

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

March 13, 1987

The meeting of the Business and Labor Committee was called to order by Chairman Les Kitselman on March 13, 1987 at 8:00 a.m. in Room 312-F of the State Capitol.

ROLL CALL: All members were present.

SENATE BILL NO. 280 - Senator George McCallum, Senate District No. 26, Plains, sponsored the bill. Senator McCallum stated that there are problems with the bill and would cause a greater amount of unemployment in Montana. He requested that the bill be tabled.

EXECUTIVE ACTION

ACTION ON SENATE BILL NO. 280

Rep. Jones moved that Senate Bill No. 280 BE TABLED. The motion carried unanimously.

SENATE BILL NO. 319 - Senator Joseph Mazurek, Senate Bill No. 23, Helena, sponsored the bill. Senator Mazurek stated that this bill addressed workers' compensation, and that the Attorney General's opinion was that a water commissioner is an employee of the district judge for workers' compensation purposes. He said a water commissioner is someone that the district judge appoints, sometimes on a temporary basis, to investigate and resolve disputes between irrigators on adjudicated streams, and are full time employees of the irrigation district and would be covered by workers' compensation insurance. He commented that these commissioners that the bill addresses are very limited, appointed for a short time, during an irrigation season to mediate disputes between water users on a particular stream. He said that the district judge does not have funds at his disposal to have workers' compensation coverage for a commissioner that he might hire on a two or three week basis in the summer, therefore, he requested that this bill be introduced.

PROPONENTS

None.

OPPONENTS

None.

QUESTIONS

Rep. Swysgood asked if the ditch rider that works daily, and is employed for the total irrigation season, from May through August, would be excluded from coverage. Mr. Robinson responded that they are employees of the irrigation district and are covered under the irrigation district insurance policy.

Rep. Driscoll asked Mr. Robinson if the judge was covered by workers' compensation. Mr. Robinson responded that the judge was covered under the state fund policy.

Rep. Driscoll asked if this person was not covered by workers' compensation and they went to mediate a dispute about water and were in a state car or one that belonged to the court and he was injured, could he bring a law suit against the court because they did not have workers' compensation. Mr. Robinson responded that they would be put under the court's workers' compensation policy.

Rep. Simon stated the court has a policy on the judge and the other employees of the court, but this man is not an employee of the court, he is an employee of the district judge and the judge does not have a policy; what kind of problems would he have in obtaining the coverage. Mr. Robinson responded that if the judge did not have a policy and there was a problem that went back to the judge, the judge would be responsible for the injury, or he would have to get a policy.

CLOSING

Sen. Mazurek stated he has submitted correspondence between Judge Lesley, Judge Loble, and two Attorney General's opinions which addresses the problem. He said they are concerned about the problem and would like to have it solved. He commented the feeling of the judges was that it comes up so infrequently in many areas that it would be appropriate to exempt those employees. Exhibit Nos. 1-4.

SENATE BILL NO. 313 - Senator Chet Blaylock, Senate Bill No. 43, Laurel, sponsored the bill. Senator Blaylock stated that this bill was at the request of the Department of Labor and Industry to clarify the definition of the independent contractor.

Peggy Hartman, Commissioner of Labor and Industry. Ms. Hartman stated this bill would make it easier for employers by making one definition of the independent contractor, one determination, one appeal process, and it does not apply to the benefit portion of workers' compensation.

PROPONENTS

None.

OPPONENTS

None.

CLOSING

Senator Blaylock made no further comments.

EXECUTIVE ACTION

ACTION ON SENATE BILL NO. 313

Rep. Jones moved that Senate Bill No. 313 BE CONCURRED IN. The motion carried unanimously.

ACTION ON SENATE BILL NO. 319

Rep. Driscoll moved that Senate Bill No. 319 BE NOT CONCURRED IN.

Rep. Simon commented that the bill had many problems, it was even unclear as to how the water commissioners were paid, or who their employer was.

Rep. Brandewie commented that this bill should not be passed, and it can't be clarified. He said if someone gets injured, someone has to pay the workers' compensation, and if exceptions are made it could lead to many problems, and expose many employees to be without coverage.

Rep. Nisbet moved a substitute motion that Senate Bill 319 BE TABLED. The motion carried unanimously.

SENATE BILL NO. 299 - Senator Darryl Meyer, Senate District No. 17, Great Falls, sponsored the bill. Senator Meyer stated this bill was a statute of limitations under the Securities Act, and is requested by the State Auditor.

Kim Schulke, Deputy Securities Commissioner, presented a section by section review of the bill, and statutes of limitations for securities actions in other states. Exhibit Nos. 5 and 6.

PROPONENTS

Bruce MacKenzie, General Counsel, DA Davidson and Company. Mr. MacKenzie stated the unique feature of the securities law is that it imposes liability on individuals who are not

directly committing a fraud, and that is the portion of the bill they are in favor of, and putting a cap of 5 years on that liability. He said this provision brings Montana in conformity with other states so that it is in an average range.

Rick Tucker, representing IDS Financial Services, and as a former Securities' Commissioner. Mr. Tucker stated that this bill is long overdue, and for the reasons that Mr. MacKenzie cited, they support the bill.

OPPONENTS

None.

QUESTIONS

Rep. Wallin asked Mr. Schulke if the sale is made of stock and the broker makes the sale and it is discovered within five years that the stock was fraudulent, is the brokerage company responsible and not the salesman. Mr. Schulke responded that in that situation both the broker and the salesman would be liable.

Rep. Swysgood asked on page 7, line 9, if there was some reason why this was made retroactive. Ms. Schulke responded the statute of limitations now under the Securities Act is eight years from the date of the contract. She commented that was decided by the Supreme Court in early 1985, and this bill is proposed because that statute of limitations is the longest in the country and is a burden on industry. Also, she said, the bill is proposed as a compromise between investor protection and the industry, and is retroactive.

Rep. Wallin asked Ms. Schulke to explain what protection this bill provides to a person that is about to buy a security. Ms. Schulke responded that the person can bring a suit within two years if it is based on registration, or within 5 years if it is based on fraud.

CLOSING

Senator Meyer made no further comments.

SENATE BILL NO. 314 - Senator H. W. "Swede" Hammond, Senate District No. 9, Malta, sponsored the bill, but Rep. Fred Thomas, House District No. 62, presented the bill in his absence. Rep. Thomas stated this bill is an act to exclude fair workers from payment of overtime compensation.

PROPONENTS

Bill Chiesa, General Manager, MetraPark, Billings, submitted written testimony. Exhibit No. 6.

Brad Johnson, Gallatin County Fair Board, Bozeman. Mr. Johnson stated that under the existing legislation, the impact would mean that they would have to pay overtime and would lose about 200 person hours of their labor resource, and are faced with two alternatives, they can provide a greater lessened level of service to their exhibitors and people that go to the fairs, or terminate the employment of those original ten people, and hire ten new ones. He said the proposed bill is equitable.

OPPONENTS

Rep. Jerry Driscoll, House District No. 92, Billings. Rep. Driscoll stated that these people are paid very low wages, and now they won't get paid overtime. He said the fair works the people 12 hours a day, 7 days a week, and no matter how many hours they work they won't get overtime. He said this is not a fair bill.

QUESTIONS

Rep. Cohen asked why the fair board does not hire more employees so they would not need to pay overtime to the ones they have. Mr. Johnson stated that administratively it would be more complicated, because in terms of the way they are equipped, they cannot use 20 people effectively at the same time with the limited number of pieces of equipment, brooms, trucks, etc., they have. He said they have to make a major investment in equipment to utilize more people.

Rep. Cohen asked what the wages were for these people. Mr. Johnson responded that it averages to be about \$3.60 per hour.

Rep. Hansen asked if they ever pay overtime to their employees, and what was their rationale for not paying overtime. Mr. Chiesa responded that they do pay overtime in some cases, to their full time, permanent staff such as the secretarial staff. He said what they are referring to is the summer employees.

Rep. Simon asked what personnel they have that requires specialized training that requires them to work more than 8 hours a day. Mr. Chiesa responded that they have a number of supervisory staff people that work in different sections and not just in a particular time period, because they are open for different hours. He said that in the fifth consecutive day, they pay overtime or retrain the people for the different sections.

Rep. Swysgood asked if the fair operates to make a profit. Mr. Chiesa responded that by state law they cannot operate to make a profit, but they have to operate within their budget, and they receive tax funds. He said that during the actual 8 day event, they generate more revenue than expenses.

CLOSING

Rep. Thomas made no further comments.

EXECUTIVE ACTION

ACTION ON SENATE BILL NO. 313

Chairman Kitselman moved to reconsider action on Senate Bill No. 313. The motion carried unanimously.

Rep. Driscoll moved the amendment, on page 13, line 21, strike line 21 in its entirety, and line 22 through the word "that". The motion carried unanimously.

Rep. Driscoll moved that Senate Bill No. 313 BE CONCURRED IN AS AMENDED. The motion carried unanimously.

ACTION ON SENATE BILL NO. 299

Rep. Swysgood moved that Senate Bill No. 299 BE CONCURRED IN. The motion carried unanimously.

ACTION ON SENATE BILL NO. 314

Rep. Hansen moved that Senate Bill NO. 314 BE NOT CONCURRED IN.

Rep. Thomas moved a substitute motion that Senate Bill No. 314 BE CONCURRED IN.

Rep. Brandewie commented that it was not right to save money at the expense of people that are working at \$3.60 per hour.

Rep. Bachini commented that he sees no need for the bill.

Rep. Pavlovich made a substitute motion that Senate Bill No. 314 BE TABLED. The motion carried unanimously.

ACTION ON SENATE BILL NO. 186

Rep. Thomas moved that Senate Bill No. 186 BE CONCURRED IN.

Rep. Thomas moved the amendments proposed by the Insurance Commissioner. The motion carried unanimously.

Rep. Thomas moved that Senate Bill No. 186 BE CONCURRED IN AS AMENDED. The motion carried unanimously.

COMMITTEE RESOLUTION

Chairman Kitselman stated that it has been requested by the people concerned that the Business and Labor Committee study the lien laws, and 2/3 vote of the committee was needed to carry the resolution. He said the select committee on lien laws last year did not have time to study the particular portion regarding the agricultural liens, petroleum supplier liens, etc.

Rep. Simon moved that the Business and Labor Committee draft a study resolution for the lien laws. The motion carried with Rep. Grinde opposed.

ADJOURNMENT

The meeting adjourned at 9:20 a.m.



REP. LES KITSELMAN, Chairman

DAILY ROLL CALL

BUSINESS & LABOR

COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date MARCH 13, 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	✓		

STANDING COMMITTEE REPORT

MARCH 13

19 86

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report SENATE BILL NO. 186

do pass
 do not pass

be concurred in
 be not concurred in

as amended
 statement of intent attached

REP. LES KITSELMAN

Chairman

AMENDMENTS AS FOLLOWS:

1) Page 4, line 14
Following: "securities"
Insert: "to clients"

2) Page 4, lines 16 and 17
Strike: subsection (iii) in its entirety
Renumber: subsequent subsections

3) Page 12, line 9
Strike: "and the investment adviser representative"

Rep. Fred Thomas will sponsor

MS
THIRD

BLUE

reading copy (_____)
color

STANDING COMMITTEE REPORT

MARCH 13

19 87

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report ~~SENATE~~ BILL NO. 313

do pass
 do not pass

be concurred in
 be not concurred in

as amended
 statement of intent attached

REP. LES KITSELMAN

Chairman

AMENDMENTS AS FOLLOWS:

- 1) Page 13, lines 21 and 22
Strike: line 21 in its entirety and line 22
through "that"

Rep. Jerry Driscoll will sponsor

MS
THIRD

BLUE

reading copy (_____)
color

STANDING COMMITTEE REPORT

MARCH 13

19 37

Mr. Speaker: We, the committee on BUSINESS AND LABOR

report ~~HOUSE~~ BILL NO. 299

do pass
 do not pass

be concurred in
 be not concurred in

as amended
 statement of intent attached

REP. LES KITSELMAN

Chairman

Rep. Norm Wallin will sponsor

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THIRD

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reading copy (_____)
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EXHIBIT 1
DATE 3/13/87
SB SB 319

District Court

First Judicial District
County Courthouse
Helena, Montana 59601

January 13, 1987

Honorable Senator Joe Mazurek
Capitol Station
Helena, Montana 59620

Re: Workers' Compensation Act
Coverage of Water Commissioners

Dear Joe:

Enclosed is correspondence I have received from Don MacIntyre, legal counsel for the Department of Natural Resources and Conservation.

Some time ago it came to my attention that "ditch riders" appointed by the district courts to administer distribution of water on various streams throughout the state are required to have Workers' Compensation. The thought was that ditch riders are employees of the judge. However, the judge has no funds with which to pay the premiums for Workers' Compensation insurance. Moreover, the users of water on the stream are not, generally speaking, inclined to pay any such thing. In addition, who would do the paperwork? As a result in most cases, the ditch riders simply do not have any Workers' Compensation at all.

It would be my view that they should be exempted from Workers' Compensation by use of one of Don's proposed bills unless the state wishes to set up a fund which would pay the premiums.

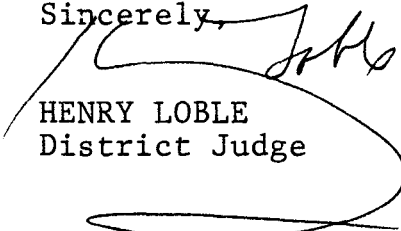
Don suggests one of the two enclosed bills drafted by him might be enacted to cure this difficulty. The first proposal would have the water commissioners defined as casual employees and thus exempt from Workers' Comp and the second proposal would be to simply say that the water commissioners are not required to have Workers' Comp. I do not see that it would make much difference how it was done. However, I will send a copy of this to Mr. Shapiro, the attorney for Workers' Comp, and if he has any comment, he will no doubt get in touch with you.

Honorable Senator Joe Mazurek
January 13, 1987
Page Two

It would be appreciated, Joe, if you could introduce such a bill or get someone else to do it who might be interested in the subject. As it is, it is a very confused situation.

Enclosed is a copy of my file on this matter. Of particular interest is the Attorney General's Opinion.

Sincerely,



HENRY LOBLE
District Judge

pc: Donald D. MacIntyre
Steve Shapiro
The Honorable W. W. Lessley
Encs.



MONTANA WATER COURTS

STATE OF MONTANA

RECEIVED
FEB 01 1984
MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

EXHIBIT 3
DATE 3/13/87
SB 319

WATER JUDGES:

January 30, 1984

Upper Missouri River Basin
Chief Judge W. W. Lessley
P.O. Box 1566X 879
Bozeman, MT 59715

Lower Missouri River Basin
Judge Bernard W. Thomas
P.O. Box 938
Chinook, MT 59523

Clark Fork River Basin
Judge Robert M. Holter
Lincoln County Courthouse
Libby, MT 59923

Yellowstone River Basin
Judge Roy C. Rodeghiero
P.O. Box 448
Roundup, MT 59072

Donald Mac Intyre
Department Natural Resources
and Conservation
32 South Ewing
Helena, MT 59620

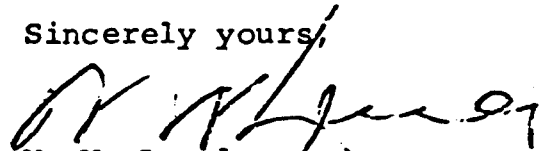
Dear Don;

You recall 'many moons ago' I spoke to you about asking the Attorney General for an opinion on the application of workmen's compnsation to an appointed Water Commissioner.

One of the Water Masters here, Suzanne Nellen, has prepared this suggestion for me. I have checked it and I think it has some merit.

I would appreciate your asking the Attorney General for his opinion.

Sincerely yours,


W. W. Lessley,
Chief Water Judge

WWL/nf
Enclosure

is appointed by a District Court Judge, the employer should be the water users who are benefitting from the appointment of the water commissioner. 2) Since the water users would be considered the employer, and a water commissioner considered an employee, the Workers' Compensation Act applies and the employer shall be bounded by a compensation plan.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'Suzanne Nellen', written in dark ink.

A. Suzanne Nellen,
Water Master

WORKERS' COMPENSATION - Water Commissioner;

MONTANA CODE ANNOTATED - Sections 85-5-101 through 85-5-108, 39-71-401, 39-71-116, 39-71-117, 39-71-118, 85-5-301, 85-5-201 through 85-5-206, Title 85, chapter 5.

- HELD:
1. When a District Court Judge appoints a water commissioner pursuant to Title 85, chapter 5, the water users who are benefitting from the appointment of the water commissioner should be considered the employer.
 2. Since the water users would be considered the employer, and a water commissioner considered an employee, the Workers' Compensation Act applies and the employer shall be bounded by a compensation plan.

January 26, 1984

Judge W. W. Lessley
Chief Water Judge
P.O. Box 879
Bozeman, MT 59715

Dear Judge Lessley:

You have requested my opinion on the following question:

1. When a District Court Judge appoints a water commissioner pursuant to Title 85, chapter 5, is the District Court Judge considered the employer of the water commissioner or are the water users considered the employer of the water commissioner and therefore liable for payment of workers' compensation?

Chapter 5, entitled "Water Commissioners," of the MCA, allows for appointment of water commissioners by District Court Judges. Usually this appointment occurs upon application from 15% of the owners of water rights affected by a decree, but an appointment may occur under other circumstances. At the time of the appointment of such water commissioner, the District Court

shall fix the compensation, and the owners and users of the distributed water shall pay their proportionate share of such fees and compensation. Section 85-5-101, MCA. The water commissioner has the power and duty to distribute water, maintain and repair ditches, record daily distribution of water and other duties. Section 85-5-101 through 85-5-108, MCA.

Section 39-71-401, MCA, states that the Workers' Compensation Act applies to all employers as defined in 39-71-117 and to all employees as defined in 39-71-118. An employer who has an employee in service under any appointment or contract of hire, express or implied, shall be bounded by a compensation plan. As the Section indicates, the employee may be appointed to the employer as is the case in our factual situation.

Section 39-71-117, MCA, defines an employer and it appears broad enough to apply to both the District Court Judge and the water users. Section 39-71-118, MCA, provides the definition of an employee which may include the water commissioner.

Presuming the District Court Judge would be considered the employer of the commissioner, Section 39-71-401, MCA, further provides the types of employment in which workers' compensation provisions do not apply. Specifically, Section 39-71-401, MCA, states that workers' compensation does not apply to a casual employee. Section 39-71-116, MCA, defines casual employment as employment not in the usual course of trade, business, profession or occupation of the employer. It is apparent that if the District Court Judge was considered the employer, a water commissioner would fall in the category of a casual

employee. The Water Commissioner is not in the usual course of trade, business or profession of the Judge and therefore Workers' Compensation Act does not apply.

The test used in determining whether an employer-employee relationship exists within any relationship is whether the purported employer has the right to control details of the individual's work. This test is known as the control test. State ex rel. Ferguson v. District Court, 164 Mont. 84; Nelson v. Stuckey, 89 Mont. 277, 300 P. 287; Grief v. Industrial Account Fund, 108 Mont. 519, 93 P.2d 96. The water commissioner's position is initiated by the water users as well as controlled by their demands and needs. The rights and duties of the water users is fully explained in Sec. 85-5-301, MCA. As indicated in the statute, a dissatisfied water user can file a complaint with the Court. Upon the determination of a hearing, the Judge shall make such findings and order as he considers just and proper.

The fact that the District Court Judge merely appoints a water commissioner does not designate that Judge as the employer. As stated above, in most circumstances the District Court Judge appoints a water commissioner upon the request of the water users. The owners and the users of the distributed waters under the appointed water commissioner pay their proportionate share of fees and compensation owed to the water commissioner. Sec. 85-2-201 MCA, Sec. 85-5-101(4), MCA. The term of the commissioner's service is determined upon the Judge's discretion or when requested in writing by a least three persons entitled to the use of the water for which the commissioner is appointed. Sec. 85-5-104, MCA.

Therefore, it is my opinion: 1) When a water commissioner

is appointed by a District Court Judge, the employer should be the water users who are benefitting from the appointment of the water commissioner. 2) Since the water users would be considered the employer, and a water commissioner considered an employee, the Workers' Compensation Act applies and the employer shall be bounded by a compensation plan.

Very truly yours,

A handwritten signature in cursive script, appearing to read "A. Suzanne Nellen".

A. Suzanne Nellen,
Water Master



EXHIBIT 4
DATE 3/13/87
SB 319

District Court

First Judicial District
County Courthouse
Helena, Montana 59601

May 13, 1986

Hon. W. W. Lessley
Chief Water Judge
P. O. Box 879
Bozeman, MT 59715

Re: Water Commissioners--Workers' Compensation

Dear Judge Lessley:

Enclosed is a copy of Attorney General's Opinion No. 56, found in Volume No. 40 of those Opinions. The holding is that:

"When a district court judge appoints a water commissioner pursuant to Title 85, chapter 5, MCA, the district court judge is considered the employer for the purpose of payment of workers' compensation."

So far as I know, this district does not have funds with which to pay Workers' Compensation for water commissioners. I would assume that it would be the obligation of the State and not of the county. I do not know that, however. A representative of the Beaver Creek Water Users' Association of Broadwater County has asked me whether they should continue to pay the premiums for Workers' Compensation for their water commissioner, as they have in the past, or whether it is the obligation of the district judge. I have no ready answer to that question.

I discussed this with Steve Shapiro, the attorney for Workers' Compensation. He pointed out to me that although § 85-5-101, MCA, requires the district judge to appoint water commissioners, § 3-7-211, MCA, allocates that duty to the water judge of each water division. Since I have been on the bench (as did Judge Meloy before me), I have appointed the water commissioners who

Hon. W. W. Lessley
Page 2
May 13, 1986

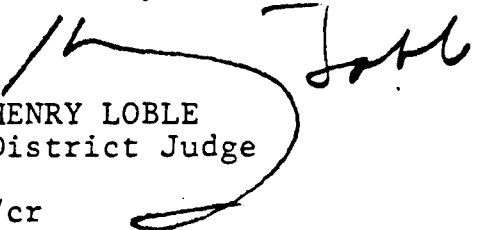
supervise the various water decrees in Broadwater and Lewis and Clark Counties. The water judges are appointed in accordance with § 3-7-201, MCA, et seq. So far as I know, except when appointed in a specific case, I am not a water judge. The Montana Supreme Court pays the expenses of the water judges from the Water Right Adjudication Account.

Mr. Shapiro believes that, whatever public entity is the employer, the water commissioner must be covered by Workers' Compensation.

I am sending a copy of this letter to Donald D. MacIntyre, Chief Legal Counsel of the DNRC, and to Mike Greely, the Attorney General.

I would appreciate your advice as to how to proceed.

Sincerely,


HENRY LOBLE
District Judge

/cr

Enc.

cc: Donald D. MacIntyre
Mike Greely
Nellie Sayer

WORKERS' COMPENSATION - Water commissioner;

MONTANA CODE ANNOTATED - Sections 39-71-116, 39-71-117,
39-71-118, 39-71-401, Title 85, chapter 5, 85-5-301.

HELD: When a district court judge appoints a water commissioner pursuant to Title 85, chapter 5, MCA, the district court judge is considered the employer for the purpose of payment of workers' compensation.

26 June 1984

Donald D. MacIntyre
Chief Legal Counsel
Department of Natural Resources
and Conservation
32 South Ewing
Helena MT 59620

Dear Mr. MacIntyre:

You have requested my opinion on the following question:

When a district court judge appoints a water commissioner pursuant to Title 85, chapter 5, MCA, is the district court judge considered the employer of the water commissioner or are the users considered the employer of the water commissioner and therefore liable for payment of workers' compensation?

Before I address the specifics of your question, I will say a word about the general applicability of Montana's Workers' Compensation Act to this situation. Your opinion request and the accompanying legal research assume that a water commissioner is covered by workers' compensation if he or she has been appointed pursuant to Title 85, chapter 5, MCA. That is correct. The Workers' Compensation Act applies to all employers and employees, with specific exceptions. § 39-71-401, MCA. Questions might arise about the applicability to water commissioners of the "casual employee" or "independent contractor" exceptions. However, the detailed statutory basis of the position of water commissioner (Title 85, chapter 5, MCA) rules out the application of either of those two exceptions. §§ 39-71-116(3), 39-71-120, MCA. Therefore, as you have properly recognized, the only question is: Who is the "employer" for purposes of workers' compensation?

The Montana Supreme Court has addressed the question of the existence of the employer-employee relationship many times:

"The test to determine whether or not an employer-employee relationship exists...is the

so called control test. Under that test an individual is in the service of another when that other has the right to control the details of the individual's work." State ex rel. Ferguson v. District Court (1974), 164 Mont. 84, 88, 519 P.2d 151, 153.

Carlson v. Cain, 40 St. Rptr. 865 at 872, 664 P.2d 913 (1981). See also Sharp v. Hoerner Waldorf Corporation, 178 Mont. 419, 424, 584 P.2d 1298, 1301 (1974); Kimball v. Industrial Accident Board, 138 Mont. 445, 449, 357 P.2d 688, 691 (1960). The Court usually employs the control test to determine if the employment relationship exists with a known employer; but the Court has also spoken in cases analogous to this one:

[W]hile this test [the control test] has most often been used to determine whether or not an individual was an independent contractor or an employee, it may also be used to determine who the employer is, in a given situation. Biggart v. Texas Eastern Transmission Corp. (Miss.1970), 235 So.2d 443. Under this test an employee will have been transferred from one employer to another when the right to control the details of his work has passed from one to another.

State ex rel. Ferguson v. District Court, 164 Mont. 84, 88, 519 P.2d 151 (1974).

Thus, we must apply the control test in this situation. Montana statutes clearly establish that the district judge has the right to control the details of the water commissioner's work:

Upon the determination of the hearing [upon the complaint of dissatisfied water user], the judge shall make such findings and order as he considers just and proper. If it appears to the judge that the water commissioner or water commissioners have not properly distributed the water according to the provisions of the decree, the judge shall give the proper instructions for such distribution. The judge may remove any water commissioner and appoint some other person in his stead if he considers that the interests of the parties in the waters mentioned in the decree will be best subserved thereby, and if it appears to the judge that the water commissioner has willfully failed to perform his duties, he may be proceeded against for contempt of court, as provided in contempt cases. The judge shall make such order as to the payment of costs of the hearing as appears to him to be just and proper...

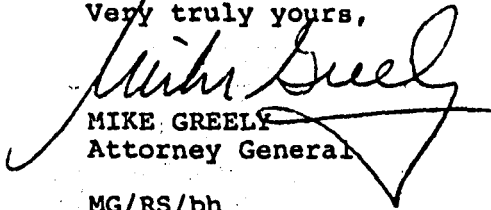
§ 85-5-301(2), MCA.

I conclude that although the affected water users have the duty to pay a water commissioner's compensation and expenses as authorized by law, for the purposes of the Montana Workers' Compensation Act, the district court judge is the water commissioner's employer.

THEREFORE, IT IS MY OPINION:

When a district court judge appoints a water commissioner pursuant to Title 85, chapter 5, MCA, the district court judge is considered the employer for the purpose of payment of workers' compensation.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Mike Greely", written over a horizontal line.

MIKE GREELY
Attorney General

MG/RS/bh

Kim Schulte
Deputy Securities Commissioner
444-5236

EXHIBIT 5
DATE 3/13/87
SB 299

SB 299 Securities Act - Statute of Limitations. SECTION BY
SECTION REVIEW.

Requested by State Auditor and Commissioner of Securities,
Andrea "Andy" Bennett

Section 1. Amendment to 30-10-305.

Section 30-10-305 sets forth the type of enforcement actions which the Commissioner can bring for violations of the Securities Act of Montana. These include cease and desist orders and injunctive actions.

New subsection (4) provides that no administrative or civil action shall be maintained by the Commissioner for violations of the registration provisions of the Securities Act, unless brought within 2 years after the violation occurs. Section 30-10-201 provides for the registration of securities salesmen, broker-dealers and investment advisers. Sections 30-10-202 through -205 provide for the registration of securities.

New subsection (5) provides a statute of limitations for actions based upon violations of the Securities Act other than registration violations. The period of limitation is 2 years after the discovery by the commissioner or his staff, of the facts constituting the violation. Additionally, a final cut-off of 5 years from the date of the transaction sued upon, is stated.

Section 2. Amendment to 30-10-307.

Section 30-10-307, provides for private civil actions based on violations of the registration sections of the securities act, or for the offer or sale of a security by means of fraud or misrepresentation.

New subsection (5) provides that all private civil actions founded upon violations of the registration provisions of the Securities Act, must be brought within 2 years after the violation occurs.

New subsection (6) provides that private civil actions founded upon fraud or misrepresentation must be brought within 2 years after discovery of the fraud or misrepresentation, or after such discovery should have been made by the exercise of reasonable diligence. A final cut-off of 5 years from the date of the transaction sued upon, is also stated.

Section 3. Retroactive application of statute of limitations.

This section states that the new statute of limitations shall apply retroactively to all securities actions which could have been filed before the effective date of this Act, but which have not been filed within one year after the effective date of this Act. For securities actions which could have been filed before the effective date of this Act, and which will be filed before one year after the effective date of this Act, the current 8-year statute of limitations applies.

Securities Act - Statute of Limitations. JUSTIFICATION.

On October 3, 1985, the Montana Supreme Court ruled that the statute of limitations which applies to civil actions brought pursuant to 30-10-307, MCA, of the Securities Act of Montana, is 8 years. This is the current statute limitations for all private civil actions brought under the Securities Act.

When the Securities Act of Montana was enacted by the legislature in 1961, the Act contained a 2-year limitation on private civil actions under 30-10-307. In 1967, the legislature eliminated the 2-year statute of limitation, and no limitation period was substituted. The issue as to the statute of limitations for securities act claims did not arise again until 1985 when the Supreme Court decided the limitations period would be 8 years. No statute of limitations has ever been provided for civil or administrative enforcement actions brought by the Commissioner for violations of the Securities Act.

The brokerage community in Montana was very unhappy with the decision of the Supreme Court. The 8 year statute of limitations is the one of the longest such statutes in the nation. On the other hand, from an investor protection standpoint, the 8 year statute of limitations is very favorable.

The Commissioner of Securities proposes this legislation to balance the needs of the brokerage community and the concerns of investor protection. Indeed, the Securities Act provides, in 30-10-102, that the Act shall be construed to:

- (1) protect the investor, persons engaged in securities transactions, and the public interest;
- (2) promote uniformity among the states; and
- (3) encourage, promote, and facilitate capital investment in Montana.

The proposal adequately protects the investor. While it provides a relatively short period in which registration claims must be brought, it provides an ultimate limitations period of 5 years for the more serious fraud violations.

The proposal also promotes uniformity among the states. Most states have a two-year statute of limitations for registration violations. The 5-year statute for fraud is about average,

with the shortest being 2 years from the date of contract, and the longest being two years from date of discovery of the violation, with no ultimate cut-off date.

The proposal encourages capital investment in Montana by providing reasonable limitations on civil and enforcement actions under the Securities Act.

SB 299

EXHIBIT 6
DATE 3/13/87
SB 299

STATUTES OF LIMITATIONS FOR SECURITIES ACTIONS

<u>State</u>	<u>Statute of Limitations</u>
Alabama	2 years from date of sale of securities
Alaska	3 years from date of sale of securities
Arizona	Securities fraud - 2 years after discovery of fraudulent practice, or after such discovery should have been made by the exercise of reasonable diligence Registration violations - 1 year after violation
Arkansas	5 years from date of sale of securities
California	Securities fraud - 1 year after the discovery of the violation, with a maximum of 4 years
Colorado	Registration violations - 2 years after date of sale of securities Securities fraud - 3 years after discovery or when reasonable person would make discovery, maximum of 5 years from sale
Connecticut	2 years from date of sale of securities
Delaware	2 years from date of sale of securities
Florida	Securities fraud - 2 years from date of discovery of facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, with a 5 year maximum
Georgia	2 years from date of sale of securities
Hawaii	5 years from date of sale or 2 years after discovery of the facts constituting the violation, but never more than 7 years after the date of the sale
Idaho	3 years from date of sale of securities

Illinois	3 years from date of discovery of the violation with a maximum of 5 years from date of sale
Indiana	3 years after discovery of the violation
Iowa	Registration violations - 2 years from date of sale of securities Securities fraud - 2 years after plaintiff receives notice of the facts constituting the violation, with a maximum of 5 years after the violation occurs
Kansas	No controlling authority
Kentucky	3 years after date of sale of securities
Louisiana	2 years after date of sale of securities
Maine	Registration violations - 2 years from date of sale of securities Securities fraud - 2 years after the discovery of the violation or after discovery should have been made by the exercise of reasonable diligence
Maryland	Registration violations - 1 year from date of sale Securities fraud - 1 year after discovery, but no more than 3 years after date of sale
Massachusetts	2 years after date of sale
Michigan	Registration violations - 2 years after date of sale Securities fraud - 2 years after discovery of violation, with maximum of 4 years
Minnesota	3 years after the date of violation
Mississippi	Registration violations - 2 years from date of violation Securities fraud - 2 years after discovery of act constituting violation
Missouri	2 years after the sale
Nebraska	2 years after the sale
Nevada	2 years after the sale

New Hampshire	6 years after first payment of money in the transaction
New Jersey	Within 2 years of discovery of the violation
New Mexico	Within 2 years of discovery of the violation, with a maximum of 5 years
New York	2 years from date of discovery of the violation, with a maximum of 6 years
North Carolina	2 years after the sale of securities
North Dakota	3 years from date of sale or contract for sale, or not more than 1 year after the purchaser has received information as to the matter upon which the proposed recovery is based
Ohio	2 years after discover of facts constituting the violation, maximum of 4 years from date of sale
Oklahoma	Registration violations - 3 years after date of sale Securities fraud - 2 years after discovery of violation
Oregon	3 years after sale of securities
Pennsylvania	Registration violations - lesser of 2 years from date of violation or 1 year after plaintiff knew of the violation Securities fraud - 1 year after discovery of violation, maximum of 4 years
Rhode Island	No controlling authority.
South Carolina	3 years after date of sale
South Dakota	3 years after date of sale
Tennessee	Lesser of 2 years after th violation or 1 year from date of discovery
Texas	Registration violation - 3 years after date of sale Securities fraud - 3 years after discovery of violation, with maximum of 5 years from date of sale of securities
Utah	2 years after date of discovery with a maximum of 4 years from date of sale

Vermont	2 years from date of sale of securities
Virginia	2 years from date of sale of securities
Washington	Registration violations - 3 years from date of violation
	Securities fraud - 3 years from date of discovery of violation
West Virginia	3 years from date of sale of securities
Wisconsin	3 years from date of sale of securities
Wyoming	2 years from date of sale of securities

METRAPARK

FAIRTIME ARENA HORSE RACING

EXHIBIT 7
DATE 3/13/87
SB 314

March 13, 1987

Representative Les Kitselman, Chairman
House Business and Labor Committee
Helena, Montana

Dear Representative Kitselman:

I am appearing here today as the Legislative Committee Chairman for all Fairs in Montana. The purpose of Senate Bill 314 is simple, to save money for local Fair Boards of 38 counties in Montana.

The United States Department of Labor has a provision that allows facilities such as amusement parks, fairs, and carnivals that (1) do not operate more than 7 months in a calendar year and (2) generate more than 2/3rds of its revenue in six months may qualify for a minimum wage and overtime pay exemption.

As is the case with Yellowstone Exhibition in Billings, it takes 18 months to receive the United States Department of Labor exemption (attached) only to find Montana law supercedes the Federal regulation.

Senate Bill 314 simply allows those who qualify to receive the exemption. There are many Fairs in Montana who use temporary help and find that after the 5th consecutive day of 8 hour employment, they must pay overtime or re-employ new people.

Senate Bill 314 will save Fairs in Montana thousands of dollars - dollars that come from local taxpayers.

Sincerely yours,



Bill Chiesa, CFM
General Manager
MetraPark

BC/cg



OCT - 8 1986

Mr. Bill Chiesa
Marketing Manager
Yellowstone Exhibition/Metra
P.O. Box 1302
Billings, Montana 59103

Dear Mr. Chiesa:

This is in further response to your letter of September 4, 1985, which was forwarded to this office on January 2 by our Denver Regional Office for reply. You specifically request an opinion on the application of section 13(a)(3) of the Fair Labor Standards Act (FLSA) to employees of the Yellowstone Exhibition. We regret the delay in responding to your inquiry.

The FLSA is the Federal law of most general application concerning wages and hours of work. An employee who is covered under this law must be paid a minimum wage of not less than \$3.35 an hour and overtime pay of not less than one and one-half times his or her regular rate of pay for all hours worked in excess of 40 in a workweek, unless specifically exempt.

Section 13(a)(3) of FLSA provides a complete minimum wage and overtime pay exemption for any employee employed by an establishment which is an amusement or recreational establishment...if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year.

It is our understanding that the Yellowstone Exhibition operates in one distinct physical area known as Yellowstone Exhibition/Metra. Metra is a building, which is a public facility, where such events as indoor rodeos, rock concerts, conventions, trade shows, circuses, and ice hockey and basketball games are held. The Yellowstone Exhibition operates the fairgrounds that surround the Metra building. The Yellowstone Exhibition operates such events as the annual Yellowstone County Fair, horse racing activities, and tractor-pulls. There is one general manager who oversees the operation of the Yellowstone Exhibition/Metra.

This employee's salary is paid by the Yellowstone Exhibition and Metra. The employees employed by the Yellowstone Exhibition, including those employed in horse racing activities, are paid directly by the Yellowstone Exhibition. The employees employed by Metra are paid by Yellowstone County. There is no interchange of employees between the Yellowstone Exhibition and Metra, and the Yellowstone Exhibition has a separate employer identification number.

Based on the above information it is our opinion that the Yellowstone Exhibition qualifies as a separate amusement or recreational establishment for purposes of section 13(a)(3) of FLSA. It is also our opinion that, although the employees of the Yellowstone Exhibition cannot qualify for exemption under section 13(a)(3)(A) since it is open for more than 7 months a year, it may qualify for exemption under section 13(a)(3)(B) if its average receipts in the preceding calendar year for any six months do not exceed $33 \frac{1}{3}$ of its average receipts for the other six months of such year. For purpose of section 13(a)(3)(B), receipts are fees from admissions. A publically-operated seasonal amusement or recreational establishment whose operating costs are met wholly or primarily from tax funds would not qualify for exemption under section 13(a)(3)(B) of FLSA.

It should also be noted that central office employees and construction employees would not qualify for exemption under section 13(a)(3) of FLSA, and must be paid in accordance with its minimum wage and overtime pay requirements.

If you have any questions on this matter, please do not hesitate to let us know.

Sincerely,

S/PUS

Paula V. Smith
Administrator

VISITORS' REGISTER

BUSINESS AND LABOR COMMITTEE

BILL NO. SENATE BILL NO. 313 DATE MARCH 13, 1987

SPONSOR SENATOR CHET BLAYLOCK

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
<i>Prof. Hartman</i>	<i>Dept. of Higher Educ.</i>		

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. 299

DATE MARCH 13, 1987

SPONSOR SENATOR DARRYL MEYER

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
S. Kim Schulke	State Auditor	X	
Bruce H. McKeown	D. H. Johnson	X	
J. G. "Nick" Wicker	T. S. FIDAWOHL	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FOR
PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER
BUSINESS AND LABOR COMMITTEE

BILL NO. SENATE BILL NO. 280 DATE MARCH 13, 1987

SPONSOR SENATOR GEORGE MCCALLUM

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Bill McCallum	Mt. Hood Community Coll.		

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. 314 DATE MARCH 13, 1987

SPONSOR SENATOR H. W. HAMMOND

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
B. H. Chieson	WALTER PIZER	✓	
Brad Johnson	Galleria Co Fair Bk	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FOR
PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

BUSINESS AND LABOR

COMMITTEE

BILL NO. SENATE BILL NO. 319

DATE MARCH 13, 1987

SPONSOR SENATOR JOSEPH MAZUREK

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Steve Seapine	Walter Company		<input checked="" type="checkbox"/>

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

COMMITTEE MEMBERS

BUSINESS AND LABOR SUBCOMMITTEE

50TH LEGISLATIVE SESSION

<u>MEMBERS</u>	<u>DISTRICT NUMBER</u>
Representative William Glaser, Chairman.....	98
Representative Jerry Driscoll.....	92
Representative Larry Grinde.....	30
Representative Jerry Nisbet.....	35
Representative Clyde Smith.....	05

COMMITTEE SECRETARY

Gayle Carpenter

LEGISLATIVE COUNCIL

Betsy Griffing

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Lump Sum Payments evening session
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Subrogation

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MEETING MINUTES
WORKERS COMPENSATION SUBCOMMITTEE
MARCH 13, 1987

The meeting of the Workers' Compensation Subcommittee was called to order at 9:25 a.m. on March 13, 1987 in room 312f of the state capitol building by Chairman Bill Glaser.

Rep Driscoll was absent, all other members were present.

SENATE BILL 118

(1a:000) Chairman Glaser noted that after the subcommittee had taken action amending SB 118 to impose penalties on employers who violate the Workers' Compensation Act, the amendment was reviewed by the Legislative Council (LC). Betsy Griffing, LC, had offered further amendment language making the violation a criminal offense, and strictly defining "a person" who is an employer, making the offense all encompassing (business, corporation, government, or other legal entity). The amendment is exhibit 1.

Rep Nisbet made a motion to reconsider subcommittee action amending SB 118.

A voice vote was taken and the motion PASSED, with Rep Driscoll absent.

Rep Nisbet made a motion recommending adoption of the additional language (exhibit 1) in amending Senate Bill 118.

A voice vote was taken and the motion PASSED unanimously, with Rep Driscoll absent.

Rep Smith made a motion to recommend to the full committee that Senate Bill 118 BE CONCURRED IN as amended.

A voice vote was taken and the motion PASSED unanimously, with Rep Driscoll absent.

The committee will meet on adjournment of the house.

The meeting was adjourned at 9:40 a.m. (1a:060)



Chairman Bill Glaser

DAILY ROLL CALL

WORKERS COMPENSATION SUBCOMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Friday, Mar 13
2.m.

NAME	PRESENT	ABSENT	EXCUSED
Rep William Glaser	X		
Rep Jerry Driscoll		X	
Rep Larry Grinde	X		
Rep Jerry Nisbet	X		
Rep Clyde Smith	X		

Amendments to SB118 (blue copy)

1. Title, line 7.

Following: "EMPLOYER:"

Insert: "CREATE THE CRIMINAL OFFENSE OF EMPLOYER MISCONDUCT;
IMPOSE PENALTIES FOR THE COMMISSION OF EMPLOYER MISCONDUCT;
PROVIDING AN IMMEDIATE EFFECTIVE DATE;"

2. Page 2, line 8.

Following: line 7.

Insert: "NEW SECTION. Section 2. Employer misconduct. (1)

A person who is an employer, as defined in 39-71-117,
commits the offense of employer misconduct if he
knowingly or purposely:

(a) avoids his responsibility to provide coverage
for his employees as required by 39-71-401;

(b) misrepresents or falsifies employment records
or information, including but not limited to, under-
stating the amount of payroll or the number of his
employees; or

(c) refuses to pay premiums that he is obligated
to pay under compensation plan No. 2, as provided in
Title 39, chapter 71, part 22, or compensation plan No.
3, as provided in Title 39, chapter 71, part 23.

(2) A person convicted of the offense of employer
misconduct shall be fined an amount not to exceed
\$50,000 or imprisoned in the state prison for any term
not to exceed 10 years, or both."

Renumber: subsequent section

3. Page 2.

Following: line 11

Insert: "NEW SECTION. Section 4. Codification instruction.

Section 2 is intended to be codified as an integral
part of Title 45, chapter 7, and the provisions of
Title 45, chapter 7, apply to section 2.

NEW SECTION. Section 5. Effective date. This act is
effective on passage and approval."

MEETING MINUTES
WORKERS COMPENSATION SUBCOMMITTEE
MARCH 13, 1987

The meeting of the Workers Compensation Subcommittee was called to order at 6:50 p.m. in room 312f of the state capitol building on March 13, 1987 by Chairman Bill Glaser.

Rep Driscoll was excused, all other members were present.

Chairman Glaser stated that amendments to the bill could be offered to the chair or the secretary at any time, and will be cataloged and reviewed at the end of the section in question, but not acted on until the end of the committee's work.

Senate Bill 315

Public Policy

Bob Robinson, administrator, Workers Compensation Division (WCD), stated the intent of the bill was in line with the mandate to make the insurance affordable, service predictable, providing rates for the worker, and a safety net for injured individuals. He stated WC was never intended to provide full wage loss, and this legislation states wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. He stated he felt the intent of the senate committee and the administration was to have a system that is understandable, one where benefits could be speedily obtained with the minimum amount of litigation.

He stated a very important part of the public policy was page 4 line 4 - 6, a critical difference from the present system on the interpretation of the WC Act. This paragraph states the legislation "must be construed according to its terms and not liberally in favor of any party". Historically there has been a very liberal interpretation of the act.

He said another major area of change was in the area of rehabilitation. This legislation is designed to assist the worker to get back to the work place as quickly as possible, but would provide benefits for that individual during the time he is unable to go back to work. He stated there is incentive built into the legislation as to the way permanent partial benefits are determined and the way rehab is structured to promote the earliest return to the work place as is possible.

(1a:161) Gene Huntington, in response to a question from Chairman Glaser, also presented an overview of the legislation. He stated the public policy statement was to delineate the philosophy behind the recommendations made by the

Workers Compensation Council (WCC) and the administration. He added major changes are the elimination of the WC court, limitation of lump sum payments, a major emphasis on the reduction of litigation, an effort to make the system self administering, introduction of a mediation process in the system, and an emphasis on rehabilitation and a return to work put into the law.

(1a:242) Mr Huntington stated making objective calculations of benefits without necessarily having to negotiate or litigate the determination of benefits was discussed at length by the council, as well as the issue of indemnity, benefits to those incarcerated, and the need to address revisions of the act.

(1a:296) Bill Palmer, assistant administrator of WCD, noted that previous discussions with Gary Blewett delineated the number of inconsistencies and ambiguities in the system, and how difficult it was for the courts and others to interpret the intent of the WC act. The law was revised extensively in the 1970's due to federal input into the U.S. Workers Compensation system. Subsequent to that time, the Montana law had been extensively amended but not completely reviewed. The decision to do an overall review of the law was made in November, 1984 with the formation of the Workers Compensation Advisory Council of 20 individuals involved in the WC process.

(1a:335) Rep Smith noted the direction given by the governor's office to be people conscious and cost effective in reviewing the WC laws.

Subrogation, Sec 39-71-414

(1a:415) Jan VanRiper, attorney, Department of Labor, stated currently the statute grants insurers an entitlement to recover what is referred to as subrogation interest. They say they insure the employer, one of the employees is injured, a third party negligence is involved, so the claimant sues the third party. Under current law the statute itself would seem to indicate that the insurer can then recover some of the money it has paid out to that claimant from the third party. However, supreme court decisions have interpreted that statute in combination with a constitutional provision which allows citizens full legal regress and stated an insurer cannot recover their subrogation interests unless the claimant was "made whole" in the recovery. She stated the practical affect of those supreme court decisions preclude insurers from recovering any subrogation money at all. Constitutional Initiative 30 deleted the whole legal regress language from the constitution which allows language to be presented in the bill and put the system back to where it was prior to the supreme court decision. She added the intent of the language in the legislation is to simply make it clear that under these statutes the worker/claimant does not have to be made whole

in the third party recovery before an insurer can recover subrogation interests.

Attorney's Fees

(1a:561) Bob Robinson, WCD, in referring to page 28 of the legislation, stated in the current system if the insurer denies liability and later on the claim is judged compensable, and benefits are provided by a judge or on appeal, the insurer is required to pay to the claimant or his attorney reasonable attorney fees and costs as established by the judge. This is determined by assessing hours worked by the attorney's hourly rate. He stated current rules now provide that if an attorney represents a claimant and they do not have to go into a litigation process, but he only represents the claimant with the insurance company, the attorney is entitled to 25% of the additional benefits gained through his efforts. If the claim goes to the workers compensation court, the attorney is entitled to 33% of those benefits, and if the claim goes to the supreme court, 40% of the benefits. The proposed legislation states the insurer shall pay the reasonable costs of attorney fees established by the court if the insurer denies liability for a claim, and is later judged compensable by a court, and if their actions to deny or challenge the claim were unreasonable. He stated the council felt that cases were placed on the court dockets by attorneys to minimize the cost for the claimant.

(1b:052) Mr Robinson, in response to a question from Rep Grinde, stated the attorney fee schedules are set by Workers Compensation. In December 1986 new rules were published stating the attorney would receive 20% of the additional amount of benefits gained through their efforts if the claim did not go to court and 25% if the case was appealed to the workers compensation court or the supreme court. He stated the rules could be in effect by March 28, 1987.

Lump Sum Payments

(1b:086) Mr Robinson presented an overview of the current lump sum payment process. He stated an individual recovering from an injury, and until they reach the point of maximum healing, receive temporary total benefits, which are the maximum benefits eligible to that person in the amount of two thirds of their wage subject to a cap of \$299, the state average weekly wage. He stated when a person reaches maximum healing or are rehabilitated, under the current system a claim is usually settled with a lump sum payment determined by a speculative loss of income. This system includes criteria such as how much income the individual is actually losing in terms of his future job potential had he not been injured. This speculative loss of income determination is eliminated in the bill and limits the conditions and amounts of lump sum payments.

(1b:200) Mr Robinson stated that currently there are \$80,000 worth of lump sum settlements every week coming from 40 to 60 cases. Lump sum payments would become the exception rather than the rule under this bill. The current lump sum process provides incentive for attorney involvement, as they get paid out of lump sum settlements. He added this system doesn't provide long term benefits to the worker. He stated there is a great deal of evidence that the funds do not get to the intended destination; and the beneficiaries of the lump sum settlements are the attorney, people owed money, other family members, the business community, and lastly the claimant.

(1b:298) George Wood, WCD stated the lump sum settlement system is the same for all three (3) plans of insurance. He stated any injury involving a permanent partial disability is usually settled by this method. For a person with a 20% partial disability, the negotiated lump sums starts at \$14,900 and up. He stated the lump sum is, without a doubt, the reason for attorney involvement. He then provided an example of the abuse of the system and what this legislation corrects. A person with a serious injury who is not likely to return to their regular employment can opt for rehabilitation, a two year endeavor, and he would receive temporary total payments in the amount of \$30,000. The rehab program would cost \$10,000 plus for rehabilitation. If the individual is rehabed to a position where they earn less than their projected earning capacity, renumeration for actual loss of earnings, usually starting at \$70,000 (500 weeks) is the beginning point for negotiation. Under the law now, \$110,000 is the cost of settling a claim. He sited other examples of abuse in the system that are driving employers costs up.

(1b:389) In response to an inquiry from Rep Grinde, Mr Robinson stated some claimants request their settlements be paid out in installments, and they can be structured however the claimant requests.

(1b:418) Carl Englund, Trial Lawyers Association, in response from Chairman Glaser for input from the attorneys point of view, stated the attorney received payment either through the lump sum settlement or through the biweekly or optional arrangements made with the claimant for his settlement. He did not know if lump sum settlements were promoted by lawyers for quicker payment of services rendered. He stated the published list of lawyers and the amount of awards received in the last year did not reflect lump sum versus biweekly or other award settlement arrangements. He stated the ability to receive lump sum benefits are strictly curtailed under this legislation. He added under the present system the worker has a wide range of options in terms of how he gets his benefits, where the bill limits the options as well as lawyer involvement. He added the lump

sum benefits are the claimants funds and they can do as they want with the money.

(1b:528) In response to a question from Rep Grinde, Mr Robinson stated workers compensation benefits are not taxable.

(1b:615) Mr Robinson noted the difference in the current law between the permanent partial injury claimant who is eligible for 500 weeks of biweekly benefits, and also, depending on the injury, dictates the number of weeks of benefits by disability, i.e. an arm injury is 180 weeks, etc. The legislation eliminates the schedule of injury and states that as long as an individual is suffering a wage loss due to the effects of the injury, he can receive benefits up to 500 weeks.

George Wood, WCD, noted the legislation is a series of trade offs with an attempt to meet the governor's directive and to develop a balanced bill.

(2a:000) Mr Robinson further stated a permanent total disability can not go back to work due to limitations on standing, sitting, lifting, or with educational skills considered. These individuals are considered eligible until they are 65 years of age. As a compromise to attempt to minimize lump sum payments, a cost of living allowance (COLA) will be added to the benefit payment after two (2) years, not to exceed 3% or the consumer price index (CPI), whichever is less.

(2a:121) Rep Grinde asked how people now receiving benefits would be affected by this legislation. Mr Robinson stated there are no retroactive changes in the bill. Any benefits for any injury that has occurred prior to the effective date of this bill would be retained. Mr Murphy, WCD, stated disputes and mediation would affect all cases under the new legislation.

The meeting was adjourned at 8:25 a.m. (2a:225)

Bill Glaser, Chairman

DAILY ROLL CALL

WORKERS COMPENSATION SUBCOMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 13, 1987
pm

NAME	PRESENT	ABSENT	EXCUSED
Rep William Glaser	X		
Rep Jerry Driscoll			X
Rep Larry Grinde	X		
Rep Jerry Nisbet	X		
Rep Clyde Smith	X		