

## MINUTES

### MONTANA HOUSE OF REPRESENTATIVES 51st LEGISLATURE - REGULAR SESSION

#### COMMITTEE ON LABOR AND EMPLOYMENT RELATIONS

Call to Order: By Chairman Russell, on February 28, 1989, at  
3:00 P.M.

#### ROLL CALL

Members Present: Fourteen.

Members Excused: None.

Members Absent: Glaser and Thomas.

Staff Present: Eddy McClure, Staff Attorney

Announcements/Discussion: We are looking at 30 bills at the maximum, so it looks like we will be hearing about 3 bills per day. We'll take as many as we can per day and try to act on them, some we may have to hold for awhile, and I think those will be pretty obvious as we hear them.

So the first bill we are going to be hearing is SB 49.

#### HEARING ON SB 49

#### Presentation and Opening Statement by Sponsor:

SEN. RASMUSSEN: SB 49 is a bill that was requested by the Department of Administration to cover a problem they can foresee in the laws relating to temporary and seasonal employees. There seems to be kind of a loophole as the law reads now and it relates to the hours per week that a temporary or seasonal employee works. The intent of the current policy is that you have to work 20 hours per week to receive the state benefits. The language is a little unclear in that area, so this bill is an attempt to clear the language up. We have at least one proponent who is from the Department of Administration.

#### Testifying Proponents and Who They Represent:

JOYCE BROWN, Department of Administration.

#### Proponent Testimony:

JOYCE BROWN, proponent. The reason we requested this bill is to clarify what state employees are eligible for benefits. State statutes provide that the permanent employees who work 20 hours or more per week are eligible but they are silent on the question of how many hours per week seasonal and

temporary employees must work in order to be eligible. We have always interpreted it to mean that they must work 20 hours as well, so this would not change the status of any existing employees. It simply codifies what we have interpreted the statute to mean and eliminates the ambiguity so we would foreclose the possibility of a challenge by seasonal or temporary employees. This could be expensive not because we have a lot of seasonal or temporary employees, but because if the seasonal and temporary employees who work less than 20 hours per week gain benefits, then permanent employees who work less than 20 hours per week are also going to want those benefits.

Testifying Opponents and Who They Represent:

None.

Opponent Testimony:

None.

Questions From Committee Members:

COCCHIARELLA: Question for Joyce Brown. Are you saying that this is just clarifying something -- we don't, as a state, pay these people benefits now in any of these situations?

BROWN: That's correct.

DRISCOLL: Question for Joyce Brown. On page 1, sub (3), lines 23 through 25, "a seasonal or part-time employee who is scheduled to work six months or more, or who works a continuous period of more than six months, although not regularly scheduled to do so" -- what does that mean, not regularly scheduled to do so -- they wouldn't get benefits?

BROWN: If it is unclear what the schedule is, sometimes when employees are hired it is not clear how long they will be working. Maybe they are hired for two or three months and the job expands, so that language says if they are actually on the job for six months they get benefits at the point when they have been working for six months, even though it wasn't necessarily management's intent that the job be for six months. It is sort of an added definition of what it means to be regularly scheduled to work for six months or more.

DRISCOLL: Why do we need on line 23 "regularly," why can't we say "who is scheduled?"

BROWN: We use regularly in order to avoid the problem of fluctuation in work schedules. Sometimes employees will be scheduled to work additional hours when there is a crunch in work load and "regularly scheduled" allows us to simply apply the normal schedule rather than an abnormal temporary

schedule.

DRISCOLL: On line 23 it doesn't talk about hours, it says "who is regularly scheduled to work six months or more." Present law says "is scheduled to work for six months." So if you said you are going to be regularly scheduled for five months, and with this law you could say, yea you worked seven months but you weren't regularly scheduled to work seven. Page 1, line 23, "regularly scheduled" to work six months.

BROWN: It says "... or who works for a continuous period of more than six months," so if you work more than the six months you are automatically eligible as soon as you have completed your six-month period. That is why that was added to make that clear.

SIMPKINS: To follow up on Jerry's question. Is this meaning that if the person is hired and they know they are going to be hired for six months they will be eligible for benefits before that six-month period has elapsed?

BROWN: That is correct. That is the way it is administered currently. If management says this is a nine-month job and they are hired for a nine-month position they are eligible for benefits from the day they are hired. If management says this is a three-month job and it grows into a nine-month job, they are eligible for benefits as soon as they have worked six months.

RUSSELL: Question of Brown. Do we have any idea what numbers of employees we are talking about that this will effect?

BROWN: It will not effect any employees because none of the seasonal or temporaries have been given benefits who worked less than 20 hours per week at this point. We have always interpreted the statute to mean what we are trying to clarify it to say, so it won't change benefits for any employees who currently exist. We want to get it codified so there isn't a challenge to the way we are interpreting it, if that is correct.

Closing by Sponsor:

RASMUSSEN: I think Ms. Brown really did summarize what this bill is trying to do. It isn't going to affect anybody and it doesn't affect current practice, but it prevents possible confusion and possible litigation down the road if somebody should challenge this.

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HEARING ON SB 153

Presentation and Opening Statement by Sponsor:

SEN. RASMUSSEN: This bill deals with a problem that is occurring in the area of the outfitters and guides. As the title says, it is to clarify that an licensed outfitter may retain the services of a professional guide acting as an independent contractor. Current practice has been that guides could be independent contractors as they worked with outfitters. There was a decision just last year that changed this from the workers' comp division and threw it into confusion. This legislation is an attempt to restore the relationship as it was prior to last year and to allow certain guides to be able to function as independent contractors.

We do have an amendment to the bill that one of the proponents will present.

Testifying Proponents and Who They Represent:

STAN BRADSHAW, Floating and Fishing Outfitters Association of Montana and also on his own behalf as a guide.

JACK HUTCHISON, Executive Director for the Floating and Fishing Outfitters Association of Montana.

JO BRUNNER, Lobbyist for Montana Outfitters and Guides Association.

TONY SCHOANEN, self.

PAUL S. ROOS, self.

Proponent Testimony:

STAN BRADSHAW, proponent. As Sen. Rasmussen indicated, prior to 1988, float fishing guides in some instances had been determined by the workers' compensation division to be independent contractors and I submitted earlier some written testimony (attached hereto as Exhibit #1). Attachment "A" to my testimony is a letter to one of those guides indicating their finding that in fact he was an independent contractor. The situation that gives rise to that is that in the float fishing outfitting business, and it was the Float Fishing Outfitting Association who proposed this amendment to the statute, an outfitter will oftentimes have a wildly fluctuating clientele. One day he may have two clients that he needs to float down the river and another day he may have ten. As a result, his demands for guides fluctuates. Out of that reality has arisen the practice of people such as myself of working for a variety of different outfitters. When I went to the Workers' Compensation division last year to get an exemption as an independent

contractor, I was notified by a memorandum that because of the language in the outfitters' statute that characterizes guides as employees, that guides could not, even if they otherwise fit all the definitions of an independent contractor in the workers' comp statute, be considered as independent contractors. The bill is an attempt to allow workers' compensation to consider each guide who applies under the tests that they apply to all other people who seek to be declared independent contractors, without the constraints of statutory language that automatically classifies them as an employee. Now between the senate and its arrival to you today, Rep. Driscoll expressed some concerns that, as written and as before you today, there are some problems with the language. Namely, the amendment that we proposed didn't seem to take the dilemma out of creating a guide as an employee. I have an amendment that I have discussed with Rep. Driscoll that I would like to pass out and I will briefly explain, (attached hereto as Exhibit #2).

If you will look on page 2, line 22, this is sort of the heart of the bill for us, it is the definition of "guide." This would add in that a guide as an independent contractor would have to provide both personal services and facilities, transportation or equipment. The reason for that is if a guide is simply providing personal services and nothing else, it is highly unlikely that he could in good faith be considered as an independent contractor. This language is intended to make sure that at least as this statute discusses guides as independent contractors, those guides have the equipment, etc. that they would have to have as an independent contractor. Even with this in place, it still simply becomes available for workers' compensation to consider whether a guide who claims he is an independent contractor is truly one or not. After this is in place if I, as a guide, apply for the exemption and don't meet the two-part workers' compensation test then I am an employee and the outfitters for whom I work are going to have to pay those workers' compensation premiums. This simply allows that if I can meet that test then I can be granted the exemption. That is the intention of it, not to open up a Pandora's box of workers' comp evaders, but rather to simply deal with the situation that has come up because of the recent interpretation of workers' compensation.

JACK HUTCHISON, proponent. We support SB 153. To summarize our thoughts on it -- it doesn't do anything that hasn't been done before. It was because of the change in the law in the last two years that this situation was created. Prior to that, the statute read that a guide must be endorsed or recommended by an outfitter, that allowed for the option of either employment or independent contractor status. All we are trying to do is correct the wording of the law that went into effect during the last session. Based on that, this is not intended in any way to give carte blanche to an

outfitter to employ independent contractors. It strictly gives them the right of every other business in the state and that is the right to either hire an independent contractor or an employee. (Also submitted written testimony, attached hereto as Exhibit #3).

JO BRUNNER, proponent. The president of the association intended to be here today but he couldn't make it because of the weather. He asks that you consider the Montana Outfitters and Guides Association in support of this bill, including the amendment offered by Mr. Bradshaw.

TONY SCHOANEN, proponent. I have been a long time float fishing guide, this will be my 29th year. Over those years I have had my two sons working in the business. This bill would clarify the fact that both my boys, for example, have their own boats and have all their own equipment. Last year was a real good example. The two rivers that I operate on primarily, the Big Hole and the Jefferson, were too low to float, so my boys were able to go out and contract under different outfitters. This amendment would give them the type of flexibility so they could do this without worrying about breaking the law. They have been qualified guides for many years. They could work under any outfitter and they have their own equipment, so I would like to see this bill put through because it certainly would put the minds at ease of a lot of people like that, because they don't want to be breaking the law. I hope you give this bill favorable consideration.

PAUL S. ROOS, proponent. Submitted written testimony, brought in by Mr. Bradshaw, attached hereto as Exhibit #4.

Testifying Opponents and Who They Represent:

JERRY STRONG, Outfitter.

Opponent Testimony:

JERRY STRONG, opponent. I don't really want to be an opponent, I want to be a proponent, but I have some problems with the bill.

Last year we had approximately 1,650 people that this bill directly effects; 600 of them were outfitters and approximately 1,000 were guides. I employ five guides. There were 185 policies issued by workers' comp. We have over 600 outfitters but there were 185 policies issued so over 400 of them never bothered to buy any workers' comp to start with.

Guides are only temporary employees. I employ these people during the summertime and into the fall because I am also a hunting outfitter and a fishing outfitter. My problem is, who is going to cover these people? Workers' comp covers

these people because it provides a cushion. If one of my mules kicks one of my guides and breaks his leg, workers' comp pays the hospital bill and pays him some money while he is recovering. I'm not rich and I can't afford the rates they charge me right now which happen to be \$27.17 per hundred. This is astronomical, it is unbearable, I can't afford it. But at the same time, I have five good people working for me. If these people drop out, who is left to pay against the claims that are going to come? My understanding is that it is based on a history of how ever many people are involved in this thing. I don't know that for sure. There is very little information that I can get. I asked workers' comp if we are all at the same rate and they assured me that all guides and outfitters are at the same rate. Today I found out that the fishing guides are paying \$10 per hundred and I am paying \$27.17 per hundred. Somebody lied to me again. I don't know how these rates were established. I tried to find out because they couldn't tell me how many people are licensed in this state. I got this from the Department of Commerce. Does this cover my responsibility? It says we are going to make these people independent contractors.

The client is my responsibility, he books with me. According to the laws of Montana, he is my client. If I give him to an independent contractor, what does this do as far as my responsibility for his liability is concerned? Did I tell him that I was going to independently contract him out to somebody else? I did not. I'm not about to tell my clients this. I want something. I want the workers' comp rates to go down.

After talking to my accountant who is a CPA, he says you can't duck your obligations. If these people sue you you are still obligated to have workers' comp. (He held up some paper and said:) This is a copy of what they were talking about that workers' comp sent me. (Not included in exhibits). Guides cannot be independent contractors. Then in the bill here it says that they can be. One law says one thing and the other law says another, and that's my problem.

I appreciate Sen. Rasmussen bringing the bill up -- we need to do something. But does this solve my dilemma, or am I going to opt out? If one of my guides gets hurt and sues me, I will lose everything. Does this take care of the problem? That's my question.

#### Questions From Committee Members:

O'KEEFE: Question for Mr. Bradshaw. I might have to declare a conflict of interest on this one before it is all over with, but I have a question for you. I have 22 guides. Up until two years ago they were independent contractors. We were assigned a rate -- \$27 is cheap because the first rate we

got was \$38 per hundred for those guides -- we appealed it and had it brought down to \$8.53 since we don't have horses or axes or guns or fires or anything that causes these accidents out there. In reading this it seems to me that this bill only applies to float guides or any other type of guides, float or horseback or hiking or anything, that are involved with actually hunting or fishing. What happens to all the float guides out there who are whitewater float guides, historically independent contractors up until two years ago, where do they fall in under the way this bill is written?

BRADSHAW: I will have to give you my view of that and qualify it as simply that. Guides who are not hunting or fishing guides are not covered by state law, and you are probably aware of a guide who is a whitewater guide. Taking people down the river to fish, does not come under the constraints of this outfitting law; therefore, the representation of guide as employee in this law refers only to those kinds of guides. I would assume that the whitewater guide who is not a hunting or fishing guide can show that he is truly an independent contractor. Without this change in the law, he would still be able to go under workers' comp and get the proper independent contractors' exemption.

O'KEEFE: I guess that is not how workers' comp interprets it. (As of 1988). So, is there a way to work this bill, so that guides who aren't actively trying to kill something, or catch something, and are truly independent contractors, don't end up losing out? Is it the same statute?

BRADSHAW: That is the dilemma you have. There is no statute that regulates the conduct of whitewater float trips that don't involve hunting or fishing. Off the cuff, I would say that workers' comp misinterpreted this if they applied it to non-hunting and fishing guides. That is my opinion and I might be wrong about that, but I would be concerned that if you try to remedy their dilemma through a statute that doesn't already cover them, you may open up a whole new Pandora's box of regulations for those guys.

DRISCOLL: Question for Jerry Strong. I believe you said you have five guides who work for you, is that right? Do these five guides furnish anything besides themselves and their time?

STRONG: Yes. Workers' comp doesn't make a distinction between anybody. I have a packer, a cook, and five guides. I pay the same rate for all of them. Two of them work for me during the summertime as fishing guides only, and that's all they do. They have a boat and they take the people out fishing. I'm not even there. They furnish the equipment, the lunches, the whole bit, but they operate under me. My rates are the same. My packer never has a gun or fishing rod or anything in his hand. My cook stays in the tent and



cooks. All these rates are the same. Workers' comp told me that all rates for everybody in the guiding and outfitting business are exactly the same, and as this gentleman just told you, this is not true. I just found out today that it's not true and I don't know what the answer is.

DRISCOLL: Do you have to have a guide's license to cook?

STRONG: No sir.

DRISCOLL: Of the people you have, five of them have licenses?

STRONG: All of my people have licenses. This is another dilemma. I get a license for my cook. He isn't supposed to have one but if the cook happens to be riding down the trail with two fisherman and I'm not right there with him and he is stopped, he is now a guide. That happened. If he is with my clients and maybe I have had to stop back on the trail, and he is stopped, he had better have a license, so I buy them all guide licenses.

DRISCOLL: What does the guide furnish?

STRONG: My hunting guides furnish their own saddles, guns, hunting equipment, and that is all they furnish.

DRISCOLL: Why do they need you?

STRONG: Because the law says they do.

SIMPKINS: Do you furnish any equipment to the guides?

STRONG: No, I furnish it to the clients. The clients have to ride into the Bob Marshall they use my horses, my pack mules, my saddles, my tents, and my equipment. The equipment that the guides use themselves, their personal stuff that they need to use to guide with -- their own horse, saddle, parkas, everything like this -- they furnish themselves. My equipment for the hunting part of it is furnished by me -- tents, stoves, eating and cooking gear, food and the whole bit. On the fishing trips, as he has indicated, I don't furnish this. The only thing I furnish is that I am the outfitter, I book the clients, I make sure that the guides are qualified, certified and have licenses, and then they come along and have their own boats, fishing gear, etc.

SIMPKINS: Let's get back to the cook. Do you provide any tents, stoves, any equipment whatsoever for the cook to cook the meals?

STRONG: Yes sir. Technically, the cook is my employee.

SIMPKINS: So the guides are technically not your employees.

STRONG: That's not what Workers' Comp told me.

The last two years I have employed a cook who furnishes his own cooking equipment, his own tent, and he supplies the food and I pay him a flat rate for doing this, but I still pay workers' comp. I pay him \$5,000 to supply the food and I don't tell him when to cook and I don't tell him how to cook, he does his own thing. They still say he is an employee, but he has furnished it all.

RUSSELL: Any further questions from the committee?

None.

Closing by Sponsor:

RASMUSSEN: I think these people that Mr. Strong was questioned about were clearly employees so we are not dealing with them in this bill. We are dealing with those types of people who are totally independent and have all their own equipment, so we are just attempting to draw the line between those two categories. I think right now the line is blurred since this decision so I think this is all this bill does.

RUSSELL: Sen. Rasmussen, who will be carrying your bills in the House, both 49 and 153.

RASMUSSEN: I don't have anybody yet, so if you care to pick somebody from the committee, or if you want me to, I can get someone.

RUSSELL: This closes the hearing on SB 153.

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DISPOSITION OF SB 49

Motion:

REP. SMITH: I move we CONCUR IN SB 49.

Discussion:

SIMPKINS: Question of Driscoll. The way I understand the question on this SB 49 is if the employee is regularly scheduled for six months or longer, the benefits have to start right now upon employment, but they are saying that if they thought the job was only going to be four months or something like this and all of a sudden they see a prolonged situation and they go beyond the six months, then the benefits would start at six months.

DRISCOLL: That's the way they do it now.

DRISCOLL: My problem is why do they need "regularly" on page 1, line 20? Presently it says a "part-time employee who is scheduled to work a regular schedule of 20 hours or more a week." To me that is clearer, "regular schedule," then when it says "who is regularly scheduled." There is a difference there, at least the way I read it, the management can play games with your schedule and the other way if you have a regular schedule of 20 hours, but if you missed a day you were still scheduled. I don't understand the whole bill. They don't provide benefits to temporary employees now. I don't know what it does to tell you the truth.

SMITH: It looks to me like they are merely clarifying what they have been doing all along.

COCCHIARELLA: Question of Eddy McClure. On page 1, lines 20 and 23, the use of the term "regularly scheduled" could that be interpreted differently from "who has a regular schedule".

McCLURE: Anything is possible. It would be a guess on my part, but "regularly scheduled" means routinely. I guess it means not haphazardly.

Vote:

RUSSELL: We have a motion on the floor DO CONCUR.

15 DO CONCUR votes, one against it (McCormick).

Do we have any volunteers as to who wants to carry this bill in the House?

Rep. Lee volunteered to carry this bill, SB 49.

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DISPOSITION OF SB 153

Motion:

RICE: I move we CONCUR ON SB 153.

I also move the amendments.

Discussion:

KILPATRICK: Am I right in assuming that what this does is that it makes him an independent contractor now?

O'KEEFE: It makes them eligible for being classified as independent contractors by workers' comp. It doesn't automatically make them an independent contractor. It defines a test that they must meet to qualify as an

independent contractor. So they still would have to apply and it is not easy to do.

KILPATRICK: Does an independent contractor have to be covered under workers' comp?

O'KEEFE: No.

KILPATRICK: If this person is an independent contractor, is he qualified now for workers' comp? Do outfitters have to pay workers' comp on him or don't they. What is the deal here?

O'KEEFE: No, the outfitter would not be required to carry workers' comp on an independent contractor. Some outfitters require that independent contractors carry their own medical insurance. When we went the independent contractor route we were able to pay our people more than we do now with workers' comp on top of the bill. Basically what it does it saves the employers the workers' comp but they end up spending close to the same amount of money in increased wages and contracted services. An independent contractor has an option to carry his own insurance.

KILPATRICK: Why was Jerry Strong upset about this bill because this bill would make that guide into an independent contractor and save him money, wouldn't it?

DRISCOLL: As the bill is written, without the amendments, it says you are an employee or you are an independent contractor. The only test is that you only furnish personal guide service. So with the amendments the person who wanted to be an independent contractor would furnish personal guiding services, facilities, transportation, or equipment. If you didn't furnish one of those other three things you could not be an independent contractor. The outfitter furnishes everything for the customers, so the guide in this instance is furnishing his work tools, but the outfitter furnishes everything else. Those people are still going to be employees. In the case of a float fisherman furnishing the boat, fishing tackle, lunch for the day, and the bait, he could be an independent contractor under this bill with the amendments. You could play a lot of hanky panky with this bill without the amendments.

SMITH: The problem we have with this whole independent contractor status is the fact that everybody wants to be an independent contractor until they get arrested. Then they go to court and they collect the benefits. The only problem is there were never any premiums paid, so this is one of the things that this gentleman (Strong) is probably running into to make his rates so high, but it seems to me that there was an awful small percentage of guides who are paying workers' comp. One of them gets hurt and that just raises holy hell with his rates. I think this is poor legislation. It is a bad bill.

O'KEEFE: I agree with Rep. Smith as far as the problems that historically have occurred with independent contractors. When I read this bill I can see, for instance, that even in my situation this bill doesn't do anything. I still have employees. I have worked in this same type of thing before, being a guide, where I get a call at 8:00 Thursday night and someone says they need an extra guide on the Smith for five days, get there, you've got the job. I supply everything. I may never see the outfitter. I have guides who work for me who never see me. They are guides under my license. What happens here, for instance, I have guides who work for me a total of eight hours a summer, two half day float trips, and supply everything when I have 300 people on buses ready to go down the Middle Fork. Those people we have to pay workers' comp on. They truly are independent contractors. I guess I think it is good legislation for the people if it is that narrowly defined. It is a real problem out there for these outfitters and guides who have such a fluctuating flow of business. It's not like the old independent contractors in the logging business, where a lot of that occurred, where those guys were independent contractors until they got hurt. I think it is a good bill. I also think you could still play havoc with this bill, even with the amendments. It says "services and equipment." Well, if a guy brings his own oars and uses all my equipment he is still providing services and equipment and he can call himself an independent contractor. Yes, he has to apply, but I think it is a good bill because it is tight.

DRISCOLL: The reason they threw out those independent contractors was page 7, line 21. In order to be a professional guide you have to work under your employer's license. So if you are working under your employer's license you have to be an employee. So they have changed that and in order to be an independent contractor, even with these amendments, if you furnish the boat, oars, bait and a fishing pole and the outfitter says he will pay you \$5 an hour, you float until 5:00 tonight, you still are not an independent contractor because you cannot be under his control for hours and money. You can agree upon a fee -- floating from one point to another for X amount of dollars, no matter how long it takes and furnish everything. That is the only way you become an independent contractor.

I think the division needs to look at some of these independent contractors. What we ought to do is go through all these laws and change "independent contractor" to "independent businessman", then maybe it would be more understandable to a lot of people, because contractor seems to connote to a lot of people building something or hauling logs or something like that. Anybody who is in business can be an independent contractor; by law, you are an independent contractor. You hire employees if you are in business. So everybody who has a business here is an

independent contractor themselves, but then they have to pay comp on their employees.

If these professional guides or outfitters don't go to the comp division and get one of these pieces of paper saying that he is an independent contractor and goes to work for Mark (O'Keefe), and he didn't pay workers' comp, I would own his house because I would sue him for being an uninsured employer. So he had better either see my workers' comp policy or my exemption from the workers' comp division or he is still stuck.

SIMPKINS: I think if you look at this on the basis of self-employed it's the same thing. You can take a person who has a computer and they operate the computer, they are self-employed. If they have the computer in their home, a telephone in their home, and all this that is fine and dandy, but if they go to somebody's office and use their telephone or their computer, that's not self-employed. So you have to use your own equipment and everything down the line and that's all we're saying. With the amendment in here it is saying that if you are going to contract this person on the side as a self-employed person, that should relieve you of the workers' comp responsibility. There is a distinct advantage to me of being self-employed because all the equipment and everything is tax deductible. You are running your own separate business and you file your own income tax. There are a lot of tests they have to meet to see if they are an independent contractor or a self-employed person. I think it is pretty clear with that amendment in there that you better do something else.

WHALEN: Question for Clyde Smith. You made a statement earlier that I guess I didn't understand. You stated that some of these people don't pay the workers' comp premium, but then the fund ends up paying the claim. Why would they pay a claim if somebody hasn't paid the premium. Wouldn't they just say that the employer was uninsured and then tell them to go after the employer.

SMITH: That's not necessarily true. As in the case Mr. Strong was alluding to, he has a cook and there is no question in his mind that the man is an employee, so he says his guides are independent contractors. If he is covered under a master policy he is an insured employer, all he gets is penalties if somebody gets hurt. He would not come under the uninsured employers fund.

WHALEN: Say that again. He has a policy on himself but not on his workers?

SMITH: No, I didn't say on himself. He said he had a cook and he acknowledges that there is no way to get out of him being an employee. Suppose he says that the guides are independent contractors and he doesn't have to pay on them,

but he gets one of them hurt; that is not an uninsured employer because he has a master policy. All they do is go back on him with penalties and back premium.

WHALEN: What is a master policy?

SMITH: You get it from the state fund and you put up a deposit and you are insured.

WHALEN: So if he had no policy, then you would have your uninsured situation. If he had a master policy then the division would just go back on him for the back dues.

SMITH: Correct.

DRISCOLL: For example, HB 21 on the farm exemption. Workers' Comp didn't even go back and collect the premiums because their interpretation was they didn't owe the premium. The supreme court ruled that the person who got hurt got the benefits. Workers' Comp never got one dime out of that and I don't know how much they paid out in that case. It was a very expensive case. So there was no premium coming in and a whole lot of money going out, that's why we've got \$157 million debt.

O'KEEFE: Getting back to Jerry Strong again. The numbers he threw out about 600 outfitters out there and only 185 policies in effect, are really true. If you want an industry where people cheat, you have one right there. Workers' comp, I think, knows that. One reason is that it has only been two years since they have been required to have this. I would not even have known but I found out by accident and went into it. I think the people who came in here supporting the bill, the associations, the outfitters and guides and the floaters and fishers, they are the legitimate, above board businesses that are going to comply with this thing. It's like Jerry says, you've got to have a sheet of paper that says you are an independent contractor and then they have to sign a contract with you before they go to work with you, and our people always did. They ought to go after the bad guys in this industry. They are out there.

Vote: The amendments PASSED unanimously.

RUSSELL: Rep. Rice moved the bill PASS, as amended.

Vote: Fourteen votes to DO CONCUR on SB 153; two against (Smith and Whalen).

Rep. O'Keefe will carry this bill to the House.

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ADJOURNMENT

Adjournment At: 4:15 P.M.

  
A handwritten signature in cursive script, reading "Angela Russell", is written over a horizontal line.

REP. ANGELA RUSSELL, Chairman

AR/mo

4709.MIN



# DAILY ROLL CALL

## LABOR AND EMPLOYMENT RELATIONS COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date 2-28-89

NAME	PRESENT	ABSENT	EXCUSED
Rep. Angela Russell, Chairman	✓		
Rep. Lloyd "Mac" McCormick, VC	✓		
Rep. Vicki Cocchiarella	✓		
Rep. Duane Compton	✓		
Rep. Jerry Driscoll	✓		
Rep. Bob Pavlovich	✓		
Rep. Bill Glaser		✓	
Rep. Tom Kilpatrick	✓		
Rep. Thomas Lee	✓		
Rep. Mark O'Keefe	✓		
Rep. Jim Rice	✓		
Rep. Richard Simpkins	✓		
Rep. Clyde Smith			
Rep. Carolyn Squires	✓		
Rep. Fred Thomas		✓	
Rep. Timothy Whalen	✓		

STANDING COMMITTEE REPORT

March 1, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Labor report that SENATE  
BILL 49 (blue reference copy) be concurred in .

Signed: Angela Russell  
Angela Russell, Chairman

[REP. LEE WILL CARRY THIS BILL ON THE HOUSE FLOOR]

STANDING COMMITTEE REPORT

March 1, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Labor report that SENATE BILL 153 (blue reference copy) be concurred in as amended.

Signed: \_\_\_\_\_  
Angela Russell, Chairman

[REP. O'KEEFE WILL CARRY THIS BILL ON THE HOUSE FLOOR]

And, that such amendments read:

1. Page 2, line 22.

Strike: "only"

Following: "services"

Insert: "and facilities, transportation, or equipment"

2. Page 4, line 10.

Strike: "only"

Following: "services"

Insert: "and facilities, transportation, or equipment"

as independent contractors. S.B. 153 simply removes an artificial constraint to the recognition of certain guides as independent contractors. If a guide meets the workers compensation criteria defining an independent contractor, he should be so recognized. If he does not, he should be treated as an employee. S.B. 153 simply allows the latitude for that recognition when it is appropriate.

I urge your support of S.B. 153.

SENATE BILL 153

p91 of 3

Testimony of Stan Bradshaw  
February 28, 1989

Madame Chairman and members of the committee, my name is Stan Bradshaw. Among other things, I work in the summer as a float fishing guide. I wish to testify in support of Senate Bill 153.

S.B. 153 seeks to amend language in the outfitters statute (section 37-47-301 et seq. MCA) which characterizes professional guides as "employees". The amendment adds language to the definition of "professional guide" which recognizes that a guide may also be an independent contractor.

Prior to the summer of 1988, the Workers Compensation Division apparently recognized that, in certain circumstances, guides could be considered independent contractors by certifying a number of guides as independent contractors (See attachment A). As a result, outfitters did not have to pay workers compensation premiums for those guides who were independent contractors.

In June, 1988 the Workers Compensation Division notified both outfitters and guides who applied for certification as independent contractors that, in part because of the in the laws "pertaining to Fish, Wildlife and Parks," (See attachment B), guides could not be considered independent contractors. The only law addressing this that was ever a Fish, Wildlife and Parks statute was the outfitter statute, which defined guides as employees.

This interpretation causes considerable difficulty for outfitters. The nature of the float-fishing outfitting business is one of fluctuation. Trips booked are most often day trips and are likely to be booked at any time. The numbers of clients can vary wildly. One day, an outfitter may have a party of four; the next he may have twelve people. Accordingly, the number of guides needed can fluctuate wildly. It is very difficult, if not impossible for an outfitter to keep a full complement of guides employed all the time. As a result, there are many float guides who have their own boat and who work for any number of outfitters as they are needed.

For example, I guided for at least three outfitters during the summer. I made a point of communicating to those outfitters that I was available on an as-needed basis to guide. I had my own equipment and own transportation. When I am on the river with the client, I am completely outside the control of the outfitter. He does not direct me where to fish, what flies to use, or what methods to use. As an independent contractor, those are all my decisions to make. Arguably, at least, these things bring me under the criteria of independent contractor.

It is not the intent of S.B. 153 to characterize all guides

## DEPARTMENT OF LABOR &amp; INDUSTRY

DATE 2-28-89

## DIVISION OF WORKERS' COMPENSATION

HB SB153

MARGARET "PEG" CONDON BLDG.  
550 LAST CHANCE GULCH

TED SCHWINDEN, GOVERNOR

## STATE OF MONTANA

HELENA, MONTANA 59601

July 8, 1987

Jim VanMeter  
Box 358  
Clancy MT 59634

Re: Independent Contractor Exemption

Dear Mr. VanMeter:

Your application for exemption from coverage under the Workers' Compensation and Occupational Disease Act as an independent contractor has been approved in accordance with Section 39-71-401 (3) MCA, and ARM 24.29.706. This exemption is now recognized in the state of Montana.

This exemption from coverage under the Workers' Compensation and Occupational Disease Act applies only to you as an individual holding yourself out to the general public to be an independent contractor, doing business as J VanMeter, Guide and does not include any employees you may hire. This exemption will be effective from 7/8/87 to 7/7/88 unless sooner cancelled upon your written request or otherwise by the Workers' Compensation Division.

Sincerely,

Karen Doig  
Policy Compliance Investigator  
Insurance Compliance Bureau

KD/cl

Attachment A

EXHIBIT 1DATE 2-28-89HB SB153

## DEPARTMENT OF LABOR &amp; INDUSTRY

## DIVISION OF WORKERS' COMPENSATION

TED SCHWINDEN, GOVERNOR

MARGARET "PEG" CONDON BLDG.  
5 SO. LAST CHANCE GULCH

STATE OF MONTANA

HELENA, MONTANA 59601

June 27, 1988

TO: Interested Parties

FROM: Hiram Shaw, Chief  
Insurance Compliance Bureau *HS*

SUBJECT: Fishing & Hunting Outfitters: Responsibilities Under the  
Workers' Compensation Act

Businesses employing fishing and hunting guides must obtain a workers' compensation policy covering all employees. (Sec. 39-71-401, MCA)

Fishing and hunting guides do not qualify as independent contractors based on laws pertaining to Fish, Wildlife and Parks, Unemployment Insurance and Workers' Compensation.

Family Member Exemption Void: The Montana Supreme Court recently ruled unconstitutional which exempted members of an employer's family dwelling in the employer's household from coverage. Employer's family members must now be covered if paid wages.

Exceptions: There are many variations and exceptions to the general coverage requirements. The best rule of thumb is to assure all employees are covered, even if such employees are only temporary.

For further information about your specific situation and requirements, please call the Division of Workers' Compensation, Insurance Compliance Bureau, Uninsured Employers' Unit (444-6530).

*Attachment B*

Amendments to Senate Bill No. 153  
Third Reading Copy

Requested by Sen. Tom Rasmussen  
For the Committee on Labor and Employment Relations

Prepared by Mary McCue  
February 27, 1989

1. Page 2, line 22.

Strike: "only"

Following: "services"

Insert: "and facilities, transportation, or equipment"

2. Page 4, line 10.

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Following: "services"

Insert: "and facilities, transportation, or equipment"



SB 153

IN REVIEWING SB 153 IT IS IMPORTANT TO REMEMBER THAT THIS BILL DOES NOT AUTOMATICALLY GIVE ANYONE ANYTHING. IT DOES, HOWEVER, ALLOW AN OUTFITTING BUSINESS THE SAME RIGHTS AS ALL OTHER SMALL BUSINESSES IN THE STATE. THAT RIGHT IS THE OPTION TO HIRE A QUALIFIED INDIVIDUAL TO PERFORM A TASK AS AN INDEPENDENT CONTRACTOR IF THAT INDIVIDUAL MEETS ALL THE REQUIREMENTS OF THAT STATUS AS DEFINED BY THE STATE. IN THE CASE OF THE OUTFITTER AND THIS BILL, THE INDIVIDUAL IN QUESTION IS THE GUIDE. PRIOR TO THE LAST SESSION OF THE LEGISLATURE THE LAW READ THAT A GUIDE WAS ENDORSED BY AN OUTFITTER AND THE DECISION OF EMPLOYEE/INDEPENDENT CONTRACTOR WAS MADE ON A CASE BY CASE BASIS.\* THE CURRENT LAW IS WORDED IN SUCH A WAY THAT IT DOES NOT REFLECT THE TRUE NATURE OF THE BUSINESS AND ELIMINATES THE DECISION MAKING PROCESS BY DEFINITION.

I KNOW OF NO OTHER LAW THAT PURPOSLY SUPERSEDES THE DECISION MAKING AUTHORITY OF THE WORKMANS COMPENSATION DIVISION BY DEFINING 'EMPLOYEE' WITHOUT REGARD TO THE ELEMENTS OF THE TASK PERFORMED BY THE INDIVIDUAL INVOLVED.

I ASK YOU TO PASS SB 153 AND LET THE DEFINITION OF EMPLOYEE/INDEPENDENT CONTRACTOR BE HANDLED AS IT HAS BEEN HISTORICALLY; ON A CASE BY CASE BASIS.

\*Statute SE of ME FWP 1983 87-4-123(b)

*Jack Hutchinson*

TESTIMONY ON SB 153

Rep. Angela Russell, Chair  
House Labor Committee

Paul S. Roos  
1630 Leslie  
Helena, MT 59601  
February 28, 1989

I would like to make three main points regarding the need and fairness of this proposed legislation.

1. Historically, Montana's float fishing outfitters have operated since at least right after World War II using guides as independent contractors.

a. An outfitter would need an occasional guide and pay the guide an agreed upon amount to take a client fishing. This has been going on since the 1940's.

b. Personally, in the late sixties as a guide I was paid as an independent contractor, and since 1970 we have used guides as independent contractors.

2. The nature of the business demands guides who fit the criteria of an independent contractor and who do not seem to fit the definition of an employee.

a. Hours are flexible and determined by the guide and the clients in most cases.

b. The guide by the nature of the job must be responsible to make decisions regarding when, where, and how the job must be done.

c. A guide knows that his job is to provide the client with an enjoyable day. The job description to accomplish this will vary from day to day and client to client.

d. Many if not most guides own their own equipment. In order for a guide to be truly professional, he or she must spend a lot of time on the river. It is a professional guide's business to know what's going on. He needs to own his own equipment in order to have access to day to day river conditions.

e. In our industry day to day demands as to the number of guides an outfitter needs fluctuates greatly. Therefore, it makes sense for guides to contract to different outfitters on a demand basis.

3. It has been my personal experience through the last few years in dealing with the issue of whether guides are employees or independent contractors that there is mass confusion and anxiety in the industry regarding this issue. There is no uniformity in interpretation or enforcement of Department of Labor and Industry regulations regarding floating/fishing outfitters. This legislation will enable a guide's job description to legitimately determine whether or not he or she is an employee or an independent contractor.

HOUSE LABOR AND EMPLOYMENT RELATIONS COMMITTEE

DATE 2/28/89

[illegible]

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER  
RELATIONS  
HOUSE LABOR AND EMPLOYMENT / COMMITTEE

BILL NO. SB 49

DATE 2/28/89

SPONSOR Rasmussen

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Joyce Brown	Dept. of Admin	X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.