

## MINUTES

### MONTANA SENATE 53rd LEGISLATURE - REGULAR SESSION

#### FREE CONFERENCE COMMITTEE ON SENATE BILL 394

Call to Order: By Senator Mike Halligan, on April 20, 1993, at

#### 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 Chapman, Committee Secretary

**Discussion:**

Senator Halligan explained that Senator Harp had several proposals to work out a compromise on SB 394.

Senator Harp said the 15 percent contingency fee was the original amount discussed for all cases. He said attorney fees should be 20 percent when the case went before the workers' compensation judge, and 25 percent when the case went before the Supreme Court. He said these cases were rare.

Nancy Butler, State Fund, clarified that about 125 cases per year go to the workers' compensation court, and about 30 go to the Supreme Court.

Senator Harp said by raising the fees the efforts of the attorney would be recognized, but at the cases that were everyday settlements, the price would allow the injured worker to have additional money. He said that the 20 and 25 percent caps would reflect the added work of the attorney. He said the intent of SB 394 was to help the injured worker. Senator Harp said Senator Halligan had voiced concerns about the language regarding retroactive benefits and asked if those concerns had been answered.

Senator Halligan suggested on page 2, line 13, putting a period after "effort", and striking from "effort." through "court" on line 16. The 15 percent cap would then apply to the cases where

the insurer has accepted liability after the insurer has denied initial compensability. He said there would be a new subsection 4 to insert the intermediate step of 20 percent in cases that went to the workers' compensation court. Existing law allowed for 25 percent contingency fee for Supreme Court cases. He said \$95 per hour would be a compromise for fee limitation, so strike "\$75" and insert "\$95"; remove the \$7500 cap on fees; strike subsection 6, and replace it with a new section 3.

Susan Fox read the section. "When an attorney represents or acts on behalf of an insurer in a dispute over benefits payable to a claimant or beneficiary, the attorney's hourly fee must not exceed \$95 per hour".

Nancy Butler told the Committee that by removing the \$7500 cap and changing \$75 to \$95 would alleviate much of the State Fund's concern. She said changing the language would clarify that when the insurer was mentioned in SB 394, that language was talking about claims disputes, which is important because insurance companies have other business not related to claimants.

Russell Hill, Montana Trial Lawyers Association (MTLA), told the Committee MTLA had no problem with the clarification of the language. He said that Senator Harp's proposed amendments would set up a three-tier system for regulating attorneys' fees. He stated that the attorney would get 15 percent if the insurance company denied liability or not. If the insurer denied liability, the attorney would be going through all the efforts until there was an agreement. He stated there was a very small percentage of claims that actually went to the workers' compensation court or the Supreme Court. Usually the attorney did extensive work dealing with the insurer, and then the settlement would take place before a court hearing. He stated that in the three tier system work would be limited to 15 percent. He said this was not an incentive for the insurer to admit liability. He expressed his concern with removing the overall caps in disputes over benefits. MTLA did not care about the amount of the cap, but thought that the only real regulation of insurance companies would be the overall cap. He said that an hourly fee would not affect these companies.

Representative Ewer clarified that the caps would be raised on both claimant and defense attorneys.

George Wood, Montana Self-Insurers' Association, asked if Senator Halligan's amendment was contemplating the situation if there was a denial of liability then litigation awards the claimant money or benefits. In this situation, from day one until the end of the claim, the 15 percent fee would apply. Mr. Wood asked if the 15 percent applied to the period of time up until the time the court corrects the error. Senator Halligan answered that the fee would be 15 percent until the court corrected the error. At the time the court became involved, the fee would raise to 20 percent.

Mr. Wood said a claim could go on for years. He said medical claims could go on for another 3 to 5 years and there would be tremendous fees in this situation.

Mr. Hill said that deleting the language would remove the scenario where the attorney could only calculate the fees based on the past-due payments.

Nancy Butler said the language currently read that whatever the claimant was awarded due to the efforts of the attorney would be the amount that would determine the fee.

Mr. Wood said his concern was the case of domiciliary care where attorney fees are paid for the lifetime of the claimant.

Senator Harp said the case of domiciliary care was a court order. Nancy Butler said this is how she read the current law.

Mr. Wood said that the claimant would be paying the fees in all likelihood.

Senator Halligan said this was a court ordered situation. Senator Harp clarified this was a court order regarding an attorney by an attorney in Great Falls that received \$26,000 per year in fees. He said that had nothing to do with SB 394.

Nancy Butler said under current law if domiciliary care was denied and the attorney got the insurer to begin paying domiciliary care benefits outside a court situation, then that attorney would have a right to fees on the retroactive benefits, as well to fees on future domiciliary care during the time that it is paid.

Senator Halligan asked for what percentage of cases this situation existed. Nancy Butler answered that it was a small percentage of cases.

Russell Hill said domiciliary care would not be available under SB 347, a bill Senator Harp introduced in the 53<sup>rd</sup> Legislative Session. Senator Harp argued that this was not true. Mr. Hill said domiciliary care would be much more restricted. Senator Harp agreed that domiciliary care would be rightly more restricted under SB 347.

Representative Ewer said by removing the caps the proposed amendment may be giving the defense attorneys an advantage because they did not have a cap. He said there was an explicit cap in SB 394 on what the claimant's attorney could receive in fees because although the dollar amount cap was removed by the amendment the percentage limits were still in place. Representative Ewer said he had a philosophical problems with telling people that he was looking out for their best interests,

while at the same time limiting the access to a claimant's own attorney. He said if someone was going to sue him, he would go to his own attorney. He stated it was a person's right to have access to an attorney. He claimed SB 394 was an affront to due process. If the problem was attorneys, then there should be a bill that would tell attorneys how to behave, thus setting standards for attorneys.

Senator Bartlett said she had a problem with the tiered percentage effect that the amendment proposed. She stated that there were many cases in which a settlement was reached before a court case began. Benefits on the attorney's side of going to court, such as 20 percent fees instead of 15 percent fees, would work against cases being settled out of court. She said there should be no more workers' compensation cases going into court that could be avoided. She stated there were possible problems with getting access to attorneys under SB 394. She said if an injured worker had a legitimate case, but could not find an attorney to represent that, then the injured worker may not end up benefiting at all.

Representative Ewer said workers' compensation was an enormously complicated area. No one in workers' compensation printed a pamphlet or gave comprehensive information saying what benefits were available. He said if he were injured he would call an attorney because he did not know what his benefits were. When his home flooded, another insurance company gave information that told him what benefits he was eligible to receive.

Representative Benedict said there were provisions in current legislation that an employee would be notified of all benefits, so the attorneys might not be so imperative in workers' compensation cases. If cases could be kept out of court and a handle could be kept on attorneys' fees, then the employee and the system would be better off.

Representative Hibbard said HB 13 had provisions to give more operating capitol to the State Fund than it had in the past. He said one of the problems had been in claims management. If the number of claims managers was compared to the volume of claims in Montana was compared to the volume in other states, the workload in Montana would be found to be enormous in comparison. Despite changes and improvements in this area, Montana is still not up to regional standards. With the provisions in HB 13, it was Representative Hibbard's hope that Montana would be able to meet regional standards, to manage claims more quickly and professionally, minimizing the need for attorneys. There would still need to be attorneys in the system, but in a well functioning workers' compensation system the need should be minimal. Idaho has a mandatory mediation process, and few of the cases ever stretch beyond that mediation. He said when looking at the workers' compensation system, Montana was moving in the right direction, and the need for attorneys would hopefully diminish. Representative Hibbard said that though SB 394 imposed

some restrictions on attorneys, they did not seem to be onerous. He said with \$95 per hour, and no caps, along with the fact that there was nothing in the Bill to prevent a claimant from seeking out an attorney, he was comfortable with SB 394.

Representative Benedict said he shared concerns with Senator Bartlett about the tiered percentages in the proposed amendment. He asked for the percentages to stay at 15 percent all the way through the process. That way there would be no added incentive to go to court.

Senator Bartlett said she did not agree with the 15 percent, but one tier all the way through at 20 percent would be reasonable. She said she hoped to see fewer instances in which attorneys were going to be used in the workers' compensation system. She said if this was going to be the case, the instances where attorneys were needed would be those that demanded more preparation and involvement by the attorney. She said there was a free enterprise system, and if the attorneys could not make enough money to make taking the case worth their while, then the worker would have problems finding legal assistance with workers' compensation cases.

Susan Fox told the Committee there was one other section in statute that dealt with calculation of attorneys fees that was not in SB 394. Senator Harp said this was the limitations that dealt with a situation that a claimant would take the insurer to court.

Senator Halligan said there should be some statewide justification for making a new law. In 1987 and in 1991 a package was started, and now, in 1993 the rest of the package on managed care and health care, as well as other issues in workers' compensation. Without some parity between the defense and the plaintiff, SB 394 might not be constitutional. He said the questions raised by Representative Ewer had not been answered by people fighting for attorney fee limitation in committees in either the House or Senate nor in conference committees. He said if there was going to be limitation of attorneys' fees in workers' compensation, then the medical providers should also be limited. The medical costs are the biggest issue in workers' compensation, and there is enough economical evidence to justify doing something about those costs.

Senator Bartlett said she had not seen the justification for the Bill. Representative Benedict said he would cooperate with anything Senator Harp wanted to do.

Don Allen, Coalition for Workers' Compensation System Improvement, told the Committee he would urge them to not completely drop the concept of SB 394. He said the amendments sounded like they resolved most of the issues in dispute between the members. He said even if there was not the economic justification as there was for a medical cost containment bill,

the perception of the public was that attorneys' fees was one of the areas needing to be addressed by the Legislature. He encouraged the Committee that if there was any way they could feel justified in passing a bill out that addressed the issue, though they may not feel comfortable about it, he would like to see it done.

Senator Halligan said there was no data, and asked the State Fund if there was anything that could be done on its part, working with DOLI, to get information on attorneys' fees from both sides so intelligent decisions could be made.

Nancy Butler said the data base system bill that had been introduced had not passed, but current abilities allowed something limited that could be done. She said it would take a number of years to analyze the data.

Chuck Hunter, DOLI, clarified that DOLI compiled what attorney fee data was available. There was no statutory requirement currently to provide that attorneys provide DOLI concrete information as to what they were receiving in fees.

Nancy Butler said the State Fund was the only one that could be compelled voluntarily to produce that sort of information.

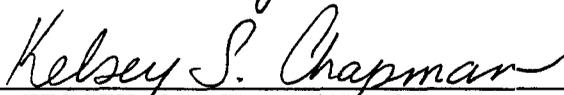
Representative Ewer told the State Fund to not worry so much about what attorneys' fees claimants were paying, but rather worry about doing its job so that people don't have to go to attorneys.

Senator Halligan said he would not foreclose the ability of the Committee to meet again.

ADJOURNMENT

Adjournment: 4:36 PM

  
\_\_\_\_\_  
SENATOR MIKE HALLIGAN, Chair

  
\_\_\_\_\_  
KELSEY/S. CHAPMAN, Secretary

MH/ksc



Free Conference Committee  
on Senate Bill No. 394  
Report No. 1, April 22, 1993

Page 1 of 2

Mr. President and Mr. Speaker:

We, your Free Conference Committee on Senate Bill No. 394, met and considered: Senate Bill No. 394 in its entirety. We recommend that Senate Bill No. 394 (reference copy - salmon) be amended as follows:

1. Title, line 11.

Strike: "REGULATING"

Insert: "REQUIRING THE DEPARTMENT OF LABOR AND INDUSTRY TO COLLECT AND REPORT INFORMATION ON"

2. Title, line 12.

Following: "FEES"

Insert: "AND LEGAL COSTS"

3. Title, line 13.

Following: "AND"

Strike: the remainder of line 13 through "MCA"

Insert: "PROVIDING AN IMMEDIATE EFFECTIVE DATE"

4. Page 1, line 16 through page 5, line 1.

Strike: section 1 in its entirety

Insert: "NEW SECTION. Section 1. Collection of attorney fee and legal cost information -- report. (1) The department shall uniformly collect the information described in subsection (2) as an element of the workers' compensation data base system from all attorneys who represent employees, employers, insurers, and beneficiaries in claims for workers' compensation and occupational disease benefits. (2) The department shall uniformly collect detailed information regarding attorney fees, legal costs, and other information relevant to the costs of prosecuting and defending claims for workers' compensation and occupational disease benefits.

(3) The department shall compile the information described in subsection (2) by the date of accident and by plan number and file the information with the legislature as provided in 5-11-210.

NEW SECTION. Section 2. Codification instruction. [Section 1] is intended to be codified as an integral part of Title 39, chapter 71, part 2, and the provisions of Title 39, chapter 71, part 2, apply to [section 1].

ADOPT

REJECT

891736CC.Sma

NEW SECTION. Section 3. Effective date. [This act] is effective on passage and approval."

And that this Free Conference Committee report be adopted.

For the Senate:

*McKally*  
Senator Halligan, Chair

*Bartlett*  
Senator Bartlett

*Harp*  
Senator Harp

For the House:

*Benedict*  
Representative Benedict, Chair

*Ewer*  
Representative Ewer

*Hibbard*  
Representative Hibbard

*M*  
Amd. Coord.  
*M*  
Sec. of Senate