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**FILED**

AUG 24 2009

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN and	)	
CARL MILLER,	)	
	)	WCC NO. 2000-0222
Petitioner,	)	
	)	
vs.	)	CASSANDRA SCHMILL'S REPLY BRIEF
	)	TO RESPONSIVE BRIEFS FILED BY
MONTANA STATE FUND,	)	MONTANA STATE FUND AND COMMON
	)	FUND INSURERS
Respondent.	)	
	)	
LIBERTY NW INS. CORP.,	)	
	)	
Intervenor,	)	
_____	)	

COMES NOW, CASSANDRA SCHMILL, by and through her attorney of record, and submits this reply brief on the definition of "Paid in Full," as directed by the Court's Minute Order of April 22, 2009.

**ARGUMENT**

The Supreme Court held in *Schmill II* that *Schmill I* could not be applied retroactively to claims that were "final" or "settled." *Schmill II* ¶19. In *Flynn II*, the Court rejected the Respondents' offer to include claims that were "closed" or "inactive" in the definitions of "settled" and "final." *Flynn II*, ¶19. A "final" claim was defined as a "claim in which a final judgment has been entered by the Workers' Compensation Court only if the claim is not currently pending on appeal." *Flynn II*, ¶9. A "settled" claim was defined as "a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full." *Flynn II*, ¶26. The WCC now has the task of determining what claims have been "settled" and thus must define what constitutes a claim that has been "paid in full."

DOCKET ITEM NO. 599

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At the outset, the analysis in *Flynn II* establishes that a claim that has been "paid in full" is more than a claim that has simply been "closed" or is "inactive." The Respondents invited the Supreme Court to include those terms in the definitions of "settled" and "final," only to have that offer rejected. Since the Respondents' definition of "paid in full" does not eliminate claims that were merely "closed" or "inactive," the definition cannot prevail.

The Respondents argue that an indemnity claim is "paid in full" if there has been a "termination of benefit payments . . ." (Common Fund Insurers Brief, p. 4.) If a claimant's disability status changed in the future, however, nothing would prevent, and in fact an insurer would be compelled to pay additional benefits pursuant to section 39-71-739, MCA, at that time, according to Respondents. (State Fund Brief, p. 7; Common Fund Insurers Brief, p. 3.) Such reasoning begs the question: Just how does a claim "paid in full" using the Respondents' definition differ from one that is merely "closed" or "inactive"? The answer is, there is no difference. In an effort to create a difference, the State Fund argues that an indemnity claim "paid in full" is only "settled" for purposes of retroactivity, but there is no such limitation stated in the "paid in full" statute, or in any of the retroactivity decisions of the Montana Supreme Court. (State Fund Brief, p. 2.) Since the Respondents' definition of "paid in full" does nothing more than define an indemnity claim that has been "closed" or is "inactive," and not one that has been "settled," the Court should not adopt the Respondents' definition.

Limiting the definition of "paid in full" to non-indemnity, med only claims as Schmill proposes eliminates the conflict the Respondents' definition of "paid in full" has with "closed" and "inactive" claims. In light of the factual and legal history of the amendment to section 39-71-107, MCA in 2001, it is clear that the "paid in full" language was added to the definition of "settled" claims for the purpose of describing med only claims.

Section 39-71-107, MCA, was amended in response to the decision in *Thompson v. Cigna*, 2000 MT 306, 302, Mont. 399, 14 P.3d 1222, in which a claimant's benefits were unreasonably delayed due to the in-state adjuster's lack of authority to settle the case. (Exhibit No. 1.) The amendments to section 39-71-107, MCA in 2001 imposed new duties on insurers to make sure in-state adjusters had what they needed to adjust claims in a timely manner. The amendment was designed to balance the need to have timely access to files with remaining benefit entitlements, with the adjusters desire to move inactive claims into long term storage.<sup>1</sup> Section 39-71-107(3), MCA, struck that balance by requiring that all claim files remain in Montana "until the claim is settled." At "settlement," the file could then be stored outside the adjuster's office, even out-of-state, provided it was available to the adjuster within 48 hours.

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<sup>1</sup> The fact that "settled" claims under section 39-71-107, MCA, are claims with ongoing benefit entitlements, undermines the Supreme Court's conclusion in *Flynn II* that the provisions of section 39-71-107, MCA, are generally applicable throughout the WCA. ¶25 There is clearly a difference between claims that are settled without any remaining benefit entitlements and those settled with preserved benefits of one sort or another.

The term "settled" was then defined in subsection 8 in three ways. The first two definitions of "settled" pertain to indemnity claims as those are the only types of claims that can be settled by way of a department-approved or court-ordered compromise of benefits and still have a remaining benefit entitlement (i.e. medical) which would necessitate an adjuster retrieving the file intermittently to pay benefits. The third definition of "settled" pertains to medical only claims because medical only claims settled by way of a petition for settlement or stipulated judgment would not have any remaining benefit entitlement necessitating the need to retrieve the file from storage at a later date, while medical only claims which were merely "paid in full" (the injury was fully treated and all medical benefits paid, but no petition for settlement was entered in to) could still require additional medical benefit payments in the future if warranted by the injury up until the 60 month statute of limitations ran.

The ability to move all three types of "settled" claims, but especially those "paid in full," to outside storage was not a meaningless gesture by the legislature. According to records kept by the Department of Labor and Industry, a full 85% of all reported claims in FY08 were med only claims. (Exhibit No. 2.)<sup>2</sup> With "paid in full" claims potentially numbering in the hundreds each year, in-state adjusters would be more than happy to move these claims to outside storage with a 48 hour retrieval time, rather than keep them indefinitely in their open files.

### **CONCLUSION**

The retroactive application of *Flynn* entitles certain claimants to additional indemnity benefits provided their indemnity benefits have not been previously "settled." Since indemnity benefits cannot be "paid in full" as that would make them merely "inactive" and not "settled," "paid in full" must apply solely to medical only claims. That conclusion is in line with the legislative and legal history of section 39-71-107, MCA, and the decisions in *Schmill II* and *Flynn II*.

For the foregoing reasons, the Court should define "paid in full" as applying to medical only claims. Since those claims are not implicated in the retroactive application of *Flynn*, only indemnity claims that have been "settled" by way of a department-approved or court-ordered compromise would be exempt from the *Flynn* retroactivity.

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<sup>2</sup> There is no reason to believe this percentage has substantially changed since 2001 in light of the fact that the statute creating med only claims was enacted all the way back in 1995. §39-71-615, MCA.

DATED this 21 of August, 2009.

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By: Laurie Wallace  
LAURIE WALLACE

Certificate of Mailing

I, Robin Stephens, do hereby certify that on the 21 day of August, 2009, I served a true and accurate copy of CASSANDRA SCHMILL'S REPLY BRIEF TO RESPONSIVE BRIEFS FILED BY MONTANA STATE FUND AND COMMON FUND INSURERS by U.S. mail, first class, postage prepaid to the following:

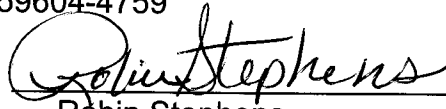
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Mr. Tom Martello  
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P.O. Box 4759  
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A handwritten signature in cursive script, reading "Robin Stephens", is written over a horizontal line.

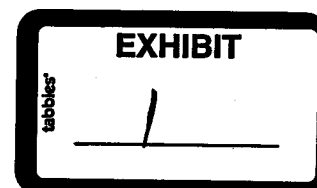
Robin Stephens

## SENATE BILL NO. 164

INTRODUCED BY W. MCNUTT

BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING CERTAIN PROVISIONS OF THE UNEMPLOYMENT INSURANCE LAW, THE WORKERS' COMPENSATION ACT, THE OCCUPATIONAL DISEASE ACT, AND SILICOSIS BENEFITS LAW; CLARIFYING THE BURDEN OF PROOF IN WORKERS' COMPENSATION INSURANCE COVERAGE DISPUTES WITH THE DEPARTMENT OF LABOR AND INDUSTRY; RESTORING THE EXEMPTION FROM ATTACHMENT OF UNEMPLOYMENT INSURANCE, WORKERS' COMPENSATION, OCCUPATIONAL DISEASE, AND SILICOSIS BENEFITS; REQUIRING WORKERS' COMPENSATION CLAIMS TO BE ADJUSTED BY AN IN-STATE ADJUSTER; CLARIFYING WORKERS' COMPENSATION INSURANCE COVERAGE REQUIREMENTS FOR TRUCK DRIVERS; REVISING THE WORKERS' COMPENSATION ASSESSMENT METHODOLOGY; RESTORING DISTRICT COURT JURISDICTION IN CASES INVOLVING THE FAILURE OF AN EMPLOYER TO PRODUCE BOOKS AND RECORDS; REQUIRING INSURERS TO FILE REPORTS OF MISCELLANEOUS CLAIM EXPENSES; SPECIFYING THE APPEAL PROCEDURE FOR CASES APPEALED FROM THE INDEPENDENT CONTRACTOR CENTRAL UNIT AND PROVIDING AN APPEAL TIME; CLARIFYING THAT THE WORKERS' COMPENSATION ASSESSMENT IS COMPUTED WITHOUT CONSIDERATION OF A DEDUCTIBLE; CLARIFYING THAT AN APPEAL OF A DEPARTMENT ORDER TO PAY INTERIM BENEFITS IS A NEW PROCEEDING IN THE WORKERS' COMPENSATION COURT; IDENTIFYING THE CURRENT STANDARD FOR MEASURING OCCUPATIONAL DEAFNESS; CLARIFYING THE TIME FOR CERTIFYING A CURRENT EMPLOYEE AS BEING VOCATIONALLY DISABLED; REVISING THE SUBSEQUENT INJURY FUND ASSESSMENT METHODOLOGY; ALLOWING ADDITIONAL ORGANIZATIONS TO BE DESIGNATED AS AUTHORIZED TO REPORT NOTICE OF COVERAGE; REQUIRING THE STATE FUND TO PROVIDE NOTICE OF CANCELLATION TO THE DEPARTMENT 20 DAYS PRIOR TO CANCELLATION; PROVIDING AN ADJUSTMENT IN SILICOSIS BENEFITS THAT IS CONSISTENT WITH THE APPROPRIATION LEVEL; AMENDING SECTIONS 30-9-129, 39-71-107, 39-71-117, 39-71-201, 39-71-304, 39-71-306, 39-71-415, 39-71-435, 39-71-610, 39-71-805, 39-71-906, 39-71-915, 39-71-2204, 39-71-2205, 39-71-2337, 39-71-2339, 39-72-606, 39-72-608, 39-73-103, 39-73-107, AND 39-73-109, MCA; REPEALING SECTION 39-72-605, MCA; AND PROVIDING AN EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."



Title 39, chapter 51, 71, 72, or 73."

**Section 3.** Section 39-71-107, MCA, is amended to read:

**"39-71-107. Insurers to act promptly on claims -- in-state adjusters. (1)**

Pursuant to the public policy stated in 39-71-105, prompt claims handling practices are necessary to provide appropriate service to injured workers, to employers, and to providers who are the customers of the workers' compensation system.

(2) All workers' compensation and occupational disease claims filed pursuant to the Workers' Compensation Act and the Occupational Disease Act of Montana must be adjusted by a person in Montana. For a claim to be considered as adjusted by a person in Montana, the person adjusting the claim is required to determine the entitlement to benefits, authorize payment of all benefits due, manage the claim, have authority to settle the claim, maintain an office located in Montana, and adjust Montana claims from that office. Use of a mailbox or maildrop in Montana does not constitute maintaining an office in Montana.

(3) An insurer shall maintain the documents related to each claim filed with the insurer under the Workers' Compensation Act and the Occupational Disease Act of Montana at the Montana office of the person adjusting the claim in Montana until the claim is settled. The documents may be either original documents or duplicates of the original documents and must be maintained in a manner that allows the documents to be retrieved from that office and copied at the request of the claimant or the department. Settled claim files stored outside of the adjuster's office must be made available within 48 hours of a request for the file. Electronic or optically imaged documents are permitted.

~~—(2)~~(4) An insurer shall provide to the claimant:

(a) a written statement of the reasons that a claim is being denied at the time of denial;

(b) whenever benefits requested by a claimant are denied, a written explanation of how the claimant may appeal an insurer's decision; and

(c) a written explanation of the amount of wage loss benefits being paid to

the claimant, along with an explanation of the calculation used to compute those benefits. The explanation must be sent within 7 days of the initial payment of the benefit.

———~~(3)~~(5) An insurer shall:

(a) begin making payments that are due on a claim within 14 days of acceptance of the claim, unless the insurer promptly notifies the claimant that the insurer needs additional information in order to begin paying benefits and specifies the information needed; and

(b) pay settlements within 30 days of the date the department issues an order approving the settlement.

———~~(4)~~(6) An insurer may not make payments pursuant to 39-71-608 or any other reservation of rights for more than 90 days without:

(a) written consent of the claimant; or

(b) approval of the department.

———~~(5)~~(7) The department may adopt rules to implement this section.

(8) For purposes of this section, "settled claim" means a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full. The term does not include a claim in which there has been only a lump-sum advance of benefits."

**Section 4.** Section 39-71-117, MCA, is amended to read:

**"39-71-117. Employer defined.** (1) "Employer" means:

(a) the state and each county, city and county, city school district, and irrigation district; all other districts established by law; all public corporations and quasi-public corporations and public agencies; each person; each prime contractor; each firm, voluntary association, limited liability company, limited liability partnership, and private corporation, including any public service corporation and including an independent contractor who has a person in service under an appointment or contract of hire, expressed or implied, oral or written; and the legal representative of any deceased employer or the receiver or trustee of the deceased employer;



# FISCAL NOTE

**Bill #:** SB0164

**Title:** Generally revise workers' compensation and related laws

**Primary Sponsor:** Walter McNutt

**Status:** As Introduced

Sponsor signature	Date	Chuck Swysgood, Budget Director	Date
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## Fiscal Summary

	<u>FY2002 Difference</u>	<u>FY2003 Difference</u>
<b>Expenditures:</b>	0	0
<b>Revenue:</b>	0	0
<b>Net Impact on General Fund Balance:</b>	0	0

<u>Yes</u>	<u>No</u>		<u>Yes</u>	<u>No</u>	
	X	Significant Local Gov. Impact		X	Technical Concerns
X		Included in the Executive Budget		X	Significant Long-Term Impacts
	X	Dedicated Revenue Form Attached		X	Family Impact Form Attached

## Fiscal Analysis

### ASSUMPTIONS:

1. There will be 60 recipients receiving the \$225/month silicosis benefit in FY 2002 and 50 recipients in FY 2003. This is a \$25/month increase over current statute. However, the net \$18,000 general fund expense in FY 2002 and the \$15,000 general fund cost in FY 2003 already is included in the executive budget. Therefore, this bill has no additional fiscal impact.

## **MINUTES**

### **MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON BUSINESS AND LABOR**

**Call to Order:** By **CHAIRMAN MIKE TAYLOR**, on January 17, 2001 at 8:00 A.M., in Room 422 Capitol.

#### **ROLL CALL**

**Members Present:**

Sen. Mike Taylor, Chairman (R)  
Sen. Mike Sprague, Vice Chairman (R)  
Sen. Edward Butcher (R)  
Sen. Vicki Cocchiarella (D)  
Sen. Sam Kitzenberg (R)  
Sen. Dale Mahlum (R)  
Sen. Glenn Roush (D)  
Sen. Don Ryan (D)

**Members Excused:** Sen. Dale Berry (R)

**Members Absent:** None.

**Staff Present:** Bart Campbell, Legislative Branch  
Kyanne Kelly, Committee Secretary

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

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: SB 142, 1/14/2001; SB 164,  
1/14/2001  
Executive Action: SB 142

**SENATOR MAHLUM** asked if the license would sell for an inflated price.

**Lee Baerlocker** said it would be for market price.

**Closing by Sponsor:**

**SENATOR MIKE SPRAGUE, SD 6, BILLINGS**, stated this situation does not happen much. There are 3 cases in the past couple of years, but the bill would facilitate the process when it does happen.

**HEARING ON SB 164**

**Sponsor:** **SENATOR WALTER McNUTT, SD 50, SIDNEY**

**Proponents:**      **Jerry Keck, Department of Labor and Industry**  
                         **Kevin Braun, Department of Labor & Industry**  
                         **John Gregory, Crawford & Company**  
                         **Cheryl Lee, Association of Worker's Comp Adjusters**  
                         **George Wood, Montana Self Insurers Association**  
                         **Nancy Butler, State Fund**

**Opponents:**      **Jacqueline Lenmark, American Insurance Association**  
                         **Stan Kallis, National Council on**  
                         **John Metropoulos, Association Independent Insurers**

**Opening Statement by Sponsor:**

{Tape : 1; Side : A; Approx. Time Counter : 12.8}

**SENATOR WALTER McNUTT, SD 50, SIDNEY**, said the bill can be broken out into three categories of change. He said the first part would be procedural and technical fixes to the law. He noted that the second part would be fixes to administrative assessments and the third part would be some general housekeeping.

**Proponents' Testimony:**

**Jerry Keck, Department of Labor and Industry**, spoke to three sections of the bill. **EXHIBIT(bus13a02)**

**Kevin Braun, Department of Labor & Industry**, went over all the other sections.

**John Gregory, Crawford & Company**, said by passing this bill the most important thing that would happen would be a local accountability and also there would be local access to the Workers' Comp system.

**Cheryl Lee, Association of Worker's Comp Adjusters**, said she thinks claims adjusted within the state offer closer working relationships with the employers, medical providers, and injured worker. **EXHIBIT(bus13a03)**

**George Wood, Montana Self Insurers Association**, said he had an opportunity to give his opinion as the bill was being drafted and he supports it.

**Nancy Butler, State Fund**, supports this bill.

**Opponents' Testimony:**

**Jacqueline Lenmark, American Insurance Association**, suggested some amendments.

**Stan Kallis, National Council on Compensation Insurance**, said he there was not any need for two different groups to be overseers.

**John Metropoulos, Association Independent Insurers**, opposed section two of the bill, but supported the rest of the bill.

**Questions from Committee Members and Responses:**

**SENATOR MIKE SPRAGUE** asked if adjusters are licensed.

**Jackie Lenmark** said they can be licensed, but are not required to be licensed.

**CHAIRMAN TAYLOR** asked how it is handled if the adjuster is from out of state and there is a need to do an on site inspection.

**Jackie Lenmark** said they would send the nearest adjuster to do the on site inspection.

**Closing by Sponsor:**

**{Tape : 2; Side : A; Approx. Time Counter : 16.8}**

**SENATOR WALTER McNUTT, SD 50, SIDNEY**, said relying on out of state adjusters is not timely and not very efficient.

**EXECUTIVE ACTION ON SB 142**

**Motion/Vote:** SEN. MAHLUM moved that SB 142 DO PASS. Motion carried unanimously.

## **MINUTES**

### **MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON BUSINESS AND LABOR**

**Call to Order:** By **CHAIRMAN MIKE TAYLOR**, on January 23, 2001 at 8:00 A.M., in Room 422 Capitol.

#### **ROLL CALL**

**Members Present:**

Sen. Mike Taylor, Chairman (R)  
Sen. Mike Sprague, Vice Chairman (R)  
Sen. Edward Butcher (R)  
Sen. Vicki Cocchiarella (D)  
Sen. Sam Kitzenberg (R)  
Sen. Dale Mahlum (R)  
Sen. Glenn Roush (D)  
Sen. Don Ryan (D)

**Members Excused:** Sen. Dale Berry (R)

**Members Absent:** None.

**Staff Present:** Bart Campbell, Legislative Branch  
Kyanne Kelly, Committee Secretary

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

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: SB211, 1/20/2001; SB229,  
1/20/2001; HB98, 1/20/2001  
Executive Action: SB211; SB229; SB195; SB164;  
SB27; HB98; SB145; SB189

**SENATOR BUTCHER** asked if there was a problem with tenure with both spouses at the University.

**Kathy Crego** said there are nepotism laws with which they currently comply. She further elucidated that there would be instances where they would sometimes have to hire someone slightly less qualified because they are the spouse.

**Closing by Sponsor:**

*{Tape : 1; Side : B; Approx. Time Counter : 4.5}*

**SENATOR VICKI COCCHIARELLA, SD 32, MISSOULA**, said the essence of this legislation is to remove the roadblocks to bringing the best qualified people to work at the University.

**EXECUTIVE ACTION ON SB 211**

**Motion/Vote:** SEN. RYAN moved that SB211 DO PASS. Motion carried unanimously.

**EXECUTIVE ACTION ON SB 229**

**Motion/Vote:** SEN. COCCHIARELLA moved that SB229 DO PASS. Motion carried unanimously.

**EXECUTIVE ACTION ON SB 164**

**Motion/Vote:** SEN. COCCHIARELLA moved that AMENDMENTS 16402 AND 16401 BE ADOPTED. Motion carried unanimously. EXHIBIT(bus18a02) and EXHIBIT(bus18a03)

**Motion/Vote:** SEN. COCCHIARELLA moved that SB 164 DO PASS AS AMENDED. Motion carried unanimously.

**EXECUTIVE ACTION ON SB 27**

**Motion/Vote:** SEN. COCCHIARELLA moved that SB 27 BE TABLED. Motion failed 4-5 with Cocchiarella, Mahlum, Roush, and Ryan voting aye.

**Motion/Vote:** SEN. BUTCHER moved that SB 27 DO PASS AS AMENDED. Motion carried 5-4 with Cocchiarella, Mahlum, Roush, and Ryan voting no. EXHIBIT(bus18a04)

## **MINUTES**

### **MONTANA HOUSE OF REPRESENTATIVES 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON BUSINESS AND LABOR**

**Call to Order:** By **CHAIRMAN JOE MCKENNEY**, on March 2, 2001 at  
8:00 A.M., in Room 172 Capitol.

#### **ROLL CALL**

##### **Members Present:**

Rep. Joe McKenney, Chairman (R)  
Rep. Rod Bitney, Vice Chairman (R)  
Rep. Gary Matthews, Vice Chairman (D)  
Rep. Roy Brown (R)  
Rep. Nancy Fritz (D)  
Rep. Dave Gallik (D)  
Rep. Kathleen Galvin-Halcro (D)  
Rep. Dennis Himmelberger (R)  
Rep. Jim Keane (D)  
Rep. Rick Laible (R)  
Rep. Bob Lawson (R)  
Rep. John Musgrove (D)  
Rep. William Price (R)  
Rep. Allen Rome (R)  
Rep. Donald Steinbeisser (R)  
Rep. James Whitaker (R)

**Members Excused:** Rep. Sylvia Bookout-Reinicke (R)  
Rep. Carol C. Juneau (D)  
Rep. Brett Tramelli (D)

**Members Absent:** None.

**Staff Present:** Gordon Higgins, Legislative Branch  
Jane Nofsinger, Committee Secretary

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

##### **Committee Business Summary:**

Hearing(s) & Date(s) Posted: HB357, SB142, SB164, SB252,  
SB279, 2/21/2001  
Executive Action: SB122, SB279, SB142



HEARING ON SB164

Sponsor: SEN. WALTER MCNUTT, SD50, SIDNEY

Proponents: Jerry Keck, Department of Labor and Industry  
Kevin Braun, Department of Labor and Industry  
Jacqueline Lenmark, American Insurance Assn.  
Cheryl Lee, MAWCA  
Michele Fairclough, Adjusters  
George Wood, Montana Self-Insurers Assn.  
John Gregory, Crawford and Company  
Aidan Myhre, Montana Chamber of Commerce  
Dwight Easton, Farmers Insurance  
Jon Metropoulos, NAIL, Farmers Insurance  
Nancy Butler, State Fund  
Gregg VanHorssen, State Farm Insurance

Opponents: None

Opening Statement by Sponsor:

SEN. WALTER MCNUTT, SD50, SIDNEY, said the legislation had been requested by the Department of Labor and Industry. He said it revised certain provisions of the unemployment insurance law, the workers' compensation act, the occupational disease act, and the silicosis benefits law. The bill also addressed other matters including workers' compensation issues and certain court jurisdiction, he said.

Proponents' Testimony:

Mr. Keck presented written testimony. EXHIBIT(buh48a01)

*{Tape : 1; Side : A; Approx. Time Counter : 23}*

Mr. Braun said the bill clarifies the coverage requirements for truck drivers, noting an interstate motor carrier must have a presence within the state, and restores the court's jurisdiction. The bill raises the silicosis benefit \$25 per month, and sets occupational hearing loss standards, he said.

*{Tape : 1; Side : B; Approx. Time Counter : 0}*

Ms. Lenmark said she supported the bill for all the reason given previously, but said she had an amendment striking the references to an "in-state adjuster." EXHIBIT(buh48a02) She told the

committee that physical location does not insure adequate knowledge of Montana law.

**Ms. Lee** presented written testimony. **EXHIBIT(buh48a03)**

**Mr. Fairclough** said this bill would keep good jobs in Montana, noting that adjusters earned \$40-50,000 and hired clerical help at \$9-10. He said people prefer to work with in-state adjusters, and this bill will protect these jobs.

**Mr. Wood** urged the committee to pass the bill without the amendment. He noted the guaranteed funds operated by self-insurers requires an in-state adjuster.

**{Tape : 1; Side : B; Approx. Time Counter : 21.7}**

**Mr. Gregory** said in-state adjusters know the territory and he supported the bill. He said the in-state adjusters are familiar with the doctors, the lawyers and the geography of Montana. He said he meets quarterly with and works with companies like Smurfit Stone Container and Stillwater Mining. He said this doesn't happen with out-of-state adjusters.

**{Tape : 2; Side : A; Approx. Time Counter : 0}**

**Mr. Easter** said he supported the amendment by **Ms. Lenmark**. He said the bill will create a barrier for doing business in Montana without the amendment.

**Mr. Metropolous and Mr. Van Horssen** said they supported the bill with the amendment.

**Ms. Butler** said she was not impacted by Section 3 and she supported the bill.

**Opponents' Testimony:** None

**Questions from Committee Members and Responses:**

**REP. LAIBLE** asked **Mr. Gregory** if it was open now for any adjuster. **Mr. Gregory** said there is an in-state adjuster rule in the rules section. He said this law will make a change which would put teeth into what is not being enforced. He said if amended, it will stay like it is today. **REP. LAIBLE** asked if it was amended, then it would just be a clean-up bill, and no different from today. **Mr. Gregory** said it has not been applied consistently.

**{Tape : 2; Side : A; Approx. Time Counter : 10.7}**

**REP. GALLIK** asked **Mr. Wood** if there had been any problems due to out-of-state adjusters. **Mr. Wood** said there had because one firm, which was self-insured, went bankrupt and the checks didn't show up. They were told the files had been moved to Miami, and they were never found, he said. **REP. GALLIK** asked what would disallow using a third party in-state. **Mr. Wood** said that would be the recommended choice. He added it was not practical to be a self-insurer unless the company had \$500,000.

**REP. LAIBLE** asked **Mr. Easton** if the 64% of the carriers with less than \$100,000 would pull out. **Mr. Easton** said it would be sound economics, and they could go to third party administrators. He said the trend was to administer from service centers throughout the state. He said if the bill passes, there will be carriers who will pull out.

**REP. GALVIN-HALCRO** asked **Mr. Braun** if other states had laws like Section 3. **Mr. Braun** said he would provide her the information.

**REP. GALLIK** asked **SEN. MCNUTT** what the committee vote was in the Senate. **SEN. MCNUTT** said the amendment failed in executive action, and the bill came out unanimously without the amendment.

**Closing by Sponsor:**

**SEN. MCNUTT** asked the committee to concur on the bill without the amendment. He said this law deals with injured workers. The response needs to be timely, and the parties need to know the facts of what is going on.

*{Tape : 2; Side : B; Approx. Time Counter : 0}*

**HEARING ON SB279**

**Sponsor:** **SEN. WALTER MCNUTT, SD50, SIDNEY**

**Proponents:** Carroll South, Board of Investments  
John Cadby, Montana Bankers Assn.  
Gloria Paladichuk, City of Glendive  
Bob Gilbert, NFIB

**Opponents:** None

## **MINUTES**

### **MONTANA HOUSE OF REPRESENTATIVES 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON BUSINESS AND LABOR**

**Call to Order:** By **CHAIRMAN JOE MCKENNEY**, on March 8, 2001 at 8:00 A.M., in Room 172 Capitol.

#### **ROLL CALL**

##### **Members Present:**

Rep. Joe McKenney, Chairman (R)  
Rep. Rod Bitney, Vice Chairman (R)  
Rep. Gary Matthews, Vice Chairman (D)  
Rep. Sylvia Bookout-Reinicke (R)  
Rep. Roy Brown (R)  
Rep. Nancy Fritz (D)  
Rep. Dave Gallik (D)  
Rep. Kathleen Galvin-Halcro (D)  
Rep. Dennis Himmelberger (R)  
Rep. Carol C. Juneau (D)  
Rep. Jim Keane (D)  
Rep. Rick Laible (R)  
Rep. Bob Lawson (R)  
Rep. John Musgrove (D)  
Rep. William Price (R)  
Rep. Allen Rome (R)  
Rep. Donald Steinbeisser (R)  
Rep. Brett Tramelli (D)  
Rep. James Whitaker (R)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Gordon Higgins, Legislative Branch  
Jane Nofsinger, Committee Secretary

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

##### **Committee Business Summary:**

Hearing(s) & Date(s) Posted: SB141, SB221, SB392, 3/5/2001  
Executive Action: SB164

good question, and the bill did not say "copy," but it could be amended to say "copy."

**REP. BOOKOUT-REINICKE** asked **Mr. Holder** about the date of the bill and asked if a retroactive date would help the man involved in the lawsuit to get his records. **Mr. Holder** said yes, but he did not want to jeopardize the bill.

**REP. JUNEAU** asked **Mr. Frohnmayer** how many years the employer was required to maintain the records. He said that was not included in this bill, and it was up to the employer. **REP. JUNEAU** asked if the file could be terminated with employment. **REP. JUNEAU** said yes, but that would be stupid to do.

**REP. LAIBLE** asked if the bill would allow an attorney to inspect a client's records. **Mr. Frohnmayer** said it would.

**REP. BITNEY** asked if an employee was fired and applied for a new job, if the prospective employer had any rights to inspect records or disciplinary action. **Mr. Frohnmayer** said the bill would have no effect on this. He said the signature of an employee on disciplinary action means they received notice, not that they concurred. {Tape : 3; Side : B; Approx. Time Counter : 0}

**REP. BROWN** asked **Mr. Frohnmayer** who owns the file. He replied that the employer owns the file, but the court will grant a request to access.

**REP. LAIBLE** asked **Mr. Frohnmayer** if there were laws similar to this in other states. He replied there were many other states which have this statute, and if fact, this statute was copied from one of the other states.

**Closing by Sponsor:**

**SEN. STONINGTON** said one issue came up in the Senate concerning what if the employer doesn't even have a file, as in a "mom and pop" operation. She said the wording should be plain that only "if" the employer maintains records, the bill does not require an employer to maintain personnel files. She said the amendments offered by **REP. BOOKOUT-REINICKE** were good ideas, and she hoped the committee would find favorable concurrence.

**EXECUTIVE ACTION ON SB164**

**Motion:** **REP. LAIBLE** moved that **SB164 BE CONCURRED IN.**

**Discussion:**

**REP. LAIBLE** said he was concerned with Section 3 and offered amendments to address his concerns. **EXHIBIT (buh53a12)**

**Mr. Higgins** said the amendments struck the regulation that claims by adjusted by an in-state adjuster, changed the 48 hour time period required to produce documents, and deleted some superfluous language.

**REP. LAIBLE** said this will give a choice of the best way to effect a claim and does not hurt the in-state adjuster because the cost is less. He noted this would be particularly helpful to e-commerce.

**REP. GALVIN-HALCRO** presented the committee a fact sheet of which states allow out-of-state adjusters and the number of out-of-state claims adjusted in Montana. She said she thought the bill was fine without the amendment. **EXHIBIT (buh53a13)**

**REP. PRICE** asked to segregate 1,2 & 3 from the amendments. He said he had concerns about Section 3 but would like to maintain in-state adjusters.

**REP. BITNEY** asked **REP. LAIBLE** how he thought the segregation affected the amendment.

**REP. LAIBLE** said they should look at the comparison sheet.

**REP. BROWN** said they should think about companies that might be considering coming here to do business. He said this bill restricts opportunities so they may not even consider coming here. He said, "Let's make it so more people want to come here to do business."

**REP MATTHEWS** said the committee was told in testimony Section 3 would be the controversial part of this bill as out-of-state adjusters are at a high risk of making mistakes. He said this was why he would vote no.

**REP. GALVIN-HALCRO** asked **REP. PRICE** if the in-state adjuster language had been in administrative rule since 1972. **REP. PRICE** said it had.

**REP. GALLIK** said he did not like the bill and would vote against it. He wished it would include all other kinds of insurance. He said it was difficult to work with out-of-state adjusters because they did not understand Montana law and geography.

**REP. PRICE** said this is workmen's compensation and nothing else, it is not auto. He did not feel it restricted the marketplace, but the problem was with other people not understanding Montana laws.

**Vote:** Motion failed 6-13 with Bitney, Brown, Laible, McKenney, Rome, and Whitaker voting aye.

**REP. LAIBLE** said he was still in favor of 4, 7 and 8.

**REP. GALLIK** asked him why.

**REP. MATTHEWS** said it would be a mistake to pass the amendment.

**Mr. Higgins** said the language was connected to the first half of the segregated motion.

**REP. LAIBLE** said he didn't segregate it, **REP. PRICE** did, so what was his intention.

**REP. PRICE** said he had no intention other than the in-state adjuster.

**CHAIRMAN MCKENNEY** asked **Ms. Lenmark** to discuss the amendments.

**Ms. Lenmark** said that now the in-state adjuster was rejected, the language which dealt with records was also rejected. She said the insurance industry would like the ability to have a reasonable amount of time to get files from another location.

**REP. PRICE** withdrew his motion.

**REP. GALLIK** moved to table the remainder of the amendments.

**CHAIRMAN MCKENNEY** said that would not work and called for a voice vote on the second amendment.

**Vote:** Motion failed 0-19.

**CHAIRMAN MCKENNEY** asked for the discussion to return to the bill.

**Motion:** **REP. MATTHEWS** moved that **SB164 BE CONCURRED IN.**

**Discussion:**

**REP. LAIBLE** said now he opposed the bill.

**Vote:** Motion **SB164** carried 17-2 with **Laible** and **Whitaker** voting  
no.

**REP. SLITER** will carry the bill in the House.



## 2001 Montana Legislature

About Bill -- Links

SENATE BILL NO. 164

INTRODUCED BY W. MCNUTT



AN ACT REVISING CERTAIN PROVISIONS OF THE UNEMPLOYMENT INSURANCE LAW, THE WORKERS' COMPENSATION ACT, THE OCCUPATIONAL DISEASE ACT, AND SILICOSIS BENEFITS LAW; CLARIFYING THE BURDEN OF PROOF IN WORKERS' COMPENSATION INSURANCE COVERAGE DISPUTES WITH THE DEPARTMENT OF LABOR AND INDUSTRY; RESTORING THE EXEMPTION FROM ATTACHMENT OF UNEMPLOYMENT INSURANCE, WORKERS' COMPENSATION, OCCUPATIONAL DISEASE, AND SILICOSIS BENEFITS; REQUIRING WORKERS' COMPENSATION CLAIMS TO BE ADJUSTED BY AN IN-STATE ADJUSTER; CLARIFYING WORKERS' COMPENSATION INSURANCE COVERAGE REQUIREMENTS FOR TRUCK DRIVERS; REVISING THE WORKERS' COMPENSATION ASSESSMENT METHODOLOGY; RESTORING DISTRICT COURT JURISDICTION IN CASES INVOLVING THE FAILURE OF AN EMPLOYER TO PRODUCE BOOKS AND RECORDS; REQUIRING INSURERS TO FILE REPORTS OF MISCELLANEOUS CLAIM EXPENSES; SPECIFYING THE APPEAL PROCEDURE FOR CASES APPEALED FROM THE INDEPENDENT CONTRACTOR CENTRAL UNIT AND PROVIDING AN APPEAL TIME; CLARIFYING THAT THE WORKERS' COMPENSATION ASSESSMENT IS COMPUTED WITHOUT CONSIDERATION OF A DEDUCTIBLE; CLARIFYING THAT AN APPEAL OF A DEPARTMENT ORDER TO PAY INTERIM BENEFITS IS A NEW PROCEEDING IN THE WORKERS' COMPENSATION COURT; IDENTIFYING THE CURRENT STANDARD FOR MEASURING OCCUPATIONAL DEAFNESS; CLARIFYING THE TIME FOR CERTIFYING A CURRENT EMPLOYEE AS BEING VOCATIONALLY DISABLED; REVISING THE SUBSEQUENT INJURY FUND ASSESSMENT METHODOLOGY; ALLOWING ADDITIONAL ORGANIZATIONS TO BE DESIGNATED AS AUTHORIZED TO REPORT NOTICE OF COVERAGE; REQUIRING THE STATE FUND TO PROVIDE NOTICE OF CANCELLATION TO THE DEPARTMENT 20 DAYS PRIOR TO CANCELLATION; PROVIDING AN ADJUSTMENT IN SILICOSIS BENEFITS THAT IS CONSISTENT WITH THE APPROPRIATION LEVEL; AMENDING SECTIONS 30-9-129, 39-71-107, 39-71-117, 39-71-201, 39-71-304, 39-71-306, 39-71-415, 39-71-435, 39-71-610, 39-71-805, 39-71-906, 39-71-915, 39-71-2204, 39-71-2205, 39-71-2337, 39-71-2339, 39-72-606, 39-72-608, 39-73-103, 39-73-107, AND 39-73-109, MCA; REPEALING SECTION 39-72-605, MCA; AND PROVIDING AN EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1. Burden of proof -- insurance coverage.** (1) In a proceeding brought by the department or an employer to resolve the issue of the existence of workers' compensation insurance coverage for that employer, the initial burden of proof is on the department to demonstrate that:

(a) the employer is required to have workers' compensation insurance coverage; and

(b) either:

(i) that the database of the recognized agent providing proof of coverage indicates that no coverage is reported by an insurer to cover the employer's Montana operations; or

(ii) that the department confirms with the insurer that reported coverage for the employer that the policy previously covering the employer's Montana operations has been canceled by that insurer.

(2) The burden then shifts to the employer to demonstrate that the employer is not required either to have workers' compensation insurance coverage or to produce a valid workers' compensation insurance policy covering the employer's Montana operations during the period of time in question. A valid workers' compensation insurance policy is one acknowledged by the insurer to be valid or adjudged to be valid by a court of competent jurisdiction.

**Section 2.** Section 30-9-129, MCA, is amended to read:

**"30-9-129. (Effective July 1, 2001) Scope.** (1) Except as otherwise provided in subsections (3) and (4), this chapter applies to:

(a) any transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

- (b) an agricultural lien;
- (c) a sale of an account, chattel paper, payment intangible, or promissory note;
- (d) a consignment;
- (e) a security interest arising under 30-2-401, 30-2-505, 30-2-711(3), or 30-2A-508(5), to the extent provided in 30-9-130; and
- (f) a security interest arising under 30-4-208 or 30-5-118.

(2) The application of this chapter to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this chapter does not apply.

(3) This chapter does not apply to the extent that:

- (a) a statute, regulation, or treaty of the United States preempts this chapter;
- (b) another statute of this state expressly governs the creation, perfection, priority, or enforcement of a security interest created by this state or a governmental unit of this state;
- (c) a statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the state, country, or governmental unit; or

(d) the rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under 30-5-134.

(4) This chapter does not apply to:

- (a) a landlord's lien, other than an agricultural lien;
- (b) a lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but 30-9-353 applies with respect to priority of the lien;
- (c) an assignment of a claim for wages, salary, or other compensation of an employee;
- (d) a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;
- (e) an assignment of accounts, chattel paper, payment intangibles, or promissory notes that is for the purpose of collection only;
- (f) an assignment of a right to payment under a contract to an assignee that is also obliged to perform under the contract;
- (g) an assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;
- (h) a transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but 30-9-335 and 30-9-342 apply with respect to proceeds and priorities in proceeds;
- (i) an assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;
- (j) a right of recoupment or setoff, but:
  - (i) 30-9-360 applies with respect to the effectiveness of rights of recoupment or setoff against deposit accounts; and
  - (ii) 30-9-444 applies with respect to defenses or claims of an account debtor;
- (k) the creation or transfer of an interest in or lien on real property, including a lease or rents ~~thereunder~~ under the interest in real property, except to the extent that provision is made for:
  - (i) liens on real property in 30-9-213 and 30-9-328;
  - (ii) fixtures in 30-9-354;
  - (iii) fixture filings in 30-9-521, 30-9-522, 30-9-532, 30-9-536, and 30-9-539; and
  - (iv) security agreements covering personal and real property in 30-9-604;

(l) an assignment of a claim arising in tort, other than a commercial tort claim, but 30-9-335 and 30-9-342 apply with respect to proceeds and priorities in proceeds; ~~or~~

(m) an assignment of a deposit account in a consumer transaction, except that 30-9-335 and 30-9-342 apply with respect to proceeds and priorities in proceeds; or

(n) an assignment of payments made to or on behalf of claimants pursuant to Title 39, chapter 51, 71, 72, or 73."

**Section 3.** Section 39-71-107, MCA, is amended to read:

**"39-71-107. Insurers to act promptly on claims -- in-state adjusters.** (1) Pursuant to the public policy stated in 39-71-105, prompt claims handling practices are necessary to provide appropriate service to injured workers, to employers, and to providers who are the customers of the workers' compensation system.

(2) All workers' compensation and occupational disease claims filed pursuant to the Workers' Compensation Act and the Occupational Disease Act of Montana must be adjusted by a person in Montana. For a claim to be considered as adjusted by a person in Montana, the person adjusting the claim is required to determine the entitlement to benefits, authorize payment of all benefits due, manage the claim, have authority to settle the claim, maintain an office located in Montana, and adjust Montana claims from that office. Use of a mailbox or maildrop in Montana does not constitute maintaining an office in Montana.

(3) An insurer shall maintain the documents related to each claim filed with the insurer under the Workers' Compensation Act and the Occupational Disease Act of Montana at the Montana office of the person adjusting the claim in Montana until the claim is settled. The documents may be either original documents or duplicates of the original documents and must be maintained in a manner that allows the documents to be retrieved from that office and copied at the request of the claimant or the department. Settled claim files stored outside of the adjuster's office must be made available within 48 hours of a request for the file. Electronic or optically imaged documents are permitted.

~~(2)~~(4) An insurer shall provide to the claimant:

- (a) a written statement of the reasons that a claim is being denied at the time of denial;
- (b) whenever benefits requested by a claimant are denied, a written explanation of how the claimant may appeal an insurer's decision; and
- (c) a written explanation of the amount of wage loss benefits being paid to the claimant, along with an explanation of the calculation used to compute those benefits. The explanation must be sent within 7 days of the initial payment of the benefit.

~~(3)~~(5) An insurer shall:

- (a) begin making payments that are due on a claim within 14 days of acceptance of the claim, unless the insurer promptly notifies the claimant that the insurer needs additional information in order to begin paying benefits and specifies the information needed; and
- (b) pay settlements within 30 days of the date the department issues an order approving the settlement.

~~(4)~~(6) An insurer may not make payments pursuant to 39-71-608 or any other reservation of rights for more than 90 days without:

- (a) written consent of the claimant; or
- (b) approval of the department.

~~(5)~~(7) The department may adopt rules to implement this section.

(8) For purposes of this section, "settled claim" means a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full. The term does not include a claim in which there has been only a lump-sum advance of benefits."

**Section 4.** Section 39-71-117, MCA, is amended to read:

**"39-71-117. Employer defined.** (1) "Employer" means:

- (a) the state and each county, city and county, city school district, and irrigation district; all other districts established by law; all public corporations and quasi-public corporations and public agencies; each person; each prime contractor; each firm, voluntary association, limited liability company, limited liability partnership, and private corporation, including any public service corporation and including an independent contractor who has a person in service under an appointment or contract of hire, expressed or implied, oral or written; and the legal representative of any deceased employer or the receiver or trustee of the deceased employer;



the Department of Labor's statistics reveal that for FY08, of the 31,641 First Reports of Injury, 15% were wage loss claims and 85% were medical only claims. (Exhibit A.)

DATED this 14 day of August, 2009.

ATTORNEYS FOR PLAINTIFF

BOTHE & LAURIDSEN, P.C.  
P.O. Box 2020  
Columbia Falls, Montana 59912  
Telephone: (406) 892-2193

By: Laurie Wallace  
Laurie Wallace:

Subscribed and sworn to before me this 14 day of August, 2009.

Christine Stephens  
Notary Public for the State of Montana  
Residing at Columbia Falls  
My Commission Expires 7/17/12

Laurie,

**Laurie Wallace**

**From:** Ferriter, Diana [DiFerriter@mt.gov]  
**Sent:** Thursday, August 06, 2009 9:03 AM  
**To:** 'legalpad@digisys.net'  
**Subject:** No. of medical only First Reports of Injury

Laurie,

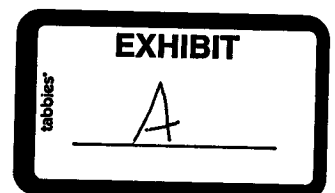
As you requested, I'm providing an estimate of the number of medical only first reports of injury (FROIs) that are reported to us. For FY08, we received 31,641 FROIs. Based on subsequent reports that have been submitted on these claims, we estimate that 15% are wage-loss claims. Therefore, approximately 85% of those claims would be considered medical only claims. Keep in mind that these figures and percentages change as new reports are filed.

This information has been extracted from the workers' compensation data base system. The data in the data base system is primarily obtained from employer, insurer and adjuster records filed with the Department. Although the information furnished is accurate and complete to the best of the Department's knowledge, the Department does not guaranty the accuracy or completeness of the information contained in the data base system.

Diana Ferriter  
Bureau Chief  
Workers' Compensation Claims Assistance  
Employment Relations Division  
PO Box 8011  
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8/7/2009



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JOHN H. BOTHE

(1951-1996)

August 21, 2009

Ms. Clara Wilson  
Clerk of Workers'  
Compensation Court  
P.O. Box 537  
Helena, MT 59624-0537

RE: FLYNN v. MONTANA STATE FUND/LIBERTY NW INS. CORP.  
WCC No. 2000-0222

Dear Ms. Wilson:

Enclosed please find Cassandra Schmill's Reply Brief to Responsive Brief Filed by Montana State Fund and common Fund Insurers in regard to the above-referenced matter.

Should you have any questions concerning this matter, please contact me directly.

Sincerely,

  
LAURIE WALLACE  
BOTHE & LAURIDSEN, P.C.

LW/rs

Enc.

cc: Larry Jones  
Bradley Luck  
Rex Palmer  
Steven Jennings  
Thomas Martello