

SUPREME COURT OF COLORADO

2 East 14th Avenue 4th Floor
Denver, Colorado 80203

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2007)
Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE
AND SUBMISSION CLAUSE FOR 2007-2008, #93

Petitioner:

JOSEPH B. BLAKE,
Objector,

v.

Respondents:

ERNEST DURAN, JR. and BRADLEY JOHNSON
Proponents,

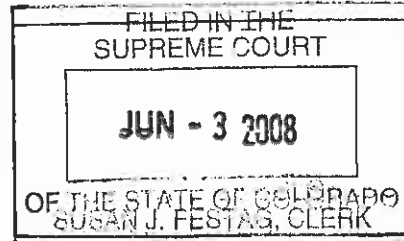
and

Title Board:

WILLIAM A. HOBBS, DANIEL L. CARTIN, and
GEOFFREY BLUE.

Attorneys for Petitioner:

Douglas J. Friednash, #18128
John M. Tanner #16233
Susan F. Fisher, #33174
Fairfield and Woods, P.C.
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▲ COURT USE ONLY ▲

Case No. 08SA180

PETITIONER'S OPENING BRIEF

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Joseph B. Blake, a registered elector of the State of Colorado, by and through his attorneys, hereby files this Opening Brief to appeal the Title Board's approval of the Title for Proposed Initiative 2007-2008 #93 (unofficially captioned by legislative staff for tracking purposes, "Safe Workplace") (hereinafter "Initiative").

STATEMENT ISSUES PRESENTED FOR REVIEW

1. Whether the proposed Initiative violates the single subject requirement of Colo. Const. art. V, § 1(5.5) and Colo. Rev. Stat. § 1-40-106 and § 1-40-106.5.
2. Whether the Initiative's Title, ballot title, and submission clause are misleading, confusing, unfair and fails to reflect the Initiative's true meaning and intent.

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case Course of Proceedings, and Disposition before the Title Board.

On May 7, 2008, the Title Board conducted its initial public meeting and set title for Proposed Initiative 2007-2008 #92. Petitioner filed a Motion for Rehearing, pursuant to section 1-40-107(2). Following the Rehearing, the Motion was denied on May 21, 2008 by a vote of two to one. Petitioner hereby seeks a review of the final action of the Title Board with regard to the Initiative.

B. Statement of the Facts

The Initiative mandates that, “every employer in this State shall provide a safe and healthy workplace for its employees.” Initiative, § 8-2-124(2). The Initiative does not define the terms “safe,” “healthy,” or “workplace.” Nor does the Initiative direct the General Assembly to define these terms.

The Initiative eliminates the exclusivity provisions of the Workers Compensation Act. According to the proponents counsel, “[i]f you are injured, you can file suit and it’s in addition to rights you have under the Workers Compensation statute. . .” (May 21, 2008 Transcript, p.11).

The Initiative would allow an injured employee to bring an action in District Court for compensatory and punitive damages, including damages for past and future pecuniary losses, pain and suffering, emotional distress, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, provided that the employee shall not be entitled to a double recovery for the same losses for which the employee has already been compensated under the Workers Compensation Act. Initiative, § 8-2-124(3).

SUMMARY OF ARGUMENT

The single purpose of the Initiative is to require employers to provide a safe and healthy workplace. Under the guise of creating an enforcement mechanism for this policy, the proponents hide the true purpose of the Initiative: to eliminate the exclusivity provisions of the Workers Compensation Act. The Workers Compensation Act provides for limited and defined benefits under a "no fault" system of liability for injuries sustained in the workplace.

This measure would allow employees to take all of the benefits of the Worker Compensation Act and then sue for unlimited damages in District Court. This proposal renders the Workers Compensation Act meaningless.

The title also fails to advise the voters of the true intent and meaning of the Act. The purpose of the Initiative is hidden from the voters. Further, its language is confusing, misleading and unclear.

ARGUMENT

I. THE INITIATIVE CONTAINS MULTIPLE PURPOSES

A. Standard of Review

The Colorado Constitution provides that the Title Board may not set the title of a proposed initiative, or submit it to the voters if the initiative contains multiple subjects

or purposes. *In re the Matter of the Title, Ballot Title and Submission Clause for 2007-2008 #62* (Colo. May 16, 2008). A proposal that has at least two distinct and separate purposes which are not dependent upon or connected with each other violates the single-subject requirement. *Id.*

An initiative with multiple subjects may not be offered as a single subject by stating the subject in broad terms. *See In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 873–74 (Colo. 2007) (holding measure violated single subject requirement in creating department of environmental conservation and mandating a public trust standard); *see also, In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A)*, *supra*, 4 P.3d at 1097 (holding that elimination of school boards’ powers to require bilingual education not separate subject; titles and summary materially defective in failing to summarize provision that no school district or school could be required to offer bilingual education program; and titles contained improper catch phrase).

When analyzing whether an initiative meets the single subject requirement, this Court must characterize the proposal only insofar as necessary to conduct review for compliance with the constitutional or statutory provisions that apply to the initiative process. *In re Title, Ballot Title & Submission Clause, & Summary for 1997-1998*

30, 959 P.2d 822, 825 (Colo. 1998). In order to do so, this Court applies the general rules of statutory construction and gives the words of the initiative their plain and ordinary meaning. *In re Title, Ballot Title & Submission Clause & Summary for 2005-2006* #75, 138 P.3d 267, 271 (Colo. 2006).

An initiative with multiple purposes may not be properly offered as a single subject by stating the subject in broad terms. See *In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008* #17, 172 P.3d 871, 873–74 (Colo. 2007) (holding measure violated single subject requirement in creating department of environmental conservation and mandating a public trust standard); see also, *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000* #258(A), *supra*, 4 P.3d at 1097 (holding that elimination of school board’s powers to require bilingual education not separate subject; titles and summary materially defective in failing to summarize provision that no school district or school could be required to offer bilingual education program; and titles contained improper catch phrase).

“Grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single subject requirement.” *In re Proposed Initiative, 1996-4*, 916 P.2d 528 (Colo. 1996) (citing *In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an*

Amendment to the Constitution to the State of Colorado Adding Subsection (10) to Section 20 of Article X, 900 P.2d 121, 124–25 (Colo. 1995)).

B. The Single Purpose of the Initiative is to Require Employers to Provide a Safe and Healthy Workplace. However, the true purpose of the Initiative is to eliminate the exclusivity provisions of the Workers Compensation Act rendering it meaningless.

1. *The Initiative requires every employer with ten or more employees to provide a safe and healthy workplace.*

The Initiative provides that it is the policy of the state that every employee should work in a safe and healthy work environment. The Initiative then requires every employer with ten or more regular employees, to provide a “safe and healthy workplace.” These terms are not defined by the Initiative.

2. *The true purpose of the Initiative is to render the Workers Compensation Act meaningless.*

The proponents of this measure will assert that the provisions governing the enforcement of this measure are directly tied to the initiative’s single subject, and should not constitute a separate subject. Petitioner recognizes that the implementation or enforcement details of a measure generally do not constitute separate subjects. *In re the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #57*, p. 9 (Colo. May 23, 2008). However, a review of the Initiative

provides that it does much more than merely provide an enforcement mechanism for the safe workplace policy.

The Initiative provides a new right of action that can be maintained in district court, in addition to any rights the employee may have under the Workers Compensation Act (the “Act”). Currently, the Act is the exclusive remedy for an employee to recover damages for injuries incurred in the course of or arising out of the employment relationship. A cornerstone of the effective functioning of the Act is the statutory provision that declares that an employer who has complied with the provision of the Act shall not be subject to any other liability for death of, or personal injury to, any employee, and “[all causes of action, actions at law, suits in equity, proceedings, and statutory and common law rights and remedies for and on account of such death of or personal injury to any such employee and accruing to any person are abolished except as provided]” in the Act. Colo. Rev. Stat. § 8-41-102 (emphasis supplied).

The exclusivity provisions of the Act “constitute part of the *quid pro quo* of the workmen’s compensation schemes, under which the employer assumes liability for work-related injuries irrespective of fault, and in return, employees are precluded from bringing actions at common law.” *Kandt v. Evans*, 645 P.2d 1300, 1302 (Colo. 1982).

In return for the “no fault” statutory scheme, the worker’s remedies are statutorily limited to medical benefits, temporary wage replacement benefits, and awards for disfigurement and permanent disability. These benefits and awards are strictly defined and limited under the Act. The exclusive remedy provision of the Act not only bars a worker’s access to district court for claims of personal injury, disease, or death arising out of the employment relationship, but the Act also defines the exclusive and comprehensive remedies available to the worker within the workers’ compensation system. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1264-1265 (Colo. 1985). This radical departure is inconsistent with Colorado law, and a completely separate subject.

The Initiative renders the Act utterly meaningless. It eliminates the exclusivity provisions, no-fault system and limited benefits. A proposed initiative contains multiple purposes not only when it proposes new provisions, but also when it proposes to repeal subject too. See *In the Matter of Title, Ballot Title and Submission Clause for 20007-2008 #62*, p.9 (Colo. May 16, 2008).

II. THE INITIATIVE IS CONFUSING, UNFAIR, MISLEADING, AND IS LIKELY TO SURPRISE VOTERS

Section 1-40-106(3)(b), C.R.S. 2007, provides that “[t]he title for the proposed law or constitutional amendment...shall correctly and fairly express the true intent and

meaning thereof...” “Accordingly, the titles must be fair, clear and accurate.” *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #57* (Colo. May 23, 2008). This requirements serves to make sure that voters are not surprised after an election to find that an initiative included a surreptitious, but significant provision that was disguised by other elements of the proposal. *Id.* This Court will reverse the Title Board’s decision if the titles are insufficient, unfair or misleading. *In re the Matter of Title, Ballot Title, and Submission Clause for 2007-2008 #62* (Colo. May 16, 2008).

A. The Title Fails to Express the Initiative’s True Intent and Meaning.

The title fails to fully express the Initiative’s true intent and meaning. Colo. Rev. Stat. §1-40-102(10) provides that the title should be a “brief statement that fairly and accurately represents the true meaning and intent of the proposed text of the initiative.” Further, in setting a title, the Board “shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a ‘yes’ or ‘no’ vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof...” *Id.*

The title misleads voters about its effect. The title states that it prohibits “injured employees from recovering any damages for which the employee already received

pursuant to the ‘Workers Compensation Act.’ The text provides that the employee shall not be “entitled to a double recovery for the same losses for which the employee has already been compensated under the Workers Compensation Act.” Proponents of the measure argue that the intent and meaning is to allow injured workers to have the best of both worlds. However, the title fails to adequately inform voters that the civil action is in addition to those damages available under the Act. Proponents of the measure claim that the purpose of the Initiative is not to provide an election of remedies between the Act and District Court (Transcript, p.16).

B. The Initiative’s Ambiguous Provisions Make it Impossible to Set an Accurate and Complete Title.

The Initiative provides that “every employer in this State shall provide a safe and healthy workplace for its employees.” The terms “safe” and “healthy” are undefined. Nor does the Initiative instruct the General Assembly to define these terms. The language is broad and confusing, as recognized by Legislative Council staff and Office of Legislative Legal Services. Similarly, the Initiative fails to define the term “workplace.” The intended scope of the term is unknown. Cf. Colo. Rev. Stat. § 25-14-203 and § 8-40-201, (2007). Ultimately, the term “safe and healthy workplace” is nothing more than an impermissible catch phrase.

CONCLUSION

Petitioner requests the Court to reverse the actions of the Title Board and to direct it to strike the Title, ballot title, and submission clause and return proposed Initiative for 2007-2008 # 93 to its proponents.

Respectfully submitted this 3rd day of June, 2008.

FAIRFIELD AND WOODS, P.C.

By: 

Douglas J. Friednash, #18128

John M. Tanner, #16233

Susan F. Fisher, #33174

Petitioner's Address:

1445 Market Street

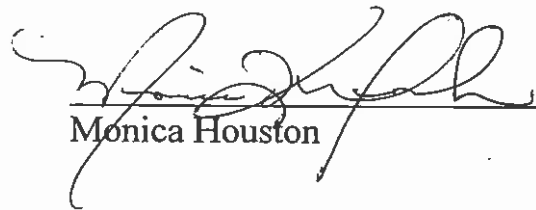
Denver, CO 80202

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2008, a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was hand delivered to the following:

Michael J. Belo
370 17th Street, Suite 4800
Denver, CO 80202

Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, CO 80203



Monica Houston

*Proposed Initiative
93
Final Text*

Be it Enacted by the People of the State of Colorado:

Part 1 of article 2 of title 8, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

8-2-124. Safe workplace. (1) IT IS THE POLICY OF THIS STATE THAT EVERY EMPLOYEE SHOULD WORK IN A SAFE AND HEALTHY WORK ENVIRONMENT.

(2) EVERY EMPLOYER IN THIS STATE SHALL PROVIDE A SAFE AND HEALTHY WORKPLACE FOR ITS EMPLOYEES.

(3) FAILURE OF AN EMPLOYER TO COMPLY WITH ITS OBLIGATIONS UNDER THIS SECTION SHALL BE ACTIONABLE BY AN INJURED EMPLOYEE IN DISTRICT COURT IN ADDITION TO ANY RIGHTS THE EMPLOYEE MAY HAVE UNDER THE WORKERS' COMPENSATION ACT OF COLORADO, ARTICLES 40 TO 47 OF THIS TITLE. THE INJURED EMPLOYEE SHALL HAVE A RIGHT TO A JURY TRIAL ON ALL ISSUES OF FACT, IF DEMANDED IN ACCORDANCE WITH THE COLORADO RULES OF CIVIL PROCEDURE. THE COURT OR JURY MAY AWARD THE INJURED EMPLOYEE COMPENSATORY AND EXEMPLARY DAMAGES, INCLUDING DAMAGES FOR PAST AND FUTURE PECUNIARY LOSSES, PAIN AND SUFFERING, EMOTIONAL DISTRESS, INCONVENIENCE, MENTAL ANGUISH, LOSS OF ENJOYMENT OF LIFE, AND OTHER NONPECUNIARY LOSSES, PROVIDED THAT THE EMPLOYEE SHALL NOT BE ENTITLED TO A DOUBLE RECOVERY FOR THE SAME LOSSES FOR WHICH THE EMPLOYEE HAS ALREADY BEEN COMPENSATED UNDER THE WORKERS' COMPENSATION ACT.

(4) "EMPLOYER" AND "EMPLOYEE" SHALL HAVE THE MEANINGS SET FORTH IN SECTION 8-4-101, EXCEPT THAT THIS SECTION SHALL APPLY ONLY TO EMPLOYERS THAT REGULARLY EMPLOY TEN OR MORE EMPLOYEES IN THE STATE OF COLORADO.

RECEIVED

APR 25 2008

ELECTIONS
SECRETARY OF STATE

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RECEIVED

April 25, 2008

APR 25 2008 1:25 P.M.
ELECTIONS
SECRETARY OF STATE *DB*

VIA HAND DELIVERY

Mike Coffman
Colorado Secretary of State
1700 Broadway, Suite 270
Denver, CO 80290

Re: **Proposed Initiative Measure 2007-2008 #93 concerning safe workplaces**

Dear Mr. Coffman:

On behalf of the proponents, I am submitting the attached initiative for the Title Board hearing which I understand is scheduled to take place on Wednesday, May 7, 2008. I will plan to be available then. In accordance with requirements, I am submitting (1) the original typed draft submitted to the Legislative Council for a review and comment hearing, (2) an amended typed draft with changes highlighted, and (3) a final typed draft for printing of the proposed initiative.

The proponents of this initiative are Ernest L. Duran, Jr., and Bradley Johnston. Their addresses and other information are as follows:

Ernest L. Duran, Jr., President
United Food & Commercial Workers, Local 7
7760 West 38th Avenue, Suite 400
Wheat Ridge, CO 80033
Telephone: (303) 425-0897
E-mail: eduran@ufcw7.com

Bradley Johnston
7047 South Davies Street
Littleton, CO 80120
Telephone: (303) 798-9638
E-mail: [easbjohnston@msn.com](mailto: easbjohnston@msn.com)

Please direct all correspondence related to this initiative to me. Thanks for your cooperation and consideration.

Sincerely,

BERENBAUM, WEINSHIENK & EASON, P.C.

Michael J. Belo

MJB:PBA

Enclosure: Proposed Initiative Measure 2007-2008 #93

cc: Ernest L. Duran, Jr.
Bradley Johnston

Ballot Title Setting Board

Proposed Initiative 2007-2008 #93¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado Revised Statutes concerning a safe workplace for employees, and, in connection therewith, requiring employers to provide safe and healthy workplaces for their employees; restricting such requirement to employers regularly employing ten or more employees in the state; and enabling employees who are injured because of an employer's violation of this requirement to file suit in district court, with the right to a jury trial, to recover compensatory and exemplary damages, actual past or future pecuniary losses, and noneconomic losses including pain and suffering, emotional distress, inconvenience, mental anguish, and loss of enjoyment of life, but prohibiting injured employees from recovering any damages for which the employee already received compensation pursuant to the "Workers' Compensation Act of Colorado".

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado Revised Statutes concerning a safe workplace for employees, and, in connection therewith, requiring employers to provide safe and healthy workplaces for their employees; restricting such requirement to employers regularly employing ten or more employees in the state; and enabling employees who are injured because of an employer's violation of this requirement to file suit in district court, with the right to a jury trial, to recover compensatory and exemplary damages, actual past or future pecuniary losses, and noneconomic losses including pain and suffering, emotional distress, inconvenience, mental anguish, and loss of enjoyment of life, but prohibiting injured employees from recovering any damages for which the employee already received compensation pursuant to the "Workers' Compensation Act of Colorado"?

Hearing May 7, 2008:

Single subject approved; staff draft adopted; titles set.

Hearing adjourned 10:55 a.m.

Hearing May 21, 2008:

Motion for Rehearing denied.

Hearing adjourned 12:25 p.m.

¹ Unofficially captioned "Safe Workplace" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

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Secretary of State's Rehearing
Before the Colorado Title Setting Board
Blue Spruce Conference Room
1700 Broadway, Suite 270
Denver, Colorado
Wednesday, May 21, 2008

8

9

10 Re: 2007-2008 No. 93 Safe Workplace - Rehearing

11

12

13 Title Board Appearances:

14 William A. Hobbs, Deputy Secretary of
State appearing on behalf of Secretary of
15 State Mike Coffman

16 Dan Cartin, Deputy Director of the Office of
Legislative Legal Services

17

Daniel Dominico, Esq., Solicitor General

18

Geoff Blue, Deputy Attorney General

19

Maurice Knaizer, Deputy Attorney General, representing
20 the Title Board

21 Ceci Gomez, Secretary of State's Office

22 Douglas Friednash, Esq., appearing on behalf of the
opponents

23

Michael Belo, Esq., appearing on behalf of the
24 proponents

25

1 CHAIRMAN: Good morning. Let's go ahead and
2 get started. This is a meeting of the Title Setting
3 Board pursuant to Article 40 of Title 1, Colorado
4 Revised Statutes. The time is 7:33 a.m. The date is
5 May 21, 2008. And we're meeting in the Secretary of
6 State's Blue Spruce Conference Room, 1700 Broadway,
7 Suite 270, Denver, Colorado.

8 The Title Setting Board today consists of
9 the following: My name is Bill Hobbs. I'm Deputy
10 Secretary of State. I'm here on behalf of Secretary
11 of State Mike Coffman. To my left is Dan Cartin,
12 Deputy Director of the Office of Legislative Legal
13 Services, who is the designee of the Director of the
14 Office of Legislative Legal Services, Charlie Pike.

15 Mr. Cartin will be sitting as the Director's
16 designee for this morning's agenda Items 1 through 11.
17 And then for this afternoon's agenda items the
18 Director's designee will be Sharon Eubanks, who is
19 also Deputy Director of the Office of Legislative
20 Legal Services.

21 To my right is Dan Dominico, Solicitor
22 General, who is the designee for Attorney General John
23 Suthers.

24 Also sitting in as the Attorney General's
25 designee on some agenda items will be Geoff Blue,

1 Deputy Attorney General.

2 To my far left is Maurice Knaizer, Deputy
3 Attorney General who represents the Title Board. And
4 to my far right is Ceci Gomez from the Secretary of
5 State's Office.

6 (CD starts at 4:27:43.)

7 CHAIRMAN: Let's turn to No. 93, Safe
8 Workplace. This is before the Board on a Motion for
9 Rehearing. And Mr. Friednash, I think you submitted
10 the Motion for Rehearing. And you were admirably
11 succinct on the last agenda item, so I'm looking
12 forward to the same.

13 UNIDENTIFIED MALE: Despite my taking you on
14 further.

15 UNIDENTIFIED MALE: That's right.

16 MR. FRIEDNASH: I will do the same here.
17 I'm not going to go through everything and I assume
18 you have read Conditions for Rehearing.

19 Let me -- you know, it's interesting. The
20 last issue we dealt with was whether something needed
21 to be clarified because it was ambiguous and here we
22 have a policy that creating this new safe and healthy
23 workplace and none of those terms are defined and
24 nothing is left up to the General Assembly to
25 implement that or define that as the health measure

1 that deals with major medical healthcare coverage that
2 you'll hear in a little bit.

3 So we have this kind of anomaly that on one
4 hand we need to define things and the next one we can
5 create an initiative that's so unclear, so vague,
6 voters really won't know what they're voting on and I
7 think that's essentially one of the biggest problems
8 with this initiative.

9 Another big problem with this initiative is
10 that this -- the policy, again, is to create the safe
11 and healthy workplace. Really what this is trying to
12 do, and it's not listed in here, is it eliminates the
13 exclusivity provisions in the Workers' Compensation
14 Act.

15 The Workers' Compensation Act has been in
16 Colorado since 1919. And, you know, briefly as the
17 (inaudible) states, the cornerstone of this was that
18 it was a statutory provision that declared an
19 employer, who has complied with the provisions of the
20 Act shall not be subject to any other liability for
21 death, personal injury to any employee and all causes
22 of actions, actions of loss, (inaudible), proceedings,
23 statutory and common-law rights and remedies for and
24 on account of such death or personal injury to any
25 such employee and accruing to any person or

1 (inaudible) except as provided. That's under Colorado
2 Revised Act 8-41-102.

3 I think (inaudible) pointed out the
4 exclusivity provisions of the Workers' Compensation
5 Act where the quid pro quo of the scheme which created
6 this no-fault system preventing actions from being
7 brought (inaudible) common law. This completely
8 abolishes that. It's hidden in the initiative, but it
9 completely abolishes it.

10 Basically, it says from now on you have a
11 choice and your choice is do you want to go to the
12 Workers' Compensation system or do you want to be able
13 to file a civil case for unlimited damages, basically,
14 compensatory, punitive damages, pain and suffering
15 damages, which aren't allowed by the Workers' Comp
16 system? And I don't think voters are going to know
17 that that's what they're voting for.

18 And I'm also confused by the language of
19 Paragraph 3, the very last sentence that says in the
20 text -- and then I'll talk about the title. It's the
21 very last sentence of the title. Let's start at the
22 title. It says, but prohibiting injured employees
23 from recovering any damages for which the employee
24 already received compensation pursuant to the Workers'
25 Compensation Act of Colorado.

1 In the text it talks about, provide that the
2 employee shall not be entitled to double recovery for
3 the same losses for which the employee has already
4 been compensated on the Workers' Comp Act.

5 I think there may be a difference between
6 losses and damages. But I guess the question I have
7 is as a voter is, is this saying you can get some
8 damages for some injuries, but you can get other
9 damages -- I don't think the intent was, and I think
10 we need some clarification, but I don't think the
11 intent was to create a system where you can do both.

12 I think it was clearly intended to create a
13 different avenue, a much more financially viable
14 alternative for an injured employee to pursue any kind
15 of injury anywhere it may take place, on your way
16 home, on your way in, you know, on your way to lunch
17 during the job.

18 I don't know what workplace means, but I
19 think that was the goal of this, but I'm not sure the
20 title of this is that clear, or the text.

21 So with that, unless there's specific
22 questions, as promised I'd keep my comments succinct
23 and I'll rely on the rest of my brief and thanks for
24 your time.

25 CHAIRMAN: Okay, thank you, Mr. Friednash.

1 Any questions?

2 (No audible response.)

3 If not, Mr. Belo, very briefly.

4 MR. BELO: I'll talk fast like the Federal
5 Express guy on the commercials years ago. The
6 single-subject issue, they somehow derive three
7 separate subjects out of an initiative that has one
8 simple straightforward purpose, to require the
9 employer to maintain a safe and healthy workplace and
10 to provide a remedy to an employee who was injured if
11 the employer doesn't.

12 They make the same error, a fundamental
13 error of disregarding the established law that because
14 an initiative spells out the details related to its
15 implementation and so long as those procedures have a
16 necessary and proper relationship to the substance,
17 that that does not constitute a single subject.

18 I'm not sure if I cited these cases before,
19 but there's at least four cases right offhand I can
20 cite, 962 P.2d 927. That's Ballot Title 1997-1998,
21 No. 74.

22 The same re-ballot title 1999-2000 No. 256,
23 that's 12 P.2d 927. There is Ballot Title 20506, No.
24 73, that's 135 P.3d 736, a Colorado 2006 case, and
25 another companion case, Ballot Title 2005-2006, No.

1 74, 136 P.2d 237.

2 They've all said that the mirror
3 implementation or enforcement details are directly
4 tied to the initiative single-subject and do not in
5 themselves constitute a separate subject.

6 UNIDENTIFIED SPEAKER: Mr. Belo, let me
7 focus you for a second here because I think that the
8 concern that I have with this ballot measure is the
9 one raised Mr. Friednash that what essentially this
10 does is this is subjecting employers -- it's
11 eliminating the quid pro quo that was created with the
12 Workers' Compensation Act without being clear to the
13 voters that it's eliminating that quid pro quo and
14 opening up a whole new avenue without the voters
15 knowing that what it's doing is changing that
16 relationship between employers and employees.

17 And I'd like you to address that because I
18 think that that's a -- I think that's a well-founded
19 concern and I'd like to hear your arguments.

20 MR. BELO: Okay, and I did definitely want
21 to address that. First, I would say that to claim
22 that this is hidden in the body of the initiative is
23 false.

24 The first sentence of the third section of
25 this initiative says failure of an employee to comply

1 with this -- an employer to comply with this
2 obligation under this section shall be actionable by
3 injured employee in District Court in addition to any
4 rights the employee may have under the Workers'
5 Compensation Act.

6 And that clearly spells out that this is in
7 addition to the rights of the worker -- the employee
8 may have under the Workers' Compensation Act.

9 Then in the last sentence of that same
10 paragraph it talks about you can't receive a double
11 recovery for the same lawsuit. For example, if the
12 employee's medical benefits are paid, he couldn't
13 receive a double recovery.

14 If the employee received lost time from work
15 on what they call Total Temporary Disability Benefits,
16 then that would be something that he couldn't recover
17 in a civil action.

18 So this is -- it's just disingenuous to say
19 that this is buried somewhere in the provision when
20 it's right there on the face of it in the first
21 sentence of Section 3.

22 Now, let's talk about the exclusivity issue
23 a little bit. In the first place, the word
24 exclusivity is not used anyplace in the Workers'
25 Compensation statute. That's a lawyer's word. In

1 fact, I dare say that many lay people, if they heard
2 -- if the word exclusivity were in this document or
3 in this initiative, they would be scratching their
4 heads, what do they mean by exclusivity?

5 What we've done is stated it more simply
6 that it shall be in addition to any rights that the
7 employee may have. So it's quite clear in the face of
8 our provision and in the title that this is in
9 addition to the rights that he may have or he or she
10 may have. It's plain English and it's clearer and
11 more understandable than the word exclusivity.

12 Let me try a formulation that they would
13 probably suggest. In the first sentence of Paragraph
14 3 would be failure of the employer to comply with
15 these obligations under this section shall be
16 actionable by the employee in District Court
17 notwithstanding the exclusivity provisions of the
18 Workers' Compensation Act.

19 Now, I ask you to take off your lawyer's hat
20 for a minute and think that if a voter were to look at
21 that, is he more likely to be misled or confused about
22 that than he or she would be by reading the language
23 that we've got.

24 So I think the word exclusivity, while it's
25 a term that we, as lawyers, use regularly is not

1 required to be in this statute because it's not even
2 used in the Workers' Compensation statute anywhere
3 because it's covered, because it's clear from this
4 (inaudible) or language of the proposed initiative.
5 So I'm just responding to that question.

6 One or two other points -- well, that was
7 really primarily what I wanted to discuss. I mean,
8 it's really simple, safe and healthy workplace.

9 If you're injured, you can file suit and
10 it's in addition to rights you have under the Workers'
11 Compensation statute, but you can't get a double
12 recovery. Those are all one integral, whole, closely
13 related and interdependent upon each other.

14 Yet again, the Title Board was correct when
15 it initially set the title and the title as set
16 faithfully reflects the terms of the initiative.

17 CHAIRMAN: Thank you. Any questions of Mr.
18 Belo?

19 (No audible response.)

20 Mr. Friednash, do you have anything further?

21 MR. FRIEDNASH: No.

22 CHAIRMAN: Then I'll turn to Board
23 discussion on the Motion for Rehearing. Any
24 discussion by the Board?

25 UNIDENTIFIED MALE: Sure. I'm troubled by

1 the impact this has on the Workers' Compensation Act
2 in the fact that it's not clear in the measure that it
3 is going to change the nature of compensation for
4 workers when they've been injured in Colorado. I
5 think the measure could have been a lot clearer on
6 that point.

7 Frankly, at this point I'm struggling which
8 way I'm going to vote. I have to be honest about
9 that. I think at this point I'm not -- and I'm
10 curious to what the rest of the Board thinks about it,
11 but I'm certainly on the fence because I think that
12 it's -- this kind of change, I don't think the average
13 person's going to read this initiative and realize the
14 impact this is going to have on the Workers'
15 Compensation Act.

16 CHAIRMAN: I don't think I have a problem
17 with the measure as a single-subject question and to
18 the extent that any measure is maybe unclear on
19 something.

20 Then, of course, I generally think that's
21 beyond our purview except for the extent that we have
22 to understand a measure well enough to conclude that
23 it has a single subject. And we know that lots of
24 times there are effects on other laws that we don't
25 necessarily have to determine.

1 I mean, I may be cutting straight to Mr.
2 Blue's point. It may be that we do need to include
3 something in the title though that reflects the fact
4 that the measure says that it's in addition to any
5 other -- to any rights an employee may have under the
6 Workers' Compensation Act. And if that's not clear in
7 our titles, I'm open to including that. But
8 otherwise, I tend to think that the titles that we've
9 set are pretty clear and fair.

10 UNIDENTIFIED MALE: I agree with that. It
11 raised some issues, but I also feel as though Mr. Belo
12 has ably responded to those issues and in my mind the
13 measure has a single subject.

14 I'm willing to explore modifying the title
15 if that addresses some concerns of the other Board
16 members. But as far as the motion goes (inaudible)
17 subject grounds or the allegation that it violates the
18 single-subject requirement we're denying that
19 particular aspect of the motion.

20 CHAIRMAN: I guess I'm just wondering, I'll
21 raise the possibility about if we should amend -- if
22 the question is, could we amend the titles to reflect
23 the impact on the Workers' Compensation law now? I'm
24 wondering if the place to do that would be in between
25 where the title currently says that the measure

1 enables employees to file suit in District Court and
2 recover compensatory and exemplary damages, et cetera,
3 et cetera. And then the next clause says, but
4 prohibiting recovery in -- you know, recovering from
5 under the Workers' Compensation Act.

6 I mean, it may be that, I'm just trying to
7 think this through, that where we say that we are
8 prohibiting basically a double recovery. If we were
9 to say providing that such recovery, the recovery that
10 this measure provides for that such recovery is in
11 addition to the rights the employee may have under the
12 Workers' Compensation Act, but, but prohibits injured
13 employees from recovering -- and I'm picking back up
14 the language of the measure.

15 I mean, it's like I say, you could still
16 recover under Workers' Comp, but you can't recover
17 under both is the way I understand it.

18 UNIDENTIFIED MALE: Actually, I have to say
19 I don't think that that's what this does. My reading
20 on this is that I think you can get your Workers'
21 Compensation losses then you can bring a lawsuit and
22 get your nonpecuniary losses.

23 And so, what this does is it actually
24 encourages people to get their Workers' Compensation
25 losses and then go to court and get more money. I

1 think that's how a court will read this.

2 It's not preventing somebody from getting
3 additional damages. It just says that basically the
4 employer's going to get an offset on the Workers'
5 Compensation benefits that the employee gets. I think
6 that's a legitimate reading of this. That's my
7 concern. And that's why I think that this -- a result
8 of this is probably not a single subject.

9 CHAIRMAN: Brief comment? Mr. Friednash.

10 MR. FRIEDNASH: I guess the concern I have
11 is exactly that. It doesn't say same claims. It says
12 same losses. There's a big difference. And I think
13 that's a significant difference. And I don't know how
14 you can fix that (inaudible) because I think this is
15 one of the things that is unclear and that's the
16 problem.

17 I think it could have said the goal of this
18 initiative was to prevent double recovery from
19 different (inaudible) on the same injury. It doesn't
20 say that.

21 UNIDENTIFIED MALE: I mean, I think that if
22 the point of this was to prevent what I just
23 suggested, it would say that -- the initiative would
24 say something along the lines that once you received
25 Workers' Compensation benefits you can't go to court,

1 but it doesn't say that.

2 MR. BELO: If I could respond, that's
3 correct. This says in addition to. This is not
4 intended to say that you have an option or an
5 election; that you either go to Workers' Compensation
6 or you go to your civil lawsuit.

7 It says that in addition to the rights you
8 may have, provided that you may not have a double
9 recovery with the same losses, you can also go to
10 District Court. That's not a single subject issue to
11 me.

12 I would tend to agree with that maybe we
13 could tweak the language to use the phrase in addition
14 to any rights perhaps at some appropriate place. That
15 might make it -- I think it's clear, but we could make
16 it clearer to the voters. But I don't think that's a
17 single-subject issue. I think that's just a matter of
18 phrasing the title slightly differently.

19 UNIDENTIFIED MALE: And we could address
20 that possibly by saying in line 5 on the screen, and
21 I'll read starting on line 4, because of an employer's
22 violation of this requirement, in addition to any
23 benefits they receive under the Workers' Compensation
24 Act, to file suit in District Court.

25 That is very clear to me about what this is

1 allowing to happen. It's allowing them to get their
2 Workers' Compensation benefits and then to go into
3 Court and get additional damages.

4 CHAIRMAN: I guess I'm having second
5 thoughts about trying to clarify this that we may end
6 up confusing things. I mean, it seems to me, I'll
7 make a pitch the other way, that, I mean, as the
8 measure provides we've said that the Act enables
9 people to bring an action in district court and
10 recover damages.

11 It does, and to the extent the question
12 arises about is this in -- can you still pursue your
13 Workers' Compensation rights? Nothing in the measure
14 says you can. In fact, it says it's in addition to
15 that.

16 I think the heart of it though is that you
17 cannot recover for both. That if you sue under both,
18 you're not going to get double recovery. And we've
19 said that in the titles, I think. Mr. Friednash?

20 MR. FRIEDNASH: Yeah, I may be fighting a
21 losing battle and that's never stopped me yet, but I
22 will say I don't think the (inaudible) what the text
23 of the initiative does and that's my concern.

24 I started out by saying my reading of it
25 suggests I had a much different understanding of this

1 than what was being offered. And I think voters are
2 going to be confused.

3 There's a difference, again, between damages
4 and losses and causes of action. This says damages,
5 the text says losses, for example. Damages would
6 suggest an award to an attorney at least. I don't
7 know in terms of the average voter, but to each of us
8 I think damages has a special meaning.

9 I think it needs to clearly articulate the
10 fact that -- and trust me, I'm not trying to drag this
11 on. I think you know that, that look, you get your
12 Workers' Compensation damages, whatever they are, and
13 then you're entitled to additional damages -- that you
14 can sue for additional damages for pain and suffering,
15 punitive damages. These are things that aren't
16 covered by the Workers' Compensation (inaudible).

17 And it's really hard to clarify that in a
18 way that really expresses what this does. But it
19 really does allow double dipping through the system.
20 And I think that is a separate subject.

21 UNIDENTIFIED MALE: Let me, in the interest
22 of moving this forward, just let me make a statement
23 and then actually I'm going to make a motion. In Mr.
24 Friednash's brief the quote from the statute that says
25 that the title should provide a brief statement that

1 fairly and accurately represents the true meaning and
2 intent of the proposed text.

3 So in other words, you don't have to follow
4 the language of the initiative. You've got to tell
5 the voters what the true meaning and intent of
6 initiative is.

7 I think by putting the language in or
8 something similar on Line 5 that I suggested you get a
9 lot closer to telling the voters what the true meaning
10 and intent of the proposed text of the initiative.

11 In the interest of moving this forward I'll
12 make a motion that we insert language there similar to
13 what I said and we'll work that out if my motion
14 passes. But the point being, at least we'll find out
15 where the Board is on that issue.

16 So I'll move that we insert some language
17 there to clarify that a employee can get benefits
18 under the Workers' Compensation Act and then file
19 suit.

20 CHAIRMAN: Okay. Although, I think it's a
21 really close issue, I think I'm not going to second
22 the motion just because I just don't think it's that
23 significant. The fact that the measure does clarify
24 that this -- that the rights under this measure are in
25 additional to the Workers' Comp. I don't think that's

1 significant that we should put that in the title.

2 As long as we have the -- I do think what's
3 significant is that you don't get the double recovery
4 and that I think we've said. I'm pretty much still
5 okay with the titles the way we have them.

6 UNIDENTIFIED MALE: I appreciate the motion,
7 but I guess in some ways I look at the precedent that
8 says that the title need not spell out every detail.
9 And I don't think that particular addition is
10 necessary under the circumstances.

11 CHAIRMAN: Again, I think it's a real close
12 call, but I think that motion dies for lack of a
13 second then. I think I'll go ahead and move then that
14 the Motion for Rehearing be denied.

15 UNIDENTIFIED MALE: Second.

16 CHAIRMAN: Any further discussion?

17 (No audible response.)

18 If not, all those in favor say aye.

19 (Aye responses heard.)

20 All those opposed, no.

21 That motion carries two to one. That
22 completes action on No. 93. The time is 12:25 p.m.

23 (CD ends at 4:50:15.)

24

25

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
COUNTY OF ADAMS)

I, Geneva T. Hansen, do hereby certify that I am a Professional Shorthand Reporter and Notary Public within the State of Colorado.

I further certify that the foregoing transcript constitutes a true and correct transcript to the best of my ability to hear and understand the tape recording.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

IN WITNESS WHEREOF, I have affixed my signature and seal this 2nd day of June, 2008.

My commission expires 11-18-11


Geneva T. Hansen

