

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON LABOR & EMPLOYMENT RELATIONS

Call to Order: By **CHAIRMAN THOMAS F. KEATING**, on March 13, 1997,
at 3:20 P.M., in Room 325

ROLL CALL

Members Present:

Sen. Thomas F. Keating, Chairman (R)
Sen. James H. "Jim" Burnett, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Benedict (R)
Sen. C.A. Casey Emerson (R)
Sen. Dale Mahlum (R)
Sen. Debbie Bowman Shea (D)
Sen. Fred Thomas (R)
Sen. Bill Wilson (D)

Members Excused: None

Members Absent: None

Staff Present: Eddy 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: HB 252; 3-5-97
Executive Action: None

HEARING ON HB 252

Sponsor: REP. BRAD MOLNAR, HD 22, Laurel

Proponents: Riley Johnson, National Federation Independent
Business
Russ Penkal, Independent Contractors of Montana
Walt Dupea, Representing Self
Delbert Hostetter, Representing Self
Jenny Dodge, Best Dan Painting
Bob I. Davies, Representing Self
Charles Lorentzen, Representing Self
Dick Rossingol, Rossingol Construction
Dean Randash, NAPA Auto Parts
Kevin Nelson, Geo Tech
Dick Skees, Skees Construction

John Novotny, Novotny Land & Cattle
Jim Eberly, Representing Self
Ron Pearson, Constructive Remedies
Darrell Adams, Representing Self
Donald Kramer, Wattnem Construction
Alex Martin, Martin Construction
Steve Hadnagy, Buffalo Horn Trucking
Gene Ackersen, Gene's Electric
Bob Becker, Bob's Cabinet Shop
John Bloomquist, Montana Stockgrower's Association
Dave Cole, DC Construction
Dennis Roehl, Representing Self
Joe Schlemmer, Representing Self
Sam Turley, S & S Mobile
Rod Becker, Becker Cabinet & Miller
Steve Howeth, S & K Construction
Dick Green, Representing Self
Gary Arnold, GL Arnold Concrete
Larry Brown, Agriculture Association

Opponents: John Denherder, Representing Self
Laurence Hubbard, State Fund
Carl Schweitzer, Montana Contractors' Association
Carl Hafer, Representing Self
David Owen, Montana Chamber of Commerce
Chuck Hunter, Department of Labor & Industry
Don Chance, Montana Home Builders' Association
Jacqueline Lenmark, American Insurance Association
Don Allen, Coalition Workers' Compensation System
Improvement
George Wood, Montana Self-Insurers' Association
Dave Cogley, Representing Self
Don Judge, Montana State AFL/CIO

Opening Statement by Sponsor:

REP. BRAD MOLNAR, HD 22, Laurel, said this bill is designed to find resolutions for proponents and opponents for the contractor's registration for the purpose of mitigating liabilities.

HB 252 not only eliminates the old liabilities created in the old SB 354, but as a bonus, restores the Constitutional Rights that were taken away.

It also eliminates the upward migration of liability from one contractor to another. Further, HB 252 limits the liabilities of hiring an independent contractor.

The binding requirements that a contractor who is contracting with an unregistered contractor is liable for the other contractor's employees wages and fringe benefits is repealed.

The rights against self-incrimination is restored.

The need to seek permission of the government to enter into common occupations is repealed.

A bond which was attached to put a contractor out of business is repealed.

The right to use the court system and have a jury trial is restored.

The right to publish ads as desired without government oversight is restored.

The right to privacy in your own home and in the government's files is restored.

The passage of this bill protects the people of Montana from having their projects stopped and property seized without due process.

The passage of this act also repeals the provision that a government employee has the right to enter private homes without a warrant to look for unregistered contractors.

REP. MOLNAR stated old SB 354 did begin a process of wondering how to limit the upward migration of liability and the hiring of independent contractors. We, the representatives of the people, created the liability in statute. We need to reverse or repeal those statutes. HB 252 does that for us.

He would appreciate the bill to be considered with the amendment presented. **(EXHIBIT 1)**

Page 1 states "each person in this state", "including a contractor" is stricken. It continues to read, "is considered to be by current state law an employee". This is how an independent contractor climbs the ladder as a contractor, then falls down the ladder as an employee. We make them wear both hats, so in striking this, a contractor can be considered an employee. Nowhere in **REP. MOLNAR'S** more than 20 years as a contractor has he been a contractor and an employee simultaneously.

On page 5 subsection (c) is stricken. The contention in this is that this used to state that "an individual performing services for remuneration is considered to be an employee under this chapter". The burden of proof is on the independent contractor to prove he does not have an uninsured employee. **REP. MOLNAR** said this is reversed in the bill to state, "an individual performing services for remuneration who represents to the public that the individual is an independent contractor, is considered to be an independent contractor and not an employee". In other words, the burden of proof lies on the person who would allege otherwise. That contractor is considered innocent until proven guilty, the same as in any other arena of law.

"An individual representing to the public, that the individual is an independent contractor may not make claims against an employing unit". People should be responsible for themselves and file claims on their personal medical insurance.

"The Department may not take action against a person relying on a claim of independent contractor status pursuant to this section". **REP. MOLNAR** stated that this means when a person comes into your business to audit, and they ask about a payment made to an independent contractor, if that person does not meet their criteria of 'independent' or 'business' he is an uninsured employee.

"The Department may not adopt rules to implement this section". **REP. MOLNAR** said obviously, they will be audited by the Department of Labor, Workers' Compensation, Department of Revenue, and the Internal Revenue Service. All of those base their determinations on the two words 'independent' and 'business'. He stated we do not need thirteen pages to define those two commonly used words.

He also stated that a person who represents the public is called an independent contractor. An independent contractor is also assumed to be an employee. **REP. MOLNAR** said our laws do not match up. In referring to page 7, under subsection 3, he brought the two parts of the law together. He has not broadened the law, but has narrowed the focus for the people.

Referring to page 8, subsection (c), he said when an application is approved by the Department, or when the contracting parties agree to an independent contractor status, we have not made it easier for people to be independent contractors. This precludes the applicant from obtaining benefits under this chapter. Under subsection (e), page 8, if the independent contractor violates this, he pays a \$1,000 fine per infraction. This is not a "get-out-of-jail-free" card. That independent contractor is held liable for his errors and omissions, not the person who unwittingly hired him.

REP. MOLNAR said for the person who contracts work out the law used to say if a contractor hired another contractor who had no insurance, that the first contractor was liable. It is not the independent contractors of Montana who are forcing this issue, it is the Department who is forcing it. This is not right. Under the last section of HB 252, if an uninsured contractor doesn't have insurance on his employees, he is liable.

It is not now, nor has it ever been, proper policy for any government to force artificially created liabilities on the people for the purpose of selling insurance plans. If private business tried to do that, we would throw them in jail.

Informational Testimony:

David Hoffman, Attorney, Dillon, stated one of his clients is a Montana corporation called Intermountain Systems, Inc. which is owned wholly by **REP. BRAD MOLNAR**. **REP. MOLNAR** asked **Mr. Hoffman** to talk about the status of the law suit that he filed in February of 1996 challenging the Constitutionality on numerous grounds of SB 354.

Mr. Hoffman said he is not in a position to really comment on **REP. MOLNAR'S** HB 252 today, so he is not appearing as a proponent, but to give information regarding the status of the law suit on SB 354.

In February of 1996 he filed a law suit on behalf of Intermountain Systems in Beaverhead County challenging SB 354 on numerous Constitutional grounds. A hearing was held in July after Judge Davis had issued a temporary restraining order barring the Department of Labor from enforcing any part of Chapter 500. The opponents were represented by the Attorney General's office in the State of Montana appearing in defense of the bill as they are obligated to do. After that evidentiary hearing was held, **Judge Davis** issued his temporary restraining order again, this time barring enforcement on only that portion of Chapter 500 which was codified in Title 39, Chapter 9 which is now known as the Contractor Registration Act.

In barring enforcement of that portion of the Act, **Judge Davis** found sufficient evidence to conclude that enforcement of the Act would likely violate numerous Constitutional Rights of the plaintiff and all others similarly situated. All other contractors who have failed or refused to register under this Act. Those Constitutional violations included, among other things, the violation of their right to privacy, the violation of their right to due process, and the violation of their right to be free of the imposition of excessive sanctions.

The State of Montana appealed that temporary restraining order to the Montana Supreme Court which decided it in Intermountain Systems' favor in all respects. They returned the verdict to **Judge Davis** without reservation for a final determination on the merits. **Judge Davis** has not issued his final opinion on the merits, however, **Mr. Hoffman** is confident that when he does, he will strike Chapter 500 in its entirety because when he strikes the offending portions of SB 354, what will be left is a bill that is so scattered and disconnected that it will be unenforceable.

Proponents' Testimony:

Riley Johnson, National Federation Independent Business, said this bill has been a hot topic of **NFIB's** over 8,000 members in Montana. It has generated many calls and a tremendous amount of mail. They have also surveyed their members and this is how

their determination is solely made. They do not make a determination through a Board of Directors. Their position on all legislation is determined by a ballot of their members.

They support HB 252 with emphasis on one section. This is the elimination of the 'C' test. In September **NFIB** surveyed its many members in Montana on the issue of the Construction Contractor Registration. From that poll 52% of their members voted to repeal the Construction Contractor Registration Law, 37% no, and 11% undecided, which is almost a 50-50 split. As a result, **NFIB** cannot take a strong position on that portion of HB 252.

However, in January, they surveyed the members again asking about the elimination of certification for independent contractors. The results were 80% in favor of the repeal of test 'C', 9% were against it, and 11% were undecided. Based on this, they strongly support the elimination of the 'C' test which has caused a tremendous amount of problems, a lot of grief and misunderstanding.

Mr. Johnson stated one other portion of this bill they greatly support is the elimination of the upward mobility of liability. **Russ Penkal, Independent Contractors of Montana**, said his group formed as a result of the passage of the Contractor Registration Law which HB 252 repeals. They support HB 252. (**EXHIBIT 3**)

He referred to (**EXHIBIT 4**). HB 252 identifies an independent contractor by the 'A', 'B' tests, by publically entering into a contract verbally or in writing, or by having an exemption from the State. In the past that has been voluntary. The Department has distributed (**EXHIBIT 4**) and **Mr. Penkal** stated they believe this is a good idea. It is an exemption and at the bottom is a place for signatures which will help establish relationship in writing.

Walt Dupea, Bigfork, Representing Self, supported HB 252. (**EXHIBIT 5**)

Delbert Hostetter, Manhattan, Representing Self, had three reasons he wanted to see this bill pass.

He stated one of the very real problems and concerns in the State of Montana is the lack of affordable housing. With added restrictions and penalties and the time it takes to stop to be interviewed and harassed by the State Departments, it will push the cost of that housing up. On Tuesday night, in a Holiday Inn in Bozeman, over 100 community leaders, including city commissioners, hospital administrators, physicians, registered nurses, college professors, lawyers, teachers from the elementary and the secondary education, as well as others, met for a seminar on healthy communities. The moderator requested they separate into groups of five and report the five things they would like to see accomplished by the year 2015. All five groups came up with identical requests for the first two. The first was a good

education for our children, the second was affordable housing so that our children can afford to stay and live in Montana if they choose to.

Mr. Hostetter said the second reason he would like to see this bill pass, is that it repeals a very grossly unfair law, which is the upward migration of liability. It is not fair or democratic to be penalized if he hires someone to work on his project and he violates the law by not paying Workers' Compensation on his help.

He stated the third reason is that he is opposed to excessive taxation. Our current Governor, Marc Racicot, and his immediate predecessor, ran for office on a plank which included the promise of less government. SB 354, Contractor Registration that went through the Legislature two years ago added to big government, promoted a program which will cause increase in taxes according to the fiscal report that **Mr. Hostetter** received. It would take an additional half million dollars per year to support this program. That would come out of the General Fund or taxpayer's pocket. Once a government program becomes established, it has a tendency to grow.

HB 252 will correct a lot of wrongs. A vote against this bill is a vote for higher taxation, unprecedented government intrusion in our private lives and businesses, and it will push the hope of owning a home in the State of Montana farther out of reach.

Jenny Dodge, Best Dan Painting, Representing Self, spoke in support of HB 252. (EXHIBIT 6)

Bob Davies, Bozeman, Representing Self, said there is a perceived problem, that is non-compliance with Workers' Compensation and Unemployment Insurance. Since the duty of the Legislature is to legislate, **Mr. Davies** said they must figure the laws on the books are not sufficient and we need new laws.

Rights are violated in SB354 and all the problems that entails. The more laws we have that trample freedom, the more they will be ignored and the less respect will be found for law in general. If it perceived the current laws are not being enforced, that is where attention should be directed, not in punishing everyone, especially the law abiding. There is a close parallel between the contractor bill passed by the last legislature and those who would take away our gun rights because of a few misused guns. In Montana we understand that argument.

Charles Lorentzen, Kalispell, supported HB 252. (EXHIBIT 7)

{Tape: 1; Side: B; Approx. Time Count: 4:03 P.M.}

Dick Rossingnol, Rossingnol Construction, Lolo, was also in support of HB 252. (EXHIBIT 8)

Dean Randash, NAPA Auto Parts, Helena, supported HB 252.
(EXHIBIT 9)

Dick Skees, Skees Construction, said he has been contracting 31 years. He has a small business of three employees.

They can possibly build three houses per year. They build custom homes for individual customers. One thing that hasn't been mentioned is the pressure on a small contractor. **Mr. Skees** said he gets up at 5:30 a.m. and he works six days a week and is lucky if he makes it home by 7:00 p.m.

He said he loves Montana, but it is difficult to live here and takes a lot of work to stay alive in this State. Every contractor will agree that there is pressure every 30 days. On the tenth of the month, everything they buy has to be due net in 30 days. OSHA comes on the job site and are penalized if the ground cord isn't correct, if the ladder isn't correct, if a safety guard is off a saw. They have to deal with state inspectors and permits, city inspectors, and they are also governed by the private sector. They have bank inspectors who come on the job site and they have cameras which photograph every phase of the structure.

Mr. Skees said their biggest headache in making a living is to accomplish the greatest amount of quality in the shortest period of time.

Also, to regulate this is to create another whole bureaucracy. There are three compliance officers to put in the field now, which will be six in five years and ten in a short period of time after that. There will not be a legislator strong enough to cut this Department.

Mr. Skees said the biggest fear he has as a contractor, is that one of these compliance officers who **Mr. Skees** feels would be somewhat of a predator because he would have to have something wrong to create funds to keep his job. If he stops the job for even a week, this sets back production time and stops him from paying his 10th-of-the-month bills, and to keep his reputation with his suppliers. If this happens, his business will go under. He only has three employees, but these people work very hard and the deductions which come out of their paycheck and the taxes they pay on their property, help feed the system in this state. He asked the Committee not to put another bureaucracy on this industry. We are now over-regulated.

Mr. Skees said regarding his liability insurance, every single year they are required to go through an audit through the private sector on their liability insurance. He has to have a certificate of insurance of liability for every painter, wallpaper hanger, tile man, any contractor which he hires to do a project for him.

It is the same with Workers' Compensation. In the past three years, **Mr. Skees** has been audited twice. It is the same principal. They will go through his books and pull out every single check he has written to some small contractor who performed a duty on one of the projects. If that individual does not have a current Workers' Compensation certificate, or a certificate stating he is an independent, that individual's entire amount of checks that were written to him go into **Mr. Skee's** payroll, which is also how Workers' Compensation premiums are paid.

There are so many restrictions and we do not need more. It is so difficult to make an income in the State of Montana. **Mr. Skees** said he was present to plead for no more regulation. This is a very competitive field.

John Novotny, Novotny Construction, Helena, said he is a rancher in the Helena valley and does part-time carpenter work.

He recently attended a meeting with the Montana Stockgrowers. He stated they are somewhat in favor of the independent contractor rules due to the fact they exempted agriculture people.

Mr. Novotny said he was told he was protected if someone he hired were to work on his barn, and he fell off and got hurt. When he is hired he is considered an independent contractor and when he falls off, he is an employee. He said there are too many lawyers and they will find a way to take him to court in this situation.

This all places more government on our backs. He said he wants them off his back and out of his pocket.

Jim Eberly, Custom Paint, Bozeman, said he has been a painting contractor for 6 years and in the trade for 12 years. He supports HB 252. (EXHIBITS 10 & 11)

Ronald Pearson, Constructive Remedies, Helena, said his company primarily builds custom homes and does remodeling work. They are a small operation.

He said he has three sons who would like to enter into this same field of industry and have the same opportunities he has had in Montana. He has lived in the Helena area 20 years and he would like his children to have the same opportunities.

Russ Wattnem, Wattnem Construction, Helena, said he has been in Helena 24 years and asked the Committee to pass HB 252.

REP. DARRELL ADAMS, HD 84, Columbia Falls, stated he would like to go on record as being in favor of HB 252.

Donald Kramer, Wattnem Construction, Helena, said he supports HB 252.

Alex Martin, Martin Construction, Belgrade, also supported HB 252. (EXHIBIT 12)

John Krosky, Krosky Repair, said he supports HB 252.

Steve Hadnagy, Buffalo Horn Trucking, Bozeman, said he is in support of HB 252. Old SB 354 regulated gravel trucking. One type of truck dumps gravel from the end and the other type dumps gravel out of the belly. He said both trucks do the same thing. They were told if they owned the trucks which dumped gravel out the belly they had to register, but if they owned the trucks which dumped gravel out the end they were not required to register.

Gene Ackersen, Gene's Electric, supported HB 252.

Bob Becker, Bob's Cabinet Shop, Butte, said he is in support of HB 252.

John Bloomquist, Montana Stockgrowers' Association, stated with the passage of SB 354, he has had more grief over that particular piece of legislation than anything in his time representing the Stockgrowers. They support the elimination of the 'C' test.

In terms of trying to define the independent contractors and trying to define the presumptions, they urge the Committee to support HB 252. They also ask the Committee's support in eliminating the upward mobility of liability.

Dave Cole, DC Construction, Whitehall, said he has been building for more than 20 years and he agrees with all the prior testimony.

Dennis Roehl, Drywall Contractor, Helena, said he has been in business 33 years and supports this bill. He believes our freedoms are at stake.

Joe Schlemmer, Representing Self, said he is an independent contractor and has always maintained the state agencies to be his friend, but they have not been his friend but more his adversary. For the same reasons of the testimony already given, he urges the Committee to support HB 252.

Sam Turley, S & S Mobile, Clyde Park, supports HB 252.

Rod Becker, Belgrade, said he also supports this bill.

Steve Howeth, Representing Self, said he is a registered contractor and asks for support of HB 252.

Dick Green, Representing Self, said he was involved to a great extent with REP. MOLNAR in his efforts to bring his law suit and has been involved in various meetings since the 1995 legislative session. More than 200 people showed up at a meeting in Hamilton

they held. He has had communication from constituents in HD 61, HD 60 and HD 69, which is the entire Bitterroot Valley. The feeling is very strong that SB 354 is something we need to totally repeal.

Gary Arnold, GL Concrete, Lolo, said he is for HB 252.

Larry Brown, Agricultural Preservation Association, stated his association supports HB 252 and oppose SB 354. A number of the agricultural community are contractors who fill in the downtime in the winter to do contracting, whether it be locally or through trucking.

Opponents' Testimony:

John Denherder, Representing Self, said this past summer he hired a siding contractor. He was an independent contractor but never did the work. He had three crews who he forced to sign statements saying they were independent contractors and were insured. They were not. He expressed his concern over the liability of someone falling off a ladder and his homeowner's insurance would not cover anything that would disable someone.

Mr. Denherder said he went to the Labor Department and inquired of how Montana protects its citizens. He was told there was only four officers in the State of Montana to cover the whole state and that it would take him months to get to the bottom of his problem. He gave the Department the signed statements from the contractors and has never found out what the outcome of this case was. He comes as a concerned citizen to protect other citizens.

Laurence Hubbard, State Fund, opposed SB 252. (EXHIBIT 13)

Carl Schweitzer, Montana Contractors' Association, said the reasons he opposes this bill are from a historical perspective.

He asked if anyone felt the Workers' Compensation rates for construction are too high? He said that is what has gotten us into this mess. Construction is a dangerous business. Four or five years ago, the Workers' Compensation rates for construction workers are the highest than any other occupation. One of the reasons housing costs so much is because Workers' Compensation rates are so high. They are high because construction is a dangerous business and there is a lot of abuse out there in the system.

Mr. Schweitzer stated one of the arguments has been that people want less government interference but they also want to make sure everybody is complying with the Workers' Compensation laws.

{Tape: 2; Side: A; Approx. Time Count: 4:42 p.m.}

He stated SB 354 was intended to help provide some regulation and enforcement of the law, and he has never heard from **REP. MOLNAR**

regarding how he intends to enforce the Workers' Compensation laws in the State of Montana.

Mr. Schweitzer said in HB 252 we are taking a giant step backwards. We are going to be asking for higher Workers' Compensation rates and higher costs in construction. Our home costs will go up because of the Workers' Compensation rates.

He said he represents 100 contractors in the State of Montana. Normally when someone goes to work for them, the first thing they have to prove is compliance with the Workers' Compensation laws of the State of Montana. They hoped that overall Workers' Compensation rates would come down.

He does not believe the proponents of this bill are seeing the total picture. If they have employees, would they like to compete against somebody who isn't paying Workers' Compensation?

For the above reasons, he opposes HB 252.

Carl Hafer, Representing Self, opposed HB 252. (EXHIBIT 14)

David Owen, Montana State Chamber of Commerce, said he finds his Board skeptical of nine out of ten pages of this bill but is also supportive of **REP. MOLNAR** in a couple points he is trying to make. **Mr. Owen** said we need to change SB 354 from two years ago and he has done us a favor in focusing us on that.

He said we are more inclined to back some basic registration, something that is simple. They would strongly like to support the last part of HB 252 and that is that businesses being the 'cops' to enforce regulations on other businesses. He said his Board said they are tired of being the long arm of the law and tired of being the enforcers on one another.

Chuck Hunter, Department of Labor & Industry, said they are in opposition of this bill for two reasons, one dealing with contractor registration, another dealing with the independent contractor changes which are made.

He stated the reason why we have a contractor registration program is that in the construction industry, there are high injury rates and an unlevel playing field. There is a host of problems with coverage in the construction industry. People are misclassified. There is a question of whether or not they have Workers' Compensation coverage for their employees. SB 354 is a result of these issues. Repealing this act does not solve any of those problems.

For those reasons, the Department believes the proper approach is to amend the Contractor Registration Act in such a way to make it less onerous, less costs to comply with and to make it easy.

Also, **Mr. Hunter** said the independent contractor law is difficult to follow particularly for a layman. The reason we have 13 pages of rules which define who is and who is not an independent contractor, or because there is 40 or 50 years of case law which define those, we have taken the pertinent elements out of the case law and placed them in administrative rules so laymen employers can understand who is and who is not an independent contractor. This bill takes those statutes and turns them into a complete mess.

Mr. Hunter stated first, there is a change in presumption. When you hire someone and pay them to do work for you, they are your employee unless you can prove otherwise. As convoluted as the 'A,B' test is, at least you have a standard that people have come to recognize and know over time. The way HB 252 would have that read is that if a person represents that he is an independent contractor, then he shall be one. That term is defined nowhere in the law or rule and people would be forced to rely just upon what is stated in the law, and perhaps knowledge of Supreme Court cases.

He also said the part that says the Department cannot take any action against a person relying on a claim of independent contractor status leaves the Department and other people in the position, any time there is an injury or accident on a worksite in construction or other industries, all the employer has to do is merely claim he was relying on someone's word that they were an independent contractor to prevent any further investigation to that. **Mr. Hunter** stated that they see, week in and week out, people come into their office saying they need the exemption because their employer is not going to pay him wages until they have one. No rules leaves everyone in the position of not knowing what the rules of the game are.

He said in the bill there is the requirement that an independent contractor can either buy a Workers' Compensation policy for himself or can get the independent contractor's exemption. We now have the clause under this bill where merely if the two parties agree they have an independent contractor relationship, that will be sufficient. **Mr. Hunter** said under this bill he does not know whether a person needs to have this exemption or policy, or if a mere agreement is enough. They have worked hard to get attorneys out of the Work. Comp. system and in the view of the Department of Labor, the changes in this independent contractor definition, merely lays out the welcome mat to bring them back in.

Don Chance, Executive Director, Montana Building Industry Association, spoke in opposition to HB 252. (EXHIBIT 15)

Jacqueline Lenmark, American Insurance Association, said the American Insurance Association is a trade association comprising some 250 property and casualty carriers. The companies she

represents write approximately 40% of the market share of Workers' Compensation in Montana. They oppose HB 252.

She commented on what the affects of HB 252 would do in terms of insurance availability in Montana. Many proponents have spoken about their desire to be free from regulation and she said those Montanans gave up that freedom when they made the compact with workers in enacting the Workers' Compensation Act. There was a give and take in the enactment of that Act. Workers gave up the need to prove negligence and at that same time, employers gave up a defense to their own negligence. Workers accepted limited recovery, employers gained the protection of not having to pay that full amount of damages.

Ms. Lenmark said under current law, Montana citizens still can be free from regulation. All current law asks is that they make that declaration first. Insurance companies ask for an affirmative declaration from those persons who want to be exempt from the law. This is an important policy decision. She stated if this bill is allowed to pass, she believes we are inviting more litigation, leaving more workers unprotected, and introducing more uncertainty in determining the risk that insurance companies are insuring. When you do those things, you are adding cost to the Workers' Compensation system, also making those insurance products less available for Montanans who choose to insure, introducing volatility into the Workers' Compensation market, putting more pressure on the State Fund which is our insurer of last resort.

She also asked the Committee to consider the welfare of the workers that this system is intended to protect. This bill will be lessening those protections, making them less available to the very persons this system is designed to benefit.

Ms. Lenmark said Montana is not unique in this problem. This is a national issue and states have variously attempted to treat it. She has testified on this bill in the House and the irony of this issue for Montana is that at least right now her association is using Montana's current law as the model.

Her association believes the current law is appropriate. She does not believe the registration procedure is any more burdensome than applying for a driver's license, a hunting license, for obtaining a license to practice medicine or to practice law. The benefit to Montana workers justifies that little bit of effort.

She asked for a 'do not concur' recommendation.

Don Allen, Coalition for Workers' Compensation System

Improvement, said the Coalition's main concern is for the system to work. They did not get involved in the contractor's registration issue until the home builders and contractors agreed on a bill they wanted to come forward with.

He said it was a terrible mistake to deal with 'C' in terms of the independent contractor issue because many of the complaints and calls which took place was a result of the confusion over which of those small businesses and independent contractors were really at risk. Many calls were about the independent contractor issue but they were really calling about the contractor registration part.

Mr. Allen said none of the contractors want a lot of paperwork and meddling by government. The State Fund and private insurers' testimony reflected why we need to be careful in passing this legislation. He thinks this bill will make matters worse, rather than trying to improve them.

George Wood, Executive Secretary, Montana Self-Insurers' Association, said they arise in opposition to this bill.

He said the independent contractor section of this bill, as written can cause nothing but difficulty in litigation for those who have to put it into practical usage.

They would like to see changes in the upward mobility of liability but would like to point out if the upward mobility is not provided, **Mr. Wood** believes we are obligated to provide benefits of some kind for the employee.

He asked what would happen when somebody's medical bills become large and they have no wage. On page 10 of this bill, he said when an employer contracts the work to be done as specified, the contractor and the contractor's employees may not come under the same plan of compensation adopted by the employer.

Mr. Wood asked if the employer is in Plan 3 and the independent contractor has three employees where is he going to get his coverage? That man's option is the last resort insurer, and that is the State Fund. He thinks this bill says that both cannot be in the same plan.

Mr. Wood believes there is enough inconsistencies in the bill that it should not pass.

Dave Cogley, Representing Self, Helena, said he has dealt with this issue for quite awhile.

In 1983 the independent contractor exemption was proposed as a way to try to identify who is and who isn't an employee. That law still appears and is on page 7 and 8 of HB 252 and did not work very well.

Mr. Cogley said he thinks to go into the definition and liability provisions as **REP. MOLNAR** has done, goes way too far and interjects a lot more confusion. He believes there is a common goal in trying to prevent the upward migration of liability. He thinks SB 45 is a better way of dealing with this issue, as it

specifically addresses only construction contractors and does not mess with all the other kinds of independent contractors.

He asked the Committee not to pass HB 252.

Don Judge, Montana State AFL/CIO, pointed out his position on this bill is a unanimous position adopted by the delegates to their last convention. Thousands of building and construction trades workers represented through their unions were present.

Mr. Judge said there is a problem of fairness that goes beyond the bidding war in the work force. It gets into the issue of who pays for Workers' Compensation in the State of Montana.

In Montana we have never taken a survey to see how bad fraud is amongst Workers' Compensation. Fraud is not just employees who abuse the system and claim injuries that don't actually occur on the job, but fraud occurs when employers don't pay on the appropriate number of employees or on the appropriate classification of workers. **Mr. Judge** said in California fraud has been found in about 70% of construction contract work. It amounted to about \$2 billion lost to the California system.

Mr. Judge said there are hard working people in Montana who would like to be free as much as possible from the burden of regulation and the high cost associated with Workers' Compensation. Contractor registration was not designed under the law to take people who are not independent contractors and claiming they are independent contractors.

Regarding the statement made about employers being tired of policing one another, **Mr. Judge** asked who would you rather have 'police' you, the Department of Labor or each employer making sure the employer's subcontractors have complied with the law? If the State is going to do it we are going to have to put a lot of money into the Department of Labor and a lot of those little 'policemen' out there to do that job.

Also, in referring to **Don Chance's** statement that 23 out of every 100 employees are injured in the building construction trade, **Mr. Judge** said that is a pretty high ratio of injuries to workers. In this situation you have independent contractors asking to absolve them from any obligations to provide Workers' Compensation coverage who also claim they are independent contractors. They are also asking to hold down the migration of liability for any injuries which occur. Somebody is going to end up paying the costs for those workplace injuries, whether it is all taxpayers in the State of Montana through the social system that we have or whether it is Workers' Compensation for those employers who do actually pay Work. Comp. premiums on their employees, are maybe it is the folks who have the sufficient amount of liability insurance to take care of those kind of injuries and wage losses.

Mr. Judge said what will happen with HB 252 is that we will create a lawyer's paradise. He stated this bill is not going to solve the problems for the Workers' Compensation system, for the independent contractors or for the upward migration of liability. He encouraged a 'table' or 'do not pass' on this bill.

{Tape: 2; Side: B; Approx. Time Count: 5:18 p.m.}

Questions From Committee Members and Responses:

SEN. FRED THOMAS stated on page 5, what seems to be an important part of the bill is the independent contractor defined. Line 14 indicates that an individual representing to the public that the individual is an independent contractor may not make claims. He asked **REP. MOLNAR** what type of claims these are.

REP. MOLNAR said we are talking about Unemployment Insurance claims and also Workers' Compensation claims.

SEN. THOMAS said in the Constitution, section 16, under 'Administration of Justice', it states that no person should be deprived of this full legal redress for injury incurred in employment for which another person may be liable. Then it exempts fellow employees and an employee's immediate employer if he provided Workers' Compensation. He said it seems to him that HB 252 is in direct contrast to the Constitution.

REP. MOLNAR said it is not, and certainly no more so than the laws passed in 1983. A person is also a business, and a business may not make a claim. They may for liability, but not for under Workers' Compensation. A person under contract, if the conditions are met, has given up his personhood. **REP. MOLNAR** stated takes place every day in his business. He signs a contract with someone and when he does that he gives up the right to file a claim against that person. It is not a violation of Constitutional Rights.

SEN. CASEY EMERSON stated that the Committee heard **Mr. Hunter** state with all of this going on, there is so much case law from the Supreme Court. It seems **SEN. EMERSON** that most of the case law is based on statute, therefore, he thinks a lot of that can be negated. He asked **REP. MOLNAR** if he had any advise regarding this.

REP. MOLNAR said our law states the upward mobility of liability is mandated. Then they state the courts have no choice. Then a bill is introduced which says it cannot go up, if they read and interpret it properly, the only assumption is that we have stopped that and the old case histories cannot be relied on.

SEN. EMERSON stated he hears quite often about what **Mr. Judge** said regarding someone getting injured at work, he has to be taken care of because he is going to sue or find a way to do something, whether he is injured at work or on the golf course,

why isn't he concerned about finding a law that will take care of him.

Don Judge responded there are some differences, and clearly one is the difference that **SEN. THOMAS** pointed out in the Constitution. The Constitution of the State of Montana makes it very clear that a person cannot deny an employee or a person who is injured in performance of employment, the right to full legal redress. The only caveat it gives to that situation, is if you have that employee covered with Workers' Compensation. Otherwise, that person has the total right to go to court. In the situation on the golf course, he would hope that person would have medical insurance before they went golfing. The difference is that unless he could prove that the golf course had a golfer's hole and he stepped in it, then he would have the right to sue the golf course for not providing a safe place to play golf.

SEN. EMERSON said he heard **REP. MOLNAR** say that as a private contractor he is not an employee.

Mr. Judge responded the Constitution states the courts of justice are open to every person and speedy remedy shall be afforded for every injury of person, property or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable, except as to fellow employees and his immediate employer who hired him, if such immediate employer provides coverage under the Workers' Compensation Laws of the State.

SEN. EMERSON said that was written by Dahood and still says an employee and employer.

CHAIRMAN KEATING stated on page 9, line 25 and 27, the words 'a contractor' appear, and he is unable to locate where contractor is defined in the bill. Where contractor is defined in the statute it is repealed in the bill. He asked **REP. MOLNAR** his definition of contractor as it is used in HB 252.

REP. MOLNAR said the definition of contractor in SB 45 and old SB 354 is being repealed. However, that is a duplication of the term contractor which is defined in other statutes. It is at the beginning of the section of the old bonding requirements.

CHAIRMAN KEATING said the bonding requirements are repealed.

REP. MOLNAR stated the bonding requirements are repealed but not that part of the definition.

CHAIRMAN KEATING said we still have an Uninsured Employer Law and the Department of Labor has been receiving claims for Workers' Compensation injuries under that law. The Department has located the employer or the person who is held as an employer for an employee and collects double premiums and the cost of the benefits, then pay the injured worker for the medical benefits

and for wages lost. He asked **Chuck Hunter** if those claims affect Workers' Compensation rates in the Plans 1, 2, and 3?

Mr. Hunter responded if they do it is in a very indirect fashion. These are people who are paid claims and if the uninsured employer had insurance and had been in the pool with the other employers who had insurance, that would have some very small effect on rates.

CHAIRMAN KEATING asked as much as they are not in one of the plans, then are those claims and the payments made are not part of the actuarials of the other plan.

Mr. Hunter responded that is correct and the more uninsured employers, the larger the affect would be.

CHAIRMAN KEATING asked **Jim Eberly** if he was an independent contractor and had employees.

Mr. Eberly responded he was an independent contractor and had employees for nine months and found it not profitable so he is just an independent now.

CHAIRMAN KEATING asked if he worked alone.

Mr. Eberly said he wears a couple different hats.

CHAIRMAN KEATING asked if when he had employees, did he provide Workers' Compensation.

Mr. Eberly answered, of course.

CHAIRMAN KEATING asked if he was doing subcontracting at the time he had those employees.

Mr. Eberly responded he had.

CHAIRMAN KEATING asked if he had not provided Workers' Compensation for those employees, would the General Contractor have hired him.

Mr. Eberly answered, no he would not have been hired. He had to provide proof of insurance and proof of independent contractor status to do his work.

CHAIRMAN KEATING asked **Kevin Nelson** if he provides Workers' Compensation for himself.

Mr. Nelson answered he does not.

CHAIRMAN KEATING asked **Mr. Nelson** if he seeks exemption from that.

Mr. Nelson answered he does not have to have Workers' Compensation on himself because as a corporation and a corporate officer with more than a 20% interest in the company, he is exempt from Workers' Compensation and also from independent contractor status.

CHAIRMAN KEATING asked if he operated as a live corporation.

Mr. Nelson responded he did.

CHAIRMAN KEATING asked if as an officer of the corporation if he was automatically exempt.

Mr. Nelson responded yes.

CHAIRMAN KEATING asked **Steve Hadnagy** if an individual, like yourself, who has no employees but you are planning to contract with somebody else to do some work and you are looking at potential for an uninsured employer like **Mr. Hafer** who testified, how do you provide Workers' Compensation for yourself or hold the party with whom you are contracting not liable for your injury?

Mr. Hadnagy responded for himself he declared he is exempt from Workers' Compensation and if he got hurt on someone else's job that he was subcontracting for, he is responsible for his own injury. Because the person he is working for is not responsible for his insurance.

CHAIRMAN KEATING said we just heard testimony that there will be a whole bunch of people who are not going to have Workers' Compensation coverage on themselves and will subcontract for someone and when they get hurt, then they will charge somebody out there to cover them through their payroll or through their Workers' Compensation plan.

Mr. Hadnagy said that is the upward migration of liability and with **REP. MOLNAR'S** bill that upward migration, that liability is not there, so that is not a problem.

CHAIRMAN KEATING asked if **Mr. Hadnagy** was an independent contractor, and didn't want to register as a contractor, is that the reason why he is supporting this bill.

Mr. Hadnagy answered he is not an independent contractor and he does not want to register as one.

CHAIRMAN KEATING said you don't want to register as a contractor but you don't mind obtaining a certificate from the Department of Labor which states you are an independent contractor.

Mr. Hadnagy said that is right but that is completely different. That is saying he is accepting the responsibility of being an independent contractor and saying that he does not choose to have

Workers' Compensation Insurance on himself. He said that is not registering with the State.

SEN. THOMAS asked **Laurence Hubbard** if he were a lawyer.

Mr. Hubbard responded that he is.

SEN. THOMAS said this legislation is very important to many people across this state, and he believes it is important to address its foundation, which is built in Section 2 in the definition. **SEN. THOMAS** said he had asked **REP. MOLNAR** if he saw any conflict between the language in Section 2 dealing with an individual representing to the public that the individual is an independent contractor and cannot make claims against his employer. He said **REP. MOLNAR** found no conflict with that and the full legal redress in the State Constitution. **SEN. THOMAS** asked **Mr. Hubbard** if he found any conflict between those two.

Mr. Hubbard responded he does. It doesn't define what a claim is. He stated that any type of claim, whether it be a personal injury claim or a claim for Workers' Compensation or a claim for Uninsured Employment benefits, a claim can be broadly construed and it does run afoul of the Constitution. The Constitution provision, Article 2, Section 16, which **SEN. THOMAS** referred to, only protects the employer who has Workers' Compensation Insurance from the full liability provided by the law in the Constitution. An independent contractor is not an employee by definition, therefore, if you have any person who is reportedly an independent contractor, and you try to prevent them from making claims, you run afoul of the Constitution.

SEN. THOMAS stated with this definition of independent contractor, as it ties into the third significant part of the bill, in Section 4 there is limited liability for an employer who contracts work out. The same definition of independent contractor is brought into that section, so its ability to withstand Constitutional muster would also apply in this other case. He asked **Jacqueline Lenmark** if she finds any conflict between the Constitution, Section 16, the full legal redress and the definition and prohibition against making claims which is found in Section 2 of the law.

Ms. Lenmark asked she does. She doesn't think she can articulate that any better than **Mr. Hubbard** just did.

SEN. DALE MAHLUM asked **Mr. Hubbard** if an independent contractor is working by himself in a new home and he is putting up plaster board and suddenly something happens which causes him to hurt his back and he will be in the hospital for six months, and he is not covered by Workers' Compensation because he is an independent contractor, how does he get into the uninsured pool?

Mr. Hubbard responded the only way he can get to the Uninsured Employer's Fund would be if he claimed to be the employee of someone else who did not provide Workers' Compensation Insurance.

SEN. MAHLUM said so they may have law suit if he said he was working for that person and he knew that employee should have been covered.

Mr. Hubbard said if he understands the question, it is who are you working for? If you are working for a homeowner, then obviously the homeowner's insurance policy would be exposed to a claim for full liability, which has nothing to do with Workers' Compensation Insurance.

If you are working for another contractor, you have two avenues.

Mr. Hubbard said in his experience he has been litigating independent contractor defense claims, both on behalf of employers and on behalf of claimants who are hurt. You can take one avenue that person is an employee under the definition under the Act, therefore, he is entitled to Workers' Compensation benefits. He goes to the Uninsured Employer's Fund because his employer didn't get insurance. Or he could say he is an independent contractor because the employer has a lot of assets and he will sue him in tort. **Mr. Hubbard** has seen it happen on occasion where the employer says he has insurance through another carrier, we really are your employer and you are not an independent contractor. Because now they want the protection of the Workers' Compensation Act.

CHAIRMAN KEATING said those things **Mr. Hubbard** mentioned happened before this bill has been heard. Those things are happening now under current law. We have not found any way to get away from that court precedent.

Under Section 39-79-1120 states there is a test about employer/employee relations in that you are free of control and direction from the contract and that you are engaged in an independently established trade. So a painter working for a homeowner is in an independently established trade and if he is free from control and direction, then he is an independent contractor. An individual performing those services, if they meet the requirements of subsection 1, is prohibited from filing a claim against that contractor. **CHAIRMAN KEATING** asked **Mr. Hubbard** if these things were true.

Mr. Hubbard said as he reads that section, it is not just someone who represents to the public that they are an independent contractor. If they do represent themselves to the public that they are there is a presumption. But they still must meet the 'A,B' test.

CHAIRMAN KEATING said he understands that, but he does not know if we can write any kind of law which will cover that situation

to make it perfectly safe. Somebody is going nailed someplace, no matter which law is written.

SEN. EMERSON stated it was mentioned that a man was injured working in a home and that he wasn't covered and found out that he could not get covered this way, so he sued the homeowner because the homeowner had liability insurance. He asked **Mr. Hubbard** if that is what he said.

Mr. Hubbard responded that he was answering **SEN. MAHLUM'S** hypothetical question that if someone were working in that situation, one was there is not a prime contractor and the other is just dealing with the homeowner.

SEN. EMERSON asked if it were true that he could not sue that homeowner unless the homeowner is negligent in some way. If everything is perfectly right, and the employee just drops his hammer, steps on it and falls, that is his problem. The homeowner's liability insurance is not put at risk for that, is it?

Mr. Hubbard responded it is his understanding that it is still the law of the land in Montana that the contractor would have to prove negligence on the part of the homeowner.

Closing by Sponsor:

REP. MOLNAR stated you have to prove the lack of negligence as **Mr. Hubbard** just spoke. **REP. MOLNAR** said he cannot stop the law suit. Perhaps there is a weakness on line 15, for indeed the courts are open to all persons but that does not mean they are going to win. He said language may mean they cannot collect on a claim, but under the current law it says that we will begin under the assumption the person is an employee. We have to assume guilt on the part of the employer.

REP. MOLNAR said under his law that employee will have to state he is an independent contractor, he signed the contract as an independent contractor. He got paid a certain amount of money and then three weeks later his back hurt and he wants on the Workers' Compensation policy.

REP. MOLNAR said he may not be able to preclude them from the courts, but the employee is precluded from the courts under SB 45 and SB 364. He said that not **Mr. Judge** nor anyone else rose against that, but rather in favor of it.

He said in the fiscal note he has amended out the request that the Department return the \$1.12 Million they took under a law that they were barred from enforcing.

REP. MOLNAR said that **Mr. Judge** said this would be a lawyer's paradise. Since 1994 there has been nine cases, under existing law you have a higher probability of this happening because you

have the possibility of assumption of employee status, instead of the assumption that both these people entered into a legal contract.

Also, he said there is a huge fear in our existing system that a person will be sued by somebody. This bill will not stop the law suits but will give more wins on the 'good guy' side, those who are not trying to dupe the system.

He said the Department holds you and me responsible for the errors and omissions of others because we are easy and the law gives us a presumption of guilt.

REP. MOLNAR then stated that **Mr. Hunter** mentioned the unlevel playing field and the only way that happens is to hold people down and keep them from rising above others. To stifle their initiative to artificially created liabilities.

He said that **Mr. Chance** and **Mr. Schweitzer** stated that their members do not care if their Constitutional Rights are trashed.

REP. MOLNAR said he doubts that is what their clients want. They want an end to the upward migration of liability, not a compliance officer to enter their home or shut down their job site.

REP. MOLNAR said **Mr. Chance** also spoke of confusion under the current system. **REP. MOLNAR** stated that 13 pages of rules on two words is confusion. Most of those pages end with "do not rely upon these words for we shall interpret them for you".

He said if you take **George Wood's** conclusion that if a person is self-insured, Plan 3, that whoever that person hires must be Plan 3 because that is his plan of compensation. Instead of the plan of compensation we could simply say the policy of the employer. The employer can simply be interpreted as the person.

REP. MOLNAR referred to the highlighted words in **EXHIBIT 2**.

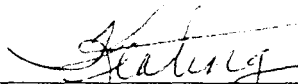
He said currently Workers' Compensation rates are based on exposure. If they are not exposed to other contractors and employees, he believes the rates will come down. They have come down by good management, instituted by **Mr. Hill**. He stated **Mr. Hill** told him that by the current Act rates will hit the Uninsured Employer's Fund \$5 to \$10 Million.

REP. MOLNAR stated that those who came forward as opponents have not given a solution because they benefit from it. He said **Mr. Hunter's** Division says right on the door, "Third Party Liability". It is his job to migrate it upward and it is the job of the State Workers' Compensation to migrate it upward, not to protect the people, but to protect their funding source.

He asked for a do-pass on this bill.

ADJOURNMENT

Adjournment: 6:08 p.m.



SEN. THOMAS F. KEATING, Chairman



GILDA CLANCY, Secretary

TFK/GC