

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

HOUSE COMMITTEE ON LABOR

May 8, 1991Hearing Room D 8:30 a.m.Tapes 132 - 133

MEMBERS PRESENT:Rep. Gene Derfler, Chair Rep. Kevin Mannix, Vice-Chair Rep. Sam Dominy Rep. Jim Edmunson Rep. Rod Johnson Rep. Bob Repine Rep. John Watt

STAFF PRESENT: Victoria Dozler, Committee Administrator Johanna Klarin, Committee Assistant

MEASURES CONSIDERED: HB 3569 - Work Session HB 2599 - Work Session HCR3 - Work Session HB 3574 - Work Session

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TAPE 132, SIDE A

002 CHAIR DERFLER: Opens the hearing at 8:30 a.m.

MOTION: REP. REPINE: Moves to suspend the committee rules.

VOTE: The motion carries 5-0.

EXCUSED: Representatives Edmunson and Mannix.

MOTION: REP. REPINE: Moves to suspend the committee rules to reconsider HB 3569.

-The committee has no objections to the above motion.

WORK SESSION, HB 3569

CHAIR DERFLER: Opens public hearing on HB 3569.

024 DOZLER: Explains why the bill is brought back to the committee. The amendments did not accurately reflect the committee's intent.

040 MOTION: REP. REPINE: Moves the committee adopt the amendments that reflect all the surviving spouse benefits in HB 3569.

-The committee has no objections to the above motion.

042 MOTION: REP. REPINE: Moves HB 3569, with the conceptual amendments, to the Committee on Ways and Means with a "do pass" recommendation.

VOTE: The motion carries 5-2.

EXCUSED: Representatives Edmunson and Mannix.

INFORMATIONAL MEETING, EMPLOYMENT DIVISION - EXTENDED BENEFITS (Exhibit A).

060 FRANK RICHEY, Manager, Unemployment Insurance Analysis, Employment Division: Introduces Larry Hanson, Manager, Field Offices in the Central Region. Presents an overview of the Federal-State Unemployment Insurance Extended Benefits program (Exhibit A).

-Provides background information about how the program is working in its current experience.

-Outlines the financing of the benefits.

097 -Chair Derfler, Ms. Dozler and Mr. Richey discuss the financing mechanisms of the benefits.

-Discusses the "triggers" in the federal and state law.

-Provides background information with regard to federal requirements--eligibility requirements, etc.

220 -He discusses the extended benefits this time around.

253 CHAIR DERFLER: What do you think about regionalizing the paying of the additional benefits? Would the feds go along with that?

RICHEY: It is hard to say at this point. I believe there would be less concern about spending Oregon money.

CHAIR DERFLER: I would like to have the feds to help us out, because they are the ones that are causing our problems.

268 REP. DOMINY: How long would it take to find out if we could get that kind of a waiver?

RICHEY: It would be a matter of changing the federal law. There is no current legislation that I am aware of.

306 -Ms. Dozler and Mr. Richey discuss the additional benefits.

329 DOZLER: Refers to Exhibit A, page 2. Would you clarify the "more stringent federal eligibility requirements?"

334 LARRY HANSON: The federal laws are much stricter for extended benefits. The individuals who do not look for work and claim extended benefits would be disqualified. Somebody on extended benefits would have more strict requirements as to what is considered "suitable work."

DOZLER: What about people who are receiving regular benefits under vocational UI waivers, are they eligible for extended benefits?

HANSON: Yes they are.

WORK SESSION, HB 2599 (Exhibits B,C and D)

Witnesses:Chris Davie, SAIF Fred Van Natta, Oregon State Home Builders Association David Thurber, Assistant Attorney General

CHAIR DERFLER: Opens work session on HB 2599.

380 DOZLER: Describes the bill and the proposed -4 amendments to HB 2599-A (Exhibit D).

TAPE 133, SIDE A

014 MOTION: REP. MANNIX: Moves that the committee adopt the proposed -A4 amendments to HB 2599.

-There being no objections, the amendments are adopted.

024 -Rep. Edmunson and Rep. Mannix discuss the SAIF memo presented by Chris Davie (Exhibit B). They also discuss the Woody versus Waibel case (Exhibit C).

025 REP. MANNIX: Addresses section 1 in Exhibit B. The answer is that you look at the contract and see what the contract covers. Normal contract law calls for you to look at the four corners of the document and determine what the document covers. That would mean normally that the amendments require that you have a written contract for services specifying that the individual satisfies the provisions of ORS 701.025, that the individual is registered and that the individual's work is being performed within the scope of this registration. A contract will have to cover those factors. Normally one could say that a contract of future services would have to be evaluated in case those services change. Certainly, in terms of the current kind of work being carried on as it is carried on into the future under the contract, I don't think there needs to be any distinction put into the legislation.

REP. EDMUNSON: Agrees with Rep. Mannix.

042 -Comments on section 2 in Exhibit B. Discusses the Woody versus Waibel decision (Exhibit C) which was relied upon earlier by some of the witnesses to suggest that the nature of the work would remain an overriding concern in determining independent contractor status. Even if the carpet layer was working in an independent mode, the nature of the carpet laying industry was such that it justified the insurance coverage, that they be complying employers. The controversy was brought on by the nature of the industry and not by the particular aspects of the jobs or the registration. Section B makes the policy choice clear that the nature of the work or the general character of the work are not to be taken into account when determining the independence or dependence of the worker performing in these sorts of occupations.

070 REP. MANNIX: One would extrapolate from the restriction in section 2, in Exhibit B, that in interpreting any situation the courts would have to rely on this limitation, and so will the administrators. They are not free to go beyond this restriction and start making determinations by category despite the prohibition on insurer or self-insured employer.

091 REP. MANNIX: Discusses section three of Exhibit B. A contract is written in present and may contemplate the future. One might find that some day someone is no longer working within the scope of the contract

but those are the kind of fact situations that are impossible for us to address in legislation. We are talking about a contract that goes into the future if the terms in the contract so provide.

103 -Addresses section 4 in the SAIF memo (Exhibit B).

112 FRED VAN NATTA, Oregon State Home Builders Association: Discusses section 4 in Exhibit B. Addresses the conflicting information between the statute and the SAIF memo.

157 CHRIS DAVIE, SAIF: Discusses section 4 of Exhibit B. Mr. Van Natta might have a point with his interpretation of the statute. Maybe it would be better to have the workers' compensation people respond to this.

183 REP. MANNIX: Isn't the more direct response that this bill does not change or back ORS 656 .029. The statute remains out there to be applied and interpreted on its own terms.

DAVIE: That is correct. I was pointing out the way that I understood ORS 656 .029 operated and would continue to operate.

REP. MANNIX: I am not incorporating that interpretation by reference nor am I incorporating by reference Mr. Van Natta's interpretation.

194 REP. EDMUNSON: There could be a situation where the general contractor would be the employer and not escape responsibility of injury to the crew even if the foreman were an independent contractor. You are correct in that situation. The general contractor cannot escape responsibility. The key is that the subcontractor must be exempt from inquiring coverage.

215 DAVID THURBER, Attorney General's Office: Describes two situations when the second tier player could be a non-independent contractor.

REP. EDMUNSON: That is because the Construction Contractors Board (CCB) does not allow their registration to be effective when the registered employs others?

THURBER: That is correct. An exempt employer is one who does not hire employees.

240 REP. MANNIX: Suggests adding a clause in the contract "when you hire somebody the contract is no more valid", and this provision would be strictly enforced.

THURBER: Who is going to enforce that contract?

REP. MANNIX: Wouldn't the general contractor want to enforce it?

THURBER: He or she may want to do that.

300 REP. EDMUNSON: Exemption under ORS 656.029 means an exempt worker under the workers' compensation definition. It does not mean exempt under the contractors' board law. I am confused--you are a non-exempt if you have no employees, you are exempt if you have employees. Why wouldn't both categories be considered registered for purposes of satisfying independent contractor law?

THURBER: There are two requirements under the law. One is to have a

contract and one to be registered with the CCB. You lose your registration with the CCB, if you sign up as a non-exempt employer and you, in fact, go out and hire people to work for you. You would lose your status with the CCB and your registration would be no longer effective under other statutes with that chapter.

REP. EDMUNSON: Your problem is with ORS 701.035, not with the workers compensation law? That would all be satisfied if that registration were, as a matter of law, transferred to non-exempt status?

332 REP. MANNIX: This bill would allow either kind of registration be effective?

-Rep. Edmunson and Mr. Thurber discuss this issue further.

342 VAN NATTA: When the applicable language was passed by this committee, the concept was that the Board would cancel your registration and there would be an opportunity for everybody to have notice. When the DIF began to look at those cases, they say that the act of hiring an employee invalidates the registration. That interpretation has not been tested in court. We are trying to change it so that it takes actual action by the Board and an opportunity for everybody to have notice before the registration is canceled.

364 REP. MANNIX: There is some exposure out there for general contractors. This bill does not really address that issue. Either the exempt or non-exempt status can register with the CCB and can meet the requirements here.

357 REP. EDMUNSON: Discusses section 5 in Exhibit B. There is always the potential of abuse of laws. The -A4 amendment states that the worker is a subject worker unless they have the written contract specifying they have satisfied the provisions in ORS 701 .025 (Exhibit D). The contract must express that they have satisfied the provisions. The individual's work must be performed within the scope of the registration. The contract is based upon the registration and the registration requires the scope of the work be consistent with the contract and the provisions in ORS 701.025 and that the work is being performed within the scope of this registration implies that the contract is consistent with the registration. That is the purpose of tying these two together. I have no problem if we say "within the scope of this contract and registration", but I think that is an unnecessary surplus.

-The key is that the work is being performed within the scope. That is a phrase that we intend to mean work is being performed consistent with all the provisions of ORS 701 .025 which is the independent contractor law.

414 MOTION: REP. MANNIX: Moves to correct the word "worker" into "work" on line 9 of the -A4 amendments.

-The committee has no objections to above motion.

420 DAVIE: My interpretation is that the contract specifies that the individual's work is being performed within the registration, not that it is a separate issue in addition to the contract and the registration.

TAPE 132, SIDE B

002 REP. EDMUNSON: If we added the words "the contract and..."  
Wouldn't that take care of it?

008 REP. MANNIX: My point would be that it is somewhere in between of  
Rep. Edmunson's and Mr. Davie's views. The contract can be treated as a  
sham or as a fraud if the contract was just designed to say some things  
that do not reflect a measure of reality.

REP. EDMUNSON: We should be modifying the subject status of the worker  
rather than modifying the contract.

023 Rep. Edmunson and Rep. Mannix discuss possible language changes for  
the -A4 amendments.

032 MOTION: REP. EDMUNSON: Moves to amend the -A4 amendments as  
follows: On line 8, after the word "and," insert "provided." On line  
7, in front of the word "that," insert "and." On line 7, delete comma  
after ORS 701 .025. On line 7, delete the word "that."

-The committee has no objections to the above motion.

053 MOTION: REP. MANNIX: Moves to refer HB 2599, as amended, to the  
House floor with a "do pass" recommendation.

048 REP. JOHNSON: Discusses another bill introduced by Mr. Van Natta.  
We need to change this bill so that part of this whole thing doesn't  
collapse just because an exempt subcontractor hires employee, at least  
until the general contractor gets notice.

070 DOZLER: We attempted to address this issue in this bill earlier and  
the legislative counsel's response was that the relating clause is too  
narrow.

092 REP. MANNIX: The other bill is HB 2924. That bill has a good  
chance of passage. I am concerned about the relating clause issue.

-Rep. Edmunson and Rep. Mannix discuss incorporating amendments for HB  
2924 into HB 2599.

133 MOTION: REP. MANNIX: Moves that the language of section 29 of HB  
2924 be incorporated into HB 2599 with the following change of language:  
"and such registration may be uninterrupted."

-The committee has no objections to the above motion.

145 REP. EDMUNSON: Comments on section 6 in the SAIF memo (Exhibit B).

150 REP. JOHNSON: Isn't there a paragraph somewhere that allows someone  
who is interested in the registration of a given company to ask for  
notification if something happens to the registration?

THURBER: I cannot speak to that. That would relieve some of the  
concerns reflected in this matter.

164 FRED VAN NATTA: There is such a system provided for by the statute  
where the CCB is instructed by statute to establish a process where a  
general contractor can bring in their subcontractors and ask to be  
notified if any of those subcontractors are no longer registered with  
the board.

REP. JOHNSON: We should add to the adopted amendments the following phrase: Being valid on notice to the registrant and to any persons who have given notice that they want to be notified. The general contractor needs to be notified also.

182 THURBER: ORS 701.250 provides this specific statutory basis for any individual to request the board to provide them a notification. I am informed that they are presently setting that system up as we speak.

194 REP. DOMINY: Can't this be dealt with through administrative rule?

REP. MANNIX: It is sufficient for us to note that we assume that there is going to be some warning.

MOTION: REP. JOHNSON: Moves that the issue of notification be put in the statute.

-The committee has no objections to the above motion.

216 REP. EDMUNSON: Discusses section 7 in Exhibit B. That is not the intent or the purpose of the amendment. This amendment specifically deals with the category of exempt workers who are not subject to the workers compensation law and therefor do not enjoy the protection of ORS 656 .236.

234 THURBER: I think you are correct. Most insurance carriers have a concern that the person is found to be a covered worker because the terms of the contract are not being complied with, or it was entered into under duress. What is your intent with regard to the carrier's obligation to cover that worker now?

REP. EDMUNSON: They are covered under the provisions of noncomplying employer law.

REP. MANNIX: There is a statutory provision that if inappropriate action by the employer causes an expense to the insurer, the insurer shall have recovery.

250 THURBER: It is a solution, but it is kind of contrary to general insurance principals for collecting premiums in advance of the work being performed.

REP. MANNIX: I trust that the insurance companies will be reasonably careful about the selection of their insureds.

272 REP. EDMUNSON: Discusses section 8 in Exhibit B. The answer is, yes.

-Addresses section 9 in Exhibit B. The immunity of exclusive remedy is not available to nonsubject employers and employees, they are treated at arms length. I doubt that the courts would consider sculpatory clauses to be enforceable in contracts. They are disfavored in Oregon. To the extent that the tort liability would be sorted out as in the course of all human affairs except under workers compensation, yes, that is the intent.

294 REP. JOHNSON: If we have a floor covering store that contracts with a carpet layer who is registered, and yet hires someone he is not supposed to because he is registered as exempt, and that employee gets hurt. The employee's action is against the carpet layer, not the floor

covering store.

REP. EDMUNSON: That is correct, the cause of action being a claim for workers compensation benefits or tort remedy. The store would be involved only if there was some negligence or misconduct on their part.

312 REP. MANNIX: Explains the exculpatory clause.

322 THURBER: Expands on Rep. Johnson's question. It would open the door for tort clause of action by that second tiered employer, or subcontractor.

-Rep. Johnson and Mr. Thurber discuss this potential.

343 REP. EDMUNSON: Discusses section 10 in Exhibit B.

DAVIE: This section says that if you have a contract and if you are CCB registered, then you are nonsubject. It does not say that the reverse is true. In the absence of a contract we would fall back into the prevailing practice of looking at the test of direction and control to determine whether a person is an employee or an independent contractor.

367 REP. MANNIX: We did not want to create the presumption that the absence of a written contract meant you were a subject worker, and that is why we ended up with the double negative. The absence of a written contract does not mean that you cannot have an independent contractor situation.

REP. EDMUNSON: If you satisfy this statutory provision, then you are nonsubject as a matter of law.

415 VAN NATTA: We are saying then that by the addition of the requirement of the written contract as an option, it does not require the thousands and thousands of people who are out there today registered as individuals with the CCB, who may not have a written contract but who have been accepted as independent contractors, to get a written contract.

TAPE 133, SIDE B

010 REP. MANNIX: Mr. Van Natta's point is correct.

DAVIE: We all agree. I just wanted to make it clear that the reverse of this situation is not true.

036 REP. JOHNSON: We are saying that this bill does not modify the registered contractor standards, application process contained in ORS 701.025.

REP. MANNIX: That is correct.

038 THURBER: Presents a hypothetical situation relating to workers compensation referees on the board. If a worker has a contract and is registered with the CCB, but for some reason believes that he was forced into it, showing up at the workers compensation board claiming having been injured on the job. Is it in defense, in your view, for the carrier or that employer to show up and say there is a contract in place, he is registered with the CCB, he is not a subject worker, you cannot award him benefits. Is that also your intent?



REP. MANNIX: We are assuming a valid non-duress contract. There is no perfect solution.

066 -Rep. Johnson, Rep. Edmunson, Rep. Mannix and Mr. Thurber discuss this scenario further.

084 REP. MANNIX: I see this as a shifting of the burden of the proof. If the insurer proves the existence of the contract and that there was registration and that the work was being done within the scope of the registration. That is the end of the debate and the burden of proof shifts to the worker to show that the contract was fraudulent or entered into under duress, or that the worker was working outside the scope of the registration.

106 MOTION: REP. JOHNSON: Moves to amend the -A4 amendments as follows: Line 16 to read, "delete lines 9 and 10." Add on line 16, "delete lines 23 through 32."

-The committee has no objections to the above motion.

WORK SESSION, HCR3

124 CHAIR DERFLER: Opens work session on HCR3.

-Rep. Dominy will chair the rest of the hearing.

122 DOZLER: Describes the bill.

125 REP. DOMINY: Discusses the effects of the -1 amendments (Exhibit E).

MOTION: REP. MANNIX: Moves that the committee adopt the -1 amendments to HCR3.

-There being no objections, the amendments are adopted.

MOTION: REP. MANNIX: Moves to refer HCR3, as amended, to the House floor with a "do pass" recommendation.

165 REP. WATT: Small business people have also gone through a great deal of struggle since the beginning of time. If we'll bring forth a concurrent resolution honoring a month for business people, I hope you'll side with me on that.

REP. DOMINY: I am sure I would.

REP. MANNIX: It is important that we appreciate labor history in the U.S., and this helps to put things in perspective.

CHAIR DERFLER: The employees really are the business so it is important that we recognize that.

REP. REPINE: I am proud to be one of the two republicans who sponsored this bill.

VOTE: The motion carries 7-0.

CARRIER: Rep. Dominy.

WORK SESSION, HB 3574

Witnesses: Tom Mattis, Department of Insurance and Finance

200 REP. DOMINY: Opens work session on HB 3574.

DOZLER: Describes the bill. Outlines the outstanding issues (Exhibit F).

228 MOTION: REP. MANNIX: Moves that the bill apply only to cities and counties.

CHAIR DERFLER: That is a good starting point.

-The committee has no objections to the above motion.

274 CHAIR DERFLER: Discusses whether the local political subdivisions should continue to pay into the state Loss Adjustment Reserve Fund or not. He feels they should be removed from paying into that.

286 TOM MATTIS, Manager, Compliance Sector, Workers Compensation Division: The problem we would have with leaving lines 22 and 23 in the bill is that there would be no fund to pay injured workers' claims in an event that the city or county would go bankrupt and the Loss Reserve account was unable to cover the cost of those claims.

312 MOTION: REP. MANNIX: Moves to remove lines 22 and 23 on page 2.

REP. MANNIX: We don't need to say that they will be paid from the reserve, because the other provisions require that they pay into the reserve and hence the workers are covered. There is no need for that language.

-The committee has no objections to the above motion.

MOTION: REP. MANNIX: Moves to add an emergency clause to HB 3574 with an effective date of July 1, 1991.

-The committee has no objections to the above motion.

MOTION: REP. MANNIX: Moves to adopt the actuarially sound language on the memorandum of May 6, 1991, to Chuck Wilson from Victoria Dozler (Exhibit G).

-The committee has no objections to the above motion.

345 REP. DOMINY: Adjourns the meeting at 10: 20 a.m.

Submitted by:      Reviewed by:

Johanna Klarin      Victoria Dozler Assistant      Administrator

EXHIBIT LOG:

A            -            Overview - Extended benefits - Frank Richey - 2 pages.

- B - Testimony on HB 2599 - Chris Davie - 2 pages.
- C - Testimony on HB 2599 - Committee staff - 6 pages.
- D - Amendments for HB 2599 - Committee staff - 1 page.
- E - Amendments for HCR3 - Committee staff - 1 page.
- F - Outstanding issues HB 3574 - Committee staff - 1 page.
- G - Amendments for HB 3574 - Committee staff - 1 page.