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

February 18, 1987 A.M.

The first meeting of the Labor and Employment Relations Subcommittee was called to order by Chairman Haffey on February 18, 1987, at 8:40 a.m. in Room 413/415 of the State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF SENATE BILL NO. 315 AND SENATE BILL NO. 330: Senator Haffey made the suggestion that the committee proceed very informally and include the principal role-players in the discussions and defer to them for a common ground. Senator Haffey suggested the committee approach this subject by identifying conceptual areas of importance. These areas could be shared ideas everyone wants to include in the Workers' Compensation bill and statutes or areas that still need to be considered further. Then, possibly a package of areas can be identified, or at least as many concepts as possible. These areas can then be put into a form of bill language. This language could be a new bill, or the language could be amended to the present bills. Senator Haffey stated there is a list of twenty-three areas that are common ground for both SB 315 and SB 330, and there are other areas where both bills stand alone. Senator Haffey would like the committee to work toward the direction of getting conceptual identification and agreement. This could be put into bill language to be presented to the Labor and Employment Relations Committee.

Senator Blaylock said the subcommittee should state their basic ideas on how to proceed. He stated there are two bills because of the irreconcilable differences between the two groups. Senator Blaylock asked if the committee should put together a grey bill.

Senator Gage feels the committee members should state how the individual views this subject and concept. From previous testimony, Senator Gage feels case law has been given more credence than statutes concerning the cases being settled in the courts. Senator Gage feels everyone is under the opinion things have been too liberal concerning case law. His concern at this point is to overcome the liberal decisions. There is a need for an ultra-conservative statute in the law to off-set the liberalness of the court cases.

Senator Thayer stated he served on the Governor's Advisory Council. He wanted to carry a bill at the June 1986 Special Session which was basically the same as SB 330. The committee must never lose sight of the fund. The state fund is approximately $100 million in the red. This insolvent fund is growing every day, and the longer we wait to rectify the situation, the worse it will get. Senator Thayer feels SB 330 is seven months late and $50 million short. The Labor and Industry representatives, during the April 1986 hearings, were testifying they did not want Senator Thayer's bill introduced during the Special Session, and at the hearing on February 14, 1987, they testified for it. Senator Thayer does not feel either SB 330 or SB 315 solve the deficit problem; they will only allow us to survive a little longer. Senator Thayer reminded the committee Montana has one of the highest Workers' Compensation rates in the country. These high rates are driving businesses out of the state, and many employers are waiting for the outcome of this legislative session. Senator Thayer said every time a business leaves Montana or closes, it will probably drag four or five other small businesses down also. Senator Thayer gave an example of a trucking firm which employes 200 employees. This would also affect a tire shop, a gas station, and other people will also be affected. This entire situation will effect the tax revenue in Montana. Senator Thayer stated the committee has to decide on a new Workers' Compensation Reform law. One that is readable; one that people can settle in an expeditious manner and get the injured worker back in the work force as soon as possible. He feels SB 315 is the vehicle which addresses these concerns. If SB 330 is used, it will codify the case law that has been used the past few years. Senator Thayer feels the committee would be better off to start with a new bill, and that is a decision the committee will have to make. He discussed the design of a bill. Each part of a bill has to fit throughout the bill process. He doesn't think it is reasonable to take bits and pieces of the bills to form a new bill.

Senator Blaylock said he agrees with Senator Thayer and he was determined the Workers' Compensation system needed to be fixed. Senator Blaylock is deeply concerned that neither of the bills take care of the unfunded liability. He felt a grey bill would be the answer because it could answer the problem areas. One problem area is if the committee chooses the court or the proposed board concept. The other is a problem with the definition of injury. Senator Blaylock feels if we start with a grey bill, a decision could be made. He said there were 23 ideas both bills agree on, and this could be the beginning of the grey bill. A determination could then be made on the definition of injury. Senator Blaylock believes if the Workers' Compensation Court is retained, then

the people have the option of going directly to the court. However, if it was put into the system where the cases could be settled before they got to court, this could be a possible way of substantial savings. We have to be careful so the court does not construe.

Senator Haffey stated he would not have consented to work on this subcommittee if he thought it would be a continuation of party political division. This issue is far too important for this type of division. He feels this committee can work toward a legitimate workable compromise. Senator Haffey feels to reach this compromise the members should not insist on any certain bill, as no interested party will get completely what they want. There will have to be a compromise from all who work on this project. Senator Haffey said he had asked at the February 14, 1987 hearing on SB 315 and SB 330, if the sponsors, the Workers' Compensation Division, the involved lawyers, and involved insurance agents could all work toward some common ground. This would mean the benefits won't be as high as certain parties hoped, and the premiums might not be as low as certain parties hoped. Everyone agrees the unfunded liability has to be solved, and this will be done to some extent now; however, the solution will not come from this committee.

Senator Haffey asked the committee if there should not be a state fund, and if it is an issue. Senator Gage stated concerning these two bills, it is not particularly an issue.

Senator Haffey said he received a response to the previous question from all parties involved. The response was that there should be a fund of last resort in this state since Workers' Compensation is mandatory as explained by Laury Lewis. Senator Haffey stated this has given him a sense of the committee. The grey bill might be the direction the committee should take. If this is the route we take, Mary McCue and Tom Gomez are prepared to put together a bill.

Senator Haffey asked Mr. Robinson to give his views on the progress made and to define the concepts. Mr. Robinson replied there were a number of areas with differences. They are 1) the court; 2) the definition of injury; 3) the language in SB 315 related to subrogation, 4) the cost of awards to successful claimants; 5) criteria for lump sums for permanent partial; 6) lump sums; and 7) rehabilitation. Mr. Robinson explained that No. 4, the cost of awards to successful claimants, is the out of pocket cost the attorney incurs while hearing the case for its claimant. These are costs for depositions, for additional medical evaluations,

telephone calls, and copies of all records. These costs can only be recovered by the claimant's attorney if the criteria is shown that the insurer is unreasonable.

Senator Haffey asked Mr. Robinson if these are the 7 areas of concern. Mr. Robinson replied he feels these are the problem points discussed at the SB 315 and SB 330 hearing.

Mr. Grosfield commented on the above issues also. He stated during the deliberation process with the Governor's Advisory Council, it was agreed something had to be done to lower rates, which means taking away benefits. There were several areas where benefits had been reduced, and those are set forth in SB 330. SB 315 accepts those reductions and does other things. Mr. Grosfield agrees with Mr. Robinson's list of areas that are viewed differently. Mr. Grosfield feels of the seven issues, there are three and one-half major areas. The issues as viewed by Mr. Grosfield are 1) the elimination of the court; 2) the definition of injury; 3) the combination of permanent partial and lump sums; and 4) matters concerning subrogation and rehabilitation of the successful claimants. Mr. Grosfield designated issue 4, concerning rehabilitation and subrogation to be a minor difference. Mr. Grosfield does not feel everyone is happy with the rehabilitation provisions, and hopefully, something can be worked out without a lot of controversy. This area needs to be streamlined a little more. The reason the area of subrogation was not addressed by the Governor's Advisory Council at that time was because of a supreme court opinion which negated the Advisory Council from proceeding due to a decision on cases formed from constitutional grounds. This prevented a Workers' Compensation insurer from taking his full subrogation interest as provided by statute. The basis for this decision was the constitutional provision which has now been changed. If the law that now exists is reinstated prior to the decision rendered by the supreme court, this is what SB 315 does. Then, it will provide for whole subrogation by the Workers' Compensation insurer. Subrogation only applies when a third party caused the accident, and this happens in 10-15% of the cases. In specific cases involving serious injuries, the subrogation proposal, as drafted in SB 315, could provide a fairly significant recovery which goes back to the Workers' Compensation insurer and has the effect of lowering the cost of Workers' Compensation insurance. In very few cases is this a meaningful provision. This area could provide additional cost savings. In the area awarded to successful claimants, the Advisory Council amended the current law, which provides for automatic payment of costs and attorney fees to a successful claimant. The Advisory Council stated the claimant had to prove the insurance company

acted unreasonably in adjusting the case before the award of costs and attorney fees. This would cut back 8% of all awards of attorney fees. Few cases go to decision before the Workers' Compensation Court. Only 100 cases per year have been tried in the court in the last five years. The Advisory Council stated a successful claimant should recover his costs automatically when they win. These costs can vary from $300 to $5,000, depending on the complexity of the case. The high cost cases involve expensive medical depositions which some physicians charge as much as $1,500. Mr. Grosfield feels in the entire scheme, this is not a real significant issue. Mr. Grosfield stated he has heard a concern from the division that cases are entering the courts too quickly in regard to permanent and partial disability benefits. Mr. Grosfield explained that the lawyer's concern while representing a claimant is a fair, independent review, and this is a major concern with SB 315. He feels creating a buffer between the stage of dispute and the stage of court would cut down on many cases going to court. Some type of mandatory non-binding arbitration system should be provided. One party may demand the division set up a system to get the parties in to talk and resolve the issues before going in to court. Mr. Grosfield's opinion is a fair number of cases could be resolved in this manner. A person from the division would be the mediator and would order the parties together, listen to both sides, review the medical depositions, and listen to all the hearsay. The mediatory could, after hearing all testimony of the people involved, resolve the case at that point. Mr. Grosfield does not feel this proceeding should be a formal recorded proceeding, or that an official decision should be rendered by the division. The federal system in Montana orders the parties going to a jury or judge trial to a magistery, who is a former Montana judge. In the federal system the parties are ordered to go to a settlement conference and the judge hears both sides of testimony. The judge then gives his view of the case to the involved parties and askes them if they want to go through the expense and trouble of the court process. The judge also gives the parties the option of settling their case. Many cases are settled through this process. Mr. Grosfield feels this type of buffer would solve the division's concerns and would eliminate a number of cases, but it would still provide the protection of an independent review. This system would also provide a savings for the Workers' Compensation Court.

Senator Thayer asked Mr. Grosfield if the court is an appellate review that would just deal with the facts before the arbitrators. Mr. Grosfield replied no, he would not see it as an appellate review because it would not be an appeal from a mandatory non-binding arbitration. No record would be

kept at the first level. It would delay the process before the parties could get to court and it would not be an appeal on the record. If the parties could not agree, then they would go to court.

Senator Thayer asked Mr. Grosfield why the appeal would not go on record, and if this would not be the same third party assistance. Mr. Grosfield replied he is not suggesting the arbitration proposal be a formalized detailed system. The average Workers' Compensation Court case takes approximately six to eight hours to try. With the mandatory non-binding arbitration system, a division person reviews the file, the parties sit down without the expense of depositions and discuss what will be presented in court. The medical testimony will be reviewed carefully and the medical reports can give a good estimation of what the deposition will say. In a formal hearing the parties need formal deposition or the information is considered to be hearsay. Mr. Grosfield's concern of the mandatory non-binding system being formalized and then appealing to the Workers' Compensation Court, is that there would be no independent review. If this process is binding and formalized, the division will be deciding the first issue and Mr. Grosfield does not think it would be right. He would like to see the issue decided by someone independent.

Senator Haffey asked Mr. Grosfield about the need to have an injured worker talk to the provider of insurance on their own. He asked where the attorney fits into the mandatory but non-binding arbitration. Mr. Grosfield replied, it could be written into the law during the non-binding process. The insurance company could talk to the injured worker without representation. In a formalized, contested proceeding, a corporation has to be represented by an attorney; a claimant can represent himself. If a claimant was represented by an attorney, the attorney would have to continue representing the claimant even during the non-binding arbitration. It could be written into the law that an insurance company would not have to be represented, which would save insurance costs. If a claimant is represented by an attorney, the attorney would have to be involved and the attorney would also have to represent the claimant at the non-binding arbitration system. If the claimant is not represented by an attorney, this process could provide a great deal of protection because the division representative would be there to protect the nonrepresented claimant. If an insurance adjuster was present who had a sophisticated knowledge of the law, they could overwhelm a claimant. A division mediator, who also has a sophisticated knowledge of the law, would be there to protect the system of

which the claimant is a part, and this would put the insurance adjuster and the claimant on equal terms.

Senator Haffey asked if having an attorney present is an issue in terms of the suggested mandatory non-binding buffer process between the time of the injury and when it would become a formal proceeding. Mr. Grosfield replied he does not understand how an attorney can be removed from being involved. The attorney is obligated to protect his client. In most cases that go to a contested case hearing, the claimant is represented by counsel because the counsel understands the system and the issues. The claimant not represented does not know what direction to take, and from the practical standpoint, there are not many unrepresented claimants.

Senator Blaylock said this is an idea the committee should consider. He feels if the claimant wants an attorney present at any step, it should be allowed. To give the claimant a fair hearing, an attorney should be present.

Senator Van Valkenburg stated in resolving the overall dispute, the most important issue, if we are going to unite the parties, is the overall cost. Concerning the subject of lawyer involvement in a precourt setting, Senator Van Valkenburg said the way to help this system work would be to take away the financial incentives to go beyond the precourt setting. If we can structure an arbitration setting which holds out the financial incentives, then there can be a reduction of cost and we can facilitate the process of settling cases without litigation. Prior to submitting the Governor's Bill, the division looked at some other alternatives that modeled some things done in other areas of Labor and Industry and mediation.

Mr.Bob Robinson stated the division looked at employment insurance, the Human Rights Commission, and how other states handled this situation. The results were an appeal step with a hearing held before. In most states if there is a Workers' Compensation benefit dispute, there is a hearing, the case is developed, issues are laid out, and a decision is made. If this committee decides to maintain the Workers' Compensation Court or maintain a board, then there should be earlier decisions. Mr. Robinson suggest a record should be developed and the record could be appealed to the court. The record for the Board of Industrial Insurers goes to the district court, then to the supreme court. He suggests one of these steps may need to be eliminated. A hearing could be appealed to the court and then to the supreme court and the important issue would be an objective and unbiased hearing. The Compliance Bureau in the division would be unbiased. However, it has been suggested it is not an unbiased department.

Senator Haffey asked Mr. Robinson about the impartiality of the mandatory but non-binding arbitration where a record is not developed and the opportunity for a pre-formal interaction between the claimant and the insurer is not controlled by litigation. He asked if a mandatory non-binding arbitration without the record appears to be developable. Mr. Robinson stated this is a good suggestion and the division feels the board and courts should be an appeal system. Senator Haffey clarified the system by explaining the process might stop at mediation and if it doesn't, then the parties would go to the formal process. He suggested this concept be put into language for the grey bill.

Senator Gage asked Mr. Grosfield if he anticipated a person being the mediator or three people being the mediators during this process. Mr. Grosfield stated it would be left to the division's discretion. Senator Gage asked Mr. Grosfield what would happen if three people were involved in the mediation process and they gave a unanimous decision that the parties would go to the supreme court. If they did not give a unanimous decision, then the next step would be to appeal to the courts. Mr. Grosfield replied he would leave the structure decision to the division. However, if there were three people hearing a major case in unanimity, it would have a powerful influence on the outcome of a resolution.

Mr. Robinson said he had not considered three people being the arbitrators; his thought was there would be one person as the mediator for the non-binding arbitrator. He feels it would be a waste of resources to have three people. There would be many claimants at this first level and the division does not have the resources for two or three teams of three members. The division would be better financially to have three people handle three individual claims.

Senator Haffey asked how the mediator would be chosen. Mr. Robinson stated the person would be chosen from the Compliance Bureau.

Senator Williams asked Senator Van Valkenburg if this bill has to be out of committee by Friday, February 20, 1987. Senator Van Valkenburg replied it has to be out of committee by Friday at the latest. He explained to Senator Williams that there will only be a need for fine-tuning, not major revisions. Senator Van Valkenburg stated if the subcommittee is not finished by Friday, but it is agreed the committee is making progress for a solution to this problem, he feels there would be support from the House to obtain a suspension

of the rules from the House. Senator Van Valkenburg has discussed this subject with House members Clyde Smith and Jerry Driscoll, and they have indicated their support. Senator Van Valkenburg feels this bill has to be done right.

Senator Williams asked Senator Van Valkenburg what length of time he is referring to for a suspension. Senator Van Valkenburg feels deadlines are a good thing because it forces people to make decisions. If the committee is given too much time, it could go on until the next deadline. Senator Van Valkenburg suggests the committee work hard, and if more time is needed, then we can get more time.

Senator Haffey feels this discussion is leading to a developable concept where language could be drafted into a bill. This language would be a first stop place that would not control the rest of the process. This might address impartiality, extent of involvement of attorneys, and the need to go to a court or a board. Senator Haffey said if there is no objection, Mr. Robinson, Mr. Grosfield, Ms. Mary McCue and Mr. Tom Gomez will work on the language. Senator Haffey asked if this would be a step forward on the discussion. Mr. Robinson replied yes it would.

Mr. Karl Englund wanted to remind the committee that in both bills there is procedure which requires a detailed demand on the other side before a person goes to court.

Senator Haffey said there are two words to be understood. The words are mandatory and non-binding. Mandatory means you have to do it and it might be the only stop a claimant makes. It is non binding if there are other stops you have to make.

Mr. Grosfield said this concept is recognized in the medical malpractice area and it is controlled by the Montana Medical Association. It is a mandatory non-binding system with three doctors and three lawyers who listen to cases. The statute provides if a claimant pursues a medical malpractice case, the panel is mandatory. Anything said during this panel cannot be used in court and the record is destroyed. In a medical malpractice issue, the claimant and the defense present their case to the panel. The major number of medical malpractice cases are decided at the point of this panel. Thus, there are very few medical malpractice cases in the state of Montana that go to court. This mandatory non-binding process is nothing new.

Senator Haffey stated subrogation, the cost of the claimant, and the rehabilitation concepts are the minor issues and could be defined in agreeable language.

Senator Thayer stated the employers of this state are very concerned with the issue of the Workers' Compensation Court. The employers believe the Workers' Compensation Court is the demise of the system. At the beginning of this session, it was hoped a system could be devised to offer employers a reduction of premium and we all realize it is not possible in either bill. Also, there is still the unfunded liability of $100 million to solve. Further reductions were considered during the Governor's Council hearings.

Senator Blaylock asked Senator Thayer if the issue the employers are concerned about is the Workers' Compensation Court or the decisions of the supreme court. Senator Thayer stated he cannot answer this question, but he is mainly interested in the perception of his constituents to this concept.

Senator Blaylock stated he views Judge Timothy Reardon as an honest, fair judge and a competent person who understands this system. Senator Blaylock feels the committee should be very careful when considering the court removal just because the perception of the court is bad.

Senator Thayer also feels Judge Reardon is a competent person and the problems with the court are not Judge Readron's fault. The perception of the court system is that it settled cases across the state, and has lead to a severe impact on the fund. Senator Thayer stated when he refers to the court, he is not referring to Judge Reardon.

Senator Gage stated the committee should remember the issues have to considered by the House also.

Senator Thayer feels the committee should come back with proposals.

Senator Haffey suggested the involved parties work with Tom Gomez and Mary McCue to form language on the issues.

Mr. Robinson stated the division would be willing to lay out the issues in more detail.

Senator Haffey suggested there will have to be some give on both sides if this is ever to work.

Senator Gage stated if the involved parties do not come together with a compromise bill, we will have to choose either SB 315 or SB 330 in its present form.

Senator Haffey feels if a compromise is not reached, it would be a disservice to the state and a discredit to the Labor and Employment Relations Committee.

Senator Haffey suggested using a grey bill as the starting point of fine-tuning the two bills. Mary McCue agreed the grey bill would be the easier route.

ADJOURNMENT: There being no further business to come before this subcommittee, the hearing adjourned at 10:00 a.m.

Jack Haffey

SENATOR JACK HAFFEY, SUBCOMMITTEE CHAIRMAN

jr