

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on January 27, 1995, at 8:00 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: NONE

Members Absent: Vice Chair Diana Wyatt

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

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

Committee Business Summary:

Hearing: NONE
Executive Action: HB 158 DO PASS AS AMENDED

{Tape: 1; Side: A}

EXECUTIVE ACTION ON HB 158

Motion: REP. SHIELL ANDERSON MOVED HB 158 DO PASS.

Motion: REP. LINDA MC CULLOCH MOVED AMENDMENTS PROPOSED BY MONTANA STATE AFL-CIO. EXHIBIT 1

Discussion: REP. DANIEL MC GEE said he had no problem with the second amendment, but questioned if the word, "mechanism," included a sidewalk.

REP. MC CULLOCH said she did not believe a sidewalk was a mechanism.

REP. MC GEE contended that it is just as are steps. He did not believe that a ladder should be part of the scaffolding.

REP. MC CULLOCH disagreed with him and recalled testimony that oftentimes a scaffolding was further up on the building, often attached to the building and as way is needed to get there. The vehicle to get to the scaffolding was the ladder and therefore the ladder became part of the scaffolding in order to work from that section. She did not recall that mechanism is meant to be a sidewalk, but the device that gets one to the scaffolding.

CHAIRMAN BOB CLARK suggested separating the amendments for the purposes of discussion and voting. Amendment one was open for further discussion.

REP. DEB KOTTEL asked the staff counsel, John MacMaster, for his interpretation of the word, "mechanism," and whether he agreed that a sidewalk would be considered a mechanism.

REP. MC GEE interjected, "a mechanism used to reach the platform," not just a mechanism.

REP. KOTTEL said the key word was mechanism.

REP. MC GEE said, "No, it's a specified mechanism."

Mr. MacMaster suggested using a typical dictionary to see if that would help. He suggested using the words, "ladder or similar device," which would eliminate a sidewalk.

REP. KOTTEL asked if REP. MC CULLOCH would agree to that change in the amendment.

REP. MC CULLOCH agreed to it.

REP. AUBYN CURTISS remembered testimony that someone had used some kind of elevating device for accessing the scaffolding which

was totally inappropriate and she wondered if the wording should be left in there.

REP. MC GEE said that it was a forklift and in using it the person had fallen and sued the contractor.

REP. CLIFF TREXLER spoke against the amendment. He believed that they had taken the word, "ladder" out of the bill for specific purposes simply because they are not part of the scaffolding and in many cases they are portable.

REP. MC CULLOCH said her point is that if a contractor erected a scaffolding and the only access to it was a ladder or some device to reach it, then the employer had deemed that as part of the scaffolding.

REP. WILLIAM BOHARSKI said the scaffolding is a steel structure with a ladder incorporated into it. If a ladder were leaned against a scaffolding the platform could be knocked off the scaffolding. If the contractor were to set up that sort of structure, the contractor would be misusing the equipment.

REP. BILL TASH asked if these amendments had been discussed with the bill sponsor.

REP. MC CULLOCH said they had not been discussed with the sponsor.

REP. TASH said he would have to speak against the amendments because after the testimony during the hearing many of these issues were explained and adding more amendments now might be adding complexities.

REP. BRAD MOLNAR spoke against both amendments. The original intent of the bill was to take away the legal morass of a safety procedure. These procedures are well-documented and used throughout the industry under OSHA. If it is a hanging scaffold which needs a device to access it, and ladder is going to be incorporated in its definition, then a crane or manlift or a rigging will also have to be incorporated. The intent of the bill was to deal with scaffolding and these items were eliminated to avoid legal contention.

REP. JOAN HURDLE questioned eliminating the device to reach the scaffolding from the necessity of safety standards.

REP. MOLNAR said his reasoning was that ladders, cranes, manlifts, and other types of rigging and devices to reach the scaffold are covered by OSHA. The intent of the sponsors of the bill is to limit the legal liability on a safety measure which at the state level has outlived its usefulness except for suing employers. They are trying to eliminate a double jeopardy.

REP. KOTTEL said testimony showed that the reason they wanted to exclude ladders was one Montana Supreme Court case that held a free-standing ladder against the side of the work was deemed by the court to be a scaffold. She did not hear any testimony that said they didn't consider a ladder which was attached to the scaffold as not part of the scaffolding device. Therefore, she spoke in favor of this amendment which clarifies that free-standing ladders are not included in this act, but when a device is used to reach the scaffold itself, that become part of the scaffolding device. That was her interpretation of their intent.

REP. DUANE GRIMES said the scaffolding act is so broad that they even considered an employee who fell through the roof as being on scaffold. He was worried about the wording of the amendment which again makes it again very broad and subjective. He spoke against the amendment.

REP. MC CULLOCH restated the amendment and felt it was specifically directed toward hanging type ladders.

REP. MC GEE explained that scaffold by definition has the ladder necessary to get to the platform as an integral part of the scaffold. Therefore, any other ladder that is leaned up against the scaffolding would be superfluous, not part of the scaffolding and if a person falls off another ladder to get to the scaffolding when the integral ladder is available, that would be using a device beyond the intended purpose of the scaffolding. He spoke against the amendment.

REP. KOTTEL asked if the committee would ask the question regarding the support of the amendment by a member of the audience who was involved in drafting the bill.

REP. MC GEE objected.

Vote: Motion failed on voice vote.

Motion: REP. MC CULLOCH MOVED THE SECOND AMENDMENT. EXHIBIT 1

Discussion: REP. MC CULLOCH explained the reasoning behind the amendment and recalled that the sponsor had agreed to such an amendment.

REP. ANDERSON urged the committee to vote against this amendment because it would make a law which would say "you have to follow the law." He felt it was unnecessary and redundant.

Vote: The motion failed 6 - 12, REPS. CAREY, MC CULLOCH, DEBBIE SHEA, KOTTEL, LIZ SMITH and HURDLE voting aye.

Motion: REP. MC GEE MOVED THE SPONSOR'S ORIGINAL AMENDMENTS. EXHIBIT 2

Discussion: REP. HURDLE asked who was included when a "fellow employee or immediate employer" are excepted.

REP. MC GEE said he believed this was the language used in law regarding liability issues.

REP. BILL CAREY asked Mr. MacMaster to share his view with the committee.

Mr. MacMaster said he believed this amendment was written by the lawyer who testified at length on the bill. He did not believe it added to the but merely was the lawyer's preference in wording the sentence.

REP. MOLNAR said that every drafter of a bill has a right to have it worded as they see it and for that reason, he wanted to adopt the amendment and pass the bill out of committee.

Vote: The motion carried 16 - 3, REPS. KOTTEL, MC CULLOCH and HURDLE voting no.

Motion: REP. MC GEE MOVED HB 158 DO PASS AS AMENDED.

Discussion: REP. CAREY referred to written testimony dated January 23, 1995, by Russell Hill. EXHIBIT 3 His concern was on the second paragraph of page 1 that the bill would "remove whole categories of employees from Montana's workers' compensation." He asked Mr. MacMaster to comment.

Informational Testimony: A letter dated January 26, 1995, submitted by Mr. Hill is included as information testimony.
EXHIBIT 4

{Tape: 1; Side: A; Approx. Counter: 31.7}

Mr. MacMaster said he agreed with most of what Mr. Hill said on it, but did not agree with this particular point. He did not believe the bill could remove employees from workers' compensation if the employer covers them. The state Constitution says that a person has a right to sue anybody in negligence, but a person can't sue their employer if the employer has provided workers' compensation. In the case of an employee who has a scaffolding act type of accident, if the employee is working for an employer who is covering them with workers' compensation, the employee cannot sue the employer. He can sue third parties. If the employer is not covering the employees with workers' compensation, he is violating the law, then the employee can sue the employer. If the employee sues the employer under traditional negligence law, the employer does not have the defense of either contributory negligence or comparative negligence. That is one of the things this bill is designed to do; which is to say that the employer does have the comparative negligence defense. He can say that part of the fault lies with the employee.

REP. KOTTEL said her understanding was that the new section 2 repeats exactly what the law already does, but the way it is worded now, if an employer does not offer workers' compensation, an injured employee cannot sue under the scaffolding act to recover liability insurance for his injuries because of the exceptions on the last line of the amendment. By codifying it she wondered if they had removed a small group of people from having recourse for liability for negligence of the employee (sic).

Mr. MacMaster said he reads the amendment to mean that the contractor, subcontractor or builder are employers who use the scaffolding and are liable except for the fellow employee. "A fellow employee or immediate employer" of the contractor did not make much sense to him. He did not think that takes away an employee's right to sue, but it takes away the right of an employee who is a fellow employee of the boss to sue. He thought the section says "the employee cannot use 27-1-702, MCA, or rather the contractor, subcontractor, builder, employer, can use the comparative negligence statute against his employee."

REP. KOTTEL said they do not know who a fellow employee is.

REP. TREXLER asked if the committee would permit **Mr. Hill** to explain it from his standpoint.

REP. MC GEE objected.

REP. MC CULLOCH spoke from a layman's point of view that if there are two lawyers at this table who can't agree on what this information means, would the committee be sending out a "muddled" bill for everybody else to be confused.

REP. MC GEE said the bill makes sense. He felt it was easy to define who the people are as discussed in the bill. He felt the bill was simply saying that if an employee takes it upon himself to act out of negligence, that employee shall share part of the damage that he incurred as a result of falling.

REP. KOTTEL said to her it was unclear whether or not the bill supersedes workers' compensation. The Constitution does not require workers' compensation and so it is not a constitutional issue but a statutory issue. New statutes override previous statutes. Since workers' compensation is required by statute and this is a new statute, it is unclear whether this would override the previous statute by superseding the workers' compensation as indicated by its subtitle. Nowhere that she knew of in the statute are the new words, "fellow employee" or "immediate employer," defined. She also saw a problem with the non-delegatability (sic) of responsibility. She felt this statute is unclear and confusing and might very well overturn workers' compensation.

REP. MOLNAR clarified the terminology of the bill from his viewpoint and did not agree that it was "muddy" or unclear as to responsibility and it would allow for looking at the total aggregate of who is responsible.

REP. GRIMES referred to the new language of the bill in the amendment. He said he could understand what it was saying and that he believed it followed the sponsor's intent.

REP. KOTTEL discussed the concept of negligence per se and explained the difference between that and strict liability. She would strongly vote against the change in the law provided by this amendment.

REP. LOREN SOFT asked if any business in Montana could operate without workers' compensation.

Mr. MacMaster said the state workers' compensation law mandates that employers cover their employees with workers' compensation and very few are excepted from that. There are penalties for not complying with that law. He reiterated the employee's recourse in an injury when an employer had not carried workers' compensation insurance on him. Most of this bill simply codifies that right; this bill states it is subject to 27-1-702, MCA. Court case law says the employer cannot use the defense of comparative negligence. Under this bill an employer can.

Vote: The motion carried 14-4 by roll call vote.

Motion: **REP. CAREY** MOVED TO ADJOURN.

{Comments: This set of minutes is complete on one 60-minute tape.}

ADJOURNMENT

Adjournment: The meeting was adjourned at 8:55 AM.



BOB CLARK, Chairman



JOANNE GUNDERSON, Secretary

BC/jg

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL

DATE 1/27/95

| NAME | PRESENT | ABSENT | EXCUSED |
|--|---------|--------|---------|
| Rep. Bob Clark, Chairman | ✓ | | |
| Rep. Shiell Anderson, Vice Chair, Majority | ✓ | | |
| Rep. Diana Wyatt, Vice Chairman, Minority | | ✓ | |
| Rep. Chris Ahner | ✓ | | |
| Rep. Ellen Bergman | ✓ | | |
| Rep. Bill Boharski | ✓ | | |
| Rep. Bill Carey | ✓ | | |
| Rep. Aubyn Curtiss | ✓ | | |
| Rep. Duane Grimes | ✓ | | |
| Rep. Joan Hurdle | ✓ | | |
| Rep. Deb Kottel | ✓ | | |
| Rep. Linda McCulloch | ✓ | | |
| Rep. Daniel McGee | ✓ | | |
| Rep. Brad Molnar | ✓ late | ✓ | |
| Rep. Debbie Shea | ✓ | | |
| Rep. Liz Smith | ✓ late | ✓ | |
| Rep. Loren Soft | ✓ | | |
| Rep. Bill Tash | ✓ | | |
| Rep. Cliff Trexler | ✓ | | |



HOUSE STANDING COMMITTEE REPORT

January 27, 1995

Page 1 of 1

Mr. Speaker: We, the committee on **Judiciary** report that **House Bill 158** (first reading copy -- white) **do pass as amended.**

Signed: *Bob Clark*
Bob Clark, Chair

And, that such amendments read:

1. Page 1, lines 22 through 25.

Strike: "subject to" on line 22 through "construction of" on line 25

Insert: "when the damages are caused by negligence of the contractor, subcontractor, or builder in the use or construction of the scaffold, subject to the application of 27-1-702, for damages sustained by any person, except a fellow employee or immediate employer, who uses"

-END-

mw
1/30

Committee Vote:
Yes 14, No 4.

231400SC.Hdh

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

Judiciary Committee

DATE 1/27/95 BILL NO. ^{HB}158 NUMBER _____

MOTION: DO PASS AS AMENDED

| NAME | AYE | NO |
|---|-----|----|
| Rep. Bob Clark, Chairman | ✓ | |
| Rep. Shiell Anderson, Vice Chairman, Majority | ✓ | |
| Rep. Diana Wyatt, Vice Chairman, Minority | | |
| Rep. Chris Ahner | ✓ | |
| Rep. Ellen Bergman | ✓ | |
| Rep. Bill Boharski | ✓ | |
| Rep. Bill Carey | | ✓ |
| Rep. Aubyn Curtiss | ✓ | |
| Rep. Duane Grimes | ✓ | |
| Rep. Joan Hurdle | | ✓ |
| Rep. Deb Kottel | | ✓ |
| Rep. Linda McCulloch | | ✓ |
| Rep. Daniel McGee | ✓ | |
| Rep. Brad Molnar | ✓ | |
| Rep. Debbie Shea | ✓ | |
| Rep. Liz Smith | ✓ | |
| Rep. Loren Soft | ✓ | |
| Rep. Bill Tash | ✓ | |
| Rep. Cliff Trexler | ✓ | |

dissent

Properly Voted
attached

HB 158 Amad

1/27/95

Tash takes yes

EXHIBIT 1
DATE 1/27/95
HB 158

(1) As used in this part, "scaffold" or "scaffolding" means
a temporarily elevated platform, and its supporting structure AND
ANY LADDER OR OTHER MECHANISM USED TO REACH THE PLATFORM that is
used for supporting a person, material, or both. The term does
not include a-ladder-or-other mobile construction equipment.

(2) A person working on or near a scaffold shall MUST follow
the safety practices commonly recognized in the construction
industry and the safety regulations required by the person's
employer. EMPLOYEES INVOLVED IN ERECTING OR USING A SCAFFOLD
MUST BE INSTRUCTED BY THE EMPLOYER IN APPROPRIATE SCAFFOLD
ERECTION AND USE. EMPLOYERS MUST FOLLOW SAFETY PRACTICES
COMMONLY RECOGNIZED IN THE CONSTRUCTION INDUSTRY, AS WELL AS
APPLICABLE SECTIONS OF THE STATE AND FEDERAL OCCUPATIONAL SAFETY
ACTS.

Proposed Sponsored Amendment to HB 158

1. Page 1 Line 21 following "exceptions. (1)" strike the remainder of line 21 through 25 and insert:

"A contractor, subcontractor, or builder who uses or constructs a scaffold on a construction site is liable, when the damages are caused by the negligence of the contractor, subcontractor, or builder in the use or construction of the scaffold, subject to the application of 27-1-702, for damages sustained by any person, except a fellow employee or immediate employer who uses the scaffold."

Pro

Mike Young Atty
Ron McCulloch
Loren Darby - Contract.

strict liability - defense of contributory negligence is involved.
negligence w/ breach of duty - have to find a violation or fault.

Bill Barrett - Ins Agent

James F. Smith Ins Agent - availability of Ins.

Roger McGlen - Ex. Dir. Ins.

Ron Ashbrenner

Carl Schwitzer - MT Contractors Assoc.

Mike Young - human error applies to everything - the only thing 100% certain.

OF. Darrel ~~Miller~~ ^{Dolzer} AFL CIO. ^{may I HAVE - your. omitting LADDERS.}
Contract person for Mont CEH

NOT uncommon - Hanging Scaffold - ladder can be integral part of scaffolding.

Russell Hill - ~~MTA~~ MTLA

Carl -

Tool Box meeting -

Montana Trial Lawyers ASSOCIATION

Directors:

Wade Dahood
Director Emeritus
Steve D. Beck
Elizabeth A. Best
Michael D. Cok
Mark S. Connell
Michael W. Cotter
Patricia O. Cotter
Karl J. Englund
Robert S. Fain, Jr.
Victor R. Halverson, Jr.
Gene R. Jarussi
Peter M. Meloy
John M. Morrison
Gregory S. Munro
David R. Paoli
Michael E. Wheat

Russell B. Hill, Executive Director
#1 N. Last Chance Gulch
Helena, Montana 59601
Tel: (406) 443-3124
Fax: (406) 443-7850

January 23, 1995

Officers:

Gregory S. Munro
President
Michael E. Wheat
President-Elect
Gene R. Jarussi
Vice President
John M. Morrison
Secretary-Treasurer
William A. Rossbach
Governor
Paul M. Warren
Governor

Rep. Bob Clark, Chair
House Judiciary Committee
Room 312-1, State Capitol
Helena, MT 59620

RE: HB 158

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to House Bill 158, revising state scaffolding laws. If SB 158 operates as its proponents apparently intend, it will raise workers compensation costs in Montana by increasing serious injuries and decreasing subrogation payments to workers-compensation insurers.

MTLA believes, however, that SB 158 will not operate as its proponents intend and may, in fact, remove whole categories of employees from Montana's workers compensation system and subject their employers to civil liability.

Background. Montana's scaffolding laws, codified at Sec. 50-77-101 et seq., MCA, were first enacted before the advent of workers compensation in the state. The rationale behind those scaffolding laws remains as true today as then: working at great heights is extremely dangerous, and injuries caused by falls are extremely costly. Moreover, workers frequently exercise less control over their own safety at great heights than their employers do. Consequently, as Gov. Racicot correctly emphasizes, preventing such workplace injuries in the first place makes enormous sense.

Negligence per se. Proponents of HB 158 apparently believe that Sec. 50-77-101, MCA, creates strict liability for injuries whenever a contractor, subcontractor, or "builder" violates the statute. MTLA disagrees. A violation of Sec. 50-77-101, MCA, creates negligence per se, not strict liability. The difference is substantial. Strict liability subjects a defendant to liability *even when that defendant took all possible care*. Negligence per se, however, simply means that, when the defendant violates a statute specifically designed to protect a specific plaintiff, then legally that defendant is

responsible for *some* degree of negligence. MTLA believes, however, that:

- SB 158 does not remove scaffolding-law violations from the application of negligence per se.

- The statutory duty of a contractor, subcontractor, or "builder" to provide safe scaffolding also arises from other statutes which SB 158 ignores, such as Sec. 50-71-201, MCA.

- Negligence per se does not defeat the applicability of comparative negligence (i.e., reducing a plaintiff's damages to reflect his/her own fault). MTLA has been unable to find any Montana statute or court decision which prevents judges or juries from considering the negligence of workers in scaffolding-accident cases. To the contrary, the Montana Supreme Court in *Mydlarz v. Palmer/Duncan Construction Co.*, 682 P.2d 695, 703 (1984), expressly held: "Liability does not become fixed upon the showing of a scaffolding-associated injury." A plaintiff must still demonstrate that the violation caused the injury.

Non-delegable duties. Moreover, despite the intentions of proponents, SB 158 does not alter Montana law making certain duties of contractors, subcontractors, and "builders" *non-delegable*. For instance, the non-delegable duty of a contractor or subcontractor to protect the safety of workers often arises from contract, i.e. between an owner and general contractor. SB 158 would not affect these duties.

More importantly, as the Montana Supreme Court recognized in *Stepanek v. Kober Construction*, 191 Mont. 430 (1981), the adoption in 1972 of Montana's new Constitution clearly prevented owners, general contractors, subcontractors, "builders" and the like from delegating a duty of safety to employees covered by workers compensation. Article II, Section 16 of the Montana Constitution protects an employee's "immediate employer" from civil liability if that employer provides workers compensation coverage. But that Constitutional provision also makes certain employment-related duties non-delegable since workers compensation is a no-fault system; since remote owners/general contractors/etc. could easily subvert the constitutional language if they could delegate their duties down the line to an "immediate employer"; and since "immediate employers" shielded from liability by workers compensation obviously have much less incentive to prevent the type of workplace injuries addressed by scaffolding laws.

House Bill 158. Aside from the intention of its proponents, MTLA believes that House Bill 158 contains serious problems, including:

- **The definition of "scaffold" and "scaffolding."** HB 158, for example, doesn't limit this definition to construction-related activities. Temporary shelving and car jacks fall within the definition. The specific exclusion for ladders indicates that, without such an exclusion, equipment similar to ladders should be included. And the exclusion for "other mobile construction equipment" is terribly broad--broad enough to include even mobile scaffolding, precisely the type of equipment which the statute presumably intends to address.

- **Section 1, subsection (2).** By imposing a statutory duty of care on employees, this section conflicts with Montana's no-fault workers compensation scheme, at least regarding "immediate employers."

- **The phrase "person working on or near a scaffold."** This language imposes a duty on employees to follow complex safety practices designed to apply to industry employers. This language also applies to any employer "working on or near" a scaffold. The language is not limited to scaffolding-related safety practices and regulations.

- **The phrase "safety practices commonly recognized in the industry."** This language would replace the current duty of a contractor, subcontractor, or "builder" to exercise reasonable care in the matter of scaffolding with a statutory duty to follow an incredibly complicated array of safety practices detailed by such industry experts as the American National Standards Institute (ANSI), the National Safety Council (NSC), Underwriters Laboratories (UL), the American Society of Safety Engineers, the Institute for Product Safety, and even individual scaffolding manufacturers and OSHA.

- **The phrase "safety regulations required by the person's employer."** This language makes no provision for instances in which industry safety practices and employer safety regulations are inconsistent or even contradictory. *At minimum, SB 158 should clarify that an employee is not negligent if he/she is following the orders or safety regulations of an employer.*

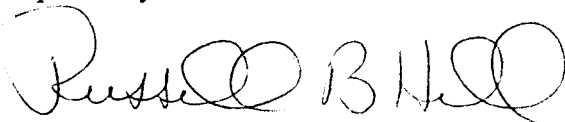
- **Section 2, subsection (1).** This language makes an employer liable for negligence. It unreasonably limits the scope of this section to contractors, subcontractors, and something called "builders," thus relieving such entities as owners from the duties imposed by current law.

- **The phrase "who uses or constructs a scaffold on a construction site."** This language extends to any person (not just employers or employees) who uses or constructs the scaffold, but it abolishes the protections in current law for such entities as passersby.

- **The phrase "except a fellow employee or immediate employer."** This language, taken from Montana's Constitution where it applies to the legal redress available to employees, makes little sense here where it applies to the duty of employers.

If I can provide additional information or assistance to the Committee, please allow me to do so. Thank you again for this opportunity to express MTLA's opposition to House Bill 158.

Respectfully,



Russell B. Hill
Executive Director

Proposed Sponsored Amendment to HB 158

1. Page 1 Line 21 following "exceptions. (1)" strike the remainder of line 21 through 25 and insert:

"A contractor, subcontractor, or builder who uses or constructs a scaffold on a construction site is liable, when the damages are caused by the negligence of the contractor, subcontractor, or builder in the use or construction of the scaffold, subject to the application of 27-1-702, for damages sustained by any person, except a fellow employee or immediate employer who uses the scaffold ."

Directors:

Wade Dahood
Director Emeritus
te D. Beck
abeth A. Best
Michael D. Cok
Mark S. Connell
Michael W. Cotter
Patricia O. Cotter
Karl J. Englund
Robert S. Fain, Jr.
Victor R. Halverson, Jr.
Gene R. Jarussi
Peter M. Meloy
John M. Morrison
Gregory S. Munro
David R. Paoli
Michael E. Wheat

Montana Trial Lawyers ASSOCIATION

Russell B. Hill, Executive Director
#1 N. Last Chance Gulch
Helena, Montana 59601
Tel: (406) 443-3124
Fax: (406) 443-7850

Officers:

Gregory S. Munro
President
Michael E. Wheat
President-Elect
Gene R. Jarussi
Vice President
John M. Morrison
Secretary-Treasurer
William A. Rossbach
Governor
Paul M. Warren
Governor

January 26, 1995

Rep. Bob Clark, Chair
House Judiciary Committee
Room 312-1, State Capitol
Helena, MT 59620

RE: HB 158

Mr. Chair, Members of the Committee:

Thank you for this opportunity to supplement--and correct--MTLA's written testimony to this committee regarding HB 158 on January 24, 1994.

1. As MTLA testified, Scaffolding Act cases do hinge on "negligence per se."
2. As MTLA testified, Scaffolding Act cases do consider the carelessness/fault of injured employees, because:

- "Negligence per se" only applies when an employer violates a Scaffolding Act requirement *which was designed to prevent the type of injury which occurred*. Clearly, for example, the Montana Legislature intended guard rails on scaffolding to prevent accidental falls. But just as clearly, the Montana Legislature did not intend guard rails to prevent employees from intentionally throwing themselves from scaffolds, and did not intend guard rails to absolutely guarantee the safety of drunk employees. In such cases, the fault of employees would bar recovery.

- "Negligence per se" only applies *when the violation of a Scaffolding Act requirement actually caused the injury*. If the violation had nothing to do with the injury--if, for example, the injured employee's carelessness and not the violation caused the injury--then the Scaffolding Act imposes no liability on the employer.

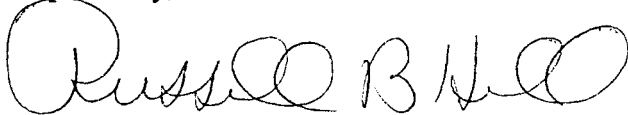
3. Nevertheless, once a court or jury finally applies negligence per se to an employer, then Mr. Young's testimony regarding Scaffolding Act cases is correct: the employer cannot at that stage reduce compensation by comparing its own fault to that of the employee.

Consequently, MTLA's testimony on January 23 at page 2, lines 7-8, regarding comparative negligence is incorrect to the extent that it refers to Scaffolding Act cases. I apologize for that misstatement. I respectfully ask this committee to accept my correction.

4. Still, as MTLA testified, Montana law prohibits consideration of an employee's contributory negligence (along with other historical defenses to a workers compensation claim) not just because of Sec. 50-77-101, MCA, but also *because of the "immediate employer" language in the Montana Constitution, Art. II, Sec. 16.* Consequently, MTLA continues to believe that HB 158 will not alter constitutional, non-delegable imperatives by simply amending Sec. 50-77-101, MCA.

If I can provide additional information or assistance to the Committee, please allow me to do so. Thank you again for this opportunity to clarify MTLA's opposition to House Bill 158 and correct my mistake.

Respectfully,

A handwritten signature in dark ink, appearing to read "Russell B. Hill". The signature is fluid and cursive, with the first name "Russell" being more prominent and the last name "Hill" following in a similar style.

Russell B. Hill
Executive Director