

MINUTES

MONTANA SENATE 53rd LEGISLATURE - REGULAR SESSION

FREE CONFERENCE COMMITTEE ON SENATE BILL 394

Call to Order: By Senator Mike Halligan, on April 19, 1993, at 11:06 AM.

ROLL CALL

Members Present:

Sen. Mike Halligan, Chair (D) Missoula
Sen. John Harp (R) Kalispell
Sen. Sue Bartlett (D) Helena
Rep. Steve Benedict (R) Hamilton
Rep. David Ewer (D) Helena
Rep. Chase Hibbard (R) Helena

Members Excused: None.

Members Absent: None

Staff Present: Susan Fox, Legislative Council
Kelsey S. Chapman, Committee Secretary

Discussion:

Senator Halligan told the Committee to discuss the key issues on SB 394. He said he had been contacted by the Montana Department of Labor and Industry (DOLI) and others about the House's amendment limiting the defense attorney's fees. He said having the fee limitation in workers' compensation cases be \$7500 could affect DOLI's ability to contract out to attorneys.

Senator Harp said he would ask the House to accept SB 394 as it left the Senate. He stated this would be limiting the attorney fees cap to the claimant attorneys only. He said originally SB 394 would have reduced the percent of the benefits the attorney could receive, and put a cap of \$7500 on the total fee, allowing the injured worker to retain more money from any settlement that was rewarded. Senator Harp said Representative Cocchiarella had offered the House amendment to include defense attorneys' fees in the cap. He continued, saying there may be problems with having the cap on defense attorneys' fees, but rather than trying to kill SB 394, the problems should be addressed, and a middle ground found. He said reducing the percent of a settlement to a claimant that an attorney could charge would allow the injured worker to recover more of the benefits and settlement.

Senator Halligan asked if the House had discussed the constitutional question of the right to legal redress if the defense side was not put in SB 394. He said currently there was a 20 percent limit on the contingency fee, but when there was a

cap there was an absolute dollar amount, and the right to legal redress and equal protection might be an issue.

Representative Benedict said when SB 394 was discussed in the House Select Committee on Workers' Compensation, there were no technical discussions of SB 394, but rather an attitude that said that if a cap was going to be put on the trial attorneys, then the defense attorneys should receive the same cap. He stated there had been no talk about the different levels of appeal. He said the amendments accepted by the House were not well thought out.

Senator Harp asked Senator Halligan if his biggest concern was with the ceiling of \$7500.

Senator Halligan said the concern was that there may be some parity between the defense and the plaintiff's bars, and the cap might not reflect reality. He said there were substantial changes in 1987 and 1991, and the average fees on settlements had gone down dramatically. He said this showed there had been major impact on attorneys' fees.

Senator Harp said the average settlement was less than \$7500 to a claimant's attorney.

Senator Halligan said 1992's average was \$11,498, down from \$40,000, per case paid in attorneys' fees.

Senator Harp said he had not heard the decision of Judge Reardon which had overturned stress claims as a compensable injury. He said if that case lost, the Supreme Court would side with Judge Reardon, and there would be additional potential claims, and litigation would increase dramatically. He said the decline of fees Senator Halligan was talking about could become an incline quickly. He noted that a decision was coming up with a potential to have this affect.

Representative Benedict said the workers' compensation fund was in very bad shape, and the defense attorneys were defending the system. He said there was not a level playing field, and creating one is what the House amendment was doing by adding the defense attorneys. The amendment had tried to reflect a level playing field for both the trial and defense attorneys. He said as SB 394 had come out, the defense attorneys would be at a disadvantage under the provisions. He said the House might do something that would give up the level playing fields, but leave SB 394 so the defense could defend the faltering workers' compensation system.

Senator Bartlett said the concern of the House Select Committee on Workers' Compensation was to provide equity in defense and prosecution. She stated if there were limitations on one side, there should be limitations on both sides. Part of the concern was that injured workers were having extreme difficulty finding an attorney willing to take their cases because of the limits on the attorneys' fees.

Senator Harp asked if there was any interest in adjusting the

dollar amount for both the defense and claimant attorneys, with the percentage on the claimants side without the ceiling. He said people would be upset if the Legislature came out with a major payroll tax, major cost containment legislation, change in management of the State Fund, and an additional data information system without the cost of attorneys being considered. He said the original intent of workers' compensation was an agreement between an employer and employee to work as partners to ensure that the injured worker was taken care of and that the employer could do this without risk of litigation. Many of the workers' compensation system problems were with third party interest, and the problem was not with attorneys, but with the medical provider costs.

Senator Halligan said the Legislature had made many other cost containment measures, and the attorney fees had been limited to 20 percent. He said when there was a non-workers' compensation related personal injury the limit was 33½ percent. Most attorneys would not take a workers' compensation case because they did not generate enough money. He said he would like to see how much of the money of the attorney's fees in question were made on old fund cases, and how much was made on new fund cases (1987-1991 cases). He said there was no complaints that 20 percent was too much to take from an injured party.

Representative Benedict asked Senator Halligan if he was suggesting that SB 394 should die. Senator Halligan answered that the justification for SB 394 was diminished when one looked at the numbers that showed how dramatically the attorneys fees had been impacted by the 20 percent limit. He said the problem is how to get control of the old fund cases. He said including the defense attorneys in the limit might eviscerate the ability of the State Fund to stop some of the claims.

Representative Benedict said SB 394 was an important bill, and offered an amendment. He asked to leave the 15 percent limit on attorneys' fees, remove the \$7500 cap, and amend the hourly fee cap from \$75 to \$90 or another reasonable compromise. He said this might reach a compromise that defense and trial attorneys would find acceptable.

Senator Halligan said the House language on how and when an attorney would be paid in workers' compensation cases might encourage last minute resolution of a claim (subsection 3 on page 2). He said the language the House added was not thought out.

Senator Harp asked Senator Halligan if the claimant should benefit that before an insurer recognizes there is a claim, or from the initial time of accident. Senator Halligan said he would keep the checks and balances that were in SB 394.

Senator Harp said this language came from existing rulemaking and the administrative rules. He asked if Senator Halligan's concern was that prior to the insurer's acceptance of the claim an

attorney should be involved. Senator Halligan said he was trying to understand the House amendments.

Senator Harp said this language was from the Senate and addressed the concern that the attorney should not receive benefits from the claimant until the insurer recognized the injury as compensable.

Russell Hill, Montana Trial Lawyers Association, told the Committee that subsection 3 allowed an insurer to postpone settling a case until right before a court hearing, and then admit liability the insurer had been denying. The attorney can only calculate the 15 percent contingency fee on past due benefits, rather than on benefits that extend years into the future, which without the attorney's involvement may not have been paid. He said there was also a problem in that SB 394 did not deal with whether fees were hourly or contingent fees, but rather with fees that could be paid by claimants and those that could be paid by insurers. He said even if a claimant wished to do so, an hourly attorney fee could not be paid.

Lawrence Hubbard, attorney for the State Fund, told the Committee subsection 3 was a threshold question in cases of initial compensability. He said under the statutes, Section 608, the insurer could begin paying wage loss compensation during the period of investigation. He said subsection 3 would come into use only in cases of denied liability. Subsection 3 would not affect disputes in which a worker claims the temporary total rate should be higher than has been paid from a past point in time. If the attorney representing a claimant petitions the court and succeeds in increasing the claimant's rate, the new rate would apply for the entire period of the claim. He said the attorney's fees are still payable on the entire amount of benefits obtained by that attorney for the client.

Senator Halligan asked Mr. Hubbard if the 15 percent was to be applied as long as it did not exceed \$7500. Mr. Hubbard answered that this was correct. He said there were provisions in the statutes providing protection for a claimant to whom an insurer unreasonably delayed or denied benefits, and allowing 20 percent to be added to the final award. He said the Supreme Court had ruled that even if the insurer grants benefits right before the trial, the penalty could be considered by the workers' compensation court. He said the current 20 percent cap on fees was manageable from the State Fund's perspective. Mr. Hubbard said the language added by the House was not absolutely clear and that it dealt with representation solely regarding defense of claims. He said the language was broad enough to include cases the State Fund initiated against policy holders to collect premiums due. He mentioned the Strattemeyer case dealing with stress claims as compensable injuries. He said the claim would not have much dollar value from the defense perspective, but there would be many insurers involved in the case who had been drawn in because of the potential impact of the one decision on

many claims, costing millions of dollars over time. He said to limit defense fees to \$7500 through a court would be excessive. He said originally the fee limiting statute was a beneficent law regulating only attorney fees. Mr. Hubbard stated defense attorneys and insurers were more able to protect their interests than an injured claimant.

Senator Halligan asked if Mr. Hubbard's interpretation of the wording on "up to the date on which the claim" would be up to the day that liability was accepted by the insurer, but not the amount of the claim. Mr. Hubbard answered this was how he would interpret the language.

Senator Halligan asked where an attorney would be in terms of the fees at that point. Mr. Hubbard said where liability is accepted by the insurer before trial, there may be retroactive benefits. An attorney might be hired a year after initial benefits have been denied and may get the evidence and get the benefits. The benefits would be from the time the medical provider said the claimant was injured. The language would go to a circumstance where the whole claim has been denied, rather than a circumstance where part of the claim has been denied.

Senator Halligan said if the insurer has accepted liability, but not decided the benefit amount, the attorney receives fees on only past benefits, and not for future benefits that may be paid. Senator Halligan asked from where the attorney's fees were coming. Mr. Hubbard said these fees were payable from the retroactive amount, or the past benefit amount.

Mr. Hubbard explained if the insurer settles a claim right before a court hearing, SB 394 might prevent an attorney from getting a percentage of the future settlement. If the insurer settled immediately before court an attorney would not be needed. If an attorney was working on the case and dealing with only a limited issue, and the insurer resolves the entire case, the attorney should not get a percentage of all the benefits.

Senator Harp said from the date of the injury until the insurer recognizes the injury as compensable, the efforts of the attorney should be paid for.

Senator Halligan argued that the next months would be spent figuring future payments.

Senator Harp said once the insurer has recognized an injury as compensable, the insurer and the injured worker should work together without attorney involvement. He said once the injury has been recognized as compensable, it would be easy to recognize the benefits and to determine the benefits schedule. Senator Harp stated that the workers' compensation should be allowed to work. He said SB 394 was not preventing access to attorneys. If the efforts of an attorney lead to the payment of benefits, then the attorney should receive the compensation. If it is

recognized by all parties that the benefits should be paid, the attorney should not be involved. Senator Harp said some medical benefits would never be terminated, so there had to be a time to turn off the flow of money to the attorney.

Representative Hibbard said should an attorney become involved and win benefits for the claimant the stream of the benefits would go forth from that point. He said the way SB 394 read, the attorney would get compensated for retroactive benefits, but not for future benefits. He said sometimes there was a very small portion of retroactive benefits, but many future benefits. He asked Mr. Hubbard to give an analysis of the significance of this possibility.

Mr. Hubbard told the Committee it would be hard to say that most of the benefits were in the future. He said he had taken cases where the debate was over two years of retroactive benefits that had not been paid where the claimant's attorney finally establishes evidence of liability on behalf of the insurer. That period of retroactive liability could be significant, and the fee owed on services rendered during that period of time. He said in one circumstance it would operate fairly, and in the other situation it would be unfair. He said the question was whether under SB 394, there would be a for the injured worker in obtaining representation. He stated he did not know how the trial lawyers would feel about the fee caps, but he thought it was a legitimate concern that fewer attorneys were practicing workers' compensation law in Montana. He said there were four statutes that apply to injury cases. He stated this was a complex system and injured workers were at a disadvantage without representation in the benefits system. Mr. Hubbard said limitation of attorneys' fees was purposeful, and the statute was created to give guidance.

Senator Halligan said the insurance companies were not seeming to be enthusiastic about volunteering to pay many future benefits. He said attorneys sit at the table and make sure the claimant is not taken advantage of in the negotiation. He stated some people were not capable to handle the system without attorney representation. To say that the attorney should not be involved in future benefits would leave the claimant to be taken advantage of in the negotiation. If insurance companies could show more benevolence in this area, the attorneys might not be needed.

Representative Benedict said Mr. Hubbard was concerned that the language on page 3, line 21 could be construed to mean anything an attorney would do in the workers' compensation arena. He said after "fees", "regarding claims" could be inserted, or something to clarify this point. He suggested striking "\$75 per hour" and inserting a compromise of "\$90 per hour.", and striking the rest of "subject to a maximum fee of \$7500 per claim". He said this might be a good compromise for the defense attorneys.

Mr. Hubbard said the \$7500 cap was a great problem. Senator Harp

clarified that Representative Benedict's amendment would remove the cap for defense attorneys.

Senator Halligan said there was also language that prevented the claimant from paying an attorney an hourly fee that would have to be worked on.

Representative Ewer asked Senator Harp what the original intent of SB 394 was. He asked if the intent was to prevent injured workers from being hurt by attorneys or to try to save the State Fund money. Senator Harp said SB 394 would not save the State Fund any money, but would put more money from benefits received in the injured employee's pocket by reducing attorneys' fees.

Representative Ewer said in the House Select Committee on Workers' Compensation there were no injured workers testifying that they had been hurt by attorneys, nor was anyone saying there should be a law to limit access to attorneys for the claimants. He said this was a complicated system, and people get benefits by using attorneys. He said the intent to help the injured workers was not borne out by what SB 394 would do.

Representative Benedict told the Committee there were many arguments in Labor Committees regarding attorneys' fees. He told Representative Ewer there were cases where an injured worker hired an attorney, the attorney does nothing except correspond with the insurer started, and that attorney would get 20 percent of the settlement. He said the reason that many people had not testified on SB 394 in the current session was they did not understand how the process worked. He stated attorneys were in the Capitol to represent themselves, and they were very capable of accessing the system. The injured workers and the claimants were not as sure of the Legislative process. He said attorneys had charged \$18 million in workers' compensation case fees in the three years between 1989 and 1991. Representative Benedict stated this was \$18 million in claims that did not go into the injured workers' pockets.

Senator Halligan asked what percentage of this \$18 million was in total premiums.

Senator Harp said the total premiums were \$160 million. He stated SB 394 was drafted in response to a law firm in the area in which he lived that took workers' compensation cases in a factory-like manner. Senator Harp stated that it did not matter if the cases were new or old fund because these attorneys were treating injured workers unfairly. In some cases, they did not do a fair enough job at representing the workers to receive the fees because they were more interested in closing claims quickly, receiving the 20 percent contingency, and then going on to the next case.

Senator Bartlett asked what percentage of the attorneys working in the workers' compensation field were representative of this

type of firm. Senator Harp answered that it was a small percentage, but those attorneys were to whom most of the money was going, and where the injured worker was being misrepresented.

Representative Benedict said abuse was abuse, no matter how often it took place, or how common it was.

Senator Bartlett said she did not dispute this fact, but SB 394 would affect all attorneys in workers' compensation, not just those who deal with the claims to make a quick dollar. She said there should be equal consideration given to workers' compensation attorneys with integrity.

Senator Harp conceded that the vast majority of attorneys were trying to represent their clients in a legitimate and fair manner.

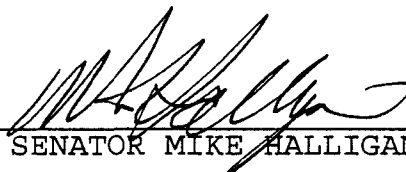
Senator Bartlett said most of the problems were in the system, and the system could not preclude representation to get benefits to which people were genuinely entitled to.

Representative Benedict said the merits, rather than the amendments of SB 394 were being debated. He said there needed to be a focus on the caps, hourly wages, and percentages, and there needed to be an attempt to fix SB 394.

Senator Halligan said the Committee would meet again to attempt to find a middle ground with SB 394.

ADJOURNMENT

Adjournment: 11:57 AM



SENATOR MIKE HALLIGAN, Chair



KELSEY S. CHAPMAN, Secretary

MH/ksc

Exhibit #1
 SB 394
 Sen. Halligan
 4/19/93

Printed by: Glead, Carol
 Printed at: 4-20-93 3:26p

From: Williams, Annette
 Sent at: 4-20-93 2:47p
 Message: Carol,

Here is a revised report. The subtotals were fine, but the grand total was missing a digit.

Subject: Revised grand totals on report
 Author: annette
 Doc name: LEGRPT.OE2
 Type: PC file
 To: Glead, Carol

DEPARTMENT OF LABOR AND INDUSTRY
 EMPLOYMENT RELATIONS DIVISION

CASES WITH SETTLEMENT DOLLARS GREATER THAN ZERO
 REPORT DATE 4-20-93

Fiscal Year	# of Cases	Settlement Amount	Attorney Fee Amount	Represented Settlement Amount	
79	14.4	17	\$ 438,023.09	\$ 63,121.75	\$ 396,875.00 18.8%
79	11.3	15	\$ 814,293.60	\$ 92,061.83	\$ 442,982.93 20.1%
80	17.8%	35	\$ 1,724,673.14	\$ 307,466.43	\$ 1,389,468.59 23.7%
81	19.4%	45	\$ 2,023,751.73	\$ 392,203.71	\$ 1,366,165.06 21.7%
82	19.1%	67	\$ 2,893,517.21	\$ 552,907.66	\$ 2,537,273.33 21.8%
83	17.5%	87	\$ 3,511,455.65	\$ 615,022.93	\$ 2,773,429.10 22.1%
84	18.7%	155	\$ 5,225,518.73	\$ 1,174,828.66	\$ 5,447,569.64 21.6%
85	18.1%	232	\$ 8,995,369.64	\$ 1,632,410.06	\$ 7,529,747.86 21.7%
86	18.4%	326	\$ 13,646,241.21	\$ 2,512,144.06	\$ 11,331,298.04 21.6%
87	16.6%	472	\$ 19,058,909.29	\$ 3,167,523.72	\$ 16,458,319.41 19.2%
88	15.3%	498	\$ 13,233,330.81	\$ 2,029,502.01	\$ 10,406,192.13 19.5%
89	13.5%	725	\$ 18,559,360.07	\$ 2,506,082.32	\$ 10,516,946.92 18.4%
90	14.2%	895	\$ 21,135,392.24	\$ 2,985,672.45	\$ 16,373,146.60 18.9%
91	13.9%	777	\$ 16,411,016.76	\$ 2,294,673.47	\$ 12,309,716.25 18.6%
92	14.3%	667	\$ 8,951,043.61	\$ 626,365.08	\$ 3,649,052.10 17.2%
93	4.7%	71	\$ 300,310.94	\$ 15,423.74	\$ 31,931.97 2.8%
Grand Totals					
	5,076	\$ 137,958,010.97	\$ 20,667,632.42	\$ 106,340,085.60	