

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

February 18, 1987 P.M.

The second meeting of the Labor and Employment Relations Subcommittee was called to order by Chairman Haffey on February 18, 1987, at 6:50 P.M. in Room 413/415 of the State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF SENATE BILL NO. 315 AND SENATE BILL 330:

Senator Haffey explained that at the first meeting of the Subcommittee, a group of interested parties were asked to address several issues. The issues were, the possibility of a buffer group or a mandatory non-binding arbitration vehicle; the cost of the claimant; the definition of injury; and permanent partial lump sums. Senator Haffey said there is now a list of issues (see Exhibit 1), and five of the issues are of possible agreement. He asked for a brief summary of these issues.

Mr. Grosfield stated they met in good faith and as impartially as possible reviewed the major issues. Mr. Grosfield explained issues 1 - 5 of Exhibit 1. Under issue 5 (b), Mr. Grosfield feels repetitive trauma should be a compensable industrial injury. If this is taken out, the exclusive remedy rule is being jeopardized. A fair compromise to this situation would be to put repetitive trauma under occupational disease. Under the occupational disease act there is no benefit for permanent partial disability. Claimants can only obtain benefits for temporary total disabilities and for permanent total disabilities. This would cut approximately half the benefits the repetitive trauma claimant would receive.

Senator Thayer asked how long the process represented in Issue 1 would take. Mr. Grosfield replied the first process would take approximately 45 days. Mr. Robinson stated it would take 15 days for the mediation process. Then the parties would be given 45 days for a cooling off period, or time to make a decision to the mediator's proposal. If a party was not acting in good faith during the process, the case would be sent back to the beginning and it would take another 45 days.

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Senator Thayer asked Mr. Grosfield how long the court process would take to complete. Mr. Grosfield replied it generally takes at least 3 months before the pretrial proceedings are resolved. It would reach court 3 to 6 months after the petition is filed and it usually takes the court 2 to 4 months to issue a decision. If the case goes to supreme court, it would take 8 months more.

Senator Haffey asked if the time period is a turning point. Mr. Grosfield replied it has the effect of a cooling off period and the effect of forcing the parties to think about their case and to hear from an objective party. Mr. Grosfield feels this is a meaningful period of time.

Mr. Robinson stated the dispute resolution language from both bills would eliminate 40% or less of the cases.

Senator Blaylock asked Mr. George Wood to comment. Mr. Wood agrees the mediator system could eliminate a good number of cases, but he feels they have underestimated the number of cases to be resolved at the mediation process.

Senator Gage referred to incentives to settle at the stage of mediation. Mr. Grosfield replied it is tied with the other package. Mr. Karl Englund stated it is also tied in with unreason. If the claimant receives a reasonable offer from the mediation process, the claimant will not receive attorney fees unless the court states a party acted unreasonably. Then, there would be no economic incentive for the attorney to push a claimant to go further so he can get his fees paid by the division.

Senator Gage stated he has been discussing the Workers' Compensation problem with some people who were injured and have been through the Workers' Compensation process. Most of these people express concern of the Workers' Compensation process as being the judge, jury, and hangman, and they are not very happy with this idea. Senator Gage also talked to people from the State Auditor's office about their reaction to the mediator process. Their concern was that we are not getting away from the Division's control. Mr. Grosfield replied there would be two potential reviews by two independent reviewers. In most contested case proceedings there is only one person who hears the case, and they are the judge, the trier of fact, and the one who makes the final decision. That is the process under the current system. Under the proposed system in SB 315, the hearing officer is all powerful. We have to put faith in the people who are appointed to these positions.

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Mr. George Wood asked Mr. Robinson if he wanted the mediator in his department. Mr. Robinson replied a hearing officer would be better off not being in the Workers' Compensation Division, but a mediator would not be a problem in the division. Mr. Grosfield explained he has enough faith in the mediation process and the division personnel that he would not object to them hearing it. They may have to consider that one party could ask for a mediator from outside the division. Senator Haffey asked Mr. Robinson and Mr. Grosfield if there was a problem with having the mediator within the division. Mr. Robinson explained the mediator would not be a judge or a jury, but the mediator would be a facilitator who is very familiar with the Workers' Compensation.

Senator Thayer asked Mr. Grosfield if there is a disincentive in the proposed system so an attorney would not push a claimant along into a second mediation for the purpose of obtaining a larger fee, when the claimant has been offered a reasonable offer. The attorneys would be under the new rules of only being paid for the portion over and above the offer. Mr. Grosfield replied that is correct, and there should not be any incentive for the attorney to ignore the mediation proceedings and push the claimant into court.

Senator Thayer asked Mr. Grosfield if there are hourly wages included in the court costs. Mr. Grosfield replied the court costs include the cost of medical depositions, private investigators, filing fees and travel costs for witnesses. Mr. Grosfield stated he was discussing the court costs with Mr. George Wood. Mr. Grosfield estimated the cost to be \$500 - \$1,000 and Mr. Wood estimated the cost to be \$500. If you look at the current cases that go to Workers' Compensation Court for a decision, there are approximately 100 cases per year. The mediation process will drop the number of cases going to the court. You will be looking at 50-70 cases per year going to the courts, and you would multiply these cases by \$500. Considering the entire scheme of Workers' Compensation, this amount is a relatively low number.

Ms. Bonnie Tippy, representing the Alliance for American Insurers, asked the committee if they would like the help of Mr. Bill Molman concerning SB 315.

Senator Blaylock stated he read Mr. Molman's critique of SB 315 and found it to be very good, and would be glad to have his input.

Senator Thayer stated he does not have any serious objections to his helping the committee, but Mr. Molman should be aware of the changes already proposed.

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Senator Gage stated Mr. Molman's comments were interesting and he could do nothing but help.

Mr. Gene Huntington stated the time problem is a concern and with another person adding more issues there might not be enough time to address the present issues.

Mr. Wood stated he respects Mr. Molman's expertise, but after participating in today's discussion with the quick pace movement, he feels the issues can be resolved by the people who are working on them now.

Mr. Keith Olson agreed with Mr. Wood's statement.

Senator Van Valkenburg stated he is assuming a Workers' Compensation bill will be brought out of the Senate by the 45th day. He is determined to see this happen and the leadership of the Senate will do all they can to help get this bill onto the Senate floor and passed through to the third reading.

Senator Thayer stated Senator Lynch has pledged the full cooperation of the Labor and Employment Relations Committee. Senator Haffey expects the full Labor and Employment Relations Committee will meet on Friday, February 20, 1987 to receive the work product and a recommendation from the subcommittee.

Senator Haffey suggested a phone update for Mr. Molman and if he has any comments he can give them over the phone.

Senator Gage reminded the subcommittee this bill also has to go through the House and if any problems arise they can also be handled in the House.

Mr. Bob Robinson explained issues 6 - 10 are issues which were not agreed upon (see Exhibit 1). Issue 6: The language included in the bill that speaks to aggravation of a pre-existing condition has changed the burden of proof to be more probable. Mr. Grosfield's position has been the language in the body of the bill probably handles the heart attack language which occurs in the work place or claimed to have occurred in the work place. The doctor would have to state the burden of proof would be more probably than not the heart attack was caused by an event on the job.

Senator Gage explained the concern of the injured people he talked to concerning this subject. In many instances doctors are brought in who have no knowledge of the injured worker's injuries. Mr. Robinson stated the worker has the right for first choice of a physician.

Senator Haffey asked Mr. Robinson to clarify Issue 6. Mr. Robinson explained it comes from SB 315, page 29, lines 20 to the bottom of the page. This section will be left in the bill. The language on page 30, lines 1 through 6 will be deleted. Mr. Grosfield explained the committee has to be concerned about the exclusive remedy rule. Generally statutes are written in general terms and the reason they are written this way is to protect the exclusive remedy rule. The more specific language added, the greater the danger of violating that rule.

Mr. Grosfield does not feel emotional or mental stress language should be in this section because it threatens the exclusive remedy rule; however, this will just have to be determined by a court at some later date. The heart language would be better off if the specific situation was not addressed in the definition of injury. Mr. Grosfield explained he has tried many cardiac cases and claimant attorneys now have a fighting chance. The reason for the chance is the possibility rule. It is not a good rule from the standpoint of jurisprudence, but it is a good rule from the standpoint of the claimant. Mr. Grosfield assured the committee that that language will prevent most attorneys from even agreeing to represent a claimant in those areas.

Senator Gage asked Mr. Grosfield if it is determined employers will be covered under the Workers' Compensation laws. Mr. Grosfield replied Montana has a mandatory law that employers carry Workers' Compensation and claimants have no choice but to recover under Workers' Compensation. The exclusive remedy rule simply states if you are covered by Workers' Compensation by law, then you cannot sue your employer for injuries covered under the law.

Senator Blaylock asked Mr. Grosfield about his concern of putting this language into the bill. Mr. Grosfield feels this language should be stricken or the employer will be taking a chance.

Senator Haffey asked Mr. Robinson if this issue has been agreed on but there is still a risk factor. Mr. Robinson replied his legal counsel does not see the risk because the employer has to be proven negligent in order to be liable. Mr. Grosfield disagreed. In the tort area, negligence is a nebulous area, and you can proceed in tort and fight the battle and someone will win and someone will lose. Mr. Grosfield's concern in the stress area is by excluding it in the definition, you have not given the claimant the opportunity to proceed in court.

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Mr. Robinson explained Issue 7: SB 330 provides for lump sum benefits as means for settling all cases, and SB 315 eliminates all lump settlements except for impairment awards. This issue involves whether or not lump sums could be included in the package of settling a case. A lump sum could only be authorized by mutual agreement. There could be no court orders for lump sum settlements. Also there could be a lump sum, but with limited court jurisdiction amounting to a certain number of weeks.

Issue 8: See exhibit 1.

Issue 9: See exhibit 1. Mr. Robinson explained the basic concept of the rehab language and the return to work philosophy is included in both bills, but the language in SB 315 has more control and places more burden on the insurer. The insurer is encouraged to begin rehabilitation immediately or they will be penalized if they wait. Mr. Robinson feels SB 315 is much more refined and more direct.

Issue 10: SB 315 has 500 weeks of maximum benefits and SB 330 has 350 weeks of maximum benefits. SB 315 takes someone with a minor injury, who is eligible for benefits as long as there is documented wage loss. The division recommended the benefits be maintained at the status they are currently, but there will be a change on how they are paid out.

Mr. Robinson stated Issues 1 through 5 are at the point of agreement for the people involved in discussing the issues, but the subcommittee has to come to an actual agreement. Issues 6 through 10 are points not in agreement to the people involved in the discussions, and these are also the subcommittee's responsibility.

Mr. Grosfield stated he agrees with Mr. Robinson's analysis, but that Issue 9 should probably be added to the top category of those already agreed on. Mr. Grosfield feels the issues that still need additional work are Issues 6, 7, 8 and 10. These can be considered as a group in the lump sum area and especially in the permanent partial area. Mr. Grosfield's preference is the parties have the opportunity to discuss a settlement of their case; however, the parties would be precluded from proceeding to arbitration or to the court because neither would have jurisdiction. Mr. Grosfield would like to see the court have jurisdiction over a smaller amount, a figure which could be reached and agreed on. Then, the claimant with a dispute could possibly get a smaller portion of their entitlement to a lump sum. The lump sums for the permanent total benefits the proposal under SB 315

allows the claimant to receive is up to \$20,000. Mr. Grosfield would prefer the parties be entitled to negotiate an amount in excess of \$20,000.

Mr. Grosfield feels Issue 10, the permanent partial benefits, is the area that has to be looked at for cost savings. He also feels Issue 7 and 10 could be tied together. Consideration should be given to reducing the maximum recovery because this is where money can be saved in the least important benefit to the injured worker.

Senator Haffey asked Mr. Grosfield to give an explanation of how Issues 7 and 10 might work together. Mr. Grosfield explained no claimant could get more than 400 weeks for an injury in the permanent partial category. The court would be precluded to force payment up to 400 weeks and could hear arguments on bonafide issues where there are disputes between insurers and the claimant. The parties would go through the mediation process and if they cannot come to an agreement the parties would go to court. The statute would specifically state the court could grant a lump sum up to a set amount. The court agrees with the claimant and the court would award an amount up to 200 weeks. Senator Haffey asked Mr. Grosfield how this is related to the release. Mr. Grosfield stated the court order does not provide a release; however, once the court awards an amount it takes away from the 400 weeks of benefits. If the court awarded 150 weeks of permanent partial benefits, the claimant would only be allowed 250 weeks of potential recovery. Mr. Robinson stated this is a point where there is a difference of opinion. In SB 315 under the permanent partial benefits the claimant is eligible for a lump sum settlement at the time he reaches maximum healing and has an impairment rating. Also, SB 315 would pay the rest of the benefits based on actual documented wage loss. A limited lump sum ordered by the court or by the mediator would force the insurer to pay some portion of a future wage loss which may not exist.

Mr. Robinson said in Issue 8, lump sums or permanent total benefits do occur now and the reason they occur is because there is no cost of living adjustment for the individual over his life span. There is a cost of living adjustment in both bills so there no longer is a need for lump sum settlements under permanent total impairments. A claimant receiving permanent total benefits generally will not be able to return to work and there is some trustee responsibility to the claimant by the division and the insurers. It has been the opinion of Workers' Compensation experts that lump sums generally do not go where they were intended in many cases. The recipient of the lump sum is often not the ultimate beneficiary. The

division has strong feelings regarding the lump sums in the permanent total categories, especially if there is a beginning of a cost of living adjustment.

Senator Gage asked Mr. Robinson if an award is made for an impairment, is that a total payoff for the impairment. Mr. Robinson stated in SB 315 it was proposed if a claimant had a 20% loss of body function, then they are entitled to 20% of 500 weeks benefits, which can be paid weekly or in a lump sum discount.

Senator Gage asked what percentage of the claims that go to court are in the permanent partial category. Mr. Robinson replied the majority of injuries are provided medical help to help the claimant return to work. The permanent total injuries are less than 2% of the cases.

Mr. Grosfield suggested under the permanent partial concept, they agree with the division's payment provision for permanent partial and remove the indemnity award. He asked if an agreement could be reached and the parties could resolve their case without the order of the court and a possible level of court jurisdiction. This would be throwing out a major concession, which is removing permanent partial indemnity awards, but in turn we would like the court to have some limited jurisdiction to award a lump sum when the insurance liability is reasonably clear and when a claimant is in need of a lump sum. This would have to be written into the law. Mr. Grosfield feels the division should have the final approval on any settlement and with this control there should not be any abuses that some people feel currently exist.

Mr. Robinson stated the division is not very comfortable with the idea of limited court jurisdiction, but maybe the criteria of lump sum settlements in SB 315 could be used. This criteria pays for the accumulated bills during the permanent or temporary disabled time.

Senator Blaylock asked Mr. Robinson if he agreed with Mr. Grosfield's statement that removing the permanent partial indemnity awards is a major concession. Mr. Robinson replied that it depends on which bill you are conceding. If you are looking at SB 315, it would not be much of a concession. However, if you are looking at the current law, or SB 330, then it would be considered a major concession.

Senator Haffey asked Mr. Grosfield if it was put into a bill and became law, would it become a major step in controlling costs and what injustice would it do to the injured worker.



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Mr. Grosfield explained there is a need for lump sum resolution cases because injured workers earning between \$25,000 and \$40,000 live a life style built around this salary. Families spend what they earn and this puts them at a certain financial level. Currently the maximum total disability rate is \$15,000 a year. These families can drop their living standard some, but they cannot do away with their house, cars, or other financial obligations. During the period of temporary total disability, a person can get into deep financial trouble, and that affects the individual and the family psychologically, which usually leads to counseling. The impairment ratings suggested by Mr. Robinson are small and the amount paid to the high-income worker is not sufficient to take care of the financial crisis he has gotten into while on temporary total disability benefits. Mr. Grosfield feels if they are giving up the indemnity awards, then the alternative should be a limited jurisdiction within the court to hear the issues.

Senator Haffey asked if the issues raised on labor, market and wage definition are at a point of agreement. Mr. Grosfield replied he had discussed the issues with Mr. Jim Murphy and they agreed there are details that could be worked out. He feels the main issues are being addressed.

Senator Gage asked if the involved people are confident we are at a point where the fund will carry itself.

Mr. Robinson replied the division is as confident as they can be with a law that leaves some to interpretation. Issues 1 through 5 are not considered high dollar cost items, but Issues 6 through 10 are considered high dollar cost items.

Senator Haffey explained that language is being written for Issues 1 - 5 by Ms. Jan VanRiper, Ms. Mary McCue, and Tom Gomez. The disagreement with Issue 6 is the extent of exposure and risk on the stress language. Issue 6 is related to Issue 5 in terms of definitions of injury and accident. Senator Haffey suggested tentative language for the stress as SB 315 proposes and eliminating the heart and stroke language. Mr. Robinson stated there is some disagreement on the heart and stroke language. In Issues 7 and 10 the new language would eliminate indemnity, and the total would be less 500 weeks for permanent partial benefits. Mr. Robinson stated a concern with reducing the maximum number of weeks for a claimant with a serious injury. Mr. Grosfield stated he has always had a problem with the wage loss system. To have a true wage loss system, in theory, it should be open ended, but due to practical matters in 1915, body parts were arbitrarily labeled in terms of number of weeks. Senator

Haffey suggested language being written should state the involvement of the court to a certain extent, and the reduction of maximum permanent partial benefits which Senator Thayer suggested. This would lead to a more solvent system. Mr. Robinson stated the division is still not comfortable paying lump sums for something that might occur. He would rather pay when it occurs. Senator Haffey asked Mr. Robinson if there is a disagreement with the difference between mutual agreement and no court orders and limited court jurisdiction. Mr. Robinson replied yes there was a disagreement.

Senator Haffey asked if Issue 7 and Issue 10 relate, and should Issue 8 be an independent Issue. Mr. Robinson stated Issue 8 should be considered a separate issue.

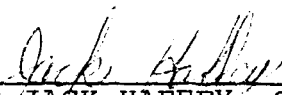
Senator Blaylock asked Mr. George Wood for his views on the limited jurisdiction of the court. Mr. Wood stated the lump sum has never been an issue with him.

Senator Gage suggested when working on the language they leave the amounts for lump sums and number of weeks blank. Senator Haffey explained the language would be written for relating indemnity, court involvement and maximum weeks.

Senator Williams stated the equation will have to reflect back on the system to support itself without any increase in Workers' Compensation. Senator Haffey stated it is directed at not raising the rates for employers.

Senator Haffey asked Senator Gage if it was agreeable to him if in the draft language they use the assumed numbers. Senator Haffey stated the drafting of new language will take most of the day and the subcommittee will meet tomorrow, February 19 on adjournment.

ADJOURNMENT: There being no further business to come before this committee, the hearing adjourned at 8:20 p.m.

  
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SENATOR JACK HAFEEY, Chairman

POSSIBLE AGREEMENT

- ISSUE #1 Maintain Court with mandatory non-binding arbitration. (See attached)
- ISSUE #2 Provide court costs to claimant if he prevails.
- ISSUE #3 Maintain subrogation language in SB 315.
- ISSUE #4 Insert impairment rating by treating physician. Panel system to resolve dispute without mediation.
- ISSUE #5 Definition of "injury."

- a.) Include language on unusual strain.
- b.) Include repetitive trauma in occupational disease law.

OTHER ITEMS

- ISSUE #6 Maintain stress and eliminate heart attack and stroke language.
- ISSUE #7 Lump sums for permanent partial wage supplement benefits.
- Release insurer liability.
  - Mutual agreement--no court orders.
  - Limited court jurisdiction.
- ISSUE #8 Lump sums for permanent total benefits.
- Mutual agreement.
  - No court order.
- ISSUE #9 Rehab to be refined and/or clarified before 1989.
- ISSUE #10 Consider reducing maximum permanent partial award. <sup>benefits.</sup>

SENATE LABOR & EMPLOYMENT  
EXHIBIT NO. 1  
DATE 2/18/87  
BILL NO. SB 315

MANDATORY--Non-Binding Arbitration

- 1.) With or without representation.
- 2.) Mediator hears dispute informally.
- 3.) Mediator reviews Division file for the case and has authority to receive any additional documentation or evidence either side provides and shall hear arguments presented by either party.
- 4.) Argument should include all evidence either party would present to the Workers' Compensation Court should the case go to hearing.
- 5.) After presentation of all information, the arbitrator shall recommend a solution and present such to both parties within a reasonable time. The parties must notify the mediator within 45 days of the mailing of his report whether or not the dispute has been resolved.
- 6.) The mediator shall make every reasonable effort to resolve the dispute.
- 7.) Both parties must make a bona fide effort to present all information and argument to the mediator, including a bona fide effort to resolve the dispute.
- 8.) In the event the dispute is not resolved, the mediator shall advise the Workers' Compensation Court in writing of his decision as to whether each party fairly presented the case as outlined above and fairly attempted to resolve the issue.
- 9.) The mediator shall also advise the Court whether, in the mediator's opinion, a bona fide dispute exists and whether or not the parties fairly attempted to resolve the dispute.
- 10.) If the mediator determines that either or both parties did not fairly present their case or did not make a bona fide effort to resolve the issue, the Court shall summon all parties including the mediator, shall review the proceedings that took place, and determine whether the mediator's conclusion is correct.
- 11.) Should the Court confirm the mediator's report, the parties are ordered back to mediator for further proceedings in an attempt to resolve the dispute.
- 12.) If a resolution is not obtained after the second proceeding, the parties may proceed to the Court for formal resolution of the dispute.

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

WORKERS' COMPENSATION  
REFORM LEGISLATION

Requested

By

GOVERNOR TED SCHWIDEN

Presented

to

MONTANA'S FIFTIETH LEGISLATURE

FEBRUARY 1967

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# STANDING COMMITTEE REPORT

February 13,

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19.....

MR. PRESIDENT

## LABOR AND EMPLOYMENT RELATIONS

We, your committee on.....

having had under consideration... ~~SENATE BILL~~..... No. ~~34~~  
33

(first) \_\_\_\_\_ reading copy ( ~~white~~ )  
color

## EXEMPT SALARIED OFFICERS, OWNERS, AND DIRECTORS FROM UNEMPLOYMENT INSURANCE

### SENATE BILL

Respectfully report as follows: That..... No. 34

1. Title, line 5.

Following: "LAW"

Insert: "CERTAIN"

2. Title, line 6.

Following: "CORPORATIONS AND"

Insert: "CERTAIN"

3. Title, line 7.

Following: ";

Strike: "AND"

4. Title, line 8.

Following: "MCA"

Insert: "; AND PROVIDING AN EFFECTIVE DATE"

5. Page 1, line 14.

Following: "corporation"

Insert: "or by an officer of a corporation owning less than 10% of the voting stock"

6. Page 9, lines 17 through 20.

Following: line 16

Strike: subsection (m) in its entirety

DO PASS

(CONTINUED)

DO NOT PASS

.....  
Chairman.

February 18,

87

..... 19.....

Insert: "(m) service performed for a corporation by a salaried officer or director who owns 10% or more of the voting stock of the corporation;

(n) service performed as a salaried owner or officer of a partnership, association, or sole proprietorship if the individual performing such service owns at least a 10% interest in the assets of the firm or business."

7. Page 11.

Following: line 4

Insert: "NEW SECTION. Section 4. Effective date. This act is effective January 1, 1988."

7049k/L:JEA\WP:jj

AND AS AMENDED,  
NOBELSS  
DO PASS

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