MINUTES OF THE MEETING
LABOR AND EMPLOYMENT RELATIONS COMMITTEE
MONTANA STATE SENATE

February 10, 1987

The ninth meeting of the Labor and Employment Relations Committee was called to order by Chairman Lynch on February 10, 1987, at 1:00 p.m. in Room 325 of the State Capitol.

ROLL CALL: All members were present.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 154: Senator Lynch stated he is opposed to this bill as he feels the caboose is a safety factor.

Senator Manning stated he wanted to question a few people who testified; however, they did not stay for the questions at the hearing. Senator Manning feels if he could have questioned these people, it would have been relative to the outcome of the hearing. He wanted to know what type of insurance policies the short line railroads carried. He feels the caboose should be considered as a safety factor.

DISPOSITION OF SENATE BILL NO. 154: Senator Thayer made a motion that SB 154 Do Pass. Senator Thayer's motion that SB 154 DO PASS CARRIED 5-3. See attached roll call vote sheet.

OVERVIEW OF WORKERS' COMPENSATION: Senator Lynch thanked the people who responded to his request to attend this overview hearing. He informed the audience that neither bill will be addressed individually since we have not received both bills. He also said the committee should hear from interested parties concerning the problems and philosophies of Workers' Compensation, rather than hearing the specifics of the two bills. Senator Lynch suggested the bills be referred to as "The Division's Bill" sponsored by Senator Bob Williams, and "The Council's Bill" sponsored by Senator Fred VanValkenburg. Senator Lynch had been informed by Senator Paul Boylan that there will be an additional Workers' Compensation revamp bill that the Labor and Employment Relations Committee has not received. Senator Lynch stated he will call on people to give their views and to answer questions of the committee. Other interested parties in the audience may then give their views.

Senator Thayer stated at the end of the 1985 session he was appointed to the Governor's Advisory Council to study the Workers' Compensation issues. He explained it is extremely complicated, and many people who serve on the Council are

people who deal with the law. Senator Thayer stated he was one of the people on the Council who did not have law experience. He feels no one has all the answers concerning this issue and there are no experts who understand all the facets of the entire law. This issue has been further complicated over the years by court decisions, has been amended many times, and is at the point now where case law determines more outcomes than the statutes. From the beginning, Senator Thayer requested the Department of Labor to inform the Council of the financial status of the Workers' Compensation Fund. Senator Thayer feels it is difficult for anybody to deal with an issue without knowing where they stand financially. In the beginning the Department gave estimations of their fund as being $25 million in the hole, which refers to the unfunded liability. The Council became aware of a report from the NCCI, who the State fund does their contracting, that estimated the unfunded liability to be approximately $100 million. The Council requested the Governor request an independent audit to research the status of the fund. This was completed through the Legislative Audit Committee. The results of this audit were the unfunded liability of $31 million. Senator Thayer tried to promote a Workers' Compensation bill during the June 1986 Special Session because this issue needed to be dealt with. Most legislators felt they were dealing with a $100 million general fund problem and to add this to a complicated special session was too much to handle. Thus, the special session was not an adequate time to deal with this problem. The last day the Governor's Advisory Council met, they were asked to attend a news conference called by the Governor. During the news conference it was announced the Workers' Compensation unfunded liability was $81 million. A few weeks later the newspaper carried stories that a new court decision handed down by the supreme court would probably add another $20-30 million to the unfunded liability. It is reasonable to assume the State of Montana is facing an unfunded liability in the State Workers' Compensation fund of at least $100 million. As a result of the knowledge that the fund is more severe than anyone realized, many people have changed their views on how this problem should be resolved and addressed. This all led to the Governor's Bill and the Division's Bill. Senator Thayer stated regardless of which bill passes, it will not resolve the problem of the unfunded liability, but it will be the start of solving the liability for the future. The unfunded liability still has to be dealt with in some manner and many people are searching for the answer to this, and hopefully we will find the answer by the end of this session. A new bill will give private carriers the opportunity to be extremely competitive, and the State Fund has the obligation to take all comers, regardless of the risks. Senator Thayer closed by

stating the problem is so severe that party politics had better be put aside so the problem can be dealt with. Senator Thayer has requested a bill that would combine his ideas with the Governor's bill, and this will help approach the problem by a bi-partisan fashion.

Mr. Bradley J. Luck, representing the Defense Insurance Council for the Governor's Advisory Council, and who is an attorney from Missoula, Montana, exclusively does defense work in Workers' Compensation, representing insurance carriers for all three plans. The three plans include, Plan 1, self-insurers; Plan 2, private carriers; and Plan 3, compensation insurance fund. Mr. Luck stated it is difficult to appear before the committee without any specific direction or questions. Mr. Luck stated he also believes reform is necessary to handle the systemic problems experienced and it is necessary to work toward handling the problems of the State Workers' Compensation Insurance Fund. The State Workers' Compensation Fund is one of the carriers involved in the Workers' Compensation system. We are greatly in favor of revamping the Workers' Compensation Fund, but the problem is how this will be achieved. Mr. Luck mentioned a critical point concerning the consideration of SB 335 and SB 330. That point is the Workers' Compensation court issue. In the Division's Bill, it is part and partial of the approach and in the Council's Bill, it is addressed and reformed. This should be discussed further. Mr. Luck explained if there are conflicts in Workers' Compensation over the law, the claims are adjudicative by the Workers' Compensation Court and this can be appealed to the Supreme Court. This is a two step process. The proposal that will be considered from the Division Bill will include a multi-step process of administrative review. It starts with a division's hearing, a hearing examiner's hearing, a board (comparable to the Industrial Accident Board), then to the District Court, and finally to the Supreme Court. The two step process would be changed into an administrative process with more levels, and this will include evaluation panels, rehabilitation panels, and a mediation process. Mr. Luck feels these points should be reviewed very carefully. Mr. Luck explained during his years of working with the Division and the Workers' Compensation Court when there was a problem with a number of court decisions, the tendency was to "throw the baby out with the bath water." This is an unfair situation and by removing the court and creating a more multi-level bureaucratic approach will not solve the problem. The Workers' Compensation Court provides a professional, fair and impartial judicatory process. The alternative will be a multi-level administrative review, staffed by the Division and the Department of Labor. Mr. Luck feels this will be an

unmistakable conflict of interest. Mr. Luck advised the Labor Committee while reviewing the two bills, that they consider strongly and thoroughly the recommendations of the Advisory Council. Mr. Luck believes there are problems with the court process; however, they are problems that can be fine-tuned and were addressed by the Governor's Council. There are recommendations to speed up the process and get it under control, and to control litigation. Mr. Luck closed by asking the committee to give careful consideration of retaining the court.

Senator Lynch asked Mr. Luck if the three areas he represents are all three plans. Mr. Luck replied yes, that Plan 1 is the self-insurers, Plan 2 is the private carriers, and Plan 3 is the State Compensation Insurance Fund.

Senator Haffey asked Mr. Luck if he spent the last ten years in the Workers' Compensation field. Mr. Luck replied that he has spent most of his time in the Workers' Compensation field, and in the last seven to eight years, he has spent more than 80% of his time on these cases. In the last five or six years he has spent over 90% of his time on these type of cases. Senator Haffey asked Mr. Luck about the three insurance plans he represents and if it basically means he represents employers. Mr. Luck replied yes. Senator Haffey asked Mr. Luck about his statement concerning the efficiency and fairness of the process for employers with the court in relation to the multi-level procedure approach in the Division's Bill. He also asked Mr. Luck about his statement of opting for the court in fairness to those he represents. Mr. Luck replied yes, he believes there should be reform in the Workers' Compensation Court. The Council Bill has steps and changes to the court process that are very important to stay away from inviting litigation and getting the courts involved. Mr. Luck commented on over the hundred cases he tried in court. Many cases he did not agree with the court and others he disagreed with the interpretation. Some days he even wished there was no court, but someone needs to interpret the act, and if there is a problem with court decisions, then by throwing the court out, this will not help. What needs to be done is to go back to the act and make reforms and make it less subject to interpretations.

Senator Thayer asked Mr. Luck if he stated that the present system has conflicts that are adjudicated by the Workers' Compensation Court and then the Supreme Court and if he referred to it as a two-step system as opposed to the new bill which would have a three-step system. Isn't the present system supposed to be a three-step system, where the

first step is supposed to be an administrative process and it then goes to the Workers' Compensation Court if it cannot be resolved. Mr. Luck replied there are a number of collateral issues that in the first instance would be adjudicated by the division. The bulk of the issues that would be in controversy are how much money a claimant is entitled to, and how the claimant would receive the money.

Senator Thayer asked Mr. Luck if it is true that 48 of the states have the system being proposed, which is not having a Workers' Compensation Court. Mr. Luck replied he is not a student of the National System of Workers' Compensation, however, he does believe most systems have an administrative approach to the payment of benefits. He is not aware of any states that have tried the Workers' Compensation type approach.

Senator Blaylock asked Mr. Luck if he was supporting the Council's Bill. Mr. Luck replied the Advisory Council Bill is the product of two years of monthly meetings. Various interested groups of all kinds were represented and the discussions were quite spirited, lengthy and comprehensive. The bill that finally came out of the proposed legislation was the Governor's Bill. It was a compromise agreed to by everyone on the Council, with the Division representative abstaining. No one was totally happy with the bill, but everyone agreed there was some middle ground which would handle both considerations. They are reduce the cost, keeping in mind the injured worker and not forgetting the employer because of the significant drain the cost has had on the employer. Mr. Luck feels there are areas in the Council Bill that still need work, and there are some good ideas in the Governor's Bill that should be incorporated in the Council's Bill. Mr. Luck feels very strongly that the vehicle the committee should be working from should be the Council Bill because it does not dismantle the system in an unknown way. The Council's Bill could be cleaned up if needed.

Senator Blaylock asked Mr. Luck if he believed if we take the Council's Bill and make some changes which could come from the Governor's Bill, would this make the system sound again, and would we then begin to take care of the unfunded liability. Mr. Luck replied he learned from his Council experience not to try to understand the numbers that get crunched, because it can be confusing. He does not know how far the problem has gone, or what the dollar figure is in terms of the necessity of scraping the system just for the sake of fixing the unfunded liability. Independent measures might have to be taken to take this into account. The recommendations

of the Council are very significant dollar savings. The lumb sum situation might be one to take into account. Mr. Luck feels there is hidden expense and bureaucracy that no one fully anticipates and he questions claims of significant savings over the Council Bill.

Mr. Pat McKittrick, a private citizen and attorney, gave testimony for the Overview Hearing. A copy of his testimony is attached as Exhibit 1.

Senator Haffey asked Mr. McKittrick about the rhetorical question he made during his testimony. Senator Haffey asked who it is that would want to deprive the worker of this opportunity to have an impartial judge address the circumstances. He also asked if Mr. Luck is a fair representation of those who advocate on behalf of the employers and if Mr. McKittrick represents attorneys who would speak on behalf of injured workers.

Mr. McKittrick replied he would speculate that an impartial judge was going to look at the law that has been established by the legislature, then look at the individual and the facts of the case, and then apply the law. This is the impartiality of what a judge does. The only interest at stake in this forum is for the judge under oath to look at the facts and apply the law. There have to be other interests involved if people want to take away this impartiality. These interests may be legitimate interests, but they should be rejected because some interests could include premium savings. The other interests are in conflict with the judge's interest concerning partiality and fairness. If there is an attempt to address other parts of the law, for example, benefits and the question of solvency of the State fund, this should be addressed in the state legislature. When the individual worker is in the least situation of defending himself, the injured worker has the right to an impartial decision.

Senator Haffey asked Mr. McKittrick if he is saying the same thing Mr. Luck stated about attempting to resolve a real problem, such as level premiums, fairness to employees, and solvency to the funds. Mr. McKittrick replied yes, and we have to remember the history of what happened before so the abuses will not happen again.

Senator Gage asked Mr. McKittrick about Senator Thayer's observation that case law has more to do with the settlement of cases than statutes. Mr. McKittrick replied the laws are the product of compromise. They are not perfect. They are subject to interpretation and they are subject to the dynamics of the whole system checks and balances of making a law. He said Senator Thayer is absolutely right; it is a complicated area.

Senator Gage asked Mr. Luck to respond to Senator Thayer's observation also. Mr. Luck replied he agrees with Mr. McKittrick. Regardless of who is making the decision, everything is subject to interpretation. At the present time one of the most frustrating aspects in working with Workers' Compensation law is the fact that court interpretation is ruling much more than the Act. Reform is necessary in terms of the Act. The Council did address this before. This reform would get away from so much interpretation and discretion. Not liking the court and thus removing it, is not reform, this is more like blackmail.

Senator Gage asked Mr. Luck if, assuming the statutes are changed, would we throw out a big share of the previous case law. Mr. Luck replied regardless of how the bill is amended, there will have to be some area of case law that will have to remain because we are still dealing with the same subject matter. If some definitions are changed, the old law interpretations on an entirely different statute may be of some value, but it will not be directly relevant. It is impossible to assume that if we change the act, certain cases will never return. The best reform would be to identify the problem areas of interpretation and deal with those areas.

Senator Blaylock asked Mr. McKittrick about the rhetorical question do we want to injure the workman. We have to make the system whole. You have stated we should keep the court. Part of the problem we are facing is due to the case law, but we cannot follow the law as it is written. We have to keep going back, especially to the Supreme Court cases. Senator Blaylock basically is asking if we keep the courts and the present system, how do we make this system sound. Mr. McKittrick replied, it is important to keep the court. As Mr. Luck has indicated, if a worker falls and injures himself on the job, and there is a dispute on whether this employee was hurt on the job, the facts are applied to existing law and the judge makes a determination within the perimeter of the judical forum. Regardless of what is done, the impartial forum, due process, is important to the integrity of the system.

Mr. Pat McKittrick stated if there is a question of reform and modification of benefit levels, then there would be a debate whether the permanent or partial structure is too high, too low or whether it addresses the aggravation of a preexisting injury. Mr. McKittrick suggests all of the issues be debated on their merits in one or both of the bills. He feels the Workers Compensation judge is an important forum for the claim when it gets to the dispute level and is heard by the court. Senator Lynch explained that both bills will address

some reduction in benefits at the hearing February 14, 1987.

Mr. Bernard J. Everett, an attorney representing claimants of Workers' Compensation cases, and has served on the Governor's Advisory Council, gave testimony for the Overview Hearing. A copy of his testimony is attached as Exhibit 2. Mr. Everett stated as a result of the debate of the council, the benefits were reduced for the injured worker in every area. The Advisory Council's bill is a compromise of 19 people representing every area of industry, such as labor, employers, private insurers, self-insurers, claimant's attorneys, and defense attorneys. The result of this council is reform for the Workers' Compensation Division. This bill would save employers money. Mr. Everett stated the Division's bill is extremely lengthy and complex and is totally one sided. The Division's bill vests within the division extreme power and creates a conflict of interest. Mr. Everett addressed a question Senator Thayer had asked during the Governor's Advisory Council as to why a hearings process that worked in 48 states could not work in the state of Montana. Mr. Everett stated they exist in other states but in a 1974 audit of this process, the dual role of the administrator of the Workers' Compensation Division exists only in Montana. The dual role is one of the primary reasons Montana has a Workers' Compensation Court. Mr. Everett stated Montana has a good system and the costs can be reduced; it can be made more affordable for employers. While meeting with the Governor's Council, the Governor addressed the council and stated there were two things the council must keep in mind. The recommendations must be cost effective and people sensitive. Mr. Everett said the Workers' Compensation Act is for the benefit of the injured worker and in exchange for that the employer and insurer get limited liability. There is an exclusive remedy under the Workers' Compensation Act that if a worker is injured he may not sue the employer for the employer's negligence. There is also a change of definition of injury in the Division's bill and they are excluding from that definition certain injuries that occur at the work place. Mr. Everett said if certain injuries are excluded under the definition of injury in the Workers' Compensation Act, the employer will be subjected to common law. There is a safe place to work statute, and these create common law liabilities. The Division's proposal is so one sided it forgets it is opening the door to extreme exposure to employers and insurers in this state. The goal of an injured employee is to return to work. If you deprive the injured employee the ability to meet the necessities of life, to have income while being rehabilitated, then the system is just throwing away the injured worker. As a result, we will be back in several years to redo this bill. Mr. Everett urged the committee to consider the compromise package which has fine tuned the Workers' Compensation Act.

Senator Lynch asked about an agreement members of the Council have mentioned.

Mr. Everett replied the council decided in order to make progress and substantially reform, each member would have to throw away their individual self-interest and compromise certain areas. As an attorney representing claimants, Mr. Everett said he knew every compromise made would hurt the injured worker. There was a compromise on temporary total impairment benefits. They took away the first six days as compensable. On permanent partial impairment benefits, they removed the maximum number of weeks from 500 to 325 weeks. On death benefits for the widow and children from lifetime benefits to a maximum of 500 weeks. Mr. Everett stated he compromised many things he knew would hurt the injured worker, but he did it on the basis others would also be compromising things they held dear. Everyone can live with the Advisory Council's bill. It is cost conscious, remains people sensitive and is a fully debated and argued proposal.

Senator Gage asked Mr. Everett if the compromises were among the representatives who were on the Council or were these compromises from the various interested parties. Mr. Everett replied his understanding was the vote for the compromise was the individuals voted by the representation of his organization. Mr. Everett stated all involved parties compromised and to do that they had to throw away self-interests and do what was best for the system. Senator Gage asked Mr. Everett if speaking for the group he represents, did the compromises come through discussions and input from his organization. Mr. Everett replied the compromises came from him and he told his organization he had made those compromises. Senator Gage asked if they agreed with his compromises. Mr. Everett replied the organization does not agree with his compromises.

Senator Manning asked Mr. Everett to explain the effect the Workers' Compensation Division proposed wage loss system will have on the injured worker. Mr. Everett replied the wage loss system, as proposed by the Division, is a proposal presented to the Advisory Council and which was debated. Prior to debating this subject a representative from the American Insurance Association, Mr. Bill Molman, spoke to the Council about acts in other states with a wage loss system. Mr. Molman warned Montana against adopting such a system if the economic conditions were on a downturn. Under the wage loss system being proposed, each claimant who suffers an injury will have a minimum of 10 years benefits for permanent partial disability. The case will have to be adjusted every other week and the administrative costs will be tremendous. For the injured worker when the wage loss proposal is combined there will be settlement of cases. The word settlement is stricken from the Workers' Compensation Act. This will mean no case can be closed, no file can be resolved, and the paper work will be

tremendous over the 500 weeks. Under the present system there are lump sum settlements and compromise settlements used in order to get the injured worker back into the work force. The wage loss system is not an actual wage loss. No one gets compensated under our system or under the Division's proposal for the actual loss of wage the injured worker suffers. Prior to the injury the individual is usually spending the income he is making. He is incurring debts based upon that income. When an injury occurs he receives a maximum of 66 2/3% of his wage subject to a maximum of the state's average weekly wage, which in many cases is less than the wage of the injured worker. The injured worker then does not have the ability to pay his debts and goes deeper in debt. If the injured worker is able to compromise the case, then the insurance company saves money and the injured worker receives a lump sum to pay off the debts. This would then allow the injured worker to get back into the labor force and get back on stable financial ground. The restriction in the Division's bill will create problems for businesses because there will be much bad debt. There was a debate on lump sums and the result was lump suns were found to be essential to the injured worker and for the insurer to save money. Under the Division's proposal, no case will be resolved. Senator Manning asked Mr. Everett in the event the Division's bill was to pass, would there be a need for more personnel to process the claims. Mr. Everett replied yes, this would be a boon to a bureaucracy that has ever existed in this state.

Senator Haffey stated when Senator Thayer made his presentation he suggested because of the size of the unfunded liability everyone seems to think a problem exists separate from the problem and set of solutions we are going to address through one of the two bills, or through a combination of the bills to be heard on February 14, 1987. The bills are going to address the system and adjustments needed for the future. Senator Haffey said he thought he heard Senator Thayer state the Council, in its support for the proposed solutions, might not have been a unanimous vote had they known the unfunded liability was so large. Senator Haffey asked Mr. Everett if he agreed with this statement.

Mr. Everett replied he could not speak for the other members, but the figure $80 million for the unfunded liability was brought before the Council as speculation and that is why they requested the audit long before the compromise was reached. The Council knew the state fund was in terrible financial shape.

Senator Haffey referred to testimony of Mr. McKittrick and Mr. Luck and said the amount of the unfunded liability would not

cause him to change his opinion if he thought they had reached a set of solutions that addressed the statutes and the system for the future. Senator Haffey asked Mr. Everett if the level of the unfunded liability would affect his decision. Mr. Everett replied no, it would not.

Senator Thayer reminded Mr. Everett in the new language, in the case of a deceased worker, the widow and children up to age 22 can receive benefits. He said this is a new benefit to the workers of this state. Mr. Everett stated it is after the reduction has occurred that the benefits expand. In the death benefit, the life time benefit for the widow was reduced and because of that, other benefits were added.

Senator Blaylock asked Mr. Everett if we were to adopt the Advisory Bill, are you convinced the Workers' Compensation Fund and the system would become whole. Mr. Everett replied he is convinced this bill will result in substantial premium savings. If the question is, is the system going to be made whole because the $100 million unfunded liability will be paid back, then the answer would be no. The 20% reduction in premiums could be used by keeping the premium at the present rate. The fund can be made whole by the Advisory Council's bill if, from today forward, employers will receive relief from high premiums and benefits be brought into line in a reasonable manner. Senator Blaylock asked Mr. Everett if the Advisory Council's Bill was accepted, would the unfunded liability begin to decrease. Mr. Everett replied yes, if the premium rate remains at the present rate and the cost is reduced by 20%.

Senator Thayer asked Mr. Everett how he would propose to keep businesses in Montana that are threatening to leave because of the uncompetitive nature of the Workers' Compensation rates. Mr. Everett replied that was an issue he thought about with great concern and the members knew there had to be a substantial reduction of costs in order to make employers able to afford Workers' Compensation. That is why there was a dramatic reduction in benefits to the injured worker.

Mr. George Wood, Executive Secretary of the Montana Self-Insurers Association and a member of the Governor's Advisory Council said he has adjusted claims in Montana for over 35 years. In testimony today regarding the merits of the various bills, Mr. Woods feels there is one thing being overlooked, and that is that the cost of Workers' Compensation has become prohibitive for all employers. When Workers' Compensation benefits, which are mandated by law, become high, the employer has to mix and match his cost. High Workers' Compensation premiums lead to less employment. This state has always been known as one that exported its educated youth; now we are also exporting jobs.

Mr. Woods said the employer and employee need a drastic revision in Workers' Compensation benefits which will be reflected in cost. This will lead to a financially sound system.

Judge Timothy J. Reardon, Workers' Compensation Court Judge, gave testimony reflecting the Workers' Compensation Court's activity and involvement in the system. A copy of his testimony is attached as Exhibit 3.

Senator Lynch asked Judge Reardon how long he has been the Workers' Compensation Court Judge. Judge Reardon replied he was appointed in August, 1981. Senator Lynch asked if there had been an explosion of litigation since he has been judge. Judge Reardon replied numerically there is no question that petitions for hearings to decide disputes have increased. The key figures are how many cases go to trail and how many cases have to be decided. There is a high percentage of increasing number of requests for hearing. The number of actual cases that go through to trial has remained relatively flat. Judge Reardon said for fiscal year 1983 to date, the percentage of cases that go to trial as a percent of petitions filed, has actually been decreasing. In fiscal year 1983, there were 405 petitions and 121 trials, which is 30%. In fiscal year 1986 there were 571 petitions and 112 trials, which is 20%. Thus, the number of trials is staying constant and the number of hearings is going up. The only way an attorney or unrepresented claimant can accomplish anything is by filing a petition. Judge Reardon explained that from July 1, 1986 to December 31, 1986, there were 430 petitions for hearing. 15% went to trial and the rest of the cases are being settled. He said the pretrial conferences of attorneys representing claimants cannot get answers to questions from the claims personnel of the State Fund. This is the reason petitions are filed. It will guarantee someone will represent the insurance company at the pretrial conference. Judge Reardon stated there are a number of claimant attorneys who believe the court system is a better system. The State Fund case load has gotten unmanageable in terms of their claims people and that is the reason the number of hearings has risen. It is not necessarily an increase in court activity on deciding disputes under question of benefits.

Senator Lynch asked Judge Reardon if the Workers' Compensation Court was eliminated, would a worker who was injured prior to the elimination of the Court still have the right to the Court that was in existance when he was injured, or would he go to the new system. Judge Reardon replied that as he understands the Division's bill, there is a period of transition from July 1 to December 31 for the Workers' Compensation Judge and Clerk to continue working on cases tried prior to July 1. Any issues requested after July 1 would go to the new hearings agency. Judge Reardon said his term will end June 30, 1987 if this

legislation does not pass. If legislation does pass, he is not committed to stay beyond July 1, 1987.

Senator Gage asked Judge Reardon if he had a comparison of percentages of employers covered by each of the three plans. Judge Reardon furnished the committee with a number of petitions for hearing, broken down by plan. See Exhibit 4.

Senator Thayer asked Judge Reardon if the system were being administered on the basis of clear concise law, which anyone could read and understand, would this not eliminate lawyer involvement and would we not then be administering a law based on the law itself. Judge Reardon stated individuals will tell you the law is clear, but each individual will have a different interpretation. He said words in any statute will lead to controversy and the controversy will come when someone makes a decision to deny a claim. It could be clear to that adjustor that this claim is not compensable. If the claimant believes the claim is compensable, the claimant will probably seek legal advice. This leads to the adjudication process. Judge Reardon agrees that a nice clear concise law is great; however, they are hard to achieve and someone has to interpret the statute. Senator Thayer stated the state of Montana may need to start over with something new instead of tampering with the old law. Judge Reardon said he does not disagree some change is needed, and it should be made in the interest of reducing costs. He said if all previous case law that is in the books was stopped, some time down the road someone will challenge a decision and then another set of case law will be built.

Mr. Gary Blewett, former Director of Workers' Compensation Division, stated 2 years ago he prepared a report for Governor Schwinden which expressed his concern about the Workers' Compensation system case laods, and the unpredictability in the system as far as being able to understand how much of a liability the state of Montana had. In that report he recommended to the Governor that an Advisory Council be formed to evaluate the system. At the time he prepared the report for the Governor he had no idea of the extent of the unfunded liability. He said in any insurance program there will be some lag in the predicted liability. Mr. Blewett stated he could see the claims case load starting to get beyond the ability of the staff of examiners to reasonably cope with. The Governor appointed the Council and they have come up with the recommendations of the Council's bill. Senator Lynch asked Mr. Blewett if he agreed a state fund should be statutorily separated from the Division. Mr. Blewett replied he did not particularly agree they should be separated, but he did agree it was one solution. Senator Lynch asked Mr. Blewett if there would be advantages to separating the State Fund from the

Division. Mr. Blewett replied the only advantage he could see would be there would be two separate operations; one would be a regulatory function part of the Division, and the other would be an insurance function and there may not be the same two individuals involved with regulation and insurance.

Senator Haffey asked Mr. Blewett if more separation or less separation is best. Mr. Blewett stated further separations would put the Court in one department and the current Division in another department. Someone will have to deal with these decisions. Mr. Blewett's personal opinion is the Division's structure with the Insurance Compensation Fund and the regulatory function in it is a good system.

Senator Thayer asked Mr. Blewett if he thought the unfunded liability was $5 -10 million two years ago and it grew to the present unfunded liability of $100 million because there was not enough money to file claims. Mr. Blewett replied no, he did not believe that is the entire case. He said the lack of staff to process claims creates delays and more court petitions. The growth in cases that had to be managed was unpredictable because of the law changing daily. Mr. Blewett stated the law was changing daily through Court opinions and Court decisions that interpreted law in ways they had not anticipated at the time premiums were set.

Mr. Gene Huntington, former Commissioner of Labor, and representing the Governor's Office, stated there was some speculation for the motive of proposing the Division's bill and he proposed it not because of concern of the Workers' Compensation Court judge, but that it happened at a time when they learned the unfunded liability had increased from $29 million to $81 million. Mr. Huntington stated the proposed reform will not guarantee a solvent fund. The Division's bill is proposing an independent board which would be in a different Division.

Mr. Huntington stated the Court has been viewed as being very basic to the system, and Montana is a very unique situation. What has been characterized as multi-level bureaucracy, is in fact the administrative process used to provide due process to citizens for human rights. The first level of resolving a dispute is to go into court. It has contributed to the level of litigation and leaves the state in a situation where it is hard for anyone to predict what can happen given the amount of the litigation.

Senator Haffey stated the court is neither the problem or the solution, but it is an issue. Senator Haffey stated he

had difficulty understanding how a proposal to get rid of the Court upon learning of the unfunded liability of $80 -$100 million was a turning point in Mr. Huntington's decision. Senator Haffey said we have heard from representatives of employers and insurance companies who understand the system and an attorney who works for claimants. This gives two different sides to the issue. Employers, insurance companies, claimants, and self-insurer's representativesall find the court to be an appropriate instrument in the system. Senator Haffey explained he was having trouble understanding why, with all of the support for the court, would Mr. Huntington suggest it was appropriate to remove the court from the system when learning of the unfunded $80 million. Mr. Huntington replied his evaluation is they have a much higher level of litigation in Montana; our law is tested daily. He explained there is a situation that allows people to take the first level of dispute into court. People are represented by attorneys, and the attorneys doing their job, are going to look for new construction of the law and conflicts of the law. Therefore, the law will constantly be tested. This will all lead to a volatile situation where it will be hard to predict what the law will be a year from now. Mr. Huntington feels this will be the situation the state of Montana will face if reforms are passed this session.

Mr. Bob Robinson, Administrator of the Workers' Compensation Division provided a notebook with information for each committee member. (See Exhibit 5) Mr. Robinson stated there will be no way to recover the unfunded liability through premium increases; that would have to come from alternate sources. He said there is an outline of the bill being presented at the hearing on February 14, 1987, in the notebook.

Senator Thayer asked Mr. Robinson to furnish the committee with figures on what the trend has been with involvement from attorneys and what their fees are that are being paid by the Department of Labor. Mr. Robinson replied he should be able to get this information although he will not be able to get the amount of attorney fees paid by claimant. That is a private relationship between the claimant and attorney after the settlement has occurred.

ADJOURNMENT: There being no further business to come before the committee, the hearing adjourned at 3:10 p.m.

SENATOR JOHN "J.D." LYNCH, Chairman

jr

ROLL CALL

LABOR AND EMPLOYMENT RELATIONS COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date Feb 10, 1987

NAME	PRESENT	ABSENT	EXCUSED
John "J.D." Lynch Chairman	X		
Gene Thayer Vice Chairman	X		
Richard Manning	X		
Thomas Keating	X		
Chet Blaylock	X		
Delwyn Gage	X		
Jack Haffey	X		
Jack Galt	X		

Each day attach to minutes.

DATE Feb 10, 1987

COMMITTEE ON Labor

Workers' Compensation Overview

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppo
Ben Everett	self			
Brad Luck	self			
[illegible]	Mt Self Insurers Assn.			
[illegible]	W.C.I. Judge			
Nikki Noland	self			
[illegible]	Mt Bldg Trades			
Pat McKittrick	Self -			
Rep Menahan	House Dist #67			
Jerry Driscoll	Dist 92			
John Delano	Plum Creek			

(Please leave prepared statement with Secretary)

DATE Feb. 16, 1987

COMMITTEE ON Labor

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
James McWolf	Mt Assoc for Rehab			
Jim Smith	MAR			
Dan Glenny	Orion	315	✓	
Charles Mazurek	WSF&G			
Ray Tilman	Montana Resources	315	✓	
Bob Wallace	Senate 15			
Marian Wicks	WIFE			
BOB JAMES	SELF	315		
Kati Williams	Sen. Williams			
Bryan M. Endorle	Missoula Chamber of Commerce			

(Please leave prepared statement with Secretary)

ROLL CALL VOTE

SENATE COMMITTEE LABOR AND EMPLOYMENT RELATIONS

Date Feb 10, 1987 Bill No. 154 Time 1:00 p.m.

NAME	YES	NO
John "J.D." Lynch, Chairman		X
Gene Thayer, Vice Chairman	X	
Richard Manning		X
Thomas Keating	X	
Chet Blaylock	X	
Delwyn Gage	X	
Jack Haffey	-	X
Jack Galt	X	

Julie Rademacher
Secretary

John "J.D." Lynch
Chairman

Motion: Do Pass

1987

To: Senate Labor and Employment Relations Committee

From: Pat McKittrick

Date: February 10, 1987

Dear Senator Lynch and Members of the Committee:

I am appearing here today as a private citizen and as a lawyer who is proud to belong to the legal profession. I had the privilege of serving as Chairman of the House Labor and Employment Relations Committee during the 1973 and 1974 Legislative Sessions and had the high honor of being the Speaker of the House in 1975.

It is my understanding that soon you will be debating a bill, which in part, would abolish the Workers' Compensation Court. I urge you to reject such an attempt.

Prior to 1973, there was intrigue and there were abuses and corruption centering the Workers' Compensation Division. The Workers' Compenstion administrator, serving more than one interest, possessed awesome powers in the administration of the programs under his control, being responsible for the solvency of the State Fund, and in the adjudication of disputed claims. If an injured worker did not receive his legitimate benefits from the Administrator, he then could appeal the Administrator's ruling to that same Administrator to determine what was due and owing. Then if he did not like the decision, he could appeal to the District Court and then to the Montana Supreme Court. All of this cost time and money to an injured worker who was in the least position to hire an attorney and go through the procedures required.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 2/10/87
BILL NO. SB 315

In 1973, I sponsored legislation to strip from the Administrator the quasi-judicial powers he possessed in adjudicating disputed claims. This and other legislation became the focal point for the Legislative Select Committee on Workers' Compensation, which studied the area of Workers' Compensation reform between 1974 and 1975 and which produced House Bill 100. I was the chief sponsor of HB 100 in the 1975 Legislative Session.

The editorial in the Great Falls Tribune, dated January 18, 1975 read in part:

> "Most of the gross abuses in the Workers' Compensation cases and the worst governmental scandal in the State in decades would have been prevented if a special Judge had been in charge of the compensation hearings rather than the Administrator." (Attached hereto is a copy of the Great Falls Tribune editorial.)

House Bill 100 became law. It created the Office of the Workers' Compensation Judge and it provided a desperately needed check and balance in the system. The establishment of the Workers' Compensation Court restored public confidence to this system.

The law provides that the Workers' Compensation Judge is vested with the powers, the responsibilities and the obligations of impartiality just as every District Court Judge is vested with these powers. It provides that the Judge devote all his time to the position of Judge and that the judicial office be separate and distinct from the Workers' Compensation Administration. The Court assures not only impartiality, but fairness and proper consideration be given to all disputed Workers' Compensation claims. If a party to a dispute does not like the decision of the Workers' Compensation Judge, that party has a

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 2/10/87
BILL NO. SB 315

right to appeal directly to the Montana Supreme Court rather than have to appeal first to the District Court and then to the Supreme Court. Importantly, a Judge is not part of the bureaucracy or the administration in power and is not subject to the pressures attendant thereto.

We have had two (2) distinguished Montanans serve as Workers' Compensation Judges. The Honorable William Hunt, now a Justice on the Montana Supreme Court, was the first Judge; and the Honorable Timothy Reardon is currently serving as the Workers' Compensation Judge.

The Court has served the people of the State of Montana well. It has been a forum for the injured worker who has had need of legal redress from actions or inactions at the hands of an insurance carrier who handles the claim. The injured worker now can be represented by an attorney who advocates his case before an impartial judge, and if he is successful, his attorney fees are paid by the insurance carrier who has wrongfully denied him his benefits in the first instance. On the other hand, the insurance carrier can also present its case to the impartial judge. The insurance carrier still has the right to be represented by its battery of attorneys, its experts, its adjusters.

What could be a more fair way to resolve the dispute? Could this be the reason attempts are made to abolish the Court? Who is it that does not want the judicial proceeding to be carried out according to law in a fair and impartial manner? Who is it that would argue that an injured worker should be deprived of the judicial process established? Certainly not the injured worker, who, for once, has his day in Court and has his case fairly tried by an impartial judge.

I would respectfully request that when you deliberate on this and other issues that affect fundamental rights of the people of Montana, you do so within the quiet consciousness of your souls. Please do not be caught up in the frenzy and emotionalism of the moment. I would urge you to reflect upon the sanctity of the judicial system and the important role the Court plays in protecting all of our rights. If access to the Court is taken away in this area of the law, where next will the people of Montana be precluded from having access to the judicial process in the addressing of grievances or wrongs? I would ask you not to discard the Workers' Compensation Court and, in doing so, place the rights of injured workers in jeopardy. I would ask you to clearly and emphatically state that these rights and access to the Court are not for sale.

Thank you.

D. Patrick McKittrick

DPM:ac

cc: House Business and Labor Committee

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 2/10/87
BILL NO. SB 315

1-13-15:16 6F Tri6

Workmen's comp reform

It's encouraging to note that both Democratic and Republican leaders of the Montana House of Representatives are sponsoring a bill designed to help reform the Workmen's Compensation system.

The bill calls for the governor to appoint an independent workmen's compensation judge to have the authority over claims hearings. At present, that authority is vested in the administrator of the Workmen's Compensation Division.

The judge appointed to preside in the workmen's compensation cases would have the same qualifications as a district court judge and receive the same salary of $25,000 a year.

The bill provides for appeals from the special judge's decisions to be taken directly to the Montana Supreme Court.

Since the majority and minority leaders of the House are sponsoring the bill, it should sail easily through the House and also receive favorable attention in the Senate.

Speaker Pat McKittrick, D-Great Falls, explained that the bill resulted from an interim legislative committee's study of the workmen's compensation laws.

Most of the gross abuses in the workmen's compensation cases and the worst governmental scandal in the state in decades would have been prevented if a special judge had been in charge of the compensation hearings rather than the administrator.

And, many of the disgraceful abuses would have been stopped years ago if the press had been allowed to inspect the workmen's compensation records.

Wm. Buckley

AS A CATHOLIC, I have abandoned hope for the liturgy, which, in the typical American church, is as ugly and as maladroit as if it had been composed by Robert Ingersoll and H. L. Mencken for the purpose of driving people away. Incidentally, the modern liturgists are doing a remarkably good job, attendance at Catholic mass on Sunday having dropped sharply in the ten years since a few well-meaning cretins got hold of the power to vernacularize the mass, and the money to scour the earth in search of the most unmusical men and women to preside over the translation.

The next liturgical ceremony conducted primarily for my benefit, since I have no plans to be beatified or remarried, will be my funeral; and it is a source of great consolation to me that, at my funeral, I shall be quite dead, and will not need to listen to the accepted replacement for the noble old Latin liturgy.

MEANWHILE, I am practicing Yoga so that, at church on Sundays I can develop the power to tune out everything I hear, while attempting, athwart the general calisthenics, to commune with my Maker, and ask Him first to forgive me my own sins, and implore him, second, not to forgive the people who ruined the mass.

Now the poor Anglicans are coming in for it. I am not familiar with their service, but I am with their Book of Common Prayer. To be unfamiliar with it is as translating it. As it now stands, for instance, there are the lines, "We have erred, and strayed from thy ways like lost sheep. We have followed too much the devices and desires of our own hearts. We have offended against thy holy laws. We have left undone those things which we ought to have done; and we have done those things which we ought not to have done."

THAT KIND of thing — noble, cadenced, pure as the psalmist's water — becomes, "We have not loved you (get that: you, not thee. Next time around, one supposes it will be "We haven't loved you, man".) with our whole heart, we have not loved our neighbors as ourselves." "Lead us not into temptation" becomes "Do not bring us to the test."

Well, if the good Lord intends not to bring his Anglican flock into the test, he will not test it on this kind of stuff. As it is, Anglicanism is a little shaky, having experienced about a hundred years earlier than Roman Catholicism, some of the same kind of difficulties. I revere my Anglican friends, and highly respect their religion, but it is true that it lends itself to such a pasquinade as Auberon Waugh's, who wrote recently, "In England we have a curious institution called the Church of England . . . Its strength has always lain in the fact that on any moral or political issue it can produce such a wide divergence of opinion that nobody — from the Pope to Mao Tse-tung — can say with any confidence that he is not an Anglican. Its

The man we left behind—"with hc

Anthony Lewis

BOSTON — There has hardly been a time when problems so numerous and so profound confronted us at once. The American economy is in deep trouble. The price of oil is shaking the international financial structure. Future world supplies of energy and food are in doubt. War threatens the Middle East. Relations between the United States and the Soviet Union are deteriorating.

In the midst of all this, the leaders of the American government are thinking about . . . Vietnam. Vietnam? Vietnam.

OUR OBSESSION with a country so remote from American interests has been a puzzle for years. That it should go on now, as half-a-dozen real problems strain our resources of leadership and character, shows how mad an obsession it is.

Indeed, many Americans will find it hard to believe that their leaders are once

breakdown of the truce. I issue of Foreign Affairs, h journal, Maynard Parker w

"ALMOST FROM the agreement was signed, P took to the offensive in eradicate the Com spots . . . the second phas on Jan. 4, 1974, with a sp ordering the army 'to hit base areas' and ended resulted in a marked inc scale offensive operations

Thieu also blocked implem agreement's political pro ing creation of a new natio assurance of free move zones in South Vietnam prohibited any public m agreement's terms. Parker side evidently did think at least a period of pe unprepared for — and stag

CHANGES IN THE WORKERS' COMPENSATION ACT--
RELIEF FOR EMPLOYERS OR RETRIBUTION FROM INJURED WORKERS?

INTRODUCTION

The State Compensation Insurance Fund has a deficit of over $100 million. Premiums charged employers for Workers' Compensation coverage are too high and continue to rise. The private insurance carriers cannot compete with the State Compensation Insurance Fund. Injured workers are waiting up to ninety days to receive their first bi-weekly check. Injured workers have to retain attorneys because of Division rules and regulations that make it absolutely impossible for the injured workers to get his benefits. Medical bills are not being paid on a timely basis. The State Compensation Fund has approximately 70% of the Workers' Compensation business and is severely understaffed. A typical claims examiner handles up to 750 cases at one time. These are real problems not myths.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 2
DATE 2/10/87
BILL NO. SB 315

The Division of Workers' Compensation and the Department of Labor and Industry have engaged an all out campaign focusing on myths. One myth is that there is a litigation explosion in the Workers' Compensation Court. This is simply not true. The Workers' Compensation Court caseload has remained relatively constant over the past several years.

Another myth being pursued by the Division is that recent Court decision have caused the deficit problem. There have been no cases decided by the Workers' Compensation Court that could have possibly caused an $80 - $100 million dollar deficit since the legislature last met.

In January 1985 a Workers' Compensation Advisory Council composed of 20 individuals appointed by the Governor to study the Workers' Compensation Act and recommend legislative changes to this legislature convened. This 20 member council composed of representatives of the insurance industry,

employers, labor, the medical profession, private and state rehabilitation and defense and claimants ' attorneys discussed, debated, argued and compromised over the next 18 months. In June 1986 the council presented to the Governor a comprehensive report for revision of the Workers' Compensation Act that was both cost conscious and people sensitive. Nineteen of the twenty members signed the report. The only member not to sign the report was the Division of Workers' Compensation representative.

Representatives of labor, claimants' attorneys, and all those who have a special interest in maintaining the present system reluctantly agreed to the package in order to allow for a substantial reduction in premiums and give relief to the employers of Montana.

The Division of Workers' Compensation and the Department of Labor and Industry embarked on a private campaign. They went behind the backs of the Advisory Council and

secured Governor Schwinden's approval to destroy the rights of the injured worker. Almost every member of the legislature has been lobbied by Mr. Robinson and Mr. Huntington to accept their proposal without amendment.

UNFORTUNATELY FOR EMPLOYERS AND THE INJURED WORKERS THE DIVISION'S PROPOSAL IS NOT FAIR, IT IS NOT RIGHT, IT WILL NOT WORK, IT WILL COST MORE TO ADMINISTER AND IT WILL CREATE SUCH A CONFLICT OF INTERESTS BETWEEN THE STATE COMPENSATION INSURANCE FUND AND THE DIVISION OF WORKERS' COMPENSATION THAT WILL DESTROY THE ACT.

The following is a partial analysis of the Division's bill:

THE DIVISION'S BILL

THE WORKERS' COMPENSATION COURT

The Division's bill recommends that the Workers' Compensation Court be replaced by Hearings Examiners, a three member Board of Industrial Insurance, and the District Courts.

A. REMOVAL OF COURT WILL RESULT IN A TREMENDOUS CONFLICT OF INTERESTS.

The 1974 legislative council report and Division Audit recommended the formation of Workers' Compensation Court because of a conflict of interest between the State Compensation Insurance Fund and the Division.

The following is a direct quote from the report entitled "Interim Study By The Select Committee On Workers' Compensation":

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 2
DATE 2/10/97
BILL NO. SB 315

> LC 0058 (Appendix C) which creates the office of workmen's compensation judge, will eradicate the present conflict of interest inherent in the administration of Plan III. Presently, the administrator of the Division of Workmen's Compensation has dual roles. He is the administrator of the state agency responsible for the administration and enforcement of the state workmen's compensation laws and he is also the administrator of the state insurance program. The inherent conflict occurs since one person is responsible for reviewing and adjudicating worker's claims; and also for regulating the insurance (including the state fund) and operating the state insurance program, which pay those claims.

Moreover, the Legislative Audit report of June 30, 1974 provides as follows:

> Accordingly, the administrator presently has dual roles. He is (1) administrator of the state agency (the division) responsible for the prompt and fair administration and enforcement of the state workmen's compensation laws, and (2) the administrator and chief executive of the state insurance program, which in actuality is the largest

> single insurance company writing workmen's compensation insurance in the state. These two roles are not compatible and result in a conflict of interest.
>
> * * *
>
> Consequently, Montana is the only state with the conflict of interest circumstances.

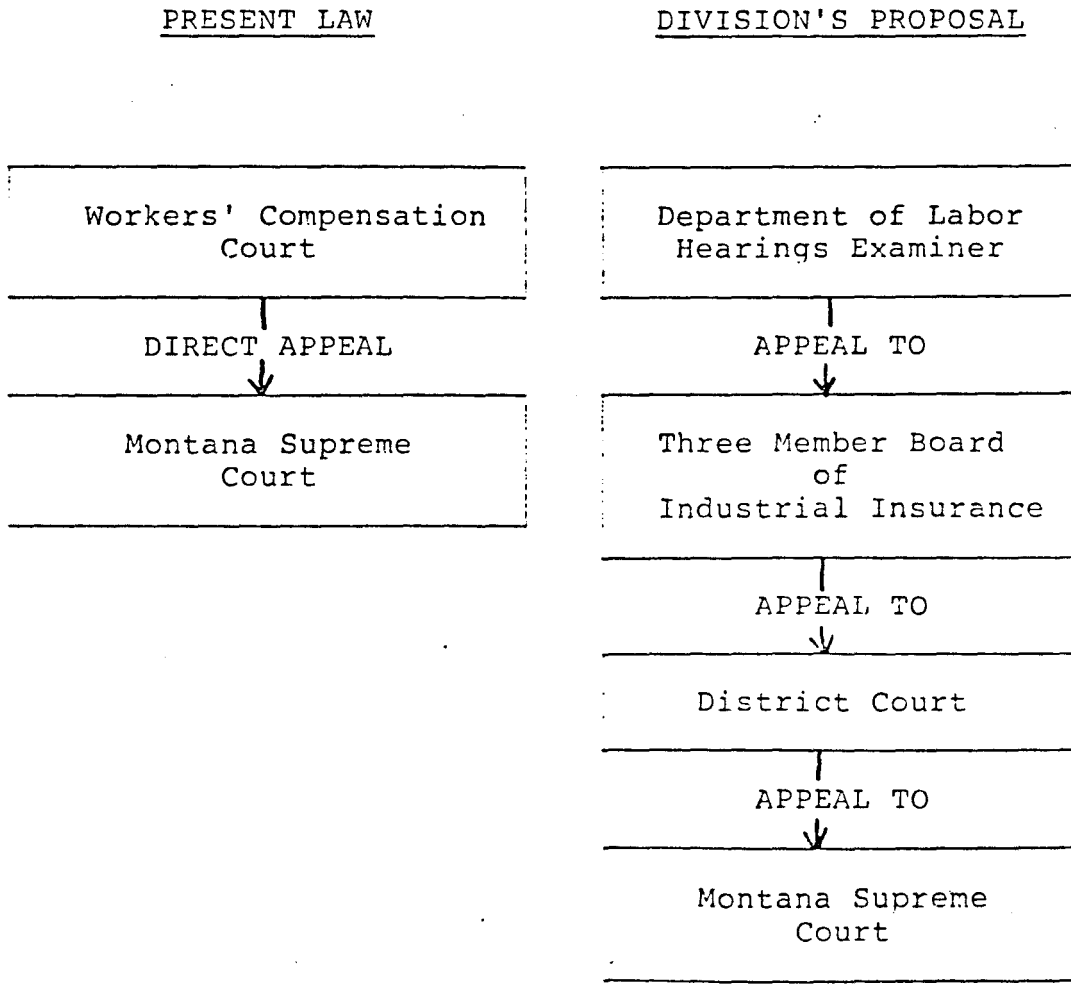
The Division's proposal is an attempt to recreate the inherent conflict of interest between the State Compensation Insurance Fund and the Division of Workers' Compensation. The administrator of the Division is obligated is to administer the State Compensation Insurance Fund in a business like manner and also to fulfill his fiduciary obligation to the injured workers who is the beneficiary of the Act. This dual obligation creates a conflict of interest in the performance of the administrator's duties.

B. THE DIVISION'S PROPOSAL TO REMOVE THE COURT WILL COST MORE THAN THE PRESENT SYSTEM.

The Division proposes to replace the Workers' Compensation Court with Hearings Examiners, a three member Board of

SENATE LABOR & EMPLOYMENT
EXHIBIT NO 2
DATE 2/6/87
BILL NO SB 315

Industrial Insurance, each paid an annual salary of 80% of the Commissioner of Labor and Industry, and direct appeals to the District Court of the State of Montana. The following diagram is a flow chart of the procedure of the present law compared to the procedure proposed by the Division:



It has been recently estimated that the Division's proposal will cost the state approximately $500,000 more this biennium to replace the Workers' Compensation Court with an Administrative process. This figure does not include extra costs to District Courts to handle appeals that are likely if the court is replaced. Division costs are already a strain on county budgets.

Moreover, contrary to the intent set forth in the Division's bill of minimizing the necessity of resorting to lawyers to obtain benefits this procedure will make it absolutely essential that claimants retain attorneys just to understand the procedure and appeal rights that they may have.

C. REMOVAL OF THE WORKERS' COMPENSATION COURT WILL RESULT IN TREMENDOUS DELAYS BOTH FOR THE INJURED WORKER AND THE INSURANCE CARRIER.

The procedural delays that are inherent in the Division's proposal will be tremendous. A claimant who

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 2
DATE 2/10/97
BILL NO. SB 305

after going through the Hearings Examiners, the three member Board of Industrial Insurance and now who must appeal to the District Court will wait years for a decision. The insurer who may be justified in terminating benefits will also be required to wait years before a case is finally resolved. Such delays will defeat the purpose and intent of the Workers' Compensation Act and cause frustration to all those involved in the system.

MEDICAL IMPAIRMENT PROCEDURE

The Division has proposed in Section 35 of its bill that it shall appoint impairment evaluators to render impairment ratings. Neither the claimant's physician nor the insurer's physician of choice will be allowed to render impairment ratings. This procedure is unfair, will be more costly than the present system and will result in a conflict of interest in those cases in which the State Compensation Insurance Fund is the insurer.

A. THE CLAIMANT'S PHYSICIAN IS IN THE BEST POSITION TO DETERMINE THE EXTENT OF IMPAIRMENT THAT HIS PATIENT HAS SUFFERED AS THE RESULT OF AN INDUSTRIAL INJURY.

The most commonly used procedure in the rendering of an impairment rating is as follows:

> The treating physician will make the determination that the injured worker is stable. The physician is then asked to render an impairment rating. The treating physician has usually seen the injured worker many times, has taken x-rays, has prescribed medication and physical therapy and in many cases has performed surgery. If the insurer disagrees with or questions the degree of impairment as stated by the treating physician, it has the right to have the claimant examined by a physician or medical panel of its choice. In most cases the treating physician's opinion as to the degree of impairment is accepted.

The Division proposes that a doctor unfamiliar with the claimant and chosen by the Division will receive the medical reports and records from the treating physician

and then will render an impairment rating based upon his or her own examination. This, of course, will result in a tremendous delay, it will be more expensive because the evaluating physician will be unfamiliar with the injured claimant.

Under the Division's proposal if either side disagrees with the opinion rendered by the Division's handpicked physician, either party may request another evaluation from another physician. However, once that request is made, a third physician is automatically consulted. Whoever requests the second opinion is responsible for paying for that opinion. To the injured worker this expense cannot be justified because he is in the least able position to be able to afford to pay another physician for another examination.

B. THE DIVISION'S PROPOSAL WILL RESULT IN A TREMENDOUS CONFLICT OF INTEREST IN THOSE CASES IN WHICH THE STATE COMPENSATION INSURANCE FUND IS THE INSURER.

The administrator of the Division of Workers' Compensation is also the administrator of the State Compensation Insurance Fund. The State Compensation Insurance Fund is the largest Workers' Compensation insurer in the State of Montana. In most of the cases the Division will be handpicking physicians who will render impairment ratings that will effect the liability of the State Compensation Insurance Fund. Not only is this an apparent conflict of interests but is a real conflict of interest that cannot be resolved under the Division's proposal.

Basic fairness and justice is essential in Workers' Compensation. The injured worker is in the least able position to afford an injury. In many cases his ability to survive financially is dependent upon the benefits he receives. An insurance carrier has exactly the opposite

goal. Its goal is to pay the least amount of money that is necessary. The Division's proposal is an insult to the basic tenants of fairness and justice.

REHABILITATION PANELS

The Division proposes in Section 50 that it shall designate and administer rehabilitation panels. The panels will be composed of:

a. The insurer designated rehabilitation provider.

b. A representative from the Department of Labor and Industry.

c. The representative from the Division who shall chair the panel.

Once again, the authority being requested is unfair, will be costly and will result in a tremendous conflict of interest in those cases in which the State Compensation Insurance Fund is the insurer.

A. THE PROPOSED REHABILITATION PANELS WILL RESULT IN A TREMENDOUS CONFLICT OF INTEREST IN THOSE CASES IN WHICH THE STATE COMPENSATION INSURANCE FUND IS THE INSURER.

As the largest Workers' Compensation insurer the State Compensation Insurance Fund will have most reason to use the rehabilitation panel procedure. In those cases in which the State Compensation Insurance Fund is the insurer, it will be able to designate the rehabilitation provider. The second representative will be from the Department of Labor and Industry and the third representative and chair of the panel will be a representative from the Division of Workers' Compensation. The claimant will have absolutely no say in the rehabilitation that is selected for him. Moreover, a nice safety valve for the State Fund has been placed into the proposal in Section 52. That Section provides that the Division shall issue the initial order of determination which can differ from the recommendation of the rehabilitation panel. The administrator of the Workers' Compensation Division is also the administrator of the State Compensation Insurance Fund. This tremendous conflict of interest cannot be resolved.

SENATE LABOR & EMPLOYMENT
EXH'BIT NO. 2
DATE 2/13/97
BILL NO. SB 315

B. THE DIVISION'S PROPOSAL FOR A REHABILITATION PANEL IS UNFAIR TO THE INJURED WORKER.

In addition to the conflict of interest, the Division's proposal is unfair to the injured worker. A big bother attitude that will result in a decision of the best rehabilitation course for an injured worker who can no longer return to his former job which he may have held for many years will be selected by people other than the claimant. The proposal leaves very little room for the claimant's involvement in his future. A disabled carpenter who has worked at his trade for 25 years could suddenly be required to become rehabilitated as an LPN even though he has no interest, desire or motivation to become an LPN. The examples are many.

The injured worker must play a role in rehabilitation if it is to be successful.

PERMANENT PARTIAL DISABILITY BENEFITS- A WAGE-LOSS SYSTEM

The Division's proposal takes the present law of permanent partial disability and converts it to a wage-loss system that will be based solely upon the difference in wages that the injured worker earned at the time of his injury and the wages the worker is qualified to earn in the workers' job pool subject to a maximum compensation rate of one-half of the state's average weekly wage. (Section 34.)

The wage-loss system proposed by the Division does not take into consideration inflation, the rate of pay the injured worker's job will pay in the future, and a spokesman for the insurance industry has stated that conversion to the wage-loss system in a poor economy is extremely dangerous. Moreover, the administrative cost of administrating such a wage-loss system is prohibitive.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 2
DATE 2/3/87
BILL NO. SB 315

A. GIVEN MONTANA'S ECONOMY, THE WAGE-LOSS SYSTEM AS PROPOSED IS EXTREMELY DANGEROUS.

William P. Molmen, Government Affairs of the American Insurance Association, addressed the Workers' Compensation Advisory Council and discussed a conversion to a wage-loss system for permanent partial disability benefits. Mr. Molmen as an insurance industry spokesman certainly does not express the opinions held by those representing claimants. Nonetheless, Mr. Molmen stated that:

> * * * (B)ut what you are doing by creating a wage-loss system is creating a much more expensive system, unless you know more about your workers, because there aren't the dollars in your system. We see in most states 85% of the workers go back to work, but that could be because we have only looked at three or four states. Montana with your industry mix, and I don't know if you have any economic problems or not, but if you do, going to a wage-loss system and creating one in times of economic down turn may be a mistake, because all your case law is going to be bad case law maybe.

The reason a wage-loss system is so dangerous in Montana is that there are not an abundancy of jobs that allows the injured worker to return to a modified position or after being rehabilitated to compete for jobs with those who have not suffered an injury. A wage-loss system in Montana because of its economic problems will result in a higher percentage of injured workers being entitled to the full amount of benefits for 500 weeks. The system cannot afford to carry the financial load that such a system will impose.

B. THE ADMINISTRATIVE EXPENSE OF ADMINISTERING A WAGE-LOSS SYSTEM WILL BE SUBSTANTIALLY MORE THAN THE PRESENT SYSTEM.

Once again Mr. Molmen, a representative of the insurance industry, admitted to the Advisory Council that the administration expenses in those state, specifically Minnesota and Florida, that have adopted a wage-loss system has increased in his estimate by two times what it was before. The actual testimony is as follows:

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 2
DATE 2/12/87
BILL NO. SB 315

Mr. Everett: What is the cost of administration expenses in Minnesota and Florida, because you said they beefed up their administration? There have obviously been some increases.

Mr. Molmen: I can only give you a guess that it would be twice. If you want that information, you had better go to them because I don't have those figures in my head.

The administration cost adopting a permanent partial wage-loss system such as that proposed by the Division would be even more expensive. Under the Division's proposal every permanent partial disability case would be required to be adjusted by a claims adjuster on a bi-weekly basis for a total of 500 weeks or almost ten years. Every two weeks a determination would have to be made for those injured workers who have returned to work whether or not they are making more or less at that time than they were at the time of their injury. If they were making less during that time period than they were at the time of the injury, a second determination of how much less would have to be made.

There are now approximately 10,000 wage-loss injuries in the State of Montana per year. Each one of these injuries would be subject to a permanent partial disability wage-loss determination. Complicating this matter is another Division's proposal that no claims, other than disputed liability claims, could ever be settled. As a matter of a fact, the word settlement is stricken from the Act under the Division's proposal.

What this means is administration costs would be that after ten years under this system there would be approximately 100,000 open and active permanent partial disability wage-loss claims that would have to be adjusted on a bi-weekly basis. The administration cost of trying to keep track of 100,000 claims is financially prohibitive.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 2
DATE 2/10/87
BILL NO. SB 345

C. THE DIVISION'S PROPOSAL IS UNFAIR TO THE INJURED WORKER WHO RETURNS TO WORK AND DOES INDEED SUFFER A PERMANENT PARTIAL DISABILITY UNDER THE DIVISION'S PROPOSAL BECAUSE THERE IS NO INFLATION FACTOR BUILD IN.

The Division's proposal for permanent partial disability wage-loss is merely a analysis on a bi-weekly basis of the difference between the wages the injured worker made at the time of his injury and the wage that he is earning now at his new job for a total of 500 weeks. There is no inflation factor built in. An example of unfairness is as follows:

> Assume the injured worker is injured on January 1, 1988 and is earning $10 per hour. He has medical benefits, a pension plan and is entitled to a cost of living increase under a collective bargaining agreement on an annual basis. The injury prevents him from returning to his former occupation. He becomes hired at a job which pays $5 per hour, has no medical plan and no pension plan. During the next 500 weeks if he were still able to

work at his former job his wage would increase. The fact that he has lost the opportunity for increased wages as well as the value of the benefits that he would be entitled to if he were able to continue in his former occupation is not factored into the wage loss proposal submitted by the Division.

Not only is this unfair to the injured worker but the modification of the injured worker to return to any form of work will be greatly lessened.

D. THE FACT THAT A PERMANENTLY PARTIALLY DISABLED WORKER CANNOT SETTLE HIS CASE IS UNFAIR TO THE WORKER AND TO THE INSURERS.

It is well known that many injured workers do better if they are able to get their cases behind them. Moreover, in addition to the psychological benefits of resolving a case, the injured worker can put the proceeds of settlement to beneficial uses that increases the success of his ability to return to gainful employment.

disability for the full 500 weeks would be entitled to a maximum of $74,750. Under the Advisory Council's bill that maximum amount would be reduced to $48,588 resulting in a clear reduction of benefits and a substantial savings.

E. THE DIVISION'S PROPOSAL WOULD ACTUALLY COST MORE IN ADMINISTRATION COSTS AND THE POTENTIAL PAYMENT OF BENEFITS TO PERMANENTLY DISABLED INDUSTRIES. THE ADVISORY COUNCIL'S PROPOSAL RESULTS IN A CLEAR AND SUBSTANTIAL REDUCTION IN COSTS.

Under the Division's proposal all permanently partially disabled workers would be entitled to a maximum benefit of $74,750 if injured within the next four years. The administration costs of administering the permanent partial disability provisions of the Division's proposal would increase tremendously.

The Advisory Council's proposal on the other hand would reduce the maximum permanent partial disability benefit

EXHIBIT [illegible]
DATE 2/[illegible]/87
BILL NO. SB 315

to $48,588 and the administration costs would actually be less. Under the Advisory Council's proposal settlement and closing of case files is considered to be a benefit to the system. The emphasis is placed on getting the injured worker back to work as soon as possible and as motivation the injured worker is allowed to compromise and settle his claim without governmental interference.

Under the Advisory Council's proposal the insurer and the claimant are able to resolve the case on a timely basis to the benefit and best interest of all the parties. The Division's proposal is mired in administration costs, creation of controversies and total unfairness. Furthermore, it ignores the real impact an injury has to the worker.

LUMP SUM SETTLEMENTS AND AWARDS

Under the Division's proposal only those who are permanent totally disabled would be entitled to a lump

sum award. Even that is limited to a maximum of $20,000 after being discounted. The word settlement is stricken from the Workers' Compensation Act under the Division's proposal. Settlements are prohibited. this will result in the total inability to resolve a case and close a file. Not only is this not in the best interests of the injured worker, it is contrary to the best interests of insurers.

A. INSURERS MUST BE ABLE TO RESOLVE CLAIMS AND SETTLE CASES.

The settlement of Workers' Compensation cases not only benefits the injured worker but also benefits the insurer and reduces the administration costs of handling the claims. One can imagine what the administration cost of adjusting an increasing number of claims without ever being able to settle those claims would cost the insurance industry. The storage rooms and personnel alone would not be cost effective. The more and the greater number of cases that are active, the greater likelihood of a mistake

SENATE
EXHIBIT 2
DATE 2/10/87
BILL NO SB 345

or error being made. It is bad business practice to expect an insurance industry to maintain the case load that would be required under the Division's proposal.

The major reason that the State Compensation Insurance Fund has a deficit of at least $80 million and estimated to be in excess of $100 million is the failure of the administration to operate that fund as a business. The political decision to reduce premiums for certain industries even though past experience has resulted in a loss is bad business.

Attached as EXHIBIT A is a copy of the State Compensation Insurance Fund Class Code Experience as of December 31, 1984. In that EXHIBIT for example in the fiscal year 1982-83 state asylums and hospitals were paying premiums at the rate of $5.25 per $100. At that rate the State Compensation Insurance Fund was experiencing a 15% loss. Yet, in fiscal year 1983-84 the premium was reduced to $4.65. The result of the reduction in the premium resulted in a 75% loss.

That is poor business practice. The decision to reduce the premium charge even though a loss was being suffered at that premium level was a political decision and not a business decision.

Workers' Compensation claims must be allowed to be settled. If the insurer and the worker agree as to the amount and form of payment, i.e. lump sum or bi-weekly, the government should not interfere. In its proposal the Division is asking for your authority to be all powerful. There would be no settlements or lump sums unless the Division, "in its discretion", approves such an agreement.

B. LUMP SUMS ACTUALLY BENEFIT THE INSURANCE CARRIER AND THE INJURED WORKER.

An injured worker who is suffering from financial distress or desires to relocate to another area to seek employment opportunities or to finance a rehabilitation plan of his own or engage in a business venture achieves

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 2
DATE 2/10/87
BILL NO. SB 315

the goal of the Workers' Compensation Act. That goal must be to get that injured worker back to work as soon as possible. In most cases lump sum settlements and awards are the only vehicle to achieve that goal. Members from the Insurance Commission who served on the Advisory Council recognized the need and benefit of lump sum settlements and awards. The Division of Workers' Compensation completely ignores reality, the best interests of the injured worker, and the best interests of the insurer in its quest for omnipotent power of the Workers' Compensation system.

Long after the present administration is gone the injured workers and insurance carriers will be around to suffer the consequences of the Division's mistakes and poor judgment. The Division cannot be allowed to be more politicized and be granted more power as a reward for its incompetence in managing its own affairs.

C. THE $20,000 LUMP SUM LIMIT AFTER REDUCED TO PRESENT VALUE IS A NUMBER THAT HAS NO REALISTIC BASIS.

In its proposal the Division sets a $20,000 limit on lump sum awards in permanent total disability cases. That number was picked out of the air and has no realistic basis. If analyzed there is no rhyme or reason for that number.

A worker who is entitled to wage-loss benefits in excess of $74,000 under the Division's proposal and who has existing debts in excess of $25,000 which if paid would allow the injured worker to take a lower paying job and still meet his obligations and the necessities of life would not be able to achieve that goal. Such a limit would in many cases defeat the purposes and intent of the Workers' Compensation Act. Moreover, even if an insurer agreed, as they often do, that a lump sum payment of $25,000 or $30,000 is necessary to get the injured worker back on his feet and into the labor market, it would be impossible under the Division's proposal.

Lump sum payments and awards must be analyzed on a case by case basis. The need of the injured worker and the best interests of all the parties must be considered. An artificial limit without room for growth or consideration of the injured workers' real need is unfair to all parties, contrary to the purpose and intent of the Act and will actually result in a greater cost to the injured worker, the insurer and society.

DEFINITION OF JOB POOL IS UNFAIR, UNWORKABLE AND WILL DEFEAT THE PURPOSE AND INTENT OF THE WORKERS' COMPENSATION ACT.

As a further insult to the injured worker the Division proposes to adopt the definition of a job pool in Section 45 of its proposal. The Division's proposal sets forth two job pools: A. A local job pool and B. A state-wide job pool. It further provides that lack of immediate job openings is not to be considered.

A. THE LACK OF A REQUIREMENT THAT JOBS CONSTITUTING A WORKERS' JOB POOL MUST EXIST IN SIGNIFICANT NUMBERS IN ORDER TO PROVIDE THE INJURED WORKER WITH A REASONABLE PROSPECT OF EMPLOYMENT IS UNFAIR, UNWORKABLE AND WILL DEFEAT THE PURPOSE AND INTENT OF THE WORKERS' COMPENSATION ACT.

The purpose and intent of the Workers' Compensation Act is to provide benefits to the injured worker and to enable that injured worker to return to work as soon as possible. The Division's proposal to adopt a job pool to be considered in determining whether or not the injured worker has the opportunity to return to work with the provision that the lack of immediate job openings must not be considered will defeat the purpose and intent of the Act. The injured worker must have a reasonable prospect of finding regular employment in his normal labor market. Jobs that he is trained and qualified to perform must exist in significant numbers in order to provide that injured worker with a reasonable prospect of regular employment. Under the Division's proposal the existence of one job within the boundaries of the State of Montana as a circus train dispatcher,

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 2
DATE 2/10/87
BILL NO. SB 345

an airport parking lot attendant or a floral arranger for example will disqualify most injured workers form benefits and will result in them having no reasonable prospect of finding regular employment. The Division's proposal is so slick and deceitful that it will result in leaving injured workers without the ability to pay for their necessities of life or return to meaningful employment. If this is how the administrator intends to fulfill his fiduciary obligation to the injured worker then the Act should be repealed.

B. THE DIVISION'S PROPOSAL TO DEFINE A JOB POOL WILL IGNORE THE BEST INTERESTS OF THE PARTIES AND REALITY.

A 25 year old injured worker residing in Ekalaka can and should under appropriate circumstances be required to relocate to another area to find work. However, a 55 year old injured worker who has his life savings tied up in his home, who may be caring for his parents, and whose injuries have resulted in his inability to compete for

jobs in his local economy should not be required to relocate under most circumstances. The 55 year old injured worker should not be required to move from Eureka to Bozeman or Missoula to take a part-time minimum wage job at McDonalds or some other business. Such a move would not be in his best interests, does not result in meaningful employment and actually increases the financial distress the injured worker suffers.

Under the Division's proposal these matters cannot be considered. Reality and the devastating impact of such real problems cannot be considered. THIS IS WRONG.

THE DIVISION'S PROPOSAL TO TERMINATE THE INJURED WORKER'S ENTITLEMENT TO DISABILITY BENEFITS WHEN HE BECOMES ELIGIBLE FOR SOCIAL SECURITY RETIREMENT BENEFITS IS UNFAIR, WILL DEFEAT THE PURPOSE AND INTENT OF THE WORKERS' COMPENSATION ACT AND IS PROBABLY UNCONSTITUTIONAL.

The Division proposes in Section 38 that when a claimant is eligible to receive Social Security Retirement

SENATE LABOR
EXHIBIT NO. 2
DATE 3/10/87
BILL NO. SB 315

benefits he will be automatically considered to be retired and will be entitled no future wage-loss benefits. The injured worker does not have to be receiving Social Security Retirement benefits for this provision to be enforced. A 62 year old worker who has intended to work until age 65 or more will receive no wage-loss benefits under the Division's proposal. Workers are eligible for Social Security Retirement benefits at age 62. They do not have to take Social Security Retirement but this provision as written will disqualify them for temporary total, permanent total or permanent partial wage-loss benefits under the Division's proposal. In effect, the Division is imposing upon injured workers age 62 and above forced retirement.

A worker who because of his health, his motivation and his financial circumstances desires to work past age 62, 65 or even 70 is thrown to the wolves under the Division's proposal. Not only is this unfair to these individuals, it is also probably unconstitutional.

GENERAL DISCUSSION

The remaining portions of the Division's proposal that have not been addressed in this paper contain serious defects and flaws that are unworkable. The Division's proposal cannot be fixed. It is a proposal that is so one sided, so offensive to legitimate purposes and so offensive to the rights of the injured workers that it should be discarded in total.

The Division's proposal is not cost effective, will not achieve the purposes and intent of the Workers' Compensation Act and offends intelligence.

The Advisory Council's proposal is a carefully thought out, debated and argued proposal. It is a compromise reached among 19 members representing employers, insurers, labors, attorneys, the medical profession and legislators. It will result in definite and definable reduction in the

SENATE LABOR
EXHIBIT NO. 8
DATE 3/10/87
BILL NO. SB 315

cost of Workers' Compensation and yet will maintain and preserve the purpose and intent of the Act. It is neither one sided nor unrealistic. It will not create additional problems nor will it result in a widening of the conflict of interest problem that is inherent in the administration of the State Compensation Insurance Fund.

Your careful consideration is deeply appreciated.

Respectfully submitted,

BY: Bernard J. Everett

BERNARD J. "BEN" EVERETT

STATE COMPENSATION INSURANCE FUND

Class Code Experience as of December 31, 1984

Code	Description	Rate	Comp. Liability	Medical Liability	Premium	Loss Ratio
0006	Farms & Drivers					
	1979-80	$ 5.95	$1,804,000	$1,038,000	$2,713,000	10
	1980-81	5.95	2,456,000	1,225,000	3,003,000	123
	1981-82	7.50	3,742,000	1,236,000	4,043,000	12
	1982-83	6.95	3,393,000	1,391,000	4,053,000	11
	1983-84	7.70	2,855,000	1,324,000	4,512,000	93
2702	Logging/Lumbering					
	1979-80	$20.90	$1,548,000	$ 417,000	$1,904,000	10
	1980-81	18.85	1,875,000	508,000	2,142,000	11
*	1981-82	19.85	2,988,000	555,000	1,952,000	130
*	1982-83	19.55	2,440,000	505,000	2,251,000	13
	1983-84	20.35	2,853,000	725,000	2,702,000	13
5190	Electrical Wiring					
	1979-80	$ 1.85	$ 331,000	$ 51,000	$ 240,000	159
	1980-81	1.85	228,000	73,000	226,000	13
	1981-82	2.40	284,000	46,000	274,000	1
	1982-83	2.55	51,000	39,000	308,000	9
	1983-84	3.20	321,000	76,000	454,000	8
5403	Carpentry & Oil Rig Erecting & Dismantling					
	1979-80	$ 4.60	$1,255,000	$ 268,000	$ 627,000	245
	1980-81	5.45	432,000	112,000	703,000	78
	1981-82	7.85	816,000	235,000	705,000	14
	1982-83	7.95	1,125,000	265,000	725,000	19
	1983-84	8.75	721,000	244,000	830,000	116
7219	Trailer Towing & Truckman					
	1979-80	$ 8.10	$ 644,000	$ 98,000	$ 702,000	10
	1980-81	7.00	472,000	117,000	937,000	65
	1981-82	8.00	1,610,000	388,000	1,294,000	154
	1982-83	8.55	680,000	137,000	1,122,000	7
	1983-84	8.60	885,000	230,000	1,138,000	9

EXHIBIT A

STATE LEGISLATIVE [illegible]
3
2/10/87
SB 315

STATE COMPENSATION INSURANCE FUND

Class Code Experience as of December 31, 1984 (continued)

Code	Description	Rate	Comp. Liability	Medical Liability	Premium	Los Rat
7720	Policemen, Detectives & Patrol Agencies					
	1979-80	$ 2.35	$ 428,000	$ 128,000	$ 577,000	9
	1980-81	2.10	624,000	139,000	548,000	13
	1981-82	2.60	376,000	140,000	757,000	6
	1982-83	2.40	456,000	140,000	780,000	7
	1983-84	2.15	334,000	149,000	711,000	6
8743	Municipal/State Professional or Administrative					
	1979-80	$ .65	$ 605,000	$ 334,000	$ 381,000	24
	1980-81	.65	79,000	60,000	392,000	3
	1981-82	1.00	65,000	19,000	604,000	1
	1982-83	1.00	184,000	74,000	673,000	3
	1983-84	.80	114,000	41,000	560,000	2
8834	State Asylum/Hospitals, etc.					
	1979-80	$ 2.60	$ 214,000	$ 55,000	$ 243,000	11
	1980-81	3.30	670,000	172,000	593,000	
	1981-82	5.50	669,000	170,000	991,000	8
*	1982-83	5.25	1,014,000	253,000	1,102,000	11
	1983-84	4.65	1,422,000	294,000	981,000	17
9079	Restaurant, Bar, Household					
	1979-80	$ 1.90	$ 454,000	$ 152,000	$ 684,000	8
	1980-81	1.95	724,000	338,000	847,000	12
	1981-82	2.15	1,125,000	420,000	1,046,000	14
	1982-83	2.10	671,000	384,000	1,115,000	9
	1983-84	2.30	1,093,000	466,000	1,280,000	12
9420	Municipal/State/all others Employees					
	1979-80	$ 4.15	$1,187,000	$ 274,000	$1,218,000	12
	1980-81	4.55	$ 851,000	381,000	1,407,000	8
	1981-82	4.95	951,000	266,000	1,676,000	7
	1982-83	4.85	1,181,000	318,000	1,634,000	9
	1983-84	4.70	827,000	257,000	1,622,000	6

STATE COMPENSATION INSURANCE FUND

Summary Totals - All Classes
(omit $000)

Fiscal Year	Comp. Liability	Medical Liability	Manual Premium	Loss Ra
1979-80	$24,675	$ 8,041	$27,542	119
1980-81	28,423	9,158	29,813	12
1981-82	31,050	9,334	33,861	11
1982-83	31,707	10,059	36,057	116
1983-84	32,005	10,413	39,176	108

Active Classification Codes - 350

2
3/10/87
SB 310

5 SOUTH LAST CHANCE GULCH
P.O. BOX 537
HELENA, MONTANA 59624-0537
(406) 444-6540

Workers' Compensation Court

TIMOTHY W. REARDON
JUDGE

February 10, 1987

Senator J. D. Lynch
Senate Labor & Employment Relations Committee
State Capitol, Room 325
Helena, MT 59101

Re: Workers' Compensation Legislature

Dear Senator Lynch:

I am grateful for the opportunity to appear before the Senate Labor Committee on February 10, 1987. I will be most happy to answer any questions regarding the Court and my views on the various proposals in the Legislature regarding workers' compensation. I have prepared some general written comments for the committee which will be given to the Committee Secretary.

Additionally, I have prepared some statistics which reflect the Court's activity and, involvement in the system considering the workforce population, reported injuries and lost time injuries. I hope this information will be helpful to the committee.

Very truly yours,

Timothy W. Reardon

Timothy W. Reardon
Judge

TWR:lld
cc: Senator Haffey
Senator Blaylock
Senator Manning
Senator Thayer
Senator Gage
Senator Keating
Senator Galt

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 3
DATE 2/10/87
BILL NO. SB 315

TO: Senator John Lynch

FROM: Timothy W. Reardon
Judge

COMMENTS ON WORKERS' COMPENSATION REFORM

INTRODUCTION

It is generally agreed by everyone involved in workers' compensation (employees, employers and insurers) that legislative reform is needed and perhaps overdue in Montana. I am convinced that changes are needed to reduce the cost to employers. While I do not believe injured workers are reaping financial windfalls at the expense of their employers, the fact remains that the cost of workers' compensation insurance, combined with other economic factors such as property taxes, income taxes, depressed markets for goods and federal policies, and relaxed safety standards (OSHA), demand that this Legislature act. The urgency of reform is compounded by the financial disaster hovering over the State's largest compensation insurer, the State Fund. As is always the case when the needs of people (claimants) have to be balanced with available funds (premium dollars), solutions will be difficult.

Recognizing the difficulty of this often emotional issue, Governor Schwinden appointed a 20 member Advisory Council in 1985 to study the matter and propose reforms for this session. Not satisfied with the solutions proposed by the Advisory Council, the Department of Labor in concert with its sibling, the Division of Workers' Compensation, has proposed its own legislative reform. Though the proposals of the Department include about 80 percent of the Advisory Council work product, the differences are essentially the heart of the Act.

I agree that the only meaningful cost saving to employers will come at the expense of benefits to workers. My comments are directed at what I feel are significant problems with the Department's proposals in two areas. First, benefits and secondly, the system of resolving disputes. In my opinion, to follow the Department proposal, though unquestionably well motivated, will result in an Act that harms workers, saves no money for employers and will increase operating costs for every insurer.

BENEFITS

Over the last five or six years, the benefit payouts to injured workers have increased and in some areas, such as temporary total disability, the increase is significant. In part, these increases can be traced to decisions issued by the

Workers' Compensation Court and the Montana Supreme Court. The principal decisions are in the area of rehabilitation and the calculation of permanent partial disability benefits.

The first decisions came early in 1982. By 1984, the Supreme Court had ruled that once a claimant had established that he/she could not compete in a labor market particularized to the individual claimant (those jobs for which he/she was eligible given age, education, work history), total disability benefits should be paid. Though somewhat unanticipated by insurers at the time, the ruling has been accepted and in 1985 was essentially codified by the legislature. Though this principle has increased costs, it still leaves unanswered certain key questions which this Legislature should address. Most importantly, some determination should be made as to how much retraining is required. Should an insurer pay for retraining that maximizes an injured worker's potential, or should a worker be retrained to compete in a labor market commensurate with his/her pre-injury earnings (eg. - should a worker who was earning $12/hr. when hurt, be entitled to sufficient retraining to compete in a job market that pays comparably) or is retraining to be the minimal amount required to compete for any job that may exist in a job service listing?

Contrary to the position argued by the Division, the Court decisions in this area merely reflect the State of the law. Section 39-71-1001, MCA, which has been in existence since 1961 states:

> **39-71-1001. Referral of disabled workers to department of social and rehabilitation services for vocational rehabilitation.** The division shall refer to the department of social and rehabilitation services workers who have become permanently disabled as the result of injuries sustained within the scope and course of employment by an employer enrolled under the Workers' Compensation Act and who, in the opinion of the division, can be vocationally rehabilitated. The department of social and rehabilitation services shall provide for the vocational rehabilitation of the injured workers under the provisions of Title 53, chapter 7, parts 1 and 2.

While not every injured worker requires vocational rehabilitation, once the worker demonstrates that because of an injury he no longer has a job market available to him, the Division must provide rehabilitation services to the worker. The Court decisions in this area have merely implemented the Statutes.

In the area of permanent partial disability, there has always been controversy and case law. In 1984, the Supreme Court in Hafer v. Anaconda Aluminum, _____ Mont. _____, 684 P.2d 1114, 41 St. Rep. 1403 (1984) and McDanold v. B.N. Transport, _____ Mont. _____, 679 P.2d 1188, 41 St. Rep. 472 (1984) set out more precisely than ever before, how injured workers and employers should calculate partial disability amounts under the two statutory criteria of Sections 39-71-703, MCA and 39-71-705, through 708, MCA. Though originally thought to be innovative, time has proven the decisions to simply be the last in a progression of cases in this area. Prior to McDanold and Hafer, the calculation of partial benefits and 703 was oftentimes guesswork. While the vagueness of those calculations prior to McDanold and Hafer often promoted negotiation, the cases finally set out the necessary evidence or basis upon which the extent of benefits could be determined.

In its proposal, the Department wants to adopt an impairment/wage loss system for paying permanent partial benefits. The premise of this proposal is that claimants could receive up to 500 weeks of partial benefits at a maximum rate of one-half the State's average weekly wage which, at this time, would be $148.50. The maximum cost would be $73,250.00. The only means whereby insurers (employers) could hope to save any money under this concept is to insure that all partially disabled claimants become reemployed. Though retraining costs would be minimized under the Department proposal so that a claimant's labor market could be expanded, in order to achieve the necessary cost savings, the claimant has to have a job which would allow his wage loss benefit to be less than the maximum. Mr. William Molmen of the American Insurance Alliance, spoke to the Advisory Council regarding wage loss systems in other states and indicated that there would be no cost saving under a wage loss system in a state with a depressed economy and high unemployment. As proposed by the Department, there would be no lump sum payout of future benefits to pay debts, further rehabilitation or any other purpose. For workers whose pre-injury income was less than the State's average weekly wage, a wage loss system such as this may well be fair, however, for workers whose pre-injury income exceeds the State's average weekly wage, the inability to obtain a lump sum payment guarantees financial problems. While not necessarily imprudent in handling money, we all tend to spend what we earn. If a worker is taking home $350 or $400 a week or more when hurt, his lifestyle is set on that income. Given the cap on weekly benefits and no hope of eliminating the debt that has to occur with the loss of equivalent take home pay, the financial peril for many claimants is obvious and certain. Such should not be countenanced.

In addition to the lack of financial savings to insurers and employers under this proposal, in order to properly monitor all claims (since no claim can be compromised each file has a 10 year

life), the Division would have to expand staffing significantly. Under a wage loss system, benefits are paid for the difference in pre and post injury earnings so every raise, bonus or even reduction would have to be monitored on every file to insure the proper rate was paid.

The Advisory Council bill has a direct mathematical savings to insurers (employers) in the area of partial benefits because it reduces the maximum number of weeks of available benefits to 325. The maximum comp rate would be the same. Lump sum settlements would likewise be permitted. The Department's primary objection to the Council's proposal is that it encourages speculation as to future benefits which may not be owed while the Department bill provides that the comp is not paid until after every two weeks loss of income is reached. While it is correct to state that a lump sum of future benefits assumes a future earnings loss, the McDanold and Hafer and more recently Dunn v. Champion International provide sufficient parameters, as to how a claimant and insurer can calculate the amount. Additionally, once the claim is settled, the carrier (employers) liability is ended except as to medical cost and the liability fixed. It is, in the long run, no more or less speculative than the Department bill and permits claimants a means whereby they can utilize a lump sum amount to eliminate debts incurred because of their disability and it allows a claimant and insurer to end the matter once and for all.

In my view, considering the entirety of the benefit proposals of both bills, the Council bill is superior in that it insures cost reduction today forward and not in retrospect after 500 weeks elapses.

COURT V. INDUSTRIAL APPEALS BOARD

As part and parcel of its reform plan, the Division and Department recommend that the Workers' Compensation Court be eliminated and replaced with an administrative hearings process.

Given the need for legislative consideration of Workers' Compensation, I am in agreement that the Court system should not be immune from review. Since hindsight is the only known product of human perfection, anything can be improved. Having considered the Department's proposed replacement for the Court in resolving disputes under the Act, I am convinced that there is no improvement anywhere in the proposal. Under the current draft proposal from the Department, I believe the Legislature is being asked to adopt a regressive piece of legislation. No doubt my objectivity is somewhat colored but no more so than that of the Department or Division whose only basis in support of its proposal is that they disagree with certain Court decisions.

To its credit, the Division has all but conceded that there is no intent to change the system of adjudicating disputes to improve the timeliness, cost or quality of decisions. As the multiple press releases issued by the Division show, the singular motive is to preclude the granting of benefits which the Division does not want granted. To rectify what the Division feels is a Court system gone awry, it is proposed that the Division (or the Department) should be allowed to conduct hearings on disputes and issue decisions. Not coincidentally, the proponents of this solution happen to be the Chief Executive Officers of the State's largest workers' compensation insurer which is 100 million dollars in the red.

To say that this proposal creates a statutory conflict of interest is a gross understatement. Due process as protected by the Constitution is at risk. Though the Department of Labor would appoint hearing examiners and not the Division for benefit disputes, for all intents and purposes there is no distinction. One need only observe the media campaign under way to observe that the Labor Department and the Division speak as one voice. To suggest that the Division or Department can act impartially on disputes under the Act is simply not supported. The public pronouncements by the Administrator and the Commissioner, criticizing Court decisions and complaining that the Courts have taken over the policy making role of the Division, should make a fair minded person pause to think of how claimants would be treated under this proposal. The Division would be empowered to mediate disputes, hold hearings on rehabilitation issues, appoint rehabilitation evaluation and medical panels, and at the same time it would fulfill its fiduciary duty to protect claimants, somehow solve the deficit of the State Fund, protect employers and treat self insurers and private companies just as it treats the Fund. Promoting that type of control in the Department and Division under its current statutory relationship to the State Fund is akin to allowing the Directors of Montana Power and Mountain Bell to decide utility rate disputes.

In addition, this proposal as it pertains to resolving disputes, is so convoluted and time consuming as to require every claimant to have to have an attorney. Instead of a two step process as it is now, there is a hearing, appeal to the Board, appeal to the District Court and then to the Supreme Court. Critical to the consideration of this approach is the fact that for all intents and purposes, the review by the Board, the District Court and the Supreme Court is based on the record presented at the hearing before the Department or Division hearing officer.

Added to that obvious fact of conflict, is that the amount of time it will take to wade through this procedural morass will result in a financial endurance contest which insurers will invariably win.

Whether a dispute is considered litigation in a Court or a contested case, "in the Administrative Procedure Act" is immaterial - a dispute is a dispute. Similarly, any decision regardless of who makes it will generate support from the winner and contempt from the loser. Numerically less than 2 percent of all lost time injuries, require any adjudication. There is no available data to indicate the numbers will decrease under this proposal except, that as presently designed, the Division will obtain the authority to decide disputes involving its deficit ridden offspring. I am not suggesting that the hearings officer or Board members would pre-judge disputes, but obviously, the inertia of the Fund deficit would put enormous pressure on individuals who are essentially co-employees of the Fund.

If this committee and the Legislature as a whole is convinced that some form of administrative hearing is appropriate in place of the Court, I would suggest three essential changes in the Department plan. First and foremost, neither the Division nor the Department should have any role to play in hearing and deciding disputes under the Act. In their stead, I would suggest using the Agency Legal Services Division in the Attorney General's Office. Secondly, the members of the Industrial Appeal Board should be required to satisfy minimal statutory qualifications. The primary qualification should be that no person who has been employed by the Department of Labor and/or Division, particularly the Workers' Compensation Division, within the last five years is eligible for the Board.

Third and, perhaps most importantly, the State Fund should be statutorily separated from any bureaucratic or governmental influence. If the Fund is to survive as an insurance company, it must be independent enough to do so. A policy setting board as proposed by the Advisory Council is far superior to the current situation.

CONCLUSION

Proponents of the proposal prepared by the Advisory Council as well as the Department bill are seeking the same goal, namely, an Act that provides essential, meaningful benefits to injured workers at a cost Montana employers can afford in these difficult economic times. In some industries such as logging, mining, construction and trucking, the cost of workers' compensation added to the other financial burdens of the industry, demand reform. Neither workers nor employees can find solace in an Act whose cost in dollars causes losses of jobs. The cost of insurance in these industries reflects the fact that they are the industries whose wages are significantly higher than the average worker and the injuries of such workers generally more severe. These are the very workers whose permanent partial entitlement under the Department proposal is not likely to be decreased since comparably paying jobs will be difficult to find. Accordingly,

the benefit in premium reduction to these most effected employers is not likely. As demonstrated by the diversity of the two major bills, the issues are complex and the solutions evasive. There are other significant differences between the two bills which I have not commented on. Each, however, is very important in its own request. I am convinced that page for page the Council bill is superior to that of the Department, both in terms of cost reduction and benefit maintenance. Additionally, the Council's proposal retains a simple, efficient, fair method of resolving controversies.

There is a certain amount of irony in the fact that everyone wants to reach the same goal but the different routes have caused bitterness, name calling and a divisiveness among the very people most concerned with the survival of a viable, healthy workers' compensation system for Montana.

Regardless of the final product of this Legislature, it does not appear likely that the State Fund's financial difficulties can be solved in the short term, if at all. Whether the Fund's deficit is 80,100 or 150 million dollars, the changes in this Act will be for injuries that arise prospectively after the effective date of the change. Since the Fund's deficit is existing now, the money to pay these claims must come from future premiums. There is a very real danger that private insurers who have long complained that the Fund's artificially low rate policies drove them from the market, will now suddenly be highly competitive. Enrollment losses of employers to the Fund diminishes a revenue source for the existing deficit. It is this possibility that neither bill really addresses. Some satisfactory answers to this question must be obtained to preclude more problems in the future.

TWR:lld

INDEX FOR STATISTICAL INFORMATION

The number of petitions/requests for hearing has risen steadily since 1982. This increase is demonstrated by the number of petitions as a percentage of the lost time injuries; reported injuries; and the work force of Montana.*

	FY83	FY84	FY85	FY86	**FY87
Petitions (as a % of) Lost Time Injuries	405 / 8,709	436 / 9,597	646 / 9,533	571 / ***N/A	430 / N/A
Percent Petitions	=4.6%	=4.5%	=6.7%		
Petitions (as a % of) Injuries Reported	405 / 29,717	436 / 31,343	646 / 31,243		
Percent Petitions	=1.3%	=1.3%	=2.0%		
Petitions (as a % of) Work Force	405 / 395,000	437 / 404,000	646 / 405,000		
Percent Petitions	=.10%	=.11%	=.15%		

*Division Statistics
**7/1/87 - 12/31/87
***Division Statistics not available.

COMPARISON TO OTHER STATES

Source: U.S. Department of Labor State Workers' Compensation: Administration Profiles published October, 1984. Statistics for 1983.

This is latest publication available.

Montana compares to Nevada, Idaho, and North Dakota for percent of Petitions for hearing as to the total work force as follows:

	Montana	Nevada	Idaho	North Dakota
1983				
Petitions	351	4,500	494	270
Work Force	395,000	501,700	400,000	299,000
Percent Petitions	=.08%	=.89%	=.12%	=.09%

The amount of time spent by the Court in hearing cases and considering arguments has increased. One reason is that the issues are increasingly more complex. On average, the Court conducts somewhere between 120 and 150 separate proceedings annually.

However, the number of hearings on the merits of disputes or hearings on the ultimate issues of what if any benefits are due, has remained fairly constant. The chart on page _____ refers to the number of trials on benefit issues. The additional hearings in those years relate to arguments on production of evidence, issues as to answering or not answering interrogatories, attorney fees as to amount, if any, as well as oral arguments on petitions for rehearing following the filing of Findings of Fact, Conclusions of Law and Judgments.

TRIALS*

Even though the number of petitions/requests for hearing has risen steadily since 1982, the number of trials on the merits has not changed significantly.

	FY83	FY84	FY85	FY86	**FY8
Trials (as a % of) Petitions	121 / 405	113 / 456	93 / 646	112 / 571	6 / 4
Percent	=30%	=25%	=14%	=20%	=1
Trials (as a % of) Lost Time Injuries	121 / 8,709	113 / 9,597	93 / 9,533	112 / ***N/A	N
Percent	=1.3%	=1.1%	=.9%		
Trials (as a % of) Injuries Reported	121 / 29,717	113 / 31,343	93 / 31,243	112 / N/A	
Percent	=.04%	=.04%	=.02%		
Trials (as a % of) Work Force	121 / 395,000	113 / 404,000	93 / 405,000	112 / N/A	
Percent	=.030%	=.028%	=.022%		

*Represents trials on the merits. There were a number of additional hearings related to disputes regarding attorney fees and motions related to production (objecting or compelling), interrogatories (protective or compelling), oral arguments on

The number of Orders issued annually by the Court has increased. We have titled the orders as Findings of Fact, Conclusions of Law and Judgment and as Substantive Orders.

The number of Findings and Conclusions of Law has been relatively constant, yet total orders have increased. These orders include orders related to discovery (production of documents; answers to interrogatories), attorney fees, post-trial depositions, motions to dismiss or continue a trial and summary judgment where no factual disputes exists.

It is critical to note that determinations by the Court on benefit issues are set out in the Findings of Fact, Conclusions of Law and Judgment. The rest of the Orders, though important, do not affect benefit determinations. For example, in FY85, the Court issued 334 Orders. By deducting Findings and Attorney Fees, the remaining 187 orders relate to those matters set forth previously. In point of fact, there are many single cases which will have three or four orders included in the total but all relate to one case. Thus, those totals can be very misleading if not explained.

	FY83	FY84	FY85	FY86	*FY87
FINDINGS & CONCLUSIONS ON MERITS	67	87	99	92	41
ORDERS ATTORNEY FEES		63	48	53	13
ORDERS TOTALS	124	229	334	264	97

*7-1-86 to 12-31-86

This chart depicts the ratio of findings of fact, conclusions of law and judgment (FFCL) as a percentage of the (1) reported injuries, (2) lost time injuries and of (3) work force for Montana, FY76 - FY87.*

As these percentages show, the Court's involvement (FFCL) as compared to the total number of reported injuries, lost time injuries and of total work force has remained fairly constant over the past 6-10 years.

	FY76	FY77	FY78	FY79	FY80	FY81
FFCL (as a % of)	88	66	86	61	39	51
Lost Time Injuries	N/A	9,760	9,668	10,185	10,306	10,127
Percent		=.7%	=.9%	=.6%	=.4%	=.5%
FFCL (as a % of)	88	66	86	61	39	51
Reported Injuries	29,415	31,734	32,068	34,295	34,736	33,888
Percent	=.29%	=.20%	=.26%	=.17%	=.11%	=.15%
FFCL (as a % of)	88	66	86	61	39	51
Work Force	335,000	348,000	368,000	371,000	371,000	385,000
Percent	=.03%	=.02%	=.02%	=.02%	=.01%	=.01%

*Division Statistics
**7/1/87 - 12/31/87
***Division Statistics not available.

Continued FY82-FY87

Ratio: FFCL to (1) lost time injuries, (2) reported injuries and (3) wage force.*

	FY82	FY83	FY84	FY85	FY86	**FY87
FFCL (as a % of) Lost Time Injuries	57 / 8903	67 / 8709	87 / 9597	99 / 9533	92 / ***N/A	41 / N/A
Percent	=.6%	=.8%	=.9%	=1.0%		
FFCL (as a % of) Reported Injuries	57 / 31,953	67 / 29,717	87 / 31,343	99 / 31,243	92 / N/A	41 / N/A
Percent	=.18%	=.22%	=.27%	=.31%		
FFCL (as a % of) Work Force	57 / 394,000	67 / 395,000	87 / 404,000	99 / 405,000	N/A	N/A
Percent	=.01%	=.02%	=.02%	=.02%		

*Division Statistics
**7/1/87 - 12/31/87
***Division Statistics not available.

Court statistics: Ratio of Findings of Fact, Conclusions of Law and Judgment as a percentage of the number of petitions filed.

	FY76	FY77	FY78	FY79	FY80	FY81
FFCL (as a % of) Petitions Filed	88/300	66/213	86/195	61/184	39/200	51/211
Percent	=29%	=31%	=44%	=33%	=19%	=24%

==========

	FY82	FY83	FY84	FY85	FY86	*FY87
FFCL (as a % of) Petitions Filed	57/351	67/405	87/436	99/646	92/571	41/430
Percent	=16%	=17%	=20%	=15%	=16%	=10%

*7-1-86 to 12-31-86

WHY MORE REQUESTS FOR COURT CONSIDERATION?

Answers are not easily found but the following reasons stem from discussions with attorneys representing both claimants and insurers:

1. A breakdown somewhere in the delivery system and a lack of consistency in the delivery system. Such breakdowns in the delivery system demand more attorney involvement and more attorneys are willing to get involved.

2. Court decisions regarding rehabilitation and permanent partial disability benefits have increased costs, which tend to give claimant's and insurers more to argue about, yet as shown by these charts most cases get resolved short of trial and the percent being settled before trial is increasing.

3. A greater disparity between wages an injured worker can earn and his pre-injury earnings makes it tougher to get high wage earners back to work and increases costs for rehabilitation and time on benefits during a job search. Like it or not, a person earning a high wage who suffers a permanent injury will be less inclined to return to work at a lesser paying job even though there is no intent to take advantage of the system.

5 SOUTH LAST CHANCE GULCH
P.O. BOX 537
HELENA, MONTANA 59624-0537
(406) 444-6540

Workers' Compensation Court

TIMOTHY W. REARDON
JUDGE

February 11, 1987

Senator J. D. Lynch, Chairman
Senate Labor & Employee Relations Committee
Room 325, Montana State Senate
Montana State Capitol
Helena, Montana 59601

Dear Senator Lynch:

During the course of the hearing held in the Senate Labor Committee on February 10, 1987, Senator Gage asked me to provide the committee with information regarding the number of petitions for hearing, broken down by plan. I have attached to this letter a graph demonstrating the breakdown as requested by Senator Gage. As you will note, for fiscal years 76, 77 and 78 there are no statistical breakdowns because the Court did not keep records in that fashion. Beginning in fiscal year 1979, the numbers were noted primarily to breakdown the administrative assessment for purposes of funding the Court operations.

I trust this is the information that Senator Gage requested. If there is any additional information that any member of the committee would like from the Court, I will certainly make every effort to supply it. I would note that it is important to place these numbers in perspective in terms of cases that proceed to trial and decisions rendered. Unfortunately, we do not have a breakdown of the number of cases decided as it pertains to each plan. That information could be obtained but it would take some time as it would require a manual counting of the decisions.

Sincerely,

Timothy W. Reardon
Judge

TWR:lld
Enclosures
cc: Committee Members

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 4
DATE 2/11/87
BILL NO. SB 315

STATISTICAL BREAKDOWNS OF FILING AND OF PETITIONS BY PLAN 1, PLAN 2, PLAN 3

FISCAL YEAR:	76	77	78	79	80	81	82	83	84	85	86	*87
PLAN 1				33	37	45	49	84	61	65	71	59
PLAN 2				118	109	101	141	188	217	359	312	173
PLAN 3				33	54	65	160	133	159	222	188	198
TOTAL	300	213	195	184	200	211	350	405	437	646	571	430

Plan 1 - Self Insurers
Plan 2 - Private Insurance Companies
Plan 3 - State Compensation Insurance Fund

This graph depicts the number of cases in which a petition for trial was received. To compare to lost time injuries, injuries reported and total work force, see page 1(a) February 10, 1987 handout.

Statistics on the number of petitions which progressed to trial on the merits for fiscal years 1983, 1984, 1985, 1986 and six months of 1987 can be found on page 2(b) February 10, 1987 statistical information.

Page 3(d) February 10, 1987 handout, statistical information shows the percentage of petitions which are ultimately decided on the merits in the Court's Findings of Fact, Conclusions of Law and Judgment.

During FY76, FY77 and FY78, the Court did not record the petitions filed by individual plan. The information is available, but some time would be required to individually count those years.

*FY87 July 1, 1986 - December 31, 1986

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND HELPERS - LOCAL 45

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International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers of America
Western Conference of Teamsters
Joint Council of Teamsters No. 2

P.O. Box 2648 GREAT FALLS, MONTANA 59403 Phone 453-1431
Area Code 406

February 11, 1987

Senator John "J.D." Lynch
State of Montana
Capitol Station
Helena, MT 59624

Dear Senator Lynch:

I am in receipt of your letter dated February 5, 1987 asking me to attend a meeting on February 10, 1987. Due to a previous commitment I was unable to attend. It is also my understanding that there will be other hearings on this bill later this week and next week. However, I will be out of town for the next two weeks and regret being unable to attend any of these hearings.

I would like to give you some of my thoughts in regards to this Workers' Compensation matter. Much effort was put into the meetings of the Workers' Compensation Advisory Council to come up with something that would help all parties involved with the rising costs and coverage for the injured workers. These meetings wer very intense due to the fact that we were looking at the possibility of a fifty million dollar plus deficit in the Workers' Compensation fund and attempting to come up with a solution that would keep costs at their current rate and the benefits to injured workers at the same level.

After about a year and one-half the Department of Labor and Industry had a change in administration and came in to the meetings with a complete set of new proposals to the Advisory Council which was very upsetting to all of the Council members due to the fact that the Department of Labor and Industry had been sitting in and providing their input and agreeing with the decisions of the Advisory Council as they went along and then all of a sudden they deviated from what had been talked about for one and one-half years.

I believe the entire proposal by the Workers' Compensation Advisory Council is one of compromise which everyone could live with until such time as the economy of Montana turns around and we eliminate the deficit within the Workers' Compensation Division.

The Governor's proposal is devastating to the injured workers in many regards. The following represents some of these issues:

1. The Governor proposes the elimination of the Workers' Compensation Court. I believe that the elimination of the Court would bring more and faster law suits due to the fact that I do not believe that a Panel would have the knowledge of the Workers' Compensation Act to enable them to handle the case load now pending plus the possibility of many more cases in the future. I think that Judge Reardon has done an exemplary job in his position in making the decisions necessary. As you know, the Council has requested a second judge to make sure these cases are heard in a timely manner to prevent lawsuits by the injured worker who is unable to have his case heard within a reasonable time or to reach a settlement fairly and efficiently. I think that when we compare the dollar amount necessary to maintain the Judge system versus the Panel system we will find that the Judge system would be considerably less expensive and I am in favor of retaining the Workers' Compensation Court.

2. The Advisory Council recommends the establishment of a bonding policy for new companies or companies coming into the State to insure that they have Workers' Compensation coverage for employees so that they do not leave Montana without paying which in the past has left the Workers' Compensation Fund picking up the tab for injured workers.

3. The Advisory Council also made it very clear that the Department would assign people to check employers to make sure that they were paying correct premiums for coverage and to be certain that all companies had coverage for employees. Several thousands of dollars have been lost in the past due to these problems.

4. The Council reduced the weekly benefit from a maximum of 500 weeks to 350 weeks which is devastating to the injured worker, but was a compromise to try and keep the rest of the benefits in tact for the rest of the workers so that they would not suffer other financial probelms after a serious injury. Further, the Council recommended setting up a better program for rehabilitating an injured worker as quickly as possible or at his request which would enable him to return to work and not be dependent upon Workers' Compensation forever.

These are just a few of the issues at hand. I again extend my apology for being unable to attend the hearings, but I would be most happy to visit with you in this regard when I return to the office. Please give me a call and keep me informed on this legislation.

Thank you for your effort and your concern. I hope that you can save what the Advisory Council worked so hard to put together.

Sincerely,

Earl E. Brandt

Earl E. Brandt
Secretary Treasurer

EEB/df

WORKERS' COMPENSATION

REFORM LEGISLATION

Requested

by

GOVERNOR TED SCHWINDEN

Presented

to

MONTANA'S FIFTIETH LEGISLATURE

FEBRUARY 1987

TABLE OF CONTENTS

SYNOPSIS--WORKERS' COMPENSATION REFORM LEGISLATION

Requested by Governor Ted Schwinden

INTRODUCTION

The following material is an overview of the governor's proposal for workers' compensation reform. This synopsis separates some 86 sections into thirteen parts for better understanding and review. "S" page numbers refer to the summary information found in Parts I through XIII. Section numbers refer to the bill.

TABLE OF CONTENTS

WORKERS' COMPENSATION REFORM HIGHLIGHTS

Proposed by

Governor Schwinden

A. Statement of Public Policy -

The Act should replace lost wages for injured workers, provide medical treatment, rehabilitation and retraining through a self-administering system which minimizes the need for litigation. The Act should be construed according to its terms.

B. Board of Industrial Insurance & Workers' Compensation Court -

The current court system is replaced with a quasi-judicial hearing process that hears disputes for both unemployment insurance and workers' compensation insurance. A transition schedule is also provided.

C. General Provisions -

Clarifies and refines certain definitions; eg., injury, wages, beneficiary, and maximum healing. Provides criminal penalties for filing fraudulent claims or obtaining benefits by wrongful means.

D. Administrative Provisions -

Provides for disputed issues to be initially brought before a hearings officer, unresolved items go to Board. Disputed Board decisions reviewed in District Court. Gives the opportunity to resolve contested issues without the necessity for legal counsel. Another provision would allow insurers to give immediate financial incentives to employers who institute approved safety programs.

E. Coverage, Liability, and Subrogation -

Clarifies the current section on coverage by stating which employments are covered, which are exempt, and which can elect to be covered. Redefines insurer liability when an injury aggravates a pre-existing condition. Gives insurer an avenue to subrogate against entire third party settlement.

F. Uninsured Employers -

Provides for payment of wage loss and medical benefits in that order, eliminates lump sum payments, reserve requirements, and puts Uninsured Employers Fund on a cash available basis.

G. Filing for Benefits and Attorney Regulation -

Provides award of attorney fees and costs only if insurer is unreasonable. Reasonable costs can still be awarded to a successful claimant. Provides that no worker can be fired solely for filing a claim, and gives injured worker a two year hiring preference with the same employer. Attorney fees based on additional benefits gained due to the efforts of the attorney. The Division (DWC) to establish limits

H. General Benefit Provisions -

Principal revisions made to reflect clear understanding of benefit structure. Benefit categories are the same as current law. Revisions generally reflect the manner of payment and not the rate or duration of benefits. Two year freeze at 1987 rates incorporated. Temporary total benefits paid from seventh (7th) day rather than first if off work after five days. Lump sum payments limited to $20,000. Cost of living allowance provided in permanent total cases. Death benefits for spouse limited to 10 years rather than life. Only one impairment award for injury to same part of body. Hospital and medical rates frozen for two year period. Wage compensation for incarcerated felons eliminated.

I. Rehabilitation and Re Employment -

Amendments emphasize a "return to work" system rather than a "vocational training" system. Return to work priority sequence established and private rehab vendors provided for. Timelines for assessment, evaluation, and retraining are provided, with a penalty for insurer not actively managing a case. New benefits for job search and relocation provided and retraining benefits continued. Wage supplement benefits at full rate while in assessment and retraining limit on total time to 500 weeks. Reduction in benefit provisions to discourage malingering participants. Rehabilitation panels are established to give process direction. Disputed issues provided for.

J. Self Insurer Solvency -

Allows Division to establish financial security deposit criteria to assure payment of benefits in case of insolvencies.

K. Occupational Disease -

Generally incorporates "Board" language for "Court."

L. Rule Making, Repealers, and Codification Instruction -

General provisions necessary to assure smooth transition, effective dates, and applicability of the Act.

WORKERS' COMPENSATION REFORM LEGISLATION

MAJOR REFORM EFFORTS:

1.) Advisory Council Proposals -- SB-330
2.) Governor's Requested Reform -- SB-315

A. Proposals which are common to both bills

Bill Sec. No.'s SB-330	SB-315		
3	17	1.)	Definitions: surviving spouse; unmarried child under age 22; Board of Rehab. Certification; benefit categories; T.T.; P.T.; and PP.
6	22	2.)	Filing fraudulent claims--penalties attached.
7	25	3.)	Covered and Exempt Employments.
9	26	4.)	Liability of insurers; "medically probable" rather than "medically possible"; traveling employees; intoxicated employees.
10	29	5.)	Uninsured Employers Fund: Put on cash basis; pay wage compensation before medical costs.
11	31	6.)	Attorney Fees on denied claims later found compensable; insurer pays fees if found to be unreasonable, not bad faith.
15	35	7.)	Hiring Preference: No firing for filing a workers' compensation claim; two-year preference with same employer.
17	37	8.)	Cost of Living Adjustment: Adds a 3% maximum increment each year for ten (10) years after a two-year-waiting period.
18	38	9.)	Schedule of Injuries deleted.
21	43	10.)	Incarcerated Claimants: Not entitled to wage compensation benefits.
22	44	11.)	Death Benefits: Change lifetime spouse benefits to ten (10) years; cease upon remarriage; unmarried children from 25 to 22, if in school, or apprenticeship program.

EXHIBIT NO. 2/19/87
DATE 5
BILL NO. SB 315

21	45	12.) Waiting Period Temporary Total: Pay from seventh (7th) day rather than first when off five (5) days.
27	47	13.) Lump Sum Payment permanent total: Discounted at current Treasury rate.
28	51	14.) Rehabilitation Priorities: Establishes return to work and retraining priorities.
29	52	15.) Rehabilitation Services: Can be requested by claimant, insurer, or DWC; Certified counselors provided for as well as SRS counselors; appeals provided for.
32	63	16.) Rehabilitation Information Exchanged.
33	66	17.) Self-Insurer Solvency Proof: Requires $250,000 or average of past 3-year-incurred liabilities.
46	73	18.) Incorporate workers' compensation benefit fraud into criminal statutes.
8	24	19.) Give financial incentives to employers who institute approved safety programs.
19	40	20.) Establish maximum hospital rates.
18	38	21.) Apportion Pre-existing Injuries: Reduce by prior payment, award for injury to same part of body for which an impairment award had been received.
2	1	22.) Liberal Construction: Construe Act according to its terms rather than in favor of any party.
40	23	23.) What constitutes a dispute.

B. Proposals exclusive to the Governor's Bill -- SB-315

Sec. No.s SB-315	
1	1.) Declaration of Public Policy.
2-16, 67, 68, 74	2.) Board of Industrial Insurance to replace Workers' Compensation Court.
17	3.) Definitions: Maximum healing, injury, and wages.
27	4.) Subrogation, insurer entitled to full rights against any settlement.
36-38, 40	5.) Two-year freeze on: Benefit levels--wage compensation and medical services.
38	6.) Permanent Partial Benefits: Give lump sum impairment awards at worker's choice, maximum benefits at 500 (weeks); eliminate future earning capacity criteria; pay wage supplement difference between pre- and post- injury earnings; introduce job pool concept.
37	7.) Permanent Total Benefits: Job pool concept to replace normal labor market; exhaust all rehabilitation possibilities before considered as total disability.
39	8.) Establish medical impairment panels.
42	9.) Clarify benefit eligibility upon qualification for Social Security retirement.
47	10.) Limit lump sums to $20,000 on permanent total for necessities of life; self-employment after rehab process completed; needs arising subsequent to accident; injured agrees to provide follow up information.
54	11.) Establish rehabilitation panels to emphasize a return-to-work program rather than a vocational training concept.
59	12.) Structure rehab benefits to encourage return to work.
61	13.) Add auxiliary benefits for travel, relocation, job search, and on-the-job training.
17	14.) Temporary total benefits cease at maximum healing.
60	15.) Paid rehabilitation benefits during retraining at partial rate.
23	16.) Mediation of disputes.

C. Proposals exclusive to the Advisory Council Bill -- SB-336 SB-337

1	1.) Add additional judge to Workers' Compensation Court.
3	2.) Define normal labor market.
17	3.) Change term 'Permanent Total' to 'Continuing Total.'
18	4.) Permanent Partial Benefits: Reduce duration to 350 weeks from current 500 weeks; make impairment one factor in determining indemnity; other considerations are--physical condition, age, education, work history, continuing pain, actual wage loss, loss of potential future earnings, and any other relevant factors affecting workers' ability to engage in gainful employment.
23	5.) Lump Sum Payments: Use best interest criteria; DWC can only disapprove if detrimental to claimant.
36	6.) Expand powers of Workers' Compensation Court.
44	7.) Require a $25 filing and $25 appearance fee before the Court.
48, 49	8.) Give jurisdiction over Occupational Disease cases to Workers' Compensation Court rather than DWC.
34, 35	9.) Permit employer deductible plans.
31	10.) Continue temporary total benefits through rehabilitation process.

STANDING COMMITTEE REPORT

February 10, 1987 19 87

MR. PRESIDENT

We, your committee on LABOR AND EMPLOYMENT RELATIONS

having had under consideration SENATE BILL No. 154

first reading copy (white color)

REPEAL REQUIREMENTS CONCERNING CABOOSE AS REAR TRAIN CAR

Respectfully report as follows: That SENATE BILL No. 154

DO PASS

~~DO NOT PASS~~

Sen. John "J.D." Lynch Chairman.