MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON BUSINESS AND INDUSTRY

Call to Order: By Chairman Gene Thayer, on March 8, 1989, at 10:00 a.m.

ROLL CALL

Members Present: Chairman Thayer, Vice Chairman Meyer, Senator Boylan, Senator Noble, Senator Williams, Senator Hager, Senator McLane, Senator Weeding, Senator Lynch

Members Excused: None

Members Absent: None

Staff Present: Mary McCue, Legislative Council

Announcements/Discussion: None

HEARING ON HOUSE BILL 573

Presentation and Opening Statement by Sponsor:

Representative McCormick, House District 38, said this bill amended two different sections of the gambling laws dealing with video gaming machines, one dealt with the description and specifications for video draw poker machines, and the other dealt with the same provision relating to keno machines. He said the bill allowed machine manufacturer bill acceptors on those gaming machines.

List of Testifying Proponents and What Group They Represent:

John Willims - Bureau Chief, Video Games Control Bureau

List of Testifying Opponents and What Group They Represent:

None

Testimony:

John Willims stated the 1987 legislature passed a bill authorizing the installation of bill acceptors on video keno and video draw poker machines. He stated was some language in that legislation that required the creation of a separate meter called a bill acceptor meter, which required software changes, and required some additional costs for handling. He stated that all this bill did was allow for the installation of the bill acceptor as an after market product, without going through the sophisticated software changes. He said it still required the manufacturer's involvement, and still required the customers approval by the department. He said the department agreed with the bill.

Questions From Committee Members: Senator Noble asked Representative McCormick about a tape being put on each of the keno machines, and asked if that was part of this bill?

Representative McCormick said no, that had nothing to do with this bill.

Chairman Thayer asked if this eliminated the problem they had just discussed?

Representative McCormick said most of the new keno machines came out with the bill acceptor on them already. He said this bill only dealt with the bill acceptor.

Closing by Sponsor: Representative McCormick asked the committee to pass the bill.

DISPOSITION OF HOUSE BILL 573

Discussion: Mary McCue explained that there was a major piece of legislation moving through the process that was a major revision of the gambling laws. She said one of the parts of that bill repealed these two sections that you are amending here today. She stated they needed a coordination instruction in this bill. She said she had presented the information in her bill summary. (See Exhibit #1) She stated it would say that if this bill passed and SB 431 also passed, justice would have to allow, by rule, this kind of bill acceptor. She explained that if these statutes were not in existence anymore, then their rules would have to permit what this bill is permitting. She said she had discussed the amendment with Mr. Willims, and he

did not have a problem with the amendment, and neither did the Sponsor.

Amendments and Votes: Senator McLane made a motion to amend HB 573 to add a coordination clause with SB 431. Senator Meyer seconded the motion. The motion Carried Unanimously.

Recommendation and Vote: Senator McLane made a motion HB 573 BE CONCURRED IN AS AMENDED. Senator Meyer seconded the motion. Eight Senators voted in favor of the motion, with Senator Hager opposing. The motion Carried. Senator Boylan carried HB 573 on the Senate floor.

HEARING ON HOUSE BILL 570

Presentation and Opening Statement by Sponsor:
Representative Gary Spaeth, House District 84, said HB 570 allowed one person to hold all the offices in a close corporation if the articles of incorporation contained a statement to that effect. He said these were small corporations of twenty-five stockholders or less, and it allowed for the corporation to act similar to a partnership, which allowed for more informality. He said this was a recognition of the fact that a lot of the business of a family operation is done with the head of the family as the head of the corporation. He stated HB 570 allowed one stockholder to hold all the offices in a corporation. He said this was a clarification of language which indicated that was the intent of the original legislation, and he urged passage of HB 570.

List of Testifying Proponents and What Group They Represent:

Doug Mitchell - Office of the Secretary of State
Steven C. Bahls - Associate Professor, University of Montana School of Law - written (See Exhibit #5)

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Doug Mitchell stated their office agreed that this bill would help clarify a difficulty in the law, and it would enable small business in the state to avoid through difficult, bureaucratic red tape. He asked them to concur in the bill.

Questions From Committee Members: Senator Noble asked if the word "close" corporation was the correct term, as he had heard the word "closed" used in testimony?

Representative Spaeth said "close" was correct, and any other word had been an error in speaking.

Senator Hager asked if the board of directors of a corporation could also be one person?

Representative Spaeth said the believed that you could have one member boards. He said that a close corporation was different than a business corporation where you had to have three board members.

Senator Hager asked if the stipulation had to be in existence in the articles of incorporation, when they were filed?

Representative Spaeth stated the articles of incorporation could be amended to specify the number.

Senator Weeding asked Representative Spaeth purpose a close corporation served?

Representative Spaeth said that the reason for a close corporation was that it was basically a family corporation, where the stockholders are twenty-five or less. He said a close corporation was exposed to much less regulation than a larger business corporation, but both provided corporate protection, such as corporate bail. He stated the advantage of a close corporation was the ability to operate less formally.

Chairman Thayer asked if a close corporation could have any outside ownership or directors, and What percentage of stock had to be owned within? He also asked if the choice of corporation type had to be made at the time you filed your articles of incorporation?

Representative Spaeth said yes there could, there just had to be twenty-five stockholders or less. He stated the choice was made at the time of filing, however there were methods of transferring your type of corporation.

Closing by Sponsor: Representative Spaeth closed the hearing. He said he had located the information which stated a close corporation did not need a board of directors.

DISPOSITION OF HOUSE BILL 570

Discussion: None

Amendments and Votes: None

Recommendation and Vote: Senator Hager made a motion HB 570 BE CONCURRED IN. Senator Boylan seconded the motion. The motion Carried Unanimously. Senator McLane carried the bill on the Senate floor.

HEARING ON HOUSE BILL 321

Presentation and Opening Statement by Sponsor:
Representative Gary Spaeth, House District 84, stated he was carrying HB 321 at the request of the Secretary of State's Office. He said the bill dealt with a section of the uniform commercial code which required a Social Security Number, or a tax identification number on financial statements. He said the reason for the bill was to eliminate confusion between people with similar names. He said the bill contained the same requirement as was required when filing an agricultural lien.

List of Testifying Proponents and What Group They Represent:

Doug Mitchell - Office of the Secretary of State office

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Doug Mitchell said the bill would help businesses in the state of Montana, by allowing their office to improve the quality of service they could provide. He said that all the bill did was require a Social Security Number, or tax identification number to be filed with a uniform commercial code financing statement. He stated the additional information would enable them to clarify the actual search product out of a lending institution, or others who needed a financing search. He said the problem arose when a lien was searched on a name that was very common, because without a number it's very difficult to determine which is the correct individual holding a lien. He said they wanted to issue correct information to creditors, and this was a method already being used by banks. He stated Secretary of State's

computers were already set up to handle the information, so no conversion was necessary. He asked the committee to concur in HB 321.

Questions From Committee Members: Senator Hager said he had carried a bill 15 years ago that allowed the use of Social Security Numbers as voter identification numbers. He stated, that at that time, we had to give them a ballot, even if they refused to give their Social Security Number. He asked if there was a federal law that prohibited the use of Social Security Numbers as an ID Number?

Doug Mitchell said he understood there was, perhaps some precedential action against the use of Social Security Numbers in identification for drivers licenses, etc.. However, for financing information, you don't get very far in a loan process or bank account without providing a tax number. He said that he felt there would have been opposition present, if that were the case.

Representative Spaeth said he understood there were limits on Social Security Numbers, but by making the choice optional for use of a Social Security Number, or a tax identification number, there was no problem. He said divers licenses offered an option also.

Senator Boylan asked what happened if the person refused to give either number?

Representative Spaeth said that people involved in financial transactions usually cooperated.

Closing by Sponsor: Representative Spaeth urged passage of HB 321.

DISPOSITION OF HOUSE BILL 321

Discussion: None

Amendments and Votes: None

Recommendation and Vote: Senator Hager made a motion HB 321 BE CONCURRED IN. The motion was seconded by Senator Williams. Eight Senators voted in favor of the motion, with and Senator Boylan opposed. The motion Carried. Senator Noble carried HB 321 on the Senate floor.

HEARING ON HOUSE BILL 611

Presentation and Opening Statement by Sponsor:
Representative Mary Ellen Connelly, House District 8, said HB 611 provided that protest of issuance or transfer of a alcoholic beverage license could be made only by creditors, and residents of the county from which the application came, or adjoining counties.

Representative Connelly said the reason for the bill was because of a bar owner who told a bus load of students, who had stopped to use his rest room, that they had to buy something. She said he had shot at the departing bus, and a similar situation had happened to another family who stopped at the establishment. She said the proprietor had been presented an injunction to prevent any continuance of his actions. She stated he had later become involved in a dispute with the Highway Department, which ended in court action which revoked his liquor license. She stated the man had sold his bar and liquor license, then a Canadian friend of his felt he had been treated unfairly, and filed a protest and got an injunction against the transfer of the license. She said the legislation had arisen because the person who had filed the protest wasn't even a citizen of Montana. She stated the legislation was proposed to limit the avenues of protest.

List of Testifying Proponents and What Group They Represent:

None

List of Testifying Opponents and What Group They Represent:

None

Testimony: None

Questions From Committee Members: Chairman Thayer asked if HB 611 did anything to alleviate the problems they had experienced?

Representative Connelly said it would not help past problems, but once they realized anyone could file a protest, regardless of their interests, there was evidence of a need for some limitations.

Chairman Thayer asked if the language, on Page 1, line 22, would preclude a single resident from making the protest?

Gary Blewitt stated he would interpret the language of the bill, by stating "an individual", did not have an intent to require more than one.

Closing by Sponsor: Representative Connelly closed the hearing.

DISPOSITION OF HOUSE BILL 611

Discussion: None

Amendments and Votes: None

Recommendation and Vote: Senator Lynch made motion HB 611 BE CONCURRED IN. Senator Williams seconded the motion. The motion Carried Unanimously. Senator Story carried HB 611 on the Senate floor.

HEARING ON HOUSE BILL 446

Presentation and Opening Statement by Sponsor: Representative Daily, House District 69, said HB 446 was a bill that would give discretionary authority to the lottery commission to raise the present five percent commission on the sale of lottery tickets to eight percent. He stated the bill was requested by the Montana Food Distributors Association. He said it was hoped that HB 446 would increase the ticket sales, and that the grocers would be able to cover their ticket sales costs. He stated that it currently cost the grocers about 10 cents to sell a ticket, and that they were losing about five cents per sale.

Representative Daily said that in order to have a successful lottery, you had to have people buying tickets and people selling tickets. He stated the bill was purely discretionary, in allowing the lottery commission to choose to raise the percentage if they felt it was necessary. He stated the had bill been amended to stipulate the increased commission would have to come from the administrative expenses, or from the prize expenses.

List of Testifying Proponents and What Group They Represent:

Frank Capps - Montana Food Distributors Association
Bill Stevens - Executive Director, Montana Food Distributors Association

List of Testifying Opponents and What Group They Represent:

None

Testimony: Frank Capps said he believed the lottery program, in Montana, was in trouble. He stated the sales had declined over 40% the past year. He said he felt the fate of the lottery lay within two decisions the legislature had to make. He stated the passage of the original form of HB 207 could help save the lottery program, because it allowed the lottery commission to run the lottery as a business. He further stated passage of HB 446 was necessary because those presently selling lottery tickets were selling them at a loss. He said that created very little interest in selling tickets.

Mr. Capps said, that in order to sell lottery tickets, he had to place his ticket order every other Tuesday. He said the tickets were delivered on Thursday, and the tickets had to be individually stamped the sellers ID number, and distributed to the check stands for sale. He said that two weeks after the ticket order was placed, the money was taken from his checking account to pay for them. He said the handling of the tickets, to this point, did not offset the five cents they made on a ticket.

He said the lottery was one good fun way to pay taxes, and the Montana Grocers had shown their willingness to help. Mr. Capps said that without someone to sell the tickets the program was dead, and he urged the committee's support.

Bill Stevens stated, that he wished to add that during yesterday's hearing on HB 207, the director of the lottery said the two bills were compatible.

Questions From Committee Members: Senator Lynch asked if, under this bill, the lottery commission could charge six, eight, seven, or five percent, why hadn't it been set at ten percent, and not have to repeat the process of raising the percentage again. He also wanted to know if Representative Daily would object to that?

Representative Daily said he didn't object, but did not know what would happen in the House.

Senator Noble stated that he was on the board of the Montana Retailer Association when a national survey was done, and that survey showed it cost the lottery ticket sellers a little over nine cents to sell each lottery

ticket. He stated they had felt the low commission was one of the problems with the bill, at that time.

Senator Hager asked if this was part of the management ability of the lottery commission?

Representative Daily said that he thought the bill gave them some flexibility so they could do some promotion to help create an interest. He stated that if interest did increase, they might be able to raise the commission, and if there was no increased interest, they could try a lower amount. Representative Daily said the House was very adamant about the 35% going to the schools.

Senator Williams asked Frank Capps if he had to bond his employees, or if he had noticed an identifiable increase in business because he had lottery tickets.

Mr. Capps said he did not bond any employees, and that his daily income was graduated, but there had been no notable increase in sales of grocery items.

Senator Weeding asked what limits were on the take for administration?

Representative Daily said it was fifteen percent.

Chairman Thayer asked, if they assumed the lottery was being managed efficiently, and the percent of prize money was set, why was the House so adamant raised costs had to be taken out of something other than retirement?

Representative Daily said the House had felt one of the main purposes of the lottery was to give tax relief to local property tax payers, through the teacher's retirement. He said the bill would not create a fiscal impact, unless the lottery commission chose to raise the percentage.

Senator Noble asked if the lottery commission should be allowed to make this decision, or if legislature should this decision? He said that if stores didn't really want to sell the tickets at a loss, then what is the lottery commission going to do?

Representative Daily said he felt this gave them an opportunity to increase sales, and the way to do that would be to raise the commission. He said that if they didn't do something along this line, he thought the lottery was going to fail.

Senator Weeding asked why the fiscal note said 5.6%?

Mr. Capps said that with every 500 tickets ordered, there were some bonus tickets, and the average number of extra tickets per packet made of the .6% stipulated on the fiscal note.

Chairman Thayer stated the amendment eliminated the fiscal note.

Closing by Sponsor: Representative Daily said the people of Montana had voted for a lottery, and there was a responsibility to administer the program. He said he hoped the committee would favor the legislation.

DISPOSITION OF HOUSE BILL 446

Discussion: Mary McCue said there was another bill that amended the same language, and they had realized codification would render an unintelligible sentence. The suggested solution had been to make a minor technical amendment which would require the bill to return to the House for approval. The amendment would put a period at the end of sold on line 21, page 2, and would read, "sales agents are entitled to no more than eight percent commission", and insert a period after sold. Then it would say, "commissions may not come from that part". She said it was not a substantive change, but breaking the language into two sentences would make the other bill make sense when codified.

Amendments and Votes: Senator Hager made a motion to amend HB 446 as Mary McCue had suggested. Senator Meyer seconded the motion. The motion Carried Unanimously.

Senator Lynch made a motion to amend HB 446 by striking eight percent and inserting ten percent on line 21. Senator Noble seconded the motion. Eight Senators voted in favor of the amendment, with Senator Weeding opposing. The Motion Carried.

Recommendation and Vote: Senator Lynch made a motion HB 446 BE IN CONCURRED IN AS AMENDED. Senator Meyer seconded the motion. The motion Carried Unanimously. Senator Lynch carried HB 446 on the Senate floor.

DISPOSITION ON HOUSE BILL 706

Recommendation and Vote: Senator Lynch made a motion HB 706 BE CONCURRED IN AS AMENDED. Senator Meyer seconded the motion. The Motion Carried Unanimously. Senator Williams carried HB 706 on the Senate floor.

DISPOSITION ON HOUSE BILL 339

Discussion: Chairman Thayer told the committee they had three pieces of written information before them, which had been handed in since the hearing. (See Exhibits #2, #3, #4) he asked Senator Lynch to explain the bill.

Senator Lynch stated that as soon as the cap was placed on the bill, the opponents and proponents switched sides. He said that if the Senate removed the cap, the bill would be killed in the House, so he thought the bill should be tabled.

Recommendation and Vote: Senator Lynch made a motion to TABLE HB 339. Senator Williams seconded the motion. The motion Carried Unanimously.

DISPOSITION ON HOUSE BILL 151

Discussion: Senator Lynch said some of the bankers had a problem with this bill. He said his area had a variety of banking choices, and he was pleased the independent bankers were in favor of the bill.

Recommendation and Vote: Senator Williams made a motion HB 151 BE CONCURRED IN. Senator Hager seconded the motion. Six Senators voted in favor of the motion, and Senator McLane, Senator Boylan and Senator Meyer opposed. The Motion Carried. Chairman Thayer carried HB 151 on the Senate floor.

DISPOSITION OF HOUSE BILL 191

Recommendation and Vote: Senator Noble made a motion to LAY HB 191 ON THE TABLE. Chairman Thayer called for a second. Senator Lynch asked why they didn't just kill it?

Senator Lynch said proponents of the bill should have the opportunity to vote "NO" on an adverse committee report.

Senator Noble withdrew his motion.

Senator Boylan made a motion HB 191 BE CONCURRED IN.

Senator Williams said that if we passed this bill and it was vetoed, we would be right back here, in the same situation.

Chairman Thayer said HB 191 and HB 151 were in conflict, and we don't need both.

Senator Lynch made a substitute motion that HB 191 BE NOT CONCURRED IN. Senator Meyer seconded the motion. The roll call vote was taken. Seven Senators voted in favor of the motion and Senator Boylan and Senator McLane opposed. The motion carried.

DISPOSITION OF SENATE BILL 453

Discussion: Chairman Thayer said SB 453 was reported out of committee on a DO NOT PASS recommendation, then he was asked by Senator Lynch to hold the report until today.

Senator Williams said he had made the motion to Do Not Pass previously, and he still felt the same way.

Chairman Thayer said there were people here representing both sides of the issue, and asked if further discussion was desired?

Senator Lynch said he had listened to the Auditor's office, and thought there was a lesson to be learned, and that was to not combine about eight different bills, and call them "housekeeping bills". He said he didn't think the insurance industry was going to fall apart in the next two years. He said he also felt they should come up with a true housekeeping bill, and if they wanted the other legislation they should address it separately.

Senator Meyer said he agreed with Senator Lynch, and he felt combining all of this was ridiculous.

Senator Noble said he didn't understand why they were so late getting the bill introduced, and how the committee was supposed to be able to work with all this legislation at such a late date? He said there were portions of the bill he liked, and he felt it should have been broken down into different bills.

Chairman Thayer asked if anyone wanted to bring the bill back and reconsider it? No one responded. Chairman Thayer apologized to the committee for holding up the report, and stated the adverse committee report would stand.

Senator Lynch told Chairman Thayer he had been more than fair in his efforts to accommodate everyone, and no apology was necessary.

DISPOSITION OF HOUSE BILL 536

Discussion: Chairman Thayer said the only other bill needing executive action was HB 536, which was being held pending action on HB 734. He asked if anyone knew the status of that bill.

Roger McGlenn said HB 734 had been amended on the House floor, and the amendments did not conform with language contained in the bill, so there were amendments being drafted for a meeting with the sponsor.

Chairman Thayer stated HB 536 would have to be held until HB 734 was received.

ADJOURNMENT

Adjournment At: 11:34 A.M.

SENATOR GENE THAYER, Chairman

GT/ct

ROLL CALL

BUSINESS & INDUSTRY COMMITTEE

DATE 3/8/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR DARRYL MEYER	✓		
SENATOR PAUL BOYLAN	✓		
SENATOR JERRY NOBLE	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM HAGER	✓		
SENATOR HARRY MC LANE	✓		
SENATOR CECIL WEEDING	✓		
SENATOR JOHN"J.D."LYNCH	✓		
SENATOR GENE THAYER	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

March 8, 1989

MR. PRESIDENT:

We, your committee on Business and Industry, having had under consideration HB 573 (third reading copy -- blue), respectfully report that HB 573 be amended and as so amended be concurred in:

Sponsor: McCormick (Boylan)

1. Page 10.
Following: line 10
Insert: "NEW SECTION. Section 4. Coordination instruction. If this bill and Senate Bill No. 431 are passed and approved and if Senate Bill No. 431 repeals 23-5-606 and 23-5-609, the department of justice shall by rule allow machine manufacturer bill acceptors on video draw poker machines and keno machines."

Renumber: subsequent section

AND AS AMENDED BE CONCURRED IN

Signed: Gene Thayer
Gene Thayer, Chairman

3/8/89
2:30 p.m.

scrhb573.308

SENATE STANDING COMMITTEE REPORT

March 8, 1989

MR. PRESIDENT:

We, your committee on Business and Industry, having had under consideration HB 570 (third reading copy -- blue), respectfully report that HB 570 be concurred in.

Sponsor: Spaeth (McLane)

BE CONCURRED IN

Signed: Gene Thayer

Gene Thayer, Chairman

3/18/89
3:30 p.m.

scrhb570.308

SENATE STANDING COMMITTEE REPORT

March 8, 1989

MR. PRESIDENT:

We, your committee on Business and Industry, having had under consideration HB 321 (third reading copy -- blue), respectfully report that HB 321 be concurred in.

Sponsor: Spaeth (Noble)

BE CONCURRED IN

Signed: _____
Gene Thayer, Chairman

3-8-89
3:20 p.m.

scrhb321.308

SENATE STANDING COMMITTEE REPORT

March 8, 1989

MR. PRESIDENT:

We, your committee on Business and Industry, having had under consideration HB 611 (third reading copy -- blue), respectfully report that HB 611 be concurred in.

Sponsor: Connelly (Story)

BE CONCURRED IN

Signed: Gene Thayer, Chairman

3/18/89
2:20 pm

scrhb611.308

SENATE STANDING COMMITTEE REPORT

March 8, 1989

MR. PRESIDENT:
We, your committee on Business and Industry, having had under consideration HB 446 (third reading copy -- blue), respectfully report that HB 446 be amended and as so amended be concurred in:

Sponsor: Daily (Lynch)

1. Page 2, lines 20 and 21.
Strike: "an 8%"
Insert: "a 10%"
Following: "sold"
Insert: "."
Strike: "AND MUST"
Insert: "Commissions may"

AND AS AMENDED BE CONCURRED IN

Signed: _____
Gene Thayer, Chairman

H.C. 3/8/89 2:20 p.m.

scrhb446.308

SENATE STANDING COMMITTEE REPORT

March 8, 1989

MR. PRESIDENT:

We, your committee on Business and Industry, having had under consideration HB 706 (third reading copy -- blue), respectfully report that HB 706 be concurred in.

Sponsor: Nelson, T. (Williams)

BE CONCURRED IN

Signed: Gene Thayer, Chairman

3/8/89

scrhb706.308

SENATE STANDING COMMITTEE REPORT

March 8, 1989

MR. PRESIDENT:

We, your committee on Business and Industry, having had under consideration HB 151 (third reading copy -- blue), respectfully report that HB 151 be concurred in.

Sponsor: Swift (Thayer)

BE CONCURRED IN

Signed: Gene Thayer

Gene Thayer, Chairman

H.C. 3/8/89 2:30 p.m.

scrhb151.308

SENATE STANDING COMMITTEE REPORT

March 8, 1989

MR. PRESIDENT:

We, your committee on Business and Industry, having had under consideration HB 191 (third reading copy -- blue), respectfully report that HB 191 be not concurred in.

Sponsor: Stang (Thayer)

BE NOT CONCURRED IN

Signed: _____

Gene Thayer, Chairman

3/18/89
2:30 p.m.

Bill Summaries
Senate Business and Industry
March 8, 1989
Prepared by Mary McCue

HB 321: This bill amends a section in the uniform commercial code dealing with security transactions. The bill requires a UCC financing statement to include the social security number or tax identification number of the debtor.

HB 446: This bill simply increases the amount of commission allowed to lottery sales agents. Presently sales agents may retain no more than 5% commission of ticket and chances sold. The bill raises the amount to 8%.

HB 570: This bill amends a section in the laws dealing with statutory close corporations. It would allow one person to hold all the offices in such corporation if the articles of incorporation contain a statement to that effect.

HB 573: This bill amends two different sections in the gambling laws dealing with video gaming machines, one dealing with the description and specifications for video draw poker machines, the other dealing with the same provision relating to keno machines. The bill allows machine manufacturer bill acceptors on those gaming machines.

SB 431 repeals these two sections in the gambling laws that HB 573 is amending. If both bills pass we would need a coordination instruction in HB 573 as follows:

"1. Page 10, following line 10.
Insert: "NEW SECTION. Section 4. Coordination instruction. If this bill and Senate Bill No. 431 are passed and approved and if Senate Bill No. 431 repeals 23-5-606 and 23-5-609, the department of revenue shall allow, by rule, machine manufacturer bill acceptors on video draw poker and keno machines."

Renumber: subsequent section"

HB 611: This bill amends a section in the liquor control laws dealing with the application procedure for obtaining a retail liquor license. The bill provides that a creditor of an applicant for a retail liquor license or residents of the county from which the application comes or adjoining counties may protest against the issuance of the license.

VOL. VI
No. 326

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF MISSOULA
BEFORE THE WORKERS' COMPENSATION JUDGE
****

GARY A. LARSON,

Claimant,

vs.

SQUIRE SHOPS, INC.,

Employer,

and

INDUSTRIAL INDEMNITY,

Defendant.

WCC No.: 8501-2851
Area: Missoula
County: Missoula
Heard: May 14, 1985
Submitted: July 25, 1985

Presiding Judge: THE HONORABLE TIMOTHY W. REARDON

Counsel of Record:

Mr. Lon J. Dale
Attorney at Law
Milodragovich, Dale & Dye, P.C.
P.O. Drawer R
Missoula, MT 59806

ON BEHALF OF THE CLAIMANT

Mr. David E. Bauer
Attorney at Law
Marra, Wenz, Johnson & Hopkins, P.C.
P.O. Box 1525
Great Falls, MT 59403-1525

ON BEHALF OF THE DEFENDANT

* * * * * * * * * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

* * * * * * * * * * * *

Ex. #2
3/8/89

1. Claimant filed a petition to resolve a dispute between himself and the insurer under Title 39, Chapter 71, Part 29, MCA.

2. The Clerk of Court gave notice to interested parties of (a) the time, place and nature of the trial; (b) the legal authority and jurisdiction under which the trial was to be held; (c) the particular sections of the statutes and rules involved; and (d) the matters asserted by notifying all parties who appeared of record to have an interest by mailing to them a copy of the Order and Notice Setting Time and Place for Trial and Notice of Pretrial Conference with a copy of the Petition attached and a copy of the Clerk's Certificate of Mailing the Notice and Petition. MCA § 2-4-601.

3. A pretrial conference was conducted on April 3, 1985, before Clarice V. Beck, Hearing Examiner. The Pretrial Order was docketed on May 8, 1985. Pertinent parts of the Pretrial Order are as follows:

> III. STATEMENT OF JURISDICTION:
>
> The Workers' Compensation Court has jurisdiction in this case pursuant to §39-71-2905 MCA.
>
> IV. MOTIONS:
>
> The Defendant anticipates making a motion to dismissing [sic] the petition for hearing or staying the petition for hearing pending a determination by the Court as to whether Industrial Indemnity can be relieved from liability under § 39-71-2207(2) MCA. The Defendant has until April 15 to have his motion in the mail with a reply from the Claimant to be in the mail by April 27, and the Defendant's response to Claimant's reply to be in the mail by April 29, 1985.
>
> The Defendant may also make a motion to preclude Claimant's witnesses from giving live testimony, and substituting depositions in their place.
>
> V. STATEMENT OF UNCONTESTED FACTS:
>
> 1. Claimant was injured on February 25, 1983, in the course and scope of his employment with Squire Shops, Inc. in Missoula, Montana.

Ex. #2
3/8/85

2. At the time of the injury, the Employer was enrolled under Compensation Plan Number 2 of the Workers' Compensation Act and the Insurer is Industrial Indemnity.

3. The Insurer has accepted liability and paid weekly temporary total disability benefits up to January of 1985 when Insurer admitted the Claimant was totally permanently disabled. The Insurer has paid permanent total benefits since January 1985.

4. The Insurer has paid medical expenses to date and paid three partial lump sum advances totaling $20,600.00 paid on the following dates:

(a) January 30, 1984 --$8,600;

(b) September 20, 1984 -- $6,000;

(c) March 4, 1985 -- $6,000.

5. The Claimant's biweekly benefits are $301.48.

. . .

The parties have presented the following issues for the Court's determination; the Court adopts the parties' statements of the issues:

1. Whether the Claimant is entitled to a conversion of his bi-weekly benefits into a lump sum pursuant to MCA § 39-71-741 and appropriate case law;

2. Whether the Claimant is entitled to his attorneys fees, costs, and a penalty pursuant to MCA §§ 39-71-611, 612 and 2907;

3. Whether the Insurer can be relieved from liability under § 39-71-2207(2) MCA.

4. Whether the matters to be decided in this hearing as disclosed in Claimant's Petition of January, 1985, are affected by the passage of SB 281.

Ex. #2
3/8/89

4. The trial in this matter came on May 14, 1985, before the Honorable Timothy W. Reardon. Claimant, Gary A. Larson, was introduced at the time of trial and excused. Dr. Susan Bertrand, Patricia Webber, Ph.D., Paul H. Stickney, Dennis O'Donnell, Randi Wood and Candace Larson were sworn and testified. Exhibits No. 1 through 15 were admitted per stipulation.

5. The undersigned, having reviewed the pleadings, considered the Pretrial Order and the exhibits admitted into evidence, heard the testimony and observed the demeanor of the witnesses at trial and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law and Judgment:

FINDINGS OF FACT

1. The uncontested facts are found as facts.

Claimant

2. Claimant is a 27-year-old married male. Claimant has two step-children, ages 13 and 14, who consider the claimant their father. (Exhibit 7. Trial testimony of Candace Larson at 82.)

3. Claimant was working as the assistant manager at the Squire Shop at the time of his industrial accident. (Trial testimony of Candace Larson at 81.)

4. Claimant did not testify at his trial. He was introduced to the Court and excused from the hearing. Claimant's wife, Candace Larson, is a very credible witness.

Injury/Accident

5. On February 25, 1983, claimant was in an automobile accident within the course and scope of his employment. As a result of the automobile accident, claimant suffered a subdural hematoma. A subdural hematoma is a collection of blood and fluid under the protective lining which surrounds the brain, the dura. (Uncontested fact No. 1. Trial testimony of Dr. Bertrand at 17.)

Medical-Psychological Evidence

6. Two specific things occurred in claimant's automobile accident which have resulted in claimant's long-term problems. Claimant suffers from localized deficits incurred as a result of the blow he suffered or pressure from the subdural hematoma. Claimant has another set of problems secondary to the shearing of connections. Claimant's brain functions, as a result of the shearing, aren't coordinated or are slower than they ought to be. (Trial testimony of Dr. Bertrand at 17.)

Ex. #2
3/8/89

7. Claimant has problems with auditory memory. Claimant makes sense of spoken words slowly and makes visual memories slowly. The slowness in processing causes his memories to be inaccurate. He cannot process more than one conversation at a time. (Trial testimony of Dr. Bertrand at 19, 20.)

8. Claimant's morning peripheral vision is somewhat less than normal. When he gets fatigued, claimant's peripheral vision shrinks. (Trial testimony of Dr. Bertrand at 20, 21.)

9. Claimant can no longer maintain interest in or motivation for specific tasks for extended periods. Claimant has difficulty maintaining emotional control and limited ability for abstract thinking. (Trial testimony of Dr. Bertrand at 22, 23, 24, 25.)

Disability

10. Combining claimant's impairment ratings for emotional status, 75 percent; visual impairments, 19 percent; sexual function, 15 percent; totals 109 percent. A different method of totalling claimant's impairments totals 189 percent. Dr. Bertrand explains these greater than 100 percent impairment ratings as a reflection of the amount of time needed by a second person that must be expended on claimant's behalf. (Exhibit 5. Exhibit 6.)

11. Claimant is permanently totally disabled. (Uncontested fact No. 3.)

Domiciliary Care

12. Claimant, in order to function optimally, needs a calm, structured, understanding environment. Claimant's wife has assumed responsibility for maintaining claimant's environment. Since claimant's industrial accident, claimant and his wife have undergone a role reversal. Claimant's wife has had to learn stress management skills to cope with the financial stresses of claimant's disability, the stress of no income and concerns about the family's quality of life and financial future. Claimant's marriage has a fair chance of surviving. (Exhibit 6. Trial testimony of Dr. Bertrand at 39. Trial testimony of Dr. Webber at 55, 56.)

13. It is essential that claimant's family structure be maintained. The greatest stressors the family has suffered in the past year have been financial. (Trial testimony of Dr. Bertrand at 29, 30.)

14. Without claimant's wife to assist him, claimant will either need five plus persons to supervise him, placement in a head injury facility or legal intervention mandating that claimant

Ex. #2
3/8/89

have supervision. If claimant requires institutionalization, the cost for his treatment will be $7,000 to $15,000 a month. (Trial testimony of Dr. Bertrand at 32, 41, 42.)

Lump Sum

15. Claimant's family's monthly income is $722.96. Claimant's family's monthly expenses are $1,565.00. (Exhibit No. 10. Exhibit No. 11.)

16. Claimant has requested that his full remaining entitlement to permanent total disability benefits be awarded to him for the following purposes:

(1) An advance of $196,000.00 to invest in an annuity which would pay claimant and his family $1,500 monthly for his life expectancy. (2) An advance of $70,000.00 to purchase, for cash, a home in a middle class neighborhood in Missoula. (3) Claimant's remaining entitlement to permanent total disability benefits, in a lump sum, to provide substitute financial benefits to replace claimant's home maintenance services and to provide vehicle replacement costs and emergency payments. (Exhibit 12. Trial testimony of Paul Stickney at 61, 62. Trial testimony of Dr. Dennis O'Donnell at 66, 67.)

17. On May 7, 1985, Kathleen D. O'Conner was appointed Conservator for Gary Larson. (Exhibit 1.)

Penalty/Attorney Fees

18. Defendant's adjustment of claimant's case has not been unreasonable.

19. The Court does not rule on claimant's entitlement to attorney fees at this time.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to MCA § 39-71-2905 (1983).

2. The claimant is permanently totally disabled.

3. The insurer may not be relieved from liability under MCA § 39-71-2207 (2) (1983) without the prior consent of the claimant. The Division's Declaratory Ruling on Sections 39-71-741 and 39-71-2207 MCA. WCC Docket No. 8411-2731, decided August 2, 1985.

4. The claimant is not presently entitled to a lump sum advance.

Ex. #2
3/8/89

This Court has ruled that the substantive sections of Senate Bill 281 as they retroactively amend MCA § 39-71-741 are unconstitutional; therefore, do not apply to this matter. The procedural sections of Senate Bill 281 are not retroactive legislation. The procedural requirements of Senate Bill 281 do apply in this matter. Stelling v. Rivercrest Ranches. Workers' Compensation Court Docket No. 8412-2757, decided June 27, 1985. The claimant's requests for lump-sum advances are denied under the constitutional, procedural sections of MCA § 39-71-741 (1985), for the reasons stated below.

The Montana legislative assembly enacted procedural requirements which must be complied with before a lump sum is awarded under MCA § 39-71-741 (1985). The initial presumption is that biweekly benefits are in the claimant's best interests. Exceptions to the general rule may be granted if the claimant demonstrates that a partial or whole lump sum advance increases the probability that the claimant can sustain himself or herself financially, as compared with the claimant's financial status, on biweekly benefits combined with other resources. MCA § 39-71-741 (2) (1985).

Claimant's request for a lump sum to finance an annuity purchase is denied. "An annuity request is analogous to the claimant's request to put an advance of his disability award 'on interest.' Kent v. Sievert, 158 Mont. 79 at 81, 489 P.2d 104 (1971). The Board's denial of the claimant's request was correct. Kent, at 81. The rule in Kent controls this claimant's request. The annuity purchase request is denied." Stelling, at 27. The Court cannot factually distinguish Gary Larson's annuity request from that made in Kent or Stelling. Thus, claimant's annuity request is denied.

Claimant's requests for a home purchase and maintenance monies do not qualify under the procedural requirements of MCA § 39-71-741 (2) (1985). As a permanently totally disabled claimant, claimant must establish that his requested lump sum advance will make his ability to sustain himself financially more probable. MCA § 39-71-741 (2) (1985). Claimant's home purchase request was contingent on the purchase of an annuity, which was denied.

The recently enacted amendments to MCA § 39-71-741 narrowed the discretionary authority of the Workers' Compensation Court to evaluate a claimant's claim for a lump sum and award an advance if it was in the claimant's best interests. Lump sum settlements are, and have always been the exception and not the general rule. Utick v. Utick, 181 Mont. 351 at 355, 593 P.2d 739 (1979). MCA § 39-71-741 (1985). Prior to the 1985 legislative amendments, MCA § 39-71-741 was interpreted as designed to cover human needs and

Ex. #2

3/8/85

financial burdens. Polich v. Whalen's OK Tire Warehouse, ____ Mont. ____, 634 P.2d 1162, 38 St. Rptr. 1572 at 1575 (1981).

Gary Larson and his family have been devastated by a mentally and emotionally crippling industrial accident. The family is struggling to cope with a multitude of problems and is additionally handicapped by a shortage of funds. Gary Larson truly presents human needs and financial burdens. However, the legislation did not appear to leave room for judicial action based on the claimant's emotional, psychological, physical and familial needs. To date, nothing has been presented to the Court which allows the Court to conclude anything other than that the amendments refer solely to the claimant's financial status. Absent compliance with the procedural requirements in MCA § 39-71-741 (1985), this Court cannot award a lump sum advance to a permanently totally disabled claimant.

This case presents one of the most compelling set of facts for awarding a lump sum. In fact, the Court's inability to award a lump sum may not be cost-effective for the insurer. If claimant's marriage dissolves under its multitude of stressors, including finances, claimant will likely be institutionalized. The cost of claimant's care as an institutionalized person far exceeds the lump sum requested.

A large part of the devastation suffered by this family as a result of claimant's industrial accident is financial. Claimant's wife is unable to assist the family financially because of the near constant demands on her time in watching, controlling and protecting claimant. The Court does not have sufficient evidence before it to issue an order awarding claimant's wife an hourly fee for domiciliary care. However, it does appear that claimant's needs for this type of assistance are analogous to, if not more vital than those of Debra Carlson. Carlson v. Jerry Cain, ____ Mont. ____, ____ P.2d ____, 42 St. Rptr. 695 (1985). If claimant requires his wife's domiciliary services under the test in Carlson, the fees for services must be computed from the date claimant was discharged from the hospital and/or his wife assumed responsibility for his care.

Defendant may object to a ruling by this Court on claimant's need for domiciliary care, on the ground that it was not an issue before the Court in this proceeding. "In circumstances such as these, when a claimant makes a general claim for review of his status, the Workers' Compensation Court has the power to review a claimant's status and to determine a proper and fair solution." Novak v. Montgomery Ward & Co., 195 Mont. 219 at 224, 638 P.2d 290 (1981). Claimant's disability is heart wrenching. Claimant's wife may very well be entitled to compensation for the assistance she has given.

Ex. #2
3/8/89

5. This Court retains jurisdiction over this matter pursuant to MCA § 39-71-2909 (1981).

6. This Court does not rule on claimant's entitlement to attorney fees at this time.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to MCA § 39-71-2905 (1981).

2. The claimant is permanently totally disabled.

3. The defendant is not entitled to relief from liability under MCA § 39-71-2207 (1983).

4. The claimant is not presently entitled to a lump sum advance of his future disability benefits.

5. The claimant shall submit, within 20 days of the date of this Order, evidence by affidavit and/or deposition documenting claimant's need for domiciliary care and its reasonable value. The defendant shall have 10 days from claimant's submission date to respond.

6. This Court retains jurisdiction over this matter.

7. This Court does not rule on claimant's entitlement to attorney fees at this time.

8. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

9. The Clerk of this Court shall mail a copy of these Findings of Fact and Conclusions of Law and Judgment to all interested parties.

DATED in Helena, Montana this 22nd day of August, 1985.

(SEAL)

Timothy W. Reardon
JUDGE

VOL. VI
NO. 346

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF MISSOULA
BEFORE THE WORKERS' COMPENSATION JUDGE
****

GARY A. LARSON,

Claimant,

vs.

SQUIRE SHOPS, INC.,

Employer,

and

INDUSTRIAL INDEMNITY,

Defendant.

WCC No.: 8501-2851
Area: Missoula
County: Missoula
Heard: May 14, 1985
Submitted: July 25, 1985

Presiding Judge: THE HONORABLE TIMOTHY W. REARDON

Counsel of Record:

Mr. Lon J. Dale
Attorney at Law
Milodragovich, Dale & Dye, P.C.
P.O. Drawer R
Missoula, MT 59806

ON BEHALF OF THE CLAIMANT

Mr. David E. Bauer
Attorney at Law
Marra, Wenz, Johnson & Hopkins, P.C.
P.O. Box 1525
Great Falls, MT 59403-1525

ON BEHALF OF THE DEFENDANT

* * * * * * * * * * * *

FURTHER
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

* * * * * * * * * * * *

Ex. #3
3/8/89

This Court entered Findings of Fact and Conclusions of Law and Judgment in the above entitled matter on August 22, 1985. As part of the Judgment, the parties were ordered to submit evidence pertaining to domiciliary care. The parties submitted depositions and other evidence, and on October 28, 1985, this Court deemed the issue of domiciliary to be fully submitted. In light of the above, the Court hereby enters the following Findings of Fact, Conclusions of Law and Judgment.

FINDINGS OF FACT

1. Linda Geiger is a case management services nurse. She supervises the Case Management Department at Community Hospital in Missoula. Her job entails meeting with a social worker to determine what kinds of services a disabled individual requires, and whether those services can be provided "the community, in their homes or within a group or in a foster home, rather than in the nursing home or some form of institution." After that assessment is made, a plan of care is drawn up and case management personnel will contract for different services and monitor those services. (Deposition of Linda Jo Geiger at 5.)

2. After reviewing claimant's file, Linda Geiger determined that claimant would need the services of a personal care attendant on the average of 20 hours per week. (Id. at 6-7.)

3. Added to that time would be "respite time" for the family, described by Linda Geiger as time for the family "to do something without the responsibility of dealing with Gary." The recommended "respite time" was (a) one week a year and (b) one 24-hour period a month. (Id. at 9-10.)

4. Taken together, those "respite times" total 456 hours per year:

(a)	7 days times 24 hours =	168 hours
(b)	24 hours times 12 months =	288 hours
	Total	456 hours

By dividing that figure by the number of weeks in a year (456 hours divided by 52.14), the average weekly "respite time" would be 8.74 hours per week. Therefore, the average time that a personal care attendant would spend with the claimant would be 28.74 hours per week.

5. Claimant needs to be supervised 24 hours a day because of his sudden mood swings. (Deposition of Dr. Patricia Webber at 12.)

Ex. #3
3/8/89

6. Claimant's wife is currently providing all of claimant's care. Once the services of a personal care attendant are commenced, claimant's wife will provide the balance of the services required by the claimant.

7. The services rendered by claimant's wife are the type normally rendered by trained attendants and are beyond the scope of normal household duties. (Id. at 8.)

8. A fair charge for those services is $7.00 an hour, which is comparable to an LPN's wage. (Deposition of Linda Jo Geiger at 12.)

9. Without his wife to assist him, claimant would need five-plus persons to supervise him, or would have to be placed in a head-injury facility. If claimant requires institutionalization, his treatment would cost $7,000 to $15,000 a month. (See original Finding of Fact No. 14.)

CONCLUSIONS OF LAW

1. Claimant is entitled to the services of a personal care attendant for an average of 28.74 hours per week. The expense is to be borne by the defendant.

2. Claimant's wife is entitled to payment for the domiciliary care she has provided in the past and will continue to provide in the future.

To date, that payment equals $162,958.32, which was computed as follows:

number of weeks from 3/3/83 (the date claimant was released from the hospital) through 12/31/83	43.43	
x (168 hours in a week x $7.00 an hour)	x $ 1,176.00	
Total		$ 51,073.68
calendar year 1984	52.14	
x (168 hours in a week x $7.00 an hour)	x $ 1,176.00	
Total		$ 61,316.64

number of weeks from 1/1/85 through 10/29/85	43.00	
x (168 hours in a week x $7.00 an hour)	x $ 11,076.00	
Total		$ 50,568.00
payment due to date in a lump sum amount		$162,958.32

3. After the services of the personal care attendant have commenced, claimant's wife will be entitled to $7.00 an hour for every hour of care she provides.

4. Claimant is entitled to reasonable attorney fees and costs.

JUDGMENT

1. Claimant's wife is entitled to receive payment for the domiciliary care she provides claimant. Her rate of pay is $7.00 an hour.

2. Claimant's wife is entitled to a lump sum award of $162,958.32 for domiciliary care provided from the date claimant was released from the hospital through the present.

3. Claimant is entitled to the services of a personal care attendant on an average of 28.74 hours per week.

4. The claimant is entitled to an award of reasonable costs and attorney fees pursuant to MCA § 39-71-612 (1985). The attorney for the claimant shall serve this Court and opposing counsel no later than 20 days from the date of this Order a statement of the hours he or she compiled in pursuing this matter and the costs incurred. Claimant's counsel shall also submit a proposed Order specifying the amount of attorney fees claimed and including his or her customary and current hourly fee used to determine the amount. If the defendant or the claimant believes the amount due the claimant's attorney is unreasonable, then each has 30 days from the date of this Order to file a Motion for Evidentiary hearing Regarding Reasonableness of Attorney Fees; the motion shall be accompanied by an affidavit and statement of the grounds on which either the defendant or the claimant believes the amount due the claimant's attorney is unreasonable.

If the parties do not agree on the applicability of the House Bill 778 amendments to MCA § 39-71-612, each has 20 days from the date of this Order to brief the issue.

Ex. #3
3/8/89

5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

6. The Clerk of this Court shall mail a copy of this Order to all interested parties.

DATED in Helena, Montana this 4th day of November, 1985.

(SEAL)

JUDGE

DOMICILIARY CARE

STATE REPORTER
Box 749
Helena, Montana 59624

VOLUME 44

No. 87-61

GARY A. LARSON,

Claimant and Respondent,

Submitted: Aug. 13, 1987
Decided: Sep. 15, 1987

SQUIRE SHOPS, INC.,

Employer,

and

INDUSTRIAL INDEMNITY COMPANY,

Defendant and Appellant.

WORKERS' COMPENSATION, Appeal from judgment awarding domiciliary care payments for services provided by wife following accident-incurred permanent brain injury. The Supreme Court held: (1) The preponderance of credible medical evidence demonstrates that domiciliary care is necessary as a result of the accident. (2) While it is agreed that claimant need not be supervised every minute, the record supports the conclusion that twenty-four hour a day care is required, and (3) An employer may be put on notice of the employee's need for medical services because of the severity of the injury.

Appeal from the Workers' Compensation Court, The Honorable Timothy Reardon, Judge

For Appellant: Marra, Wenz, Johnson & Hopkins: David E. Bauer
Great Falls

For Respondent: Milodragovich, Dale & Dye; Lon J. Dale, Missoula

Submitted on briefs.

Opinion by Justice Harrison; Chief Justice Turnage and Justices Weber, Sheehy, Hunt and McDonough concur. Justice Gilbrandson dissents in part and filed an opinion.

Remanded.

Ex. #4
3/8/89

Larson, Claimant and Respondent, v.
Industrial Indemnity Co., Defendant and Appellant
44 St. Rep. 1612

Mr. Justice Harrison delivered the Opinion of the Court.

This appeal arises from a final judgment entered by the Workers' Compensation Court of the State of Montana. Both parties appeal an award of domiciliary care. We return this cause to the Workers' Compensation Court to conform with our opinion.

This appeal concerns an award of domiciliary care issued by the Workers' Compensation Court (WCC) to the claimant, Gary Larson. Gary is a twenty-seven year old married male with two step children. He was injured in a February 1983 automobile accident while in the course and scope of his employment as an assistant manager for the Squire Shop, a Missoula retail clothing store. As a result of the accident, Gary suffered a traumatic blow to the head which, in conjunction with a resulting subdural hematoma, caused permanent brain injury. His resultant disabilities render Gary permanently disabled. Industrial Indemnity Company, workmen's compensation insurer for the Squire Shop, agrees that Gary is permanently totally disabled.

It is agreed on all sides that Gary's injuries are serious. He continues to experience disabilities of memory, thinking, motivation and, at times, vision. Significantly, Gary also suffers emotional instability or difficulty in maintaining emotional control. Because of these disabilities, Gary has experienced difficulty in handling everyday situations and has required some supervision.

Since his release from the hospital on March 3, 1983, Gary has resided with his family at their residence in Clinton, Montana. Since that date, Gary's wife, Candice, has taken over the primary care of Gary. The primary issue upon appeal is whether, under the workers' compensation laws of this state, Industrial Indemnity is obligated to pay for the services provided by Candice. For the sake of consistency, we will refer to Candice's services as domiciliary care.

This case was first presented to the WCC in May 1985. Though this first hearing concerned issues unrelated to this appeal, it was at this juncture that the WCC raised the issue of domiciliary care. In its findings and conclusions dated August 22, 1985, the WCC noted that Candice's domiciliary care might be compensable and instructed the parties to brief the issue.

On November 4, 1985, the WCC entered its judgment on the issue of domiciliary care. Of primary significance was the court's finding that Gary has required twenty-four hour a day care since his release from the hospital. The court further found that Candice had been providing this around the clock care and that under the laws of this state, Industrial Indemnity was obligated to pay for Candice's domiciliary care. Based on testimony, the WCC found that a reasonable rate of compensation for this care was $7.00 per hour. Thus, the WCC held that Industrial Indemnity was liable, at the rate of $7.00 per hour, twenty-four hours a day, for the domiciliary care provided by Candice since March 3, 1983, and would remain liable for all future care provided by Candice so long as it was required. Finally, the WCC found that to provide a respite for Candice, a personal care attendant

Ex. #4
3/8/85

Larson, Claimant and Respondent, v.
Industrial Indemnity Co., Defendant and Appellant
44 St. Rep. 1612

"(1) The employer knows of the employee's need for need for medical services at home resulting from the industrial injury;

"(2) the preponderance of credible medical evidence demonstrates that home nursing care is necessary as a result of accident, and describes with a reasonable degree of particularity the nature and extent of duties to be performed by the family members;

"(3) the services are performed under the direction of a physician;

"(4) the services rendered are of the type normally rendered by trained attendants and beyond the scope of normal household duties; and

"(5) there is a means to determine with reasonable certainty the approximate value of the services performed."

Carlson, 700 P.2d at 614.

I

Applying these factors, insurer contends that the WCC award of domiciliary care was (1) premature, (2) unsupported by substantial credible evidence, and (3) unreasonable.

A

Insurer initially argues that the award of domiciliary care was premature. After the issue of domiciliary care had been raised, insurer requested, and ultimately obtained, permission to schedule an independent medical examination at University Hospital in Seattle, Washington. During March-April 1986, the staff at the Department of Rehabilitation Medicine at University Hospital conducted a comprehensive, two-week examination of claimant. The stated purpose of that examination was to obtain a second opinion on the status of claimant in terms of his need for domiciliary care.

The Seattle staff was unable to posit any precise opinion as to the amount of domiciliary care required by claimant. Rather, the Seattle group concluded that before any conclusive determination on this issue could be reached, two recommendations should be implemented:

"(1) Modification in the medicines given claimant; and

"(2) a comprehensive rehabilitation program (to be initiated after the medication modification had been completed)."

Insurer accordingly argues that based on the Seattle report, claimant may "improve" to the point where domiciliary care is perhaps even unnecessary. Thus, concludes the argument, any determination of domiciliary care cannot be reached until the Seattle group's recommendations have been attempted. Applying this argument to our

Ex. #4
3/8/89

should be appointed to care for Gary on the average of 28.74 hours p week. Candice would care for Gary the remaining 139.26 hours p week.

Following rehearing, the WCC amended somewhat its judgment Noting that the issue of domiciliary care had not been raised unt August 22, 1985--the date of the first hearing--the court held tha Industrial Indemnity should not be held liable for payment prior that date. Industrial Indemnity therefore became liable for this ca from the date the issue was first raised, rather than the date Gary's release from the hospital.

Both parties now appeal. Industrial Indemnity (hereinafte insurer) contests the award of domiciliary care provided by Candice Gary (claimant) challenges the court's change of the starting date fo compensable domiciliary care.

Montana's medical benefit provision under the Workers Compensation Act is sec. 39-71-704, MCA, which states in part:

"(1) In addition to the compensation provided by this chapte and as an additional benefit separate and apart from compensation, th following shall be furnished:

"(a) After the happening of the injury, the insurer shal furnish, without limitation as to length of time or dollar amount reasonable services by a physician or surgeon, reasonabl hospital services and medicines when needed, and such other treatmer as may be approved by the division for the injuries sustained."

In Carlson v. Cain (Mont. 1985), 700 P.2d 607, 614-15, 4 St.Rep. 695, 703-04, this Court affirmed a decision of the WCC whic recognized that under this statute domiciliary care provided by member of an injured employee's family might be compensable as "suc other treatment." Today, we reaffirm that decision. We note tha this appears to be the majority position, see 2 A. Larson, Workman' Compensation Law, sec. 61.13(d)(2) (1986), and believe it is correc as a matter of law.

In Carlson, we quoted with approval a five-step test used by th WCC to determine whether "services provided in the home ar compensable."[2] Pursuant to this test, an insurer is liable fo domiciliary care if:

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1 Insurer does not contest the appointment of a personal car attendant.

2 This test is a slightly modified version of the factors se forth in Warren Trucking v. Chandler (Va. 1981), 277 S.E.2d 488, 493.

Larson, Claimant and Respondent, v.
Industrial Indemnity Co., Defendant and Appellant
44 St. Rep. 1612

Carlson test, insurer highlights the second factor and asserts th the preponderance of the credible medical evidence does n demonstrate the necessity of domiciliary care. Rather, the weight the evidence demonstrates that such a decision was premature.

Balanced against the conclusions of the Seattle staff are recommendations of Drs. Susan Bertrand and Patricia Webber. Bertrand is a psychiatrist who specializes in rehabilitative medicin She practices in Missoula, and has been involved in claimant's ca since November 1983. Dr. Webber, also of Missoula, is a psycholog specializing in rehabilitative psychology and has treated claima since March 1983. Both doctors testified that claimant require twenty-four hour a day supervision.

Thus, we are faced with conflicting evidence on this issue We note that since most of the critical evidence presented on th issue was entered by deposition, this Court is considered to be in good a position as the WCC to judge the weight to be given suc testimony. Shupert v. Anaconda Aluminum Co. (Mont. 1985), 696 P.2 436, 439, 42 St.Rep. 277, 281-82.

Our reading of the record persuades us that the preponderance c the credible medical evidence demonstrates that an award domiciliary care was warranted in this case. We base this conclusi on several factors.

First, this award was supported by the recommendations of Dr Bertrand and Webber, the two doctors who have had the longes association with claimant's case. While we recognize the excellenc of the Seattle staff, we must also recognize that those docto examined claimant for only two weeks, albeit intensively, a conducted the examination in a controlled environment.

By contrast, Drs. Bertrand and Webber have each treated claima since 1983 and have enjoyed the opportunity to witness claiman adapting to his everyday environment. In short, the record reveal that Drs. Bertrand and Webber have had a much more extensi association with claimant's case.

This fact was acknowledged by the Seattle staff. While t members of the Seattle group may have had reservations about the ne for domiciliary care, in the end they deferred to the opinions of Drs Bertrand and Webber because of the latters' long-term relationshi with claimant. Dr. David Shuster, claimant's resident physician o the Seattle staff, admitted that Dr. Bertrand is in a better positio to evaluate claimant's condition. Representative of the Seattl staff's conclusions on the necessity of domiciliary care was thi statement by Dr. Justice Lehmann, Chairman of the Department o

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3 In raising this point, we must point out that Dr. Bertran enjoyed a three-year residency in physical medicine and rehabilitatio at University Hospital.

Ex. #4
3/8/89

Rehabilitation at University Hospital and attending physician to claimant during claimant's examination, when asked if claimant requires twenty-four hour a day care:

"No, I don't have any opinion because I really don't know. I think it is highly unlikely that he needs twenty-four-hour a-day care but I don't have any factual basis for that, that I can say he does need it, or he doesn't need it and how much he needs it."

In essence, we find more persuasive the specific recommendations of the doctors who have worked the longest and most closely with the claimant.

Second, even if the Seattle staff's recommendations are implemented, it is disputed whether the necessity of domiciliary care would be abated. Dr. Lehmann testified he could not predict the ultimate effect of the implementation of these recommendations. And while Dr. Vernon Neppe, neuropsychiatrist with the Seattle team, predicted very favorable results, Dr. Bertrand stated that even if successful, these recommendations would probably not change claimant's need for domiciliary care. Dr. Bertrand stated:

"I don't think that those drugs [recommended by the Seattle staff], if they were used and were used successfully, would affect the amount of domiciliary care he requires. After reviewing Dr. Neppe's deposition, as well as his report, those--and having conferred with one of our local psychiatrists who is very familiar with the use of those medications in persons with organic brain syndrome, those [drugs] are for control of his emotional outbursts, and if they were successful, that would make Gary's life more comfortable. However, Gary's other problems would continue to exist and those are problems with abstract reasoning, with short-term memory, because those are not--those don't have anything to do with the emotional system that Propranolol or the Tegretol, Carbamazepine, would affect. It would not affect his need for supervision."

Finally, we must note that any benefit which might result from implementation of the Seattle team's recommendations would be offset, to some degree, by the detrimental effects of continued litigation. As the WCC noted, medical personnel involved with this case have repeatedly stressed that uncertainty, caused in part by this lengthy litigation, produces definite negative effects on claimant.

In sum, for the reasons stated, we find the preponderance of the credible medical evidence demonstrates that domiciliary care is necessary as a result of the accident.

B

Insurer next argues that this domiciliary care award is not supported by substantial credible evidence. While acknowledging the injuries suffered by claimant, insurer contends claimant has retained capabilities that belie a need for twenty-four hour a day care.

ex. #4
3/8/89

Larson, Claimant and Respondent, v.
Industrial Indemnity Co., Defendant and Appellant
44 St. Rep. 1612

We cannot accept insurer's argument in full. Dr. Bertra testified that claimant's physical abilities may make care even m difficult:

"[w]hen you consider how physically active Gary is and h physically well he appears, that he is capable of doing lots things, but not doing them in a safe or organized fashion. And really requires someone else providing his overall thinking abilit He needs someone monitoring his level of tiredness, and to do requires input from another individual to maintain him. Especiall with his emotional ability and his ability of not understandin situations he gets himself into trouble. He really requires lookin after and that absorbs the time of another, and in this case, usual Candy. So that even though he's totally impaired, he's even mor impaired when that means that he absorbs time and energy from someon else."

While it is agreed that claimant need not be supervised ever minute, the record supports the conclusion that during the day someo must constantly be available to him. Stated Dr. Bertrand:

"Not everyone who is supervised every minute needs interventio every minute. But it's the unpredictable nature of the need tha demands that there be someone available to meet the need when i arises."

As the WCC correctly noted, it is this constant availabilit that must be compensated. In Texas Employer Insurance Association v. Choate (Tex.App. 1982), 644 S.W.2d 112, an insurer argued that claimant's spouse should only be compensated for the actual time sh spent caring for her husband. In rejecting that argument, that court stated:

"The more practical problem with the argument is that it ignores the realities of the situation. Mrs. Choate cannot set aside 40 minutes a day, take care of Choate and then go on to other things. She must be available to meet his need during the entire time he is at home and awake. As the company's own witness admitted, a third person hired to do what Mrs. Choate does could not be hired or compensated on the 40 minutes per day basis now advanced by the company; instead such a person would be hired by the day or the week and paid for the time during which he or she is available, not just the time spent actually helping Choate."

Choate, 644 S.W.2d at 116. Accord, Standard Blasting & Coating v. Hayman (Fla.App. 1985), 476 So.2d 1385, 1387; Brown v. Eller Outdoor Advertising Company (Mich. App. 1982), 314 N.W.2d 685, 688. We conclude there is substantial evidence to support the court's finding.

C

Finally, insurer asserts that the $7.00 per hour rate of compensation fixed by the WCC is unsupported by substantial credible evidence. We disagree. This rate was based upon the testimony of

ex. 4
3/8/89

Larson, Claimant and Respondent, v.
Industrial Indemnity Co., Defendant and Appellant
44 St. Rep. 1612

Linda Geiger, a care management services nurse who supervises the Care Management Department at Community Hospital in Missoula. In her position, Linda assesses disabled patients and determines the scope and breadth of services required by these patients. She appears to be very well qualified to assess the need for, and cost of, domiciliary care and her testimony provides ample evidence in support of the WCC's decision.

II

Finally, claimant contends the lower court's determination that insurer is liable for this domiciliary care not from the date of claimant's release from the hospital but from the date this issue was raised by the WCC is incorrect.

We have had difficulty with this issue. The first step of the Carlson test requires that the employer know of the employee's need for medical services at home. Some courts faced with this issue have imputed a type of constructive notice upon an employer, either because of the severity of the industrial injury or because a representative of the employer had knowledge that domiciliary care would be required. See Balsano v. Fischer Body Division, General Motors Corporation (Mo.App. 1972), 481 S.W.2d 536; Stephens v. Crane Trucking, Inc. (Mo. 1969), 446 S.W.2d 772. While these cases can be distinguished, we agree that an employer may be put on notice of the employee's need for medical services because of the severity of injury. Need for domiciliary care must be supported by medical evidence, and we find it is.

We believe such is the situation in this case. Given the unquestioned severity of the injury, the degree of medical attention claimant required while in the hospital and the permanence of the resulting disabilities, we find that the employer had notice of claimant's need for home nursing services at the date claimant was released from the hospital. We accordingly hold that Candice's domiciliary care should be compensated from March 3, 1983.

We remand this case to the WCC for an order consistent with this opinion.

* * * * *

Mr. Justice Gulbrandson, dissenting in part:

I concur with all of the foregoing opinion except the extension of the Carlson opinion to now impute constructive notice of the need for medical services at claimant's residence.

I would not make the award for domiciliary care retroactive, but would affirm the Workers' Compensation Court Judge on this issue.

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 5
DATE 3/8/89
BILL NO. HB 570

Testimony of Steven C. Bahls

Associate Professor at the
University of Montana
School of Law

Before the Senate Business and Industry Committee
on March 8, 1989
in support of House Bill 570

House Bill 570 clarifies the Montana Close Corporation Act found at Chapter 9 of Title 35 to provide that a Montana Statutory Close Corporation may have one individual hold all of the offices of the corporation.

The Montana Statutory Close Corporation Act was enacted in 1987 to meet the special needs of small corporations. Prior to 1987, small corporations were forced to incorporate under the same law (the Montana Business Corporation Act) as corporations with stock traded on national stock exchanges. The Montana Statutory Close Corporation Act allowed small corporations to restrict the transfer of their shares without having to prepare a costly agreement. It affords the small corporation the flexibility to operate under the direction of shareholders instead of a board of directors. It also gives the courts of Montana tools to resolve shareholder disputes without resorting to dissolving the corporation.

As the Act exists now, however, there is some uncertainty as to whether one individual can hold all of the offices in a close corporation. MCA § 35-9-305 (before this amendment) is taken from (and is identical to) § 24 of the Model Statutory Close Corporation Supplement drafted by the American Bar Association.

ex #5
3/8/89

The Official Comment to § 24 states, in part, "[m]any small corporations have only one shareholder or one officer." Unfortunately this comment is at odds with MCA § 35-1-410 which provides that all corporations incorporated in Montana must have two officers. As a result MCA § 35-1-410 may override the clear intent of the authors of the Model Statutory Close Corporation Act, that is, to simplify matters for those incorporations, by allowing those corporations to elect only one officer.

In my judgment it is desirable to allow Montana Statutory Close Corporation to have one person serve as the only officer. Many businesses in Montana are "one person" businesses. To require these businesses to find a second person to serve as a ceremonial officer is an inconvenience. In addition, forcing a corporation to select a ceremonial officer exposes the corporation to potential liability if that officer, using his or her ceremonial title, incurs a debt or injures a third party.

The legislature adopted the Montana Close Corporation Act to provide for the needs of small corporations with less than 25 owners by allowing for the elimination of needless formalities. The archaic requirement of two officers in a corporation is one of those needless formalities.

There is no good reason to require a Montana Statutory Close Corporation to have two officers. While multiple individuals holding offices in large corporations might provide for some minimal checks and balances, shareholders of close corporations ought to be able to dispense with two officers if they so desire. There is not any requirement in Montana law that two officers must authorize corporate actions. Rather, the law provides that corporate actions are authorized

ex. #5
3/8/89

by the board of directors,* which may consist of one individual.** To require two persons as officers, but allow a one-person board of directors is inconsistent. It may be of interest to note the American Bar Association goes so far as to recommend the elimination of the two-officer requirement for all corporations.***

Finally, it should be noted that HB 570 does not allow a corporation to act with only one officer unless one officer is authorized by the articles of incorporation. Articles of incorporation cannot be amended except with the consent of a majority of the shareholders. As a result, if a majority of the shareholders wish to retain the checks and balances of two officers they will be able to block any amendment to the corporation's articles of incorporation authorizing one officer.

Thank you for this opportunity to present my views.

Steven C Bahls
STEVEN C. BAHLS

SUBSCRIBED AND SWORN TO before me this 7th day of March, 1989.

(NOTARIAL SEAL)

Charlotte Wilmerton
Notary Public for the State of Montana
Residing at Missoula, Montana
My Commission expires July 2, 1990

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* MCA § 35-1-401(1).

** MCA § 35-1-402(1).

*** Committee on Corporate Laws of the Section of Corporation Banking and Business Law of the American Bar Association. Model Business Corporation Act § 8.40 (1985).

DATE 3/8/89

COMMITTEE ON Business & Industry 1 of 2

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Oppose
Frank Cooper	MT Food Dist. Assn Supervalu Food stores	446	X	
Bill Stevens	MT Food Dist Assn	446		
Dave Mitchell	Secretary of State	570 + 321	X	

(Please leave prepared statement with Secretary.)

DATE 3/8/89

COMMITTEE ON Business & Industry 2042

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Roger Tipsord	MT Beer & Wine Wholesalers	611	X	

ROLL CALL VOTE

SENATE COMMITTEE BUSINESS & INDUSTRY #1

Date 3/8/89 Bill No. HB151 Time 11:21

NAME	SEAT NO.	YES	NO
SENATOR DARRYL MEYER	35		✓
SENATOR PAUL BOYLAN	50		✓
SENATOR JERRY NOBLE	34	✓	
SENATOR BOB WILLIAMS	39	✓	
SENATOR TOM HAGER	42	✓	
SENATOR HARRY "DOC" MC LANE	33		✓
SENATOR CECIL WEEDING	28	✓	
SENATOR JOHN "J.D." LYNCH	5	✓	
SENATOR GENE THAYER	23	✓	
		6	3

Carla R Turk
Secretary, CARLA TURK

Gene Thayer
Chairman, GENE THAYER

Motion: Senator Williams made a motion HB151 Be Concurred In. Senator Hager Seconded the motion.

passed

SF-3 (Rev. 1987)

ROLL CALL VOTE

SENATE COMMITTEE BUSINESS & INDUSTRY #2

Date 3/8/89 Bill No. HB 191 Time 11:24

NAME	SEAT NO.	YES	NO
SENATOR DARRYL MEYER	35	✓	
SENATOR PAUL BOYLAN	50		✓
SENATOR JERRY NOBLE	34	✓	
SENATOR BOB WILLIAMS	39	✓	
SENATOR TOM HAGER	42	✓	
SENATOR HARRY "DOC" MC LANE	33		✓
SENATOR CECIL WEEDING	28	✓	
SENATOR JOHN "J.D." LYNCH	5	✓	
SENATOR GENE THAYER	23	✓	

Carla R Turk
Secretary, CARLA TURK

7 2
Chairman, GENE THAYER

Motion: Senator made a motion HB 191 Be Not Concurred to. Senator Meyer seconded the motion.

passed

SF-3 (Rev. 1987)