

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON LABOR & EMPLOYMENT RELATIONS

Call to Order: By CHAIRMAN THOMAS F. KEATING, on March 27, 1997,
at 4:32 p.m., in Room 413/415.

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: 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:

Executive Action: HB 252; Be Concurred In
As Amended
HB 519; Be Concurred In
As Amended

EXECUTIVE ACTION ON HB 252

Amendments: HB025208.AEM & HB025205.AEM (EXHIBITS 1 & 2)

Motion: SEN. STEVE BENEDICT moved to take HB 252 from the table
unamended.

Vote: The motion carried unanimously by voice vote.

Motion: SEN. BENEDICT moved the amendments (EXHIBIT 1).

Discussion: Eddye McClure said since numbers 2 and 3 are taken out, there is no number 1.

SEN. BENEDICT said the number 2 amendment restores the definition of the independent contractor to the 'A,B' test which was in law prior to SB 354. We are putting it back prior to 1995 for the independent contractor exemption. It says that a person is an employee if they don't pass the 'A,B' test. The bill still eliminates the 'C' exemption requirement, which caused all the problems with the horseshoers, accountants, etc.

He said this amendment also gives the Department of Labor rule-making authority. He said if we are going to allow for a voluntary independent contractor exemption, then we need to give them the rule-making authority to implement the exemption.

Amendment number 3 is necessary because the bill, as written, creates an internal conflict between the 'A,B' test and the current language at a handshake. Under the 'A,B' test, a person must be an independent contractor both under the contract and the current language the contract would control. **SEN. BENEDICT** said he thinks we need this in order to get rid of the internal conflict.

SEN. BENEDICT said amendment number 4 is the voluntary registration amendment approved by the sponsor which provides for the three-year exemption and a \$25 fee. So if a person wants to register as an independent contractor with the State and get an exemption, which is completely voluntary, then they would pay a \$25 fee which is good for three years, then a \$25 renewal.

He said the number 5 amendment was already adopted in Committee but we took it off by taking the bill off the table unamended. He said this is **George Wood's** amendment, slightly different, but in effect, it takes care of the concerns of **Mr. Wood**.

SEN. BENEDICT stated amendment number 6 clarifies eliminating the migration of liability in that an independent contractor cannot be an employee of someone such as a homeowner because it is casual employment as to that homeowner. He would like this bill to reference the fact they are not an employee rather than the fact the homeowner is not an employer, because in other circumstances they could be an employer. If a person declares to be an independent contractor when he paints someone else's house, then they are not considered an employee of that homeowner.

SEN. CASEY EMERSON said on page 10, line 9 it says "may not come under that plan of compensation". He said compensation covers a lot of things and asked if that shouldn't read a "plan of Workers' Compensation"? He said compensation also includes getting paid for the job and somebody is going to list that and say that it isn't talking about just Workers' Compensation.

Laurence Hubbard, State Fund, said it is his understanding the amendment refers to Workers' Compensation, so he does not believe it refers to wages, or anything but, the insurance policy under Workers' Compensation.

SEN. EMERSON said he realizes that is what it is supposed to stand for, but the way it is written he does not believe is that clear. He asked why not put Workers' Compensation in?

CHAIRMAN TOM KEATING explained that the whole section 39-71-405, page 9 refers to only the Workers' Compensation Act.

SEN. EMERSON said by adding the words 'Workers' Compensation' we can make sure a lawyer along the way, doesn't get a chance to change it.

Motion: **SEN. BENEDICT** moved that the words 'Workers' Compensation' be added to the amendment.

Discussion: **Eddye McClure** said to clarify the issues, when something is stricken the law is being put back the way it is. It is not a repeal.

CHAIRMAN KEATING asked how subsections 2 and 3 read?

Ms. McClure said **SEN. BENEDICT** is taking those sections out of the bill according to his amendment. She said if you were striking the languages underlined, it would go back the way it was. She said he is not taking the whole section out, he is striking subsections 2 and 3 in their entirety.

SEN. BENEDICT said he intended to put the language back prior to 1995, the definition of the independent contractor to the 'A,B' test.

CHAIRMAN KEATING said following the amendment proposed by **SEN. BENEDICT**, in Section 2, 39-71-120, Section 1 is struck. Then, line (c) deletes the language. Also, subsections 2 and 3 are struck from the bill, but the statutes say subsection 2 reads, "an individual performing services for remuneration is considered to be an employee under this chapter unless the requirements of subsection 1 are met".

Laurence Hubbard said he believed the intent was to simply restore the statute back to the pre-1995 statute. The current amendment as proposed does not do what **SEN. BENEDICT** intended when they were initially requested. **Mr. Hubbard** suggested how the amendments should read.

CHAIRMAN KEATING said if the Committee amends to leave subsection 1 and then delete subsections 2 and 3 in the bill, then subsection 2 in the statutes will remain.

SEN. BENEDICT said that is not his understanding, they still need to take the 'C' part out.

CHAIRMAN KEATING said the 'C' part is coming out, he is talking about subsection 2. Striking it in its entirety from the bill does not take it out of the statutes.

Eddy McClure said it does.

SEN. BENEDICT said the term delete should be used instead of strike.

CHAIRMAN KEATING read the amendment with the changes. He stated this section will read like it did before 1995.

SEN. EMERSON referred to page 10, lines 10, 11 and 12 said that the word 'employer' should read 'employee'.

CHAIRMAN KEATING said it is in the amendment, **SEN. EMERSON** was reading the original bill.

SEN. BENEDICT apologized to the Committee and said those amendments were given him by the State Fund and he did not think they intended to strike subsection 2 in their entirety. He believes they meant to delete, which would simply remove it from the bill but would not take it out of law.

Vote: Motion to add amendments (**EXHIBIT 1**) carried unanimously by voice vote.

Motion: **SEN. FRED THOMAS** moved to add amendments (**EXHIBIT 2**).

Discussion: **SEN. THOMAS** explained the repealer beginning on page 9, beginning with 39-9-101 through 201 is being stricken. Those lines are deleted from the repealer section and they are not being repealed in these amendments.

He said 39-9-204 is being deleted through line 20 and through to 301. They are also being stricken and deleted from the repealer so they would remain in our current code.

SEN. THOMAS went on to explain Statute 302 will be retained. Then the next three statutes would be deleted, beginning with 303, 304, and 401, they would be deleted as repealed. He said he wants everyone to understand they are not being repealed, but retaining them in law.

On the front page of **EXHIBIT 2**, he stated the first and second amendments deal with title. Amendment number 3, he has asked to include the 'whereas' clauses which refer to the high number of accidents in this industry, and the high Workers' Compensation rates. The 'whereas' at the top of page 2 points out the fact the registration law protects a contractor from liabilities for these Workers' Compensation areas.

SEN. THOMAS said the fourth amendment is on page 1, line 17. They are striking the next section and inserting this, which contains the purpose of the legislation in amending in the construction contractors. The second section in amendment number 4 deals with the definitions and includes the term 'construction contractor' and amends construction below and strikes out the language below it in amendment number 4. In Section 3, that same amendment towards the bottom of page 2 amends the registration requirement in eliminating the prohibited acts, statutes, and references in the criminal penalty area, but retained is the registration application of contractors.

CHAIRMAN KEATING asked **SEN. THOMAS** questions regarding the sections he explained. **SEN. THOMAS** restated the information.

SEN. THOMAS explained Section 4 which contains the certificate of registration issuance. This narrows it down to the department issuing the applicant a certificate of registration upon compliance with the registration requirements of this chapter. Most of this section is struck, which deal with the bonding requirements which the State has repealed.

Eddye McClure asked if the first sentence of subsection (2) should be deleted because it is redundant to subsection (1).

SEN. THOMAS agreed with **Ms. McClure**.

SEN. BARTLETT pointed out that subsection (1) does read differently than subsection (2). She suggested that it should read "shall issue a certificate of registration to the applicant upon receipt of a completed application".

CHAIRMAN KEATING said that is what the chapter does. He read the 'registration required application' section.

SEN. THOMAS answered to clarify the issue, in Section 4, they took out the first sentence of subsection (2).

He went on to explain Section 5, page 4, 39-9-206, said now the initial application includes a \$50 fee and good for three years, then the renewal is \$50 and also good for three years. Then below is amending construction contractors. He said the \$50 fee is indifferant to the current \$80 fee which was good for one year.

SEN. THOMAS explained Section 6, which eliminates that registration be a prerequisite to suit or filing of a lien which is being struck. They are retaining the limitation on liability.

CHAIRMAN KEATING stated that 39-71-405 is for Workers' Compensation, Unemployment Insurance, and for wages for other registered construction contractors, or for an employee of a construction contractor. That establishes a barrier to the upward migration of liability so that the general contractor,

contracting with a registered construction contractor as a subcontractor, is not liable for their Workers' Compensation, their Unemployment Insurance, their wages and fringe benefits nor "anything in the payroll" as the subcontractor. The subcontractor is responsible for his own employees.

Eddye McClure stated that she is concerned about the where the commas are placed in this section. She said she believes the one comma should be placed after contractor at the bottom of page 4.

George Wood asked if the way it is written if it applies to a corporate entity who hires a prime contractor?

CHAIRMAN KEATING responded the definition of an individual includes a corporation.

SEN. THOMAS explained Section 7 is exemptions to the registration act. Subsection 3 adds the rural cooperative utility as has been needed as per prior testimony. In subsection 4 "when performed by an owner or lessee" is being taken out. In subsection 6 the word 'exclusive' is being added. In subsection 7 'construction' is added and in 8 the limit has been changed to \$2,500 and the language at the bottom of that subsection is being taken out. Subsection 9 is reformed so that it applies to a farmer or rancher while engaging in farming.

CHAIRMAN KEATING asked if these were all exemptions to the registration law?

SEN. THOMAS answered they are. He then went through subsections 10 through 24 in terms of words stricken and added to the amendment (**EXHIBIT 2**), specifically pointing to subsection 12's importance. This applies to an owner who contracts for work to be performed by a registered construction contractor. This exemption does not apply to an owner who is otherwise covered by this chapter. He stated in other words, we are not exempting out a home builder who just builds their own home with the intents of selling it. They would need to register.

SEN. BENEDICT said he is questioning that.

CHAIRMAN KEATING explained a homeowner who has a piece of property and is going to build his own house is not covered under this chapter. But if somebody who says he is a homeowner and plans to build a house to sell is trying to duck the law. This is simply plugging that loophole.

SEN. BENEDICT said he does not think they are trying to duck the law but just building a house. Whether they sell it in 11 months or 13 months makes a huge difference.

SEN. THOMAS said there is another exemption below which deals with that time frame. It simply states that if you are covered

by this act, you are not exempted from it if you build your own home with the intentions of selling it promptly.

SEN. BENEDICT said he still does not understand that. He asked what difference it makes whether someone plans to sell their home in a year and a half or six months? He said if he built a home and kept it for five years or only six months, he is still building it himself.

{Tape: 1; Side: B; Approx. Time Count: 5:19 p.m.}

SEN. THOMAS responded this exemption does not apply to an owner entirely. If you build your own home and build other homes and fall within the statute, then you need to register.

SEN. BENEDICT asked if he was pointing to people who try to get around the act who are actually homebuilders but take the mortgage out in their own name and build the house themselves, then they turn around and sell it but don't buy Workers' Compensation? They don't cover their employees who are working on that job.

SEN. THOMAS answered that is right.

SEN. DALE MAHLUM asked what if there were no employees on that job?

SEN. THOMAS answered this probably wouldn't apply. But this is intended to be applied to exempt the individual building their own house. But it doesn't exempt the guy who builds his own house and other homes.

SEN. BENEDICT said we are exempting him from Workers' Compensation and from hiring those employees, if he holds onto that house for a long time.

SEN. THOMAS stated this only applies to this registration act, not to the Workers' Compensation. The Workers' Compensation law is separate and this won't exempt them from buying Workers' Compensation, only from the registration act.

SEN. BARTLETT said she has been keying in on the words 'with the intention and for the purpose' of promptly selling it, they did not intend to make it their own residence.

SEN. THOMAS said subsection 13 deals with an owner again, working on the owner's property. This is different than an individual building a house. We have an owner who is working on his own property, whether he lives in it or not, that individual is exempted. This exemption does not apply to an owner who is otherwise covered by this chapter who constructs an improvement on the owner's property with the purpose of promptly selling the improved property, though the exemption would apply if the owner has continuously occupied the property as the owner's primary

residence for at least 12 months. Longevity will make the exemption apply for this act.

CHAIRMAN KEATING stated only if he has no employees. If he has employees he is not covered under this chapter.

SEN. THOMAS responded that is correct.

SEN. BENEDICT said the exemption is just for the registration, it is not exempting from having to have Workers' Compensation on the employees.

SEN. THOMAS indicated subsections 14 through 18 were self-explanatory. Subsection 19 deals with the fire suppression or fire protection equipment, those people have to prove Workers' Compensation in order to be licensed as such. Subsection 20 is water well contractors, 21 is tribal members, and 22 is someone engaged in the logging industry building forest roads. 23 deals with somebody who is a tenant of a home and 24 is the big exemption. He is proposing that these amendments are exempted from the registration act. This deals with an independent contractor who has no employees to be exempted from this act, which is a substantial difference from any other legislation. However, on page 7 at the top (**EXHIBIT 2**) they are adding "an independent contractor may voluntarily elect to register under this chapter". He said the purpose of that amendment is so that if registration has its benefits within the State and within the construction industry, some may want to do that whether or not they are required to.

SEN. THOMAS stated that Section 8 deals with advertising and strikes the prohibition on advertising. It adds construction contractor in subsections 2 and 3.

He said Section 9 requires the Department to compile an updated list of the construction contractors who are registered. Every time the word 'construction' is added to 'contractor', this act is being narrowed to just those construction contractors.

In Section 10 the violation infraction is narrowed substantially. **SEN. THOMAS** explained that amendment numbers 5 and 6 puts the language back into the bill as does **SEN. BENEDICT'S** amendments. Number 7, page 8, line 2 has to do with the Workers' Compensation exemption and coordinates it. Number 8, page 8, lines 5 and 6, the new language inserted is being stricken. Number 9 was contained in **SEN. BENEDICT'S** amendments also. In number 10, page 8, line 17, the word 'purposely' is being stricken, then in number 11, Section 405 is being taken out of the bill, so the amendments made for 39-71-405 are being stricken. Number 12 adds a severability clause and 13 deletes the repealing language.

CHAIRMAN KEATING stated **SEN. THOMAS'** amendment covers his amendment 1, 2, 3, 4, numbers 5 and 6 are skipped, include

amendment 7, skip amendment 8 and 9, and includes amendments 10, 11, 12, and 13.

SEN. EMERSON asked **SEN. THOMAS** why the 'whereas' clauses are needed in his amendments.

SEN. THOMAS said he encourages those because he believes the purpose of this law is because in this construction industry, the reason Workers' Compensation rates are so high is because of a high incident of injury. There is a need for structure in the old law. In chapter law, a court which is looking at the action, could look at this and the 'whereas' clauses adds more guidance.

SEN. EMERSON said he knows with the punctuation and the words he could go through it and find contradictions. He thinks this will turn out to be a negative thing and is clouding the issue. He would like to see the 'whereas' clauses taken out.

SEN. THOMAS said it is his opinion that the court is not going to look at each word and phrase. The intent and the application is why this legislation is taking place.

SEN. BENEDICT stated he is probably going to vote against these amendments because they contain some things he does not agree with. He said he appreciates the hard work which has gone into trying to get this bill out of committee. This bill obviously had problems or it would not have been tabled in Committee. He stated he will probably vote for the bill and vote against the amendments.

SEN. EMERSON said if the amendments were segregated there are parts he would vote for and parts he would vote against.

CHAIRMAN KEATING told **SEN. EMERSON** he had the right to move to segregate the amendments if he wished or if he would like to offer an amendment to the amendment, he could do that as well.

SEN. EMERSON asked **SEN. THOMAS** what he would like to do.

SEN. THOMAS answered he would encourage **SEN. EMERSON** to vote for the amendments as a package, then weigh it as a whole as the bill amended, but he won't object to **SEN. EMERSON** offering a substitute motion.

SEN. THOMAS also stated he believes that the Committee as a whole has done well in dealing with this issue. It is an important issue to this legislative session. He thinks there are some things in the amendments that are excellent, for example, an individual with no employees. He believes it is their intent as the legislature to deal with this issue.

CHAIRMAN KEATING offered his opinion on the 'whereas' clauses. He said the Department of Labor still has rule-making authority in the statutes. The 'whereas' clauses give legislative intent.

He believes that will have weight if the Department were to consider rule-making in this chapter. They can be misinterpreted as in any other language, but the courts and the Department can read English and they should properly interpret this. He stated he realizes they are taking a chance, but he believes the odds are good. He stated there is not a statement of intent on this bill, because they are not asking for rule-making. He said for that reason, he supports the 'whereas' clauses.

Motion: SEN. EMERSON moved to segregate all the 'whereas' clauses, amendment number 3.

Discussion: CHAIRMAN KEATING said he would like to go to amendments numbers 5 and 6. These were discussed as not to be included. He stated Eddye McClure pointed out to him that portion of the bill has been amended with SEN. BENEDICT'S amendments, however, there is some confusion in that language. Amendments numbers 5 and 6 are clear in this set of amendments (EXHIBIT 2) and if they are accepted by the Committee, they will override the language in amendments (EXHIBIT 1). Then that section will be perfected.

SEN. BENEDICT agreed to this.

CHAIRMAN KEATING stated that amendments 8 and 9 are still out.

Vote: THE MOTION TO SEGREGATE AMENDMENT NUMBER 3 FAILED WITH A 7 TO 2 ROLL CALL VOTE.

Motion: SEN. EMERSON moved to segregate amendment number 4, Section 10 from the amendments (EXHIBIT 2).

Discussion: SEN. MAHLUM asked Eddye McClure for an interpretation of this amendment.

Ms. McClure responded that basically it states if a person has a valid registration, it cannot be transferred to someone else or allow someone else to use it.

SEN. EMERSON said if the Committee looks at page 7, Section 8, subsection 2 it states the same thing only with different language, so one of those is redundant.

SEN. THOMAS asked if SEN. EMERSON'S intent of changing this is because it is redundant, if it is not redundant is it okay?

SEN. EMERSON responded "yes".

SEN. THOMAS stated in the language of the two different sections, 'falsify' has a different meaning than 'transferring'.

CHAIRMAN KEATING said subsection 3 which SEN. EMERSON is referring to says that they may not transfer a valid registration to an unregistered contractor, or allow an unregistered

contractor to work under a registration issue, which is totally different from what Section 8 contains.

SEN. EMERSON said somebody is certainly using an untrue name.

Vote: THE MOTION TO SEGREGATE AMENDMENT 3 FAILED WITH A 2 TO 7 VOICE VOTE. SEN. EMERSON AND SEN. BENEDICT VOTED IN FAVOR OF THE MOTION.

Motion/Vote: SEN. EMERSON moved to change \$5,000 to \$500 in Section 8, subsection 3. THE MOTION FAILED WITH A 2 TO 7 VOICE VOTE. SEN. EMERSON and SEN. BENEDICT voted in favor of the motion.

Vote: The MOTION TO ADD AMENDMENTS (EXHIBIT 2) with the EXCEPTION OF NUMBERS 8 AND 9 CARRIED WITH A 7 TO 2 VOICE VOTE. SEN. EMERSON and SEN. BENEDICT voted against the motion.

Motion/Vote: SEN. THOMAS MOVED HB 252 DO CONCUR AS AMENDED. The MOTION CARRIED WITH A 8 TO 1 VOICE VOTE. SEN. BARTLETT opposed the motion.

{Tape: 1; Side: 2; Approx. Time Count: 5:55 p.m.}

EXECUTIVE ACTION ON HB 519

Amendments: HB051901.AEM (EXHIBIT 3)

Motion: SEN. DEBBIE SHEA MOVED TO TAKE HB 519 OFF THE TABLE AS AMENDED.

Discussion: SEN. SHEA said she does not believe the Committee took a good look at the equity and savings which will be involved with this piece of legislation.

SEN. BARTLETT reiterated what the amendments accomplish. Page 5, line 29 of the bill specifies that an Advanced Practice Registered Nurse who is licensed and recognized by the Board of Nursing and the amendments add the words "practicing in consultation with the physician", if there is not a treating physician as defined elsewhere in the area where the Advanced Nurse is located, would be recognized for the purposes of Workers' Compensation medical care as a treating physician. They are basically saying it is in those areas where there is not a physician and that the Advanced Practice Nurse must be practicing in consultation with a physician.

She said the amendments further strike the change from 'treating physician' to treating provider and make the language 'treating physician'.

SEN. BENEDICT said there is a little conflict if a Physician's Assistant with an Advanced Practice Registered Nurse, in the fact

that under the statutes, the physician's assistant must be under the supervision of a physician to be licensed.

SEN. MAHLUM said his biggest concern is that he wants to make sure that people in the small communities are taken care of. But he does not want to see the doctors ran out of communities by the other providers charging less money who are making this their business. He said that is not the intent of this. He asked **SEN. BARTLETT** if he is correct in assuming that is what her amendments accomplish.

SEN. BARTLETT said this is correct.

CHAIRMAN KEATING said he does not feels this bill is necessary. He said the nurses are now being covered through present practice by Workers' Compensation plans, Workers' Compensation organizations and self-insurers are recognizing the nurse practitioner in that emergency or that first visit situation where there is not an attending physician on hand. The nurse is the primary provider at that point. The medical claims are being honored by the insurers. Then the injured worker is suppose to go to a treating physician for the evaluation for the continuation of the treatment. The primary care provider is still not trained as a physician.

SEN. EMERSON agreed and said the better they try to write the bill, the more the door is open to get started going to go the other direction.

Vote: The MOTION DO CONCUR HB 519 AS AMENDED CARRIED BY VOICE VOTE WITH 5 IN FAVOR OF AND 4 OPPOSING. Those voting in favor of were **SEN. MAHLUM**, **SEN. THOMAS**, **SEN. BARTLETT**, **SEN. WILSON**, and **SEN. SHEA**. Those opposing were **SEN. EMERSON**, **SEN. KEATING**, **SEN. BENEDICT**, and **SEN. BURNETT**.

ADJOURNMENT

Adjournment: 6:05 p.m.



SEN. THOMAS F. KEATING, Chairman



GILDA CLANCY, Secretary

TK/GC