MINUTES
MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON LABOR AND EMPLOYMENT RELATIONS

Call to Order: By Senator Gary C. Aklestad, Chairman, on February 28, 1989, at 1:00 P.M. in the State Capitol.

ROLL CALL

Members Present: The members present were: Senator Tom Keating, Senator Sam Hofman, Senator J.D. Lynch, Senator Gerry Devlin, Senator Bob Pipinich, Senator Richard Manning, Senator Chet Blaylock, and Senator Gary C. Aklestad, Chairman.

Members Excused: Senator Dennis Nathe was excused to present SB 203 in the Old Supreme Court Room.

Members Absent: No members were absent.

Staff Present: Tom Gomez, Legislative Council, staff analyst.

Announcements/Discussion: There were no announcements or discussion.

HEARING ON HOUSE BILL 243

Presentation and Opening Statement by Sponsor:

Representative Jim Rice, House District No. 43, chief sponsor of HB 243, stated supportive employment is a concept catching on nationwide supporting severely disabled individuals. HB 243 incorporates the supportive employment definition into the statute. The process of rehabilitating an individual, who is severely disabled, starts by the person working in a sheltered workshop. The sheltered workshop is a nonprofit entity paid by the state to give training to DD individuals. Many individuals reach the point of training enabling the client to leave the sheltered workshops to obtain private industry and competitive employment. The state loses the ability to support these individuals in any way. Once these people leave the sheltered workshops, supportive services are sometimes still needed. Transportation, uniform purchase, and job coach's help, enabling the individual to get on their feet, are some needs an individual may have entering the work market. SB 243 authorizes SRS to fund Supportive Services from existing

budgets. The House of Representatives did not include a statement of intent with the transmitted legislation, although a statement of intent has been drafted.

List of Testifying Proponents and What Group they Represent:

Peggy Williams, Management Operations Bureau Chief, representing the Vocational Rehabilitation, SRS.

Jim Smith, representing the Montana Association of Rehabilitation Services.

Testimony:

Peggy Williams, Management Operations Bureau Chief, SRS Vocation Rehabilitation, stated the department requested HB 243, which amends the Shelter Employment section of the Vocational Rehabilitation Laws. HB 243 enables the department to offer new services to people with disabilities, using existing budget funds. Currently, individuals, who are too severely disabled for regular employment, may be placed in sheltered employment. One such job may be working in sheltered workshop, the place where they were trained. The most recent amendments to the Federal Rehab Act adds a new service falling between sheltered employment and regular (competitive) employment. The service is called supported employment. Supportive employment is competitive job placement in community businesses with ongoing support services. The support services are used after placement in order to maintain the job.

The VR Program, for the most part, is federally funded. While federal law allows the division to pay for services to get a person a job, the division cannot use federal dollars to pay for support services after the person is placed. Specifically, the division will take some money budgeted for sheltered employment and will serve the same clients in the community rather than in sheltered workshops. The various types of disabilities served include head injuries, physical disabilities, deafness, and blindness. At present, limited funding is available to serve people experiencing developmental disabilities and serious mental illness. The bill does not authorize new dollars, but reallocates current dollars.

Jim Smith, representing the Montana Association of Rehabilitation, stated the association includes professional councilors, many who work for the SRS Vocational Rehabilitation Division, and includes thirteen sheltered workshops located in major cities, such as Billings, Great Falls, Helena, Kalispell, Missoula, and Miles City. The

Human Service Subcommittee visited the Helena Sheltered Workshop earlier in the session. The Sheltered Employment facilities stand behind HB 243. HB 243 will enable greater discretion and flexibility for the most appropriate employment. A person would be able enter the community's mainstream employment. There is no new money called for in HB 243.

List of Testifying Opponents and What Group They Represent:

There were no testifying opponents.

Questions From Committee Members:

Senator Blaylock stated page two offers a fond hope the state may encourage the establishment and funding for supervised work programs and support services for persons with severe disabilities. Representative Rice stated the bill "acknowledges" funding is wanted, but the monies comes out of current appropriations. The reason the legislation creates new services is because the same people, who are currently in the sheltered workshops, are the people targeted to be funded. The legislation follows the same people through rehabilitation and training process by supporting the person now, and wanting the ability, when the individual is able to make the step into private employment, to be able to fund the individual during the transition period. Flexibility is the issue. HB 243 gives the department the discretion of funding the individual into private employment. The budget has been a stable budget. The budget has been increased only 5% in ten years.

Senator Keating asked Peggy Williams about the phrase "vocational rehabilitation". Are there two different groups of people: developmentally disabled and physically handicapped. Ms. Williams stated HB 243 could effect the developmentally disabled, seriously mentally ill individuals, and physically disabled. The department plans to target people who are not developmentally disabled or serious mentally ill because these groups are currently funded with services provided in HB 243. The people currently served in sheltered workshops are served by the Department of Institutions or the Developmentally Disability Division. Senator Keating asked if the persons served under HB 243 are the people who have become physically handicapped or who were born physically handicapped. Senator Keating asked Ms. Williams to define a client. A client includes a person who has sustained head injuries, either by a stroke, accident, and who has, perhaps, lapsed into coma. Ms. Williams stated a part of the appropriations is called extended employment, covering people who are in sheltered

workshops. The division proposes to take the extended employment money to serve the same people when they enter private employment.

Senator Keating asked if the people in rehabilitation can eventually get to a point of self sustaining. Ms. Williams stated in some cases, but not all. Senator Keating stated the developmentally disabled reach a certain point, then regress. In vocational rehabilitation, a individual can restore themselves to a point of self care and self providing. Ms. Williams agreed. Vocational rehabilitation is taking care of an amputee until the individual can return to work. Extended employment will be geared towards more severe individuals. Vocational rehabilitation's goal is to be self sufficient and self supporting. Extended employment includes people who can or cannot restore themselves.

Senator Devlin asked Ms. Williams about the $283,076, identified in the legislation. Was the money appropriated in the subcommittee. Yes, the money is current level funding.

Senator Hofman stated these people receive some money, but it is not much. The Legislature will probably spend less money on these people in the long run, but with the same amount of money, the legislation could help more people.

Senator Pipinich stated some of the people have been trained through the sheltered workshops and are holding down jobs, such as hotel domestic service jobs. With this bill, the Legislature can help these people through the ladder, so the individuals can take over their own lives.

Senator Keating asked if there is a chance for federal funding. Ms. Williams offered there is always hope. Currently, the federal fund money can be used for training expenses, but not on going support.

Closing by Sponsor:

Representative Rice stated the legislation will help the individuals by extending the hand of assistance during a transition period to help the individuals into the new phase of their lives. Representative Rice stated the legislation is not for the developmentally disabled, but for the individuals who are very disabled, like the blind and deaf, the head injured. Rice urged passage of SB 243.

HEARING ON HOUSE BILL 154

Presentation and Opening Statement by Sponsor:

Representative Clyde Smith, House District 5, sponsor of HB 154 stated the purpose of the legislation is to clarify statutes, allowing a stay of a workers' compensation court decision while that decision is being appealed. HB 154 is drafted in response to a Supreme Court decision, "Reil vs The State Compensation Insurance Fund". In this case, even though the initial decision was appealed, the State Compensation Insurance Fund had to start paying benefits according to the Workers' Compensation Court decision. In the same case, the Supreme Court overturned the decision, which then required the State Fund to attempt to seek reimbursement for the benefits paid.

Prior to this decision, the Judgment of the Workers' Compensation Court was in effect put on hold pending an appeal regardless of whether the claimant or the insurer/employer was appealing the decision. The stay of judgement requested in HB 154 is in accordance with the procedures that apply in district court cases where a decision is being reconsidered or will be appealed to the Supreme Court. The original bill included a retroactive clause which was removed by the House Labor Committee. We recommend the committee includes a retroactive clause as well as a severability clause. The division staff will discuss the amendment in a little more detail, but the bill does need to be made retroactive because the vast majority of claims which are being appealed to the Supreme Court are old law claims. It is the old law claims, those prior to the 1987 Legislative changes, which primarily deal with long term and lump sum benefits, which may be appealed. A stay is needed until a final decision is rendered by the Supreme Court. The original bill, before it was amended, was agreed to by a group of individuals representing various interests in Workers' Compensation.

List of Testifying Proponents and What Group they Represent:

Jim Murphy, Bureau Chief, representing the Workers' Compensation Division.

Michael Sherwood, representing the Montana Trial Lawyers Association.

Oliver Goe, representing the Mt. Municipal Insurance Authority.

George Wood, representing the Montana Self-Insurers Association.

Katrina Martin, representing the Norm Grossfield Law Firm, Helena, Montana.

Testimony:

Jim Murphy, Bureau Chief, Compensation Insurance Fund, stated HB 154 allows the employer's insurer to request a stay if a Workers' Compensation Court decision is being reconsidered or appealed to the Supreme Court. In the Reil Decision referred to by Representative Smith, the order denying the stay and indicating there was no provision to get a stay under the Workers' Comp Act, was dated July 21, 1987. The final decision was issued on December 3, 1987. The denial for rehearing was issued on January 5, 1988. The final decision overturned the Workers' Compensation Court decision, but since there was no stay, the State Fund paid benefits after the stay was denied. The State Fund paid a total of $13,748 in Compensation Benefits and $10,294 in medical. The division has requested the monies be returned and have received nothing from the claimant, but $3,598 has been received from the medical providers. The Division intends to continue to pursue the collection, but it is somewhat difficult because the claimant does not have the funds. The Division understands one of the major medical providers is no longer in business. It appears it will be necessary to pursue the benefit collections through legal means or at least through the department of revenue's normal collection procedures, adding additional administrative costs. A stay, if granted by the court, would avoid such problems.

The proposed amendment, providing for retroactive statute application, allows for a Workers' Compensation Court decision stay of any court decision, not just for workers injured at the effective date of this bill. The House removed the clause because of past Supreme Court decisions which denied the retroactive application of statutory changes to the Workers' Compensation Act. The statute constitutionality could also be challenged. The amendment includes a severability clause, if such a challenge is successful.

However, the division believes, after reviewing case law and consulting with outside legal counsel, the statute could be applied retroactively to all injuries and withstand a constitutional challenge. The bill and amendment merely extends to Workers' Comp Court decisions the existing procedure for stays of execution, which are already available for civil appeals to the Supreme Court from the district courts. Mr. Murphy stated the committee is provided with a letter from the division's outside counsel. (Exhibit 1) The letter provides a legal analysis why the division believes a constitutional challenge could be defended. It is becoming increasingly evident the 1987 Legislative changes are resulting in less and less litigation on new

claims. The stay, as Representative Smith testified, is needed most when the division litigates old law claims. HB 154 does not leave the claimant without recourse: HB 154 refers to Rule 7(b), Montana Rules of Civil Procedure, which allows the Supreme Court to suspend, modify, restore any order the Workers' Compensation Court may issue regarding a stay of execution.

Michael Sherwood, Montana Trial Lawyers Association, stated when HB 154 was amended in the House, after being considered by labor, trial lawyers, Norm Grosfield, and others, compromises were reached. The Trial Lawyers Association now stand behind HB 154.

Jim Murry, Executive Secretary of the Montana AFL-CIO, stated support of HB 154.

Oliver Goe, Montana Municipal Insurance Authority, stated the Authority is a coalition of approximately one hundred Montana cities and towns providing self insurance both for Workers' Compensation and liability. Mr. Goe stated he feels HB 154 accomplishes what the Legislature intended the Workers' Compensation to be in the first place, having the same rights of appeal to obtain a stay of appeal on appropriate bonds. The court stated the insurer is going to have to take the risk in the appeal if it should prevail.

George Wood, Executive Secretary, Montana Self Insurers Association stated support of HB 154, as amended. HB 154 is part of the bill package agreed upon by all segments of Workers' Compensation.

Katrina Martin, speaking in behalf of Norm Grosfield, stated support of HB 154.

Closing by Sponsor:

Representative Smith urged support of HB 154.

HEARING ON HOUSE BILL 155

Opening Statement by Sponsor:

Representative Clyde Smith, House District No. 5, stated HB 155 is to clarify a liability insurer employee on an existing claimant when an employee suffers a new injury on the same part of the body. HB 155 is in response to the Supreme Court decision in . The case concerned the individual sustaining another injury to the same part of the body. The Supreme Court over turned the Workers' Compensation Court ruling, stating the following: "We hold

that under the law of Montana, the fact that the injury has reached maximum healing does not eliminate the employers future liability for temporary total disability benefits..."

Testimony:

Jim Murphy, Bureau Chief for the Workers' Compensation, stated the purpose of HB 154 is to clarify the Liability of the employers insurer when the previously injured claimant receives a new non-job related injury to the same part of the body. The issue is whether the insurer on the original injury was liable or whether the accident or incident was a new injury and the liability of the new employer's insurer. The Supreme Court has applied the following stand to determine whether the claimant was reinjured or aggravated an original injury. The standard applied was whether the claimant reached maximum healing. If the claimant may have reached maximum healing, the insurer, at risk at the time of the original injury, was no longer responsible for any subsequent injuries or conditions.

This standard makes good sense and should be applied regardless of whether the subsequent injury is job related or not. In the Reil decision, the Supreme Court differentiated between a subsequent injury on the job vs a non-job related injury. This decision could place the original employer's insurer at risk for any other further accident which was non-job related injury. This decision could place the original employer's insurer at risk for any other further accident which was non-job related. If an injured worker is reinjured off the job, some other insurance should be responsible, health and accident or liability coverage. The Workers' Compensation system should not be at risk for this unmeasurable and unknown future liability. The question is whether the system can afford, after the claimant reaches maximum healing, to be liable for non-job related injuries at home, or car accidents, etc., which may happen in the future.

George Wood, Executive Secretary, Montana Self Insurers, stated Mr. Murphy explained the problems created by the Supreme Court decision, and the fact, liability would go on forever without some change in statutes. The Association stands in support of HB 154.

Oliver Goe, Montana Municipal Insurance Authority, stated HB 155 is important, rendering payment for Workers' Compensation benefits for truly work related injuries of future injuries suffered to the same part of the body. The genesis of the problems is from the Supreme Court decision concerning when the employee has reached maximum healing and has gone back to work, but receives another injury. The

Authority believes HB 155 is a strong, necessary bill, one that would not limit medical wage loss benefits occasioned by the work related injury.

Jim Murry, Executive Secretary of the Montana AFL-CIO, stated support of HB 155.

Michael Sherwood, Montana Trial Lawyers Association, stated the Association approves of the amended legislation.

List of Testifying Opponents and What Group They Represent:

Mike Hankins, representing the Jockey's Guild.

Testimony:

Mike Hankins, Jockey's Guild, stated the Jockey's Guild is the main body representing all riders involved in horse racing. The Guild is concerned with the title's wording of HB 155. Hankins stated he has ridden for over 40 years and have been injured 23 times. Hankins stated he has been under every workers' compensation policy available, and he is not unusual. In the world of the jockey and gallop rider, the most frequent part of the body that is injured and has previously reach maximal healing is the collar bone. Mr. Hankin stated that every part of his body has been injured at least twice. Basically, if this bill is passed, any rider that goes down and reinjures a previously injured part of the body will lay the burden of proof, sustaining the injury, will be laid upon him and his council. The reason why the guild is concern is because in New York a similar bill passed in the New York Legislature. The response of the guild at that time was to have guild members guarantee anyone previously injured and not covered by the New York Statute would have coverage by the Guild. This proved to be very costly. The cost was transmitted through the riders, through the horse trainers ,at a cost of $31. In Montana, the rider runs for the average purse of $750. If the guild is forced to underwrite injuries because of a lack of coverage on pre-existing injuries, the guild will pass the coverage on through the jock mounts to the Montana owners and trainers at an estimated cost $60. The Montana racing industry cannot sustain the impact. Before the jockeys will ride without proper coverage, the jockeys will force the trainer and rider to absorb the cost, creating a tremendous financial burden.

Questions from Committee Members:

Senator Lynch directed comments to Mr. Hankins. If you injure the same collar bone three times while riding the horse, you would still be covered under Montana law. But if

you injure the collar bone after the race is over while celebrating your win, you would not be covered. HB 155 has nothing to do with getting multiple injuries on the same part of your body while you are working. Mr. Hankin stated many injuries show up at a later date. The Guild is concerned about the wordage of the bill title.

Senator Keating stated the jockeys are covered under Workers' Compensation while riding. After a win, and a celebration, do jockeys carry medical insurance. Mr. Hankin stated most cases the average rider carries virtually no insurance due to the high premium charges. Once a guild member is outside the racetrack's confines, the insurance coverage in minimum. Senator Keating asked if the jockey can get medical and accident insurance, other than workers' comp for work related injuries. Hankins replied the jockey can get insurance at a minimum level, the cost will exceed $200 per month. Only two insurance companies will honor the claim.

Closing by Sponsor:

Representative Smith urged passage of 154.

Senator Manning queried the committee about taking executive action on bills heard today. Senator Aklestad received the committee's approval.

DISPOSITION OF HOUSE BILL 154

Discussion:

Senator Aklestad asked Senator Manning if the amendment encompasses the retroactive clause, plus the severability. Yes.

Amendments and Votes:

Senator Manning moved the amendment HB 154. The motion passes unanimously.

Recommendation and Vote:

Senator Manning made a AS AMENDED BE CONCURRED IN recommendation for HB 154. The motion passed unanimously. Senator Manning will carry the bill.

DISPOSITION OF HOUSE BILL 155

Amendment and Vote:

Senator Devlin moved to amend the title of HB 155 to reflect

"nonwork related" on Page 1, line 8. The motion passed unanimously..

Senator Aklestad stated the House amendment is significant, compared to the original language amended into HB 155, leaving a lot of interpretation latitude as to what is meant by " reaching maximum healing". Senator Lynch stated everyone is comfortable with the wording. Senator Aklestad asked Jim Murphy where maximum healing language is defined. Murphy stated maximum healing is always a medical determination used everyday in workers' compensation jargon. It is the key (determination factor) when a person goes to temporary total benefits from partial benefits upon reaching maximum healing. It is not something that is indicated very often. HB 155 uses a term that is used elsewhere in workers' compensation language. The motion to amend passed unanimously.

Recommendation and Vote:

Senator Manning moved to accept the motion AS AMENDED BY CONCURRED IN. The motion passed. Senator Manning will carry HB 155.

Adjournment At: The Labor and Employment Relations Committee adjourned at 2:10 p.m.

Senator Gary C. Aklestad, Chairman

GCA/mfe

Minutes.228

ROLL CALL

LABOR COMMITTEE

51st LEGISLATIVE SESSION

DATE Feb 28, 1989

	PRESENT	ABSENT	EXCUSED
SENATOR TOM KEATING	X		
SENATOR SAM HOFMAN	X		
SENATOR J.D. LYNCH	X		
SENATOR GERRY DEVLIN	X		
SENATOR BOB PIPINICH	X		
SENATOR DENNIS NATHE			X
SENATOR RICHARD MANNING	X		
SENATOR CHET BLAYLOCK	X		
SENATOR GARY AKLESTAD	X		

SENATE STANDING COMMITTEE REPORT

February 28, 1989

MR. PRESIDENT:

We, your committee on Labor and Employment Relations, having had under consideration HB 154 (third reading copy -- blue), respectfully report that HB 154 be amended and as so amended be concurred in:

Sponsor: Smith (Manning)

1. Title, line 11.
Strike: "AN"
Insert: "A RETROACTIVE"

2. Page 2, line 22 through page 3, line 3.
Strike: section 5 in its entirety
Insert: "NEW SECTION. Section 5. Retroactive applicability. [This act] is procedural in nature and applies retroactively, within the meaning of 1-2-109, to any case pending before the workers' compensation judge that has not been appealed to the Montana supreme court on or before the [effective date of this act].

NEW SECTION. Section 6. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

AND AS AMENDED BE CONCURRED IN

Signed: _____
Gary C. Aklestad, Chairman

2-28-89

SENATE STANDING COMMITTEE REPORT

February 28, 1989

MR. PRESIDENT:

We, your committee on Labor and Employment Relations, having had under consideration HB 155 (third reading copy -- blue), respectfully report that HB 155 be amended and as so amended be concurred in:

Sponsor: Smith (Devlin)

1. Title, line 8.
Strike: "NEW"
Insert: "NONWORK-RELATED"

AND AS AMENDED BE CONCURRED IN

Signed: _____
Gary C. Aklestad, Chairman

scrhb155.228

HB 243
2-28-89

Amendments to House Bill No. 243
Third Reading Copy

Requested by Senator Gary Aklestad
For the Senate Committee on Labor and Employment Relations

Prepared by Tom Gomez, Staff Researcher
February 28, 1989

1. Page 1, line 13.
Following: line 12
Insert: " STATEMENT OF INTENT

A statement of intent is required for this bill because [sections 3 and 6] delegate authority to the department of social and rehabilitation services to adopt rules necessary for administration of programs and services provided in [sections 1, 3, and 5].

It is the intent of the legislature, in enacting this bill, to establish a comprehensive program of supervised work and support services for persons with severe disabilities. The program must include sheltered employment, supported employment, work activity, and support services that will help persons who are severely disabled to lead socially and vocationally productive lives so they can be integrated into society.

The department may adopt such rules as are necessary to implement a spectrum of services under the program. Rules may be adopted to govern eligibility for services, certification of services, program staffing, staff training, service goals and design, quality of services, recipient placement procedures, individual service plans, recipient rights and privileges, recipient grievance procedures, fair hearings, provider relationships, provider accounting procedures, and any other matters necessary to implement the provisions of this bill."

2. Page 8, line 19.
Following: line 18
Insert: "NEW SECTION. **Section 7. Coordination requirements -- consolidation of services authorized.** (1) The governor shall assure that services under this part are coordinated with programs and services in Title 53, chapter 7, parts 1 and 3, and Title 53, chapter 19, part 1, that are administered by the department with funds provided under the federal Rehabilitation Act of 1973 (29 U.S.C. 701, et seq.), as amended.

(2) The governor may consolidate services under this part with other programs and services in order to maximize coordination of services as required in subsection (1) and to prevent overlapping and duplication of services within state government."
Renumber: subsequent sections

3. Page 8, line 20.
Following: "5"
Strike: "and 6"
Insert: "through 7"

4. Page 8, line 23.
Following: "5"
Strike: "and 6"
Insert: "through 7"

5. Page 8, line 25.
Following: "6"
Strike: ", 7,"
Insert: "through 8"

Ex. 1 A PS/ER
2-28-89
HB 154

TESTIMONY BY

REPRESENTATIVE CLYDE SMITH

HOUSE BILL 154

(Before Senate Labor)

THE PURPOSE OF THIS LEGISLATION IS TO CLARIFY THE STATUTES BY ALLOWING A STAY OF A WORKERS' COMPENSATION COURT DECISION WHILE THAT DECISION IS BEING APPEALED. THIS IS IN RESPONSE TO A SUPREME COURT DECISION, "REIL vs THE STATE COMPENSATION INSURANCE FUND." IN THIS CASE, EVEN THOUGH THE INITIAL DECISION WAS APPEALED THE STATE COMPENSATION INSURANCE FUND HAD TO START PAYING BENEFITS ACCORDING TO THE WORKERS' COMPENSATION COURT DECISION. IN THIS SAME CASE THE SUPREME COURT OVERTURNED THE DECISION WHICH THEN REQUIRED THE STATE FUND TO ATTEMPT TO SEEK REIMBURSEMENT FOR THE BENEFITS PAID.

PRIOR TO THIS DECISION, THE JUDGMENT OF THE WORKERS' COMPENSATION COURT WAS IN EFFECT PUT ON HOLD PENDING AN APPEAL REGARDLESS OF WHETHER THE CLAIMANT OR THE INSURER/EMPLOYER WAS APPEALING THE DECISION. THE STAY OF JUDGMENT REQUESTED IN THIS BILL IS IN ACCORDANCE WITH THE PROCEDURES THAT APPLY IN DISTRICT COURT CASES WHERE A DECISION IS BEING RECONSIDERED OR WILL BE APPEALED TO THE SUPREME COURT.

THE ORIGINAL BILL INCLUDED A RETROACTIVE CLAUSE WHICH WAS REMOVED BY THE HOUSE LABOR COMMITTEE. WE RECOMMEND YOU AMEND THE BILL TO INCLUDE A RETROACTIVE CLAUSE AS WELL AS A SEVERABILITY CLAUSE.

THE DIVISION STAFF WILL DISCUSS THE AMENDMENT IN A LITTLE MORE DETAIL, BUT THE BILL DOES NEED TO BE MADE RETROACTIVE BECAUSE THE VAST MAJORITY OF

CLAIMS WHICH ARE BEING APPEALED TO THE SUPREME COURT ARE OLD LAW CLAIMS. IT IS THE OLD LAW CLAIMS, THOSE PRIOR TO THE 1987 LEGISLATIVE CHANGES, WHICH PRIMARILY DEAL WITH LONG TERM AND LUMP SUM BENEFITS WHICH MAY BE APPEALED AND A STAY IS NEEDED UNTIL A FINAL DECISION IS RENDERED BY THE SUPREME COURT.

THE ORIGINAL BILL BEFORE IT WAS AMENDED WAS AGREED TO BY A GROUP OF INDIVIDUALS REPRESENTING VARIOUS INTERESTS IN WORKERS' COMPENSATION. I AM SURE THESE INDIVIDUALS WILL TESTIFY BEFORE THE COMMITTEE.

Jim Murphy

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1 Page 1 of 4
DATE Feb 28, 1989
BILL NO. SB 154

HOUSE BILL NO. 154

Reinsert on lines 15 through 19:

Section 5. Retroactive applicability. (This act) is procedural in nature and applies retroactively, within the meaning of 1-2-109, to any case pending before the workers' compensation judge that has not been appealed to the Montana supreme court on or before [the effective date of this act].

Add Following Section 5:

Section 6. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Ex. #1 Pg 2 of 4
2-28-89
SB 154

DIVISION TESTIMONY

HOUSE BILL 154

(Before Senate Labor)

HOUSE BILL 154 ALLOWS THE EMPLOYER'S INSURER TO REQUEST A STAY IF A WORKERS' COMPENSATION COURT DECISION IS BEING RECONSIDERED OR APPEALED TO THE SUPREME COURT.

THE IMPACT CAN BE PARTIALLY UNDERSTOOD IF YOU CONSIDER THE FOLLOWING STATISTICS:

1. CASES APPEALED TO THE SUPREME COURT

F/Y	NUMBER
1987	56
1988	36
1989 (6 mo.)	23

2. CASES APPEALED DURING C/Y 1988- 26

A. PLANS I & II	14
PLAN III	12
B. APPEALED BY CLAIMANT	10
APPEALED BY INSURER	18*
C. TO DATE:	
AFFIRMED	19
REVERSED	4
PARTIAL	1

*NOTE CROSS APPEAL IN TWO CASES

IN THE REIL DECISION REFERRED TO BY REPRESENTATIVE SMITH, THE ORDER DENYING THE STAY INDICATING THERE WAS NO PROVISION TO GET A STAY UNDER THE WORKERS' COMP ACT WAS DATED JULY 21, 1987. THE FINAL DECISION ON THE ISSUE WAS ON DECEMBER 3, 1987 AND THE DENIAL FOR REHEARING WAS ON JANUARY 5, 1988.

THE FINAL DECISION OVERTURNED THE WORKERS' COMPENSATION COURT DECISION, BUT SINCE THERE WAS NO STAY, THE STATE FUND PAID BENEFITS AFTER THE STAY WAS DENIED.

THE STATE FUND PAID A TOTAL OF $13,748 IN COMPENSATION BENEFITS AND $10,294 IN MEDICAL. WE HAVE REQUESTED THE MONIES BE RETURNED AND HAVE RECEIVED NOTHING FROM THE CLAIMANT AND $3,598 FROM MEDICAL PROVIDERS. WE INTEND TO CONTINUE TO PURSUE THE COLLECTION, BUT IT IS SOMEWHAT DIFFICULT BECAUSE THE CLAIMANT OF COURSE DOES NOT HAVE THE FUNDS AND WE UNDERSTAND ONE OF THE MAJOR MEDICAL PROVIDERS IS NO LONGER IN BUSINESS. IT APPEARS IT WILL BE NECESSARY TO PURSUE THE COLLECTION OF THE BENEFITS PAID THROUGH LEGAL MEANS OR AT LEAST THROUGH THE DEPARTMENT OF REVENUE'S NORMAL COLLECTION PROCEDURES WHICH OF COURSE ADDS ADDITIONAL ADMINISTRATIVE EXPENSES. A STAY OF COURSE, IF GRANTED BY THE COURT, WOULD AVOID THESE PROBLEMS.

THE PROPOSED AMENDMENT PROVIDING FOR RETROACTIVE APPLICATION OF THE STATUTE ALLOWS FOR A STAY OF THE WORKERS' COMPENSATION COURT DECISION FOR ANY COURT DECISION, NOT JUST FOR WORKERS INJURED AT THE EFFECTIVE DATE OF THIS BILL.

THE HOUSE REMOVED THE CLAUSE BECAUSE OF PAST SUPREME COURT DECISIONS WHICH DENIED THE RETROACTIVE APPLICATION OF STATUTORY CHANGES TO THE WORKERS' COMPENSATION ACT. THE CONSTITUTIONALITY OF THIS STATUTE COULD ALSO BE CHALLENGED AND THE AMENDMENT INCLUDES A SEVERABILITY CLAUSE IF SUCH A CHALLENGE IS SUCCESSFUL.

HOWEVER, WE BELIEVE AFTER REVIEWING THE CASE LAW AND CONSULTING WITH OUTSIDE LEGAL COUNSEL, THIS STATUTE COULD BE APPLIED RETROACTIVELY TO ALL

INJURIES AND WITHSTAND A CONSTITUTIONAL CHALLENGE. THIS BILL AND AMENDMENT MERELY EXTENDS TO WORKERS' COMP COURT DECISIONS THE EXISTING PROCEDURE FOR STAYS OF EXECUTION WHICH ARE ALREADY AVAILABLE FOR CIVIL APPEALS TO THE SUPREME COURT FROM THE DISTRICT COURTS. I HAVE PROVIDED THE COMMITTEE WITH A LETTER FROM OUR OUTSIDE COUNSEL WHICH I WOULD REQUEST BECOME PART OF THE RECORD. THE LETTER PROVIDES A LEGAL ANALYSIS AS TO WHY WE BELIEVE A CONSTITUTIONAL CHALLENGE COULD BE DEFENDED.

IT IS BECOMING INCREASINGLY EVIDENT THAT THE 1987 LEGISLATIVE CHANGES ARE RESULTING IN LESS AND LESS LITIGATION ON NEW CLAIMS. THE STAY, AS REPRESENTATIVE SMITH TESTIFIED IS MOSTLY NEEDED WHEN WE LITIGATE OLD LAW CLAIMS.

ONE FINAL COMMENT, HB-154 DOES NOT LEAVE THE CLAIMANT WITHOUT RECOURSE BECAUSE THE BILL REFERS TO THE PROCEDURES IN RULE 7(b) MONTANA RULES OF CIVIL PROCEDURE WHICH ALLOW THE SUPREME COURT TO SUSPEND, MODIFY, RESTORE ANY ORDER THE WORKERS' COMPENSATION COURT MAY ISSUE REGARDING A STAY OF EXECUTION.

HB 154
2-28-89

Amendments to House Bill No. 154
Third Reading Copy

For the Senate Committee on Labor and Employment Relations

Prepared by Tom Gomez, Staff Researcher
February 28, 1989

1. Title, line 11.
Strike: "AN"
Insert: "A RETROACTIVE"

2. Page 2, line 22 through page 3, line 3.
Strike: section 5 in its entirety
Insert: "NEW SECTION. **Section 5. Retroactive applicability.** [This act] is procedural in nature and applies retroactively, within the meaning of 1-2-109, to any case pending before the workers' compensation judge that has not been appealed to the Montana supreme court on or before the [effective date of this act].

NEW SECTION. **Section 6. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

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RECEIVED
FEB 16 1989
STATE FUND
LEGAL OFFICE

February 15, 1989

SUBJECT: House Bill 154

State Fund Legal Unit
Attention: Nancy Butler
P.O. Box 4759
Helena, MT 59604

Dear Nancy:

You have requested my opinion concerning the constitutionality of applying House Bill No. 154 retroactively to workers' compensation injuries which occurred prior to the effective date of the Bill, should it pass and be signed into law. The Bill provides for a stay of execution during any appeal from the Workers Compensation Court to the Supreme Court.

While House Bill 154 does not modify substantive remedies, it may operate to delay the enforcement of any judgment the worker may obtain in the Workers' Compensation Court. The concern with applying the Bill to antecedent claims arises because of the Montana Supreme Court's recent decision in Carmichael v. Workers' Compensation Court, 45 St. Rptr. 2012, 763 P.2d 1122 (November 1, 1988), a case in which the Court struck down the retroactive application of mediation requirements enacted by the 1987 Montana Legislature. The Court held that the application of the requirements to antecedent injuries was an unconstitutional impairment of the obligation of contract because such application significantly delayed the worker's day in court. Prior to the 1987 statute, a worker had been entitled to petition the Workers' Compensation Court immediately upon any controversy arising between himself and the insurer. After carefully reviewing Carmichael and other Contract Clause cases, it is my opinion that Carmichael does not preclude the application of House Bill 154 to prior injuries and that such application is constitutional.

Contract Clause analysis is the same under the Contract Clause of the United States Constitution and the equivalent clause of the Montana Constitution. Carmichael, 45 St. Rptr. at 2015.

Modern decisions of the United States Supreme Court flatly reject the notion that every statute which delays the enforcement of remedies available to a contracting party at the time of the making of the contract violates the Contract Clause. The landmark decision is Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934), a case in which the Supreme Court rejected a Contract Clause challenge to a Minnesota statute which placed a moratorium on mortgage foreclosures. Blaisdell noted that the Contract Clause is not absolute and is "qualified" by a measure of control which the State retains over remedies and State "authority to safeguard the vital interests of it people." While the moratorium at issue in Blaisdell was enacted under emergency circumstances, an

emergency is not required for a statute to pass muster under the Contract Clause. See Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983). As a general proposition, the United States Supreme Court has held that adjustments of contractual obligations and remedies are constitutional if such adjustments are reasonable and within the reasonable expectations of the parties when the contract was made. See Energy Reserves and In re Johnson, 69 B.R. 988, 993 (D. Minn. 1987).

What distinguishes a retroactive application of House Bill 154 from the retroactive application of the mediation statute at issue in Carmichael, is the reasonable expectations of the parties. The statute in Carmichael imposed an entirely new, non-judicial procedure. In contrast, House Bill 154 modifies judicial procedures already in place. It merely extends the existing procedures for stays of execution, which are already available in civil appeals to workers' compensation appeals, to workers' compensation appeals.

It is well established that the contract clause does not preclude a modification in remedies or in the procedures for the enforcement of remedies where the modification can reasonably be anticipated. Thus, in Neel v. First Federal Savings & Loan Assoc., 207 Mont. 376, 675 P.2d 96 (1984) the Montana Supreme Court sustained the application of an increased, $40,000 homestead exemption to debts pre-existing the increase. In doing so the Court held that the parties to contracts should have reasonably expected that the amount of the homestead exemption would increase, pointing out that the exemption had regularly been increased over the previous fifty years. Similarly, the courts have sustained statutes which modify civil procedure or the timing of available remedies. Changes in statutes of limitations have been sustained, even where an otherwise barred claim has been revived, e.g. International Union of Electrical, Radio and Machine Workers v. Meyers, 429 U.S. 229 (1976). Extensions of a state's long arm jurisdiction to causes ante-dating the adoption of the long arm rule have been upheld, e.g. State ex. rel. Johnson v. District Court, 148 Mont. 22, 417 P.2d 109 (1982). Changes in the rules of evidence have been deemed applicable to causes of action arising prior to the changes, e.g. Virginia & West Virginia Coal Co. v. Charles, 254 F. 379 (1918) (holding that a change in an evidentiary presumption may be applied retroactively since there are no vested rights in rules of evidence). The reason for sustaining such modifications is apparent: States and courts have traditionally retained control over judicial procedures. Thus, the parties to a contract must reasonably expect that rules of civil and appellate procedures may be modified.

Where a right of appeal is afforded, as it is in workers' compensation cases, that right must be afforded equally to all parties, and it is a denial of due process of law to impose a bond or other financial requirement which would effectively rob a litigant of a meaningful right to appeal. Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133 (2nd Cir. 1986). It is within the reasonable contemplation of workers and insurers alike that future measures may be adopted to protect that right to appeal.

The need for stays of executions in workers' compensation cases is apparent from the history of the case which gave rise to this remedial bill. That case was

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Reil v. Billings Processors, Inc., an unreported order dated July 21, 1987, in which the Supreme Court held that the stay of execution provisions of the Montana Rules of Appellate Civil Procedure "appear to be related [only] to appeals from district courts." Following that decision, the insurer made the payments required under the Workers' Compensation Court judgment, payments which were substantial. Although the insurer prevailed on appeal, it has encountered great difficulty in recouping all of its payments and still has not done so.

Moreover, payment of a Workers' Compensation Court judgment may moot any appeal by the insurer, especially in cases of large lump sum awards or where the medical and compensation benefits have accumulated over a long period of time. In 1988 the State Compensation Insurance Fund conducted a five month survey of lump sum advances exceeding $45,000. That survey showed that workers receiving lump sums frequently fail to utilize the sums for the purposes intended, or fail in their proposed ventures. An affidavit filed in Ernest Easton v. Donald B. Shields, WCC No. 8609-3865 on October 20, 1986 summarizes those findings. Sixty-five settlements were made during the period, totalling $4,623,000. Of those settlements thirty-three (33) were for business ventures and another six (6) for educational purposes. The State Fund was only able to document that eleven (11) of the business ventures had gone forward as proposed, of which one (1) failed, two (2) had already been sold, and one (1) had ceased due to the claimant's return to total disability status. Of the six claimants who planned to attend school, two did not (one returned to heavy construction work), and two dropped out of school for medical reasons. The insurer has no control over the ultimate expenditure of the sums awarded to the claimant and thus no security for recoupment of those sums if they are not securely invested by the claimant. In cases where lump sums are based on the claimants' indebtedness, and are used to payoff creditors, recoupment will frequently be hopeless.

House Bill 154 would not leave a claimant wholly without recourse during the pendency of an appeal. Section One provides that a stay may be entered "under conditions as the judge deems proper" and Rule 7(b) of the Montana Rules of Appellate Procedure provides that, "On application, the supreme court in the interest of justice may suspend, modify, restore, or grant an order made under this subsection." These provisions are seemingly broad enough to give the courts discretion to deny a stay with respect to any order for payment of bi-weekly benefits which come due during the appeal process, while staying the remainder of the judgment. An exercise of this discretion would give needy claimants bi-weekly income to meet their current expenses during any appeal, while protecting the insurer's rights of appeal respecting accumulated benefits, medical benefits, and lump-sum commutation of future benefits.

Sincerely,

Mike McCarter

ks:Butler.Ltr

Workers' Comp. Div.
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DIVISION TESTIMONY

HOUSE BILL 155

AS REPRESENTATIVE SMITH STATED, THE PURPOSE OF THIS BILL IS TO CLARIFY THE LIABILITY OF THE EMPLOYER'S INSURER WHEN THE PREVIOUSLY INJURED CLAIMANT RECEIVES A NEW NON-JOB RELATED INJURY. THE ISSUE WAS WHETHER THE INSURER ON THE ORIGINAL INJURY WAS LIABLE OR WHETHER THE ACCIDENT OR INCIDENT WAS A NEW INJURY AND THE LIABILITY OF THE NEW EMPLOYER'S INSURER. THE SUPREME COURT HAS APPLIED THE FOFLLOWING STAND TO DETERMINE WHETHER THE CLAIMANT WAS REINJURED OR AGGRAVATED AN ORIGINAL INJURY.

THE STANDARD APPLIED WAS WHETHER THE CLAIMANT REACHED MAXIMUM HEALING. IF THE CLAIMANT MAY HAVE REACHED MAXIMUM HEALING THE INSURER AT RISK AT THE TIME OF THE ORIGINAL INJURY WAS NO LONGER RESPONSIBLE FOR ANY SUBSEQUENT INJURIES OR CONDITIONS.

THIS STANDARD MAKES GOOD SENSE AND SHOULD BE APPLIED REGARDLESS OF WHETHER THE SUBSEQUENT INJURY IS JOB RELATED OR NOT. IN THE GUILD DECISION, THE SUPREME COURT DIFFERENTIATED BETWEEN A SUBSEQUENT INJURY ON THE JOB vs A NON-JOB RELATED INJURY. THIS DECISION COULD PLACE THE ORIGINAL EMPLOYER'S INSURER AT RISK FOR ANY OTHER FUTURE ACCIDENT WHICH WAS NON-JOB RELATED. IF AN INJURED WORKER IS REINJURED OFF THE JOB, SOME OTHER INSURANCE SHOULD BE RESPONSIBLE, BE THAT HEALTH AND ACCIDENT OR LIABILITY COVERAGE, BUT THE WORKERS' COMPENSATION SYSTEM SHOULD NOT BE AT RISK FOR THIS UNMEASURABLE AND UNKNOWN FUTURE LIABILITY. THE QUESTION IS WHETHER THE SYSTEM CAN AFFORD, AFTER THE CLAIMANT REACHES MAXIMUM HEALING, TO BE LIABLE FOR NON-JOB RELATED INJURIES AT HOME, OR CAR ACCIDENTS, ETC., WHICH MAY HAPPEN IN THE FUTURE.

LABOR COMMITTEE

VISITORS' REGISTER

51st LEGISLATIVE SESSION

DATE: February 28, 1989

LEAVE PREPARED STATEMENTS WITH SECRETARY! PLEASE!!!

PRINT: NAME	REPRESENTING	Check One	
		Support	Oppose
Peggy Williams	SRS	VHB243	
Mike Hankins	Spotted Farms INC / Riders Guild		HB155 154
George Wood	Mt. Self Insurers Assn.	HB154 HB155	
Norm Crossfield	"	HB 154	
Glenn Coe	Montana Mining & Insurance Safety	HB154 and 155	
Nancy Bull	CGTF	HB154 HB155	
Jim Murphy	SCIF	HB 154 155	
Jim Smith	M.A.R.	HB243.	
Mike Sherwood	MTLA	HB154 155	
Jim Murry	Mont. AFL-CIO	"	
Don Ingels	Mt Chamber of Commerce	Monitoring all 3	

DATE 2-28-89 2 of 2

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppo
MIKE MICONE	LABOR + INDUSTRY	348 347	X	

(Please leave prepared statement with Secretary)