJURY WOULD ELIMINATE COMPENSATION FOR REPETITIVE TRAUMA. THIS REDEFINITION ALSO PLACES RESTRICTIVE LANGUAGE ON COMPENSATION FOR PULMONARY, CARDIOVASCULAR, RESPIRATORY, STROKE AND HEART CONDITIONS. IT WOULD ABOLISH COVERAGE FOR EMOTIONAL AND MENTAL STRESS DISEASES. BENEFITS TO WIDOWS WOULD BE DRASTICALLY REDUCED AND LUMP SUM SETTLEMENTS WOULD BE RESTRICTED TO ONLY THOSE CASES WHERE THE CLAIMANT AND THE INSURER AGREE ON A SETTLEMENT.

THESE ARE JUST A FEW AREAS WHERE INJURED WORKERS AND THEIR SURVIVORS ARE ASKED TO MAKE SUBSTANTIAL SACRIFICES. CLEARLY, SB 315 TAKES A GIANT STEP TOWARDS DISMANTLING ONE OF THE MOST COMPREHENSIVE WORKERS' COMPENSATION PROGRAMS IN THE NATION. WE ARE DEEPLY CONCERNED OVER THE SACRIFICES THAT MONTANA WORKERS WILL BE FORCED TO MAKE.

MEMBERS OF THE COMMITTEE, TO APPRECIATE HOW SIGNIFICANT THESE "REFORMS" ARE, IT IS IMPORTANT TO UNDERSTAND THE HISTORY SURROUNDING WORKERS' COMPENSATION LAWS IN OUR STATE.

BACK IN 1969, WE BEGAN TO SEE SOME DRAMATIC IMPROVEMENTS IN MONTANA'S WORKERS' COMPENSATION ACT. THE MONTANA STATE AFL-CIO PARTICIPATED WITH THE GOVERNOR'S ADVISORY COUNCILS IN MAKING RECOMMENDATIONS FOR CHANGES IN MONTANA'S WORKERS' COMPENSATION SYSTEM.

THESE COUNCILS WERE COMPRISED OF MEMBERS FROM THE BUSINESS COMMUNITY, THE INSURANCE INDUSTRY, SELF-INSURERS, BOTH CLAIMANTS AND DEFENSE ATTORNEYS, AGRICULTURE AND ORGANIZED LABOR. THE ADVISORY COUNCILS' RECOMMENDATIONS WERE BASED UPON OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION GUIDELINES WHICH MANDATED THAT STATES MAKE SUBSTANTIAL IMPROVEMENTS IN THEIR WORKERS' COMPENSATION LAWS OR BE FACED WITH THE THREAT OF FEDERAL INTERVENTION.

THE MONTANA LEGISLATURE RESPONDED TO THE ADVISORY COUNCILS' RECOMMENDATIONS BY RESPONSIBLY CREATING ONE OF THE BEST WORKERS' COMPENSATION LAWS IN THE COUNTRY.

AND MONTANA WORKERS RESPONDED FAVORABLY TO THE CHANGES AS THEY CONTINUE TO BE ONE OF THE MOST PRODUCTIVE WORKFORCES IN THE NATION. ACCORDING TO AN INC. MAGAZINE SURVEY IN OCTOBER OF 1985, MONTANA WORKERS ACHIEVED THE FOURTH HIGHEST RANK IN THE NATION IN VALUE ADDED PER WORKER PER YEAR.

TODAY, WITH BURGEONING DEFICITS IN EXCESS OF $100 MILLION, WE ARE TOLD THAT THE SYSTEM IS IN NEED OF RADICAL REFORM IN ORDER FOR IT TO SURVIVE. CHARGES HAVE BEEN LEVELED THAT COURT DECISIONS AND ATTORNEY INVOLVEMENT HAVE LED TO EXCESSIVE JUDGEMENTS. ALSO, THERE HAVE BEEN RUMORS OF MAJOR ABUSE AND POSSIBLE FRAUD WITHIN THE WORKERS' COMPENSATION SYSTEM.

IN EARLIER SENATE COMMITTEE HEARINGS ON SENATE BILLS 315 AND 330, THERE WERE CHARGES RAISED THAT WORKERS THEMSELVES WERE DEFRAUDING THE SYSTEM. WE CERTAINLY DO NOT APPROVE OF THIS BEHAVIOR, AND WE FEEL THAT THE PERSONS MAKING THESE ACCUSATIONS SHOULD COME FORWARD AND TELL YOU, THE MEMBERS OF

THIS COMMITTEE, ALL THEY KNOW ABOUT SPECIFIC INSTANCES WHERE WORKERS WERE ABUSING THE SYSTEM. MOREOVER, THE COSTS OF THIS ALLEGED ABUSE TO THE SYSTEM NEEDS TO BE QUANTIFIED.

THESE RUMORS ARE JUST NOT FROM UNIDENTIFIED SOURCES -- THEY COME FROM KNOWLEDGEABLE PEOPLE IN RESPONSIBLE POSITIONS. IN FACT, ONE OF THE MOST OUTSPOKEN LEADERS EXPRESSING CONCERN OVER POSSIBLE ABUSES IS REPRESENTATIVE BOB MARKS, SPEAKER OF THE MONTANA HOUSE OF REPRESENTATIVES.

IN A FEBRUARY 1, 1987, ASSOCIATED PRESS STORY, REPRESENTATIVE MARKS EXPRESSED CONCERNS OVER "INDICATIONS OF QUESTIONABLE PAYMENTS FROM THE WORKERS' COMPENSATION FUND." REPRESENTATIVE MARKS SAID IN THAT SAME AP STORY, AND I QUOTE, "IF THESE CONCERNS ARE GENUINE, THERE IS A HIGH INDICATION TO ME, THAT THERE IS FRAUD."

ON THE FOLLOWING MONDAY, DURING A MEETING OF THE LEGISLATIVE AUDIT COMMITTEE, LEGISLATIVE AUDITOR SCOTT SEACAT STATED AND WE AGREE WITH HIM, THAT THE LEGISLATORS NEED "ASSURANCE THAT THERE ARE NO MAJOR ADMINISTRATIVE PROBLEMS IN THE WORKERS' COMPENSATION SYSTEM BEFORE THEY UNDERTAKE MAJOR REFORMS OF THE SYSTEM."

MR. CHAIRMAN, THIS COMMITTEE IS SERIOUSLY CONSIDERING THE MOST DRAMATIC CHANGES CONTEMPLATED IN THE ACT'S HISTORY. THE CHANGES THAT YOU ARE CONSIDERING ARE NOT ONLY DRAMATIC AS COMPARED TO PAST CHANGES, BUT ARE TRAUMATIC TO THE INJURED WORKERS THAT ARE BEING ASKED TO MAKE SUCH SIGNIFICANT SACRIFICES. WE AGREE WITH MR. SEACAT THAT ALL THE CARDS MUST BE ON THE TABLE BEFORE WE UNDERTAKE SUCH MAJOR REFORMS OF THE SYSTEM.

WE HOPE YOU WILL CONSIDER CALLING REPRESENTATIVE MARKS BEFORE YOUR COMMITTEE TO DISCUSS AT LENGTH HIS ALLEGATIONS. BECAUSE IT IS IMPERATIVE THAT YOU HAVE ALL INFORMATION AVAILABLE REGARDING POSSIBLE FRAUD AND ABUSE BEFORE YOU PROCEED WITH DISMANTLING THE LAW. AND IF THERE IS NO BASIS FOR THESE CHARGES -- THE ALLEGATIONS SHOULD BE LAID TO REST ONCE AND FOR ALL.

NECESSARY AND LEGITIMATE BENEFITS TO INJURED WORKERS.

IT IS ALSO OUR CONCERN THAT PREMIUM LEVELS ARE NOT HIGH ENOUGH TO ADEQUATELY FUND THE SYSTEM. TESTIMONY IN AN EARLIER HEARING INDICATED THAT THE WORKERS' COMPENSATION DIVISION DELIBERATELY REFUSED TO ASSESS PREMIUMS AT LEVELS SUFFICIENT TO FUND THE SYSTEM. ACCORDING TO TESTIMONY, THIS ACTION WAS TAKEN, IN SPITE OF THE STATE FUND'S OWN INDEPENDENT ACTUARIAL ADVICE. THE IMPACT OF INSUFFICIENT PREMIUM LEVELS ON THE DEFICIT, SEEMS TO HAVE ALSO BEEN IGNORED.

THE MONTANA STATE AFL-CIO HAS RECEIVED MANY COMPLAINTS FROM WORKERS WHO HAVE BEEN INJURED AND SUBSEQUENTLY FORCED INTO REHABILITATION PROGRAMS. THESE REHABILITATION REVIEWS AND PROGRAMS HAVE BEEN OF NEGLIGABLE ASSISTANCE IN ACUTALLY RETURNING INJURED WORKERS TO FULLY PRODUCTIVE EMPLOYMENT. THE ONLY CRITERIA FOR JUDGING THE SUCCESS OF THESE REHABILITATIVE PROGRAMS SHOULD BE THE RETURN OF THESE WORKERS TO PRODUCTIVE EMPLOYMENT, AND ANYTHING SHORT OF THIS GOAL MERELY ADDS UNNECESSARY COSTS TO THE SYSTEM. IF, AFTER A DETAILED ANALYSIS, THESE COSTS ARE PROVEN TO BE UNNECESSARY, THEN WE WOULD SUGGEST THAT COST CUTTING BE MADE IN THIS AREA.

MR. CHAIRMAN, WE RECOGNIZE THAT THE CURRENT WORKERS' COMPENSATION SYSTEM NEEDS REFORM. THAT'S WHY THE MONTANA STATE AFL-CIO TOOK A VERY ACTIVE PART IN THE DELIBERATIONS OF THE GOVERNOR'S WORKERS' COMPENSATION ADVISORY COUNCIL. IN FACT, OUR PRESIDENT, JERRY DRISCOLL, SERVED AS A MEMBER OF THIS COUNCIL.

BUT WE ARE HERE BEFORE YOU TODAY TO EXPRESS OUR CONCERN THAT MANY OF THE PROBLEMS CONTRIBUTING TO THE WORKERS' COMPENSATION "CRISIS" HAVE NOT YET BEEN CLEARLY IDENTIFIED. WE URGE YOU TO INVESTIGATE THESE PROBLEMS BEFORE YOU PROCEED WITH GUTTING MONTANA'S WORKERS' COMPENSATION LAW.

IN CLOSING, MUCH HAS BEEN SAID ABOUT THE "EXCLUSIVE REMEDY" THAT EXISTS IN THE WORKERS' COMPENSATION LAW. THAT REMEDY, PROVIDED BY OUR CURRENT LAW, APPEARS TO BE IN JEOPARDY UNDER THE PROVISIONS OF SB 315. IF THAT

HOWEVER, WE BELIEVE THAT MANY PROBLEMS CONTRIBUTING TO THE WORKERS' COMPENSATION "CRISIS" HAVE NOTHING TO DO WITH POSSIBLE FRAUD OR ABUSE. IN FACT, WE BELIEVE THAT MANY OF THE PROBLEMS EXIST BECAUSE OF MISMANAGEMENT AND ADMINISTRATIVE ERRORS. WE ARE DEEPLY DISTURBED THAT THESE ISSUES AND THEIR COSTS TO THE SYSTEM HAVE BEEN LARGELY IGNORED.

WE HAVE RECEIVED NUMEROUS COMPLAINTS FROM INJURED WORKERS THAT THE CURRENT SYSTEM DOES NOT EFFECTIVELY RESPOND TO THEIR NEEDS. FOR EXAMPLE, WE'VE BEEN TOLD THAT WORKERS HAVE CALLED THE DIVISION OFFICE LONG DISTANCE, AT THEIR OWN EXPENSE, AND HAVE BEEN PUT ON HOLD INDEFINITELY AND FINALLY CUT-OFF.

WORKERS REPEATEDLY SAY THAT EVEN AFTER TIME CONSUMING NEGOTIATIONS, THEY HAVE NOT RECEIVED THEIR LEGITIMATE BENEFITS AND THAT THE DIVISION FAILS TO RESPOND TO THEIR COMPLAINTS. MANY, AFTER BEING SWEPT ASIDE BY THE SYSTEM, HAVE NO OTHER ALTERNATIVE BUT TO HIRE AN ATTORNEY.

IN OTHER WORDS, CLAIMANTS ARE BEING FORCED BY THE SYSTEM TO HIRE AN ATTORNEY IN ORDER TO OBTAIN THE BENEFITS THEY ARE ENTITLED TO UNDER THE LAW. FOR EXAMPLE, A FEBRUARY 8 MISSOULIAN LETTER, WHICH IS ATTACHED TO THIS TESTIMONY, POIGNANTLY DESCRIBES THE FRUSTRATIONS THAT AN INJURED WORKER SUFFERED IN DEALING WITH THE SYSTEM. HE HAD NO CHOICE BUT TO RETAIN AN ATTORNEY TO GET THE BENEFITS HE WAS LEGITIMATELY ENTITLED TO.

REPRESENTATIVE JERRY DRISCOLL, PRESIDENT OF THE MONTANA STATE AFL-CIO, REPEATEDLY REQUESTED INFORMATION ON THE NUMBER OF EMPLOYERS WHO ARE ILLEGALLY NOT PAYING THEIR WORKERS' COMPENSATION PREMIUMS. THE DIVISION TOOK MONTHS TO PROVIDE THIS INFORMATION TO REPRESENTATIVE DRISCOLL, CONTENDING THAT THE DATA WAS UNAVAILABLE. OBVIOUSLY, THIS IS AN EXAMPLE OF THE ADMINISTRATION NOT EVEN BEING ABLE TO ADDRESS A MAJOR COST FACTOR.

SO THERE HAS NOT BEEN A CONCERTED EFFORT MADE BY THE WORKERS' COMPENSATION DIVISION TO INVESTIGATE THESE ADMINISTRATIVE PROBLEMS AND THEIR POTENTIAL COSTS TO THE SYSTEM. UNTIL THESE COSTS ARE ASCERTAINED, WE SHOULD NOT CURTAIL

IS IN FACT THE CASE, THEN THE LEGISLATURE MAY VERY WELL BE CAUSING AN ADDITIONAL PROBLEM IN TERMS OF CREATING EXCESSIVE LITIGATION, RATHER THAN SOLVING A PROBLEM, IF YOU PROCEED IN PASSING THIS BILL.

WE URGE YOUR CONSIDERATION OF THE WORKERS WHO ARE INJURED, MADE SICK AND MANY TIMES DIE ON THEIR JOBS ALL ACROSS MONTANA.

EXHIBIT 9
DATE 3-9-87
HB 315

An injured system

As an injured worker, I would like to offer this concerning our present problem concerning the Workers' Compensation system.

Like any "business" when it has failed to perform as required, the blame for its success or failure is inevitably and justifiably placed firmly on the shoulders of its management!

As a manager myself for some 14 years in the automotive profession, I have never seen the customers blamed or punished because the business lost money or was strangled by its procedures.

For 20 years I have worked and supported myself and later my family with never a problem with injury or inability to do so until through a job-related back injury, I was forced out of work to have surgery.

Suddenly I was forced to deal with the system I had quietly ignored for all of these years.

It is like a nightmare that you hope to awake from at any moment. There is a maze of procedures, paperwork, and delay that is incomprehensible until experienced.

The "voices" over the phone at the Workers' Compensation Division won't give you any information until your human idenity has been wrenched from you and replaced by some computer claim number, which takes what seems to be an eternity when the rent and bills are not being paid.

My first payment took approximately eight long weeks, and was far short of what it should have been. After much time and paperwork proving my entitlement to a larger weekly rate, I was granted and later denied a small increase. More appeals, documents and proof later, I was still told they were unable to get someone to make the proper decision.

Out of desperation, I was forced to hire an attorney by the very system that makes so much noise about lawyers and their fees.

Shortly, I was paid the back amount owed and my weekly rate was raised to its correct amount. Without my lawyer, I quite literally would have been thrown out of my house, sued by bill collectors, and simply up the proverbal creek.

Rather than punish the "customers" and lay blame on the lawyers that are helping them, let's fix the mess in Helena and run the Workers' Compensation Division as it was intended, for those unfortunate people who are forced to utilize its intended purpose, to help the injured worker! — **Len Anderson, 103 Peterson Place, Stevensville.**

Missoulian, Sunday, February 8, 1987

Exhibit 10
3-9-87
SB315

TESTIMONY OF JAY REARDON ON SENATE BILL 315 BEFORE THE HOUSE BUSINESS AND LABOR COMMITTEE, MARCH 9, 1987

Mr. Chairman, members of the Committee, my name is Jay Reardon, and I amd the President of Local 72 of the United Steelworkers of America. I represent 225 workers at ASARCO'S East Helena Plant.

I come before you today to voice my opposition to SB 315. My biggest concern lies in the substantial changes in the definition of injury in this bill. The language placed in the law precluding repetitive trauma and restricting the coverage for cardiovascular, pulmonary, respiratory, stroke and heart conditions.

Recently, workers I represent were asked to take substantial cuts in wages and benefits, in the name of corporate survival. They made these sacrifices. Now, with this bill, as it is today, they will go to work and continue to breathe and be exposed to toxic gases and industrial poisons without the current protections they have under the law to cover the long-term effects of these exposures. It is ironic that because of the nature of the industry, we work in, it is necessary to wear respiratory protection which in itself may cause heart problems over the long-run because of the strain it puts on the cardiovascular system.

Because of the complicated nature of the workers compensation law, workers do not fully understand the changes in the law that this bill will make. I want to know that when an injured worker comes to me in the future and asks why he doesn't have the coverage the law used to provide; how I'm supposed to tell him he's out-of-luck! Also, that same worker is going to be coming to you his or her representative and asking why? And I don't believe that we are going to have a fair or just answer to give that worker.

In closing, I would ask that you consider the sacrifices that workers in this state have made already and that this bill goes too far in asking workers to sacrifice too much.

EXHIBIT 11
DATE 3-9-87
SB 315

ARE YOU AWARE?

In 1973 the state of Montana enacted a law of non-liability of insured employers. This law states:

> An employer is not subject to any liability whatever for the death or personal injury to an employee covered by Workers' Comp.

This law has been interpreted to mean:

> An employer is protected from actions by injured workers no matter how gross, willful, deliberate, reckless, culpable, malicious negligence, breach of statute, or other misconduct of an employer, short of genuine intentional injury.
> 39-71-411, Section 1, Chapter 493.
> Norman Grosfield's Book, P. 74.

What it means is this:

As an employer I can, and some do, operate my business as unsafely and irresponsibly as I want. I can remove safety guards and refuse to repair equipment which is hazardous to the safety of my employees. I can injure, maime and kill my employees and I am protected from any liability or responsibility for these inhumane acts.

This law was amended in 1979, but only to provide more protection for the employer. You might say: that's not true we're protected by OSHA. Well, I called them and here's what I found.

First they regulate safety standards of 25 to 30 thousand employers in Montana. OSHA has six inspectors in Montana, three for safety and three for health. They can only inspect the same employer once every three years. Employers to be inspected each year are selected at random by a computer. Unless your employer has a high injury record the chances of inspection more than once or twice in ten years is slim. I asked if all injuries were reported to OSHA and was told no, only if there is a death or five or more people are injured in the same accident.

Doesn't seem to be much protection as far as a safe place to work if you rely on this organization to assure safe employment practices.

At present our legislators are debating Senate Bill 315. What is this bill and why am I so concerned you might ask.

Well, I would be more than happy to inform you.

Senate Bill 315 is the bill proposed to get rid of the Worker's Compensation Court under the pretense Worker's Comp. is approximately $100 million in debt because of this court's outrageous awards to injured workers.

Here's a few facts and figures I have been made aware of that leads me to believe our present government and its administration is deceiving us.

Out of all the Worker's Compensation claims filed only one-tenth of 1% go to court. 571 cases were filed last year with only 92 of these cases coming before the Court. 72% of the 92 cases were found in favor of the insurance company.

These figures are from the Worker's Compensation Court files. What it comes down to is out of every 10,000 claims 100 go to court and 28 people win their cases.

I ask "where did all that money really go?"

Now let's take a closer look at Senate Bill 315 and see what it really is.

First is the proposal to establish a panel to determine an injured worker's degree of physical impairment. This impairment rating will be used to determine the injured worker's entitlement to benefits.

This panel of doctors will be chosen by the Division of Worker's Comp. You will not be allowed to choose your doctor. Isn't there the possibility by appointing suitably conservative M.D.'s the right to a just and fair impairment rating may be hampered or even meaningless.

Next is the proposal to enact a vocational panel or board that will (with the impairment rating from the Division's conservative Doctor's panel) determine the injured worker's entitlement to loss wages and other benefits.

Here we go again, another panel chosen by the Division, paid by the Division and the possibility again of one-sided decisions.

Now comes the provision for a fee schedule for medical bills. Apparently, if the doctor and hospitals charge more than the schedule allows the injured worker must pay the difference. Fair isn't it? If you are injured because of your employer's unsafe practices you get to pay part of the bill.

Folks, this is just a start, what about taking away widow death benefits for her and her children if she remarries. Plus the proposed decrease of survivor benefits. This is great. Dump them on Welfare, and let the taxpayer pick up Worker's Compensation's responsibilities.

Now, Worker's compensation wants laws to cut rehabilitation costs by cutting rehab to 26 weeks, half the time most courses take to complete.

If you want to complete the course pay for it yourself, as you can't get a lump sum settlement to do it. Injured and without income, how do I pay for this? Also Bill 315 would allow the state rehabilitation to force injured employees to take courses the state wants and would refuse the injured a choice in his rehabilitation. This could be done by the threat of stopping his benefits. Don't think this won't happen, it happened to me three times under the current program and if Senate Bill 315 passes into law it will protect this abuse by rehabilitation.

And this is just a small part of Senate Bill 315. There are approximately 100 pages of this kind of abusive garbage in this bill.

Let's put a stop to the intentional abuse of people's rights to fair and just treatment.

Let's put a stop to laws that protect abusers of fair and safe working conditions.

Let's get rid of laws that justify injurying, maiming, and killing by irresponsible employers.

Let's get rid of Senate Bill 315 and start making people (employees, employers and Worker's Compensation) responsible for their actions.

Let's quit dumping the injured on the taxpayer by putting them on Welfare and Social Security disability. And don't think this isn't happening "I'm living proof".

Remember, if you vote this into law, that the next victim by this society may be your wife, your brother, your sister, your children, your grandchildren, or frightening thought, yourself. You may be the next one to be physically abused and further mentally abused by an unjust, corrupt, uncaring system and you have to be the one to answer for your actions and to justify your actions for putting this into law. May the people of this state, your loved ones and the people who have elected you to represent their best interests have the strength and heart to forgive you, because I can't.

EXHIBIT 12
DATE 3/7/87
SB 315

MONTANA STATE BUILDING & CONSTRUCTION TRADES COUNCIL

IN AFFILIATION WITH

THE NATIONAL BUILDING & CONSTRUCTION TRADES DEPARTMENT

AMERICAN FEDERATION OF LABOR – CONGRESS OF INDUSTRIAL ORGANIZATIONS

sident Don Gimbel — *Secretary-Treasurer* Dan Jones

February 16, 1987

Hon. J.D. Lynch, Chairman
Senate Labor and Employment
Relations Committee
Capitol Station
Helena MT 59620

Dear Senator Lynch:

On Saturday, February 14, 1987 I presented testimony before you and your committee on SB 315 and SB 330.

My comments centered around the abuses of employers who do not pay premiums to Workers' Compensation as required by state law, especially in the construction and logging industries.

There seem to be a number of methods by which an employer can do this, but one of the most blatant is for an employer to tell their workers that they are independent contractors. When employees complain that they need and want workers' compensation coverage, they are told not to worry; that if they get hurt on the job that the employer does not have to turn in coverage reports to Workers' Compensation for up to three months, and that they will be put down as an employee if they are injured on the job.

I believe that this practice is used a great deal by non-union contractors in order to achieve a competitive edge over union contractors who the union can check for benefit coverage.

I also believe that this practice is used much more widely than is believed and that it is costing the Workers' Compensation Fund millions of dollars and forcing fair contractors to pay higher premiums as a result.

I am formally requesting that you, as Chairman of the Senate Labor and Employment Relations Committee, have the State Department of Labor investigate this practice.

I am enclosing copies of the materials which I used in my testimony, and which you have requested.

If I can provide you with further information, please let me know.

Sincerely,

Eugene Fenderson
Lobbyist

EF/bcs
Enclosures
cc: Senate Labor and
Employment Relations Committee

EXHIBIT 12
DATE 3-9-87
SB 315

AMENDMENT TO SENATE BILL 315

Be Amended as Follows:

1. Page 15, following line 3.

Insert: "(3) An employer who knowingly does not comply with section 39-71-401, MCA, regarding mandatory coverage of employees for workers' compensation purposes, or who willfully refuses to pay premiums to a compensation plan number 2 workers' compensation insurance carrier or the state compensation insurance fund, may be guilty of theft under section 45-6-301, MCA. A county attorney may initiate criminal proceedings against such employer, or in the case of a corporation, against the principal officers of the corporation."

EXHIBIT
DATE 3-9-87
SB 315

Legal fees listed for comp cases

By TOM COOK
Gazette Helena Bureau

HELENA — Of the 296 lawyers involved in workers' compensation settlements last year, 17 of them handled 36 percent of the cases and accounted for 40 percent of the money involved in the settlements, a report to the Senate Labor Committee shows.

Workers' Compensation Administrator Bob Robinson, who compiled the report at the request of the committee, said the state spent $666,558 in legal fees to defend disputed cases.

"We have no way of providing exact information as to the amount of legal fees paid by claimants or assessed against insurers by the court," Robinson said Tuesday in an interview.

But based on a random sample of cases studied by the division, Robinson estimated that 24 percent of the settlement amounts for claimants represented by lawyers went to pay legal bills.

About $38 million in settlements were made in 1986 by the state workers' comp fund, private insurance carriers and self-insured employers, Robinson said. That means about $9.1 million went to private lawyers involved in comp settlements.

The division keeps records on settlements that don't go to court, which totaled $30 million last year. Robinson estimated that another $8 million was awarded by courts.

Most private lawyers involved in work-comp cases last year handled fewer than five and in many cases only one settlement, according to the report.

Seventeen lawyers handled more than 20 cases apiece with the highest number handled by John Bothe, of Columbia Falls, who was involved in 76 settlements, according to the report.

The highest amount of settlement awards involved Tom Lewis, of Great Falls, who handled 49 settlements totaling $2.1 million.

Here is a list of the 17 lawyers with more than 20 settlements reached before the case went to court, and the dollar amount of those settlements:

- Monte Beck, Bozeman, 23 cases, $534,826.
- John Bothe, Columbia Falls, 76, $1.8 million.
- Thomas Bulman, Missoula, 30, $302,942.
- Milt Datsopoulos, Missoula, 39, $626,514.
- Ben Everett, Anaconda, 22, $656,416.
- Norman Grosfield, Helena, 28, $644,599.
- Victor Halverson, Billings, 45, $916,375.
- James Harrington, Butte, 24, $490,846.
- Gene Jarussi, Billings, 22, $456,705.
- Neil Keefer, Billings, 30, $558,150.
- Robert Kelleher, Billings, 23, $412,543.
- Tom Lewis, Great Falls, 49, $2.1 million.
- Tom Lynaugh, Billings, 28, $462,626.
- Gene Picotte, Montana City, 34, $958,455.
- Mike Preazeau, Whitefish, 22, $397,000.
- Pat Sheehy, Billings, 27, $583,022.
- Robert Skaggs, Billings, 24, $476,314.

EXHIBIT 3-9-87
DATE
HB SB315

39-71-411. Provisions of chapter exclusive remedy -- nonliability of insured employer.

Tortious conduct by insurer. Bad faith by an insurer in the settlement process is an independent tort which is not barred by the exclusive remedy provision of this section. Birkenbuel v. Montana State Compensation Insurance Fund. 42 St. Rep. 1647 (1984).

Intentional harm demand necessary. An employee receiving workers' compensation benefits must allege specific intentional harm directed at himself, and where no genuine issues of material fact are presented, the District Court was correct in granting Summary Judgment against the employee. Noonan v. Spring Creek Forest Products, Inc.. 42 St. Rep. 759 (1985).

(b) if the employer has elected to be bound by the provisions of compensation plan No. 2, by delivering the notice to the board of directors of the employer or the insurer;

(c) if the employer has elected to be bound or is bound by the provisions of compensation plan No. 3, by delivering the notice to the division.

(2) The appointment or election of an officer of a corporation for the purpose of excluding an employee from coverage under this chapter does not entitle such officer to elect not to be bound as an employee under this chapter. In any case, the notice must be signed by the officer under oath or equivalent affirmation and is subject to the penalties for false swearing.

(3) The division shall review any election by officers of private corporations not to be bound as an employee to assure compliance with this chapter.

History: En. Sec. 3, Ch. 96, L. 1915; re-en. Sec. 2842, R.C.M. 1921; re-en. Sec. 2842, R.C.M. 1935; amd. Sec. 1, Ch. 95, L. 1963; amd. Sec. 1, Ch. 145, L. 1971; amd. Sec. 1, Ch. 95, L. 1974; R.C.M. 1947, 92-208; amd. Sec. 60, Ch. 197, L. 1979.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.
"Division" defined, 39-71-116.
"Insurer" defined, 39-71-116.
"Employer" defined, 39-71-117.
"Employee" defined, 39-71-118.
Compensation plan No. 1, Title 39, ch. 71, part 21.
Compensation plan No. 2, Title 39, ch. 71, part 22.
Compensation plan No. 3, Title 39, ch. 71, part 23.

Collateral references: *Grosfield*, § 2.12; 1C *Larson*, §§ 54.00-54.23.

39-71-411. Provisions of chapter exclusive remedy — nonliability of insured employer. For all employments covered under the Workers' Compensation Act or for which an election has been made for coverage under this chapter, the provisions of this chapter are exclusive. Except as provided in part 5 of this chapter for uninsured employers and except as otherwise provided in the Workers' Compensation Act, an employer is not subject to any liability whatever for the death of or personal injury to an employee covered by the Workers' Compensation Act or for any claims for contribution or indemnity asserted by a third person from whom damages are sought on account of such injuries or death. The Workers' Compensation Act binds the employee himself, and in case of death binds his personal representative and all persons having any right or claim to compensation for his injury or death, as well as the employer and the servants and employees of such employer and those conducting his business during liquidation, bankruptcy, or insolvency.

History: En. 92-204.1 by Sec. 1, Ch. 493, L. 1973; amd. Sec. 2, Ch. 550, L. 1977; R.C.M. 1947, 92-204.1(part); amd. Sec. 1, Ch. 329, L. 1979; amd. Sec. 61, Ch. 397, L. 1979.

Cross-References

"Employer" defined, 39-71-117.
"Employee" defined, 39-71-118.
"Injury" defined, 39-71-119.

Failure to comply with accident reporting and notification requirements—not remove employee from coverage. The fact that an insured employer failed to properly file a report of injury under Section 39-71-307, and failed to provide written notice of denial of a claim under Section 39-71-606, does not remove the employee from coverage under the Workers' Compensation Act and thus subjecting the employer to a tort action. *Jacques v. Nelson*, 180 Mont. 415, 591 P.2d 186 (1979).

Action against employer for assault. A discharged employee's sole remedy against former employer for alleged acts constituting assaults by supervisory employee was under the Workers' Compensation Act. *Brown v. Stauffer Chemical Co.*, 167 Mont. 418, 539 P.2d 374 (1975).

S T A T E R E P O R T E R
Box 749
Helena, Montana 59624

VOLUME 42

EXHIBIT
DATE 3-9-87
HB SB315

No. 84-444

RANDAL J. NOONAN,

Plaintiff and Appellant,

v.

SPRING CREEK FOREST PRODUCTS, INC., a Montana corporation, and ROBERT ULRICH,

Defendants and Respondents.

Submitted: Mar. 28, 1985
Decided: May 24, 1985

WORKERS' COMPENSATION--DAMAGES; Appeal from order dismissing civil action for damages based on intentional tort. The District Court granted the employer's motion for summary judgment upon the grounds that there were no genuine issues of material fact on whether the harm suffered was maliciously and specifically directed at the plaintiff out of which such specific intentional harm the plaintiff received injuries as a proximate result. The Supreme Court held that where an employee's allegations go no further than to charge an employer with knowledge of a hazardous machine, the complaint does not state a cause outside the purview of our exclusive remedy statute, and the district court correctly construed the intentional harm exception to the exclusivity provision of the Workers' Compensation Act.

Appeal from the Thirteenth Judicial District Court, Yellowstone County, Hon. Robert Holmstrom, Judge

For Appellant: Moulton, Bellingham, Longo & Mather, Billings

For Respondents: Crowley, Haughey, Hanson, Toole & Dietrich, Billings

Mr. Brent R. Cromley argued the case orally for Appellant; Mr. L. Randall Bishop for Respondents.

Opinion by Chief Justice Turnage; Justices Weber and Gulbrandson concur. Justice Morrison specially concurs and filed an opinion. Justice Sheehy dissents and filed an opinion. Justice Hunt dissents and filed an opinion in which Justice Harrison joins.

Affirmed.

___Mont.___

___P.2d___

Noonan, Plaintiff and Appellant, v.
Spring Creek Forest Products, Inc., Defendants and Respondents
42 St. Rep. 759

Mr. Chief Justice Turnage delivered the Opinion of the Court.

Randal Noonan appeals an order of the Yellowstone County District Court granting the motion for summary judgment of Spring Creek Forest Products, Inc. The trial court's order effectively dismissed the employee's civil action for damages based on intentional tort. We affirm.

Noonan was employed by Spring Creek as a wood planer operator in July of 1980. Spring Creek is a sawmill located near Judith Gap. This was Noonan's first full-time job as the nineteen-year-old had just graduated from high school.

The employee's job required him to feed rough-cut lumber through a planer to be milled to the proper dimensions. On December 22, 1980, a piece of wood became stuck in the planer. Noonan reached in to clear the chip of wood and his left hand was drawn into the machine resulting in serious injury.

Noonan submitted a claim for workers' compensation benefits which was granted. Appellant has received these benefits up through the present lawsuit.

This action was filed on April 22, 1983. Noonan alleged that the injury was the result of the employer's intentional action. Appellant sets forth the following facts in an affidavit and deposition.

1. The planer on which Randy Noonan was working was broken for approximately a month.

2. The employer had been requested to repair the planer but had failed to do so.

3. Randy Noonan had been told by his employer not to turn off the planer because it would slow down production.

4. Randy's foreman would sometimes come to work intoxicated and was intoxicated on the day of the accident.

5. The owners of Spring Creek knew that Randy's foreman worked while intoxicated.

6. No guard was on the planer.

7. The "on" and "off" switches were mislabeled by Spring Creek.

8. Randy was required to run the planer regardless of safety.

9. Spring Creek knew of prior accidents on the planer but concealed the fact of such accidents from Randy Noonan.

10. Spring Creek knew that it was in violation of OSHA Safety Regulations.

11. Spring Creek knew that plaintiff Randy Noonan would be required to retrieve pieces of wood from the planer.

12. If the planer had not been broken, it would not have been necessary for Randy to retrieve wood from the planer and lose his hand.

13. Spring Creek's policy was to run equipment, regardless of safety, until it broke, at which time employees would be laid off without pay.

The trial court granted the employer's motion for summary judgment upon the grounds that there were no genuine issues of material fact on whether the harm suffered was maliciously and specifically directed at the plaintiff out of which such specific intentional harm the plaintiff received injuries as a proximate result. This language of the court's order is from one of our recent decisions on intentional torts in the workplace. Great Western Sugar Co. v. District Court (1980), 188 Mont. 1, 610 P.2d 717.

A second basis for granting defendant's summary judgment was that Noonan had made an election of remedies by accepting workers' compensation benefits.

Noonan has raised the following issues:

1. Does a material issue of fact exist regarding the employer's intent to injure the employee so as to preclude summary judgment?

2. Has the employee effectively elected coverage under the Workers' Compensation Act, thereby precluding recovery of damages in a civil lawsuit?

3. Is the employee entitled to summary judgment on the issue of the employer's liability for the injury?

This appeal presents a question concerning the intentional tort exception to the exclusivity provision of the Workers' Compensation Act. Section 39-71-411, MCA. Appellant is essentially asking this Court to broaden Montana's intentional tort exception and recognize what is presently the minority view in the United States.

Concerning the issue of the employer's intent, Noonan alleges that the thirteen facts set forth above show an intent to injure. In his view, they show, at the least, a material issue of fact on the question of intent; therefore, summary judgment was improper.

Noonan relies on case law from a number of jurisdictions that have recognized an intentional tort in similar circumstances. The leading cases have arisen in Ohio and West Virginia. See Jones v. VIP Development Co. (Ohio 1984), 472 N.E. 2d 1046; Blankenship v. Cincinnati Milacron Chemicals, Inc. (Ohio 1982), 433 N.E.2d 572; Madolidis v. Elkins Industries, Inc. (W. Va. 1978), 246 S.E.2d 907. What these cases have established is that a worker may pursue a cause

of action alleging intentional tort without showing the employer had a specific intent to injure. Ohio and other jurisdictions allow these intentional tort actions to proceed where the employer knows or believes that harm is a "substantially certain" consequence of the unsafe workplace. See for example, Shearer v. Homestake Min. Co. (S.D. 1983), 557 F.Supp. 549. The existence of this knowledge or intent may be inferred from the employer's conduct and surrounding circumstances.

Montana has chartered a course quite different from those states on the cutting edge of the minority trend. As recently as 1980 we held:

" . . . the 'intentional harm' which removes an employer from the protection of the exclusivity clause of the Workers' Compensation Act is such harm as it maliciously and specifically directed at an employee, or class of employee out of which such specific intentional harm the employee receives injuries as a proximate result. Any incident involving a lesser degree of intent or general degree of negligence not pointed specifically and directly at the injured employee is barred by the exclusivity clause as a basis for recovery against the employer outside the Workers' Compensation Act." Great Western Sugar Co. v. District Court, 610 P.2d at 720.

Great Western is arguably distinguishable from the present case in that the injured worker there failed to allege intentional conduct on the part of his employer. Noonan, on the other hand, has clearly made the necessary allegations in his complaint, that if supported by the facts, would remove the cause of action from the exclusivity provision of the Workers' Compensation Act.

We have reviewed each of the plaintiff's alleged facts set forth above and fail to discern how any of the specific facts could be interpreted to mean harm was specifically directed at Noonan. The facts do establish that the owners of Spring Creek operated a hazardous and dangerous workplace. The number of injuries that occurred among a relatively small number of workers provides ample support for this observation. However, to translate this situation into an inference of tortious intent on behalf of the employer would require a standard of law that this Court has thus far refused to adopt.

Where an employee's allegations go no further than to charge an employer with knowledge of a hazardous machine, the complaint does not state a cause outside the purview of our exclusive remedy statute. In so holding we are in accord with several jurisdictions that have reached this question. Fryman v. Electric Steam Radiator Corporation (Ky. 1955), 277 S.W.2d 25 (allegations that metal press was defective and dangerous and that employer was notified of unsafe condition of machine by prior operators were not sufficient to state cause of action on theory of employer's deliberate intent to injure employee); Duk Hwan Chung v. Fred Meyer, Inc. (Or. 1976), 556 P.2d 683 (employer's removal of safety switch on pie-cutting machine not sufficient to establish deliberate intent to injure employee); Jenkins

v. Carman Mfg. Co. (Or. 1916), 155 P. 703 (employer's knowledge of broken condition of a roller on a lumber conveyor, failure to repair it, and direction to employee to work in its vicinity did not constitute a deliberate intent to produce injury); Higley v. Weyerhaeuser Company (Wash.App. 1975), 534 P.2d 596 (plaintiff's affidavit that eye injury was caused by inadequate plexiglas shielding in sawmill and owner's knowledge of flying cutter heads was not sufficient to establish deliberate intention).

The deposition, affidavits and pleadings before the District Court did not raise a genuine issue of material fact on the question of whether Spring Creek intentionally injured Randal Noonan. The lower court was solely confronted with a question of law. As our discussion has indicated, the court correctly construed the intentional harm exception to the exclusivity provision of the Workers' Compensation Act.

The summary judgment of the District Court is affirmed. By the nature of our decision the appellant's additional issues need not be reached.

* * * * *

Mr. Justice Morrison concurs as follows:

I concur in the result but wish to add these comments.

Justice Hunt has done an able job in his dissent, of demonstrating the similarity between "intent" and "willful conduct". There is sufficient evidence in this record to allow a factual determination if we apply a "willful" standard. The conscious disregard of others is the type of conduct that rises to the level of willfulness and were we to adopt such a standard for Workers' Compensation purposes this case should be permitted to go to a jury for resolution of the liability and damage questions.

I believe the legislature intended Workers' Compensation to be the exclusive remedy except in those situations where the defendant's conduct arose from specific intent rather than willfulness. In other words, an assault would allow a personal injury action. Gross negligence, such as we have here, would not.

Were we to open the door for personal injury actions where the defendant's conduct rises to a level of gross negligence or willfulness, I can foresee personal injury actions in many Workers' Compensation cases. Although there may be a basis in sound public policy for allowing this, I do not believe that is what the legislature intended.

* * * * *

Mr. Justice Sheehy, dissenting:

I dissent. On April 22, 1983, Randal J. Noonan filed a complaint

against Spring Creek Forest Products, Inc. and Robert Ulrich, alleging that his employer Spring Creek, and his foreman, Ulrich, had caused his injury in the workplace. Noonan demanded a jury trial. Although his right of trial by jury is secured to him by the Constitution and should remain inviolate, Article II, Section 26, Montana Constitution, 1972, the effect of the decision of the District Court and of the majority in this case is to deprive Noonan of his right to a jury trial where he has presented a genuine issue as to a material fact.

Noonan was injured on December 22, 1980. At 7 o'clock in the morning he had gone to work and at 7:15 the injury occurred. He was "running lumber" at a planer, when a piece of wood became caught between two rollers. He went down to reach in and pull it out. The two rollers to his left were broke and scraping, and he had reported the broken condition of the rollers about a month prior but they were never fixed. When he put his hand in there, he was caught in the rollers and pulled in. The skin of his left arm was pulled off from his wrist to his elbow, he lost three fingers and a thumb, had a toe transplantation, all necessitating a severe and painful recovery process.

The buttons controlling the start and stop of the planer were reversed, "they weren't hooked up right." Noonan reported that when something was wrong with the machine, "he ran it until it broke; you don't stop and fix."

Noonan was not the first to be injured at the planer. On November 19, 1979, Neil R. Miller received a chipped bone in his right hand when he was removing a piece of wood from the planer and the roller caught his glove pulling his hand and arm between the rollers. Randal Noonan had earlier suffered a lacerated finger when he was pulling on a rope and slipped and struck a pulley on the planer. Robert Ulrich on August 12, 1980, suffered a smashed finger when he tried to remove a piece of wood which had been caught in the planer. Robert Ulrich also received a foreign body in an eye on September 18, 1980, when he was checking on the operation of the planer and a wood chip flew into his eye. Randal Noonan's accident happened on December 22, 1980.

In Great Western Sugar Company v. District Court (1980), 188 Mont. 1, 7, 610 P.2d 717, 720, this Court set out the test for "intentional harm" that removes an employer from the protection of the exclusivity clause of the Workers' Compensation Act, Section 39-71-411. If the harm is maliciously and specifically directed at a class of employee, and if out of such specific intentional harm an employee is injured as a proximate result, the test is met.

It should be axiomatic that the proof of malicious and specifically directed harm can be inferred from the facts and circumstances surrounding the occurrence. If that be not true, the only possible way for an employee to recover for an intentionally-caused injury from an employer would be the direct admission of the employer that he did in fact so wilfully intend. Surely the law cannot be so constricted as to prevent a jury or other trier of fact from

determining from all the surrounding facts and circumstance whether in fact the harm was malicious on the part of the employer and specifically directed at a class of employee working on the same machine. This Court has no trouble in criminal cases, where the proof against the defendant must be beyond a reasonable doubt, that his criminal intent may be inferred from the facts established by witnesses and the circumstances developed by the evidence. State v. Welling (Mont. 1982), 647 P.2d 852, 39 St.Rep. 1215; State v. Weaver (Mont. 1981), 637 P.2d 23, 38 St.Rep. 2050. We have stated that intent to injure may be presumed from acts knowingly committed. State v. Brown (1959), 136 Mont. 382, 351 P.2d 219. This Court has no trouble holding that actual fraudulent intent within the meaning of the Uniform Fraudulent Conveyance Act may be established by circumstantial evidence. Montana National Bank v. Michels (Mont. 1981), 631 P.2d 1260, 1263, 38 St.Rep. 334, 337. What beguiling charm of intellect allows inferences to establish malicious intent in criminal cases, in fraudulent conveyances cases, but not in a case where a man's left arm is literally ripped to pieces?

I would hold in this case that a genuine issue of material fact exists here as to whether the employer maliciously and specifically directed intentional harm to the plaintiff. A jury should decide that issue.

From a reading of the District Court's memorandum granting summary judgment, I must conclude that the District Court was led off-base by another beguiling argument. The district judge principally felt that Noonan, in accepting Workers' Compensation benefits, had made an "election" which prevented him from suing the employer for intentional harm.

In this case the insurance company which protects Spring Creek from tort liability is also the insurer that provides coverage for its Workers' Compensation cases. The insurer, through Missoula Service Company, on December 30, 1980, invited Noonan to make an industrial accident claim by sending him claim forms for compensation and assuring him that "you will receive all the benefits to which you are entitled according to law."

It is not inconsistent for Noonan to be receiving Workers' Compensation benefits at the same time that he is proceeding with his intentional harm claim against his employer. If he should lose the intentional harm claim, he is nevertheless undoubtedly entitled to Workers' Compensation benefits. If he should win his intentional harm claim, the payments provided by the employer under the Workers' Compensation Act would be an offset to any recover he might make on the intentional harm claim. Thus, the recoveries against the employer are merely cumulative; there is no inconsistency as far as Noonan is concerned, because on the same set of facts he is contending that an intentional harm occurred.

In Massett v. Anaconda Company (Mont. 1981), 630 P.2d 736, 739, 38 St.Rep. 961, 964, this Court held that an employee's application for a 30 year pension to his employer did not bar his claim for disability

benefits from the same employer. In passing we said:

"As a legal doctrine, election is the exercise of a choice of an alternate and inconsistent right or course of action. Full knowledge of the nature of inconsistent rights and the necessity of choosing between them are elements of the election. (Citing authority) (election of remedies presupposes the knowledge of alternatives with an opportunity for choice); (Citing authority) (in order that election of one remedial right shall bar another, the rights must be inconsistent and the election must be made with knowledge.) . . ."

In other cases we have held that an election of remedy exists only when a remedy is pursued to a final conclusion. State ex rel. Crowley v. District Court, Gallatin County (1939), 108 Mont. 89, 88 P.2d 23. We have said that an apparent election made under a mistake as to rights is not binding as "election of remedies," Rowe v. Eggum (1938), 107 Mont. 378, 87 P.2d 189.

"Mere acceptance of some compensation benefits, then, is not enough to constitute an election. There must also be evidence of conscious intent to elect a compensation remedy and to waive his other rights." 2A. Larson 12-117 to 12-121, § 67.35, (1983).

In this case it is clear that the remedies are cumulative, that Noonan has not procured a final disposition of his Workers' Compensation claim, that he plainly has not waived his right to sue for the intentional harm, and the mere acceptance of compensation does not constitute an election. The District Court erred in giving effect to the doctrine of the election of remedies to grant summary judgment against Noonan.

Noonan has also asked us on appeal to grant him summary judgment as to the employer's liability on his intentional harm case. It is true that in the District Court, Spring Creek did nothing to disprove the facts and circumstances which give rise to the inference here of intentional harm by the employer. Still, for the same reason that I feel that summary judgment should not have been granted against Noonan, I feel that summary judgment should not be granted against Spring Creek. The issue of fact is for a trier of fact, in this case for the jury which was demanded.

I would reverse and remand for trial upon the merits of the plaintiff's claim of intentional tort.

* * * * *

Mr. Justice Hunt, dissenting:

I respectfully dissent.

While I agree that the policy of Workers' Compensation is to protect the employer from employee tort action for injuries received during their employment, I believe there must be a limit on what the employee must tolerate. In my opinion in the case cited by the

majority, for its present holding that the employee can not file a suit unless he can show that he personally was the victim of an intentional injury, this Court paved the way for recovery of an intentional tort. That case is Great Western Sugar Co. v. District Court (1980), 188 Mont. 1, 7, 610 P.2d 717, 720:

"We hold that the 'intentional harm' which removes an employer from the protection of the exclusivity clause of the Workers' Compensation Act is such harm as it [sic] maliciously and specifically directed at an employee, or class of employee out of which such specific intentional harm the employee receives injuries as a proximate result. Any incident involving a lesser degree of intent or general degree of negligence not pointed specifically and directly at the injured employee is barred by the exclusivity clause as a basis for recovery against the employer outside the Workers' Compensation Act." (Emphasis added.)

In the case at bar the cause of action was fully pled, and in my opinion well and truly established a prima facie case for liability. To affirm a finding that none of the [13] specific factual allegations could be interpreted to mean harm was "specifically directed" at Noonan, misses the point.

The unsafe workplace existed over a protracted period of time, within the full knowledge of the employer, amid various complaints by employees and was in reckless disregard of their safety. Such conduct, "specifically directs the harm at each and every employee."

The "intentional harm" we talked about in the Great Western Sugar Co. case, supra, does not, of course, refer to any degrees of negligent conduct. Nor does it imply such conduct must go so far as to constitute conduct similar to that of assault. A specific intent to cause harm is not necessary.

Rather, what we have here is the type of intentional conduct known as reckless disregard of safety. Perhaps it is best summed up in Restatement (Second) of Torts § 500, and the Special Note:

"The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

"Special Note: The conduct described in this Section is often called 'wanton or willful misconduct' both in statutes and judicial opinions. On the other hand, this phrase is sometimes used by courts to refer to conduct intended to cause harm to another." (Emphasis added.)

Comment a following the Special Note distinguishes two types of recklessness:

"a. Types of reckless conduct. Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which creates a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it."

The conduct of Spring Creek comes within the former type. Although reckless disregard of safety is not akin to the classic type of intentional tort, it nonetheless has a close relationship to other conduct which is intentional. Comment f, following the Restatement, supra, provides:

"f. Intentional misconduct and recklessness contrasted. Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from fact which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results."

Perhaps one reason the majority ruled as it did was because in alleging an "intentional injury," Noonan was inartful. He did not base his claim on an assault, or battery, or any of that genre of intentional tort one readily thinks of when "intentional" injury is alleged. Perhaps Noonan's complaint could have been better drafted. But the District Court could have, and in my opinion should have, discerned that Spring Creek's reckless disregard for the safety of its employees embodied the intent element of Noonan's complaint.

The annotation in 96 A.L.R.3d 1064, et seq. (1979) provides an excellent discussion of the circumstances wherein various types of "intentional" conduct are not barred by the exclusive remedy provision of the Workers' Compensation Acts in several jurisdictions. One case cited therein, Mandolidis v. Elkins Industries, Inc. and also cited in the majority opinion, supra, should be reviewed carefully by this Court. That case was described as being on the "cutting edge of the minority trend." Most importantly, Mandolidis is not inconsistent with Great Western Sugar Co. The majority opinion concedes it is only "arguably distinguishable." The distinction lies in specific intent versus reckless disregard for safety. The similarity, however, lies in the fact that the unsafe conditions were specifically directed at a class of employees out of which the employee received injuries.

In my opinion, a distinction should be made between specific intent and reckless disregard of safety. Then, Noonan's allegation

would present a question of fact, rendering summary judgment inappropriate.

One other thing by way of clarification that I would like to discuss is one of the issues that was raised by Noonan according to the majority opinion. That issue is as follows:

"Has the employee effectively elected coverage under the Workers' Compensation Act, thereby precluding recovery of damages in a civil lawsuit?"

This question should never have been raised but since it has, it should be put to rest permanently. The answer to the question is no. If an employer has coverage, the employee is covered if he is injured at his place of employment and files a claim. This is true whether the injury is a result of an intentional harm or not. There is no provision in the law that allows an injured employee to refuse benefits of the Act in the unlikely event that he wanted to do so after he has filed a claim. Similarly, there is no provision for withholding benefits from an injured employee who meets the requirements of the Act. His benefits continue as long as he is entitled to them or he recovers in his tort action. In that case, necessary adjustments will be made to offset any overpayment because of Workers' Compensation benefits that may exist.

* * * * *

Mr. Justice Harrison dissenting:

I concur with the foregoing dissent of Mr. Justice William E. Hunt, Sr.

EXHIBIT
DATE 3-9-87
SB315

WITNESS STATEMENT

NAME Herb. H Resh BILL NO. S.315

ADDRESS Box 480 Diamond Road DATE 3/9/87

WHOM DO YOU REPRESENT? IAW Forest Products

SUPPORT X OPPOSE AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

Just To Deliver 40,000 mm Board ft of Logs to our mill Cost 7,200,000 MM dollars x .29%, 1986 Rate, = 2,088,000 M m dollars we pay out to contractors to deliver logs. W. th the Jan 1, 1987 rate increase we will pay an added 432,000 M dollars With the anticipated rate increase in July raising the Rate to 45%, We would be impacted 1,152,000 Million dollars from the 1986 Rate. Our employees just Took a wage decrease so we could break even or make a small profit. The increasing Rate increase has more than taken any wage cut we recived from our employees. We may have to ask for another wage cut. We currently have 120 employees which Took an average wage cut of $1.15/hr. An employee works about 2080 hrs per year which equals $287,040 savings.

I support S. 315 as is

3-9-87
SB 315

EXHIBIT
DATE 3-9-87
HB SB315

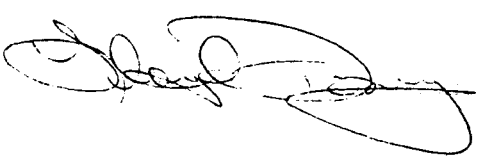
MY NAME IS LLOYD DONEY AND I AM THE PERSONNEL AGENT AT ASARCO TROY UNIT. 350 PEOPLE ARE EMPLOYED AT THE UNIT. I AM TESTIFYING IN FAVOR OF SB 315.

BEFORE COMING TO MONTANA I WAS PERSONNEL AGENT IN IDAHO. I WANT TO STATE THAT LAST YEAR IDAHO REFUNDED $4.2 MILLION DOLLARS TO ITS WORKERS'S COMPENSATION POLICY HOLDERS. IT DID THIS UNDER A SYSTEM THAT CAN ACTUALLY PAY MORE IN WEEKLY COMPENSATION BENEFITS THAN MONTANA.

SB 315 IS GOOD BECAUSE IT PROMOTES THE EMPLOYER-EMPLOYEE RELATIONSHIP RATHER THAN THE PRESENT SYSTEM THAT TENDS TO DESTROY IT. IT TELLS THE INJURED WORKER HE IS TO RETURN TO WORK AND NOT LOOL TOWARD THE SYSTEM AS SOME SORT OF A WELFARE PROGRAM. THE PROPOSED LEGISLATION WILL DECREASE ATTORNEY INVOLVEMENT AND THEREBY DECREASE COSTS TO THE SYSTEM.

FINALLY, SB 315 PROMOTES THE PHILOSOPHICAL UNDERPINNINGS OF WORKER'S COMPENSATION, IE. TO HELP THE INJURED WORKER AND GET HIM/HER BACK TO THE WORKPLACE.

REFORM IS NEEDED. A BAND-AID APPROACH IS NOT THE SOLUTION. SB 315 WILL FORM THE BASIS FOR LOWERING RATES AND I URGE PASSAGE OF COMPROMISE SB 315 WITHOUT AMENDMENT.



WITNESS STATEMENT

DATE 3-9-87

SB 315

NAME _____ BILL NO. _____

ADDRESS _____ DATE _____

WHOM DO YOU REPRESENT? _____

SUPPORT _____ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

EXHIBIT
DATE 3-9-87
HB SB 315

MONTANA CHIROPRACTIC ASSOCIATION

TESTIMONY, SENATE BILL 315
MARCH 9, 1987
SUBMITTED BY: BONNIE TIPPY, LOBBYIST, THE MONTANA CHIROPRACTIC ASSOCIATION

We support the concept of reformation of the worker's compensation laws in the state of Montana. We know that a Senate subcommittee has worked very hard to come up with a good bill for your consideration, but hope that this committee would consider a technical amendment.

The problem we have with the bill as it is written is that it only allows impairment ratings to be done by medical doctors. Many other types of health care professionals are the primary treating providers in cases of injured workers. Examples would be audiologists, physical therapists, and, of course chiropractors. Chiropractors treat many, many injured workers. Is it really fair that an impairment rating be done by a medical doctor in these cases? We believe that this is unfair both to the treating providers as well as to the injured worker.

The amendment I am offering for your consideration today will not change the fact that the department is going to be able to appoint all of the people who do impairment ratings. We have no quarrel with that at all. The only thing this amendment does is require that that appointed person be of the same discipline as the treating health care provider. This amendment in no way changes the process by which impairment ratings are done. The American Medical Association has established guides for doing impairment ratings, and any of the many types of health care providers can and do use this guide. I would ask this committee to accept this amendment, and realize that in comparison to the overall scope of this bill it is very small indeed. But please do not overlook its importance to our association.

EXHIBIT
DATE 3-9-87
HB SB 315

ncreased the assessment amount from $25 to $75.

(2)

Cross-References
"Division" defined, 39-71-116.
"Payroll" defined, 39-71-116.
"Public corporation" defined, 39-71-116.

39-71-309. Hospitals to submit schedule of fees and charges — effective period of schedule — when to be submitted. All hospitals must submit to the division a schedule of fees and charges for treatment of injured workers to be in effect for at least a 12-month period unless the division and the hospital agree to interim amendments of the schedule. The schedule must be submitted at least 30 days prior to its effective date and may not exceed the charges prevailing in the hospital for similar treatment of private patients.

History: En. 92-706.1 by Sec. 1, Ch. 252, L. 1973; amd. Sec. 1, Ch. 43, L. 1975; amd. Sec. 1, Ch. 189, L. 1975; R.C.M. 1947, 92-706.1(2); amd. Sec. 57, Ch. 397, L. 1979.

Cross-References
"Division" defined, 39-71-116.

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. SENATE BILL NO. 315 DATE MARCH 9, 1987

SPONSOR SENATOR BOB WILLIAMS

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
[illegible]	[illegible]		✓
[illegible]			✓
[illegible]	[illegible]	✓	
[illegible]	[illegible]	✓	
BRUCE VINCENT	WCAC	✓	
[illegible]	[illegible]	✓	
[illegible]	[illegible]	✓	
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[illegible]	[illegible]	✓	
[illegible]	[illegible]	—	
Gene Huntington	Governors	✓	
[illegible]	[illegible]	✓	
[illegible]	[illegible]	✓	
[illegible]	[illegible]	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. SENATE BILL NO. 315 DATE MARCH 9, 1987

SPONSOR SENATOR BOB WILLIAMS

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Harold Langley	Mont. Nurses Assn.	✓	
[illegible]	Mt. Stockgrowers & Cattlemen	✓	
[illegible]	[illegible]		✓
[illegible]	[illegible]	✓	
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[illegible]	[illegible]	✓	
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Jim Murry	Mont. AFL-CIO		✓
[illegible]	[illegible]	✓	
HADWICK N. SMITH	Mt. Hosp Ass'n	✓	

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