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cc

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

APPENDIX TO LIQUIDATOR'S OBJECTION TO
CLAIMANT HUBBARD'S MOTION TO RECOMMIT

2009 JUL 15 A 11:05
MERRIMACK COUNTY
CLERK OF COURTS
STATE OF NEW HAMPSHIRE

ROGER A. SEVIGNY, COMMISSIONER
OF INSURANCE OF THE STATE OF
NEW HAMPSHIRE SOLELY AS
LIQUIDATOR OF THE HOME
INSURANCE COMPANY,

By his attorneys,
KELLY A. AYOTTE
ATTORNEY GENERAL

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New Hampshire Department of Justice
33 Capitol Street
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(603) 271-3650

J. David Leslie
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**APPENDIX TO LIQUIDATOR'S OBJECTION TO
CLAIMANT HUBBARD'S MOTION TO RECOMMIT**

<u>Document</u>	<u>Tab Number</u>
Claimant's Written Submission re: Disputed Claim, with Exhibits	A
Liquidator's Section 15 Submission	B
Exhibits to Liquidator's Section 15 Submission.....	C
1. Proof of Claim CLMN703351 submitted by John Hubbard (without exhibits) dated June 7, 2004	
2. Liquidator's Notice of Redetermination dated March 31, 2008	
3. The Home Insurance Company general liability policy GL 1488251 issued to Carl Weissman & Sons	
4. The Home Indemnity Company workers compensation policy WC-L169449-01 issued to National General Supply, Inc. & Carl Weissman & Sons, Inc.	
5. CWS letter to Home dated January 25, 1991	
6. CWS letter to Fred S. James & Co. dated January 26, 1987	
7. Sedgewick James letter to Home dated January 22, 1991, with enclosed fax from CWS dated January 18, 1991	
8. Complaint filed January 22, 1990 in <u>Hubbard v. Carl Weissman & Sons, Inc.</u>	
9. Home letter to CWS dated January 29, 1991	
10. Home letter to CWS dated February 4, 1991	
11. Order on CWS' Motion for Summary Judgment dated November 11, 1997	
12. CWS (Jardine, Stephenson, Blewett & Weaver, P.C.) letter to Home dated April 14, 2000	
13. Second Amended Complaint in <u>Hubbard v. Carl Weissman & Sons, Inc.</u> dated March 10, 2000	
14. Home letter to CWS dated April 17, 2000	
15. Home letter to CWS dated April 20, 2000	

16. Fourth Amended Complaint in Hubbard v. Carl Weissman & Sons, Inc. dated October 5, 2000
17. Stipulation in Hubbard v. Carl Weissman & Sons, Inc. dated November 13, 2000
18. Confession of Judgment in Hubbard v. Carl Weissman & Sons, Inc. dated November 13, 2000
19. Judgment in Hubbard v. Carl Weissman & Sons, Inc. dated December 20, 2000

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7
8 **BEFORE THE COURT-APPOINTED REFEREE**
9 **IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION**
10 **DISPUTED CLAIMS DOCKET**

11 **In Re Liquidator Number: 2008-HICIL-37**
12 **Proof of Claim Number: CLMN 703351-01**
13 **Claimant Name: John A. Hubbard**
14 **Claimant Number: CDV 2007-745**
15 **Policy or Contract Number: GL-1-48 82 51**
16 **Insured or Reinsured Name: Carl Weismans & Sons, Inc.**
17 **Date of Loss: January 22, 1987**

18 **CLAIMANT'S WRITTEN SUBMISSION**
19 **RE: DISPUTED CLAIM**

20 **STATEMENT OF CONTESTED ISSUES OF FACT AND LAW**

21 Whether Claimant, John Hubbard's claim falls within Class II claims, "Policy Related
22 Claims", or Class V, "Residual Claims, under RSA-C:44.

23 Whether Claimant, John Hubbard's claim against Carl Weisman & Sons is "within the
24 coverage of" the insurance policy issued by the Home Insurance Company to Carl Weisman
25 & Sons, policy #GL-1-48 82 51.

26 Whether Claimant, John Hubbard's Judgment and decision from the Montana Eighth
27 Judicial District Court, finding that the exclusivity provision of the policy did not exclude
28 coverage under the facts of the case and the law of the state of Montana, is to be considered as
collateral estoppel and/or res judicata as to the issue of Hubbard's claim being "within the
coverage of" the insurance policy issued by the Home Insurance Company to Carl Weisman
& Sons, policy #GL-1-48 82 51.

LIST OF EXHIBITS AND AFFIDAVITS SUBMITTED

- 1
- 2 1. Deposition of John Hubbard, taken March 9, 1999.
- 3 [DOCUMENTS #]
- 4 2. (CGL) Basic Form H21013F with Amendatory Endorsement L-6178, to Carl
- 5 Weissman & Sons, Inc., (CW&S), policy #GL-1-48 82 51, effective for Jan. 22, 1987.
- 6 [DOCUMENTS #]
- 7 3. Fourth Amended Complaint; *Hubbard vs. Carl Weismann & Sons, Inc.*, (CWS),
- 8 Montana Eighth Judicial District Court, Cascade County case No. BDV-90-067.
- 9 [Exhibit 17 to Phennings Declaration]
- 10 4. January 22, 1991, letter from its then Claims Administrator, Janet Davey of Sedgwick
- 11 James of Washington, Inc., to HOME.
- 12 [DOCUMENT #]
- 13 5. Declaration of Attorney, Robert Pfennigs, January 30, 2003, (with supporting exhibits).
- 14 [DOCUMENTS #]
- 15 6. Ann Galasso Deposition, July 1, 2002.
- 16 [DOCUMENTS #]
- 17 7. February 4, 1991 HOME letter to CW&S. [Exhibit 1 to Phennigs Declaration]
- 18 8. November 11, 1997, Montana Eighth Judicial District Court Order denying CW&S
- 19 summary judgment motion. [Exhibit 3 to Phennigs Declaration]
- 20 9. Request to Take Judicial Notice parties agreed to put the UNDERLYING case on hold until
- 21 the Montana Supreme Court issued its decision in *Sherner vs. Conoco* which was decided on
- 22 March 30, 2000.
- 23 10. Letter dated April 14, 2000, from CWS attorney Robert B. Pfennigs, (Pfennigs) to
- 24 HOME'S agent, REM, the claim administrator, Anne Glasso re: tender of defense.
- 25 [Exhibit 6 to Phennigs Declaration]
- 26 11. Letter dated April 17, 2000 from Galasso on behalf of Home to CW&S attorney
- 27

- 1 Pfennigs, re: acknowledgment of receipt of the Amended Complaint and the tender of
2 the defense thereof by CW&S to HOME. **[Exhibit 7 to Phennigs Declaration]**
- 3 12. Letter dated April 21, 2000 from HOME'S assigned defense counsel, Mr.Zadick, to
4 HUBBARD'S counsel of record, Mr. Zadick indicated that he will be "taking over the
5 defense" of CWS in the underlying case. **[Exhibit 9 to Phennigs Declaration]**
- 6 13. Stipulation dated November 13, 2000 in UNDERLYING CASE between Hubbard and
7 CW&S re: Confession of Liability, Assignment, etc.
8 **[DOCUMENTS #]**
- 9 14. Letter dated April 20, 2000, from Ms. Galasso on behalf of the HOME, to
10 HUBBARD'S counsel, Mr. Pfennigs, withdrawing defense counsel Zadick and
11 denying coverage. **[Exhibit 8 to Phennigs Declaration]**
- 12 15. On May 15, 2000 Christopher Bulger, the insurance Broker on the CW&S account
13 informed HOME assigned defense counsel Zadick.
14 **[Exhibit 11 to Phennigs Declaration].**
- 15 16. May 26, 2000, letter from attorney Phennigs to Glasso (Home) demanding the defense
16 be reinstated. **[Exhibit 12 to Phennigs Declaration].**
- 17 17. June 6, 2000 letter from Glasso(Home to attorney Phennigs, re: request for Sherner
18 decision of Montana Supreme Court. **[Exhibit 13 to Phennigs Declaration].**
- 19 18. September 6, 2000 letter from Attorney Phennigs to Glasso (Home) re demand.
20 **[Exhibit 14 to Phennigs Declaration].**
- 21 19. October 25, 2000 email from Glasso (Home) to attorney Phennigs re: coverage counsel
22 retained. **[Exhibit 18 to Phennigs Declaration].**
- 23 20. October 25, 2000 email from attorney Phennigs to Glasso (Home) re: coverage counsel
24 opportunity lost. **[Exhibit 19 to Phennings Declaration].**
- 25 21. November 13, 2000, Confession of Liability by CW&S, filed in UNDERLYING
26 CASE. **[Exhibit 20 to Phennigs Declaration].**
- 27

- 1 22. November 16, 2000 the Court entered an Order of Liability and set a trial on damages.
2 **[Exhibit 21 to Phennigs Declaration].**
- 3 23. Letter dated Nov. 28, 2000, from Pfennigs to Glasso, encloses the Confession of
4 Liability and other relevant documents, executed by CWS.
5 **[Exhibit 22 to Phennigs Declaration].**
- 6 24. December 12, 2000 EMAIL FROM Attorney Phennigs to Glasso (Home), re: no
7 response from Home Judgment will be entered in UNDERLYING CASE.
8 **[Exhibit 23 to Phennigs Declaration].**
- 9 25. December 20, 2000, Judgment against CW&S in UNDERLYING CASE in the amount
10 of \$2,389,000.00. **[Exhibit 24 to Phennigs Declaration].**

11 **LEGAL BRIEF**

12 **FACTS**

13 The Home Insurance Company, (HOME) issued comprehensive general liability
14 (CGL) Basic Form H21013F with Amendatory Endorsement L-6178, to Carl Weissman &
15 Sons, Inc., (CW&S), policy #GL-1-48 82 51, effective for January 22, 1987.

16 On January 22, 1987 HUBBARD, while greasing the gears of a modified crane at the
17 direction of the insured, CW&S, sustained severe injuries, including pulling his arm off at the
18 shoulder socket and sever facial lacerations, while he was. The crane was owned by CW&S
19 and had its gear guards removed by CW&S. If the gear guards had not been removed, John
20 Hubbard's arm would not have been amputated as the gears which pulled his arm off would
21 have been covered thereby disallowing Hubbard's arm to get entangled within the gears of the
22 crane.

23 On January 22, 1990 HUBBARD filed his initial Complaint in the case of *Hubbard vs.*
24 *Carl Weismann & Sons, Inc.*, (CWS), Montana Eighth Judicial District Court, Cascade
25 County case No. BDV-90-067 (UNDERLYING CASE). The crane was being operated
26 without required gear guards in violation of 29 CFR Ch. XVII, 1910.179(6) and 1910.550(8).

1 In addition, at the time of Hubbard's injuries the crane was not being operated by a licensed
2 crane engineer, in violation of Montana's substantive law, 50-76-100, MCA. *See Count III,*
3 *Fourth Amended Complaint.*

4 On January 22, 1991, HOME received a letter from its then Claims Administrator,
5 Janet Davey of Sedgwick James of Washington, Inc., which informed HOME to set up a
6 claim under the above referenced General Liability Coverage and refer this matter to an
7 attorney to appear on behalf of C.W. & S., because Hubbard's claim alleged gross negligence.

8 CW& S tendered the defense of this claim by HUBBARD to The HOME Insurance
9 Company. In its response to CW&S tender of the defense HOME admitted that the above
10 referenced incident involving HUBBARD'S arm was an occurrence and an accident.

11 *See Declaration of Robert Pfennigs, Page 2, paragraph 6.*

12 On February 4, 1991 HOME wrote to CW&S regarding HUBBARD'S claim. Therein
13 HOME represented to its insured that HUBBARD's claim was an "occurrence" wherein the
14 claimant "sustained injury" "in this accident", by stating:

15
16 "We have now received a copy of your insurance policies which provided coverage for
17 the date of this *occurrence* in 1987." A review of your policies of insurance, Policy No.
18 GL1488251 with an inception date of 4/1/86, expiration date of 4/1/87 discloses that
coverage would not respond to the injury sustained by your employee in this *accident*".
(Emphasis mine)

19 "Coverage is afforded to CW&S via Comprehensive General Liability Insurance under
20 the basic form of H21013F ... Under Form L-6178 [the amendatory endorsement]
coverage would not be provided. It is agreed that the exclusion related to bodily injury
to any employee of the insured is deleted and replaced by the following:

21 "This insurance does not apply:

22 (i) to bodily injury to any employee of the insured arising out of
23 and in the course of his employment by the insured for which the
insured may be held liable as an employer or in any other
capacity".

24 Taking the same position as the liquidator is now taking herein, CW&S moved for
25 Summary Judgment in the UNDERLYING case based upon the exclusivity provision of
26 Montana Workers Compensation statute. CW&S argued that the injuries to HUBBARD

27
28 *Claimant's Written Submission Re: Disputed Claim*

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1 occurred during the scope of his work for CW&S. On November 11, 1997 the Montana
2 Eighth Judicial District Court denied CW&S summary judgment motion, based upon
3 Lockwood v. W.R. Grace, 272 Mont. 202, 900 P2d 314, 52 St. Rptr 705, (1995). The basis of
4 the Montana Eighth Judicial District Court's decision was that the Montana Supreme Court
5 had expanded the intentional tort exception to the workers compensation exclusivity rule. The
6 District Court denied CW&S Summary Judgement Motion because "intent to injure does not
7 mean desire to injure; it means that the employer intended the employee should undergo the
8 injury - the exposure to harm - of which the employer knew on a daily basis." *See attached*
9 *Declaration of Robert Pfennigs, Page 4, paragraph 11.*

10 Pursuant to an agreed Request to Take Judicial Notice, the parties agreed to put the
11 UNDERLYING case on hold until the Montana Supreme Court issued its decision in Sherner vs.
12 Conoco, 298 Mont. 401, 995 P.2d 990 (2000), which was decided on March 30, 2000.

13 In a letter dated April 14, 2000, from CWS attorney Robert B. Pfennigs, (Pfennigs) to
14 HOME'S agent, REM, the claim administrator, Anne Glasso, HUBBARD'S Second
15 Amended Complaint in the UNDERLYING case was enclosed with a notice that tendered the
16 defense thereof to HOME. *See attached Declaration of Robert Pfennigs, Page 5, paragraph*
17 *12.*

18 By letter dated April 17, 2000 from Galasso to Pfennigs, she acknowledged receipt of
19 the Amended Complaint and the tender of the defense thereof by CW&S to HOME. Galasso
20 further indicated that "HOME has assigned defense counsel" Gary Zadick, Esq., "to represent
21 CW&S in this matter". Galasso also stated that HOME was "reserving its right to conduct a
22 coverage investigation in this matter". *See attached Declaration of Robert Pfennigs, Page 5,*
23 *paragraph 14.*

24 In a letter dated April 21, 2000 from HOME'S assigned defense counsel, Mr.Zadick, to
25 HUBBARD'S counsel of record, Mr. Zadick indicated that he will be "taking over the
26 defense" of CWS in the underlying case.

1 Three days after her letter accepting the tender of the defense, April 20, 2000, Ms.
2 Galasso on behalf of the HOME, wrote another letter to Mr. Pfennigs, withdrawing defense
3 counsel Zadick and denying coverage. The HOME based this denial upon the same exclusion
4 from coverage cited in the initial disclaimer. The initial disclaimer occurred before the change
5 in the Montana Law with regard to allowance of a direct civil action against an employer. This
6 change in the law was the basis of the Court's denial of CW&S summary judgment, which was
7 based solely upon the Workers Compensation exclusivity provisions.

8 On May 15, 2000 Christopher Bulger, the insurance Broker on the CW&S account
9 informed HOME assigned defense counsel Zadick, by letter, that;

10 "on a couple of occasions in the mid-1980's representatives of the HOME
11 advised me that Montana was a sole remedy state and that coverage B -
12 Employer's Liability - was therefore neither needed by nor available to
Weismann and Sons. As a result such coverage was not offered to this account,
which was continuously with HOME from 1980 until 1994."

13 Mr. Zadick provided Mr. Bulger's above referenced May 15, 2000 letter, to Ms. Galasso, on
14 June 7, 2000.

15 Ms. Galasso stated she had no idea why Mr. Bulger at Marsh Advantage America
16 wrote a letter to Gary Zadick on May 15th of 2000. Ms. Galasso did not speak with Mr.
17 Bulger about the contents of his May 15, 2000 letter. After reading Mr. Bulger's May 15,
18 2000 letter to Mr. Zadick, Ms Galasso did not feel it was appropriate to talk with Mr. Wood
19 regarding the allegations made by Mr. Bulger in that letter. *See attached Galasso*
20 *Deposition P 66, L 4-7; P 68-69.*

21 HOME was aware of the fact that Employers Liability or Stop-Gap insurance would
22 provide a defense for CW&S in the UNDERLYING CASE. This is because employer's
23 liability insurance covers the defense of the insured in the civil action when they are sued
24 by the employee. In addition, Ms. Galasso was aware of the fact that HOME had offered
25 Employers Liability or Stop-Gap insurance. More specifically, Ms. Galasso was aware
26 that HOME provided stopgap endorsements under the employer's liability coverage for
27

1 Montana during the time of HUBBARD's claim. Further, Ms. Galasso knew it was fairly
2 inexpensive, \$211. *Galasso Deposition, P 43-44; P 116, L 12-22. P 165, L 2-6.*

3 Noteworthy is the fact that Ms Galasso's file notes for June 6, 2000 reflect HOMES
4 acknowledgment that;

5 "Coverage disclaimed for this loss originally in 1991. Retender in 2000
6 based upon recent Supreme Court Case allowing exception for direct action
7 by employee against employer. The exception to exclusive remedy is the
8 intentional harm exception. We disclaimed coverage again in April 2000,
9 based on the fact that there is no stop gap coverage on this policy and the
10 workers comp coverage applied solely to California and Idaho. ... Will
11 respond to counsel and advise him we are taking his position under
12 consideration. Ann"

13 Ms. Galasso received a copy of the *Sherner vs. Conoco* opinion on June 7, 2000

14 Ms. Galasso was the individual who accomplished each and every item done or task
15 undertaken to complete HOME's coverage investigation, after the tender of the Second
16 Amended Complaint in the UNDERLYING case, which resulted in HOME's withdrawing
17 the defense and denying coverage.

18 In her deposition, P 155, L 24-25, Ms. Galasso stated she has never had a case in
19 Montana involving any potential coverage issues.

20 Ms. Galasso did not consult or use any written policies, procedures, rules, manuals,
21 directives, guidelines, standards, etc. setting forth practices, procedures and policies related
22 to claims handling and insurance coverage determinations with regard to any actions she
23 took in the UNDERLYING case.

24 Ms. Galasso, on behalf of HOME, only reviewed the initial 1991 letter denying
25 coverage and pull the underwriting files, as the totality of the investigation, after CW&S
26 tendered the defense of the Second Amended Complaint.

27 *See attached Galasso Deposition P 36, L 1-8; P 37-38, L 24-25 & 1-9.*

28 In a letter dated May 26, 2000, from CW&S attorney Pfennigs to Ms. Galasso, a
demand was made that "HOME INSURANCE COMPANY reinstate the defense and
coverage of this matter". Such letter further indicated that CW&S did not obtain

1 employer's liability coverage because of an affirmative representation by HOME "that
2 since Montana is a "sole remedy" state, employers liability coverage was not needed. See
3 attached Declaration of Robert Pfennigs, Page 6, paragraph 18.

4 Ms Glasso's file notes for June 6, 2000 reflect HOMES acknowledgment that;

5 "Coverage disclaimed for this loss originally in 1991. Retender in 2000
6 based upon recent Supreme Court Case allowing exception for direct action
7 by employee against employer. The exception to exclusive remedy is the
8 intentional harm exception. We disclaimed coverage again in April 2000,
9 based on the fact that there is no stop gap coverage on this policy and the
workers comp coverage applied solely to California and Idaho. ... Will
respond to counsel and advise him we are taking his position under
consideration. Ann"

Galasso Deposition P 80, L 8-24.

10 Ms. Galasso first received a copy of the Sherner vs. Conoco, 298 Mont. 401, 995
11 P.2d 990 (2000), opinion on June 7, 2000 at 10:49 a.m. Galasso Deposition P 74, L 7.

12 This was the Montana Supreme Court decision providing a direct action against an
13 employer for intentional acts, which was the basis of the Court denying the insured's
14 motion for summary judgment in the UNDERLYING CASE. The insured's summary
15 judgment motion had been based upon the exclusivity provision of the workers
16 compensation statute and the above referenced exclusion.

17 Ms. Glasso also discussed this matter with HOME's general counsel, Joel Ross, and
18 suggested HOME get a copy of the Montana Supreme Court Case and review to find out if
19 it applies retroactively. Ms. Glasso did obtain a copy of Sherner vs. Conoco, Inc., 298
20 Mont. 401, 995 P.2d 990 (2000), which she described on June 7, 2000 as "allowing suit
21 against an employer outside the exclusivity provisions of workers comp. Galasso
22 Deposition P 98, L 20-25.

23 In finding that an employee may hold his employer liable in a civil suit, to injuries
24 occurring while working, the Montana Supreme court, in Sherner vs. Conoco, Inc., supra,
25 held;

26 //

1 "...that the appropriate definition of "malice" for use in § 39-71-413, MCA, (the workers
2 compensation exclusivity statute) is that found in § 27-1-221(2), MCA;
3 [a] defendant is guilty of actual malice if the defendant has knowledge of facts or
4 intentionally disregards facts that create a high probability of injury to the plaintiff and: (a)
5 deliberately proceeds to act in conscious or intentional disregard of the high
6 probability of injury to the plaintiff; or (b) deliberately proceeds to act with indifference to
7 the high probability of injury to the plaintiff. Section 27-1-221(2), MCA.

8 The term "act" is not defined in the Act and has no technical definition. Therefore, it
9 may also be construed according to its plain meaning. "Act" is "the process of doing or
10 performing something." The American Heritage Dictionary of the English Language, Third
11 Edition, 1996. Finally, the term "omission" may similarly be construed according to its
12 plain meaning; "1. the act or an instance of omitting; 2. the state of having been omitted; 3.
13 something omitted or neglected." The American Heritage Dictionary of the English
14 Language, Third Edition, 1996.

15 Conoco responds that if we apply the plain language doctrine to the statute, then the
16 exception to the exclusive remedy rule would not apply to this case at all because it only
17 refers to causes of action against fellow employees. However, we have held that while the
18 language of § 39-71-413, MCA, provides for a cause of action only against a fellow
19 employee or other servant of the employer who intentionally and maliciously injures an
20 employee, such an action may be brought against the employer as well. [citation omitted]
21 To fail to hold employers liable in the same manner as their employees by permitting an
22 employer to commit an intentional and malicious act or omission that causes an injury to an
23 employee, and then allowing him to hide behind the exclusivity provision of the Act, would
24 defeat the purpose of the Act."

25 Ms. Galasso made the determination, because of the fact that the policy said no
26 coverage, that notwithstanding what the Shermer decision had to say, it didn't matter,
27 because there was no coverage period, regardless of what Montana law said. *Galasso*
28 *Deposition P 80, L 16-21.*

Ms. Galasso did not make a request of anyone else to determine whether the Shermer
decision would change the CGL policy issued to CW&S, as far as whether there was
coverage or not. *Galasso Deposition P 94, L 11-14.*

A letter dated Sept. 6, 2000, from Pfennigs to Glasso, via mail, enclosed
HUBBARD'S settlement demand which was made upon CWS. Pfennigs states,

"Please consider this letter as the last demand CWS will make for a defense
and indemnity in this case. Demand is hereby made that the HOME settle
this case within policy limits". If HOME continues its refusal to defend and
indemnify, it does so at its own peril. I am sure you are aware of the line of
Montana cases holding that if the HOME breaches its duty under the policy,
it is liable for any settlement of judgment that may result in this case".

Declaration of Robert Pfennigs, Page 7, paragraph 19.

1 On September 6, 2000 Mr. Pfennigs wrote a letter to Ms. Galasso informing her:

2 "the Home's denial of coverage is based upon an exclusion that involves
3 claims "arising out of" the employment relationship. In that regard I
4 enclosed a recent opinion from the Montana Supreme Court entitled Pablo vs.
5 Moore, 298 Mont 393, 995 P2d 460 (2000), which I maintained construes the
6 "arising out of" language and construes it against the Home and in favor of
7 coverage in this case.

8 Mr. Pfennigs further informed Ms. Galasso that if the HOME was going to once again
9 wrongfully refuse to defend and provide indemnity to CWS he would encourage her to
10 send this matter to outside counsel for review in light of the Pablo vs. Moore decision.
11 *Declaration of Robert Pfennigs, Page 7, paragraph 20.*

12 The exclusions relied upon by HOME are the exact same defenses asserted
13 by CW&S in the UNDERLYING action, that being the injury to HUBBARD occurred
14 while in the employ of CWS and the exclusivity provision of the Montana Workers
15 Compensation Act is controlling. However, this was not the determination of the Montana
16 Eighth Judicial District Court, nor was it the final determination of CWS at the time it was
17 forced to confess judgment to HUBBARD. *Declaration of Pfennigs, Page 9-10, par. 29.*

18 Not having received any response to his Sept. 6, 2000 letter, in another letter dated,
19 Oct 13, 2000, from Pfennigs to Galasso, via fax, Pfennigs discussed HOME'S failure to
20 respond to his letter of September 6, 2000, by stating;

21 "I take your silence to mean that the HOME Insurance is going to continue
22 with its refusal to either defend or indemnify". In addition, Pfennigs states,
23 "While I believe that the HOME has already breached its contract, I am
24 willing to allow one more opportunity to assume its duties and
25 responsibilities under the policy. The HOME has until Friday, October 20, to
26 notify me that it is assuming its duties to defend and indemnify under the
27 policy."

28 "As with the other complaints, I believe the complaint pleads facts that fall
within the coverage of The Home's insurance policy. While I believe that the
Home has already breached its contract, I am willing to allow it one more
opportunity to assume its duties and responsibilities under its policy. The
Home has until close of business on Friday, October 20, to notify me that it is
assuming its duties to defend and indemnify under the policy. If I have not
heard from you by then, I am going to take whatever steps are necessary to
protect my clients interests and The Home will have to suffer the
consequences."

1 *Declaration of Robert Pfennigs, Page 7-8, paragraph 21.*

2 On Oct 24, 2000 Pfennigs wrote to Glasso, via Fed Ex, indicating that HOME had
3 breached its obligation to defend CWS and he is "afraid that the opportunity for the HOME
4 Insurance Company to fulfill its contractual obligations to CWS has long since past."

5 *Declaration of Robert Pfennigs, Page 8, paragraph 21.*

6 Ms. Galasso made the decision to retain coverage counsel on October, 17 2000.
7 *Galasso Deposition P 104, L 9-15.* Ms Galasso sent an e-mail dated Oct 25, 2000 to Mr.
8 Pfennigs stating;

9 "Please be advised that HOME insurance Company has retained coverage
10 counsel in this matter. Coverage counsel is Peter Habine, Esq., of The
11 Crowley Law Firm. His phone number is (406) 255-7208. Should you have
12 any questions please do not hesitate to contact Mr. Habine"

13 Mr. Pfennigs responded to Ms Galasso's Oct. 25, 2000 e-mail, by reply e-mail on Oct. 25,
14 2000, informing her that "the opportunity for HOME to retain coverage counsel and
15 assume its duties under the policy has been lost." Mr. Pfennigs again did not get a response
16 from Ms. Galasso nor did he hear from Mr. Habine, the attorney identified by Ms. Galasso
17 as being coverage counsel. *Declaration of Robert Pfennigs, Page 8, paragraph 21 & 22.*

18 On November 13, 2000 CW&S filed a Confession of Liability in the
19 UNDERLYING case, wherein it confesses its liability to HUBBARD for those claims
20 made in the Fourth Amended Complaint. CW&S also executed a Stipulation related to the
21 Confession of Liability. *Declaration of Robert Pfennigs, Page 8, paragraph 22.* On
22 November 16, 2000 the Court entered an Order of Liability and set a trial on damages. A
23 letter dated Nov. 28, 2000, from Pfennigs to Glasso, encloses the Confession of Liability
24 and other relevant documents, executed by CWS. Still not having received any
25 communication from Ms. Galasso nor Mr. Habine, CW&S attorney Pfennigs wrote an e-
26 mail to Ms. Galasso on December 12, 2000 wherein Mr. Pfennigs indicated;

27 "I still am amazed at the lack of response The Home has had to this case as I
28 expected to hear something after my last communication."

1 A trial on damages was held in the UNDERLYING Montana Eighth Judicial District Court
2 case and as a result thereof a Judgment and Order was entered on Dec. 20, 2000 wherein
3 CW&S was ordered to pay HUBBARD \$2,389,000.00. A Letter dated Dec 22, 2000, from
4 Pfennigs to Glasso, enclosed the judgment against CWS and in favor of HUBBARD.

5 HOME had ample opportunity to bring a declaratory relief action on the issue of
6 coverage in the Montana Eighth Judicial District Court, but instead denied insurance
7 coverage and a defense, even though the Montana Eighth Judicial District Court found that
8 the exclusivity provision of Montana's workers compensation laws was not applicable as to
9 Hubbard's claim. *Declaration of Robert Pfennigs, Page 9, paragraph 24-28.* C.W. & S.
10 stipulated to an assignment of any and all rights it had against its insurer (HOME), to
11 HUBBARD.

12 HUBBARD independently, and as assignee of C.W. & S.'s rights against HOME,
13 brought an action against HOME for Breach of Contract, Common Law Bad Faith, Actual
14 Malice, Violation of Montana's Unfair Claims Settlement Practices Act, §33-18-201,
15 MCA, an Independent Cause of Action pursuant to §33-18-242, MCA. At the time of the
16 stay being issued as a result of the HOME'S liquidation, HUBBARD'S case against the
17 HOME was in the United States District Court for the District of Montana, Great Falls
18 Division, under Cause No.: CV-01-71-GF-SEH.

19 LEGAL ARGUMENT

20 **COVERAGE**

21 As has been previously determined by the Montana Eighth Judicial District Court in
22 the underlying case, neither the exclusivity provision of Montana's workers compensation
23 statutes nor the cited exclusion of the CGL policy are applicable. That exclusion states:

24 "This insurance does not apply: (i) To bodily injury to any employee of the
25 insured arising out of and in the course of his employment by the insured for
26 which the insured may be held liable as an employer or in any other
27 capacity".

28 The language of the exclusion (i) mirrors Montana's workers compensation exclusivity

1 statute. It was determined by the Montana Eighth Judicial District Court in the
2 UNDERLYING case, based upon the public policy enumerated in the case of Lockwood v.
3 W.R. Grace, 272 Mont. 202, 900 P2d 314, 52 St. Rptr 705, (1995) and Sherner vs.
4 Conoco. Inc., 298 Mont. 401, 995 P.2d 990 (2000), that the exclusivity provision of the
5 worker's compensation law was not applicable to HUBBARD's injury. The
6 determination that under these circumstances the exclusivity provision is void as being
7 against public policy, also voids the exclusion in the policy. Both the contractual exclusion
8 and the Montana's workers compensation exclusivity provision, 39-71-407(1), MCA, have
9 the exact same wording.

10 "Exclusions from coverage will be narrowly and strictly construed because they are
11 contrary to the fundamental protective purpose of an insurance policy." Marie Deonier &
12 Associates vs. Paule Revere Life Ins. Co., 301 Mont 347, 360, 9 P3d 622, 630 (2000)
13 (quoting Wellcome vs. Home Ins. Co., 257 Mont. 354, 356-57, 849 P2d 190, 192 (1993)).

14 Exclusion (i) relied upon by HOME herein is the same defense CWS first asserted in
15 the defense of the UNDERLYING action brought by Hubbard. CWS argued to the
16 Montana Eighth Judicial District Court that the exclusivity provision of the workers
17 compensation statute and the exclusion were controlling. However, even though that was
18 the defense of CWS in the underlying action, it was not the determination of the Court, nor
19 was it the final determination of CWS at the time it was forced to confess judgment to
20 HUBBARD after the Court's holding.

21 The Montana Supreme Court has held that the phrase "arising out of and in the
22 course of his employment" in an insurance policy is ambiguous. The phrase "arising out
23 of" is not defined in HOME's insurance policy. This phrase has been deemed to be
24 ambiguous if undefined in the policy or by the context in which the phrase is used. Pablo
25 vs. Moore, 298 Mont. 393, 397-98, 995 P2d 460, 462-63 (2000). HOME was made aware
26 of the holding in Pablo vs. Moore, supra, by CW&S counsel in the UNDERLYING case.

1 However, HOME chose to ignore this clear statement of Montana law when it had ample
2 opportunity to defend its insured in the UNDERLYING case. The exclusionary language
3 of the policy, "bodily injury to any employee of the insured arising out of and in the course
4 of his employment", has been deemed to be ambiguous language in an insurance policy.

5 The exclusionary provision of Montana's workers compensation act, 39-71-407(1),
6 MCA, is identical to the exclusionary language of the policy. Both CW&S and the Court in
7 the UNDERLYING case determined that this language would not bar CW&S's liability to
8 HUBBARD. Accordingly, since "arising out of and in the course of his employment" is
9 ambiguous under Montana law, the interpretation of this identical language in the policy
10 which is most favorable to providing coverage must be given. *Pablo vs. Moore* 298 Mont
11 at 400, *Hudson and Edsall vs. Odyssey*, 29 MFR 100, 112 (2001 USDC MT).

12 The HOME had a duty to act in good faith toward their insured and claimants, which
13 duty exists independent of the above-referenced insurance contract. The conduct of the
14 HOME, above referenced, was a breach of it's contractual duty to act in good faith.

15 **COLLATERAL ESTOPPEL**

16 Collateral estoppel bars the party against whom the claim is asserted, or a party in
17 privity with the earlier party, from relitigating issues which have been decided with respect
18 to a different cause of action." *Federated Mut. Ins. Co. v. Anderson*, 991 P2d 915 (Mont.
19 1999). The Montana Eighth Judicial District Court has ruled that the exclusion relied upon
20 by the Home, and now the liquidator, is not applicable to Mr. Hubbard's claim. Collateral
21 estoppel, also known as issue preclusion, bars the reopening of an issue in a different cause
22 of action that has been litigated and determined in a prior suit. See *Holtman v. 4-G's*
23 *Plumbing & Heating, Inc.*, 872 P2d 318 (Mont. 1994). The preclusive effect extends to all
24 issues essential to the prior judgment. Here, that means the preclusive effect of the
25 Montana District Court's holding and judgment requires a finding here that the Home is
26 precluded from relitigating whether the exclusion is effective. The Montana District

1 Court's ruling on this issue is determinative.

2 In Aetna Life Ins. Co. v. McElvain, 221 Mont. 138, 717 P2d 1081, 43 St. Rep. 697
3 (1986), Aetna Life Insurance Company contended that the Montana District Court erred in
4 failing to give collateral estoppel effect to a South Dakota District Court judgment. Aetna
5 asserted that the South Dakota decision, holding that Aetna was not guilty of fraud, was
6 entitled to full faith and credit in Montana and conclusively defeated the fraud allegations.
7 The Court held that the South Dakota judgment was entitled to the same effect in Montana,
8 since the requirements for applicability of collateral estoppel outlined in Aetna Life & Cas.
9 Ins. Co. v. Johnson, 207 Mont. 409, 673 P2d 1277, 41 St. Rep. 40 (1984), were met. This
10 is very similar to the situation here. A Montana District Court has determined that the
11 exclusion provision at issue does not preclude coverage and therefore Hubbard's claim.
12 This tribunal should give the Montana court's decision full faith and credit. Once it does
13 so, the Home and its liquidator are precluded from relitigating that issue in this forum.

14 **RES JUDICATA**

15 The doctrine of res judicata not only precludes a party from relitigating claims that
16 were litigated in a previous action, but under Balyeat Law, P.C. v. Hatch, 284 Mont. 1, 942
17 P2d 716, 54 St. Rep. 780 (1997), res judicata will also bar an action for a claim that a party
18 had an opportunity to, but did not, litigate in a previous action. Fisher v. St. Farm Gen. Ins.
19 Co., 1999 MT 308, 297 Mont. 201, 991 P2d 452, 56 St. Rep. 1236 (1999). The home had
20 every opportunity to bring a declaratory relief action to determine the issue of coverage and
21 the applicability of the exclusion at issue, at any time after the defense of Hubbard's claim
22 was tendered to them by CW&S. The Home made a conscious choice to refuse coverage
23 and refuse to bring a declaratory relief action.

24 **REASONABLE EXPECTATIONS DOCTRINE MAKES EXCLUSIONS INVALID**

25 Montana has adopted the "reasonable expectations" doctrine which was discussed in
26 Wellcome vs. Home Ins. Co., 257 Mont. 354, 357, 849 P2d 190, 192 (1993), as follows:
27

1 We turn next to the "reasonable expectations" doctrine, first recognized by
2 this Court in *Transamerica Ins. Co. V. Royle*, (1983), 202 Mont. 173, 656 P.2d 820.
3 In that case, we held that a policy exclusion was invalid due to its failure to "honor
4 the reasonable expectations" of the purchaser of the policy. *Royle*, 656 P.2d at 824.
5 We quoted Keeton, *Insurance Rights at Variance with Policy Provisions*, 83
6 *Harv.L.Rev.* 961, 967 (1970), for the proposition that the objectively reasonable
7 expectations of the purchaser would be honored notwithstanding that a "painstaking
8 study" of the policy would have negated the expectations. *Royle*, 656 P.2d at 824.
9 The reasonable expectations doctrine is in accord with our strong public policy that
10 insurance is intended to serve a fundamental protective purpose; to this extent the
11 doctrine goes hand in hand with our rule of strictly construing policy exclusions.
12 See [*Farmers Mutual Ins. Co. vs.] Oakland*, [251 Mont. 352] 825 P.2d at 556.

13 J. Christopher Bulger, with the insurance brokerage firm of Fred S. James & Co.,
14 subsequently known as Sedgwick James, now known as Marsh Advantage America,
15 (James/Marsh), was the broker on the CW&S account from 1980 through 1987 who
16 arranged the insurance at issue herein. James/Marsh, as the insurance producer, solicited,
17 procured and prepared CW&S application for the insurance policy at issue herein. After
18 HOME insured CW&S under the CGL insurance policy, but prior to the accident which
19 resulted in HUBBARD's bodily injury, CW&S requested, on several occasions, additional
20 insurance in the form of Employers Liability coverage. James/Marsh discussed CW&S
21 request for such Employers Liability coverage with HOME. Representative of HOME
22 advised "Montana was a sole remedy state for workers compensation purposes and that
23 coverage B - Employers Liability - was therefore neither needed by nor available to
24 [CW&S]." As a result, such coverage was not offered to CW&S. It was CW&S
25 reasonable expectation, based upon the representations of HOME, that Employers Liability
26 coverage was neither needed nor available to CW&S.

27 During the UNDERLYING case, upon CW&S's inquiry to HOME about this
28 representation that Employer's Liability coverage was neither needed nor available, CW&S
learned that HOME did offer such coverage to insureds for whom they wrote general
liability policies. HOME does not dispute that the Employers Liability endorsement to the
general liability policy would have provided CW&S with a defense for the claims made by
HUBBARD.

1 Marsh/James was the agent of HOME. The provisions in the policy were
2 formulated by HOME. James/Marsh had no discretion to change the insurance forms of
3 HOME. James/Marsh was soliciting the application and promoting HOME's insurance
4 product. The actions of James/Marsh in soliciting and procuring the insurance and
5 preparing the applications are as agents for HOME. A soliciting agent of an insurance
6 company is the agent of the insurer and not of the insured for the purpose of soliciting and
7 procuring the insurance and preparing the application. *Tynes vs. Bankers Life Co.*, 224
8 Mont. 350, 730 P.2d 1115 (1986), *Marie Deonier & Assoc. vs. Paul Revere Ins. Co.*, 301
9 Mont. 347, 364-67, 9 P.3d 622 (2000).

10 As HOME's agent, the acts and representations of Marsh/James to CW&S are
11 imputed to HOME. 28-10-405, MCA, provides that an agent has authority to do everything
12 necessary and proper and usual, in the ordinary course of business, for effecting the
13 purpose of his agency; and make a representation respecting any matter of fact, except the
14 terms of his authority, upon which his right to use his authority depends and the truth of
15 which cannot be determined by the use of reasonable diligence on the part of the person to
16 whom the representation is made. Where the words used to create a principal and agent
17 relationship are ambiguous in themselves, they are to be taken most strictly against the
18 principal, and the agent in his dealings with a third person may bind the principal in
19 accordance with usage or by any construction of the ambiguous words that is reasonable.
20 The grant of powers is not to be frittered away by very nice and metaphysical distinctions
21 when the general tenor of the instruments is in favor of what was done under the power and
22 when the principal has reaped the benefit of it. *McLaren Gold Mines v. Morton*, 124 Mont.
23 382, 224 P2d 975 (1950).

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that on the date set forth below, I caused to be electronically served and filed the forgoing Claimant's Written Submission Re: Disputed Claim, to the following individuals by emailing it as a PDF file attachment, along with a PDF file attachment containing the exhibits and affidavits it to the following email addresses:

The Home Insurance Company in Liquidation
c/o Merrimack Superior Court
163 North Main Street
Concord, New Hampshire 03302-2880
E-mail help@hicilclerk.org

Eric A. Smith
Rackemann, Sawyer & Brewster, P.C.
160 Federal Street
Boston, Massachusetts 02110-1700
E-mail esmith@rackemann.com

DATED this 6 day of February, 2009.



MONTANA EIGHTH JUDICIAL DISTRICT, CASCADE COUNTY

JOHN A. HUBBARD,

Plaintiff,

-vs-

CARL WEISSMAN & SONS, INC.,

Defendant.

CAUSE NO. BDV-90-067

DEPOSITION OF JOHN HUBBARD

Great Falls, Montana
March 10, 1999
10:00 A. M.

APPEARANCES:

RANDALL O. SKORHEIM
Attorney at Law
121 Fourth Street North, #2G
P. O. Box 401
Great Falls, Montana 59401-0401
Attorney for the Plaintiff

JARDINE, STEPHENSON, BLEWETT & WEAVER
Attorneys at Law
700 U. S. Bank Building
Great Falls, Montana 59401
By: Robert B. Pfennigs
Attorneys for the Defendant.

	Page 1 of 2
1	
2	
3	WITNESS: John A. Hubbard
4	Page
5	Examination by Mr. Pfennigs 3
6	
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8	EXHIBITS:
9	Marked
10	Deposition Exhibit No. 1 44
11	Deposition Exhibit No. 2 54
12	
13	Deponent's Certificate 63
14	Certificate of Reporter 64
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Page 3

1 BE IT REMEMBERED that on Wednesday, the 10th day of
 2 MARCH, 1999 at the hour of 10:00 A. M. of said day, at 7th
 3 FLOOR, U.S. Bank Building, Great Falls, MONTANA, and before
 4 Jack L. Fletcher a Notary Public for the State of Montana,
 5 pursuant to Notice, the deposition of John Hubbard was
 6 taken on oral interrogatories.

7

8

9 Thereupon.

10 John Hubbard,

11 having been first duly sworn to tell the truth, the whole
 12 truth and nothing but the truth, testified upon his oath as
 13 follows:

14 MR. PFENNIGS: For purposes of the record I
 15 would like to establish that counsel for John Hubbard and
 16 myself this morning discussed the extent of this
 17 deposition.

18 All counsel have concerns over the liability issue and
 19 work comp exclusivity. My questions this morning will be
 20 directed toward the liability question and questions with
 21 respect to Mr. Hubbard's employment background, his
 22 employment history, mitigation, damages, and such things as
 23 that will be reserved until a later date.

24 MR. SKORHEIM: stipulate to that.

25 MR. PFENNIGS: Please state your name and

Page 4

1 address.

2 A John A Hubbard, 158 P. O. Box, Black Eagle,
 3 59414.

4 Q John, my name is Bob Pfennigs, I represent Carl
 5 Weissman & Sons with respect to a lawsuit that you have
 6 filed as a result of an accident occurring I believe in
 7 1987. I would like to ask you some questions about that
 8 accident. Before we begin, I would like to know whether
 9 you ever had your deposition taken before?

10 A Yes, on this, yes.

11 Q You were deposed with respect to this particular
 12 case?

13 A I thought you were referring to that one with
 14 your secretary.

15 MR. SKORHEIM: No. That was just a statement.

16 MR. PFENNIGS: What about with respect to any
 17 other case, have you ever had your deposition taken before
 18 in this type of a setting?

19 A Yes, I guess.

20 Q When would that have been?

21 A That would have been in 78.

22 Q Was that with respect to an injury claim or some
 23 other type of lawsuit?

24 A No. Criminal deal.

25 Q You had your deposition taken?

Page 5

1 A I don't remember to tell you the truth. It has
 2 been back in 78.

3 Q You understand in this particular proceeding that
 4 you are under oath?

5 A Yes. It was so long ago that I don't really
 6 remember. I had a lot of questions asked of me. I don't
 7 know if that is considered a deposition or not.

8 Q That is fine. I want to make sure you understand
 9 how this proceeding works.

10 A Yes.

11 Q You are under oath at this particular time, and
 12 under certain circumstances the questions and answers that
 13 you give today can be used as sworn testimony in court, did
 14 you understand that?

15 A Yes.

16 Q And one of the important things as we proceed
 17 today is for you to make sure you understand my question.
 18 Attorneys don't always ask the best questions or most clear
 19 questions. If I ask a question you find to be unclear,
 20 which you don't understand, you need to be sure and tell
 21 me, is that fair?

22 A Yes.

23 Q Have you had any discussions or prepared for this
 24 deposition with anybody other than your attorneys?

25 A No.

1 Q Have you reviewed any documents such as
2 pleadings, reports, or photographs, in preparation for your
3 deposition?
4 A Such as looking at pictures of the accident
5 scene, yes.
6 Q You looked at photographs of the accident scene?
7 A Yes.
8 Q How many photographs did you review, do you
9 recall?
10 A I don't recall offhand.
11 Q Do you know who took the photos?
12 A Some were taken by me, some were taken by Tom
13 Boland, I believe, and I don't know who took them. I was
14 in the hospital at the time.
15 Q Did you know when in relationship to the accident
16 the photographs might have been taken?
17 A I believe it would have been January 23 of 87.
18 Q Of 87?
19 A Yes.
20 Q What date was the accident?
21 A January 22 of 87.
22 Q So you believe the photos that you reviewed, at
23 least some of them might have been taken the day after the
24 accident?
25 A I believe so.

1 Q What about the photos that you reviewed that you
2 might have taken. How long after the accident did you take
3 those?
4 A I am not sure on that, because I was in the
5 hospital for quite a while.
6 Q You recall at some point you went back to Carl
7 Weissman's and took some pictures of the crane?
8 A Yes.
9 Q Do you recall about how many pictures you would
10 have reviewed?
11 A No, I don't.
12 Q Who had possession of these photographs?
13 A I had copies made and my attorneys have some and
14 I have some.
15 Q Did your attorneys have a full set, a copy of all
16 the photographs you are aware of?
17 A I believe they have a copy.
18 Q Anything other than photographs that you
19 reviewed?
20 A A sheet of missing gear guards which I did some
21 investigating on myself after I got out and went to Helena,
22 found a crane, same kind of crane and I took pictures of
23 the gear guards that are on that crane. I talked to the
24 yard man, I don't know if he owns the crane or not, but he
25 gave me a big book and it shows the gear guards that were

1 all missing off of Weissman's crane. I got a copy of it
2 here.
3 Q So it was just a drawing, then?
4 A Yes. I guess you would call it a schematic of
5 missing gear guards.
6 Q I will show you, this is the drawing that you
7 reviewed?
8 A Yes. That is out of his maintenance book for
9 that particular crane.
10 MR. PFENNIGS: For the record, this particular
11 diagram he is referring to was attached to the original
12 complaint, I believe, as an exhibit.
13 Q Who is this person in Helena?
14 A I don't remember his name. I should have wrote
15 this stuff down, and I didn't.
16 Q This was sometime after the accident, then?
17 A Yes.
18 Q Do you recall about how long?
19 A I am trying to think. I don't remember.
20 Q As I understand it you went to Helena and you
21 looked at a crane that was similar to the one that Carl
22 Weissman had in their yard?
23 A Yes.
24 Q And this guy, this person you talked to had a
25 book that you reviewed and took out some photocopies?

1 A I had photocopies made of the gear guards,
2 particularly. It was a maintenance book on that particular
3 crane.
4 Q Did you take any photographs of the crane in
5 Helena?
6 A Yes, I did.
7 Q Are those photographs some of those in the
8 possession of your attorneys?
9 A I believe so.
10 Q Anything else that you reviewed in preparation
11 for your deposition?
12 A I don't think so.
13 Q Do you recall at some point in time you answered
14 written questions or interrogatories that I sent to your
15 attorneys?
16 A Yes.
17 Q Did you have opportunity to review those prior to
18 your deposition today?
19 A Yes, I did.
20 Q As you reviewed the answers that you gave did you
21 see anything in there that you now believe might have been
22 inaccurate, or need to be changed in any way?
23 A I believe in there where Mitchell tells me I have
24 to grease the big bull gear, I didn't say anything because
25 the gear guards are missing. I had no idea about the gear

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1 guards missing, but the idea of the grease is to keep from
 2 wear, and they are exposed to the elements, wind, rain,
 3 snow, dirt, a lot of dirt.
 4 Other than that I think it came out in that as a
 5 conclusion because the gear guards were missing he told me
 6 to did this. I didn't pick it up which I should have, but
 7 I missed it.
 8 Q Anything else in your interrogatory answers?
 9 A I think the rest of the is pretty close. --
 10 Q John, do you recall whether you have ever given a
 11 recorded or written statement to anyone concerning the
 12 accident?
 13 A I gave lots of statements. I don't know if they
 14 have been recorded or not.
 15 Q Do you recall who you would have given the
 16 statements to?
 17 A First attorney, Tom Boland, probably. I seen
 18 several other attorneys that I gave statements to. I doubt
 19 if they recorded them. John Hoyt, Howard Strause, Eric
 20 Thueson.
 21 Q Do you remember giving a statement to anyone
 22 other than an attorney?
 23 A Yes, I have talked a lot about this. All sorts
 24 of people.
 25 Q Any insurance adjusters that came and asked for a

Page 11

1 statement?
 2 A No.
 3 Q What about anybody from the state OSHA or state
 4 workers' comp?
 5 A No, I don't think so.
 6 Q If I remember right you said the date of the
 7 accident as best you can recall is January 22, 1987?
 8 A Is that correct?
 9 Q What date did you start work for Weissman's, do
 10 you know?
 11 A I am terrible with numbers. I am not sure, I am
 12 really not sure.
 13 Q Do you know approximately how long you worked for
 14 Weissman's prior to the date you were injured?
 15 A I worked for them before and I worked for them
 16 this time, I think it was five years, four years, I am not
 17 sure where it is in there.
 18 Q So you think you worked for Weissman for four,
 19 five years?
 20 A Right.
 21 Q Prior to the date of the accident?
 22 A Yes.
 23 Q And then you seem to indicate that you also
 24 worked for them at another time?
 25 A Yes, years before.

Page 12

1 Q Years before?
 2 A Yes.
 3 Q Do you know when you would have first gone to
 4 work for Weissman?
 5 A I don't know the dates.
 6 Q How long did you work for them the first time?
 7 A I think a year or two, couple years, I think. I
 8 am not sure. Maybe three years. I am not sure.
 9 Q What were your job duties the first time you
 10 worked for Weissman?
 11 A Worked out toward the base there at North Park
 12 before - they had a junk yard, crushed cars, baled tin.
 13 They had a car wrecking yard out there. We were to clean
 14 it up.
 15 Q Like close it down?
 16 A The cars piled up, we had to crush them and ship
 17 them out, bale tin.
 18 Q You did that for two, three years to the best of
 19 your recollection?
 20 A From there I went to the brewery deal, Great
 21 Falls Brewery and cut up iron, missile caps from the
 22 missile job they had, wrecked train cars.
 23 Q That was for Weissman too?
 24 A Yes.
 25 Q This all happened during the first two, three

Page 13

1 year period you worked for them?
 2 A Yes.
 3 Q Did you operate any machinery for Weissman at
 4 that time?
 5 A Yes, I did.
 6 Q What type of machinery did you operate?
 7 A Big heavy loaders, Case W24 backhoe tractor with
 8 a claw on it to grab tin and iron and load into balers.
 9 Balers, car crusher, drove light truck.
 10 Q Do you recall ever seeing the crane that is
 11 subject of this lawsuit during the time you first worked
 12 for Weissman?
 13 A Yes, it was downtown in the main yard. I didn't
 14 work down there at the time.
 15 Q You had no occasion to operate it then?
 16 A No.
 17 Q At some point in time you left Weissman's
 18 employment, that is correct?
 19 A Yes.
 20 Q How long, how big a gap was there between your
 21 first employment and when you came back the second time to
 22 work for Weissman?
 23 A I got a job with Bekins Van Lines, Marbles Moving
 24 & Storage. I worked there for, I am not sure how long I
 25 worked there, five, six years. I can't say for sure. I

1 got in trouble, I ended up in prison for another five
 2 years, I got out in 82, '81 and I got a job first at the
 3 Sheraton Inn washing dishes, and then I got a job also down
 4 at Weissman's, I went down in the yard and got a job.
 5 Q This would be about the time you started your
 6 second term of employment with Weissman's?
 7 A Yes.
 8 Q During your first period of employment do you
 9 recall who your supervisors were?
 10 A The first?
 11 Q The first time you worked for Weissman's?
 12 A Don Mitchell was the head mechanic and he was the
 13 boss out there. There was another one. They hired a guy
 14 who had a funny name. I would say Don Mitchell was the
 15 main one.
 16 Q Do you recall whether you had any accidents or
 17 injuries during your first term of employment with
 18 Weissman's?
 19 A I don't think I did, no.
 20 Q Do you recall who your co-workers were during
 21 your first term of employment?
 22 A Yes.
 23 Q Who did you work with?
 24 A I worked with Orlando Parsons, Ron DuBerry,
 25 Charles Falkner, or Robert Falkner, Greg Silversmith, Ray

1 LaMere. There was a bunch of them. Some I don't know
 2 offhand.
 3 Q Were any of these people still employed with
 4 Weissman's when you returned for your second term of
 5 employment?
 6 A No.
 7 Q Do you recall any accident or injuries involving
 8 any of these people during your first term of employment?
 9 A Yes.
 10 Q What are those?
 11 A They were loading a semi with bales of tin and I
 12 wasn't there, I was over crushing, but they had the big
 13 loader that holds up a half moon grid that came from the
 14 missile silos, had bales of tin on it. Ray Lamere and Greg
 15 Silversmith were unloading it, they unloaded one side;
 16 naturally it got heavy and it flipped, catapulted Ray
 17 Lamere from the top of the truck all the way over. He
 18 landed on the ground. The only thing that saved him from
 19 the iron grid crushing him was the bale was still there,
 20 they stopped about a foot and a half off the ground. It
 21 would have cut him right in half.
 22 Q Was he injured then in the accident?
 23 A He got the wind knocked out of him, I think
 24 scratched and bruised. The ambulance didn't come or
 25 anything.

1 Q Was there anything about that particular incident
 2 which would lead you to believe that Carl Weissman intended
 3 that he be hurt?
 4 A No. That was their problem because they unloaded
 5 the grid wrong.
 6 Q You are referring to the employees?
 7 A Yes.
 8 Q You think you might have gone back to work for
 9 Weissman's some four, five years prior to 1987 when you
 10 were injured?
 11 A What do you mean?
 12 Q At some point then you left your employment with
 13 Carl Weissman, then I think you testified that a period of
 14 years later you came back to work again for Weissman?
 15 A Right.
 16 Q And that you worked for them for you believe
 17 four, five years before you were hurt?
 18 A Yes.
 19 Q So that would put, I guess the time of your
 20 second employment, when that began sometime around 1982,
 21 1983, does that sound about right to you?
 22 A I think 82, somewhere in there. I am not sure.
 23 Q When you returned to work at Weissman's what were
 24 your job duties the second time around?
 25 A I was hired as a laborer. My job was to cut iron

1 in the front yard and load and unload trucks, shear iron
 2 with the shear, sometimes smelt aluminum. That was my main
 3 job, I was to separate aluminum from the stainless steel.
 4 They had a guy smelting it, but you had to separate it. It
 5 was a big pile of junk. Take the aluminum out of the
 6 stainless steel.
 7 Q How do you do that?
 8 A By hand. Just drudgery work pulling stuff out.
 9 You pile the stainless to be baled, or pile it in boxes or
 10 something to ship out separate. You had to separate that
 11 magnesium in there, you got to separate that from the
 12 aluminum.
 13 Q So I guess in your position as a laborer then who
 14 was your supervisor?
 15 A Will Williams.
 16 Q Do you know whether Mr. Williams was still
 17 employed by Carl Weissman on the date of your injury?
 18 A Yes.
 19 Q Was he still your supervisor?
 20 A Yes.
 21 Q Did you only have one supervisor?
 22 A Paul Rosen was another supervisor. He is a
 23 purchasing agent for Weissman's and he left after while and
 24 started Rosen Brothers Demolition in Butte.
 25 Q Did he leave prior to the date of your injury?

1 A Yes, he did.
 2 Q What about Don Mitchell, was he still with CWS?
 3 A Yes, he is head mechanic, he worked over at the
 4 brewery and fixed the machinery that would break down.
 5 Q My recollection from your earlier testimony was
 6 that Don was your supervisor the first time you worked for
 7 Weissman's?
 8 A Yes.
 9 Q Did he have any supervisory authority over you
 10 the second time that he went to work for Weissman?
 11 A I listened to him because he is the head mechanic
 12 and knows his stuff about the machinery.
 13 Q You felt he was a pretty competent mechanic?
 14 A Yes.
 15 Q During your first term of employment with
 16 Weissman did you ever have any disagreements with Don
 17 Mitchell?
 18 A No.
 19 Q Did you get along with him pretty well?
 20 A Yes.
 21 Q How about during your second term of employment.
 22 Any disagreements with him?
 23 A No problems with him at all.
 24 Q So when you went to work your second time then,
 25 as I understand it, you were employed as a laborer and you

1 mostly worked with the scrap iron.
 2 A Yes.
 3 Q Did your employment duties change at all during
 4 the course of time?
 5 A Yes, they did.
 6 Q In what way?
 7 A Paul Rosen would run the crane and he would break
 8 it. He would run it too fast, he always would be pulling
 9 the electrical cable out of the magnet. He would have me
 10 fix it. Shut it down and have me fix it. I was always
 11 doing it, I always ended up fixing it and one day he said
 12 get in here, he was going to teach me how to run the crane
 13 and showed me how everything worked; you got four levers,
 14 pull up, still on the brake, two brakes, one is for
 15 drawback, one up and down, you step on the brakes and hold
 16 the magnet. Magnet weighs 3,000 pounds so you have to be
 17 careful with it. It is on a drag line, a cable crane. He
 18 had me work it a few times. I dropped it the first time.
 19 Picked it up but five feet and I didn't have sense enough
 20 to put the brake on and it dropped. He said that is what
 21 you don't want to do. Step on the brake. He had me work
 22 it, pick up iron, hit the magnet on, pick it up, move the
 23 crane. Had me do that three, four, five times and left me
 24 on my own to practice with it, clean up the yard. That is
 25 when I started running the crane.

1 Q Maybe you could describe this particular crane a
 2 little bit for me. What type it was, how it worked?
 3 A When I seen it this time it had a yellow cab on
 4 it, it was modified, redone. It didn't look anything like
 5 the old crane that was there. It was the old crane, but it
 6 was modified.
 7 Q When you are referring to the old crane, the
 8 crane that Weissman had in their yard the first time you
 9 were working for them?
 10 A Yes. Had a big orange and black house on it.
 11 Q Describe what it looked like?
 12 A Had a diesel engine in it.
 13 Q During your first employment it had a diesel
 14 engine?
 15 A Yes.
 16 Q Had an orange and black house?
 17 A Yes.
 18 Q Anything else that you can remember about it the
 19 first time?
 20 A I didn't run it or anything. I just know it had
 21 an old diesel engine in it, and big orange and black house.
 22 It was an old time crane.
 23 Q How was the crane different than when you came
 24 back to work for Weissman's the second time?
 25 A They had a different house on it. It is noisy

1 when you are in there. The levers are loose. Worked the
 2 heck out of that crane, it made them a lot of money, I am
 3 sure. It had a pigtail sticking out of the top, electric
 4 cable, electric motor in it.
 5 Q What is a pigtail?
 6 A Steel pipe coming out the top, coming back
 7 horizontally and dropping down and had a four inch electric
 8 cable that ran through the yard to a fuse box over on the
 9 side and I instantly thought that is pretty scary, electric
 10 crane in a steel scrap yard.
 11 Q Did the crane move at all?
 12 A Yes, I could walk it. You have levers on the
 13 side, lock the house, the turret so it won't roll, lock
 14 that, pull it out of gear for the swing into travel gear
 15 and then when you push your far right lever it will move,
 16 it will walk.
 17 Q What would happen with the pigtail when you tried
 18 to move the crane?
 19 A That is a scary deal. They had me get a guy and
 20 hold a board underneath the pigtail and walk with it to
 21 make sure it didn't get snagged up on iron and pull out. I
 22 have observed Paul Rosen walk it and snag it and jerk it
 23 out of the housing a few times and sparks fly and it is a
 24 scary deal.
 25 Q When about during your second employment did you

1 start running the crane, do you recall?
 2 A That is another thing, I really don't remember
 3 how often, when that started.
 4 Q Had you been there for a while, do you think?
 5 A It seemed like I was there, I can't say how long
 6 I was there, whether it was three weeks to a month or three
 7 months, or what.
 8 Q Did you run the crane -- do you recall how long
 9 you ran the crane before you were injured?
 10 A I ran it for at least a good four years.
 11 Q So would it be fair to say that you ran the crane
 12 for a good portion of the time you were working for
 13 Weissman's the second go around?
 14 A Yes. I turned into main crane operator.
 15 Q You think you were the main crane operator for
 16 maybe four years?
 17 A Yes. That is a rough estimate.
 18 Q Prior to you becoming the main crane operator you
 19 believe the main crane operator would be Paul Rosen?
 20 A Andy Rosen too. He moved to Butte with Paul. I
 21 was driving truck for them too.
 22 Q Andy was?
 23 A Andy was. They were brothers.
 24 Q You recall seeing Andy run the crane?
 25 A Yes, Andy run it better than Paul, but he could

1 drive truck too. So they had him on the road a lot.
 2 Q Other than Andy Rosen, Paul Rosen and yourself,
 3 do you recall ever seeing anyone operate this particular
 4 crane?
 5 A Will Williams.
 6 Q He was your --
 7 A Main supervisor.
 8 Q Your main supervisor?
 9 A Yes.
 10 Q On what occasions would Will Williams operate the
 11 crane?
 12 A My day off. When I was busy with something else,
 13 unloading truck or loading cars. I loaded a lot of crushed
 14 cars on trucks with the big loaders. If I was busy doing
 15 that and somebody came in I would run the crane.
 16 Q Anyone else you can recall running the crane
 17 beside those three people and yourself?
 18 A No, that is it.
 19 Q Do you recall whether during the times these
 20 other people, I am referring to Will Williams, Paul Rosen,
 21 Andy Rosen, the times that those particular people operated
 22 the crane, were there any modifications or safety guards
 23 that were added that weren't there when you operated the
 24 crane?
 25 A No.

1 Q So the condition they operated the crane in was
 2 the same condition that you operated the crane in?
 3 A Yes.
 4 Q Did you have any experience operating the crane
 5 or other heavy equipment prior to your employment with
 6 Weissman's?
 7 A Before I worked for them ever?
 8 Q Right.
 9 A I worked with my grandpa, he owned Mountain State
 10 Fence, I drove tractor, if you call that heavy equipment.
 11 Q Any other experience operating a crane?
 12 A No.
 13 Q With respect to this particular crane, I
 14 understand that sometime, I guess, between your first
 15 employment and your second employment the crane was
 16 modified?
 17 A Yes. Must have been.
 18 Q The house was changed?
 19 A The house was totally different.
 20 Q The motor was switched?
 21 A The motor was switched from a diesel engine to a
 22 440 electric motor.
 23 Q During that process as I read your complaint it
 24 is your allegation that some safety guards were removed?
 25 A Yes.

1 Q I read from paragraph 3 of what is entitled
 2 Amended Complaint and Jury Demand it says in there the
 3 defendant knowingly and intentionally removed the gear
 4 guards from the crane before the plaintiff was employed by
 5 the defendant. Is that an accurate statement?
 6 A Yes.
 7 Q So at the time you started your employment, your
 8 second employment with Weissman's the guards were already
 9 off the crane?
 10 A Yes.
 11 Q Would you agree with me then that the removal of
 12 the guards, the safety guards from the gears was not
 13 something that was done by Weissman with any specific
 14 intent to injure you?
 15 MR. SKORHEIM: Object to that, asking for a
 16 conclusion on Mr. Hubbard's part. There is no foundation
 17 and would be pure speculation. There is no way he could
 18 know what Weissman was thinking when they removed the
 19 guards.
 20 Q You can answer if you can.
 21 A I imagine they didn't put them on because it was
 22 too much trouble to put them back on.
 23 Q My question was, are you aware of any facts that
 24 would indicate to you the guards were removed with the
 25 intent that you would be injured?

1 A Not with intent that I would be injured, but with
2 total disregard for any operators' safety.
3 Q Do you recall during your second term of
4 employment with Weissman having any disputes or arguments
5 with any of your supervisors?
6 A No.
7 Q What about your fellow employeecs?
8 A A few times, yes.
9 Q Were those disputes or arguments such that you
10 have reason to believe anybody would have been out to get
11 you or injure you?
12 A No.
13 Q We will get to the facts of the accident here in
14 just a little bit. I understand that your injury occurred
15 while you were greasing the crane that we have been talking
16 about?
17 A That's correct.
18 Q Do you know what type of crane this was. Is
19 there some definition we can put to it other than just the
20 crane?
21 A It is a Northwest. I am not sure of the year.
22 That has been a big dispute on the thing. Call it the
23 Northwest Crane.
24 Q That is the crane you were working on the day you
25 were injured?

1 A Yes.
2 Q It is the same crane we have been talking about?
3 A Yes.
4 Q Were there any other cranes in the yard that we
5 could get this confused with?
6 A There is one at the brewery, it was a rail crane
7 I run too.
8 Q But that crane wasn't located in the same yard?
9 A No, it is across town.
10 Q That crane doesn't have anything to do with your
11 injury, does it?
12 A No.
13 Q You did operate that on occasion?
14 A Yes, I did.
15 Q How regular would you work on the other crane?
16 A We had iron over there, had a crew over there
17 cutting iron. It was on the tracks and you could move it
18 like a train, like boom down, and I could roll across and
19 hook onto a train car, come across, put the boom back up,
20 take it out of lock, and start loading it with the iron.
21 That is what I would do with that. I have done that I don't
22 know how many times.
23 Q Did you do that on pretty regular occasions?
24 A Yes.
25 Q Was that an electromagnetic crane?

1 A No, that was diesel.
2 Q Did it have a big magnet on it?
3 A A smaller magnct. Didn't have as good drawing
4 power.
5 Q Did you have occasion to do any type of service
6 or maintenance on the second crane?
7 A Yes. I made sure it was full of oil and fuel,
8 greased it too.
9 Q Back to the crane in the yard, the one involved
10 in the accident, I understand you were greasing or
11 lubricating that crane at the time you were hurt?
12 A Yes, I was.
13 Q Had you ever done that job before?
14 A Many times.
15 Q So you lubricated this particular crane many
16 times?
17 A Yes.
18 Q That would have been during the course of your
19 four years as the head crane operator?
20 A Yes.
21 Q Did you start with the maintenance and
22 lubrication at the same time you started operating the
23 crane?
24 A No, I didn't.
25 Q That started sometime later?

1 A Yes.
2 Q How much later?
3 A I can't be sure. It started when it started
4 squeaking, we had a service truck, it was like an old Bell
5 Telephone truck with tool compartment on both sides and a
6 compressor in the back, air compressor and grease. I think
7 I complained about a squeak, we will get the service truck,
8 you can service it. You have to clean all the zerks. I
9 can't remember how many zerks are on that things. There
10 are a lot of zerks on it. The air helped, the air greaser,
11 but you start greasing, someone comes with iron or a job,
12 you have to quit, go to work with it or something.
13 Q How long would it take to grease and lubricate
14 the crane from beginning to end?
15 A I would say better than half a day, three
16 quarters of a day, probably.
17 Q Six hours?
18 A If you want to do a complete job. I am
19 thinking-- I want to call it the stick.
20 Q The end of the crane?
21 A The boom is what it is. There is a pully on the
22 end, you want to boom that down and grease the wheels on
23 that too. The rotomatic which is a wheel on the side holds
24 electrical cable, whenever you move it it has to roll to
25 let the electrical cable come up and down without breaking.

1 You have to grease that too. A lot of times didn't
2 grease that as much as the rest of it.

3 Q Is that the work you just described, was that
4 done by means of grease zerks or grease fittings?

5 A Yes.

6 Q You would grease those with an air greaser or a
7 grease gun?

8 A Yes.

9 Q I would assume you also had to grease the gears?

10 A Yes.

11 Q Did you receive any instruction on how to do
12 that?

13 A No, I figured you just hit all the zerks. I
14 never had too much instruction on that. Mitchell was in
15 one day and that big wheel was running, the crane is
16 running, and he got up on the side, he was monkeying with
17 something. He said you got to grease this big wheel every
18 once in a while too. He had a paintbrush, we call this
19 pressed grease, tar grease, black sticky grease, put the
20 paint brush in and held it over the wheel, it was running
21 and it runs off like thick syrup. Told me I had to grease
22 that wheel every once in a while and he laughed. That was
23 Mitchell. I said all right, it is exposed to the elements.
24 It is a big bull gear, four foot diameter. I believe
25 five inch face, probably inch and a half cogs on it.

1 Q Are you aware of any facts that would indicate to
2 you at the time Don Mitchell instructed you on greasing
3 this particular gear that he or anyone else from Carl
4 Weissman intended you would be injured at some point in
5 time?

6 A No.

7 Q Did you receive instruction on maintenance from
8 anyone else?

9 A No.

10 Q And the only instruction you received from Don
11 Mitchell then was this one particular time which you just
12 described?

13 A Yes. He said I had to grease that big gear every
14 once in a while.

15 Q Did he give you any instructions on how you were
16 supposed to do it, other than just showed you that once?

17 A It was running. Something about leaving it
18 running for better lubrication.

19 Q Where was Don at the time he gave you that
20 instruction?

21 A He was standing on the deck of the crane right
22 beside that big wheel.

23 Q Where were you?

24 A I was on the ground cutting iron. He called my
25 attention to it. Prior to that I greased everything but

1 that big wheel. I didn't even think of wear on it or
2 anything like that.

3 Q Do you recall when this conversation with Don
4 Mitchell would have occurred during your term of
5 employment?

6 A I don't remember.

7 Q Subsequent to this conversation with Don Mitchell
8 did you ever have occasion to grease that gear?

9 A Yes.

10 Q How many times. Are you able to say?

11 A I am not sure of that either.

12 Q Can you give me maybe a time period as to how
13 often you would lubricate the crane or the gear?

14 A I know from friends I have who work construction
15 that all equipment is supposed to be greased every eight
16 hours. But down there there was no such animal because we
17 are too busy to grease it every eight hours. Usually on a
18 job like that they have a greaser who does nothing but
19 grease, but being where we are working, it got greased when
20 I got a break in the action to do it.

21 Q You think that was on a fairly frequent basis?

22 A Could skip months, sometimes once every two
23 months, could even drag longer. It was just whenever we
24 weren't very busy I could get at it.

25 Q Do you think you greased this crane more than a

1 dozen times?

2 A Yes.

3 Q More than two dozen?

4 A Yes.

5 Q More than 50?

6 A Yes.

7 Q So it was something you did on a fairly frequent
8 basis?

9 A Yes, because I know if you don't grease it you
10 are going to wear it out and it will be broke down.

11 Q At the time you started greasing this particular
12 gear the safety guards had already been removed?

13 A Yes.

14 Q Did you grease the crane the same way every time?

15 A Yes.

16 Q During the 50 or more times that you greased the
17 crane prior to the date of the accident had you had any
18 injuries or close calls?

19 A I pulled my back over in the rail yard. P&H
20 truck crane I run over there.

21 Q A different crane?

22 A Totally different crane.

23 Q A third crane?

24 A A third crane. I forgot about it. A diesel
25 crane on a truck. You can drive it around and put the

1 outriggers out. I had a crew over there cutting railroad
2 rail. I grabbed the rail with the magnet, pulled it out,
3 dropped it and busts like glass. They notch the top rail.
4 I got off the crane and they picked up -- we had guys hired
5 to pick up the iron. Get a loader bucket, take it over to
6 the rail head. I tried to grab a piece of rail out of the
7 ground and I pulled my back. Other than that, I had a load
8 of iron dropped on me. That was an accident. Paul Rosen
9 dropped a load of iron on me. I was on the gondola, the
10 main yard with this crane that I got injured on, but he was
11 loading the train gondola and someone threw shocks in the
12 pile and that is a big no, no. When they send it to the
13 mill the shocks blow up like a bomb.

14 Q Talking like a shock absorber for a car?

15 A Yes. So what you had to do when you had dirty
16 Number 2 iron you had to have a guy sit on the end of the
17 gondola, crane operator grabs the iron, drop it in the
18 gondola, the guy would have to look for any shocks, jump
19 down, grab the shocks, throw them out of the car. You can
20 get a whole car rejected if they find one shock. When they
21 hit the furnaces they expand, blow up like a bomb. That is
22 what I was doing. I don't know, it must have been during
23 the weekend. I watch my iron. Someone threw a bunch in
24 the iron pile. I dropped a load, I jumped down got a
25 couple shocks, threw them out, dropped another load, there

1 is a bunch of shocks in this, I am grabbing them. I heard
2 the jingle of the magnesium chains. I looked and the
3 magnet was over me. Apparently Paul didn't notice that I
4 was in there. He hit the button and dropped a load of iron
5 on me. Split my face right here and I was just trying to
6 get out of there. I got buried with iron, throwing car
7 bumpers, trying to get out before he dropped another load
8 or dropped the magnet, even worst. That was the other
9 accident I had. I think I got steel in my eye too sometime
10 down there.

11 Q Any accidents or injuries that you incurred while
12 you were lubricating or greasing the crane prior to the
13 date of your injury?

14 A No.

15 Q During the 50 or more times that you lubricated
16 or greased this crane prior to the day of your injury, do
17 you have any facts or are you aware of any facts that would
18 indicate that anyone from Weissman's intended that you be
19 injured?

20 A No. It got increasingly hard to grease the crane
21 because they took the service truck away with the
22 compressor and the grease gun. That is when I had to end
23 up greasing it by hand, hand grease guns. That was a major
24 pain in the ass.

25 Q Anything about the fact that the service truck

1 was taken away that would indicate that Weissman's or
2 anybody that was employed by Weissmans intended that you be
3 injured?

4 A I don't know about that. The throw-out bearing
5 went out on the truck, and went to the shop. We never seen
6 it again.

7 Q Is there anything, to your knowledge, any facts
8 you are aware of that would indicate that while you were
9 greasing this particular crane or lubricating this
10 particular crane that anyone from Carl Weissman intended
11 that you would be injured?

12 A No.

13 Q With respect to the accident, what time of day
14 did it occur?

15 A I am thinking 2:30 or so. I am not real sure.

16 Q This would be in the afternoon?

17 A Yes.

18 Q Do you recall it being after lunch?

19 A I believe so.

20 Q What time of day did you normally start work?

21 A 8:00.

22 Q Could you describe your activities for me maybe
23 from the time you arrived at work on the day of the
24 accident up maybe to the lunch hour?

25 A What was happening was our fab shop across the

1 street was getting emptied out and they were bringing all
2 the stuff over in the iron yard. This is stuff that was
3 brought in as junk and Morrie Weissman wanted it saved, it
4 had to be put on trucks and taken over. Now they are
5 taking it back and sitting it in front of me. I knew
6 Morrie wanted to keep it, and the guys from the fab shop
7 wanted it junked. I am inbetween a rock and a hard place
8 because I am getting the stuff he wants to keep, the big
9 boss wants to keep, and the other guys want to get rid of
10 it. All I know is they were running a lot of stuff over to
11 me, plugging up my yard big time.

12 Q Who was in charge of the fab shop?

13 A Tom and Matt Campbell, I believe. They were
14 moving that stuff out because Northwest Fence was moving in
15 there. They wanted it out of there. It was pretty busy
16 with all that stuff, trying to store good stuff and I had
17 to junk some of it.

18 Q The morning of the accident then you believe your
19 time was taken up with sorting iron that was being brought
20 over from the fabrication shop?

21 A Yes, it was giving me quite a headache. I had
22 stuff I know Morrie wanted to save.

23 Q I recall reading someplace that you were doing
24 some maintenanc on the crane in the morning. Do you
25 recall that?

1 A The morning?
 2 Q The morning of the accident.
 3 A When it is cold in the morning what you got to do
 4 is pop those brakes and you got to start it and let it warm
 5 up because if you don't that brake will come back, it will
 6 kick you like a Missouri mulc. Other than that I don't
 7 recall any maintenance.
 8 Q Do you recall who Gary Marshall is?
 9 A No, I don't.
 10 Q I can't remember where I read it, I just remember
 11 I read something you and Gary Marshall were performing
 12 maintenance on the crane in the morning?
 13 A He must have been the new guy then.
 14 Q Do you remember performing any type of
 15 maintenance on the crane with this new guy?
 16 A That afternoon I had him help me pull the motor
 17 house back.
 18 Q Describe that for me.
 19 A The crane has a motor house that covers the
 20 electric motor, keeps the snow off of it because it is
 21 electric, it takes two guys, one on each side to pick it up
 22 and roll it back so you can get at the motor to grease the
 23 zerks on the electric motor and such.
 24 Q So you recall you and Gary Marshall might have
 25 done that or you and the new guy might have done that

1 sometime during the day?
 2 A Gary Marshall is the one who worked there.
 3 Q You don't know who he is.
 4 A There was a new kid there working with me. I
 5 don't know his name. That is how new he was.
 6 Q In the morning tell me one more time what you did
 7 in the morning to the best of your recollection?
 8 A It seemed like I had all the stuff from the fab
 9 shop coming over and I was trying to have some of it put
 10 aside the building because I knew we were going to end up
 11 Morrie would want it saved. Some of it I had to junk. I
 12 was trying to sort the best stuff from the worst. There
 13 are such things as diesel engines, transmission parts,
 14 there was an overhead crane that runs on beams, stuff like
 15 that. Big metal door I know Morrie wanted. I saw they
 16 tore that up.
 17 Q Did any of the work that you did in the morning
 18 require you to use the crane?
 19 A Yes.
 20 Q So you were operating the crane in the morning?
 21 A Yes.
 22 Q At some point did you go to lunch?
 23 A Yes.
 24 Q Do you recall, tell me what happened between the
 25 time you returned from lunch up until just before the

1 accident?
 2 A I come back, I had some knothed there who was
 3 trying to cut a discscl -- he cut a diesel head. That is
 4 cast iron. You don't waste oxygen on cutting cast iron.
 5 You don't cut cast iron with a torch. I got on his ass, I
 6 don't remember his name. What did you do that for. For
 7 shits and giggles he told me. A knothed thing to do.
 8 All I know, I had bridge trestle in at the time too which
 9 is number 1 iron, it is thick iron. I was putting that
 10 away too. I remember that was around the crane on the
 11 sides. I had a hell of a mess down there.
 12 Q Did you get in an argument with this particular
 13 employee that used the torch to cut the cast iron?
 14 A No. I told him that is a knothed thing to
 15 do.
 16 Q Do you recall who that was?
 17 A I don't remember. He was a new guy. We go
 18 through guys like you change socks down there.
 19 Q Was it the same new guy who later helped you move
 20 the motor housing on the crane?
 21 A No, there was a tall guy.
 22 Q Somebody different than --
 23 A Tall goofy guy. I don't know his name.
 24 Q So then what did you do after you came back from
 25 lunch?

1 A I started moving iron, I can't remember if I was
 2 junking some of the stuff they brought over. I had the
 3 bridge trestle to put away. It was January 22 so every
 4 time I turned the crane it was squeaking bad, the house was
 5 really squealing, so I thought I can't take that any
 6 longer, it is like running your fingers on a chalk board.
 7 I am going to grease the son of a bitch. So the new kid, I
 8 don't know his name, we started greasing the crane. They
 9 called him in. We had the house back, they called him in
 10 because we had feathers coming from the Hutterites. We buy
 11 feathers from the Hutterites, and when they come in come in
 12 with all these grain trucks and they are busy. So I was
 13 greasing it by myself.
 14 Q For at least a period of time this new employec
 15 assisted you with lubricating the crane?
 16 A I remember he helped me tip the motor house back
 17 and it seemed like they took him right away, but I am not
 18 sure on that. Seemed like he was a young kid to me.
 19 Q What happened then after the new employec was
 20 called away?
 21 A The crane was running, I had that pressed grease
 22 on the side, and what I had on, I had a jean jacket over an
 23 Air Force flight jacket. I took it off, took off the Air
 24 Force flight jacket, but the jean jacket on, it was
 25 chinooking then, that is why I decided to grease it while

1 the weather was warmed up. I stuck the brush in the
 2 pressed grease or tar grease and I held it up over the big
 3 bull gear, which is a four foot gear.
 4 Q Was the crane running?
 5 A It is running, running probably about 700 rpm,
 6 the big gear.
 7 Q Had you already greased all the grease zerks?
 8 A I was more concerned with the house because every
 9 time I turned it it was squeaking. There are zerks on the
 10 tracks and you have to dig the mud out, a wire to dig the
 11 mud out of the zerks. I didn't touch those at all. I was
 12 concerned with the house, every time you turn it it was
 13 doing a high pitched screech that is nerve racking. So it
 14 has tubes running with zerks on it for the house, for the
 15 rollers underneath, and stuff, and it has that big bull
 16 gear. That is what I was greasing when I lost my arm.
 17 (Whereupon, a brief recess was taken.).
 18 MR. PFENNIGS: Back on the record.
 19 Q John, at the time we took a break I believe we
 20 were discussing your activities immediately prior to the
 21 accident?
 22 A Yes.
 23 Q You were describing what you were performing as
 24 far as lubrication and greasing of the crane on the
 25 afternoon of the accident. Maybe if you could just

1 conclude with that testimony. Is there anything else you
 2 would like to add?
 3 A Where did I leave off. I was greasing the wheel.
 4 Q Yes. I think you said you were worried about the
 5 greasing of the housing because it was squeaking real bad,
 6 so you greased some zerks for the house and then maybe you
 7 were about to tell me about greasing the big gear, the bull
 8 gear.
 9 A Right. It was running, I had that jean jacket
 10 on, I dipped the brush in the tar grease, pressed grease.
 11 Q Was there a different-- did you use the same type
 12 of pressed grease every time that you lubricated?
 13 A Yes. This pressed grease is a black sticky
 14 grease, and it is for the face of these big gears. The
 15 other grease is like you find for your car in the tube with
 16 the grease guns and such.
 17 Q Is the pressed grease, did you use a different
 18 weight during the winter as opposed to summer?
 19 A That is what is on the instructions. It is to be
 20 heated.
 21 Q And what instructions are you referring to?
 22 A On the missing gear guard.
 23 Q On that diagram referred to earlier?
 24 A I believe it says should be heated. Apply when
 25 hot.

1 MR. PFENNIGS: I will get a copy of this made
 2 and attach it as a Deposition Exhibit.
 3 (Deposition Exhibit No. 1 marked for
 4 identification.)
 5 Q You are referring to the third page of this
 6 document which will be marked as Deposition Exhibit 1.
 7 What does the instruction on that page say?
 8 A The teeth of the clutch gear are lubricated with
 9 good sticky open gear compound which requires heating
 10 before it can be applied. Always apply while hot.
 11 Lubricate clutch gear at least once each eight hours or
 12 more frequently if necessary to prevent metal to metal
 13 contact between teeth, clutch gear and teeth of the
 14 horizontal reverse shafts. I can't read it very good.
 15 Q All right. This instruction that you just read
 16 refers to lubrication of the bull gear?
 17 A Yes, we call it the bull gear. It is a clutch
 18 gear.
 19 Q I guess my question was do you recall whether you
 20 used the same weight lubricant during the winter as during
 21 the summer or use a different --
 22 A Yes. It was just a five gallon bucket of black
 23 sticky grease that Mitchell brought over.
 24 Q When did Mitchell bring this particular grease
 25 over?

1 A I don't remember. The same time he told me about
 2 greasing the face of that gear.
 3 Q At the time he instructed you about greasing the
 4 gear, I recall that you said he told you something about
 5 you need to do that every once in a while?
 6 A Yes.
 7 Q And at that point in time what did Don Mitchell
 8 do?
 9 A The crane was running and he had a paintbrush,
 10 and he had it up like this, and the grease was running off
 11 on to the gear while it is running.
 12 Q Who was running the crane?
 13 A I was cutting iron so I think he was over working
 14 on the electrical problem. We kept blowing fuses with it.
 15 I am not real sure on that. He had it running when he put
 16 the grease on. He had grease. He had grease with him, he
 17 was the main mechanic.
 18 Q Anything else that Don said at that particular
 19 time?
 20 A Leave it running for better lubrication.
 21 Q That is what you recall him telling you?
 22 A That is what I recall.
 23 Q Do you recall anybody telling you you needed to
 24 shut the crane off when you lubricated it?
 25 A No.

1 Q Do you recall receiving instruction on
2 lubrication from anyone other than Gary Mitchell?
3 A Don Mitchell.
4 Q Don Mitchell?
5 A No.
6 Q Do you recall receiving any instruction from Don
7 Mitchell other than the one time we just have been talking
8 about?
9 A Yes, a lot of different things.
10 Q Instruction on lubrication?
11 A No, not on lubrication.
12 Q Just that one particular time then that he told
13 you you needed to grease the gear once in a while?
14 A Yes.
15 Q Why don't you tell me how you were injured?
16 A I stuck the paint brush in the grease with my
17 right arm, I held it up over the gear, it was running,
18 something clunked, made a noise, and I tipped, looked like
19 this. When I did I must have dropped my arm and I had a
20 large jean jacket on and it caught my sleeve. Next thing I
21 know I jerked back, it has my fingers. I tried to jerk my
22 fingers off. I could feel it pinching my fingers, I am in
23 a panic trying to get out of the thing. I am jerking back
24 like mad, but it had that jacket and I couldn't get out. I
25 don't know how I lived through it, neither did the OSHA

1 man, because it should have ripped me off my feet and took
2 me through there and split me to pieces. I jerked back,
3 tried to jerk my fingers off, it is pulling me off,
4 mulching my arm up at the same time. This jacket was
5 fairly new. I couldn't get that denim jacket out of there,
6 it had my arm, and kept mulching and mulching, chewing me
7 and chewing me. I got down to my head, I got a crack in my
8 head here, it kind of goes to a little point. That is
9 where I was down like this, I had a groove on one side of
10 my head, it hit me in the head. I knew I was going to go
11 through that son of a bitch. I got scared and I jerked and
12 jerked. Over here the slip clutch is running, it doesn't
13 have any gear guards on it. Caught the loop on the jean
14 jacket. Drug me town, broke my arm off where it is,
15 slapped me on the deck of the crane, then it had me by the
16 jacket, spun me around. I seen the sun go by three, four
17 times. I landed on the deck of the crane, it chewed the
18 jacket off me, my shirt, I was bruised from my chest down.
19 I blacked out when I hit the deck of the crane. I come to
20 and I put my head up and I got hit in the back of the head
21 by the slip clutch spinning, so I shoved myself off the
22 crane, which I imagine is about four and half feet off the
23 ground and I landed on a bridge trestle which gouged my
24 face here. I blacked out again, I come to and I felt
25 really weak and I knew I was bleeding to death. So I

1 grabbed and pulled my arm, put pressure on it. And I had
2 to get up and walk out of the iron yard. I staggered out,
3 I fell down, I think a couple times, and I got up to the
4 scale house, Wayne Munn's truck was on the scale getting
5 weighed. I bounced off that and off the scale house and I
6 went up in the scale house and there was blood squirting
7 all over from the artery, and I went in and Fred LaRoche
8 told me to lay down. And Willy and Wayne Munn turned white
9 and ran outside and Fred LaRoche pinched off that artery
10 and was screaming at them to call the ambulance, and the
11 ambulance come and I remember I figured I was going to
12 die.
13 Q Who is Willy?
14 A Will Williams, we call him Willy. He was my
15 supervisor.
16 Q Do you know whether there were any witnesses that
17 actually saw the accident itself?
18 A No.
19 Q You never talked to anyone who told you they saw
20 what happened?
21 A No. Brian Dahl worked in the back yard smelting
22 the aluminum, but he didn't say he saw it.
23 Q As I understand it then at the time you were
24 injured the gear guards that you have been referring to,
25 there was a gear guard that was missing from the clutch

1 gear, bull gear?
2 A Yes.
3 Q And then there was another gear guard I think you
4 said that was missing?
5 A There are numbers on them. I don't know if you
6 want that or not. Yes, these are pictures of gear guards
7 that -- these are missing on this sheet 6280.
8 Q Deposition Exhibit 1?
9 A This one, all of these.
10 Q Maybe I misunderstood. There was another gear
11 behind you that grabbed on to the back of your coat?
12 A Yes.
13 Q What did you call that?
14 A Slip clutch.
15 Q Was there supposed to be a gear guard on that?
16 A There should be, yes.
17 Q That was missing?
18 A It spins really fast. The OSHA guy told me 48
19 hundred rpm. That is where I know the figures from, the
20 OSHA man.
21 Q You think there was supposed to be a gear guard
22 on the slip clutch too?
23 A A guard, yes.
24 Q And there weren't any guards on either the bull
25 gear or the slip clutch?

1 A No.

2 Q And those guards had been missing ever since you
3 started working there the second time?

4 A Yes.

5 Q Do you recall whether you ever made a complaint
6 to anybody at CWS regarding the fact that the safety guards
7 were missing?

8 A The thing is I didn't know about it. I thought
9 that is the way it was. I made comment about the
10 electrical, telling them a guy could get electrocuted in
11 this thing and they told me no, you couldn't, if the cable
12 breaks stay there. Have someone in the yard shut it off.
13 What I am telling them, it is steel. There is not rubber
14 tires on it, has tracks on it like a tank. It is right to
15 ground. You will get fried in it. I was more concerned
16 that way. I didn't have no idea about the gear guards
17 until the OSHA man told me in the hospital all the gear
18 guards were missing and I wondered how I lived through it
19 because it should have jerked me right through the thing
20 like nothing.

21 Q My question was, whether you ever made a
22 complaint to anybody at Carl Weissman regarding the fact
23 that the safety guards were missing?

24 A No. Because I didn't know. I didn't realize
25 they had them.

1 Q Is there anything about the way the accident
2 happened that causes you to believe that Carl Weissman or
3 anybody employed by Carl Weissman intended that you be
4 injured?

5 A I think it is very wreckless to redo a crane and
6 take the safety features off of it and not put them back
7 on. That is not just aimed at me, it is aimed at anybody
8 who is greasing or operating the thing.

9 Q So it is just a matter of a general safety
10 consideration then?

11 A Yes, I would think.

12 Q That would apply to you as well as any other
13 employee in the yard who is working on that crane,
14 correct?

15 A Yes.

16 Q Other than the fact that the safety guards were
17 missing, is there anything about the way the accident
18 occurred that causes you to believe that Carl Weissman or
19 anybody employed by Carl Weissman intended that you be
20 injured?

21 MR. SKORHEIM: You are saying other than the
22 guards being removed?

23 MR. PFENNIGS: Right.

24 A Can I get that again?

25 (Whereupon, the court reporter read back the

1 requested testimony.)

2 A No, just the intentional disregard for safety.
3 Just intentional disregard for safety being the gear guards
4 were removed and never replaced.

5 Q Other than this crane in this particular
6 accident, is there anything that occurred during your
7 employment with Carl Weissman which indicates to you that
8 Carl Weissman or anybody employed by Carl Weissman intended
9 that you be injured?

10 A I did have some arguments with Jerry. This is
11 going back to where you asked if I had any argument with
12 management. I had several arguments with Jerry Weissman,
13 one was about the service truck which was important to me
14 to service this crane. It was taken to the brewery for a
15 new clutch, throw-out bearing to be put in the clutch, and
16 I never seen it again. I believe I bellyached to Jerry
17 about it, he was down in the yard one day. He told me just
18 grease it the best you can. Ongoing beefs with Jerry
19 Weissman where I had a crew in the rail yard to cut
20 railroad rail, they had a contract I believe with Canada or
21 somebody to get out all this rail. I had to get a bunch of
22 guys hired, preferably people who knew how to cut. They
23 don't know how long three feet is from four feet. I had to
24 mark their hoses with tape. Lay down the hose, cut that
25 line of rail. I take the P&H truck crane, drop it. I was

1 loading it with the crane into a big Case W24 loader.
2 Jerry seemed to think that is a waste of fuel so we had a
3 bunch of guys hired to pick the stuff up by hand and load
4 it instead of me running the crane. Out of that we got a
5 guy who dropped the railroad rail and took his toenail off,
6 that was John Lopcz. I think we had some back sprains and
7 such out of that deal.

8 Then he had me lay rail out and he came down with a
9 bandsaw with a guy from the store with a portable generator
10 and electric bandsaw. They were worried about wasting too
11 much propane on the cutting torches. So he is going to
12 race me with a cutting torch with a bandsaw. Okay. So we
13 did this. I had eight cuts to his four and he was pissed.
14 Then you take a sledge hammer and hit the rail. When it is
15 hot it bends like a noodle. You got to let the rail cool
16 after you cut it. It bent like a wet noodle. First one
17 broke, the second one didn't break, just bent. On the
18 bandsaw they cut through the top webbing. Hit that, it
19 would break. Second time cut it less and less, you could
20 hit it, it didn't break. So Jerry and me were always
21 arguing with each other about the best way to do the job.
22 He is always stopping me and interfering. He made a
23 cutting machine which took three times as long to load the
24 rail on, was dangerous as hell, had a conveyer belt. Had a
25 thing, cut with a bandsaw, another hydraulic arm came down

1 and snapped the iron off. Even Mitchell laughed at it. He
2 had Mitchell come over. He told Mitchell how much do you
3 think that is worth. Mitchell said how much do you think
4 scrap iron is worth these days. Me and Jerry didn't get
5 along good.

6 Q Is there anything about any of your disputes or
7 arguments with Jerry Weissman that would indicate to you
8 that Jerry intended you be injured by that crane?

9 A Just the fact I could never get the service truck
10 back with the compressor greaser, the proper way to grease
11 equipment. I had to do it all by hand after that.

12 Q Would having the service truck available have
13 made any difference the day of the accident in the way you
14 were injured?

15 A The trouble with that was that had to be greased
16 primitively, so it really wouldn't have.

17 Q So other than the fact that you didn't have the
18 service truck is there anything about your disputes with
19 Jerry Weissman that would indicate to you that he intended
20 you be injured?

21 A No.

22 (Deposition Exhibit No. 2 marked for
23 identification.)

24 Q I hand you what has been marked as Deposition
25 Exhibit 2. I will ask if you can identify that please.

1 (Whereupon, a brief recess was taken.)

2 MR. PFENNIGS: Have you had a chance to review
3 Deposition Exhibit Number 2?

4 A I am here right now. I recognize it, I wrote
5 this a long time ago I believe.

6 Q Take as much time as you need and go ahead and
7 finish reading it.

8 A All right. That is wrong. Slip clutch spins at
9 2400 rpm. It is supposed to be 4200. I have dyslexia, I
10 get things backward sometimes.

11 Q You finished reading the letter?

12 A Yes. I wrote this up quite a while ago.

13 Q Do you remember about when you might have drafted
14 this letter?

15 A I don't know the date for sure. It was after I
16 seen that Boland wasn't going to do anything about my case.

17 Q The last page of that particular exhibit is a
18 photocopy of the envelope?

19 A Yes.

20 Q Down in the lower left hand corner there appears
21 to be, says left notice, date 12 January, 1990?

22 A Yes.

23 Q You see that?

24 A Yes.

25 Q And then just to the right of the address, Carl

1 Weissman's address there is another date on there of
2 January 12, 1990, you see that?

3 A Yes.

4 Q Do you believe that would be about the time you
5 would have drafted and sent this letter to Carl Weissman?

6 A It must have been.

7 Q As you read through this letter on the first
8 page, the fourth paragraph it states the slip clutch spins
9 about 2400 rpm. You corrected that to be 4200 rpm?

10 A I get these figures from the OSHA man who came to
11 visit me in the hospital. He told me the bull gear on that
12 top crane runs about 700 rpm, and slip clutch runs about
13 4200 rpm.

14 Q You think maybe that number you put in there?

15 A I crossed it. That is why I am no good at
16 clerical work. I have dyslexia, I am a slow, bad reader
17 and I am a terrible speller. I am really bad on numbers, I
18 cross them.

19 Q As you read the letter is there anything else in
20 here that you now think maybe is inaccurate or incorrect?

21 A No, I forgot to add about the kerchief I had,
22 made like a tourniquet, cut my throat open a little bit. I
23 forgot about that. Other than that, no.

24 Q Now, the kerchief you are talking about is
25 described in the third full paragraph at the bottom?

1 A Yes.

2 Q What you are saying, this is something that
3 happened to you, you described it in the letter, but you
4 omitted to describe it a few minutes ago when I asked
5 you?

6 A Yes, I forgot about it.

7 Q My question, is there anything else in this
8 letter as you read it now that you think is inaccurate or
9 incorrect?

10 A I don't think so.

11 Q Turn to page 2 of that letter, please. The very
12 top of page 2 there is a sentence there. What does that
13 state?

14 A If the state workers' comp.

15 Q One more line.

16 A Act of negligence and non-compliance.

17 Q Following that you have some complaints against
18 the state workers' comp division, is that correct?

19 A Yes.

20 Q And Weissmans?

21 A Yes.

22 Q And I guess it would be the second full paragraph
23 of page 2 states Weissmans is guilty of gross negligence
24 and of non-compliance of both OSHA and state workers' comp
25 rules and regulation as well as the safety standards. Do

1 you see that?

2 A Yes.

3 Q That was your feeling in 1990 at the time you
4 wrote this letter that Weissmans was guilty of gross
5 negligence?

6 A That was my feeling then, but it should be
7 changed to deliberate, Weissmans is guilty of deliberate
8 reckless endangerment in my opinion.

9 Q Your opinion has changed based on what facts?

10 A Based on the negligence clause covered by
11 workers' comp and intentional act. The gear guards were
12 intentionally taken off and never put back on. That is an
13 intentional act. The reckless endangerment, recklessly
14 endangering any operator, anyone who greases it, anyone who
15 runs it. That is the intentional endangerment of the whole
16 thing.

17 Q That intentional endangerment as you described it
18 just didn't apply to you, it applied to anybody who worked
19 on that particular piece of machinery, correct?

20 A Yes. Anybody who worked on it, and particularly
21 the operators.

22 Q Other than the fact that the gear guards were
23 left off, are there any other facts that you are aware of,
24 or which you believe indicate that Carl Weissman or anybody
25 employed by Carl Weissman intended that you be injured?

1 A I would have to say no.

2 Q Looking at your amended complaint, there are
3 several allegations that I would just like to review with
4 you real quickly. You have been handed what is filed with
5 the court as your Amended Complaint and Jury Demand. Turn
6 to the second page of that and turn to paragraph number 3.

7 A Yes.

8 Q You see that particular paragraph?

9 A Yes.

10 Q In that paragraph the first sentence alleges that
11 the defendant knowingly and intentionally removed the gear
12 guards from the crane before the plaintiff was employed by
13 the defendant. We discussed that today, haven't we?

14 A Yes.

15 Q And the guards were removed prior to the time you
16 became employed by Carl Weissman the second time, is that
17 correct?

18 A That's correct.

19 Q And the second sentence says defendant knowingly
20 and intentionally placed the plaintiff in a position of
21 extreme danger by ordering plaintiff to grease the gears of
22 the crane while it was still running. What facts do you
23 have that support that allegation?

24 A I wasn't ordered. I was told to. I don't
25 consider it an order. Mr. Mitchell and I are friends.

1 Q I believe it is your testimony earlier that is
2 how he showed you to grease the gear?

3 A That is how I was showed, yes. Other than that,
4 you mean what proof do I have to prove this?

5 Q The facts, right.

6 A There was someone in the yard cutting iron with
7 me that day. I don't know if they heard it or not. I have
8 been trying to find out who it was. The trouble is I don't
9 remember the date he told me this, the time, there are so
10 many people that have worked there and gone, I am still
11 trying to get ahold of Dave Zook, Dave Ramstad, Larry
12 Vaughn, these are all guys who worked in the front yard
13 cutting iron with me. I can't say for sure if they heard
14 him say that to me, but I am still trying to find them.
15 Other than that, there is me and Mitchell.

16 Q The employee you are looking for, you say you
17 don't know whether he heard him say that. Are you talking
18 about when Mitchell instructed you on greasing the gear?

19 A Yes.

20 Q So other than the things we talked about this
21 morning, talking about the instructions you received on
22 greasing the gear and the removal of the gear guards prior
23 to the time you became employed at Carl Weissman the second
24 time. Other than those two things?

25 A Right.

1 Q Are you aware of any other facts that indicate
2 that defendant knowingly and intentionally placed you in a
3 position of danger?

4 A The operator of the crane was placed in a
5 reckless and dangerous situation any time he was running
6 it. It doesn't just conspire to me, it goes to anybody.
7 Other than purposely, I don't believe so. Not putting gear
8 guards back on to me constitutes intentional reckless
9 endangerment.

10 Q You say purposely, so you mean that you don't
11 believe Carl Weissman purposely meant for you to get hurt?

12 A I will have to say no, I guess.

13 Q In paragraph number 4 you allege as a result of
14 the foregoing the defendant intended the plaintiff should
15 undergo the injury. You see that particular sentence?

16 A Yes.

17 Q Once again, other than the things we have talked
18 about this morning, the way you were instructed or showed
19 to grease the crane and the fact that the gear guards had
20 been removed, are you aware of any other facts which
21 support this allegation that the plaintiff intended that
22 you should undergo the injury?

23 A I think what that means, that the defendant put
24 the employee in exposure to a harmful situation on a daily
25 basis.

1 Q All right.
 2 A It voids all safety measures. I had no idea the
 3 gear guards were supposed to be on there, or how the proper
 4 procedure is to grease the crane. I had no idea about any
 5 of this stuff until I went and investigated myself.
 6 Q And I understand that. My question is whether,
 7 other than those two things, the way you were instructed,
 8 or showed to grease the crane and removal of the gear
 9 guards, are you aware of any other facts that indicate to
 10 you that Carl Weissman or anybody employed by Carl Weissman
 11 intended you should undergo the injury as you allege in
 12 your complaint?
 13 A I don't believe so.
 14 MR. PFENNIGS: No further questions.
 15 MR. SKORHEIM: I don't have anything.
 16 WITNESS EXCUSED
 17 * * *
 18
 19
 20
 21
 22
 23
 24
 25

1 CERTIFICATE OF REPORTER
 STATE OF MONTANA
 2 County of Cascade)
 3
 4 I, Jack L. Fletcher, Registered Professional
 5 Reporter and Notary Public for the State of Montana,
 6 residing in Great Falls, Montana, do hereby certify:
 7 That I was duly authorized to and did report the
 8 deposition of John Hubbard in the above-entitled cause;
 9 That the reading and signing of the deposition by
 10 the witness have been expressly reserved. That the
 11 foregoing pages of this deposition constitute a true and
 12 accurate transcription of my stenotype notes of the
 13 testimony of said witness.
 14 I further certify that I am not an attorney nor
 15 counsel connected with the action, nor financially
 16 interested in the action.
 17 IN WITNESS WHEREOF, I have hereunto set my hand and
 18 seal on this the 15th day of March 1999.
 19
 20
 21
 22
 23
 24
 25

Jack L. Fletcher
 Registered Professional Reporter
 Notary Public, State of Montana
 Residing in Great Falls, Montana
 My Commission Expires: 7-20-99

1 CERTIFICATE OF WITNESS
 2 PAGE LINE CORRECTION
 3
 4
 5
 6
 7
 8
 9
 10
 11
 12
 13 I hereby certify that this is a true and correct
 14 copy of my testimony, together with any changes I have made
 15 on this and any subsequent pages attached hereto.
 16 Dated on this the ____ day of ____ 1999.
 17
 18
 19 _____
 John Hubbard, Deponent.
 20
 21 SUBSCRIBED AND SWORN to before me this ____ day of
 22 _____ 1999.
 23
 24 NOTARY PUBLIC FOR THE STATE OF MONTANA
 Residing in Great Falls, Montana
 25 My commission Expires: _____

PERSONAL
 COMMERCIAL

LINE: GENERAL LIABILITY
 PREMIUM: 114,446.
 COMM. RATE: SEE %
 APPROVAL: H23617 %

YES
 NO

INSPECTION
 CREDIT REPORT
 ORDERED
 WAIVED

SIC CODE: 5072
 AGENCY
 I-F.O.

SEE LOGGING SLIP

GENERAL LIABILITY

GL-1 48 82 51

Insurance is provided by the Stock Company designated by and hereinafter called the Company.

FRED S. JAMES

CITY INSURANCE COMPANY
Short Hills, N.J.

THE HOME INSURANCE COMPANY
Manchester, N.H.

THE HOME INSURANCE COMPANY OF INDIANA
Indianapolis, Ind.

THE HOME INDEMNITY COMPANY
Manchester, N.H.

JUN 26 1986

SPOKANE

PRODUCER

DECLARATIONS

Item 1.

Named Insured and Address

CARL WEISSMAN & SONS
(SEE ENDORSEMENT A)
P.O. BOX 1609
GREAT FALLS, MONTANA 59403

FRED S JAMES & CO OF WASHINGTON
W. 601 MAIN STREET
P.O. BOX 2151
SPOKANE, WA 99210

Item 2. Policy Period:

From 04-01-86 to 04-01-87
12:01 A.M., standard time at the address of the named insured as stated herein.

09290
Producer No.

771
CFC

The named insured is:

Individual Partnership Corporation Joint Venture Other:

Business of the named insured is: (insert name)

SCRAP METAL, AUTO PARTS & RETAIL

Audit Period: Annual, unless otherwise stated. (insert name)

Item 3. The insurance afforded is only with respect to the Coverage Part(s) indicated below by specific premium charge(s) and attached to and forming a part of this policy.

Coverage Parts	Form Number	Advance Premiums
Comprehensive General Liability Insurance	H21013	\$ 95,186.
Premises Medical Payments Insurance		\$
Contractual Liability Insurance		\$
Completed Operations and Products Liability Insurance		\$
Manufacturers' and Contractors' Liability Insurance		\$
Owners', Landlords' and Tenants' Liability Insurance		\$
Personal Injury Liability Insurance		\$
Owner's and Contractor's Protective Liability Insurance		\$
Storekeeper's Insurance		\$
Other		\$
BROAD FORM COMPREHENSIVE GENERAL LIABILITY ENDORSEMENT	L6111	19,010.
EMPLOYEE BENEFITS LIABILITY ENDORSEMENT	H22799	250.00
TOTAL ADVANCE PREMIUM		\$ 114,446.

If Policy Period is more than one year premium is payable

Effective Date 1st Anniversary 2nd Anniversary

H22300-A, H22300-B, H21013, H21091, L6108, L6111, H22799, L9235, H36074, L6178, L9463, IL0018, H32266

Endorsements attached to policy

Install 3

Countersigned by

Authorized Representative

The Policy Period is more than one year. (The premium shown for fixed Expense Insureds are the full three year premium. Any provisions shown for Subject-To-Audit Insureds are the annual deposit premium. Any annual deposit amounts for Subject-To-Audit Insureds are payable at the effective date and each anniversary date, whether or not the remainder of premium is payable on installments.)

(The Attaching Clause need be completed only when this endorsement is issued subsequent to preparation of the policy.)

Liability

1611
(Ed. 5-81)

GL 04 04 (Ed. 05 81)

Broad Form Comprehensive General Liability Endorsement

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

COMPREHENSIVE GENERAL LIABILITY INSURANCE

This endorsement, effective 04-01-86, forms a part of policy No. GL 1488251
(12:01 A.M., standard time)

issued to **CARL WEISSMAN & SONS, ETAL**

by **THE HOME INSURANCE COMPANY**

Authorized Representative

SCHEDULE

Personal Injury and Advertising Injury Liability

Aggregate Limit shall be the per occurrence bodily injury liability limit unless otherwise indicated herein.

Limit of Liability \$ _____ Aggregate

Limit of Liability - Premises Medical Payments Coverage:

\$1,000 each person unless otherwise indicated herein \$ _____ each person.

Limit of Liability - Fire Legal Liability Coverage:

\$50,000 per occurrence unless otherwise indicated herein: \$ _____ per occurrence.

Advance Premium Premium Basis

\$19,010

20% OF THE TOTAL COMPREHENSIVE GENERAL LIABILITY BODILY INJURY AND PROPERTY DAMAGE PREMIUM AS OTHERWISE DETERMINED

\$ INCL. MINIMUM PREMIUM

I. CONTRACTUAL LIABILITY COVERAGE

(A) The definition of incidental contract is extended to include any oral or written contract or agreement relating to the conduct of the named insured's business.

(B) The insurance afforded with respect to liability assumed under an incidental contract is subject to the following additional exclusions:

(1) to bodily injury or property damage for which the insured has assumed liability under any incidental contract, if such injury or damage occurred prior to the execution of the incidental contract;

(2) if the insured is an architect, engineer or surveyor, to bodily injury or property damage arising out of the rendering of or the failure to render professional services by such insured, including

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(a) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, and

(b) supervisory, inspection or engineering services;

(3) if the indemnitee of the insured is an architect, engineer or surveyor, to the liability of the indemnitee, his agents or employees, arising out of

(a) the preparation or approval of or the failure to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or

(b) the giving of or the failure to give directions or instructions by the indemnitee, his agents or employees, provided such giving or failure to give is the primary cause of the bodily injury or property damage;

(4) to any obligation for which the insured may be held liable in an action on a contract by a third party beneficiary for bodily injury or property damage arising out of a project for a public authority; but this exclusion does not apply to an action by the public authority or any other person or organization engaged in the project;

(5) to bodily injury or property damage arising out of construction or demolition operations, within 50 feet of any railroad property, and affecting any railroad bridge or trestle, tracks, road beds, tunnel, underpass or crossing; but this exclusion does not apply to sidetrack agreements.

(C) The following exclusions applicable to Coverages A (Bodily Injury) and B (Property Damage) do not apply to this Contractual Liability Coverage: (b), (c) (2), (d) and (e).

(D) The following additional condition applies:

Arbitration

The company shall be entitled to exercise all of the insured's rights in the choice of arbitrators and in the conduct of any arbitration proceeding.

II. PERSONAL INJURY AND ADVERTISING INJURY LIABILITY COVERAGE

(A) The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury or advertising injury to which this insurance applies, sustained by any person or organization and arising out of the conduct of the named insured's business, within the policy territory, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such

injury, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

(B) This insurance does not apply:

(1) to liability assumed by the insured under any contract or agreement;

(2) to personal injury or advertising injury arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of the insured;

(3) to personal injury or advertising injury arising out of a publication or utterance of a libel or slander, or publication or utterance in violation of an individual's right of privacy, if the first injurious publication or utterance of the same or similar material by or on behalf of the named insured was made prior to the effective date of this insurance;

(4) to personal injury or advertising injury arising out of libel or slander or the publication or utterance of defamatory or disparaging material concerning any person or organization or goods, products or services, or in violation of an individual's right of privacy, made by or at the direction of the insured with knowledge of the falsity thereof;

(5) to personal injury or advertising injury arising out of the conduct of any partnership or joint venture of which the insured is a partner or member and which is not designated in the declarations of the policy as a named insured;

(6) to advertising injury arising out of

(a) failure of performance of contract, but this exclusion does not apply to the unauthorized appropriation of ideas based upon alleged breach of implied contract, or

(b) infringement of trademark, service mark or trade name, other than titles or slogans, by use thereof or in connection with goods, products or services sold, offered for sale or advertised, or

(c) incorrect description or mistake in advertised price of goods, products or services sold, offered for sale or advertised;

(7) with respect to advertising injury

(a) to any insured in the business of advertising, broadcasting, publishing or telecasting, or



(b) to any injury arising out of any act committed by the insured with actual malice.

(C) Limits of Liability

Regardless of the number of (1) insureds hereunder, (2) persons or organizations who sustain injury or damage, or (3) claims made or suits brought on account of personal injury or advertising injury, the total limit of the company's liability under this coverage for all damages shall not exceed the limit of liability stated in this endorsement as "aggregate".

(D) Additional Definitions

"Advertising Injury" means injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.

"Personal Injury" means injury arising out of one or more of the following offenses committed during the policy period:

1. false arrest, detention, imprisonment, or malicious prosecution;
2. wrongful entry or eviction or other invasion of the right of private occupancy;
3. a publication or utterance

- (a) of a libel or slander or other defamatory or disparaging material, or
- (b) in violation of an individual's right of privacy;

except publications or utterances in the course of or related to advertising, broadcasting, publishing or telecasting activities conducted by or on behalf of the named insured shall not be deemed personal injury.

VII. PREMISES MEDICAL PAYMENTS COVERAGE

The company will pay to or for each person who sustains bodily injury caused by accident all reasonable medical expense incurred within one year from the date of the accident on account of such bodily injury, provided such bodily injury arises out of (a) a condition in the insured premises or (b) operations with respect to which the named insured is afforded coverage for bodily injury liability under the policy.

This insurance does not apply:

- (A) to bodily injury

(1) arising out of the ownership, maintenance, operation, use, loading or unloading of

(a) any automobile or aircraft owned or operated by or rented or loaned to any insured, or

(b) any other automobile or aircraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to the parking of an automobile on the insured premises, if such automobile is not owned by or rented or loaned to any insured;

(2) arising out of

(a) the ownership, maintenance, operation, use, loading or unloading of any mobile equipment while being used in any prearranged or organized racing, speed or demolition contest or in any stunt activity or in practice or preparation for any such contest or activity, or

(b) the operation or use of an snowmobile or trailer designed for use therewith;

(i) owned or operated by or rented or loaned to any insured, or

(ii) operated by any person in the course of his employment by an insured;

(3) arising out of the ownership, maintenance, operation, use, loading or unloading of

(a) any watercraft owned or operated by or rented or loaned to an insured, or

(b) any other watercraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to watercraft while ashore on the insured premises;

(4) arising out of and in the course of the transportation of mobile equipment by an automobile owned or operated by or rented or loaned to the named insured;

(B) to bodily injury

(1) included within the completed operations hazard or the products hazards;

(2) arising out of operations performed for the named insured by independent contractors other than

(a) maintenance and repair of the insured premises, or

(b) structural alterations at such premises which do not involve change



ing the size of or moving buildings or other structures;

(3) resulting from the selling, serving or giving of any alcoholic beverage

(a) in violation of any statute, ordinance or regulation,

(b) to a minor,

(c) to a person under the influence of alcohol, or

(d) which causes or contributes to the intoxication of any person, if the named insured is a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages, or if not so engaged, is an owner or lessor of premises used for such purposes, but only part (a) of this exclusion (B) (3) applies when the named insured is such an owner or lessor;

(4) due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing;

(C) to bodily injury

(1) to the named insured, any partner thereof, any tenant or other person regularly residing on the insured premises or any employee of any of the foregoing if the bodily injury arises out of and in the course of his employment therewith;

(2) to any other tenant if the bodily injury occurs on that part of the insured premises rented from the named insured or to any employee of such a tenant if the bodily injury occurs on the tenant's part of the insured premises and arises out of and in the course of his employment for the tenant;

(3) to any person while engaged in maintenance and repair of the insured premises or alteration, demolition or new construction at such premises;

(4) to any person if any benefits for such bodily injury are payable or required to be provided under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;

(5) to any person practicing, instructing or participating in any physical training, sport, athletic activity or contest whether on a formal or informal basis;

(6) if the named insured is a club, to any member of the named insured;

(7) if the named insured is a hotel, motel, or tourist court, to any guest of the named insured;

(D) to any medical expense for services by the named insured, any employee thereof or any person or organization under contract to the named insured to provide such services.

LIMITS OF LIABILITY

The limit of liability for Premises Medical Payments Coverage is \$1,000 each person unless otherwise stated in the schedule of this endorsement. The limit of liability applicable to "each person" is the limit of the company's liability for all medical expense for bodily injury to any one person as the result of any one accident; but subject to the above provision respecting "each person", the total liability of the company under Premises Medical Payments Coverage for all medical expense for bodily injury to two or more persons as the result of any one accident shall not exceed the limit of bodily injury liability stated in the policy as applicable to "each occurrence".

When more than one medical payments coverage afforded by the policy applies to the loss, the company shall not be liable for more than the amount of the highest applicable limit of liability.

ADDITIONAL DEFINITIONS

When used herein:

"insured premises" means all premises owned by or rented to the named insured with respect to which the named insured is afforded coverage for bodily injury liability under this policy, and includes the way immediately adjoining on land;

"medical expense" means expenses for necessary medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services.

ADDITIONAL CONDITION

Medical Reports; Proof and Payment of Claim

As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physician selected by the company when and as often as the company may reasonably require. The company may pay the injured person or any person or organization rendering the services and the payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the company.

IV. MOST LIQUOR LAW LIABILITY COVERAGE

Exclusion (h) does not apply with respect to liability of the insured or his indemnitee arising out of the giving or serving of alcoholic beverages at functions incidental to the named insured's business, provided the named insured is not engaged in the

business of manufacturing, distributing, selling or serving of alcoholic beverages.

V. FIRE LEGAL LIABILITY COVERAGE - REAL PROPERTY

With respect to property damage to structures or portions thereof rented to or leased to the named insured, including fixtures permanently attached thereto, if such property damage arises out of fire

(A) All of the exclusions of the policy, other than the Nuclear Energy Liability Exclusion (Broad Form), are deleted and replaced by the following:

This insurance does not apply to liability assumed by the insured under any contract or agreement.

(B) The limit of property damage liability as respects this Fire Legal Liability Coverage - Real Property is \$50,000 each occurrence unless otherwise stated in the Schedule of this endorsement.

(C) The Fire Legal Liability Coverage - Real Property shall be excess insurance over any valid and collectible property insurance (including any deductible portion thereof), available to the insured, such as, but not limited to, Fire, Extended Coverage, Builder's Risk Coverage or Installation Risk Coverage, and the Other Insurance Condition of the policy is amended accordingly.

VI. BROAD FORM PROPERTY DAMAGE LIABILITY COVERAGE (Including Completed Operations)

The insurance for property damage liability applies, subject to the following additional provisions:

(A.) Exclusions (k) and (o) are replaced by the following:

(1) to property owned or occupied by or rented to the insured, or, except with respect to the use of elevators, to property held by the insured for sale or entrusted to the insured for storage or safekeeping;

(2) except with respect to liability under a written sidetrack agreement or the use of elevators

(a) to property while on premises owned by or rented to the insured for the purpose of having operations performed on such property by or on behalf of the insured,

(b) to tools or equipment while being used by the insured in performing his operations,

(c) to property in the custody of the insured which is to be installed, erected or used in construction by the insured,

(d) to that particular part of any property, not on premises owned by or rented to the insured,

(i) upon which operations are being performed by or on behalf of the insured at the time of the property damage arising out of such operations, or

(ii) out of which any property damage arises, or

(iii) the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereof by or on behalf of the insured;

(3) with respect to the completed operations hazard and with respect to an classification stated in the policy or in the company's manual as "including completed operations", to property damage to work performed by the named insured arising out of such work or on portion thereof, or out of such materials, parts or equipment furnished in connection therewith.

(B.) The Broad Form Property Damage Liability Coverage shall be excess insurance over any valid and collectible property insurance (including any deductible portion thereof available to the insured, such as, but not limited to, Fire, Extended Coverage, Builder's Risk Coverage or Installation Risk Coverage, and the Other Insurance Condition of the policy is amended accordingly.

VII. INCIDENTAL MEDICAL MALPRACTICE LIABILITY COVERAGE

The definition of bodily injury is amended to include Incidental Medical Malpractice Injury.

Incidental Medical Malpractice Injury means injury arising out of the rendering of a failure to render, during the policy period the following services:

(A) medical, surgical, dental, x-ray or nursing service or treatment or the furnishing of food or beverages in connection therewith; or

(B) the furnishing or dispensing of drugs or medical, dental or surgical supplies or appliances.

This coverage does not apply to:

(1) expenses incurred by the insured for first-aid to others at the time of an accident and the "Supplementary Payments" provision and the "Insured's Duties in the Event of Occurrence, Claim or Suit" Condition are amended accordingly;

(2) any insured engaged in the business or occupation of providing any of the services described under VII (A) and (B) above;

(3) injury caused by any indemnitee if such indemnitee is engaged in the business or occupation of providing any of

the services described under VII (A) and (B) above.

VIII. NON-OWNED WATERCRAFT LIABILITY COVERAGE (under 26 feet in length)

Exclusion (e) does not apply to any watercraft under 26 feet in length provided such watercraft is neither owned by the named insured nor being used to carry persons or property for a charge.

Where the insured is, irrespective of this coverage, covered or protected against any loss or claim which would otherwise have been paid by the company under this endorsement, there shall be no contribution or participation by this company on the basis of excess, contributing, deficiency, concurrent, or double insurance or otherwise.

IX. LIMITED WORLDWIDE LIABILITY COVERAGE

The definition of policy territory is amended to include the following:

4. Anywhere in the world with respect to bodily injury, property damage, personal injury or advertising injury arising out of the activities of any insured permanently domiciled in the United States of America though temporarily outside the United States of America, its territories and possessions or Canada, provided the original suit for damages because of any such injury or damage is brought within the United States of America, its territories or possessions or Canada.

Such insurance as is afforded by paragraph 4. above shall not apply:

(a) to bodily injury or property damage included within the completed operations hazard or the products hazard;

(b) to Premises Medical Payments Coverage.

X. ADDITIONAL PERSONS INSURED

As respects bodily injury, property damage and personal injury and advertising injury coverages, under the provision "Persons Insured", the following are added as insureds:

(A) Spouse - Partnership - If the named insured is a partnership, the spouse of a partner but only with respect to the conduct of the business of the named insured;

(B) Employee - Any employee (other than the executive officers) of the named insured while acting within the scope of his duties as such, but the insurance afforded to such employee does not apply:

(1) to bodily injury or personal injury to another employee of the named insured arising out of or in the course of his employment;

(2) to personal injury or advertising injury to the named insured or if the named insured is a partner or member thereof, or the spouse of any of the foregoing;

(3) to property damage to property owned, occupied or used by, rents to, in the care, custody or control of or over which physical control is being exercised for any purpose by another employee of the named insured, or by the named insured or if the named insured is a partner or member thereof or by the spouse of any of the foregoing.

XI. EXTENDED BODILY INJURY COVERAGE

The definition of occurrence includes an intentional act by or at the direction of the insured which results in bodily injury if such injury arises solely from the use of reasonable force for the purpose of protecting persons or property.

XII. AUTOMATIC COVERAGE - NEWLY ACQUIRED ORGANIZATIONS (90 DAYS)

The word insured shall include as named insured any organization which is acquired or formed by the named insured and over which the named insured maintains ownership or majority interest, other than a joint venture, provided this insurance does not apply to bodily injury, property damage, personal injury or advertising injury with respect to which such new organization under this policy is also an insured under an other similar liability or indemnity policy but for exhaustion of its limits of liability. The insurance afforded hereby shall terminate 90 days from the date any such organization is acquired or formed by the named insured.

AMENDATORY ENDORSEMENT

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Ed. 4-E

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

COMPREHENSIVE GENERAL LIABILITY INSURANCE
MANUFACTURERS AND CONTRACTORS LIABILITY INSURANCE
OWNERS, LANDLORDS AND TENANTS LIABILITY INSURANCE
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY INSURANCE
STOREKEEPERS INSURANCE
SNP LIABILITY INSURANCE

(The Attaching Clause need be completed only when this endorsement is issued subsequent to preparation of the policy.)

This endorsement, effective (12:01 A.M., standard time), forms a part of policy No.

issued to

by

[Redacted box]

Authorized Representative

~~It is agreed that the exclusion relating to bodily injury to any employee of the insured is deleted and replaced by the following:~~

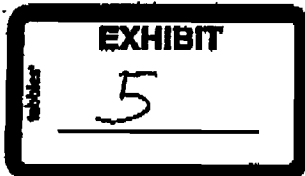
~~This insurance does not apply:~~

- ~~(i) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured for which the insured may be held liable as an employer or in any other capacity;~~
- ~~(ii) to any obligation of the insured to indemnify or contribute with another because of damages arising out of the bodily injury; or~~
- ~~(iii) to bodily injury sustained by the spouse, child, parent, brother, or sis-~~

ter of an employee of the insured as consequence of bodily injury to such employee arising out of and in the course of his employment by the insured

This exclusion applies to all claims and suits by any person or organization for damages because of such bodily injury including damages for care and loss of services.

This exclusion does not apply to liability assumed by the insured under an incidents contract.



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Sedgwick James

Sedgwick James of Washington, Inc.
West 801 Main, Suite 1400, PO Box 2181, Spokane, Washington 99210-4131
Telephone (509) 358-3900, Telex 326483, Facsimile (509) 358-3907

January 23, 1991

Rome Insurance Company
6000 Greenwood Plaza Blvd.
Greenwood Village, CO 80111

Attn: General Liability Claims Department

RE:	Insured:	Carl Weissman & Sons
	Policy Number:	Policy #GL1488251
	Date of Loss:	1/22/87
	Plaintiff:	John Hubbard



Gentlemen:

Enclosed please find a Summons & Complaint entitled Carl Weissman & sons vs. John A. Hubbard.

This was served on Jerrold Weissman in Great Falls, Montana on January 18, 1991.

We are enclosing a copy of the claim file that was sent to your office on January 23, 1987, but you advised us that this was not a GL claim, but a Workers' Compensation claim. Per the attached Complaint, the claimant is alleging gross negligence. Therefore, we request you set up a claim under the General Liability coverage.

Please refer this matter to an attorney to appear on behalf of the Insured and keep us advised regarding the status.

Also, please acknowledge receipt of this correspondence by signing, dating and returning a copy of this letter to our office.

If we may be of further assistance, please let us know.

Sincerely,

Janet L. Davey
Janet Davey,
Claims Department

Date _____ Received by _____

Encl: SAC

cc: Thomas Howard ✓

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