MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

SUBCOMMITTEE ON LABOR & EMPLOYMENT RELATIONS

Call to Order: By **CHAIRMAN FRED THOMAS**, on January 21, 1997, at 1:00 P.M., in 413/415

ROLL CALL

Members Present:

Sen. Fred Thomas, Chairman (R)
Sen. Bill Wilson (D)
Sen. Thomas Keating (R)
Sen. Debbie Shea (D)

Members Excused: Sen. Dale Mahlum (R) .

Members Absent: None.

Staff Present: Eddye McClure, Legislative Services Division
Gilda Clancy, Committee Secretary

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

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 3, SB 5, SB 45; N/A

Executive Action: None.

Note: The Committee was divided into a subcommittee to review SB 3, SB 5, & SB 45. This is not an official committee per Senate rules, but deemed necessary by the Chairman.

{Tape: 1; Side: A; Approx. Time Count: 1:07 p.m.}

Informational Testimonies Given By:

Russ Penkal, Independent Contractors of Montana
Lawrence Hubbard, Legal Counsel State Workers' Compensation Fund
George Wood, Montana Self-Insurers' Association
Jacqueline Lenmark, American Insurance Association
Riley Johnson, National Federation Independent Businessmen
Don Allen, Coalition Workers' Compensation System Improvement
Jenny Dodge, Independent Contractor

(EXHIBIT 1 was received from Fred Stevenson by FAX.)

Testimony On SB 3, SB 5, & SB 45

Russ Penkal, Independent Contractors of Montana, stated his group represents a large segment of Montanans whom these bills address, and they were not represented in the last session when SB 354 was passed. He said most of them were not aware of that bill and the impacts and changes that bill would bring about until they started receiving threatening notes in letter form from the Department of Labor & Industry. This session they have formed together to have a voice in what is happening this time. They are opposed to SB 354 as is, from various aspects. They are aware this bill is being challenged on Constitutional grounds and for that reason they feel the repeal of SB 354 would be in the best interest of the state. There were three intents in SB 354, the intent to protect Workers' Compensation and Unemployment funds, the second was to protect the consumer, and the third intent was to control the level of playing field. The second intent, which was consumer protection, was all crossed out. The bonding and everything else that was in there which was required eliminated access to the consumer. So this is a bond for state purposes.

Mr. Penkal stated that apparently in the last session it was identified that the independent contractors were the main problem of Work. Comp., Unemployment and liability. He phoned the State Fund to find out exactly how many cases they had where the independent contractor was injured and claimed compensation based on the status of an employee instead of an independent contractor. Initially they told him it was so rare, then he checked later and they came up with about 9 cases in the past 3 years, about 3 cases per year.

Mr. Penkal said that showed him there was not good documentation to show such an extensive bill. The third intent dealt with independent contractors not carrying Work. Comp. As it is, this bill still maintains independent exemption status. A person can still do that. All they have to do is pay $80 and get registered with the state, so if that's the real accusation, this bill doesn't really address that. He knows of a group of contractors which supposedly represented everyone in Montana, which was the Montana Home Builders' group. They claimed that the reason to joining their group was to receive 15 to 20% off Work. Comp. at the State Fund. This means recently they cut a deal with the State Fund and tipped the playing field in their favor. Again, it depends on what side of the fence you are on. They consider it inappropriate for the government to try to control leveling the playing field. They are also opposed to this bill because generally it discourages free enterprise. You have to jump through more hoops now to get registered to actually begin a business.

Mr. Penkal starting painting part-time when he was attending college to support his family and help pay tuition. Today if this bill was in force, he probably wouldn't be able to do that. It would eliminate a lot of general contractors from being in the same playing field as part-time workers. The bill actually does not provide consumer protection but increases the hiring units' liability. If the hiring unit does not check on every person that comes on the job site, this bill makes them automatically liable for the omissions of the person which comes on to the job site. When **Mr. Penkal** was at the meeting held by the Department of Labor & Industry, they set up an 800# hot line that the hiring unit had to call for every independent that came on the job site. If only one independent comes on the job site, that job site could be shut down for an undetermined amount of time. There was no determination on who is responsible for the shut down while it goes through the appeal process. They believe that bill reduces the right to work to a privilege granted by the state. Before this bill, under the Constitution, we had life, liberty and the pursuit of happiness. Now this has been turned over to the Department of Labor & Industry who governs these things by rules and regulations. They can keep their own money, they have their own court system, and the Department can determine whether or not he has the right to work. They can take that right away for any reasons they see fit in the rule-making process. Another reason they are opposed to this bill is that it arbitrarily enforces Workers' Compensation policies on one group of laborers in the State of Montana, and that is the construction industry.

Presently Workers' Compensation is required on every employee in the state and this bill only addresses the construction trade. They feel that is an arbitrary law. Again, it does not allow the hiring unit to bond around work stoppage, this is a major consideration. It would reduce the option of homeowners to have the choice of contractors. They feel the state has interfered with the right to enter into contracts freely. Now we have a third party entering into a contract between employee and the contractor and that third party is the State of Montana. The state gives permission on whether or not independent contractors can enter into their contract. This bill builds a state bureaucracy giving them the authority to make and enforce and judge rules, keep the money from fines, search premises without search warrants, levy fines and cite people even through their employees using the preponderance of evidence for trial purposes. Basically you are guilty unless you show up. It is entire process which we feel it is excessive legislation again for documentation which hasn't been proven to be necessary. This bill started out under the guise of consumer protection but there is none of that left into this bill. If there is some needs the

Mr. Penkal would like to make some proposals to challenge the construction field to police their own ranks, maybe using some of the independent agencies such as the **Independent Contractors of Montana Homebuilders' Association** to set up some sort of education program in which to educate the consumers. Maybe on

how to hire contractors or to set up a list of contractors that may have gone through some sort of screening process through their associations. Presently the homebuilders do not have such a screening process, the only thing a contractor has to do is pay $80. **Mr. Penkal** is familiar with **REP. MOLNAR'S** bill which deals with repealing this and the upward migration of liability. He identifies who an independent contractor is and if they enter into a contract they are not allowed to claim injury for Work. Comp. purposes on the hiring unit's Workers' Compensation. **Mr. Penkal** believes this is a good bill and would appreciate the Committee looking into that as an option.

Lawrence Hubbard, Legal Counsel For The State Compensation Insurance Fund, said he would like to address what he thinks about the independent contractor exemption and the registration law. Their concern is not with the contractor registration law, but with how the independent contractor statute, section 39-71-120, is to be dispensed. He would like to draw some distinction between the three bills on that section. SB 3 essentially restores the independent contractor law to its pre-1995, SB 354 status. It abolishes the exemption requirement, it still allows it optional. It also abolishes the fee of $25 for subsequent applications to the Department of Labor. SB 5 repeals the contractor registration law and revises the bonding requirements and also abolishes 'C' in section 39-71-120, but it leaves the fees for independent contractor subsequent application and one-year renewal requirement in place. SB 45 revises the contractor registration law, it also abolishes subsection 'C' of 39-71-120 and leaves the current fee structure in place. It also contains a provision regarding 39-71-405, the contractor over-liability we've heard about. That is not in SB 3 or SB 5. The State Fund strongly believes that if independent contractors want to exempt themselves from the system they should pay for it. It is not something employers who are insuring their employees should pay for. They certainly think, in that respect, that SB 5 has a viable point in that it leaves the fee in place. However, from their perspective if the exemption lasts for one year or until the contractor gives notice that the exemption no longer applies. Most importantly, however, is the inclusion of the 'A,B' test which has been in existence of Montana statutes since the 1940s. In its current form, prior to 1995 since 1973, it worked for us. It had worked for our insureds, it worked for our employers and our employees.

Mr. Hubbard understands these are two different issues but this is a piece of all three of those bill. There is not much controversy in getting rid of subsection 'C', making it optional. They support the return of the law to the pre-1995 status, leaving the 'A,B' test, leaving the presumption that people who work for you pre-pay our employees, and allowing independent contractors to either cover themselves or opt out of the system with the exemption process.

George Wood, Montana Self-Insurers' Association, said they have no position on the contractor registration law. Some of their members may, but that is not the status of the association. The independent contractor issue is, and they are asking the Committee to come up with something so that when they hire someone who holds themselves out to be an independent contractor, that they have a simple and recognizable set of standards that states 'up front' this person is an independent contractor and we can count on it. They don't want the law written in such an extent that it is subsequent to the activity that it is determined whether or not there is an independent contractor relationship. They also think someone who exempts out should pay a fee to exempt out of the act. They have some real problems with the upward movement of liability, since it penalizes members who are complying with the law and have Workers' Compensation covering all employees pay for someone who is operating illegally since they don't have coverage. They can live with the pre-1995 law, but they would like it if something were written which states they can contract the independent contractors' situation, in other words, if you hold yourself out but I can contract with you and that contract is binding, we don't have to go through some approval procedure. So often we hire our independent contractor because we need the emergency service and we don't have time to check with the state. For that reason, we suggest you look closely at some type of determination that does not require the registration.

Jacqueline Lenmark, American Insurance Association, (AIA), stated the AIA takes precisely the same position on the independent contractor issue as was articulated by Mr. Wood on behalf of Plan 1. Additionally, she would like to call to the Committee's attention, is if we get into the bond requirements on the contractor registration piece, she would like the opportunity to talk more about how those bonds operate and the language that is used there. She is not sure the subcommittee will reach that in this fairly arcade area of insurance law.

Riley Johnson, National Federation of Independent Businessmen, (NFIB), stated they support the efforts that are expressed by **Mr. Wood.** They surveyed all their members last December with the question of eliminating 'C', over 82% responded that it is a problem. They also feel there should be contractual allowance regarding a contractual agreement between an employer and an independent contractor. They feel they can police their own and can deal in an appropriate way to contract between two people who hold themselves to be independent contractors.

Don Allen, Coalition for Workers' Compensation System Improvement, said they would like to work with everyone to resolve this issue. In regards to the independent contractor exemption, he believes it got mixed in with SB 354 with the construction contractor registration bill. They have had several forms around the state over the past two years at which time the hottest issue was concerning independent contractors. Often, the

real problem was the two pieces of legislation were confused. So they hated the contractor registration bill because they thought it changed their world in terms of independent contractor exemption. They have supported this issue in many ways and have been concerned about how to keep the person who claims to be an independent contractor from becoming an employee. He believes the truth is, there are probably not that many real cases which can be identified. They believe there still needs to be some way to make it work better while at the same time it is obvious this solution that worked out last time was too onerous and has not been accepted well. They support other options in defining what an independent contractor is. As far as eliminating the 'C' **Mr. Allen** states that is unanimous that needs to be done. He is willing to work with the subcommittee regarding this.

Jenny Dodge, Independent Contractor, stated she has talked to several independent contractors in the Helena area and they would like to be registered and think they are for the bill because they want to be registered. She has sent a copy of the bill to these people and said they are "just blown away" with all the red tape. Referring to SB 45, page 6, section 8, subsection 2, **Ms. Dodge** said this really bothers her, that the department shall set the fees by administrative rule. She feels that is asking an independent contractor to sign a blank check. There is no definition as to what the fee intent is, it is pretty sketchy. Page 12, section 16, subsection 1, refers to the contractor who has failed to register in accordance with this chapter or the rules adopted under 39-9-103, the department may issue an order immediately restraining further construction work at the work site by the construction contractor. The word 'immediately' is bothersome to **Ms. Dodge.** She gave a scenario that if she were in Lewistown on a job and forgot her card, and an inspector comes onto the job site and shuts me down. She has a schedule she has to meet, is she suppose to drive all the way back to Helena to get her card and then go back to the job? She believes that is unrealistic.

{Tape: 1; Side: A; Approx. Time Count: 1:33 p.m.}

CHAIRMAN FRED THOMAS made the decision to set SB 5 aside to report to the Committee that bill be tabled and if needed, it can be taken off the table moved forward. **SENATOR THOMAS** reported he has amendments which **Lynn Havdahl of the Transportation Organization** gave him for SB 3, so he would like to wait to have **Mr. Havdahl** present those. He called for any amendments anyone present had for SB 3.

Chuck Hunter, Department of Labor & Industry, stated that **SENATOR BILL CRISMORE** has drafts on the independent contractor definition. That bill will be coming forward to the Committee and redefines the definition of independent contractor in terms of independent business owner. It also would eliminate the exemption process the **Department of Labor** currently provides.

Amendments Discussed:

Lawrence Hubbard, Legal Counsel For State Compensation Insurance Fund, said one issue which has been raised regarding employer-employee relations is that if one states he is an independent contractor and they shake hands, that is good enough. He sees that as lawyer's relief, and being a lawyer that is something he would welcome. What that tells him is this situation will be litigated, because that worker that everyone describes as an independent contractor, as they go to the rooftop and are falling between there and the ground they turn into an employee. The employee is injured and has a family to feed, has kids to clothe. That agreement is going to be a distant memory, in fact forgotten. The handshake will be no good. Right now, we have a presumption that if someone is working for you, they are an employee. If you can prove they are in their own business and free from your control, they are independent contractors. We don't want to pick up claims as a carrier for true independent contractors. But we also want to make sure there is a starting place and that employees are legitimately covered. We do not want more litigation. It costs a lot of money for the employer, for the claimant, and for the insurer. **Mr. Hubbard** believes that the prior system worked well. **Chuck Hunter** mentioned a bill that **SENATOR CRISMORE** will be advancing. They have seen that bill in the working draft stages. It incorporates in the statute many of the 'A,B' test factors which the courts have applied over the years under the pre-1995 law, the 'A,B' test. His view is that if it is in statute and people can read it, it makes it easier to follow. There are very good attributes to that bill. It does eliminate the exemption option, but his understanding is that often times the Supreme Court will look beyond the exemption process and analyze whether they are free from control or in their own independent business. The handshake is not the place to start. In fact, it is currently the consideration under those court cases. The intent of the parties is definitely evidence to consider, if you intended to enter into that relationship, we wouldn't ignore that, but often times what you get is the employer saying, "Oh, you agreed to be an independent contractor", and the injured worker saying, "I didn't say that". It creates more problems than it cures.

SENATOR TOM KEATING asked if a written contract helped override legal presentment. **Mr. Hubbard** answered he believes a written contract is better evidence, it is certainly tangible evidence of an initial agreement. He has looked at a lot of contracts over the years in this area and you can find evidence of control in those agreements, where it is really not an independent contractor relationship. Really, aren't we looking to the facts of those relationships? Aren't we trying to discover what the true picture is, when we are trying to ascertain whether at a point in time this worker was an employer, an independent contractor? **Mr. Hubbard** believes this is an important consideration, to find out what the facts were. Was it true? If he signs a piece of paper it is, but if he is hunting for a job

he may sign anything. **SENATOR KEATING** asked **Mr. Hubbard** if a written contract is not a certain barrier to court decision to the contrary. **Mr. Hubbard** answered that is correct.

CHAIRMAN THOMAS stated that **SENATOR CRISMORE'S** bill will be introduced when it comes in.

CHAIRMAN THOMAS said discussion at this point was open to SB 45 to put together a proposal to the full Committee. The first section in SB 45 deals with bonding, the following sections do as well. He asked for discussion among the Committee on these bonds.

SENATOR WILSON asked **SENATOR KEATING** for the rationale in increasing that bond to $10,000. **CHAIRMAN THOMAS** answered him stating that the level was too low to address unpaid wage considerations.

SENATOR KEATING stated that what he heard in the discussion on this is that the bonding for a general contractor, or a contractor with a number of employees, bonding may be a suitable action to protect payroll and that sort of thing. But for the independent contractor, particularly the self-employed, non-employer type who under this proposal suddenly has to have a bond, most don't own property and want to be an independent self-employed construction contractor by subcontracting certain jobs or doing certain things in construction, they don't have any employees but are required a bond and they can't buy a bond because they don't have any property, they don't have any collateral. It works a hardship on individuals that want to go to work. If it is possible for a differentiation between the self-employed non-employer type not being required to have a bond as opposed to an employer contractor having a bond for the protection of payroll. That is where he sees the disagreement from the people in the business end of this.

Don Chance, Montana Building Industry Association, stated the question on the bond is a little complicated. His association has done quite a bit of investigation with the **Department of Labor** and in realities of how these bonds have or haven't been used in the past. The conclusion they have come to is that the bond amount is so low that does not represent a significant protection or deterrent in the case of failed wages or Unemployment insurance, but most particularly when there is an accident and Workers' Compensation payments are required. Talking to the **Department of Labor,** it is common for them in the case of an accident to require the offending party to pay, not only the back premium for Workers' Comp. which should have been paid, but also penalties. Then the individual is responsible for all the medical claims and all the rest, so many of these settlements are $25,000, $50,000, or $100,000. A $4,000 or $6,000 bond doesn't do anything in terms of $100,000 settlement, so they going after the individual in a broader, more expensive context. The second element of the bonding is that the element

of their industry where there has been a problem, is that someone wants to call themselves an independent contractor but, in fact, they are an employee. Or they are calling themselves an independent contractor and they have employees but they are not calling those people employees, they are calling them independent contractors. The bond was specifically designed to try to get that accomplished in the industry. The other thing is that people who are employers and had employees basically were already paying all those things, so there is that question as to how effective the bond requirement was. Finally, one of the biggest complaints with contractor registration law was the administrative headache that the bonding requirement created for everybody. It was a big headache for the **Department of Labor** and has been a big headache for them and others in the industry. **Mr. Chance** said they have come to the conclusion to just get rid of it, it is not necessary, it does not provide any real deterrent at this point in time with compliance of the law. It would solve 80% of the problems that many people have with the statute.

SENATOR WILSON asked for an opposing view if anyone present had one.

Carl Schweitzer, Montana Contractor's Association, said he is not in opposition to the bill, but one of the components of this original bill is some protection for the public when a contractor was hired, and that was taken out of this bill. The bond was one of the major provisions that related to protection. Their position is that they would like to keep the bond in so at least we have the opportunity to provide some public protection at a later point in time. The real problem is with the person who says he is an independent contractor without employees. This bill takes the bonding away, if it is taken away in that segment, perhaps it shouldn't be for any segment.

{Tape: 1; Side: B; Approx. Time Count: 1:47 p.m.}

Don Chance explained an old section in the statute which deals with wage claims which is peculiar and specific to the construction industry. Basically, it states the **Department of Labor** can come after a general contractor in a case where a person has hired a subcontractor, that subcontractor has stiffed his employees and has not paid his wages or Unemployment insurance. The Department can then come back on the general contractor to pay that other person's employees. They, in those amendments, have advocated eliminating that whole section of the law, again, trying to sever that liability that moves from contractor to contractor. They are the only industry in the state right now which has that special provision. They are being treated somewhat uniquely.

SENATOR KEATING asked **Eddye McClure, Legislative Services Division,** what section **Mr. Chance** was speaking about. **Ms. McClure** answered she thought is was 39-3-7.. but she is not sure exactly what section.

SENATOR KEATING asked **Mr. Schweitzer** if his organization is bonded by the Federal Government as well. **Mr. Schweitzer** said they are not. **SENATOR KEATING** asked if that state requirement for bonding in the beginning for payroll purposes and had nothing to do with Workers' Comp. **Mr. Schweitzer** answered that is correct. **SENATOR KEATING** then stated that from the testimony, the bonding does not work for the Department of Labor. Is that in regards to the bonding for payroll or the bonding Workers' Comp. or both?

Chuck Hunter answered that the amounts of the bonds collected for purposes of Work. Comp. protection, they did not feel were really sufficient to deal with the industry. They felt the old contractors' bond under the old law did not really address wage protection issues as well.

Mr. Schweitzer said it was an ignored law. Some of the general contractors were beginning to require it from their subs, but not that many general contractors were even using it.

SENATOR KEATING then asked if this meant if the subcontractor does not provide the bonding for payroll and Work. Comp. coverage, then it goes back on the general contractor. **Mr. Schweitzer** answered that is correct.

CHAIRMAN THOMAS said then going back to the bond and it being designed to address the independent with no employees, and if we do that in this section, then the bond would be required on a contractor with employees. That is where you've got payroll, Workers' Compensation, and Unemployment to pay. Maybe this goes back to the original law if it tends to gear towards the independent contractor with no employees and yet we have a bond that is guaranteeing we will pay unpaid premiums and wages that there shouldn't be any of. **Mr. Schweitzer** stated that he thought the person who would register and say they have employees, probably the segment of the industry that is paying the Workers' Compensation for their employees, because if they are acknowledging they have employees, they are probably following the law. The following is an example of someone who presents themselves as an independent contractor and runs into a problem. There was a job being done in Townsend. The contractor said he was an independent contractor with nobody working for him. All of a sudden, on a weekend, there were three or four other people on the job. Then the general contractor is questioning who is paying the Workers' Compensation on these people and where do they come from. That is the person who is the problem, they state they are an independent contractor with no employees and then all of a sudden there is somebody working for them. That's why they felt everyone should be bonded.

CHAIRMAN THOMAS asked **Mr. Schweitzer** if somehow this bond will help in that situation, but it won't instate Work. Comp. coverage or Unemployment, it only will pay premiums which should have been

paid. **Mr. Schweitzer** answered this is true, it is not a big bond but it is something.

SENATOR KEATING asked if a solution might be that bonding for Workers' Comp. is insufficient and Work. Comp. is insurance anyway, why do we have to have insurance to have insurance? Workers' Comp. is insurance which is required if you want exclusive remedy from liability. The general contractor wants to be able to make the subs have a bond for payroll so that the general doesn't get stuck if a sub fails to make a payroll. Is there a way that we can eliminate the bonding for Workers' Comp. and then put a barrier for recourse to the general for the sub's employees if the sub fails to make payroll? Which would be easier, to try to have a barrier of protection for the general against failure to make payroll by the sub, or would it be easier for the general to require bonding of the sub for just payroll, not Workers' Comp.? We've eliminated Workers' Comp. as a requirement for bonding.

Don Chance responded the reason this is so confusing is that when the bill was passed last session, they took the new bonding requirement and they used an old part of the law to create that new bonding. Their solution to this problem is to eliminate the old statutes, Section 39-3-701 through 706. That prevents the upper migration of liability on wages, Workers' Comp. premiums, and Unemployment insurance. That solves the problem of a general contractor becoming responsible for the subcontractor's lack.

{Tape: 1; Side: B; Approx. Time Count: 1:58 p.m.}

Russ Penkal referred to the bonding requirements. The independents feel that they would like to be accountable for their own actions. They would rather have the option of purchasing their own policies whether it be Work. Comp. or some other disability policy to protect them. They want that option and they don't think all the legislation and laws are necessary to do that.

Lawrence Hubbard explained one scenario they encountered under these bonding provisions. The bond can be used for Unemployment Insurance contributions and Workers' Comp. Insurance liability. Normally what happens when they get involved is that there will be an uninsured subcontractor on the job site with employees. A Workers' Compensation claim will be made for the injury. The uninsured employers fund will reveal and investigate the claim, find out who the employer was, find out whether there was a prime contractor. If they find a prime contractor under section 39-71-405, they will send the claim to the insurer who insured the prime contractor. When our prime contractors get that liability on their policy, they are very upset. They are angry that they got stiffed by somebody who was uninsured and they also have the loss on their policy which is going to affect their experience modification and their losses. They would be very pleased if we had a bond to go against to recover, maybe not all, but some of

that liability which they incurred from that uninsured contractor. **CHAIRMAN THOMAS** asked if the bond applied. **Mr. Hubbard** said under the current language it states to insure Unemployment insurance contributions and Workers' Compensation insurance liability, that liability they have to us is under section 405. We can go against that uninsured employer dollar for dollar for the benefits we pay under that prime contractor's policy.

CHAIRMAN THOMAS asked **George Wood** if he thought the term liability is different than premium. **Mr. Wood** answered he did. He said the difference between his position and the State Fund's position on this isn't so far away, but remember, the State Fund has a place to go to spread the risk and collect the money from somebody. But when this happens to them, it stops right here, they do not have any recourse. He believes that Workers' Comp. probably shouldn't be carried in this. When this bill was originally written, it was a consumer protection act and the bonding had some thing in it. Very truthfully, if you had some elderly person who is "stiffed" by some contractor, then the consumer protection comes right. We are taking our chances with the Unemployment liability. He believes if the bonding is written, it should be written for the wages if that's what we want, or it should be written for consumer protection.

CHAIRMAN THOMAS asked in that sequence, Workers' Compensation insurance liability, if that included premiums and a claim. **Lawrence Hubbard** responded that in the situation he described it is not premium at all. The liability that uninsured employer has is for the benefits paid, not premium. **CHAIRMAN THOMAS** then asked with this language, if just unpaid premium be on Workers' Compensation? **Mr. Hubbard** answered that he thought so. He would consider premium liability.

SENATOR KEATING asked **Mr. Hunter** what his experience was with the size of the claim in the Uninsured employer program. **Mr. Hunter** responded it is a little difficult to put an average there, they have claims that are medical only which are several hundreds of dollars, they have had claims up in the $50,000's to $125,000's. **SENATOR KEATING** stated that a $4,000 bond is not much then. **Mr. Hunter** said it would be the unusual Work. Comp. claim which is settled for less than $4,000.

Jacqueline Lenmark, American Insurance Association, stated the language in the bill presently does meet that you could go against the surety bond for Workers' Compensation benefits, not just premium. She believes you can safely anticipate your surety bond is going to dry up. If your attention is to convert a surety bond into a Workers' Compensation policy, she believes you will not find much availability for those bonds. **CHAIRMAN THOMAS** asked **Ms. Lenmark** if she would be willing to check on that and compare that to another state's laws and what they deal with in this regard. **Ms. Lenmark** responded she would.

CHAIRMAN THOMAS stated no action would be taken on this bill today.

SENATOR KEATING asked if they had ever received any suggestions about how to stop the upward flow of liability. **Don Chance** answered that administratively, yes, but tort. The administrative migration of liability currently is created because we have it in statute. That is section 39-3-701 through 706. If we eliminate those statutes and that is coming back against the general contractor. In the case of a torte claim, where we have an accident, the only way for a general contractor to protect himself is to make sure that everyone who is on that construction site is insured. **Mr. Chance** is referring to the Workers' Comp. contractor liability statute section. Our insured, the prime contractor, would get the claims from the uninsured employee. That is section 39-71-405.

Lawrence Hubbard said this is in **Ben Havdahl's** amendments to SB 3. In essence, this addresses the upward migration. **Mr. Hubbard** believes that this section 4 on these amendments, are taken out of HB 252.

Chuck Hunter pointed out that the language on page 8 of SB 45, Section 9, lines 1 through 7 of this bill, states that when a construction contractor hires another registered contractor the upward liability movement for Workers' Comp. is prevented, which is section 405, and for Unemployment insurance. **Don Chance** said as far as they have been concerned, that section of the bill under the old statute is probably the most important language in terms of severing liability in the industry.

Riley Johnson, National Federation of Independent Businessmen, asked about the administrative rule regarding the upward mobility of liability and tort law that **Don Chance** mentioned. **Lawrence Hubbard** answered that just because it is clear the uninsured subcontractor is the employer by law, and the Supreme Court has basically given exclusive remedy to the employer, but not the third parties. Even though the prime contractor is getting the contractor over-liability for Workers' Comp. to pay benefits, he isn't given the exclusive remedy protection of the Workers' Compensation Act. So that prime contractor, if the contractor was negligent in some way, can be sued in a civil case or tort case. **SENATOR KEATING** asked if there was a way to protect against that. **George Wood** answered that they do, they put them on the payroll. There is no reason to get stuck twice. **Mr. Hubbard** said in regard to the language **Mr. Hunter** referred to on page 8, line 1 - 3, particularly line 2, "contractor is not liable as an employer for Workers' Compensation", he feels it might be helpful to say, "An employer is not liable under 39-71-405", which is our contractor under liability statute. Remember, the prime contractor may not be an employer of that injured worker. He thinks it would be clarified if that section were referred to. In line 2, after "an employer", insert "under 39-71-405" then continue "for Workers' Compensation". **Mr. Hunter**

stated he had one disclaimer to that. Under 405 the liability extends for payment of benefits in this clause, he is not sure it extends for payment of premiums. The language here might be broader as far as the word "premium" is used. **CHAIRMAN THOMAS** said if we don't have the liability we won't be looking for the premium. If we don't have to pay the claim, we won't be going after the money.

CHAIRMAN THOMAS asked the subcommittee to refer to page 8 and 9, section 10, line 27 through 30 and then on the next page. We have a position on that if we can get **SENATOR MAHLUM** to concur. **SENATOR WILSON** asked who proposed $1,000 in place of $2,500 on line 29. **CHAIRMAN THOMAS** responded he believed **Mr. Chance** proposed $1,000. **Don Chance** said they have withdrawn their recommendation to reduce this to $1,000. He said they would prefer to see it at $1,000 but knows this is something important to **SENATOR HOLDEN** and told him we would be satisfied with his $2,500 proposal.

Mr. Penkal said he does not like the idea of the right to have to get permission from the state to contract, but if this has to be, he would they would like to see the minimum as large as possible. He mentioned the wording that you cannot advertise if you do that kind of work. Part 3 on page 9 it states, "this exemption prescribed in this subsection does not apply to a person who advertises or puts out any sign or card or other device that might indicate to the public that the person is a construction contractor or is qualified to engage in the business of a construction contractor". He said word of mouth is one way of contracting, if you agree to do a job this way you've potentially violated this law no matter which way you turn. **CHAIRMAN THOMAS** responded unless there is a recommendation of the level there we will leave that alone. **SENATOR WILSON** said he is inclined to support **SENATOR HOLDEN'S** proposal on this section. **Chuck Hunter** referred to **Mr. Penkal's** statement about advertising. In some of the amendments to the original act that were put into this bill the prohibition about advertising was attempted to be removed, regarding registering or unregistering. This may simply be a section that was missed, so it may be something worth looking into. **CHAIRMAN THOMAS** said this refers to page 9, line 3, beginning with who advertises and puts out a sign. **Mr. Hunter** is indicating that **SENATOR HOLDEN** wanted to eliminate advertising provisions, and this may have been an oversight, so we'll highlight that and take it up with **SENATOR HOLDEN.**

CHAIRMAN THOMAS then referred to the professional licensure exemption, page 10, line 3, subsection 19. He understands if you have a professional license from the state, you are exempted from the contractors' law. **Chuck Hunter** said this pertains to being a licensed dental hygienist, licensed attorney, licensed doctor, etc. under the state's licensing laws, you are then exempt from the contractor registration requirements if you want to be a builder. In speaking with **SENATOR HOLDEN,** he does not believe this was the intent, he thinks this was a technical error.

SENATOR KEATING asked if the licensed electricians are exempt under another section. **Mr. Hunter** responded they are. **SENATOR KEATING** said he thinks that section should be omitted. It is too general and too vague. **Jacqueline Lenmark** said she may not have correctly understood **SENATOR KEATING'S** suggestion, but she thinks we may not want to strike that subsection in its entirety. You may want to amend it to say, "a person acting within the scope of their professional license" because she thinks you are not attempting to draw certified public accountants or attorneys or insurance agents into the provisions of this bill, and it is her understanding that was the intent to exempt those professional persons when they are operating in the scope of their professional license. **Ms. Lenmark** believes **Mr. Chance** is correct. If they are working part-time as a builder, this would seem to exempt the dental hygienist who is working part-time as a builder, she does not believe that was the intent. She thinks that exemption should be retained and then just clarify working in the scope of their profession. **CHAIRMAN THOMAS** asked what that creates. If he is a licensed insurance agent working within his profession, then he is exempted. If I'm identified as a construction contractor, I've got to get a license.

{Tape: 2; Side: A; Approx. Time Count: 11:31 p.m.}

Jacqueline Lenmark responded if you delete this subsection in its entirety, you are requiring insurance agents, attorneys, CPAs, etc. to license or register themselves under this law, and in effect, you will be requiring a double licensure of those professions. They all are licensed to practice their profession by separate conditions of the code. She believe we do want to protect the construction industry from those persons being able to act as contractors without some sort of registration. **SENATOR KEATING** stated if those people would not be included in some other area, would you be satisfied that we don't need this? **Ms. Lenmark** responded, no. That was one of the problems which arose after last session, and the Water Well Drillers might be an example of that. There is an exemption in this bill for that trade also. Like plumbers and electricians, they are licensed elsewhere, it was necessary to mention them in this bill so that they were not required to be licensed and registered. **SENATOR KEATING** asked if fire suppression people were licensed. Sometimes those people put in sprinkler systems, so they are working in construction, and if they are licensed as fire suppression and are working in the scope of their professional license, they would be exempt from having to obtain an independent contractor license, is that right? **CHAIRMAN THOMAS** answered that he believes that is right. You could have a double exemption for a plumber and an electrician, they could be doubly exempted in here, as fire suppression would be in this case. **SENATOR KEATING** said that we could simply put fire suppression people in here as being exempt, but by amending line 3 maybe there are other people out there who are licensed at what they do that ends up in construction, and as long as they are working within the scope of their license they don't have to have an

independent contractor's exemption. You can either go through and start exempting people individually that are licensed other than electricians and plumbers and fire suppression people or you can exempt anybody working in the construction business that is licensed to do something in the construction area as being exempt from the independent contractor rule if they are working within the scope of their professional license. **Chuck Hunter** stated it seemed to him that this act relates to the construction industry and that there are particular types of professions within construction that are already licensed. Those professions are electricians, water well drillers, and fire suppression is the only other one we have heard of that has some kind of licensure requirements that may be engaged in construction activities. He states the exemption we are talking about on line 3 and 4 as it deals with the problem of doctors, lawyers, dental hygienists, etc. Do we want to bring fire suppression people like we've brought water well drillers in as already having licensure so, therefore, not needing to be registered in this program. **SENATOR KEATING** stated if that line were amended as **Ms. Lenmark** suggested, this will include water well drillers and fire suppression people and anyone else who is licensed. **Mr. Hunter** said he did not concur with **Ms. Lenmark's** conclusion. It seems to him since the focus is construction, that's what the whole thing falls under. **CHAIRMAN THOMAS** stated then unless you qualify as a construction contractor, you are not within this. **Mr. Hunter** said that is correct. **Jacqueline Lenmark** stated she may have spoken too quickly there, she forgot that under the old law this necessary. **SENATOR KEATING** suggested a recommendation to delete subsection 19 and that water well drillers and fire suppression people. **CHAIRMAN THOMAS** stated the motion then is to strike subsection 19 on page 10, line 3. Also addressed is subsection 20, water well contractor which is already in there, and that you would want to add the fire suppression installers to subsection 17.

SENATOR KEATING suggested **CHAIRMAN THOMAS** ask if there were any other sections beyond the points they just discussed.

Chuck Hunter said they have several things they would like to propose, the first is on page 13, line 23 through 26. The bill has been amended such that in the compliance and enforcement effort, should they go out and discover a construction situation where an unregistered contractor is working on the job. The original language stated they could serve the notice of infraction on the employee and that we have to subsequently mail within four days a certified letter to one of the officers. This bill amends the language to say that we cannot serve (inaudible). From the compliance perspective, lots of construction is done without the principles, the officers of the company. Many construction companies are out-of-state companies which send people here, and for them to be able to deal on-site in an enforcement capacity, to try to get people registered, and to have to go to an out-of-state corporation to try to track down the officer, presents us a real difficulty. They saw the

original language of being able to serve someone, typically the foreman on the job site, and being able to follow up with certified mail to be a pretty practical way of doing business. We have amendments prepared to restore that should the Committee agree. **CHAIRMAN THOMAS** asked for further discussion of that. **SENATOR KEATING** asked if it could be accomplished by mail. **Mr. Hunter** responded once they have found where they are they can serve by mail. If they are unregistered the Department may have a difficult time locating them. **Mr. Penkal** feels this is not the best way to serve the employee, the employee may not know what is going on. He said if he is going to get a summons he would like to get it first-hand, he does not want his employee being responsible for throwing it away. He would personally like to receive it. **SENATOR WILSON** stated he would agree with that, he believes that is a good point. He does not think the employee has the specific interest that an employer does. **Chuck Hunter** said that from a practical perspective, working on a job site, we are going to go to the job site and find the person in charge of that job, be that a foreman, employer or principal of the company, if that is the case. If that is not the case and we are not able to quickly locate that employer, you could simply have an unregistered contractor continue to perform work for some period of time without being served notice. In terms of operating a program, it is a practical consideration for the Department. It certainly is not going to kill them if they do not have that opportunity to serve, but it is going to delay the contractor being registered and having the proper coverage. **CHAIRMAN THOMAS** then asked for the next item. **Mr. Hunter** said the next item is in two locations, page 7, line 16 and page 7, line 28. There has been quite a bit made of the Constitutionality of barring unregistered contractors from bringing action to court. In both those areas we talk about barring unregistered contractors from bringing or maintaining an action for bringing suit on breach of contract. Their amendment would allow an unregistered contractor to file an action in court, they would subsequently have to become registered to maintain that action and to carry it through the court system. In some way it is kind of a half-way measure to allow people access to the court system and filing protections for unpaid things that should have been paid. It would require them to become registered to keep progressive through those actions in the court system. **CHAIRMAN THOMAS** asked **Lawrence Hubbard** if he would address that issue. **Mr. Hubbard** said he really didn't know, he wasn't familiar with the law suit that **REPRESENTATIVE MOLNAR** is referring to. The extent to which the merits go to the language in that section so he really can't say. **CHAIRMAN THOMAS** asked **Mr. Hunter** if, with the point he brought up, obviously he must feel the amendments he is proposing significantly address the legal problem. **Mr. Hunter** responded this is true partially. If there is a Constitutional question there, there may be a dividing line between access to the court system and the follow up. So this at least partially addresses that question. **George Wood** asked if **Mr. Hunter** could give him a cause of action which this amendment does, and then require we do something else in

order to maintain that cause, other than something outside the court system. Once the action is filed doesn't the problem become the court's jurisdiction? **Mr. Hunter** responded that he is not an attorney, this was just brought to his attention. **SENATOR KEATING** suggested that since this will be addressed in **REP. MOLNAR'S** bill, for the sake of time let's acknowledge there is a problem here. **Lawrence Hubbard** said he thinks **Mr. Wood** is correct, this goes to due process and the right of access to the court, so no matter how you play with those words, "bring" and "maintain" probably have very little distance from one another, when you are going to court. **Mr. Hubbard** asked if somebody being sued under this could use this law as an estoppel to the complaint. **Mr. Hubbard** responded that is correct. **SENATOR KEATING** said we do not have to repeal the law, we can just strike it from this bill. **CHAIRMAN THOMAS** thinks we should deal with whether or not this is repealed or not in this bill. Are there other sections this applies where this is tied in? **SENATOR KEATING** responded just these two. **CHAIRMAN THOMAS** recommended that this issue be addressed and decide whether or not it should be deleted in executive action with the full committee so that everyone would be present to make the decision.

Chuck Hunter proposed two more small amendments. On page 8, line 6, section 9 is the part of the statute which provides that administrative bar from floating liability. This section was carefully constructed in the last section we were talking about. It deals with a bond being there as a protection and also crafted with the Uninsured Employers' Fund in mind, because they knew that providing the bar to floating liability would put more cases into the Uninsured Employers' Fund and they would pay more cases out of that fund. They would like to see that to receive that administrative bar from floating liability, that contractor who is hiring the registered sub must verify that they are registered at the inception of the contract. You want your general contractor make sure that the subs have that registration before work starts on the job, rather than being willing to wait several months down the road to make sure that happens. They want to insert the words "inception of the contract". **CHAIRMAN THOMAS** said let's say the independent contractor status is in affect, but they don't get it at the inception, they still have it. **Chuck Hunter** said they still have it that example, but it is in the case where the subcontractor did not have it for a period of time, work begins, then they find the problem, then after the fact the general contractor is able to come up with a certificate in arrears. **CHAIRMAN THOMAS** asked if there was any discussion regarding this. **SENATOR KEATING** said he felt it should be noted and discussed later.

ADJOURNMENT

Adjournment: 2:49 p.m.

SEN. THOMAS F. KEATING, Chairman

GILDA CLANCY, Secretary

TFK/GC