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FILED

MAR 17 2004

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CHRISTOPHER SANDRU,
Petitioner,

WCC NO. 2003-0908

vs.

ROCHDALE INSURANCE CO.
Respondent/Insurer.

**PETITIONER'S SUPPLEMENTAL
REPLY BRIEF IN SUPPORT OF
MOTION FOR LEAVE TO AMEND
PETITION AND TO DETERMINE
CLASS OF CLAIMANTS**

The Petitioner has recently received three (3) documents which Petitioner believes should be filed with the Court in regards to the above-captioned Motion. The Petitioner was not aware of any of these documents as of the filing of this Reply Brief dated January 26, 2004, in this matter. The documents are as follows, and the originals or true copies thereof are attached as exhibits to this Supplemental Reply Brief:

- Exhibit 1: Attorney General's letter dated 1/30/04, declining to intervene in this action at this stage.
- Exhibit 2: DL&I, ERD, David Elenbaas letter dated 2/12/04, re: potential class of claimants as of 6/22/03, Mr. Sandru's DOI.
- Exhibit 3: Montana Historical Society State Archivist letter dated 2/4/04, including Minutes of the Montana House of Representatives, Committee on Business & Labor, of 3/28/03, for SB 450.

Exhibits 1, 2, & 3 are self-explanatory, and update the Court on the status of issues regarding the constitutionality of Section 39-71-611(3), MCA (2003). Exhibit 1 includes notification by the Montana AG's office that it declines to intervene in these proceedings "at this stage." Exhibit 2 indicates that the State of Montana's database system has information available to assist in potential quantification of a class of claimants in this case, with typicality and commonality, as of June 22, 2003, the day after the date of injury in this instant case. Exhibit 3

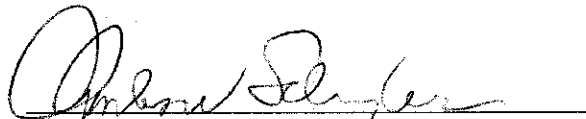
concerns a potential portion of the legislative record in regards to Senate Bill 450, now known as Section 39-71-611(3), MCA (2003). The pertinent portions of that legislative record that pertain to this case are (1) the sponsor's testimony on 3/28/03, at the bottom of page 4, as follows:

Rep. Bookout-Reinecke asked the Sponsor if these new proceedings apply to current cases. Sen. Cocchiarella said according to the effective date, this bill will only apply to workers after July 1, 2003;

and (2) Exhibit 2, consisting of a 2 page letter from attorney Allan M. McGarvey dated 3/27/03, warning the Legislature that Senate Bill 450's denial of legal access to workers compensation claimants via a class action through a common fund, would be denial of the access to justice guaranteed by Article II, Sec. 16 of the Montana Constitution.

The McGarvey letter is self-explanatory. The statement by SB 450's sponsor as to the effective date of the bill incorrectly informed the Legislature, because the effective date of SB 450 turned out to be April 21, 2003, the date the legislation was signed by the Governor. The date of injury in the instant case is June 21, 2003, which date is prior to the sponsor's proclaimed effective date. According to the sponsor's testimony, this instant case would not be affected by SB 450, with an effective date after the date of injury in this case.

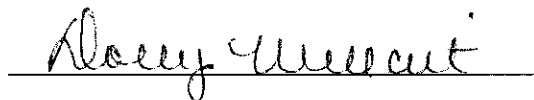
DATED this 15th day of March, 2004.


CHARLES W. SCHUYLER
Attorney for Petitioner,
Christopher Sandru

CERTIFICATE OF SERVICE

I, the undersigned hereby certify that on the 15th day of March 2004, I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

Steven W. Jennings, Esq.
Crowley, Haughey, Hanson,
Toole & Dietrich, P.L.L.P.
P.O. Box 2529
Billings, MT 59103-2529



ATTORNEY GENERAL
STATE OF MONTANA



Mike McGrath
Attorney General

Department of Justice
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

January 30, 2004

Mr. Charles Schuyler
103 South Fifth East
Missoula, MT 59801

Re: Sandru v. Rochdale Ins. Co.,
Workers' Compensation Court Docket No. 2003-0908

Dear Chuck:

We have reviewed your submission of January 27, 2004, consisting of your Notice to Attorney General of Constitutional Questions and a copy of Petitioner's Reply Brief to His Motion for Leave to Amend Petition and to Determine the Class of Claimants. The Attorney General has determined that we will decline to request intervention at this stage. Please feel free to inform Judge McCarter of our position in this regard.

Sincerely,

A handwritten signature in cursive script, appearing to read "Chris D. Tweeten".

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym

c: Steven W. Jennings

State of Montana
Department of Labor & Industry
Judy Martz, Governor



Employment Relations Division

WC Claims Assistance Bureau
David Elenbaas, Bureau Chief

February 12, 2004

Dear Mr. Skyler:

In follow-up to our phone conversations of last week, our statistician did a simple query for an estimate of the number of workers' compensation claimants that were receiving wage-loss benefits (open claims) as of June 22, 2003. He further limited the query to the SIC codes of 7011 (hotels and motels), 5812 (restaurants), 5813 (bars, taverns, etc.), 7999 (gambling establishments) and 7993 (gambling machines). His query returned a result of 399 claimants meeting those specifications.

As I mentioned on the phone, the information furnished in response to your request has been extracted from the workers' compensation database system. The data in the database system is primarily obtained from employer, insurer and adjuster reports 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 database system.

If I can be of further assistance, please feel free to call me.

Thank you.

Sincerely,

David Elenbaas

David Elenbaas, Acting Bureau Chief
Claims Assistance Bureau
Employment Relations Division
Department of Labor & Industry
(406) 444-1574



MONTANA HISTORICAL SOCIETY

225 North Roberts ♦ P.O. Box 201201 ♦ Helena, MT 59620-1201
♦ (406) 444-2694 ♦ FAX (406) 444-2696 ♦ www.montanahistoricalsociety.org ♦

February 4, 2004

Charles W. Schuyler
Marsillo & Schuyler
103 South 5th St
Missoula, MT 59801

Dear Mr. Schuyler,

Enclosed please find the materials you requested regarding Senate Bill 450 of the 2003 Montana Legislature. Thank you for your prepayment for this research.

Senate Bill 450 was heard by the Senate Business and Labor committee on February 25, with executive action the same day, and by the House Business and Labor committee on March 28, with executive action on April 1.

Enclosed please find photocopies of pertinent minutes and exhibits as well as audio tapes for the portions of these hearing dealing with SB 450.

Please remit the amount shown on the enclosed invoice for photocopies not covered by the fee, as well as copies of the audio-tapes.

If I can provide any additional assistance, please contact me at the address above.

Sincerely,

Molly Kruckenberg

Molly Kruckenberg
State Archivist



MINUTES

**MONTANA HOUSE OF REPRESENTATIVES
58th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON BUSINESS AND LABOR

Call to Order: By **CHAIRMAN JOE MCKENNEY**, on March 28, 2003 at
8:00 A.M., in Room 172 Capitol.

ROLL CALL

Members Present:

Rep. Joe McKenney, Chairman (R)
Rep. Jim Keane, Vice Chairman (D)
Rep. Donald Steinbeisser, Vice Chairman (R)
Rep. Bob Bergren (D)
Rep. Rod Bitney (R)
Rep. Sylvia Bookout-Reinicke (R)
Rep. Nancy Fritz (D)
Rep. Dave Gallik (D)
Rep. Kathleen Galvin-Halcro (D)
Rep. Ray Hawk (R)
Rep. Bob Lawson (R)
Rep. Rick Maedje (R)
Rep. Gary Matthews (D)
Rep. Scott Mendenhall (R)
Rep. Penny Morgan (R)
Rep. Allen Rome (R)
Rep. Sandy Weiss (D)
Rep. Bill Wilson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Bart Campbell, Legislative Branch
Alberta Strachan, Committee Secretary

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

Committee Business Summary:

Hearing & Date Posted: SB 450 (3/27/03); SB 282
(3/27/03); SB 360 (3/27/03); SJR 17
(3/27/03)

Executive Action: SJR 17 Be Concurred In As Amended;
SB 304 Be Concurred In As Amended;
SB 282 Be Concurred In As Amended;
SB 360 Be Concurred In

HEARING ON SB 450

Sponsor: SEN. VICKI COCCHIARELLA, SD 32, Missoula

Opening Statement by Sponsor:

SEN. COCCHIARELLA said this bill revises laws related to workers' compensation. It provides for disclosure and communication of health care information for workers' compensation purposes without prior notice to the injured employee. This bill bars attorney fees under the common fund doctrine and excludes impairment ratings based exclusively on pain. It increases the permanent partial disability benefit maximum entitlement from 350 to 375 weeks. She also provided a breakdown of the earnings of a person 41 years old and the benefits they would have received.

EXHIBIT (1)

{Tape: 1; Side: A; Approx. Time Counter: 26 - 141}

Proponents' Testimony:

Bob Pavlovich, representing himself, said he supports the bill.

{Tape: 1; Side: A; Approx. Time Counter: 141 - 143}

Oliver Goe, Attorney at Law, Montana Municipal Insurance Authority, said they provided workers' compensation. He explained the changes in the bill.

{Tape: 1; Side: A; Approx. Time Counter: 143 - 212}

Jerry Driscoll, Montana AFL-CIO, said this bill will speed up the process of getting information by a claims adjuster to acquire information from a doctor regarding a client's case.

{Tape: 1; Side: A; Approx. Time Counter: 212 - 251}

Aidan Myhre, Montana Chamber of Commerce, said workers' compensation continues to be one of the issues that rises to the top every year regarding the concerns among employers. A group of individuals put together a list of things that could be improvements in the workers' compensation system. The issues they finally determined to be the most important are the issues found in this bill.

{Tape: 1; Side: A; Approx. Time Counter: 251 - 276}

Larry Jones, Liberty Northwest, said he supports this bill.

{Tape: 1; Side: A; Approx. Time Counter: 276 - 282}

Jacqueline Lenmark, American Insurance Association, said they supports this bill.

{Tape: 1; Side: A; Approx. Time Counter: 282 - 290}

Nancy Butler, Montana State Fund, said the National Council on Compensation Insurance (NCCI) sets workers' compensation rates in a substantial number of states. They set those rates up for the private carriers. NCCI priced this legislation as having a 1.3% to 1.7% rate impact.

{Tape: 1; Side: A; Approx. Time Counter: 290 - 308}

Bob Worthington, CEO, Montana Municipal Insurance Authority, said workers' compensation is a serious issue for cities. This bill is a compromise to assist them in managing those issues for communities, and they support this bill.

{Tape: 1; Side: A; Approx. Time Counter: 308 - 314}

Riley Johnson, NFIB, said they support this legislation.

{Tape: 1; Side: A; Approx. Time Counter: 314 - 321}

Spook Stang, Executive Vice President, Montana Motor Carriers, said they support this bill.

{Tape: 1; Side: A; Approx. Time Counter: 321 - 324}

Steve Turkiewicz, Montana Auto Dealers Association, said they support this bill.

{Tape: 1; Side: A; Approx. Time Counter: 324 - 330}

George Wood, Executive Secretary, Montana Self Insurers Association, said they strongly support this bill.

{Tape: 1; Side: A; Approx. Time Counter: 330 - 337}

Don Allen, Cenex, said they support this bill.

{Tape: 1; Side: A; Approx. Time Counter: 337 - 340}

Shaun Bubb, Director, Insurance Services, Montana School Boards Association, said they support this bill. It is a good compromise bill and will be a good step forward for both sides.

{Tape: 1; Side: A; Approx. Time Counter: 340 - 346}

Carl Schweitzer, Subcontractors Association, said they support this bill.

{Tape: 1; Side: A; Approx. Time Counter: 346 - 354}

Opponents' Testimony:

Larry Anderson, Attorney at Law, Great Falls, said he wanted to emphasize the issues and terms of ex-party communications between doctors and insurance adjusters. He also spoke of the common fund issue.

{Tape: 1; Side: A; Approx. Time Counter: 354 - Tape: 1, Side: B; Approx. Time Counter: 31}

Charley Fish, Townsend resident, said he is an injured worker. He said he opposes this bill because the average person does not have complete knowledge of the law and how things are written in regard to legal assistance. He stated that the injured worker should be able to seek counsel and let an attorney represent the workers to deal with the issues regarding their cases.

{Tape: 1; Side: B; Approx. Time Counter: 31 - 46}

Don Judge, Teamsters Local 190, said they are opponents of the bill.

{Tape: 1; Side: B; Approx. Time Counter: 46 - 88}

Al Smith, Montana Trial Lawyers Association, provided testimony from Allan M. McGarvey, Attorney at Law, Kalispell.

EXHIBIT(2)

{Tape: 1; Side: B; Approx. Time Counter: 88 - 130}

Informational Testimony:

Jerry Keck, Administrator, Employment Relations Division, Department of Labor & Industry, said they would be available for questions from the Committee.

Questions from Committee Members and Responses:

REP. MORGAN asked Ms. Butler if there was a 1.5% rate increase in worker's compensation. Ms. Butler said it is primarily the additional weeks of permanent-partial coverage.

{Tape: 1; Side: B; Approx. Time Counter: 130 - 149}

REP. BOOKOUT-REINICKE asked the Sponsor if these new procedures apply to current cases. SEN. COCCHIARELLA said, according to the effective date, this bill will only apply to workers after July 1, 2003.

{Tape: 1; Side: B; Approx. Time Counter: 149 - 162}

REP. MATTHEWS asked the Sponsor to explain the common fund to the Committee. **SEN. COCCHIARELLA** said an attorney who is retained by a worker goes to court and wins a benefit. They have a relationship and a contract between them. When that attorney goes to court and wins something that could apply to other injured workers, that attorney then goes to the judge and receives a decision that he gets common-fund benefits as compensation for being the attorney. From any other worker that this attorney has never met or had a contractual agreement with, money comes from the increased benefit the unrelated attorney has been able to gain for the initial worker.

{Tape: 1; Side: B; Approx. Time Counter: 162 - 222}

REP. FRITZ asked Mr. Smith about the privacy issue problem. **Mr. Smith** said the concern with the privacy issue does not say the clients cannot talk to treating physicians. Prior to meeting with the claimant, notice must be given to the claimant and his counsel that A Notice To Counsel is issued.

{Tape: 1; Side: B; Approx. Time Counter: 222 - 247}

REP. WEISS asked Mr. Smith about the common fund. **Mr. Smith** said they were funds which had been gained from a court case involving a claimant which was due him and he didn't ever receive the benefits.

{Tape: 1; Side: B; Approx. Time Counter: 247 - 300}

REP. GALLIK asked Mr. Driscoll why a claimant's benefits were not based exclusively on pain. **Mr. Driscoll** said he did not know.

{Tape: 1; Side: B; Approx. Time Counter: 300 - 446}

REP. BOOKOUT-REINICKE asked Mr. Driscoll if dues could be paid to two different unions. **Mr. Driscoll** said they could but it was rare.

{Tape: 1; Side: B; Approx. Time Counter: 446 - 500}

REP. MAEDJE asked Ms. Butler about an effective date. **Ms. Butler** said July 1, 2004.

{Tape: 1; Side: B; Approx. Time Counter: 500 - 507}

Closing by Sponsor:


The Sponsor closed.

{Tape: 2; Side: A; Approx. Time Counter: 1 - 279}

41 year old ~~Bob~~ working at \$15/hr.
 earns \$600.00/week Average weekly wage

TTD rate \$600.00 (AWW) x .6667 (73%) = \$400.
 (temporary total disability rate)

PPD \$236.50 (1/2 states av. weekly wage)
 permanent partial disability rate
 not to exceed 1/2 states av. weekly wage (currently \$473)

- Doctor assigns physical impairment 
- 10% physical impairment
 - 1% age over 40 yrs. old
 - 0% education of ~~over~~ high school or GED
 - 5% heavy to light (restrictions)
 - 20% wage loss of over \$2.00/hr.
-
- 36%

Current: .36 x 350 weeks = 126 weeks
~~proposed~~ 126 weeks x \$236.50 = \$29,799

proposed .36 x 135 weeks x \$236.50 = \$3,192.75
 + \$2128.50

deprived Jack Murer of any recovery whatsoever if there were not a vehicle to share the cost burden with other claimants. Thus, the Montana Supreme Court in adopting the Common Fund Doctrine explained as follows:

The Doctrine is employed to spread the cost of litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone and the "stranger" (i.e., passive) beneficiaries do not receive their benefits at no cost to themselves.

Means v. Montana Power Co., 191 Mont. 395, 403 (1981).

Second, it certainly cannot be contended that abrogation of the Common Fund Doctrine is in the best interest of the workers' compensation claimants (who share in the litigation cost). Indeed, at the fairness hearing in the *Murer* case over three dozen claimants appeared. Every claimant who testified expressed gratefulness that someone had undertaken the case and absolute agreement in and willingness to contribute to the cost of the litigation through the Common Fund Doctrine.

Since the Common Fund Doctrine, as the law now exists, does not cost the insurer one penny, and since the claimants who do pay under the Common Fund Doctrine only stand to gain, I hope the Legislature will recognize that abrogation of the Common Fund Doctrine will not achieve any beneficial purpose. On the contrary, the only thing it will do is make it totally impossible for litigants such as Jack Murer to bring a case to vindicate their rights under the Workers' Compensation law. As the U.S. Supreme Court explained in the case of *Deposit Guaranty National Bank v. Roper*:

[The Common Fund Doctrine has played an enlarged role] in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the costs.

* * *

Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individuals' suits for damages, aggrieved persons may be without any effective redress unless they employ the class action device.

The Legislature should be aware that denying such access to workers' compensation claimants would be denial of the access to justice guaranteed by Article II, § 16 of the Montana Constitution.

Yours sincerely,

Allan M. McGarvey

EXHIBIT 3
 DATE 3-28-03
 SB 450

TTD Waiting Period

	Waiting Period Before TTD Benefits Start	TTD Benefits Paid Retroactive to Date of Injury
Alabama	3 days	>21 days
Colorado	3 days	>14 days
Oregon	3 days	>14 days
Utah	3 days	>14 days
Washington	3 days	>14 days
Wisconsin	3 days	>7 days or PPD sustained
Wyoming	3 days	>8 days
N. Dakota	5 days	>5 days
Idaho	5 days	>14 days
Montana	5 days	No
Arizona	7 days	>14 days
Tennessee	7 days	>14 days
Kentucky	7 days	>14 days
Kansas	7 days	>21 days
Arkansas	7 days	>14 days
New Mexico	7 days	>28 days
N. Carolina	7 days	>21 days
S. Dakota	7 days	Yes

Source: US Chamber of Commerce – 2002 Analysis of W.C. Laws

Law Offices of
McGarvey, Heberling, Sullivan & McGarvey, P.C.

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March 27, 2003

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Al Smith, Executive Director
Montana Trial Lawyers Association
P. O. Box 838
Helena, MT 59624

EXHIBIT 2
DATE 3-28-03
SB 430

Dear Al:

Thank you for the opportunity to comment on Senate Bill 450. I represented Jack Murer in litigation establishing the rights of over 1,000 claimants to payments wrongfully calculated by the State Fund. That action took hundreds of hours of attorneys' time, including two full days I worked on the case earlier this year. I literally have been working on the case for over six years. The recovery for my client was only a few hundred dollars such that my fee for this effort would have been less than \$100. Most of the 1,000 plus other claimants were similarly situated such that no one could afford to bring the case and these claimants would collectively have been deprived of their fair entitlement but for the ability to bring the litigation on a representative basis under the Common Fund Doctrine.

I have two concerns with the bill.

First, the bill would amend §§ 39-71-611 and -612 which address the assessment of attorneys fees against the insurer. The drafters of this bill apparently misunderstand the nature of the Common Fund Doctrine. No fees are assessed against the insurer under the Common Fund Doctrine. The State Fund did not pay one penny in attorneys' fees in the *Murer* litigation. Nor has the State Fund or any workers' compensation insurer ever paid a dime to an attorney under the Common Fund Doctrine. If the Legislature is concerned that the insurers should not be assessed fees under the Common Fund Doctrine, that literally is impossible under Montana law as it now exists.

The Common Fund Doctrine is merely a doctrine that says that other claimants who have benefitted from the litigation should share in the cost of litigation including attorneys' fees. Of course, it would be unfair to let these individuals reap the benefit of the litigation but not pay any share of the costs. Indeed, the costs in the *Murer* litigation would have