

NEGLIGENCE, PRODUCT LIABILITY: No apportionment of liability to employer with work comp immunity... product modification... certification denied... Battin.

Melvin Weaselboy was killed in 12/88 when a gas compressor exploded while he was working for Cenex at the Laurel refinery. It had been manufactured and installed 30 years before by Ingersoll-Rand for Universal Oil Products, which built the refinery. Weaselboy's PR asserts wrongful death and product liability claims against UOP and Ingersoll. The parties agree that Cenex has provided work comp benefits to the Weaselboy estate and is therefore immune from any liability for contribution or indemnity. Nevertheless, UOP and Ingersoll raise several questions concerning whether they may present evidence of alleged modifications to the compressor by Cenex during the 30 years between installation and failure.

They argue that Montana's comparative negligence statute governing multi-defendant cases and the product liability statute are ambiguous with respect to attribution of negligence to an employer. For example, they argue that §27-1-703(4) simultaneously demands that the trier of fact both consider an immune employer's negligence and not consider it. They ask for certification to the Montana Supreme Court to clarify the statute. They also seek a ruling on whether §27-1-719 permits evidence of an immune employer's modifications to reduce the manufacturer's liability.

The plain language of §27-1-703(4) clearly precludes consideration of *any* negligence by Cenex as an immune employer. However, Defendants will not be precluded from introducing evidence of Cenex's actions to show lack of causation.

Nor does §27-1-719 contemplate any apportionment of liability to intervening actors who may have modified a product if they are not parties to the litigation; only unreasonable misuse by the injured user or consumer constitutes an affirmative defense. On the other hand, Defendants may assert the general defense that Cenex's modifications created a "substantial change in the condition in which it [was] sold."

***Estate of Weaselboy v. Ingersoll-Rand and Universal Oil Products*, 10 MFR 41, 4/10/91.**

Frank Richter and Craig Holt, Billings, for Weaselboy; Rockwood Brown & Scott Gratton (Anderson, Brown, Gerbase, Cebull, Fulton, Harman & Ross), Billings, for Ingersoll; James Halverson (Herndon, Hartman, Sweeney & Halverson), Billings, and Arthur Karstaedt III (Hall & Evans), Denver, for UOP.