MINUTES

MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION

SELECT COMMITTEE ON WORKERS' COMPENSATION

Call to Order: By **CHAIRMAN CHASE HIBBARD**, on January 13, 1993, at 3:00 p.m.

ROLL CALL

Members Present:
Rep. Chase Hibbard, Chairman (R)
Rep. Jerry Driscoll, Vice Chairman (D)
Rep. Steve Benedict (R)
Rep. Ernest Bergsagel (R)
Rep. Vicki Cocchiarella (D)
Rep. David Ewer (D)

Members Excused: All Present

Members Absent: None

Staff Present: Susan Fox, Legislative Council
Evy Hendrickson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing: None
Executive Action: None

CHAIRMAN HIBBARD introduced **Chuck Hunter, Administrator of the Employment Relations Division, Department of Labor,** who is in charge of compliance under workers' comp in monitoring the benefits paid under all three plans.

They ensure compliance with the Workers' Compensation and Occupational Disease Acts with insurers of all plans -- Plan 1, Self Insurers, and Plan 2, Private Insurers. They monitor Plan 3, the State Fund, in regard to many aspects of their operation.

They review claims and settlements. Benefits disputes over worker' comp benefits are now put into a mediation process, a change adopted in the 1889 session. For a disputed case to get into the Workers' Compensation Court, it must go through the mediation program if it relates to benefits.

He reported that the program has been one of the real successes enacted over the past several sessions. The mediation function now resolves slightly more than 75% of all workers' comp benefit disputes, so the number of cases that are going on in the Workers' Compensation Court has decreased.

A rehabilitation process resolves disputes as to the appropriateness of rehabilitation programs and options available to injured workers. It's a three-member panel that reviews disputes and issues orders based upon appropriate options under the rehabilitation law.

Because the Employment Relations Division is a neutral organization with no financial stake, they offer unique perspectives on problems facing the committee. He hoped the committee would use ERD as a resource in deliberations.

While much of the focus this session will be on the State Fund, many of the problems commonly associated with the State Fund are truly system problems. For example, rising medical costs are certainly a problem to the State Fund; but they are problems for each of the systems, including self insurers and private insurers. They also have been frustrated by the lack of good rate management information throughout the system.

Mr. Hunter listed several recommendations to the committee. Number one is the problem with good data. Rather than look at symptoms, we need to identify the cause of the problems. Until we know exactly what's wrong, we will never be able to fix what really needs fixing. The legislative and executive branches need solid, accurate, reliable, and neutral management information.

Second, he encouraged the committee to focus on problem prevention. Preventing problems as opposed to fixing them has a return rate of 16 to 1. Providing employers and employees with information and education on their rights and responsibilities under the system would probably save a lot of dollars. Safety is another example of prevention. Preventing accidents is far more cost effective than fixing broken workers.

Third, the committee should consider ways to return the system to workers and employers. Washington, Oregon, and Wisconsin have strong programs that bring workers and employers together to help guide the system.

Mr. Hunter touched briefly on the issue of containing the costs associated with medical benefits. While the committee will hear bills on managed care, deferred provider organization and other solutions, those are only a part of suppressing the problem. Should this committee and the legislature be serious about cost containment, he sees the need for additional tools for the regulator agency, primarily in regard to setting up utilization review programs. He asked the committee to consider that issue as it considers cost containment strategies.

Questions From Committee Members and Responses:

CHAIRMAN HIBBARD asked if all benefit disputes go through mediation and if those that are not resolved then go on to the

Workers Comp Court. He asked about the volume of work and how promptly they carry it out.

Mr. Hunter replied that mediation is a mandatory process for benefit disputes arising between workers and insurers. There is a statutory time line for hearing those; he thought the time frame was either 30 or 45 days from receipt of the mediation request when they had to issue a mediator's report with a recommendation. The mediation process is a non-binding process. primarily an informal attempt to get all the issues on the table and to get the two parties together. The mediator considers the information provided at the hearing and issues a recommendation.

The parties can accept or reject the recommendation or can accept and implement part of it. Should there be a further dispute or should the dispute not be fully settled, it goes on to the Workers' Compensation Court. He believed there were about 450 mediations per year, and that figure is rising. The program, started about five years ago, has seen a steadily increasing number coming into the mediation process since then.

REP. BERGSAGEL asked about the 30 to 45 days to respond to a mediation request. He wanted to know how long cases are in workers' comp before they would reach Mr. Hunter. **Mr. Hunter** responded that it could be any amount of time. A dispute could arise very early in a worker's claim over whether the insurer was actually liable for the claim. Something could also happen two years or four years down the road.

REP. BERGSAGEL asked how fast Mr. Hunter's people respond, on an average. **Mr. Hunter** replied they have to issue a report in 45 days; therefore, he believed their timeliness typically would be within about 35 days right now.

REP. BERGSAGEL asked whether initial contact on mediation is received from an injured employee or whether it comes from Workers' Comp. **Mr. Hunter** said it could come from either party. It could come from the insurer or from the worker. Either side can file a mediation request.

REP. BERGSAGEL asked how long it takes from the time the request is received to initiate the mediation process. **Mr. Hunter** said typically that would be done within a couple of weeks.

In response to a question from **REP. BERGSAGEL, Mr. Hunter** said DLI does have a safety program in the Research, Safety and Training Division, which is not part of his division.

REP. BERGSAGEL stated that hospitals are paid a percentage of their usual and customary charges serving workers' comp beneficiaries. It was his understanding that those percentages vary from hospital to hospital and asked **Mr. Hunter** to explain why that disparity exists.

Mr. Hunter replied that the percentage increase in rates is set by the legislature, and that figure has been indexed to the state's average annual wage. The increase in the state's average wage dictates the increase from one year to the next that a hospital can be paid for services. Disparities exist, in that hospitals can file rate increases based on their own need. Currently, one hospital in eastern Montana has two rate increases in a given year; another in another part of the state may only have one. This year's cap, for example, is 3.87% The 3.87% will be applied to one rate increase for one hospital; the other hospital filing two rate increases is still capped at the 3.87%. The schedules and rates that hospitals may charge are their own individual rates; filing fewer or greater numbers of rate increases causes the disparity between hospitals. In any calendar year, the amount of inflation and increased payment is the same for all hospitals within the Work Comp system.

REP. BERGSAGEL asked **Mr. Hunter** if they had the authority not to pay a bill from the hospital because it was over inflated or over charged. **Mr. Hunter** said the responsibility for that falls on the insurer. He believed the wording in the statute states that the compliance function sets the limit for what insurers may pay, so a fee schedule is set for actual procedures that medical personnel provide. Rates are also set for hospital rooms and other charges. ERD doesn't actually set the rate itself; each hospital sets its own rates. The division only limits them to the amount of rate increase in a calendar year that's equivalent to the increase in the state's average wage.

For example, if the rate was $10 last year, they allow 3.87% increase for this year; but the hospital may raise its rate to $15. The insurer would only be bound to pay $13.87, the $10.00 from last year's schedule plus the $3.87 percentage increase. If a hospital raises the rate to $15.00, that sets one standard of how much below their rate they're getting paid. Another hospital may set its rate at $18.00, and that's where the disparity comes in from hospital to hospital. The percentage increase allowed each hospital would be 3.87% a discounted year.

REP. BERGSAGEL asked why the Department of Labor has that kind of authority. With insurers and Workers' Comp all familiar with claims payment, why is the Department of Labor involved in that? **Mr. Hunter** said the legislature gave the Department of Labor the authority and responsibility for the compliance function; some of the rationale is to have a neutral party putting together rate and fee schedules, even though the amount of increase itself is purely a function driven by the increase in the average annual wage. Insurers on one hand want rate increases; they want to be paid what they believe they deserve for their services. On the other hand, insurers are very cost conscious and want to keep costs low. He believed the legislature wanted a neutral party involved in helping that process along.

REP. HIBBARD was under the impression that when the State

Compensation Mutual Insurance Fund was set up in 1990, it was taken from the Department of Labor. Previously, everything was done in one shop. **Mr. Hunter** responded that the compliance function was under the Division of Workers' Compensation prior to the breakup. When the breakup occurred, the compliance function was actually put directly into the Department of Labor rather than being administratively attached.

REP. DRISCOLL asked if a procedure costing $100 on their fee schedule in late 1990 went to 104.00 on July 1, 1991 and what was the percentage increase.

Mr. Hunter responded to **REP DRISCOLL** that 4.02 was the percentage, so $100.00 would increase by $4.02.

REP. DRISCOLL then asked what it increased to on July 1, 1992. **Mr. Hunter** replied that the calendar year increase which just went into effect January 1st was 3.87% so $3.87 per $100.

REP. EWER asked who was responsible for taking the initiative on safety programs; the Department of Labor or the Work Comp Fund.

Mr. Hunter said he believed there are responsibilities in both areas. The Department of Labor is charged with certain safety functions for which they are legislative mandated to provide services; they would likely be the lead agency in that regard. The department is proposing new functions in the safety area. Insurers, as a matter of loss prevention and saving money, need to be very responsible for ensuring safety efforts.

REP. EWER pointed out there are other states with mandatory safety programs. In Texas, if an employee files a claim on a back injury, the employer has to go to back injury school. Those are the kinds of things Montana needs to look at.

REP BERGSAGEL said hospitals, as well as many other medical providers, are subsidizing Workers' Comp premium rates by providing discounts. What dollar amount of subsidy is provided by hospitals to insurers and how do these discounts affect the premiums charged employers. Are the discounts reflected in the actuary's projections of the funds deficit?

Mr. Hunter said that question regarding premium rates would need to be addressed by the insurers, either the State Fund or private insurers. He didn't have the answer to those questions. In terms of discounts, he assumed **REP. BERGSAGEL** was referring to the difference between what the medical provider feels is the appropriate charge and what they are actually pay under the Workers' Compensation System. A good data system meeds to be developed. He did not have those figures. The State Fund, at least for its portion of the system, may have some of those figures. He encouraged the committee to direct that question to the State Fund at the next opportunity.

REP. COCCHIARELLA asked how aggressive the Department of Labor is in finding uninsured employers.

Mr. Hunter responded that, to the best of their ability, they are very aggressive with that and are looking for new ways to speed up or enhance their process of identifying and bringing employers into compliance who don't have coverage. Over the past four or five years they have increased their capability of electronically identifying employers who may be uninsured by using the unemployment insurance program data base.

REP. COCCHIARELLA asked if **Mr. Hunter** knew about how many uninsured employers they find in a year.

Mr. Hunter guessed that they have 700 to 800 actual uninsured employers annually. There may be more than they investigate.

REP COCCHIARELLA asked **Mr. Hunter** to explain the investigation of fraud on the part of workers. **Mr. Hunter** said they operate a workers' comp fraud and abuse hot line. It's a toll free number that people call to give a tip about something they believe might be fraudulent or abusive to the system. Once the department receives those calls, they provide information to the insurer in question. At that point it is the insurer's responsibility to do any investigating and follow-up. If the insurer wants to take the case into the court system, it is referred to the county attorney. The hot line receives about 450 to 500 calls per year.

CHAIRMAN HIBBARD asked how the system would handle employers who do not report seasonal employees. Given that workers' compensation is paid on a quarterly basis, who ensures that seasonal employees who come and go within the quarter are reported? Would it be Labor's responsibility as compliance review or would it be the responsibility of the insurer?

Mr. Hunter said, generally speaking, it would be the insurer's responsibility to make sure that the payroll reported to them for premium purposes is accurate. However, when an employer does not have coverage, they would be uninsured and **Mr. Hunter** would have to deal with bringing them into compliance.

There being no further questions or discussion, **CHAIRMAN HIBBARD** asked if **Mr. Hunter** wished to close.

Closing by Speaker:

Mr. Hunter said he hoped the committee would use their offices for any information they might need. His office would like to help the committee find a solution.

CHAIRMAN HIBBARD called on Judge Tim Reardon, Workers' Comp Court.

Tim Reardon, Worker's Compensation Judge briefly gave the committee an idea of the court's background, how it operates and some information on its workload. He said the committee had probably already heard a great deal about the amount of excessive litigation, etc. He would provide some hard numbers to go by.

In conclusion, he offered some comments about the items discussed by Mr. Wood, Mr. Sweeney and others. **Judge Reardon** said he had been in the system of Workers' Compensation for about 16 years. He was formerly the Chief Legal Counsel for the Division of Workers' Compensation for about four and one half years so he felt he had a fairly good understanding of the system in addition to the time spent in court.

The court was created in 1975, a product of interim legislative study. A legislative auditor's report criticized the structure of the former Industrial Accident Board, Workers Compensation Division. In the early 1970's a growing number of cases went to the state district courts, which tended to present inconsistent rulings, necessitating a lot of appeals. He was not sure the number of appeals had dwindled a great deal but believed the consistency in rulings at least at the trial level had largely been resolved.

Over the years, the caseload of the court has ranged from a high of about 900 in 1987 to a low in 1988 of about 197. The primary reason for the significant drop was the 1987 legislation previously mentioned by **Mr. Hunter** which mandated mediation. The legislature basically said that, before people could go to court, they had to try to solve their problems using the mediators of the Department of Labor and Industry.

The Supreme Court, in a case heard shortly after the implementation of the 1987 law, ruled that the law in effect at the date of injury controls workers' compensation claims for all purposes, including mediation. Injuries that occurred before July 1, 1987, didn't have to be mediated, and following that court ruling in 1988, petitions loaded the compensation court. Regardless of the number of petitions filed with the court, the number of cases that actually go through the system to judgement has remained fairly steady since 1975.

With mediation, much that was coming to the workers' compensation court no longer does. Disputes that do get into the court are usually those cases that cannot be resolved between the parties even with the assistance of mediators.

Mr. Hunter mentioned that he expected the number of mediations to increase. **Judge Reardon** agreed, since pre-July 1, 1987 cases are slowly working their way out of the system. All injuries after that time have to go to mediation so that number will increase.

The statistics, he said, don't tell the whole story. He was sure the committee would hear horror stories about various decisions

either from the comp court or the Supreme Court. There's no question that court decisions over the years have had a significant impact on workers' compensation. By no means are those decisions the only cause for the deficit in the State Fund, but they certainly did play a role.

Judge Reardon said that the 1987 legislature, in addition to mandating mediation, also expanded the jurisdiction of the Department of Labor to hear contested case matters under the contested case provisions of MAPA, as opposed to having those matters brought to the Workers' Comp Court. One of the areas that has gotten the most attention and has generated most of the contested case hearings is the area of rehabilitation. This is a very complex area, but those cases are heard in the Department of Labor and are appealed to Workers' Comp Court from there.

Good news **Judge Reardon** offered was that they will request one less FTE in the upcoming budgeting process because of less travel. Staying in Helena and working with administrative appeals is not quite as cumbersome as traveling around the state.

QUESTIONS FROM THE COMMITTEE AND RESPONSES:

REP. BENEDICT said his information was that in 1989, 1990 and 1991, the aggregate total for attorney fees was around $18 millon which probably represents somewhere in the neighborhood of 15% of all workers' comp premiums collected in any given year. That $18 million didn't make it to the injured worker; he has a hard time rationalizing that the cases that do make it to court don't really have that much of an impact.

Judge Reardon didn't dispute the $18 million figure, but pointed out that money is generated through settlements, not through court. The only involvement he has in court is setting attorney fees on disputed cases. Prior to July 1, 1987, insurers had to pay fees if the claimant was successful. He couldn't give a precise number but guaranteed it wasn't $18 million.

For injuries after July 1, 1987, that are successfully litigated by a claimant, the insurer is not obligated to pay attorney fees; the claimant pays them. In the almost six years since that law took effect, there were four incidents where he awarded attorney fees on top of the benefits to the claimant. He said he felt fairly comfortable saying that the amount of attorney fees, the $18 million, is attorney fees based on the total amount of settlements negotiated between the insurer and the claimant. He had nothing to do with that so he couldn't dispute those numbers.

CHAIRMAN HIBBARD asked if **REP. BENEDICT** would repeat the time period to which the $18 million applied. **REP. BENEDICT** said it was 1989, 1990 and 1991 and it was on the order of $6.5 million a year, $5 million another year and $6.9 million another year.

REP. BERGSAGEL asked **Judge Reardon** if rehabilitation was the number one reason for court cases. **Judge Reardon** replied that the major area from which they receive appeals from the Department of Labor contested case hearings is in the area of rehabilitation, under the 1987 law repealed in 1991. He stressed to the committee to that the law in effect on the date of injury will trail that claim to its conclusion.

When there is a dispute over a rehabilitation staff finding, the dispute goes to the Department of Labor. Either party can appeal. That's the single largest category of cases right now, and he expects that to continue for four to six years while those cases work their way through the system.

Judge Reardon briefly concluded with several observations. One of the items presented to the committee was the "Oregon Miracle." It is important for the committee, as it considers changes necessary in this system, to compare apples with apples when looking at other states' solutions. When he was the chief attorney at the division in 1979, Florida professed to have solved the problems that existed in the 1970's. They adopted and implemented a wage loss program that promised to all but eliminate litigation, reduce premiums for employers and provide nearly full reemployment opportunities for injured workers. In 1989 or 1990, Florida gave up and went back to its old system, or something very nearly approaching that. He mentioned that simply because he didn't know if Oregon was the first miracle, it may just be more of the latest miracle.

The insurance industry is premised primarily on experience gained through time. It's hard to make changes and expect to see overnight benefits. In 1991 the Montana Workers' Compensation Act was extensively rewritten. He wasn't sure if enough time had passed to allow value judgements on whether or not there are cost savings there. Whether the continuing rise in premiums is directly attributable to anything that happened in 1991 or experience, he didn't know. He reiterated the importance of comparing apples to apples. If there's a premium savings in one state, we should look at the classifications being used.

There's an inherent instability in the Montana system largely due to ever-changing laws. The act has been rewritten every year since 1985, and that instability lends itself to people going to court. There is no certainty when there is no case law.

Referring again to the stress case, he expects it will be decided before the legislature adjourns. That would be beneficial to everyone, since it seems to be the single most popular, or unpopular case, at this point in time. The court presently has six additional cases related to the stress issue. Five of those cases were pre-tried earlier in Butte. They arise from the correction officers of the Montana State Prison and the riot that took place there over a year ago. The sixth case is a highway patrol officer in the Great Falls area who apprehended a murder

suspect. Stress is a difficult area.

QUESTIONS AND ANSWERS FROM THE COMMITTEE:

REP. BERGSAGEL asked what Montana could do to reduce lawsuits.

Judge Reardon said he had limited himself strictly to the workers' compensation area and didn't know specifically what could be done except to try to draft language. It's possible that the legislature could undertake other exclusions and be within their constitutional right to do so without violating the individual's constitutional rights. In crafting language to get that done, it would be important to state the reason for the exclusion. If it's simply a matter of saving cost, that can be accomplished in all kinds of ways. The legislature perhaps could amend the statute that makes it harder for both the claimant and the insurer to prevail in lawsuits. It would be extremely difficult to do because something would have to be drafted which would cover virtually every conceivable fact situation.

REP. BERGSAGEL asked if we were doing anything in the work comp business to encourage litigation.

Judge Reardon said he didn't see that in any individual case. There may be a particular employer, or more likely a particular insurer, that has unnecessarily prolonged the payment of benefits, denial of liability or the payment of a medical bill, but it's very much of an individual thing. He didn't think there was any way to draw any general conclusions. Most employers want to see their employees protected. He doesn't see any general pattern of employer abuse or non-compliance with the law.

REP. EWER shared some of the frustrations felt by committee members. He said he considers himself an aggressive Democrat worried about workers, worried that they have a safe environment. He doesn't want to seem like an insensitive person, but, at some point, doesn't a person have the personal responsibility to decide if he or she wants to be a deputy sheriff? He knows if he's a deputy sheriff, he's going to get called out to accident scenes, suicide scenes. He didn't feel that he could personally say, "I had a nervous breakdown because I'm serving on the Work Comp Subcommittee."

Judge Reardon did not disagree with the law enforcement example. He said that when the legislature passed the amendment in 1987, it did not remove "unusual strain." He could understand the frustration with that and could see why people would be bothered by it, but that has been the law in this state and others for quite some time. As a practical matter, if unusual results from doing usual work in a usual way were excluded, there would be an awful lot of claims that would not be compensable.

Hearing no further questions, **CHAIRMAN HIBBARD** thanked **Judge Reardon** for a very enlightening presentation.

ADJOURNMENT

Adjournment: 4:45 p.m.

REP. CHASE HIBBARD, Chairman

EVY HENDRICKSON, Secretary
by Marilyn Miller

CH/ev

HOUSE OF REPRESENTATIVES

Select - Workers' Compensation **COMMITTEE**

ROLL CALL **DATE** 1-13-93

NAME	PRESENT	ABSENT	EXCUSED
Chase Hibbard, Chairman	✓		
Jerry Driscoll, Vice Chairman	■	✓	
Steve Benedict	✓ OK	■	
Ernest Bergsagel	✓		
Vicki Cocchiarella	✓		
David Ewer	✓		