

MINUTES OF THE MEETING
LABOR AND EMPLOYMENT RELATIONS COMMITTEE
MONTANA STATE SENATE

February 19, 1987

The fourteenth meeting of the Labor and Employment Relations Committee was called to order by Chairman Lynch on February 19, 1987, at 1:00 p.m. in Room 413/415 of the State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF SENATE BILL NO. 319: Senator Joe Mazurek, Senate District 23, sponsor of the bill, stated this bill would propose to exempt the services of the Water Commissioner from workers' compensation coverage. Senator Mazurek handed out three letters, which are attached as Exhibit 1. Senator Mazurek said the reason for this bill is that the Attorney General has held that a Water Commissioner, or 'ditch rider', who is an employee of the District Judge must be provided with Workers' Compensation coverage. The judges appoint a person at the request of the residents of a water district. The judges do not have the ability to pay for coverage, and the waterusers also do not have the funds to pay, so it is mainly a budget problem. This bill would be a solution to the problem. The solution is to exempt 'ditch riders' from coverage under this act. Senator Mazurek said there may not be a need for a 'ditch rider' unless a dispute arises, then one must be appointed. Also, there might not be a need for one on a particular stream. Senator Mazurek stated since not every judge has a 'ditch rider', the easiest way to handle this situation would be to exempt them from coverage.

PROPOSERS: Rep. Gary Spaeth, House District 84, stated he is co-sponsor of this bill and he urged the committee's support.

OPPOSERS: Mr. Steven J. Shapiro, representing the Department of Labor and Industry, gave testimony in opposition to this bill. His testimony is attached as Exhibit 2.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 319:

Senator Lynch asked Senator Mazurek where the current funding comes from. Mr. Shapiro stated there is already a policy in place for the judges' payment for these employees. However, the judges have not paid sufficient premiums in the past to represent the payroll of those workers. If one of these Water Commissioners was suffering from an injury, the injury would be covered. However, because of insufficient premiums, the State Fund would be providing free coverage if those commissioners were injured. Senator Thayer asked Mr. Shapiro if the judges have not paid enough premiums to cover a particular employee, or is it all employees. Mr. Shapiro replied the courts are insured by the State Fund. Every quarter the employer reports the payroll that is paid out to its employees in order for the State Fund to assess premiums calculated on that payroll. So far the courts have not recorded the payroll of those commissioners, so the State Fund is not assessed premiums based on their wages.

Senator Thayer asked Mr. Shapiro how many employees would be covered under this bill. Mr. Shapiro stated he does not have the number.

Senator Mazurek stated he does not have a number either and that that is part of the problem because a 'ditch rider' may only be needed once in 10 years, or one may be needed on a regular basis. Senator Galt stated this is correct, sometimes a 'ditch rider' is needed for a few weeks, or a season.

Senator Thayer asked Mr. Shapiro if this will cover employees who are 'ditch riders' on a regular irrigation district. Senator Galt replied no. Mr. Shapiro replied the bill is indicating the water commissioners appointed by a judge are the only ones to be exempt.

Senator Lynch asked Rep. Spaeth if the 'ditch rider' employed by the courts were injured, is he covered, and would the Department of Workers' Compensation pay the benefits. Rep. Spaeth stated he does not believe that to be a correct assumption. Mr. Shapiro stated that is what he essentially indicated. The Attorney General's opinion has defined these persons as employees of the courts. The courts do have insurance policies through the State Fund, but the courts have not paid the premiums for these employees. Senator Gage asked Mr. Shapiro if, under this bill, would this supercede the Attorney General's

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opinion that these employees are exempted. Mr. Shapiro stated this bill would say regardless of whether they are employees or not, they would be exempted.

Senator Mazurek closed by stating it is important to keep in mind this is in reference only to the Water Commissioners who are appointed because there is a particular problem in a particular area. There is no budget to pay the premium.

DISPOSITION OF SENATE BILL NO. 319: Senator Galt made a motion that SB 319 DO PASS. The motion CARRIED with a 7-1 vote. See attached roll call vote sheet.

CONSIDERATION OF SENATE BILL NO. 350: Senator Mike Walker, Senate District 20, sponsor of the bill, stated SB 350 requires examination and qualification of boiler or pressure vessel installers. There is nothing in the code books dealing with people who install pressure vessels or boilers. Senator Walker stated there are 31 other states with similar legislation. This bill was drafted from an Oregon law and Senator Walker stated it needs some fine tuning. Senator Walker handed out a National Board 1985 Incident Report, which is attached as Exhibit 3. Senator Walker stated there is a need for this legislation because of injuries. He said his intent is to regulate only the people who install boilers. He said it is time to add a measure of safety for buildings that have boilers. Senator Walker reserved the right to close.

PROPONENTS: Mr. H. S. Hanson, representing the Montana Technical Council, stated they are testifying for the design aspect. They are concerned the department would not be allowed to develop the rules and regulations for construction. The Building Codes Bureau is already doing this. They have another concern on page 2, line 5 with the definition of a pressure vessel. This is all encompassing when there are heat exchanges, domestic water systems, propane systems, and air compressors. On page 5, lines 9-14, the hot water heating method is described.

Mr. Rondy Crawford, representing the Montana Brotherhood of Boilermakers Local 11, gave testimony in support of this bill. His testimony is attached as Exhibit 4.

Mr. Lynn Rice, representing himself, rose in support of this bill. Mr. Rice is a licensed boiler operator. He travels throughout the state repairing boilers, and he

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knows the process of repairing. He said there could be an influx of cheap shoddy workmanship that could lead to explosions because there currently is no way to regulate installers to maintain the standards of the Montana state law. Mr. Rice urged the support of the committee.

OPPONENTS: Mr. Charles Baraby, an independent contractor representing himself, rose in opposition to SB 350. Mr. Baraby stated he has 35 years experience in this area. He finds this bill vague and unclear as to who will be examined and who will be doing the examining. Mr. Baraby said he is not against an examination or a license as there is a need for both; however, this bill needs to be clarified. Mr. Baraby urged the committee to clarify this bill before passing it.

Mr. John Augustine, representing the Conoco Company, rose in opposition to this bill. He said the reason they are opposing this bill is that they do not understand it. The bill refers to licensing and qualifying installers, but it could affect refineries in Montana. There are pressure boilers, reboilers, and pressure vessels put in at the refineries by qualified people. They have welders, pipe fitters, instrument men and boilermakers working on pressure vessels, depending on the type of vessel, but the bill only refers to welders. Mr. Augustine does not feel the bill is clear and does not understand what it is trying to address, and feels he must oppose the bill.

Mr. George Troxel, representing Stone Container Corporation, stated he works in the maintenance department and he has been a welder for 30 years. Mr. Troxel is opposed to this bill because he is not sure how it will affect their maintenance program. He said currently only qualified people are welding on boilers and pressure vessels. This is assured by meeting the American Society Mechanical Engineers code standards. The ASME code clearly defines procedures of testing for welding of boilers and pressure vessels. There is an ASME code qualification program conducted by the Northern Testing in Great Falls, Montana for all people welding on boilers and pressure vessels. This testing is recorded and updated for public view and it is required by their insurance agency. Mr. Troxel feels the only requirements needed are the ASME requirement codes.

Mr. Jack Brown, representing the Montana-Wyoming LP Gas Association, stated this is an ambiguous bill because it does not give clear intentions. Mr. Brown stated there are ASME codes already in effect.

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QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 350: Senator Keating asked Mr. Rice where he obtained his license to be a boiler operator. Mr. Rice replied he obtained the license by taking a test through the Workers' Compensation Division. Senator Keating asked Mr. Rice why this bill is needed if there is already a test for licensing in effect. Mr. Rice said there is not a specific license for a person to do installation or repair work. The individual with the lowest bid can usually repair the vessel. Senator Keating asked Mr. Hanson if there are codes in existence with regard to boilers and pressure vessels. Mr. Hanson replied as far as construction, yes, there is a specific code, 50-74-103, MCA.

Senator Keating asked Mr. Baraby if he has to comply with these codes when installing a boiler. Mr. Baraby replied he does not install boilers over a certain amount of pressure or temperature. He also has to obtain a permit and be inspected according to the code. Senator Keating asked Mr. Baraby where he obtains a permit and who inspects the vessels. Mr. Baraby replied the City Building Codes and the City of Helena inspects the vessels.

Senator Keating asked Mr. Rondy Crawford if there are recorded statistics in Montana concerning injuries or death due to an explosion. Mr. Crawford stated he does not have the statistics.

Senator Manning asked Mr. Ed Gatzemeir from the Department of Labor and Industry, Workers' Compensation Division, if they have any figures on the number of people injured due to explosions. Mr. Gatzemeir replied he does not have any figures available. However, he does recall approximately 1 or 2 injuries in the last 5 years.

Senator Thayer asked Senator Walker if the bill would require someone from Workers' Compensation Division to administer the test and inspect the installations.

Senator Walker explained that currently the Workers' Compensation Division administers the test for boiler license carriers and that there is no criteria for the person that states he has to know how to assemble the boiler. He said the technical changes in the hearing industry are very complicated, so an installer should definitely know the proper way to install. Senator Walker said it is not the intent of the bill to involve refineries or pipe fitters. This bill was only intended to deal with the installation of boilers and to use the ASME code. Senator Thayer asked Senator Walker if the

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intention of the bill was to have the department use an updated examination that would specifically address installers. Senator Walker replied yes, and to use more specific ASME standards. Senator Walker said this bill will need some amending.

Senator Thayer asked Mr. Gatzemeir if he is the person from the department who gives the examination and administers this part of the law. Mr. Gatzemeir stated he is the Safety Bureau Chief and the boiler section is under his jurisdiction. Senator Thayer asked Mr. Gatzemeir if the Oregon law Senator Walker is referring to is different from the Montana law their department follows. Mr. Gatzemeir replied Montana does not have licensing for installers.

Senator Keating asked Senator Walker who qualifies the inspector. Senator Walker replied he did not know.

Senator Keating asked Mr. Hanson what the qualifications of an inspector are. Mr. Hanson replied they must have 10 years experience as a boiler operator and have a third class engineers license for three years. He also said insurance companies have inspectors that are licensed by the National Board of Boiler and Pressure Inspectors. Senator Keating asked Mr. Hanson if the insurance company inspectors are qualified. Mr. Hanson replied that the insurance company has a procedure for their qualifications.

Senator Blaylock asked Senator Walker if this bill would affect the refineries. Senator Walker replied no, there will not be inspectors checking the refineries, the intent of the bill is that the people who work on boilers and pressure vessels must be licensed.

Senator Manning asked Mr. Gatzemeir if at the present time, is the Department of Labor set up to handle the inspections. Mr. Gatzemeir stated the department does not have the personnel or funds to handle it.

Senator Gage asked Senator Walker if people who repair boilers have to be licensed. Senator Walker replied yes.

There being no further questions of the committee, Senator Walker closed.

CONSIDERATION OF SENATE BILL NO. 359: Senator Haffey, Senate District 33, sponsor of the bill, stated the reason for this bill was that in 1985 there was an increase of the Montana minimum wage rate. Congress passed an act that affected the Fair Labor Standards Act, and in turn

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resulted in many Montana employees being adversely effected. The minimum wage of many Montana employees was actually lower than intended. This bill is an attempt to correct that piece of legislation. Also, this bill offers a suggestion it may be good to relate the Montana minimum wage to the federal minimum wage. This bill will correct what was not intended to happen. Senator Haffey explained this bill will need some technical amendments and some policy amendments.

PROPOSERS: Mr. Don Judge, representing the Montana AFL-CIO, gave testimony in support of SB 359. His testimony is attached as Exhibit 5.

Mr. John Ortwein, representing the Montana Catholic Conference, gave testimony in support of this bill. His testimony is attached as Exhibit 6.

Ms. Jackie Amsden, representing the Women's Lobbyist Fund, gave testimony in support of this bill. Her testimony is attached as Exhibit 7.

OPPOSERS: There were no opposers present.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 359:

Senator Thayer asked Mr. Judge if it is very widespread that some restaurant owners are only paying their employees \$2.01 per hour. Mr. Judge replied the people representing the Labor Standards Enforcement Division of the Department of Labor and Industry might be able to give accurate numbers.

Mr. Mike Stump, Department of Labor, stated he has no specifics, but in the last four months there have been a large number of calls from employers asking if they can lower the wages of their employees to \$2.01 if they are subject to federal law.

Senator Lynch asked Mr. Stump if the larger restaurants with a big volume would be under the federal law and would pay \$2.01 per hour, and the smaller restaurant would pay \$3.35 per hour. Mr. Stump replied yes, that is under the Montana minimum wage law.

Senator Thayer asked Mr. Stump if tips have always been considered over and above the wage, and tips are a benefit for the employee. Mr. Stump replied yes, that is correct under Montana law; however, the Fair Labor Standards Act does permit a tip credit to be used in most restaurants under the coverage of this law.

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Any employee who receives at least \$10 per month in tips can use a tip credit of up to 40% of the applicable minimum wage. This means an employer can pay \$2.01 per hour and be in compliance with federal law.

Senator Keating asked Mr. Judge when the Attorney General ruled that Montana law did not apply to those under the Fair Labor Standards Act, what happened to the sheriff and his deputies in regard to their wages and overtime.

Mr. Judge replied some of those employees are being paid compensation time. What Congress did was respond to a request from the League of Cities and Towns to take care of their concern about 24 hour Kelly Shift employees, the employees in a fire station who put in 48 hours per week. Under current law, those employees should have been paid overtime. Congress responded to massive debts cities were paying to cover the costs of overtime. Congress passed the Fair Labor Standard Act and that was when the sheriff's department in Lewis and Clark County wondered if this act effected them. They wondered if they could pay compensation time instead of overtime. The Attorney General ruled yes, but in doing so, under Section 19-3-408, if you are covered by the Fair Labor Standard Act, you are not covered by the state minimum wage act.

Senator Keating asked Ms. Patricia Schaffer, Assistant Attorney General, to respond to the Attorney General's rule. Ms. Schaffer stated the Attorney General was asked to resolve the dispute between federal and state law. The federal law states if there is a state law establishing a minimum wage higher, or a maximum work week lower than the federal act, the federal law would allow the state to control. The state law as currently written in Section 19-3-408, MCA, states if an employee is covered by the federal act, the provision of the state law would not apply.

Senator Keating asked Ms. Schaffer if Montana law is better for waitresses than federal law. Ms. Schaffer said yes, it is more favorable because Montana law would not allow an employer to include their tip compensation. The federal law does allow employers to include tip compensation. Senator Keating asked Ms. Schaffer which law supercedes. Ms. Schaffer stated federal law states if a state law is more favorable to the employee, then apply the state law.

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There being no further questions of the committee, Senator Haffey closed by stating there are messages coming from Washington, D. C. that indicate consideration of higher minimum wages for the nation. He said tying the state of Montana to that might be a cost problem, and he suggested it might be best to amend the part of the bill that asks the legislature to tie the federal minimum wage and to uncouple it.

Senator Lynch asked Senator Haffey if he wants it to uncouple. Senator Haffey replied yes.

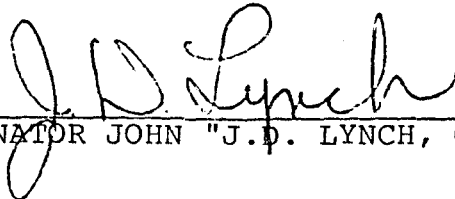
Mr. Gomez stated the changes in number 3 of the amendments are in addition to other provisions provided by law in payment or collection of salaries and wages, and shall apply to employees covered by the Fair Labor Standard Act. The provisions of that part are not only the provision of the payment of minimum wages, but it also includes the overtime compensation requirements. Mr. Gomez has some concern that there may be a conflict of law with the overtime compensation provision. Under that provision, if there is greater protection for the worker, the state law will supercede the federal law. Mr. Gomez said he is not sure Montana's law does this, and he will check into the matter further.

Mr. Judge stated they don't want this bill to affect the police, fire or sheriff's departments.

DISPOSITION OF SENATE BILL NO. 359: Senator Haffey made a motion that the amendment be adopted. The motion CARRIED UNANIMOUSLY.

DISPOSITION OF SENATE BILL NO. 350: Senator Manning made a motion that SB 350 BE TABLED. The motion CARRIED UNANIMOUSLY.

ADJOURNMENT: There being no further business to come before this committee, the hearing was adjourned at 2:30 p.m.


SENATOR JOHN "J.D." LYNCH, Chairman

ROLL CALL

LABOR AND EMPLOYMENT RELATIONS COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Feb. 19, 1987

NAME	PRESENT	ABSENT	EXCUSED
John "J.D." Lynch Chairman	X		
Gene Thayer Vice Chairman	X		
Richard Manning	X		
Thomas Keating	X		
Chet Blaylock	X		
Delwyn Gage	X		
Jack Haffey	X		
Jack Galt	X		

Each day attach to minutes.

SENATE Lalor

COMMITTEE

BILL SB-350

VISITORS' REGISTER

DATE Feb. 19, 1942

Please note bill no.

(check one)

[illegible]

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

SENATE

Labor

COMMITTEE

BILL SB 319

VISITORS' REGISTER

DATE 2-19-87

Please note bill no.

NAME

REPRESENTING

BILL #

(check one)

SUPPORT

OPPOS.

Hiram ShawWORKERS' COMP/DOLI319XSteven EspinozaWorkers Comp/AV319X

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

SENATE Labov

COMMITTEE

BILL SB 359

VISITORS' REGISTER

DATE 2/19/81

Please note bill no.

(check one)

[illegible]

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

ROLL CALL VOTE

SENATE COMMITTEE LABOR AND EMPLOYMENT RELATIONS

Date Feb. 19, 1927 Bill No. SB 319 Time 1:30 p.m.

NAME	YES	NO
John "J.D." Lynch, Chairman	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Gene Thayer, Vice Chairman	<input checked="" type="checkbox"/>	
Richard Manning	<input checked="" type="checkbox"/>	
Thomas Keating	<input checked="" type="checkbox"/>	
Chet Blaylock	<input checked="" type="checkbox"/>	
Delwyn Gage	<input checked="" type="checkbox"/>	
Jack Haffey		
Jack Galt	<input checked="" type="checkbox"/>	

Julie Rademacher
Secretary

John "J.D." Lynch
Chairman

Motion: Do Pass

ROLL CALL VOTE

SENATE COMMITTEE LABOR AND EMPLOYMENT RELATIONS

Date Feb 19, 1987 Bill No. SB 350 Time 2:30 pm

NAME	YES	NO
John "J.D." Lynch, Chairman	X	
Gene Thayer, Vice Chairman	X	
Richard Manning	X	
Thomas Keating	X	
Chet Blaylock	X	
Delwyn Gage	X	
Jack Haffey	X	
Jack Galt	X	

Julie Rademacher
Secretary

John "J.D." Lynch
Chairman

Motion: + Amend SB 350
sections 1, 2, 5, 6, 7, 8

ROLL CALL VOTE

SENATE COMMITTEE LABOR AND EMPLOYMENT RELATIONS

Date Feb 19, 1987 Bill No. SB 350 Time 2:35 p.m.

NAME	YES	NO
John "J.D." Lynch, Chairman	✓	
Gene Thayer, Vice Chairman	✓	
Richard Manning	✓	
Thomas Keating	✓	
Chet Blaylock	✓	
Delwyn Gage	✓	
Jack Haffey	✓	
Jack Galt	✓	

Julie Rademacher
Secretary

John "J.D." Lynch
Chairman

Motion: Trilled

STANDING COMMITTEE REPORT

February 19, 1927

MR. PRESIDENT

We, your committee on LABOR AND EMPLOYMENT RELATIONS

having had under consideration SENATE BILL No. 319

(first) reading copy (white)
color

EMPLOYMENT OF WATER COMMISSIONER EXEMPT FROM WORKERS' COMPENSATION
COVERAGE (MAZUREK)

Respectfully report as follows: That SENATE BILL No. 319

DO PASS

~~DO NOT PASS~~

Sen. John "J.D." Lynch

Chairman.

State of Montana



District Court

First Judicial District

County Courthouse

Helena, Montana 59601

January 13, 1987

Honorable Senator Joe Mazurek
Capitol Station
Helena, Montana 59620

Re: Workers' Compensation Act
Coverage of Water Commissioners

Dear Joe:

Enclosed is correspondence I have received from Don MacIntyre, legal counsel for the Department of Natural Resources and Conservation.

Some time ago it came to my attention that "ditch riders" appointed by the district courts to administer distribution of water on various streams throughout the state are required to have Workers' Compensation. The thought was that ditch riders are employees of the judge. However, the judge has no funds with which to pay the premiums for Workers' Compensation insurance. Moreover, the users of water on the stream are not, generally speaking, inclined to pay any such thing. In addition, who would do the paperwork? As a result in most cases, the ditch riders simply do not have any Workers' Compensation at all.

It would be my view that they should be exempted from Workers' Compensation by use of one of Don's proposed bills unless the state wishes to set up a fund which would pay the premiums.

Don suggests one of the two enclosed bills drafted by him might be enacted to cure this difficulty. The first proposal would have the water commissioners defined as casual employees and thus exempt from Workers' Comp and the second proposal would be to simply say that the water commissioners are not required to have Workers' Comp. I do not see that it would make much difference how it was done. However, I will send a copy of this to Mr. Shapiro, the attorney for Workers' Comp, and if he has any comment, he will no doubt get in touch with you.

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 1

DATE 2/19/87

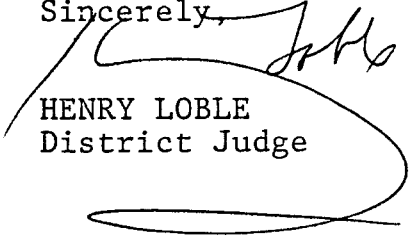
BILL NO. SB 319

Honorable Senator Joe Mazurek
January 13, 1987
Page Two

It would be appreciated, Joe, if you could introduce such a bill or get someone else to do it who might be interested in the subject. As it is, it is a very confused situation.

Enclosed is a copy of my file on this matter. Of particular interest is the Attorney General's Opinion.

Sincerely,


HENRY LOBLE
District Judge

pc: Donald D. MacIntyre
Steve Shapiro
The Honorable W. W. Lessley
Encs.

SENATE LABOR & EMPLOYMENT
EXHIBIT 1
DATE 2/19/87
BILL NO. SB 319



MONTANA WATER COURTS

STATE OF MONTANA

RECEIVED
FEB 01 1984
MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

WATER JUDGES: January 30, 1984

Upper Missouri River Basin
Chief Judge W. W. Lessley
P.O. Box 1962X 879
Bozeman, MT 59715

Lower Missouri River Basin
Judge Bernard W. Thomas
P.O. Box 938
Chinook, MT 59523

Clark Fork River Basin
Judge Robert M. Holter
Lincoln County Courthouse
Libby, MT 59923

Yellowstone River Basin
Judge Roy C. Rodeghiero
P.O. Box 448
Roundup, MT 59072

Donald Mac Intyre
Department Natural Resources
and Conservation
32 South Ewing
Helena, MT 59620

Dear Don;

You recall 'many moons ago' I spoke to you about asking the Attorney General for an opinion on the application of workmen's compensation to an appointed Water Commissioner.

One of the Water Masters here, Suzanne Nellen, has prepared this suggestion for me. I have checked it and I think it has some merit.

I would appreciate your asking the Attorney General for his opinion.

Sincerely yours,

W. W. Lessley
W. W. Lessley,
Chief Water Judge

WWL/nf
Enclosure

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 1

DATE 2/9/84

BILL NO. SB 319

WORKERS' COMPENSATION - Water Commissioner;

MONTANA CODE ANNOTATED - Sections 85-5-101 through 85-5-108, 39-71-401, 39-71-116, 39-71-117, 39-71-118, 85-5-301, 85-5-201 through 85-5-206, Title 85, chapter 5.

- HELD: 1. When a District Court Judge appoints a water commissioner pursuant to Title 85, chapter 5, the water users who are benefitting from the appointment of the water commissioner should be considered the employer.
2. Since the water users would be considered the employer, and a water commissioner considered an employee, the Workers' Compensation Act applies and the employer shall be bounded by a compensation plan.

January 26, 1984

Judge W. W. Lessley
Chief Water Judge
P.O. Box 879
Bozeman, MT 59715

Dear Judge Lessley:

You have requested my opinion on the following question:

1. When a District Court Judge appoints a water commissioner pursuant to Title 85, chapter 5, is the District Court Judge considered the employer of the water commissioner or are the water users considered the employer of the water commissioner and therefore liable for payment of workers' compensation?

Chapter 5, entitled "Water Commissioners," of the MCA, allows for appointment of water commissioners by District Court Judges. Usually this appointment occurs upon application from 15% of the owners of water rights affected by a decree, but an appointment may occur under other circumstances. At the time of the appointment of such water commissioner, the District Court

SENATE LABOR & EMPLOYMENT

RECEIVED 1

DATE 2/19/87

BILL NO. 30319

shall fix the compensation, and the owners and users of the distributed water shall pay their proportionate share of such fees and compensation. Section 85-5-101, MCA. The water commissioner has the power and duty to distribute water, maintain and repair ditches, record daily distribution of water and other duties. Section 85-5-101 through 85-5-108, MCA.

Section 39-71-401, MCA, states that the Workers' Compensation Act applies to all employers as defined in 39-71-117 and to all employees as defined in 39-71-118. An employer who has an employee in service under any appointment or contract of hire, express or implied, shall be bounded by a compensation plan. As the Section indicates, the employee may be appointed to the employer as is the case in our factual situation.

Section 39-71-117, MCA, defines an employer and it appears broad enough to apply to both the District Court Judge and the water users. Section 39-71-118, MCA, provides the definition of an employee which may include the water commissioner.

Presuming the District Court Judge would be considered the employer of the commissioner, Section 39-71-401, MCA, further provides the types of employment in which workers' compensation provisions do not apply. Specifically, Section 39-71-401, MCA, states that workers' compensation does not apply to a casual employee. Section 39-71-116, MCA, defines casual employment as employment not in the usual course of trade, business, profession or occupation of the employer. It is apparent that if the District Court Judge was considered the employer, a water commissioner would fall in the category of a casual

employee. The Water Commissioner is not in the usual course of trade, business or profession of the Judge and therefore Workers' Compensation Act does not apply.

The test used in determining whether an employer-employee relationship exists within any relationship is whether the purported employer has the right to control details of the individual's work. This test is known as the control test. State ex rel. Ferguson v. District Court, 164 Mont. 84; Nelson v. Stuckey, 89 Mont. 277, 300 P. 287; Grief v. Industrial Account Fund, 108 Mont. 519, 93 P.2d 96. The water commissioner's position is initiated by the water users as well as controlled by their demands and needs. The rights and duties of the water users is fully explained in Sec. 85-5-301, MCA. As indicated in the statute, a dissatisfied water user can file a complaint with the Court. Upon the determination of a hearing, the Judge shall make such findings and order as he considers just and proper.

The fact that the District Court Judge merely appoints a water commissioner does not designate that Judge as the employer. As stated above, in most circumstances the District Court Judge appoints a water commissioner upon the request of the water users. The owners and the users of the distributed waters under the appointed water commissioner pay their proportionate share of fees and compensation owed to the water commissioner. Sec. 85-2-201, MCA, Sec. 85-5-101(4), MCA. The term of the commissioner's service is determined upon the Judge's discretion or when requested in writing by a least three persons entitled to the use of the water for which the commissioner is appointed. Sec. 85-5-104, MCA.

Therefore, it is my opinion: 1) When a water commissioner

is appointed by a District Court Judge, the employer should be the water users who are benefitting from the appointment of the water commissioner. 2) Since the water users would be considered the employer, and a water commissioner considered an employee, the Workers' Compensation Act applies and the employer shall be bounded by a compensation plan.

Very truly yours,



A. Suzanne Nellen,
Water Master

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 2/4/57
BILL NO. SB 3/7



District Court

First Judicial District

County Courthouse

Helena, Montana 59601

May 13, 1986

Hon. W. W. Lessley
Chief Water Judge
P. O. Box 879
Bozeman, MT 59715

Re: Water Commissioners--Workers' Compensation

Dear Judge Lessley:

Enclosed is a copy of Attorney General's Opinion No. 56, found in Volume No. 40 of those Opinions. The holding is that:

"When a district court judge appoints a water commissioner pursuant to Title 85, chapter 5, MCA, the district court judge is considered the employer for the purpose of payment of workers' compensation."

So far as I know, this district does not have funds with which to pay Workers' Compensation for water commissioners. I would assume that it would be the obligation of the State and not of the county. I do not know that, however. A representative of the Beaver Creek Water Users' Association of Broadwater County has asked me whether they should continue to pay the premiums for Workers' Compensation for their water commissioner, as they have in the past, or whether it is the obligation of the district judge. I have no ready answer to that question.

I discussed this with Steve Shapiro, the attorney for Workers' Compensation. He pointed out to me that although § 85-5-101, MCA, requires the district judge to appoint water commissioners, § 3-7-211, MCA, allocates that duty to the water judge of each water division. Since I have been on the bench (as did Judge Meloy before me), I have appointed the water commissioners who

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 1

DATE 5/19/87

BILL NO. SB 319

Hon. W. W. Lessley
Page 2
May 13, 1986

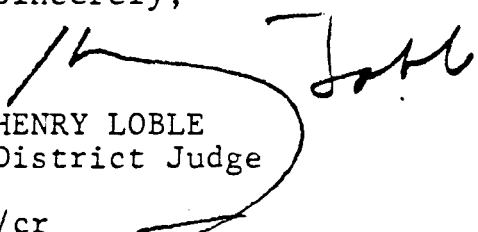
supervise the various water decrees in Broadwater and Lewis and Clark Counties. The water judges are appointed in accordance with § 3-7-201, MCA, et seq. So far as I know, except when appointed in a specific case, I am not a water judge. The Montana Supreme Court pays the expenses of the water judges from the Water Right Adjudication Account.

Mr. Shapiro believes that, whatever public entity is the employer, the water commissioner must be covered by Workers' Compensation.

I am sending a copy of this letter to Donald D. MacIntyre, Chief Legal Counsel of the DNRC, and to Mike Greely, the Attorney General.

I would appreciate your advice as to how to proceed.

Sincerely,


HENRY LOBLE
District Judge

/cr

Enc.

cc: Donald D. MacIntyre
Mike Greely
Nellie Sayer

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. _____
DATE 2/19/87
BILL NO. SB 319

VOLUME NO. 40

OPINION NO. 56

WORKERS' COMPENSATION - Water commissioner;
MONTANA CODE ANNOTATED - Sections 39-71-116, 39-71-117,
39-71-118, 39-71-401, Title 85, chapter 5, 85-5-301.

HELD: When a district court judge appoints a water
commissioner pursuant to Title 85, chapter 5,
MCA, the district court judge is considered
the employer for the purpose of payment of
workers' compensation.

26 June 1984

Donald D. MacIntyre
Chief Legal Counsel
Department of Natural Resources
and Conservation
32 South Ewing
Helena MT 59620

Dear Mr. MacIntyre:

You have requested my opinion on the following question:

When a district court judge appoints a water
commissioner pursuant to Title 85, chapter 5,
MCA, is the district court judge considered
the employer of the water commissioner or are
the users considered the employer of the water
commissioner and therefore liable for payment
of workers' compensation?

Before I address the specifics of your question, I will
say a word about the general applicability of Montana's
Workers' Compensation Act to this situation. Your
opinion request and the accompanying legal research
assume that a water commissioner is covered by workers'
compensation if he or she has been appointed pursuant to
Title 85, chapter 5, MCA. That is correct. The
Workers' Compensation Act applies to all employers and
employees, with specific exceptions. § 39-71-401, MCA.
Questions might arise about the applicability to water
commissioners of the "casual employee" or "independent
contractor" exceptions. However, the detailed statutory
basis of the position of water commissioner (Title 85,
chapter 5, MCA) rules out the application of either of
those two exceptions. §§ 39-71-116(3), 39-71-120, MCA.
Therefore, as you have properly recognized, the only
question is: Who is the "employer" for purposes of
workers' compensation?

The Montana Supreme Court has addressed the question of
the existence of the employer-employee relationship many
times:

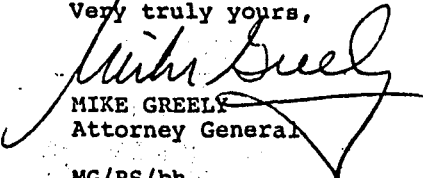
"The test to determine whether or not an
employer-employee relationship exists...is the

SENATE LABOR & EMPLOYMENT

THEREFORE, IT IS MY OPINION:

When a district court judge appoints a water commissioner pursuant to Title 85, chapter 5, MCA, the district court judge is considered the employer for the purpose of payment of workers' compensation.

Very truly yours,


MIKE GREELY
Attorney General

MG/RS/bh

so called control test. Under that test an individual is in the service of another when that other has the right to control the details of the individual's work." State ex rel. Ferguson v. District Court (1974), 164 Mont. 84, 88, 519 P.2d 151, 153.

Carlson v. Cain, 40 St. Rptr. 865 at 872, 664 P.2d 913 (1981). See also Sharp v. Hoerner Waldorf Corporation, 178 Mont. 419, 424, 584 P.2d 1298, 1301 (1974); Kimball v. Industrial Accident Board, 138 Mont. 445, 449, 357 P.2d 688, 691 (1960). The Court usually employs the control test to determine if the employment relationship exists with a known employer; but the Court has also spoken in cases analogous to this one:

[W]hile this test [the control test] has most often been used to determine whether or not an individual was an independent contractor or an employee, it may also be used to determine who the employer is, in a given situation. Biggart v. Texas Eastern Transmission Corp. (Miss.1970), 235 So.2d 443. Under this test an employee will have been transferred from one employer to another when the right to control the details of his work has passed from one to another.

State ex rel. Ferguson v. District Court, 164 Mont. 84, 88, 519 P.2d 151 (1974).

Thus, we must apply the control test in this situation. Montana statutes clearly establish that the district judge has the right to control the details of the water commissioner's work:

Upon the determination of the hearing [upon the complaint of dissatisfied water user], the judge shall make such findings and order as he considers just and proper. If it appears to the judge that the water commissioner or water commissioners have not properly distributed the water according to the provisions of the decree, the judge shall give the proper instructions for such distribution. The judge may remove any water commissioner and appoint some other person in his stead if he considers that the interests of the parties in the waters mentioned in the decree will be best subserved thereby, and if it appears to the judge that the water commissioner has willfully failed to perform his duties, he may be proceeded against for contempt of court, as provided in contempt cases. The judge shall make such order as to the payment of costs of the hearing as appears to him to be just and proper.

§ 85-5-301(2), MCA.

I conclude that although the affected water users have the duty to pay a water commissioner's compensation and expenses as authorized by law, for the purposes of the Montana Workers' Compensation Act, the district court judge is the water commissioner's employer.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 2/19/87
BILL NO. SB-319

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

JAN 12 1988



TED SCHWINDEN, GOVERNOR

1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699

HELENA, MONTANA 59620

January 8, 1987

The Honorable Henry Loble
District Court
First Judicial District
County Courthouse
Helena, MT 59601

RE: Workers' Compensation Act Coverage of Water Commissioners

Dear Judge Loble:

As a follow up to our correspondence of this past May I have drafted two proposals that would remove water commissioners from coverage under the Workers' Compensation Act. Copies are enclosed for your review. By copy of this letter I have forwarded copies to Mr. Bob Robinson, Administrator of the Workers' Compensation Division.

I have reviewed the proposed legislation with Mr. Fasbender and have concluded that this agency does not have a sufficient interest in the legislation to request introduction of it. If, however, either proposal, or similar legislation is introduced, this agency would not oppose the legislation and depending upon the comments of the Workers' Compensation Division, could support the legislation.

Although I will make these proposals available to any senator or representative who may be interested in sponsoring the legislation I do not have authorization as an employee of the Department of Natural Resources and Conservation to solicit a sponsor for either proposal. If you or the Division of Workers' Compensation are interested in pursuing legislation I will provide the appropriate bill drafting request to whomever you designate.

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 6

DATE 2/19/87

BILL NO. SB 316

The Honorable Henry Loble
January 8, 1987
Page 2

Please advise me on how you wish me to proceed in this matter.

Sincerely,



DONALD D. MACINTYRE
Legal Counsel

DDM/lt

cc: Bob Robinson

Enclosures

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 2/19/87
BILL NO. SB 3/9

L.C. _____

BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF _____

A BILL FOR AN ACT ENTITLED: "AN ACT DEFINING THE ACTIVITIES OF
A PERSON APPOINTED AS A WATER COMMISSIONER UNDER SECTION 85-5-101,
MCA, AS CASUAL EMPLOYMENT FOR PURPOSES OF WORKERS' COMPENSATION;
AMENDING SECTION 39-71-116, MCA; AND PROVIDING AN IMMEDIATE
EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 39-71-116, MCA, is amended to read:

39-71-116. Definitions. Unless the context otherwise requires, words and phrases employed in this chapter have the following meanings:

(1) "Average weekly wage" means the mean weekly earnings of all employees under covered employment, as defined and established annually by the Montana department of labor and industry. It is established at the nearest whole dollar number and must be adopted by the division of workers' compensation prior to July 1 of each year.

(2) "Beneficiary" means:

(a) a surviving wife or husband;

(b) an unmarried child under the age of 18 years;

(c) an unmarried child under the age of 25 years who is a full-time student in an accredited school;

(d) an invalid child over the age of 18 years who is dependent upon the decedent for support at the time of injury;

(e) a parent who is dependent upon the decedent for support at the time of the injury (however, such a parent is a beneficiary only when no beneficiary, as defined in subsections (2)(a) through (2)(d) of this section, exists); and

(f) a brother or sister under the age of 18 years if dependent upon the decedent for support at the time of the injury (however, such a brother or sister is a beneficiary only until the age of 18 years and only when no beneficiary, as defined in subsections (2)(a) through (2)(e) of this section, exists).

(3) "Casual employment" means employment not in the usual course of trade, business, profession, or occupation of the employer. Any person hauling or assisting in hauling of sugar beets or grains, in case of emergency, is considered engaged in casual employment.

Any person appointed as a water commissioner pursuant
to 85-5-101 is considered engaged in casual employment.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. _____
DATE 3/10/07
BILL NO. SR 310

(4) "Child" includes a posthumous child, a dependent stepchild, a child legally adopted prior to the injury, and an illegitimate child legitimized prior to the injury.

(5) "Division" means the division of workers' compensation of the department of labor and industry provided for in 2-15-1702.

(6) "Fiscal year" means the period of time between July 1 and the succeeding June 30.

(7) "Husband" or "widower" means only a husband or widower living with and legally entitled to be supported by the deceased at the time of her injury.

(8) "Insurer" means an employer bound by compensation plan No. 1, an insurance company transacting business under compensation plan No. 2, the industrial insurance account under compensation plan No. 3, or the uninsured employers' fund provided for in part 5 of this chapter.

(9) "Invalid" means one who is physically or mentally incapacitated.

(10) "Order" means any decision, rule, direction, requirement, or standard of the division or any other determination arrived at or decision made by the division.

(11) "Payroll", "annual payroll", or "annual payroll for the preceding year" means the average annual payroll of the employer for the preceding calendar year or, if the employer shall not have operated a sufficient or any length of time during such calendar year, 12 times the average monthly payroll for the current year; provided, that an estimate may be made by the division for any employer starting in business where no average payrolls are available, such estimate to be adjusted by additional payment by the employer or refund by the division, as the case may actually be on December 31 of such current year.

(12) "Permanent partial disability" means a condition resulting from injury as defined in this chapter that results in the actual loss of earnings or earning capability less than total that exists after the injured worker is as far restored as the permanent character of the injuries will permit. Disability shall be supported by a preponderance of medical evidence.

(13) "Permanent total disability" means a condition resulting from injury as defined in this chapter that results in the loss of actual earnings or earning capability that exists after the injured worker is as far restored as the permanent character of the injuries will permit and which results in the worker having no reasonable prospect of finding regular employment of any kind in the normal labor market. Disability shall be supported by a preponderance of medical evidence.

(14) The term "physician" includes "surgeon" and in either case means one authorized by law to practice his profession in this state.

(15) "The plant of the employer" includes the place of business of a third person while the employer has access to or control over such place of business for the purpose of carrying on his usual trade, business, or occupation.

(16) "Public corporation" means the state or any county, municipal corporation, school district, city, city under commission form of government or special charter, town, or village.

(17) "Reasonably safe place to work" means that the place of employment has been made as free from danger to the life or safety of the employee as the nature of the employment will reasonably permit.

(18) "Reasonably safe tools and appliances" are such tools and appliances as are adapted to and are reasonably safe for use for the particular purpose for which they are furnished.

(19) "Temporary total disability" means a condition resulting from an injury as defined in this chapter that results in total loss of wages and exists until the injured worker is as far restored as the permanent character of the injuries will permit. A worker shall be paid temporary total disability benefits during a reasonable period of retraining. Disability shall be supported by a preponderance of medical evidence.

(20) "Wages" means the average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week, and overtime is not to be considered. Sick leave benefits accrued by employees of public corporations, as defined by subsection (16) of this section, are considered wages.

(21) "Wife" or "widow" means only a wife or widow living with or legally entitled to be supported by the deceased at the time of the injury.

(22) "Year", unless otherwise specified, means calendar year.

Section 2. Effective date. This act is effective on passage and approval.

-End-

SENATE LABOR & EMPLOYMENT
EXH. NO. 1
DATE 2/1/18
BILL NO. 319

L.C. _____

BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF _____

A BILL FOR AN ACT ENTITLED: "AN ACT EXEMPTING WATER COMMISSIONERS
APPOINTED UNDER SECTION 85-5-101, MCA, FROM EMPLOYMENT COVERAGE
UNDER THE WORKERS' COMPENSATION ACT; AMENDING SECTION 39-71-401,
MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 39-71-401, MCA, is amended to read:

"39-71-401. Employments covered and employments exempted. (1) Except as provided in subsection (2) of this section, the Workers' Compensation Act applies to all employers as defined in 39-71-117 and to all employees as defined in 39-71-118. An employer who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3. Every employee whose employer is bound by the Workers' Compensation Act is subject to and bound by the compensation plan that has been elected by the employer.

(2) Unless the employer elects coverage for these employments under this chapter and an insurer allows such an election, the Workers' Compensation Act does not apply to any of the following employments:

(a) household and domestic employment;

(b) casual employment as defined in 39-71-116(3) except employment of a volunteer under 67-2-105;

(c) employment of members of an employer's family dwelling in the employer's household;

(d) employment of sole proprietors or working members of a partnership other than those who consider themselves or hold themselves out as independent contractors and who are not contracting for agricultural services to be performed on a farm or ranch, or for broker or salesman services performed under a license issued by the board of realty regulation, or for services as a direct seller engaged in the sale of consumer products to customers primarily in the home;

(e) employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States;

(f) any person performing services in return for aid or sustenance only, except employment of a volunteer under 67-2-105;

(g) employment with any railroad engaged in interstate commerce, except that railroad construction work shall be included in and subject to the provisions of this chapter;

SENATE LABOR & EMPLOYMENT
ENACTED NO. 1
DATE 2/10/87
BILL NO. SB 316

(h) employment as an official, including a timer, referee, or judge, at a school amateur athletic event, unless the person is otherwise employed by a school district;

(i) any person performing services as a water commissioner appointed under 85-5-101.

(3) A sole proprietor or working member of a partnership who holds himself out or considers himself an independent contractor and who is not contracting for agricultural services to be performed on a farm or ranch, or for broker or salesman services performed under a license issued by the board of realty regulation, or for services as a direct seller engaged in the sale of consumer products to customers primarily in the home must elect to be bound personally and individually by the provisions of compensation plan No. 1, 2 or 3, but he may apply to the division for an exemption from the Workers' Compensation Act for himself. The application must be made in accordance with the rules adopted by the division. The division may deny the application only if it determines that the applicant is not an independent contractor. When an application is approved by the division, it is conclusive as to the status of an independent contractor and precludes the applicant from obtaining benefits under this chapter.

(4) Each employer shall post a sign in the workplace at the locations where notices to employees are normally posted, informing employees about the employer's current provision of compensation insurance. A workplace is any location where an employee performs any work-related act in the course of employment, regardless of whether the location is temporary or permanent, and includes the place of business or property of a third person while the employer has access to or control over such place of business or property for the purpose of carrying on his usual trade, business, or occupation. The sign will be provided by the division, distributed through insurers or directly by the division, and posted by employers in accordance with rules adopted by the division. An employer who purposely or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation. "

Section 2. Effective date. This act is effective on passage and approval.

-End-

SENATE LABOR & EMPLOYMENT
L.R. /
DATE 3/12/77
BILL NO. 3197



District Court

First Judicial District

County Courthouse

Helena, Montana 59601

May 15, 1986

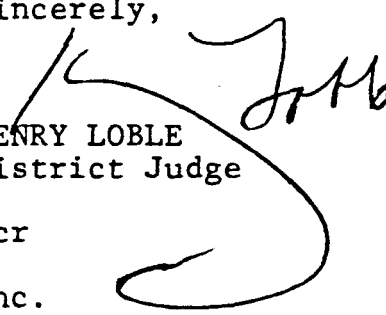
Mrs. Nellie B. Sayer
Clerk of District Court
P. O. Box 1158
Townsend, MT 59644

Re: Workers' Comp. for Water Commissioners

Dear Nellie:

As you can see from the enclosed, the question of who pays Workers' Compensation for water commissioners is in some confusion. Until it gets straightened out, I would suggest that the Beaver Creek Water Users Association continue to pay for Workers' Compensation benefits for their water commissioner. It doesn't appear to me that the question is going to be resolved for a while.

Sincerely,


HENRY LOBLE
District Judge

/cr

Enc.

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 1

DATE 2/19/97

BILL NO. SB 316



District Court

First Judicial District

County Courthouse

Helena, Montana 59601

May 15, 1986

Donald D. MacIntyre
Chief Legal Counsel
Department of Natural Resources
1520 East Sixth Avenue
Helena, MT 59620

Re: Workers' Comp. for Water Commissioners

Dear Don:

Enclosed is Chief Water Judge W. W. Lessley's reply of May 14, 1986 to my letter of May 13, 1986.

If Attorney General's Opinion No. 56 contemplates that District Judges will pay for Workers' Compensation benefits for water commissioners they appoint, I don't know where the money is supposed to come from. Do you? Has the Supreme Court ever been asked to provide these funds? I am sure Lewis and Clark and Broadwater Counties have never budgeted for any such items. It is my understanding the Attorney General's Opinions are the law until changed by a court. The question ruled upon by the Attorney General has never been presented to me for decision and, so far as I know, to any other District Court in the state.

Don, I would very much appreciate your comments on this situation. You might wish to discuss this with Steve Shapiro, attorney for Workers' Compensation. When I talked to him, I got the impression that he thought Workers' Compensation coverage was required for water commissioners.

I would appreciate hearing from you.

Sincerely yours,


HENRY LOBLE
District Judge

cc: Hon. W. W. Lessley
Steve Shapiro
Nellie Sayer

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 2/9/87
BILL NO. SB 319

State of Montana



District Court

First Judicial District

County Courthouse

Helena, Montana 59601

January 13, 1987

Honorable Senator Joe Mazurek
Capitol Station
Helena, Montana 59620

Re: Workers' Compensation Act
Coverage of Water Commissioners

Dear Joe:

Enclosed is correspondence I have received from Don MacIntyre, legal counsel for the Department of Natural Resources and Conservation.

Some time ago it came to my attention that "ditch riders" appointed by the district courts to administer distribution of water on various streams throughout the state are required to have Workers' Compensation. The thought was that ditch riders are employees of the judge. However, the judge has no funds with which to pay the premiums for Workers' Compensation insurance. Moreover, the users of water on the stream are not, generally speaking, inclined to pay any such thing. In addition, who would do the paperwork? As a result in most cases, the ditch riders simply do not have any Workers' Compensation at all.

It would be my view that they should be exempted from Workers' Compensation by use of one of Don's proposed bills unless the state wishes to set up a fund which would pay the premiums.

Don suggests one of the two enclosed bills drafted by him might be enacted to cure this difficulty. The first proposal would have the water commissioners defined as casual employees and thus exempt from Workers' Comp and the second proposal would be to simply say that the water commissioners are not required to have Workers' Comp. I do not see that it would make much difference how it was done. However, I will send a copy of this to Mr. Shapiro, the attorney for Workers' Comp, and if he has any comment, he will no doubt get in touch with you.

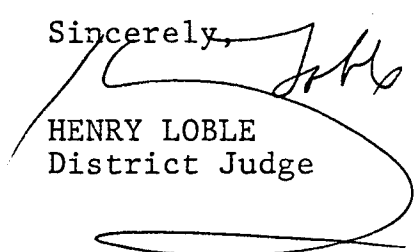
SENATE
EXHIBIT
DATE 2/19/87
BILL NO. 513 31-9

Honorable Senator Joe Mazurek
January 13, 1987
Page Two

It would be appreciated, Joe, if you could introduce such a bill or get someone else to do it who might be interested in the subject. As it is, it is a very confused situation.

Enclosed is a copy of my file on this matter. Of particular interest is the Attorney General's Opinion.

Sincerely,



HENRY LOBLE
District Judge

pc: Donald D. MacIntyre
Steve Shapiro
The Honorable W. W. Lessley
Encs.

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 1

DATE 12/19/87

BILL NO. SB 3/7

OUTLINE OF TESTIMONY BY
STEVEN J. SHAPIRO, CHIEF LEGAL COUNSEL OF
DIVISION OF WORKERS' COMPENSATION OF
DEPARTMENT OF LABOR AND INDUSTRY

IN OPPOSITION TO SB 319

REGARDING EXEMPTION OF WATER COMMISSIONERS
FROM MANDATORY WORKERS COMPENSATION COVERAGE

The Department of Labor and Industry opposes SB319 which has been introduced in order to exempt water commissioners from the mandatory coverage requirements of the Workers' Compensation Act.

The Legislature has established that workers' compensation insurance is a basic benefit of employment which must be provided to all Montana workers with few exceptions. Workers who are not covered by insurance may be left to suffer medical expenses and wage loss without any assistance at all resulting in economic and social disaster for the injured workers.

In 1984, the Attorney General issued an opinion indicating that for the purposes of the Workers Compensation Act, the district judges who appoint the water commissioners are their employers and should provide insurance coverage. However, the district judges have not been including them in payroll reports for premium assessment purposes. The dispute here seems to be budgetary rather than involving a questions of whether the water commissioners should have coverage. Neither the district

SENATE LABOR & EMPLOYMENT

ENH. 2

DATE 2/19/27

BILL NO. SB 319

courts nor the water courts have budgeted for insurance coverage. Certainly this problem can be taken care of by budget revision rather than an exemption of workers who should have the safeguard of insurance coverage.

The Legislature should not encourage erosion of the mandatory coverage of the Workers Compensation Act by allowing this exemption. The Department urges the Committee to recommend that SB 319 do not pass.

>>>> END <<<<

February 19, 1987

Helena, Montana

SENATE LABOR & EMPLOYMENT

FILED

DATE

BILL NO

2

2/19/87

SB 319



NATIONAL BOARD 1985 INCIDENT REPORT



INITIAL PART FAILURE	CAUSES							TYPE OF FAILURES							NUMBERS		
	Low Water Cut-off	Faulty Design Fabrication or Installation	Corrosion or Erosion	Operator Error or Poor Maintenance	Burner Failure	Pressure Control Failure	Other	Burned or Overheated	Collapsed Inward	Combination Explosion	Cracked	Torn Assumers (rupture)	Leakage	Other	Accidents	Injuries	Deaths
POWER BOILERS																	
Tube	91	9	108	85	12		65	121	13	3	65	51	11	22	336		
Shell	11	1	42	13	1	1	7	17		3	16		12	32	74	6	
Drum	142	1	7	1		3		4			5		4	3	27	4	
Furnace	16	3	11	22	12	1	12	9	10	13	18	9	3	5	81	9	1
Tube Sheet	31	2	18	12	2	2	13	16	7	1	33	10	9	9	80	1	
Header		1	4										2	3	3		
Piping	1	4	6	4		1	6			1	10	4	9	3	23	20	12
Safety Valves		12					29					11		30	41		
Miscellaneous	5	11	11	6	14	3	44	20	4	8	19	4	6	35	76		
STEAM AND HOT WATER STEEL HEATING BOILERS AND FIRED HOT WATER STORAGE TANKS															741 Subtotals	40	13
Tube	180	12	78	32	14	4	44	157	1	2	44	14	133	9	358	1	
Shell	125	11	55	25	6	2	12	133	1	2	19	11	27	3	197	3	3
Drum	6		2	4			1	4			2	2	1	1	9	1	1
Furnace	93	8	4	33	11	2	17	50	8	15	29	62	5	9	171	6	1
Tube Sheet	34	4	15	42	4		12	46	1		35	1	22	4	112	1	
Header	2		1	2		1	3	1			4	1	1		10	1	
Piping	3	4	6	4		1	18	3	1		10	9	13	2	36	4	
Safety Valves		206					6					2		300	316	2	
Miscellaneous	10	6	18	9	15		59	12	4	11	22	3	23	36	345	21	2
CAST IRON BOILERS															1554 Subtotals	40	7
Sections	622	32	101	662	40	5	184	41		5	882	15	316	11	1146	5	
Tie Rods		7			1			1			1	6			8	1	
Burners	3			4	12	2	1	7		3	1			9	21		
Piping	1	1	10	4	1	5	22				11	5	20	7	44		
Safety Valves		1	1	3			1				2		1	1	15	1	
Miscellaneous																	
PRESSURE VESSELS															1234 Subtotals	7	0
Shell	1	15	87	21	1	9	17	6	9	6	33	50	73	12	152	177	33
Head		7	55	12		5	3	2	4	1	10	18	2	40	36	14	8
Attachments		11	13	11		1	2			1	25	7	3	9	32	36	15
Piping	1	8	11	26	1	1	20			1	13	9	26	12	52	22	5
Safety Valves		2	4	3	1		40				1	8	4	17	25		
Miscellaneous	3	10	53	11	2	3	65	10		2	57	18	73	33	180	20	17
															477 Subtotals	269	78
															4006 Totals	356	98

The above report was compiled from data submitted by National Board Jurisdictional Authorities and Authorized Inspection (insurance) Agencies. It also includes material submitted from several insurance companies that insure boilers but do not provide inspection services.

SENATE LABOR & EMPLOYMENT

DATE 2/19/87

BILL NO. 513 3 56



NATIONAL BOARD 1985 INCIDENT REPORT



INITIAL PART FAILURE	CAUSES							TYPE OF FAILURES							NUMBERS		
	Low Water Cut-off	Faulty Design Fabrication or Installation	Corrosion or Erosion	Operator Error or Poor Maintenance	Burner Failure	Pressure Control Failure	Other	Burned or Overheated	Collapsed Inward	Combination Explosion	Cracked	Torn Assunders (rupture)	Leakage	Other	Accidents	Injuries	Deaths
POWER BOILERS																	
Tube	91	9	108	85	12		65	121	13	3	65	51	11	22	336		
Shell	11	1	42	13	1	1	7	17		3	16		12	32	74	6	
Drum	142	1	7	1		3		4			5		4	3	27	4	
Furnace	16	3	11	22	12	1	12	9	10	13	18	9	3	5	81	9	
Tube Sheet	31	2	18	12	2	2	13	16	7	1	33	10	9	9	80	1	
Header		1	4										2	3	3		
Piping	1	4	6	4		1	6			1	10	4	9	3	23	20	12
Safety Valves		12					29					11		30	41		
Miscellaneous	5	11	11	6	14	3	44	20	4	8	19	4	6	35	76		
STEAM AND HOT WATER STEEL HEATING BOILERS AND FIRED HOT WATER STORAGE TANKS															741	40	13
															Subtotals		
Tube	180	12	78	32	14	4	44	157	1	2	44	14	133	9	358	1	
Shell	125	11	55	25	6	2	12	133	1	2	19	11	27	3	197	3	
Drum	6		2	4			1	4			2	2	1	1	9	1	
Furnace	93	8	4	33	11	2	17	50	8	15	29	62	5	9	171	6	1
Tube Sheet	34	4	15	42	4		12	46	1		35	1	22	4	112	1	
Header	2		1	2		1	3	1			4	1	1		10	1	
Piping	3	4	6	4		1	18	3	1		10	9	13	2	36	4	
Safety Valves		206					6					2		300	316	2	
Miscellaneous	10	6	18	9	15		59	12	4	11	22	3	23	36	345	21	
CAST IRON BOILERS															1554	40	7
															Subtotals		
Sections	622	32	101	662	40	5	184	41		5	882	15	316	11	1146	5	
Tie Rods		7			1			1			1	6			8	1	
Burners	3			4	12	2	1	7		3	1			9	21		
Piping	1	1	10	4	1	5	22				11	5	20	7	44		
Safety Valves		1	1	3			1				2		1	1	15	1	
Miscellaneous																	
PRESSURE VESSELS															1234	7	
															Subtotals		
Shell	1	15	87	21	1	9	17	6	9	6	33	50	73	12	152	177	3
Head		7	55	12		5	3	2	4	1	10	18	2	40	36	14	8
Attachments		11	13	11		1	2			1	25	7	3	9	32	36	15
Piping	1	8	11	26	1	1	20			1	13	9	26	12	52	22	5
Safety Valves		2	4	3	1		40				1	8	4	17	25		
Miscellaneous	3	10	53	11	2	3	65	10		2	57	18	73	33	180	20	17
															Subtotals	477	269
															Totals	4006	356

The above report was compiled from data submitted by National Board Jurisdictional Authorities and Authorized Inspection (insurance) Agencies. It also includes material submitted from several insurance companies that insure boilers but do not provide inspection services.

SENATE APPROVED

2/11/87

50 352

TESTIMONY TO SENATE LABOR & EMPLOYMENT RELATIONS ON S.B. 350
February 19, 1987

My name is Rondy Crawford and I am the elected Business Manager/ Secretary-Treasurer of the International Brotherhood of Boiler-makers Local 11, whose jurisdiction covers the entire state of Montana and represents approximately 250 members across the state.

I am here today to give total support to S.B. 350 that would require the state of Montana to establish a licensing law for individuals performing work on boiler and pressure vessels. This law would ensure the people of Montana and their property situated in this state would be properly protected from potential hazards of explosions or fires resulting from improperly maintained boilers or pressure vessels operating in Montana.

Let me present you with a couple of facts I compiled from the National Board of Boiler and Pressure Vessel Inspectors booklet entitled, "The overdue Entitlement: Equal Safety for All".

Not long ago in a day care center in a major U.S. city, a boiler exploded. The center itself was destroyed, five people were killed, four of them children. Another seven became amputees and another 20 were burned badly enough to require skin grafts. The public outcry was enormous. Why did this happen? More than a dozen clues all pointed to the same reason. Periodic inspection had not been performed to ensure the boiler's safety.

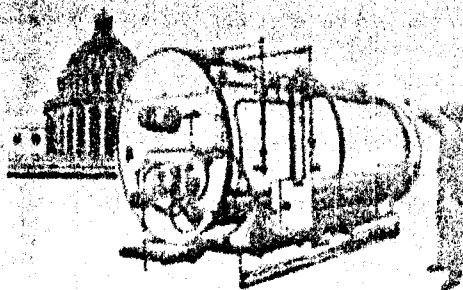
In 1980, at least twenty-two (22) people were killed by boiler and pressure vessel explosions, but because these explosions are so relatively rare people sometimes take boiler and pressure vessel safety for granted.

Currently Montana has a boiler law in effect, but this such law is not effectively enforced, and Montana does not have the protection of a pressure vessel law. In fact, Montana has exemptions from the codes which have been granted to certain industries such as Military installations, railroads, Indian territories, and federal buildings. These exemptions permit weaker codes, or sometimes, no code at all.

S.B. 350 would require that all individuals installing and/or servicing pressure vessel and boilers located anywhere in this state are adequately trained, tested and licensed for this vital, yet often overlooked service. I have cited only two examples of the potentially disastrous effect resulting from inadequately installed or maintained boiler and pressure vessel systems. Preventative measures are almost always the most economical. I encourage you to support passage of S.B. 350, keeping in mind the safety and protection of the lives and property of the many Montana citizens it will effect.

Thank you.

SENATE LABOR & EMPLOYMENT
DATE 2/19/87
BILL NO. SB 350



The Overdue Entitlement

Equal Safety

for All

SENATE COMMITTEE ON LABOR & INDUSTRY

DATE _____
BILL NO. _____

**NATIONAL BOARD OF BOILER
AND PRESSURE VESSEL INSPECTORS**

1045 Cropper Avenue, Columbus, Ohio 43229

614/866-8200

NS-138





JAMES W. MURRY
EXECUTIVE SECRETARY

Box 1176, Helena, Montana

ZIP CODE 59624
406/442-1708

TESTIMONY OF DON JUDGE ON SENATE BILL 359 BEFORE THE SENATE LABOR AND EMPLOYMENT
RELATIONS COMMITTEE, FEBRUARY 19, 1987

Good afternoon, Mr. Chairman and members of the committee. For the record, my name is Don Judge and I am here today on behalf of the Montana State AFL-CIO to testify in support of Senate Bill 359.

Members of the committee, our organization obviously favors the idea of tying the Montana minimum wage law to the federal wage guidelines. However, our support of SB 359 reflects a desire to correct a discrepancy within Montana's wage and overtime statutes that was caused by an act of congress and subsequent interpretation by Montana's attorney general.

In 1986, the congress amended the Fair Labor Standards Act and applied its provisions to employees -- particularly certain public employees -- not covered under the federal Fair Labor Standards Act (FLSA).

After this congressional amendment was enacted, the Lewis and Clark County Sheriff's Department requested a Montana attorney general's ruling on the applicability of the Fair Labor Standards Act, as amended, and its effects on Montana's minimum wage and overtime statutes.

The effect of the Montana attorney general's ruling is that wherever the Fair Labor Standards Act applies, state laws are no longer applicable.

The implications of this decision extended far beyond sheriff's deputies or even all covered public employees. The attorney general's opinion regarding the Fair Labor Standards Act applies to private sector employees in Montana as well.

This application of the Fair Labor Standards Act effectively reversed a decision by the 1985 legislature to raise Montana's minimum wage to \$3.35, without off-setting credit for tipped employees.

Let me explain. Under federal law, employers covered under the FLSA may withhold up to 40 percent of minimum wages paid, which must then be made up by tips (gratuities) received by employees.

For example, employees covered under FLSA guidelines must currently receive a \$3.35 per hour minimum wage. An employer may pay as little as \$2.01 per hour in wages, so long as the employee receives tips of at least \$1.34 per hour.

In 1985, the hotel and restaurant industry joined with other employers to support raising Montana's minimum wage to \$3.35 per hour which would off-set any wages resulting from tips paid to employees.

SENATE LABOR & EMPLOYMENT

EXHIBIT 5

DATE 2/19/87

BILL NO. SB 359

February 19, 1987

In fact, each of Montana's minimum wage levels established before the \$3.35 per hour floor was enacted, were recognized by all Montana industries as the minimum hourly compensation to be paid in wages only.

Unfortunately, the attorney general's decision negated the intent of the 1985 legislature by issuing its broad application of the FLSA.

We stand before you today to state our firm belief that standards set forth by Montana's minimum wage and overtime laws should be the minimum acceptable for all workers, regardless of FLSA guidelines.

It is our opinion that the intent of the 1985 Montana legislature was to guarantee that Montana's minimum wage of \$3.35 would be the minimum wage paid to all Montana workers, even if their vocations entitled them to patron gratuities such as tips.

For this reason, we urge you to support Senate Bill 359.

SENATE LABOR & EMPLOYMENT

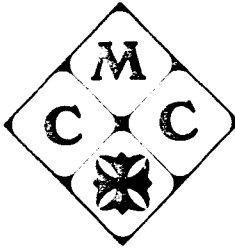
EXHIBIT NO. 5DATE 2/9/87BILL NO. SB 359

AMENDMENTS TO SB359 (introduced bill)

1. Page 3, line 1
Following: "employees."
Strike; the remainder of line 1 through "(section 4)." on line 3
2. Page 3, line 4 through line 7
Add: (a) at least \$3.05 an hour after September 30, 1985
and before October 1, 1986
(b) at least \$3.35 an hour on October 1, 1986, and
and thereafter.
3. Page 4, line 8
Following: "salaries"
Strike: "but"
Insert: "and"
Following: "shall"
Strike: "not"
4. Page 4, lines 9 and 10
Following: "Act"
Strike: the remainder of line 9 through line 10.
5. Page 4, lines 11 through 14
Strike: lines 11 through 14
6. Page 4, line 15
Following: "NEW SECTION. Section"
Strike: "5"
Insert: "4"
7. Page 4, line 19
Following: "NEW SECTION: Section"
Strike: "6"
Insert: "5"
7. Page 4, line 23
Following: "NEW SECTION. Section"
Strike: "7"
Insert: "6"

SENATE LABOR & EMPLOYMENT

FILE NO. 5
DATE 2/9/87
BILL NO. SB 359



Montana Catholic Conference

February 19, 1987

SENATOR LYNCH AND MEMBERS OF THE SENATE LABOR AND EMPLOYMENT COMMITTEE:

I am John Ortwein representing the Montana Catholic Conference. I am here today to speak in favor of S.B. 359.

A report entitled, "The Future of Work" released in 1983 by the AFL-CIO made the following statement: Much of the job growth in the 1980's is expected to be in the traditionally low-paying, high-turnover jobs such as sales, clerical, janitorial and food service. Too often these jobs do not have career ladders leading to higher-skilled higher-paying jobs. Often workers are forced into a choice between an inadequate wage or no wage at all.

Justice, not charity, demands that workers receive certain minimum guarantees.

It would seem to us that ^{raising} ~~raising~~ the Montana minimum wage to comply with the federal minimum wage would help workers to better support themselves and their families in dignity.

We urge your support for S.B. 359.

SENATE LABOR AND EMPLOYMENT

EXHIBIT NO. 42

DATE 2/19/87

BILL NO. SB 359

WOMEN'S LOBBYIST FUND

EX-103
FEB 19 1987
S-S-717

Testimony in support of SB 359
Senate Labor & Employment Committee
February 19, 1987

Mr. Chairman, members of the committee:

My name is Jackie Amsden and I represent the Women's Lobbyist Fund.

We support SB 359 because it amends the minimum wage law to do what it was originally intended to do. SB 359 would correct the discrepancy that arose as a result of an April 1986 Attorney General's opinion.

Because of this opinion, some restaurants have been getting away with paying their waitresses less than the minimum wage of \$3.35. Businesses that gross over \$362,500 can let tips from customers make up 40 percent of the minimum wages that businesses should be paying. This means that some restaurants -- the larger businesses -- are paying their waitresses just \$2.01 an hour. But small businesses still are required to pay employees at least \$3.35 an hour.

And women are bearing a disproportionate burden because of this discrepancy. Most tipped employees, such as waitresses, are women. According to 1980 census data, waitresses outnumber their male counterparts 17 to 1 in Montana.

But women really cannot afford to bear this extra burden: the poverty rate for households headed by women is six times that of households headed by men. (Women's Economic Agenda, July 1984).

And when workers cannot afford to feed their families, taxpayers have to make up the loss. In fact, 80 percent of AFDC recipients are women. All taxpayers are being required to subsidize employers who do not have to pay their employees enough to live on. (Figure from Women's Economic Agenda, July 1984).

For these reasons, the Women's Lobbyist Fund urges you to give SB 359 a do pass recommendation.

SENATE LABOR & EMPLOYMENT

EXHIBIT 7

DATE 2/19/87

BILL NO. SB 359

THE INTERPRETATION OF MONTANA'S MINIMUM WAGE LAW FAILS TO MEET LEGISLATIVE INTENT.

SB 359 returns Montana's Minimum Wage Law to where it was before the Attorney General's decision in April, 1986.

Before the Attorney General's opinion in April 1986, when an occupation was covered by both federal and state law, the law providing the most benefits to the employee applied. This is what the federal law requires, and what is done in other states.

After the Attorney General's opinion, when an occupation is covered by the federal law, the state law does not apply.

Federal Labor Standards Act

Montana Minimum Wages & Maximum Hours Act

-tip credits allowed

-tip credits not allowed

-\$3.35/hour, or \$2.01
if employees are tipped

-\$3.35/hour after 10/1/86

-applies only to businesses
grossing over \$362,500

-applies only to areas specifically
exempted from FSLA

Big restaurants can pay tipped employees \$2.01 an hour, but small restaurants are required to pay \$3.35 an hour. Businesses making over \$362,500 annually are subject to the federal law, which allows tips to be used in the computation of 40 percent of the minimum wage, and 40 percent of \$3.35 is \$2.01. However, businesses making under \$362,500 are subject to Montana law, and cannot use tip credits.

WOMEN ARE BEARING A DISPROPORTIONATE BURDEN BECAUSE OF THIS MISINTERPRETATION.

- * Waitresses outnumber their male counterparts 17 to 1 in Montana, according to 1980 census data.
- * 23 percent of working women are employed as service employees, according to the U.S. Department of Labor's 1985 statistics. This includes health service workers, however, who are not tipped.
- * The poverty rate for households headed by women is six times that of households headed by men nationwide. (Women's Economic Agenda, July, 1984).
- * Women are 80 percent of AFDC recipients and 60 percent of all social service recipients nationwide. (Women's Economic Agenda, July, 1984).

When employers start paying their workers enough money to feed their families, taxpayers will stop subsidizing women's wages.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 7
DATE 2/19/87
BILL NO. SB 359

AMENDMENTS TO SB359 (introduced bill)

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Following: "NEW SECTION: Section"
Strike: "6"
Insert: "5"
8. Page 4, line 23
Following: "NEW SECTION. Section"
Strike: "7"
Insert: "6"

not complete

STATEMENT OF INTENT

SENATE BILL NO. 350

A statement of intent is required for this bill because section 3 provides the division of workers' compensation authority to adopt rules for administration of sections 2 through 12 and to establish minimum safety standards. Section 3 also allows the division to adopt standards for persons performing welding on boilers and pressure vessels.

It is the intent of the legislature that, in adopting rules, the division consider the regulations adopted by the Oregon board of boiler rules pursuant to Or. Rev. Stat. 480.510 through 480.665.

The legislature further intends that, in adopting minimum safety standards, the division incorporate provisions of the boiler and pressure vessel code of the American society of mechanical engineers. The division may also use the code on pressure piping established by the American society of mechanical engineers.

Finally, it is intended that the division establish fees for licensure and examination. Such fees should cover the costs of administering the services required under this act.

AMENDMENT TO SB 350

1. Page 4, line 11.
Following: "or"
Strike: "caused"
Insert: "cause"

STATEMENT OF INTENT

____ Bill No. SB 359

A statement of intent is required for this bill because section 4 provides the commissioner of labor and industry authority to adopt rules establishing the state minimum wage.

It is the express intent of the legislature that the commissioner determine by rule the state minimum wage that must be paid employees under 39-3-404. The legislature intends that the minimum wage be the same minimum hourly wage rate established under the Fair Labor Standards Act, 29 U.S.C. 206.

It is intended that, under this act, the state minimum wage be maintained at federal minimum wage levels. Therefore, the commissioner should revise the state minimum wage in accordance with any changes in the federal minimum wage rate enacted by congress after January 1, 1988.