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

February 19, 1987

The third meeting of the Labor and Employment Relations Subcommittee was called to order by Chairman Haffey on February 19, 1987, at 6:30 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 NO. 330: Senator Haffey stated the subcommittee and interested parties would discuss the possible agreements. (See exhibit 1) Ms. Jan VanRiper began the discussion with Issue 2. (See exhibit 2) She explained the drafting process and said it was almost impossible not to work from one of the bills since you have to work in a context. In the case of Issue 2, she worked from SB 315. The additions and the eliminations of language are shown in Exhibits 1, 2 and 3.

Senator Van Valkenburg asked about Issue 4, page 2, and if the references concerning impairment ratings are consistent. Ms. VanRiper stated once you have obtained an impairment rating, the insurer has to start paying the award.

Mr. George Wood said he was under the impression impairment awards were not going to be adopted. Senator Haffey replied he did not recall making that statement. Senator Thayer said he heard this in the halls. Senator Blaylock asked Mr. Grosfield to explain what he had discussed concerning this subject at the last meeting. Mr. Grosfield explained the discussion was about "what ifs". The what ifs were if we took out the indemnity and accepted the division's proposal which would include an impairment award. If SB 330's approach was adopted it would not include an impairment award. Mr. Robinson stated the discussion on SB 330's lump sum award was that the impairment award was included as part of the negotiations.

Mr. Grosfield suggested the committee assume, for this discussion, the division's approach was adopted. Then there would be payment for an impairment award. Ms. VanRiper stated if there is not going to be an impairment award there would then be no need for an impairment panel.

Ms. VanRiper explained Issue 5 a (see Exhibit 2). She worked from the language in SB 315. Senator Thayer asked if unusual strain is defined. Mr. Grosfield replied unusual strain is defined in the current law. The court has stated the intent of putting that language in the law was to cover the incident that involves the usual work in the usual manner and having an unusual result. It is clearly stated by the court, and Mr. Grosfield doubts there would be any dispute on the definition of unusual strain.

Senator Gage asked Mr. Grosfield if other states have a different definition of unusual strain. Mr. Grosfield replied there are probably fifty different definitions of injury, but for the most part they all have the same meaning.

Ms. VanRiper explained Issue 5 b (see Exhibit 2). Ms. VanRiper incorporated the total definition of injury in the Workers' Compensation Act and omitted from that definition the requirement there be an accident. Mr. Robinson asked Ms. VanRiper what happens to the disease language. Ms. Mary McCue stated the word disease was accidently dropped and they will return the disease language to the bill. Ms. VanRiper does not feel there is a need to add the disease language because a disease is an external or internal physical harm, but it is not something which occurs due to an accident. Ms. VanRiper feels the distinguishing characteristic is what caused it in terms of time. Ms. McCue asked Ms. VanRiper if there would be a problem to include the disease language. Ms. VanRiper stated if it is not acceptable we could come up with other language. Mr. Grosfield stated the language is very preceptive. Senator Blaylock asked Mr. Wood his views on this language. Mr. Wood said it appears to him there is more than repetitive trauma in the occupational disease law and it also states those conditions that are not the result of an injury. Mr. Wood asked if this language is too board. Ms. VanRiper stated the reason she preferred this language is because it clearly excluded stress from the Occupational Disease Act. An injury is defined in Section 39-71-119, MCA. Except for the subsection on accidents, this section specifically excludes stress. Ms. VanRiper's concern of the language written in SB 315 is adding repetitive trauma. There would then be a good argument that stress would be included in the Occupational Disease Act.

Senator Thayer asked Mr. Robinson if he was happy with the language in Issue 5. Mr. Robinson deferred to Mr. Grosfield. Mr. Grosfield stated by defining occupational disease, it cannot affect the definition of injury or the Workers' Compensation coverage. Ms. VanRiper stated the language

referring to the term disease from Chapter 72 could be retained, but exclude the term injury. Mr. Grosfield stated he is satisfied with this issue.

Senator Thayer stated he discussed the mandatory non-binding mediation process with some of his constituents and they felt it might lead to problems. The problems described to Senator Thayer were the fear this process would be an effort in futility because the claimants would go through the motions, but would eventually end in court anyway. Senator Thayer would like to see a combination of SB 315 and SB 330 on the court issue, which would retain the Workers' Compensation Court, but the first step of mediation would have the authority to resolve and settle cases.

Senator Haffey reviewed the discussion on this issue from the previous meeting, and the conclusion was a knowledgeable person from the division would be a mediator.

Mr. Gene Huntington brought up a point from the previous meeting's discussion concerning the mediation court judge which may lead to some due process problem. Ms. Van Riper has concerns with the due process perspective under the original proposal. For example, a mediator comes to the conclusion a party has failed to bargain in good faith and this would be communicated to the judge. The parties would then have to go through the mediation process again because from the first meeting they communicated to the judge there was a potential problem with prejudicing the judge. The effect then would be the parties would have to go through another mediation process, which would take approximately 45 days. During this period the parties would not have the opportunity to dispute the findings of the mediator.

Mr. Grosfield feels there is merit in slowing down the process and forcing the parties to review their cases and to force the parties to present an informal case at much less cost. He said there may be a possible concern with due process, but feels language can be written to avoid this problem. The events of mediation process would be taken to the judge even though there is no record. The mediator would state his views of the process and it would be discovered if one of the parties did not cooperate or did not appear to resolve the issue; if there was a recalcitrant attorney who did not do the best job; or came late; or was not prepared; or feels they will not get a fair hearing. The effect would be concern from the judge on how the attorney operated during the mediation process. These actions could

prejudice the attorney's case when it comes to the merits and it is tried in court. However, Mr. Grosfield does not believe an attorney would act this way. Mr. Grosfield feels if a problem occurs and the bill goes into effect July 1, it would take until October or November before the case would get to court. It would take another 6-8 months to get the case tried and a decision rendered and there could then be an appeal on the supreme court ruling. By the time there is a decision made on the claim, and if the claimant was not given a due process at this level, the legislature would be back in session and the legislature could address it.

Senator Thayer asked Mr. Grosfield what would be the outcome if due process was a problem. Mr. Grosfield replied the effect would be if anything is declared unconstitutional, that part is thrown out and everything else remains. The effect would be the section that allows the mediator to make the determination that one or both of the parties did not act in good faith would be thrown out. The mediation process would be retained.

Senator Van Valkenburg stated keeping the Workers' Compensation Court as the finder of fact is important and if there is not agreement of this issue, then it could result in problems. Senator Haffey does not see the mediation process as a problem. Mr. Huntington replied this issue has to be resolved and he would like someone to convince him the due process will not be an issue.

Mr. Karl Englund does not feel a claimant's attorney would dare to go into the mediation process and be completely recalcitrant because there will be a judge only trial. The attorney would have to assume the mediator and the judge will be working close together. Even if there is no report, the mediator and the judge will discuss the case and the judge is the ultimate finder of fact.

Ms. Jan Van Riper does not feel the point of issue is whether or not a claimant's attorney will come in and be uncooperative during the mediation process. The issue is what if the mediator finds the claimant's attorney is uncooperative. Then what would the claimant's attorney do. Many claimant's attorneys would not stand for this and would probably take it to the supreme court.

Senator Van Valkenburg asked Ms. McCue and Ms. VanRiper if they considered that the Workers' Compensation Court is a statutory court and is a creature of the legislature. The Constitution discusses the difference between injuries in the

course of employment as opposed to other injuries. He asked if in this context, does the legislature have the right to establish something different in due process. Would the Constitution then require a tort action situation in district court. The due process in the Workers' Compensation Court permits the mediator to report to the judge. This bill would make a policy choice that a written report given to the judge does not prejudice the judge.

Ms. McCue asked Senator Van Valkenburg if he is referring to the provision in the Constitution which states a person has constitutional rights except when it comes to Workers' Compensation. Ms. McCue interpreted this to mean the remedies for injury to which the claimant is entitled. However, just because this is a Workers' Compensation area, the due process theory should not be forgotten. Ms. VanRiper stated we could veer away from traditional notion of due process. Ms. VanRiper feels it is important to raise these issues, but she feels the langauge could be drafted and it could be researched how far it can be changed within the constitutional limits. Senator Haffey stated he would like to see this issue researched to insure it will stand strong in the constitutional tests and due process.

Senator Thayer asked if there was another plan if the due process issue of mediation cannot be resolved. He asked Mr. Robinson to explain an alternative plan.

Mr. Robinson explained an administrative hearing, as proposed in SB 315, which would be the finder of fact and the initial recommendation.

Mr. Grosfield stated the concern of the issue of due process basically would involve the testimony of all parties, and in his opinion, the parties do have a due process hearing because all parties can speak freely and make comments.

Senator Haffey stated his preference would be to accept this mediation process language and the stress language and present it as part of the recommendation to the full committee.

Senator Thayer stated his constituents and other business and industry people consider the Workers' Compensation Court to be the problem. He feels this should be considered.

Mr. Don Allen asked if the mediation process could be explained. Ms. McCue stated it is written out in Exhibit 1. Senator Haffey explained the mediation process would stop the flow of cases that would go to court. He stated there was a shared judgment from Mr. Grosfield, Mr. Robinson and Mr. Wood that the mediation process would stop approximately 35-40% of the cases which might proceed to court.

Senator Blaylock asked Ms. McCue if #10 of the Mandatory Non-binding Arbitration (see Exhibit 1) would meet the due process procedure. Ms. McCue stated she does not understand what is meant by #10 of the Mandatory Non-binding Arbitration. She does not feel there is criteria for this statement. Ms. McCue also brought up the issue of conflict of interest. If the mediators are working for the division, who is the insurer, as in Plan 3, and if the mediator makes a decision for a division employee, a co-worker, this would be a conflict of interest.

Senator Gage stated he feels it would be a big mistake if the mediators came from the division. Mr. Huntington feels the answer to this issue would be to have the mediators come from the Employment Relations Division or the Department of Labor. Mr. Grosfield feels the simple answer would be if either party requested an independent mediator, a mediator could be chosen from the Attorney General's Office, or another agency. Mr. Grosfield stated he would accept a mediator from the division and would not be concerned with a conflict of interest. Mr. Robinson feels there would be many attorneys who would be concerned about a conflict of interest if the mediator came from the division. Mr. Robinson feels the mediator should come from the Department of Labor's Employment Relations Office. Senator Haffey asked if someone from the Employment Relations Office would have the knowledge to handle this job.

Mr. Robinson stated an employee from the Employment Relations Office would have the basic knowledge, but would also have to develop that knowledge. He feels the person to be hired would probably come from the Workers' Compensation Department. Senator Gage said he is speaking from the point of view of the injured worker and they have expressed the need to be saved from the Workers' Compensation Division.

Senator Thayer asked Mr. Robinson and Mr. Huntington if they are satisfied due process is resolved. Mr. Huntington replied it was consistent with what was originally envisioned in SB 135.

Mr. Don Allen asked if there has been any thought given concerning the mediation process and having a three person group, appointed by the Governor, as the mediator. Senator Haffey explained this issue was discussed at the previous meeting in terms of complexity, knowledge and ability to handle the issue. Mr. Allen's concern is with a conversation between the hearing examiner and the judge and if this discussion would result in more problems. Mr. Allen feels it would be more difficult to prejudice the judge with a

three person panel than with a single mediator.

Mr. Grosfield believes any judge would hear the evidence and rule fairly on the merits, but in any trial setting an attorney can do something to upset the judge, which makes it more difficult for the attorney to present his case. Mr. Grosfield explained that trial lawyers are extremely careful to keep a good working relationship with the court. Language written would be beneficial in forcing attorneys to cooperate. Mr. George Wood stated it does not make a difference if there is an administrative board or the Workers' Compensation Court. If the judge is going to make the decision the attorney will do everything to have the judge on his side.

Ms. VanRiper explained Issue 6 (see Exhibit 2). Senator Thayer said he understood the heart attack and stroke language were to remain. Senator Haffey explained that the previous evening there was a lengthy discussion to draft an amendment to maintain the stress language and eliminate the heart attack and stroke language. Mr. Grosfield explained the discussion on Issue 6 to Senator Thayer.

Mr. Grosfield's concern is when any specific medical malady is combined in an injury definition, if this was excluded, would the exclusive rule be jeopardized, and expose the industry to potential civil litigations. The burden of proof requirement, which is agreed upon in both bills, will cut out almost all heart attack, stroke and instant pulmonary cases.

Mr. Robinson stated there is definitely a difference of opinion concerning this issue. He said there may not be a large number of cases, but heart attacks are an expensive item to the Workers' Compensation Division. Insurance agencies make agreements to buy out a case. The Workers' Compensation Division recently bought out a heart attack case for the amount of $50,000. He said many of these cases are bought out before going to court.

Mr. Robinson mentioned a letter received from Mr. Mike McCarter, a Workers' Compensation Defense attorney. Mr. McCarter's letter discusses the definition of injury and the result of the definition of injury relative to the exclusive remedy rule. Mr. Robinson feels this letter emphasizes the overall view that leaving the heart attack language and the stroke language in the definition does not increase the liability to employers. Mr. Grosfield feels Mr. McCarter is saying it would open the employer to a potential case and that is in agreement with what Mr. Grosfield believes.

The exclusive remedy rule prevents the filing of a case. It is one area of the law that is clear. The problem is if the potential for filing is allowed, then it would abolish the exclusive remedy rule in that area. Senator Haffey feels comfortable with maintaining the stress language and eliminating the heart attack language.

Senator Blaylock asked Mr. Robinson if, when the division bought out the heart attack case, that was the only option. Mr. Robinson stated there is some question whether there is liability. There is also the possibility the claimant's attorney will take the case to court. Thus, the division in effect pays the claimant so the case can be resolved.

Senator Thayer stated he is comfortable with leaving the heart attack and stroke language as it was. Senator Haffey stated the objectives for the subcommittee are to make progress by compromise. The issue to use the current statute as the frame of reference, placing stress in as not compensable and leaving the heart attack and stroke language as rewritten would be a reasonable compromise.

Senator Haffey stated he realized it is not SB 315 which makes both circumstances noncompensable. Jim Murphy stated that was not a correct statement as stress is excluded in SB 315. Senator Thayer was under the impression Mr. Grosfield stated he had no objections to leaving the language in its original form. Mr. Grosfield corrected Senator Thayer and stated he feels strongly about the change of the new language. Mr. Grosfield stated in SB 315, on page 40, line 20, the key issue creates the burden of proof in establishing aggravation of pre-existing conditions. There are two ways to establish a heart attack case. The first is by proving there was a severe blow to the chest, and the second is to prove there was aggravation of a pre-existing condition. Under current law the proof comes if a doctor will state it is possible the heart attack was caused by the physical condition of the job or stress aggravated the pre-existing heart condition. An attorney would then have a chance of establishing a defensable case. This language prevents the burden of proof as a possibility. Mr. Jim Murphy stated there are cases when a person has a heart attack due to a one time occurrence and a doctor will state it is a possibility the one occurrence triggered the heart attack. The question would then be if the heart attack was more probable or not caused by a one occurrence, and what about the primary cause such as 4 packs of cigarettes a day.

Senator Blaylock feels the heart attack language with the

primary cause language should be in the bill. Senator Gage asked what would the difference in cost be if the stress language was eliminated and the heart attack and stroke language was maintained. Mr. Robinson feels it would make a significant difference. It would be much more expensive if stress was included in SB 315. Mr. George Wood stated the problems with the cost of stress benefits are great and the cost of heart attacks is not that significant.

Senator Haffey stated language should be written for Issues 1 - 5, Issue 6, and Issue 9 if there are no further questions for these issues. Mr. Robinson stated they are not that far apart on the views and if there is a potential problem it can be handled in the next legislative session. Ms. McCue asked if the language should be drafted from the language in SB 315. Mr. Grosfield stated he could assure the committee he will not be involved in a dispute concerning the rehabilitation language. Senator Haffey asked the involved parties if they can proceed to draft language. Senator Thayer suggested some of the matters not addressed by the subcommittee could be addressed by the House members. Senator Haffey stated he would like the full committee to receive a readable grey bill by the next day. Senator Thayer stated if the committee decides to use SB 315 and redo it to reflect the changes, then the grey bill would actually be SB 315 with amendments. Senator Haffey stated the number of the bill will be decided at another time.

Senator Blaylock asked Mr. Grosfield to explain indemnity awards. Mr. Grosfield explained under permanent partial disability there are two potential awards. Permanent partial disability means after you reach maximum healing and you have a permanent condition, it will be there the rest of claimant's life, and the condition will affect their employment. The claimant can then receive a permanent partial award. The current law provides a wage loss permanent partial award, which means if the claimant can demonstrate the salary he was able to earn after the injury is less than the salary the claimant can earn before the injury, then the claimant is entitled to an award of 2/3 the difference, subject to the maximum amount set by law. The claimant can receive the benefits under current law for whole body injury for up to 500 weeks. For an arm the benefit award is up to 280 weeks and for a hand the benefit award is up to 200 weeks. If the claimant cannot demonstrate a true wage loss but they can demonstrate a diminished ability to compete in the normal labor market in the future, then they are entitled to an indemnity award. This award under current law is based on age, education, type of work done in the past, and pain they will be suffering in the future. All of this is taken into

consideration and a negotiated figure is reached. Mr. Grosfield feels indemnity awards are fair and they provide an award for the life suffering of the person. He also feels the indemnity awards should remain in the law. SB 330 keeps this award but lowers the maximum recovery.

Senator Haffey believes the issue of permanent partial and indemnity awards is whether there is a role for indemnity awards or not; whether there are going to be lump sum changes in the current law; if there is a role for lump sums in the court or not; if lump sums will still be available under some circumstances; and if there is an issue on the maximum permanent partial award in terms of weeks. Senator Haffey asked Mr. Huntington if he had any comments on his summary. Mr. Huntington stated SB 315 is central to their proposal. Senator Haffey told Mr. Huntington he feels there are cases where an injured worker would be better off with the lump sum, and he asked if that was addressed in SB 315. Mr. Huntington stated the permanent partial award is allowed to be paid out however the injured worker would like to be paid. Mr. Huntington stated bi-weekly payments tend to be the rule in Montana. Mr. Grosfield stated impairment ratings are based on a study done by the American Medical Association A recent study concluded there is no basis for the American Medical Association guide to impairments, and no one knows where they obtained their information. An impairment is a restriction of anatomical movement. Mr. Grosfield explained there is generally a 5% impairment for major back injuries. After a back injury, the person can move, but he cannot lift. A 5% impairment, which would be the standard, would amount to 25 weeks of benefits, which is approximately $3,000-$4,000. He said people in a high income bracket could get into a financial bind while they are in the healing stage and an impairment award would hardly be meaningful to them. Mr. Huntington stated there are cases with unusual circumstances. However, there has to be a balance.

Senator Thayer stated division members have told him one of the main reasons there is an unfunded liability in Montana, is due to the lump sums. Senator Thayer feels this area is being overlooked, and is too important an issue to be forgotten. Mr. Grosfield agreed with the point Senator Thayer made that there were problems. He suggested an approach at the last meeting that would address concerns for both sides. Mr. Grosfield does not feel the court should be able to grant large lump sums, and he suggested the court have limited jurisdiction and only be able to grant awards to a certain amount. This would resolve some of the claimant's problems. Mr. Grosfield feels this would be a fair compromise and there

would be substantial cost savings. Senator Thayer stated he understood Mr. Grosfield's views, but the discussions of the Governor's Advisory Council were centered around the unfunded liability. There may not be enough money to meet payrolls at the rate it is going. Senator Thayer said he does not know if the people understand the seriousness of the situation.

Senator Haffey stated he understood the gravity of the situation and that he had discussed the situation with Mr. Robinson and Mr. Huntington more than once.

Senator Blaylock stated when the Advisory Council was formed, the Governor said he wanted the problem solved but he wanted to remain "people sensitive". He suggested language be written that would award lump sums on the basis of need. He asked Mr. Robinson if this would cut down on costs. Mr. Robinson stated under a wage loss system when a claimant is advanced benefits, due to a court order, the problem lies with advancing more benefits than the claimant would have received through a biweekly award.

Senator Haffey asked Mr. Robinson how the committee would address the issue and if the claimant would be better off with the lump sum than receiving the bi-weekly benefits. Mr. Robinson stated many claimants are not at the high income level Mr. Grosfield referred to earlier. The insurer has a responsibility to the claimant and support should be given to the injured worker as long as there is a need, but benefits should not be given for a period of time longer than needed. Senator Haffey asked how this could be achieved through mutual agreement. Mr. Robinson stated the lump sum should be awarded only as the exception, not the rule, and only awarded in rare situations.

Senator Blaylock asked Mr. Wood for his viewpoint. Mr. Wood stated decisions are made by financial concerns. He said insurers feel lump sum awards, on a voluntary basis, are appropriate because they want to close cases.

Senator Haffey asked Mr. Grosfield to assume for this discussion, that there is a court, mediation process, definitions of injury, noncompensable stress language, and heart attack language with the primary cause. The mutual agreement is lump sums and the maximum permanent partial award remaining at 500 weeks and indemnity is out. Assume each item described has passed this committee. Where does this place the injured worker relative to where they are under current law, and knowing if we stay with the current law, the fund could reach a

billion dollar deficit. Mr. Grosfield stated compared to current law, it would be substantially different, primarily in the permanent partial area. The reason many lump sums are paid now is because indemnity awards exist. Take away indemnity award limits and there is not much reason to go to court. In the proposed system, the award granted by the judge would be discounted, and the judge would have to be clear that the insurance carrier has a continuing obligation to pay permanent partial benefits on a wage loss basis in the future. If that is not the situation and the judge has a question, he could not award a lump sum. This will force many claimants with severe financial problems, after the temporary total disability, into a situation of a hopeless financial condition. If there is not some type of remedy an attorney or an unrepresented claimant would have no place to turn. Senator Haffey stated the subcommittee could present the grey bill with a few unresolved issues, but he would prefer not to present it in that form.

Senator Williams feels it is not the purpose of the Workers' Compensation Act to provide injured workers to live the way there are accustomed.

Senator Van Valkenburg stated the division people are so driven by the unfunded liability that they do not have an open mind concerning this issue. The unfunded liability is a separate problem that the legislature has to responsibly address. However, the unfunded liability should not drive us in terms of this decision. Senator Van Valkenburg asked the subcommittee to review his statement before making a decision. Senator Williams stated his concern with this issue has nothing to do with the unfunded liability. Senator Williams stated he has addressed the issue many times and his concern is not with the unfunded liability but the cause of the unfunded liability.

Senator Thayer stated he does not feel SB 315 is discriminate against workers, and it was designed to aid an injured worker immediately. This bill eliminates fraud and abuse to the system while still taking care of the truly injured worker.

Senator Blaylock asked Mr. Robinson if the reason there is an unfunded liability was because lump sums were paid to workers who were not in need of it because they were rehabilitated. Mr. Robinson stated yes, because the division is paying for liabilities that really will not occur at a later date. Senator Blaylock asked Mr. Robinson what would be a reasonable award. Mr. Robinson stated there would have to be research done on each individual case, and the claims examiner could research each case. Senator Blaylock asked Mr. Robinson what was the maximum amount awarded for a lump sum. Mr. Robinson stated the maximum on the permanent partial benefit awards on a weekly basis is one half the state's average weekly

wage, which is $158. Senator Blaylock asked Mr. Robinson if a judge awards this amount for a year, would that put the fund into more jeopardy. Mr. Robinson replied he would have to check to find out the duration of partial benefits, but he would guess it would be more than a year. Mr. Grosfield stated the wage loss system without indemnities, is a hard question to answer.

Mr. Huntington stated in SB 315, the impairment can be paid and the amount varies with the case. Senator Gage asked if there is a possibility with limiting the amount of lump sums and limiting the amount of weeks. Mr. Grosfield explained if an injured worker was going to ask for more money through the lump sum awards, and if there was a limit, eventually they will hit the limit. In SB 330 there is protection against claimants returning for a lump sum because they have reached their limit. Senator Thayer stated the reason SB 315 did not propose lump sums was to resolve a case immediately. With lump sums most cases go to court. Senator Haffey suggested adding mutual agreements for lump sums might be helpful, leaving permanent partial at 500 weeks, and using the SB 315 langauge for permanent total. Mr. Huntington stated there needs to be a sense of perspective in terms of how people sensitive this bill would be. If we are compared to our neighboring states concerning a surtax and the possibility of mutual agreement, then this bill would put us equal or beyond in terms of being sensitive.

Senator Van Valkenburg disagreed with the comparison with other states and said there should be a frame of reference to our own state. Senator Haffey feels Senator Van Valkenburg made a good point. There are two legitimate reference points - what has been done in the past and what will be done in the future relative to where others are.

Mr. Bob Holding represents the trucking industry and said their interest is with economic reform and Workers's Compensation reform. The state is not in the position to be liberal. There is a large unfunded liability, companies are going broke, and some companies are moving out of state. All of this has to be taken into consideration with this bill.

Mr. Keith Olson, representing the Montana State Logging Association, stated the non-injured employee is being forgotten, and they are the ones making a wage concession or loosing jobs, and they were left out of the Governor's discussions.

Mr. Robinson stated he does not like seeing injured workers

benefits being cut. He also does not like the way different body parts are labeled by a certain number of weeks. SB 315 is people sensitive in the aspect that if an injured worker suffers actual wage loss of longer than the assigned amount of weeks, they can obtain something else.

Senator Blaylock asked Senator Thayer if there could be a compromise through lowering the total amount of a lump sum. Senator Thayer does not feel this would solve the problem.

Senator Haffey asked the subcommittee if they would present a grey bill to the committee with the following language; (1) language for mediation; (2) language changes on injury definition; (3) mutual agreement on lump sums; (4) 500 weeks of award to remain; and (5) a rule for the judge concerning lump sums. Senator Gage, Senator Blaylock and Senator Thayer agreed to this language. Senator Haffey said this process should state for itself that the Governor's Counsel, the subcommittee and the committee are trying to attend to the wants of our constituents.

Senator Gage asked Mr. Robinson who makes the decisions for Plan 3. Mr. Robinson said it was the claims examiner manager. Senator Gage asked Mr. Robinson what would happen if there was a liberal person in that position. Mr. Jim Murphy stated that internally all claimant's settlements are reviewed and there is a requirement that every settlement made by any claims examiner is also reviewed by the claims manager. There is a check and balance system. Mr. Murphy said if there is mutual agreement, then there would also be division approval required. He has a concern for an unrepresented claimant who settles a case, and stated there should be division approval. Senator Haffey agreed with his statement, and said it will be added to the language.

Senator Blaylock moved that the package outlined by Senator Haffey be recommended to the full committee.

Mr. Grosfield stated he has concerns with the way the language is written to receive lump sums. He said one of the biggest problems an attorney faces is getting a case through the structure, and with the statute the division now has, it is frustrating to everyone. He asked for some assurance from the division that the language written will be reasonable regarding the standard for review of lump sums by the division. Mr. Robinson stated he and Mr. Murphy spent most of the afternoon discussing the issue Mr. Grosfield raised. If there was mutual agreement by the insurer and the claimant, there would not be need for much more review except the division would need to look at the value received in a lump

sum by the claimant. Senator Haffey stated the standards in reviewing lump sum awards should be written into the statute. Mr. Robinson agreed he would like to see this language put into the grey bill so the division has some direction.

Senator Van Valkenburg still has concerns with some issues in SB 315 that have not been discussed in this subcommittee, such as the definition of a workers job pool, and a definition of disease. Senator Van Valkenburg suggested thinking about putting repetitive trauma under injury rather than disease. Mr. Huntington also has some concerns with not addressing all the issues. Senator Haffey stated the principal persons involved in writing language will be refining the rest of SB 315 and SB 330, which were not addressed in the subcommittee, and this should be completed with an easy-to-reach agreement.

Mr. Robinson explained that a large amount of repetitive trauma can lead to classification problems. Senator Haffey asked what repetitive trauma does to the cost circumstances if included as an injury. Mr. Murphy replied it is a significant part of the injuries claims and is more costly in the injury portion than compared to occupational disease.

Senator Gage feels that the state of Montana is in a bad position when it comes to the Workers' Compensation rates, and we have to do more than our consciences allow in regard to the injured worker. If problems arise, then they can be amended in the next session.

Senator Blaylock made a motion to take the package as Senator Haffey outlined, which would not include Senator Van Valkenburg's request. There was a unanimous vote to accept this package. Senator Haffey stated the grey bill and the amendments that reflect the grey bill be drafted as amendments to SB 315. The work done on every part of SB 315 and the language in SB 330, that is other than the issues addressed in the subcommittee, will be drafted as soon as possible. Mr. Grosfield feels there might be a need for adjustment to the language concerning the mediator, but feels it can be worked out.

Mr. Tom Gomez stated in order to facilitate the preparation of the grey bill he would like to suggest the subcommittee give approval to Mr. Gomez, Ms. McCue, Ms. VanRiper and the staff to prepare the amendments in the form of a substitute bill. That is what is allowed under joint rules whereby you strike everything from the enacting clause of SB 315 and

rewrite the bill so it will read as if it were just introduced without all the complexities of various formal types of amendments. The committee agreed to this request. Senator Haffey explained this will be brought to the full committee when it is ready. Senator Haffey asked Senator Van Valkenburg if the bill is not ready until Saturday, February 21, 1987, would this meet the deadline. Senator Van Valkenburg stated there should be no problem with the Rules Committee.

ADJOURNMENT: There being no further business to come before this subcommittee, the hearing was adjourned at 9:51 p.m.

Jack Haffey

SENATOR JACK HAFFEY, Chairman

jr

STATEMENT OF INTENT

____ Bill No. SB 315

A statement of intent is required for this bill because of the following:

(1) section 2: The newly created board of industrial insurance is granted the authority in this bill to adopt rules that prescribe the procedures to be followed by persons appealing to the board. Also, if the board finds it necessary to adopt policies, those policies should be formally adopted to give affected parties notice. It is the legislature's intent to give the board the authority to adopt rules necessary to provide for efficient and orderly procedure before the board and to publish those rules.

(2) section 4: This bill removes original jurisdiction to hear disputes concerning workers' compensation and occupational disease cases from the workers' compensation court which is repealed in this bill to department hearing examiners and the division of workers' compensation. It is the legislature's intent that the division adopt the rules necessary for efficient and orderly procedure before the hearing examiners.

(3) section 19: The division of workers' compensation needs to adopt rules to efficiently and fairly implement the Workers' Compensation Act. There are numerous references throughout the act to rules, rates, procedures, and forms to be prescribed by the division. (e.g., 39-71-208, 39-71-307, 39-71-410, 39-71-604, 39-71-2102, 39-71-2303, and 39-71-2304) However, there is no explicit statutory grant of rulemaking authority in the chapter.

(4) The Montana supreme court, in Garland v. The Anaconda Company, 177 Mont. 240, 581 P.2d 431 (1978), tacitly recognized 39-71-203 as a general grant of rulemaking authority. To preserve the division's rulemaking authority and extend it to the amendments promulgated in this bill, the legislature explicitly

grants and extends rulemaking authority to the division to implement the Workers' Compensation Act.

(5) The division may adopt rules as necessary to implement the act. The division shall provide the rules, procedures, and forms specifically referred to in sections of the act and implement other sections as necessary and appropriate by providing specific guidelines, policies, and procedures to serve the efficient and fair administration of the act.

7040e\c:\eleanor\wpree

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.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 2/19/87
BILL NO. SB 315

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 benefits.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 2/19/87
BILL NO. SB 315

2/19/87

ISSUE #2 Provide court costs to claimant if he prevails.

39-71-611. Costs and attorneys' fees payable on denial of claim or termination of benefits later found compensable. ~~In the event an insurer denies liability for a claim for compensation or terminates compensation benefits and the claim is later adjudged compensable by the workers' compensation judge or on appeal, the insurer shall pay reasonable costs and attorneys' fees as established by the workers' compensation judge.~~ (1) The insurer shall pay reasonable costs and attorney fees as established by the hearing examiner, board, or court if:

(a) the insurer denies liability for a claim for compensation or terminates compensation benefits;

(b) the claim is later adjudged compensable by the hearing examiner, board, or court; and

in the case of attorney's fees,

(c) the hearing examiner, board, or court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

(2) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.

SENATE LABOR & EMPLOYMENT

2

2/19/87

BILL NO. SB 315

"39-71-612. Costs and attorneys' fees that may be assessed against an ~~employer--or~~ insurer ~~by---workers' compensation--judge~~. (1) If an ~~employer--or~~ insurer pays or ~~tenders~~ submits a written offer of payment of compensation under chapter 71 or 72 of this title but controversy relates to the amount of compensation due, the case is brought ~~before the workers' compensation judge~~ hearing examiner, board, or court for adjudication of the controversy, and the award granted ~~by the judge~~ is greater than the amount paid or ~~tendered~~ offered by the ~~employer or~~ insurer, a reasonable attorney's fee and costs as established by the ~~workers' compensation--judge~~ hearing examiner, board, or court if the case has gone to a hearing may be ~~awarded--by--the--judge~~ assessed against the insurer in addition to the amount of compensation.

~~(2)--When an--attorney's--fee--is--awarded--against--an employer--or-insurer-under-this-section-there-may-be-further assessed-against-the-employer-or-insurer--reasonable--costs, fees,--and--mileage--for--necessary--witnesses--attending--a hearing-on-the-claimant's-behalf.--Both-the-necessity-for-the witness-and-the-reasonableness-of-the-fees-must-be--approved by-the-workers'-compensation-judge.~~

(2) An award of attorneys' fees under subsection (1) may only be made if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.

DATE 2/19/87
BILL NO. SB 315

(3) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 2
DATE 2/19/87
BILL NO. SB 315

2/19/87

ISSUE #3 Maintain subrogation language in SB 315.

No amendment necessary. Current SB 315, Section 27, incorporates the agreed upon language on p. 43, lines 14-21.

2/19/87

ISSUE #4 Insert impairment rating by treating physicial. Panel system to resolve dispute without mediation.

Impairment evaluation -- ratings.

(1) An impairment rating:

(a) is a purely medical determination and must be rendered by an impairment evaluator after a claimant has reached maximum healing;

(b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association; and

(c) must be expressed as a percentage of the whole person.

(2) A claimant or insurer, or both, may obtain an impairment rating from a physician of the party's choice. If the claimant and insurer cannot agree upon the rating, the procedure in subsection (3) must be followed.

(3)(a) On request of the claimant or insurer, the division shall direct a claimant to an evaluator for a rating. The evaluator shall:

(i) evaluate the claimant to determine the degree of impairment, if any, that exists due to the injury; and

(ii) submit a report to the division, the claimant, and the insurer.

SEN... & EMPLOYMENT
EXHIBIT NO. 2
DATE 2/19/87

(b) (i) Unless the following procedure is followed, the insurer shall begin paying the impairment award, if any, within 30 days of the evaluator's mailing of the report.

(ii) Either the claimant or the insurer, within 15 days after the date of mailing of the report by the first evaluator, may request that the claimant be evaluated by a second evaluator. If a second evaluation is requested, the division shall direct the claimant to a second evaluator, who shall determine the degree of impairment, if any, that exists due to the injury.

(iii) The reports of both examinations must be submitted to a third evaluator, who may also examine the claimant or seek other consultation. The three evaluators shall consult with one another and then the third evaluator shall submit a final report to the division, the claimant, and the insurer. The final report must state the degree of impairment, if any, that exists due to the injury.

(iv) Unless either party disputes the rating in the final report as provided in subsection (6), the insurer shall begin paying the impairment award, if any, within 45 days of the date of mailing of the report by the third evaluator.

EXHIBIT

2

2/19/87

BILL NO. SB 315

(4) (a) The division shall appoint impairment evaluators to render ratings under subsection (3). The division shall adopt rules that set forth the qualifications of evaluators and the location of examinations. An evaluator must be a physician licensed under Title 37, chapter 3. The division may seek nominations from the board of medical examiners.

(5) The cost of impairment evaluations is assessed to a workers' insurer, except that the cost of an evaluation under subsection (3)(b)(ii) and (iii) is assessed to the requesting party.

(6) A party may dispute a final impairment rating rendered under subsection (3)(b)(iii) by filing a petition with the workers' compensation court within 15 days of the evaluator's mailing of the report. Disputes over impairment ratings are not subject to [NEW SECTION 23 in SB 315] or [mandatory mediation].

(7) An impairment rating rendered under subsection (3) is presumed correct. This presumption is rebuttable.

NOTE: Amend §38, 39-71-703, p. 55, line 23. Replace "an impairment evaluator" with "a physician".

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 3
DATE 2/19/87
BILL NO. SB 315

2/19/87

ISSUE #5 Definition of "injury".

(a) Include language on unusual strain.

39-71-119. Injury ~~or injured~~ and accident defined. (1) "Injury" or "injured" means:

~~(1) a tangible happening of a traumatic nature from an unexpected cause or unusual strain resulting in either external or internal physical harm and such physical condition as a result therefrom and excluding disease not traceable to injury, except as provided in subsection (2) of this section;~~

~~(2) cardiovascular or pulmonary or respiratory diseases contracted by a paid firefighter employed by a municipality, village, or fire district as a regular member of a lawfully established fire department, which diseases are caused by overexertion in times of stress or danger in the course of his employment by proximate exposure or by cumulative exposure over a period of 5 years or more to heat, smoke, chemical fumes, or other toxic gases. Nothing herein shall be construed to exclude any other working person who suffers a cardiovascular, pulmonary, or respiratory disease while in the course and scope of his employment.~~

(a) internal or external physical harm to the body;

(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 3
DATE 2/19/87
BILL NO. SB 315

2/19/87

ISSUE #5 Definition of "injury".

(b) Include repetitive trauma in occupational disease law.

39-72-101. Short title. This chapter may be cited as the "Occupational Disease Act of Montana".

History: En. Sec. 1, Ch. 155, L. 1959; R.C.M. 1947, 92-1301; amd. Sec. 84, Ch. 397, L. 1979.

39-72-102. Definitions. As used in this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Beneficiary" is as defined in 39-71-116(2).

(2) "Child" is as defined in 39-71-116(4).

(3) "Disablement" means the event of becoming physically incapacitated by reason of an occupational disease from performing work in the normal labor market. Silicosis, when complicated by active pulmonary tuberculosis, is presumed to be total disablement. "Disability", "total disability", and "totally disabled" are synonymous with "disablement", but they have no reference to "partial permanent disability".

(4) "Division" is as defined in 39-71-116(5).

(5) "Employee" is as defined in 39-71-118.

(6) "Employer" is as defined in 39-71-117.

~~(7) "Husband" is as defined in 39-71-116(7).~~

(7) ~~(8)~~ "Independent contractor" is as defined in 39-71-120.

(8) ~~(9)~~ "Insurer" is as defined in 39-71-116(8).

(9) ~~(10)~~ "Invalid" is as defined in 39-71-116(9).

(10) ~~(11)~~ "Occupational disease" means ~~all diseases arising out of or contracted from and in the course of employment.~~

an injury as defined in 39-71-119 which arises out of or is contracted in the course and scope of employment, but is not caused by an accident as defined in 39-71-119(2).

(11) ~~(12)~~ "Order" is as defined in 39-71-116~~(10)~~.

(12) ~~(13)~~ "Pneumoconiosis" means a chronic dust disease of the lungs arising out of employment in coal mines and includes anthracosis, coal workers' pneumoconiosis, silicosis, or anthracosilicosis arising out of such employment.

(13) ~~(14)~~ "Silicosis" means a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide (SiO_2) and characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs causing the characteristic x-ray pattern and by other variable clinical manifestations.

(14) ~~(15)~~ "Wages" is as defined in 39-71-116~~(20)~~.

(15) ~~(16)~~ "Wife" is as defined in 39-71-116~~(21)~~.

(16) ~~(17)~~ "Year" is as defined in 39-71-116~~(6) and 39-71-116(22)~~.

NOTE: This definition of "occupational disease" assumes the definition of "injury" in SB 315.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 8
DATE 2/19/87
BILL NO. SB 315

~~(3)~~ (c) death ~~resulting from injury~~.

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

(3) "Injury" or "injured" does not mean a physical or mental condition arising from:

(a) emotional or mental stress; or

(b) a nonphysical stimulus or activity.

(4) "Injury" or "injured" does not include a disease that is not caused by an accident.

(5) ~~A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker while in the course and scope of employment~~ is an injury only if the accident is the primary cause of the physical harm in relation to other factors contributing to the physical harm.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 3
DATE 2/19/87
BILL NO. SB 315

2/19/87

ISSUE #6 Maintain stress language and eliminate heart attack and stroke language.

39-71-119. Injury ~~or injured~~ and accident defined. (1) "Injury" or "injured" means:

~~(1)--a-tangible-happening-of-a-traumatic-nature-from-an unexpected--cause--or--unusual--strain--resulting--in-either external--or--internal--physical--harm--and--such---physical condition--as--a--result-therefrom-and-excluding-disease-not traceable-to-injury,-except-as-provided-in-subsection-(2)-of this-section;~~

~~(2)--cardiovascular---or---pulmonary---or---respiratory diseases--contracted--by--a--paid--firefighter-employed-by-a municipality,-village,-or-fire-district-as-a-regular--member of--a--lawfully--established-fire-department,-which-diseases are-caused-by-overexertion-in-times-of-stress-or--danger--in the--course--of--his--employment-by-proximate-exposure-or-by cumulative-exposure-over-a-period-of--4--years--or--more--to heat,--smoke,--chemical-fumes,-or-other-toxic-gases.--Nothing herein-shall-be--construed--to--exclude--any--other--working person---who---suffers---a---cardiovascular,--pulmonary,--or respiratory-disease-while-in-the-course--and--scope--of--his employment.~~

(a) internal or external physical harm to the body;

(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 3
DATE 2/19/87

~~(3)~~(c) death ~~resulting from injury~~.

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

(3) "Injury" or "injured" does not mean a physical or mental condition arising from:

(a) emotional or mental stress; or

(b) a nonphysical stimulus or activity.

(4) "Injury" or "injured" does not include a disease that is not caused by an accident.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 3
DATE 2/19/87
BILL NO. SB 315

2/19/87

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 #10 Consider reducing maximum permanent partial award.

1. 39-71-741. Compromise settlements and lump-sum advances. ~~payments.~~

~~division approval required.~~ (1) The biweekly payments provided for in this chapter may be converted, in whole or in part, into a lump-sum payment. Regardless of the date of the injury or of a prior lump-sum payment, a lump-sum conversion of permanent total biweekly payments awarded or paid after April 15, 1985, must equal the estimated present value of the total unpaid permanent total biweekly payments, assuming interest at 7% per year, compounded annually, unless the conversion improves the financial condition of the worker or his beneficiary, as provided in subsection (2)(b). If the estimated duration of the compensation period is the remaining life expectancy of the claimant or the claimant's beneficiary, the remaining life expectancy must be determined by using the most recent table of life expectancy in years as published by the United States national center for health statistics.

(2) The conversion can only be made upon the written application of the injured worker or the worker's beneficiary, with the concurrence of the insurer, and approval of the conversion rests in the discretion of the division as to the amount of the lump-sum payment and the advisability of the conversion. It is presumed that biweekly payments are in the best interests of the worker or his beneficiary. The approval or award of a lump-sum conversion by the division or the workers' compensation judge must be the exception, not the rule, and may be given only if the worker or his beneficiary demonstrates that his ability to sustain himself financially is more probable with a whole or partial lump-sum conversion than with the biweekly payments and his other available resources. The following procedure must be used by the division and the workers' compensation judge in determining whether a lump-sum conversion of permanent total biweekly payments will be approved or awarded:

(a) The difference between the present discounted value of a lump sum and the future value of the biweekly payments cannot be the only grounds for approving or awarding a lump-sum conversion.

(b) A lump-sum conversion that improves the financial condition of the worker or his beneficiary over what would have been reasonably expected had the worker not been injured or died can be approved or awarded only if the lump-sum conversion is limited to the purchase price to the insurer of an annuity that would yield an amount equal to the biweekly benefits payable

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

SENATE LABOR & EMPLOYMENT

~~over the estimated duration of the compensation period. The worker or his beneficiary must demonstrate the financial condition that would have been reasonably expected, taking into consideration his age, education, work experience, and probable job promotions and pay increases.~~

~~(c) If the existing delinquent or outstanding debts are used as grounds for a lump-sum conversion, the worker or his beneficiary must demonstrate through a debt management plan that a lump sum for that purpose is necessary to sustain himself financially.~~

~~(d) If a business venture is used as grounds for a lump-sum conversion, the worker or his beneficiary must demonstrate through a business plan that a lump sum for that purpose is necessary to sustain himself financially. The business plan must at least show the feasibility of the business, given the market conditions in the intended market area, and the cash that will be available to him on a biweekly basis after start-up costs and other business expenses are considered throughout the expected life of the venture.~~

~~(3) If the division finds that an application for lump-sum conversion does not adequately demonstrate the ability of the worker or his beneficiary to sustain himself financially, the division may order, at the insurer's expense, financial, medical, vocational rehabilitation, educational, or other evaluative studies to determine whether a lump-sum conversion is in the best interest of the worker or his beneficiary.~~

~~(4) The division has full power, authority, and jurisdiction to allow and approve compromises of claims under this chapter. All settlements and compromises of compensation provided in this chapter are void without the approval of the division. Approval of the division must be in writing. The division shall directly notify every claimant of any division order approving or denying a claimant's settlement or compromise of a claim.~~

~~(5) A controversy between a claimant and an insurer regarding the conversion of biweekly payments into a lump sum is considered a dispute for which the workers' compensation judge has jurisdiction to make a determination.~~

(1) Benefits provided for in this chapter may be converted, in whole or in part, to a lump sum payment, upon agreement by a claimant and an insurer. An agreement is subject to approval by the division, but approval may be withheld only if the division finds the conversion detrimental to the claimant, as set forth in subsection (2).

(2) The division may consider an agreement for a lump sum conversion detrimental to a claimant only if:

(a) in the case of a compromise and release settlement when the insurer disputes liability for the injury, the dispute over liability is reasonable; or

(b) in the case of a lump sum conversion when the insurer has accepted liability for the injury:

(i) the ability of the worker to sustain himself financially would be substantially less likely with the lump sum than with biweekly benefits; or

(ii) under the agreement the claimant releases the insurer from probably liability for payment of benefits substantially in excess of the value of the lump sum.

(3)(a) If a claimant and an insurer cannot agree to a lump sum conversion, it is considered a dispute over which [a mediator or the workers' compensation court] has jurisdiction.

(b) [A mediator or the workers' compensation court] may order a lump sum conversion only if:

(i) the worker demonstrates that his ability to sustain himself is more probable with the lump sum conversion than with biweekly benefits;

(ii) the benefits to be converted are wage supplement benefits as set forth in [ ];

(iii) the benefits to be converted to not exceed 200 weeks of the workers' projected wage supplement benefits; and

(iv) the insurer's future liability for the benefits to be converted is substantially certain.

(c) [A mediator or the workers' compensation court] may not order a compromise and release settlement.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 3
DATE 2/19/87
BILL NO. SB 315

(4)(a) Any conversion of biweekly benefits to a lump sum may be discounted based on the discount figure adopted by the division rounded to the nearest whole number, and based on the average rate for United States treasury bills in the previous calendar year.

(b) A conversion of permanent total disability benefits must be based on the permanent total disability rate at the time of the conversion, and may not take into consideration any cost-of-living adjustments as provided in [ ].

(c) The undiscounted value of a lump sum advance may be recouped by an insurer. An advance made pursuant to an agreement between the parties may be recouped as provided in the agreement. An advance of wage supplement benefits ordered by [a mediator or the workers' compensation court] may be recouped by the insurer by withholding biweekly payments until the advance is recovered.

(5)(a) The division has jurisdiction and full authority to approve lump sum conversions under this chapter, subject to the criteria set forth in subsection (2).

(b) Approval or disapproval shall be in writing, with a copy sent directly to the claimant. In the case of disapproval, the order shall state the reasons for the disapproval.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO 2
DATE 2/19/87
BILL NO SB 315

(c) Once the division approves a compromise and release settlement, or in the case of a division denial and [the workers' compensation court] orders the approval, the case may never be reopened by the division or any court.

(6) If the division does not approve a lump sum conversion agreed to by the parties, either party may seek review of the division's decision by [the workers' compensation court].

(7) In addition to providing information to the division prior to division approval, a claimant must agree, as a condition of receiving a lump sum conversion, to provide any information regarding the expenditure of the lump sum as the division may from time to time request.

2. To limit the maximum permanent partial award as provided in SB315, p. 57, line 3 reference to "500" should be changed to "400".

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 2
DATE 2/19/87
BILL NO. SB 315

NEW SECTION. Section . Purpose. The purpose of this part is to prevent if possible the filing in the workers' compensation court actions by claimants or insurers relating to claims under chapters 71 or 72 of this title if an equitable and reasonable resolution of the dispute may be effected at an earlier stage. To achieve this purpose this part provides for a procedure for mandatory, nonbinding mediation.

NEW SECTION. Section . Authority to adopt rules. The department may adopt the rules necessary to implement this part. The rules may prescribe:

(a) the qualifications of mediators; and

(b) a procedure for the conduct of mediation proceedings.

NEW SECTION. Section . Mandatory, nonbinding mediation. (1) In a dispute arising under chapter 71 or 72 of this title the insurer and claimant shall mediate any issue and the mediator shall issue a report following the mediation process recommending a solution to the dispute before either party may file a civil action in the workers' compensation court.

(2) The resolution recommended by the mediator is without administrative or judicial authority and is not binding on the parties.

(3) The mediator may recommend an award and approve settlement agreements. An approved settlement agreement is binding on the parties.

NEW SECTION. Section . Duties of a mediator. (1) A mediator shall assist the parties in negotiating a resolution to their dispute by:

(a) facilitating an exchange between the parties;

(b) assuring that all relevant evidence is brought forth during the mediation process;

(c) suggesting possible solutions to issues of dispute between the parties;

(d) recommending an award; and

(e) assisting the parties to voluntarily resolve their dispute.

NEW SECTION. Section . Limitations on mediation proceedings.

(1) Mediation proceedings are:

(a) held in private;

(b) informal and held without a verbatim record; and

(c) confidential.

(2) All communications, verbal or written, from the parties to the mediator and any information and evidence presented to the

mediator during the proceeding are confidential.

(3) A mediator's files and records are closed to all but the parties.

(4)(a) A mediator may not be called to testify in any proceeding concerning the issues discussed in the mediation process.

(b) Neither the mediator's report nor any of the information or recommendations contained in it are admissible as evidence in any action subsequently brought in any court of law.

EW SECTION. Section . Mediation procedure. (1) A party may take part in mediation proceedings with or without counsel.

(2) The mediator shall review the division file for the case and may receive any additional documentation or evidence either party submits.

(3) The mediator shall request that each party offer argument summarizing the party's position. A party's argument shall include the evidence the party would present if the case were being presented to the worker's compensation judge.

(4) After the parties have presented all their information and evidence to the mediator, he shall recommend a solution to the parties within a reasonable time to be established by rule.

(5) The mediator's recommendation shall be in writing.

(6) A party shall notify the mediator within 45 days of receipt of the mailing of his report whether the party accepts the mediator's recommendation.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 3
DATE 2/19/87
BILL NO SB 315