MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON LABOR AND EMPLOYMENT RELATIONS

Call to Order: By Chairman Russell, on January 26, 1989, at 3:00 p.m.

ROLL CALL

Members Present: All Present.

Members Excused: None

Members Absent: None

Staff Present: Eddye McClure, Staff Attorney.

Announcements/Discussion: None

HEARING ON HB 156

Presentation and Opening Statement by Sponsor:

CLYDE SMITH: The statutory qualifications governing coal mine and boiler inspectors make it extremely difficult to find someone with those requirements who are also willing to work for state government, in other words, we don't pay enough. Frequently applicants are available and ready to work and are qualified for the inspector jobs but lack specific statutory requirements. The proposed legislation removes the statutory language and allows the division to establish education and experience requirements for these positions in the state classification system. There are approximately 49,000 public employees working at approximately 2,300 work sites maintained by public employers. It would be desirable to increase the number of inspections at these work sites but the safety bureau does not have the staff to provide inspections as often as it should. Accepting private inspectors reports would allow the division inspectors more time to provide effective loss control programs, along with performing the required safety inspections.

Bill Palmer will explain this a little further.

Testifying Proponents and Who They Represent:

BILL PALMER, Interim Administrator at the Division of Workers' Compensation.

JAMES D. MOCKLER, Executive Director of Montana Coal Council.

Proponent Testimony:

BILL PALMER, proponent. HB 156 is the only bill introduced this session to address our safety function. For those new members on the committee, remember the division of Workers' Compensation has several responsibilities. One of them is to run a state insurance fund, and you have heard about that; another one is a regulatory function to regulate Plan 1 and Plan 2 insurers; this particular function is enforcement of state safety laws and we use that function not only to assist the state compensation insurance fund in doing loss control activities but it is also a statutory responsibility to enforce public safety at work sites where the work site is not covered by the federal laws -- OSHA.

We are going to offer an amendment to this bill, if I may. (Attached and made a part hereto as Exhibit #1). The amendment to the bill that I would like to offer would strike section 1. The reason that we had section 1 in there in the first place was an attempt to better define the area of responsibility that the state of Montana has in enforcing health and safety laws. After considerable discussion with legal counsel, we have determined that there is enough court action to address our concerns so that part of the amendments to the law is really not necessary. Court cases have already defined that Montana is not responsible for enforcement of safety in areas of the private sector because we are preempted by the federal law and that has been held up by court action, so we would ask that you consider that amendment.

The other sections of the act as Rep. Smith mentioned, there are statutory qualifications for hiring coal mine and boiler inspectors in the act and they have made it extremely difficult at times to obtain qualified personnel. These people having the necessary qualifications are generally employed as coal miners or as boiler operators currently. In the past the mining section has been without a mine inspector for a period of one or more years simply because no applicants were available from persons meeting the requirements. In researching this I found that since February, 1976 to the current date, a passage of some 156 months, in those 156 months because of the requirements in the act, we had a couple different coal mine positions vacant for about 52 months. The primary reason was that we could not find people willing to work for state government that had the necessary statutory requirements. The proposed legislative changes then would remove these requirements and place these particular positions in the state classification system. Applicants for boiler inspectors or mine inspectors could then be considered based on experience requirements

necessary to be effective without unnecessary restrictions required in current law. The Montana Safety Act also goes on to mandate that the division inspect certain places of public employment. Loss control staff devote a great deal of time to working with employers but their time is limited to conducting an adequate number of inspections in those work places. This statutory change would allow the division to accept inspection reports from insurers of public employers provided, and I emphasize the word "provided", that they meet the requirements provided by the division. (Also written testimony attached hereto as Exhibit #2).

With that I close my testimony and also mention that I should have members of the bureau of health and safety here in case there are some particular questions the committee members would like to address.

JAMES D. MOCKLER. Proponent/Opponent. I really don't know where I stand but I would like to see an amendment to page 2, line 20 and on page 3, line 10, where the new language says the department shall prescribe the qualifications, duties and powers. I think it is up to the legislature to describe the powers that anyone should have and I would certainly hate to see the administrative record after they got through creating a czar of that nation. I don't think that is their intention. I think that simply if they describe their duties, how they should work and how they should be working. I would ask, therefore, that you strike "and powers" at the ends of those two lines in those two places.

A few years ago the department asked to have the coal mine inspector section repealed. We have the best safety record of any industry in Montana and we intend to keep that. We would object if you did that. Our people with five years experience are making over $40,000 a year. Not many of those people are anxious to quit and go to work for the state at $16,000. I understand the quandaries they are in but that's the facts of life. Anyone working in the coal mines who has been there over five years is making a salary in excess of $40,000, so there is no way the state is going to hire someone with those qualifications. Due to the actions the legislature took a couple years ago, our people are remaining employed and so there is not anyone being laid off down there, especially those with five years experience.

Testifying Opponents and Who They Represent:

MICHAEL SHERWOOD, Montana Trial Lawyers Association.

JIM MURRAY, Executive Secretary of the Montana AFL-CIO.

NADIEAN JENSEN, Executive Director of the Montana State Council

#9, American Federation of State, County and Municipal Employees.

JOHN SCOTT CHAUSSEE, SR., Missoula, Employed by Stone Container.

TIM BERGSTROM, Billings Fire Fighters Union.

ROBERT L. CULP, Frenchtown, Local 185 Paperworkers Union.

GEORGE WOOD, Montana Self Insurers Association.

Opponent Testimony:

MICHAEL SHERWOOD, opponent. Our concern was the section 1 that has now been proposed to be amended. Specifically, I would ask that you please adopt that amendment for the following reasons. There is a concern, and a valid one, at least initially, on behalf of the division that they could very well be sued for failing to inspect premises. That has been resolved by a case called Thornock vs. the State of Montana, (attached hereto as Exhibit #3). In that case the Montana Supreme Court held that there is no need for Montana to inspect all businesses in Montana, only those that are state run, because OSHA has come in and preempted. I believe that this legislation was proposed in good faith to get rid of an overlap but the courts have already done so. Our concerns about that language is that the definition of an employer in Montana currently encompasses virtually all employers, while the definition in OSHA (copies attached as Exhibits #4 and #5) says that employer means a person engaged in a business affecting commerce who has employees but does not include the United States or any state or political subdivision of the state. Of course, the problem is that when you have a private business that is not affecting commerce then OSHA is not applicable and certainly many of the interstate businesses in the state of Montana are in that category. I have also provided a case that came out in the mid-eighties Austin Road Company vs. OSHA, a federal case (copy attached as Exhibit #6) indicating that indeed OSHA does not control all private enterprise in the United States and some businesses do not affect commerce to the point that they will be controlled. In that case, Austin Road Company was a Texas contractor engaged in building residential streets, storm drains, sanitary sewers and water transmission lines, the court held that they were not subject to OSHA standards.

Finally, I might point out that the duties of the employers for both OSHA and in Montana, copies of both those pieces of legislation are also provided (attached as Exhibits #7 and #8) are fairly similar. Our concern is that when we have third party lawsuits out there against employers that the courts are in the practice of imposing or giving a jury

instructions saying that these employers are supposed to stand up to a given standard and what has been used routinely in the past is the Montana Occupational Safety Health Act standard. If this language was deleted as was initially proposed in the bill then arguably that instruction would not be available and certainly would not be available where OSHA does not apply to a small interstate business that does not significantly affect commerce.

JIM MURRY, opponent. I am here today to oppose HB 156 primarily because of the threat that it poses to worker safety. I would also like to agree with the testimony given by the Trial Lawyers. We are concerned because lawyers and courts use the language that is presently in the law in the Montana Safety Act to build a foundation for court cases where workers' comp doesn't apply. We would not like to see that language taken out because those cases, of course, apply to injured workers across the state of Montana. We have another concern and that is, as we talk about that specific section of the law, that we recognize that federal law supercedes the state law, but in the event that something should happen that the federal government should repeal the safety laws at that level, then Montana workers have nothing to fall back on should that happen. This bill, HB 156, essentially eliminates the requirement for qualified mine and boiler inspectors at a time when work caused accidents and illnesses are increasing. In just the last year, fiscal year 1987 to fiscal year 1988, there was 14.2% more work related accidents and illnesses reported in Montana. That means that more Montana workers are being made sick by conditions at their work places and that more Montana workers were maimed and injured at their jobs. That's an intolerable situation that begs for more inspectors and more emphasis on safety, not less. Let me just give you a few statistics comparing injury data from the 1988 and 1987 annual reports of the workers' compensation division. There were 3,553 more work place accidents in the fiscal year of 1988 or 14.2%, for a total of 28,613 accidents. Of those additional accidents almost 37% of them were serious and resulted in lost work time. There were a total of 8,026 lost time injuries, an increase of 19.4%, almost 20% increase. In some of the industry groups the increase in work related accidents was absolutely shocking. For example, the mining industry, and this is total mining industry, annual accidents rose by 86.1% from 567 to 1,055 in just one year. Now, there is one other very disturbing figure from the accident reports provided by the division. They track accidents by where they happen, what happened, who was injured, even where on the body the injury occurred. There are some pretty shocking statistics in there about dramatic increase. One of those pertains directly to boilers that under HB 156 could go basically uninspected by qualified inspectors. The division statistics show that the

number of job related injuries involving a boiler accident went up by 75.5% from 1987 to 1988; 103 people injured or maimed in 1988. This bill would essentially eliminate qualified inspections of those work places. Clearly we must increase the emphasis on safety, not only to protect our workers, but also to protect the insurance fund that so many people seem to be very concerned about. We can't continue to de-emphasize safety and have more and more workers injured and still expect to have a solvent insurance fund.

There is one other section of the law that I want to touch on and that is the last part of the bill that talks about the bill that would now pertain to public employees who would be covered through the self-insured plan, Plan 1. So what will happen is that their employers, when this part of the law would apply, their employers would be submitting their own safety inspection reports and I know the arguments. The arguments are simply that employers should be motivated to provide a safe place to work so fewer people are injured and hurt and killed, but that doesn't always apply and I think that the statistics that I talked about earlier bear that out. There is always a potential conflict between safety and productivity and so many, many times productivity wins out in that priority and the result is that another Montana worker is injured, crippled or killed on the job.

I hope that the committee will see fit to give this bill a do not pass recommendation, even with the amendments proposed.

NADIEAN JENSEN, opponent. I, too, rise as an opponent to HB 156. My concern, of course, are pages 3 and 4, lines 23 through 25. A self-insured public employer, does he do his own inspection, and if he does is it going to be a truthful one? I have had instances where my members have reported to their employers who do pay the workers' compensation insurance and they use either one of the three plans, and they have reported unsafe conditions and those unsafe conditions continue to go on until that member contacts me, I call the Workers' Comp division and they have been very quick to get out there and inspect the situation and to declare it safe or unsafe. Is a self-insured employer's inspector going to do the same thing? That's why I would urge do not pass on HB 156.

JOHN SCOTT CHAUSSEE, SR., opponent. Missoula, Montana. Employed by Stone Container and a member of UPIU Local 885, currently holding the position of standing committee chairman. (Submitted written testimony, Exhibit #9, attached hereto.)

TIM BERGSTROM, opponent. Just to echo the concerns of Nadiean Jensen and Jim Murray, my people have a problem also with

the language in Section 4 that authorizes the public employers to provide for their own inspection reports. Quite frankly, if I were asked by someone to do a fire inspection at home I would probably come back with a "no hazards noted" report. I think it is imperative that if we are going to have meaningful inspections within the work place that those inspections be performed by impartial third party assessors and not someone who may be of a financial interest in the employer.

ROBERT L. CULP, opponent. Frenchtown, Montana. Currently the safety committee chairman for Local 885 of UPIU. Employed by Stone Container Corporation. (Submitted written testimony, Exhibit #10, attached hereto.)

GEORGE WOOD, opponent. The previous opponents have outlined our concerns on this bill. The establishment by the division instead of the legislature of the qualifications and the powers of both the boiler inspectors and the mine inspectors. In addition to that, I had some confusion about the new language in paragraph 3, section 3, in the event that the federal government turns back the preemption of the safety laws, are we then going to be allowed as an insurer, because under the law the self insured employer is an insurer, are we going to be allowed to inspect our own plants as state safety inspection. It causes us some concern as to what obligation that will put upon us in addition to the safety inspections we presently make. So we have some concerns about that section and about the powers of qualifications.

Without amendment, we suggest this bill do not pass.

Questions From Committee Member:

SIMPKINS: Question of Mr. Sherwood. The way I hear it, Mr. Sherwood, is that the federal government now has the responsibility of performing these inspections, does perform the inspections, and then some of the testimony has gone on to say that they were afraid that they were going to stop. Is this correct, that the federal government does perform these inspections?

SHERWOOD: The federal government is mandated by federal OSHA to regulate employers whose businesses affect interstate trade or commerce and is specifically precluded from monitoring any state or public entity employers. The problem with the language that was contained in this bill as initially proposed was that it left a potential gap of employers in the private sector who would not be controlled by OSHA because their business did not significantly affect interstate trade or commerce. Does that make sense?

SIMPKINS: We heard from Stone Container, that I presume was controlled by the federal government OSHA regulations because of its size.

SHERWOOD: I would presume that they are controlled by all the federal regulations, but I don't know that for sure.

CHAUSSEE: (Employee of Stone Container) Boilers are not regulated by the federal government at all. Our regulations come from the state and that is why it is so critical that we keep our boiler inspectors and the laws working safely for me as well as you.

SIMPKINS: Asked of Bill Palmer. What did we do for the 52 months that we didn't have any inspector on board?

PALMER: Those 52 months where we had no mining inspector on board -- that was not a boiler inspector -- we are addressing two areas here, both mine and boilers. We did have boiler inspectors on most of the time, primarily because we had a fellow who had been with the state for a number of years and he retired so he was on board during that period. It was the mining section that did not have an inspector on board.

KILPATRICK: Of Bill Palmer. What did you do during those 52 months in the mines?

PALMER: We had no inspections during that period. There were a lot of inspections that went vacant. We just had nobody there because we could not hire them, and I apologize to the opponents of this bill and for the impression that the division really isn't too concerned about safety. It is quite the contrary, we are extremely concerned about safety. We are so concerned that because of the requirements in statute rather than in the classification plan, we are unable to acquire or train the individuals who could handle this type of activity. We are very concerned about safety in all areas and I hope that I can clear up that misunderstanding.

SQUIRES: Asked a question of Jim Murry. She did not have her microphone on and her question could not be understood.

MURRY: We realize that the division is having great difficulty filing those inspector positions and I don't want the committee or anyone in this legislature for a moment to think that we have a quarrel with Bill Palmer or most of the people in that division. They do care about workers and they do care about industrial safety. The thing that we have tried to do session after session was just to simply sensitize people to problems that exist not only in Montana

but all across the country. We have had a de-emphasis of the enforcement of the Occupational Safety and Health Act and the result of that is that we were killing more workers, crippling more workers, making more workers sick, than any time since the passage of the act. That's a driving force in pushing premium costs up. I guess we take issue with the division because we feel that they should be coming to the legislature to be making the argument for better pay for these people, or perhaps they should be appealing the grades to the classification division to get people there who are competent and qualified people to be inspectors. That is all we ask. It's just that we can't ignore this any longer. We can't allow the accident rates to continue to go up. The Montana work force contributes more to a good business climate than probably anybody else in the state because statistically and study after study shows that we have one of the most literate work forces in the country; we have one of the best educated work forces in the country, and we have one of the most productive work forces in the country. We shouldn't respond to that by subjecting workers to these kind of problems.

We do care about premium costs -- you can't have it both ways. It is very expensive to do that to workers.

SIMPKINS: Question to John Chaussee. I know that insurance companies have boiler inspectors, they check things out before they continue the insurance, in fact it is one of the only insurances that they can actually shut you down on the spot right there and cancel your policy.

Would you tell me, do you have insurance inspectors checking your boilers, how often, and what other inspectors do you have in your plant facilities checking your boilers?

CHAUSSEE: I can't go into it exactly how often they do inspect them but I believe at least annually. If you have problems they do come in, but the point is that those insurance inspectors, just by paying the premium that the company pays, go with the company, and I'm not saying that they are neglecting their duty. Our state boiler inspectors, where the law is now, allows us as operators of boilers to go and voice our concerns to the situation and I can bring this example up. We had what I call an explosion on our package boiler in the last week. We had an insurance inspector in, and why I say it was an explosion is because there was up to about 100 tubes that were ruptured in this package boiler, there were no injuries. I was talking to this insurance inspector and commented on our having an "explosion" and he said no, that the boiler had just overheated. I asked him what constitutes a boiler eruption and he said that occurs when the steam drum is blown out, then you have a boiler explosion. Anytime you have a tube rupture, it is an

explosion. In this case, luckily, the water came down onto the natural gas burners and put the boiler out so there was minimal damage overall. I asked the boiler inspector under Montana state law if he didn't have to send in a report as to what caused this and that way it is available to the public. A lot of places it would not be if we kept it that way. He says, "Well, yah, but I don't have to give them everything that happened here, I just have to tell them the cause".

COCCHIARELLA: Question of Bill Palmer. I would like Mr. Palmer to explain some of his last comments. I was confused what you said about how the statute affects classification or getting a person in that can do this kind of work and how does this address this bill?

PALMER: What the bill essentially does is allow the division to put the position in the classification system along with all the other employments in the state of Montana. We have health people, we have professionals of every kind, to classify the position, to specify the requirements and duties in the classification system rather than in statute. What we have in statute are restrictions -- for instance, the five year language -- and the five year language that addresses that this individual has to have worked in the mining industry or in the coal mining industry for five years. We feel that if we had it in the classification system, as we do all of our other employees, we could specify that the individual could work four years in a very similar kind of surface mining activity which, in our professional opinions, would accommodate and adequately cover the same kind of inspection qualifications.

COCCHIARELLA: Then with state employees in the financial situation they are in right now could you, even if this happened, afford to or could you find someone who would be willing to come to work for the state under those circumstances?

PALMER: We do feel that allowing us to put qualifications, training requirements, etc. in the classification system, we would have a better opportunity to fill those positions and then get people out to do the inspections.

THOMAS: Question for Jim Murry. First of all I do want to reject that there is a "them" and "us." I know specifically on this committee they were all the same vote I believe, that we are all interested in public safety no matter what the public is, an employee, employer, what have you.

I don't think I understand all this issue here we are discussing as well as I wish I did. Is our main objection

the repealer of 203 with the qualifications, or is it section 4 ahead of that repealer where we are allowing the acceptance of an inspection of a workers' comp employee, or both.

MURRY: We have problems with several sections of the law. The first part of the law deals with the occupational safety and what the bill would do is bring it into compliance, recognizing that the federal law, Occupational Safety and Health Act, supercedes that part of the law. Our position is that we would like to see that language remain because of the argument given by the trial lawyers and that is that arguments on tort cases, foundations on those tort cases, are built on that part of the law when workers' comp doesn't apply. That benefits workers in those court cases and we would not like to see that disturbed because obviously that gives them an advantage that we would like to see them have, so we disagree with that section of the law.

The law applies to public employees because public employees are specifically exempted from the Occupational Safety and Health Act.

We disagree with the other section of the law that deals with coal mine inspectors because what we are doing is we are reducing significantly the qualifications of those inspectors. We have worked for many, many years on raising qualification, not lowering qualifications.

We also have problems with the sections of the law that applies to boiler inspectors because what we are doing with that is we are lessening the qualifications of boiler inspectors and you can tell by testimony here today that is a very complicated field and we probably shouldn't be trying to hire people at a grade 13 to do those kinds of jobs anyway. We shouldn't be lowering those standards, we should be holding those standards as high as we possibly can. So we disagree with that section of the law.

The other section that we disagree with has to do with treatment of public employees because I think all of those people are under self insured programs under Plan 1. So what you would have is a situation where the employer would be writing the safety inspection report and then submitting that to the division. Under certain circumstances that would be acceptable. Our problem with that is when an employer does that, and they can have the best intentions in the world, there is a potential conflict between safety for workers and productivity. Productivity too often wins out and when that happens many times workers pay the price by being injured, made sick, crippled or killed on the job. We don't impugn the intentions of Bill Palmer or his division, we just think it is a bad bill.

THOMAS: Just on that last aspect though, the language that says the division may accept the inspection, and it wouldn't mean that they would have to accept it, nor would it mean that any self insurer would want to submit their own inspection. Just the liability of doing that is significant, like George pointed out. Then you're saying we've inspected ourselves and we are in great shape -- you are kind of doubling your liability.

MURRY: By the same token that same thing applies, that you are talking about, applies to the workers' compensation system itself. We just went through a terrible time with an unfunded liability and the reason that we had that unfunded liability is because a political decision was made not to raise premium costs to employers. We subsidized employers because political pressure was put on the administration and in that instance a democratic administration, to hold the premium costs down and the result of that was that we developed this unfunded liability because of the number of people we were hurting and crippling, so the legislature responded to that by saying well rather than meeting the conditions of the law we will just lower the benefits to the workers. The idea is that it should be very, very expensive to hurt, cripple, make sick, and kill workers -- that's the whole idea behind the system and that is what the idea was in 1915 when we put the law in place and we gave up the right to sue. In that trade it was going to be an employer paid program -- the employers were going to pay for that because of what workers gave up -- and then again the idea would be that it would be very expensive, it would be less expensive to provide a safe place to work. That didn't happen anywhere in America -- the federal government had to enact the Occupational Safety and Health Act because states were not responding the way some of us felt that they should.

THOMAS: Question for the department. What do we want to do with these in striking 203. Do we want to raise these standards, lower these standards. What are your plans?

PALMER: No, we do not want to change the standards. We would appreciate having the opportunity to, if we have difficulty in employing people who do not meet the current standards, putting them into some type of training program, give them extra work, bring them up to speed, a lot quicker than the current requirements mandate. I think in the boiler area the requirements are that they must have ten years experience. I could see that it would be possible to specify a certain number of years of experience, however I think maybe ten years is quite extensive. Certainly the individuals would have to be very technical and as the gentleman from Stone Container pointed out, these are very

technical types of apparatus that our boiler inspectors are looking at. Boiler explosions kill people. It is the furthest thing in our mind to let somebody who has no background or experience take a look at them and say they are safe. We would like to have a little more flexibility in being able to hire people that we can train, that we could test or send to school with not quite that length of experience required as it is in the statute.

THOMAS: If you did lower the qualifications and what have you substantially, or even minorly, you would be creating more liability for the state should those people not have proper qualifications to inspect.

PALMER: In any case, the state has the responsibility to inspect the boilers to make sure they are safe. If we had an unqualified individual I would guess that the state would certainly be liable for not doing its job, so it is our responsibility to make sure that those qualifications and the testing or whatever that we go through enable us to get the job done.

SQUIRES: You are talking about ten years of experience and then you are talking about sending this person to school to get them up to speed. I find a real conflict here with what you are saying between ten years of hands-on experience -- how do you get them up to speed that fast before we have a problem?

PALMER: I might have misled you. The current law requires ten years of boiler experience. If we hired someone I would guess we would require less than ten years experience but in order to get them up to speed we would have to send them to some type of school if they did not meet all the requirements of that position. I would guess that we would use something far less than ten years if they had the knowledge of the equipment that they were going to inspect. Certainly, as laymen, I don't think that it takes ten years to learn a particular apparatus, I would guess it would take something less. I'm not quite sure of the requirements for a first class license, for instance. We have our safety chief here. He could probably address what the requirements are for a first class, second class and a third class license. I think if those same requirements to have that kind of license were in the classification system, I would guess that we could probably do the job without having at least ten years.

WHALEN: Question for Mr. Palmer. I think the suggestion was made by Rep. Thomas that if the division or the state didn't do their job in adequately performing these inspections that it would increase liability to the state and consequently they would have motivation to do these inspections. Let me

preface my question by saying that the last time the state fell down on the job, the division in particular, with regard to Great Western Sugar approving it to be a Plan 1 self insured carrier, and then they went bankrupt and you've got a couple hundred employees who all of a sudden didn't have any benefits, are you aware of the position that you, the division, are taking in that case insofar as any liability you might have.

PALMER: We are greatly aware of the Great Western Sugar. In fact, they tell me recently that we have recovered some funds in that case and are paying them out in benefits. There was another self insurer who was in the same situation that we recently recovered from. Yes, it is a great responsibility and we don't take it lightly, Rep. Whalen.

WHALEN: I take it if you are aware of that case, first of all the funds haven't been paid out to injured workers and the court specifically ruled that it would not do that but you, the state, are taking the position that you are immune from suit any time you make a decision because of the supreme court decision last summer. The attorney general's office and the division is taking the position that they are immune from suit and no matter what the facts of the case are you have no liability to these injured workers and so I just want that clarified and I presume you are aware of that position that you are taking.

RICE: Question of Bill Palmer. I just want to clarify your understanding of the relationship between OSHA and some of the requirements that it leaves us. I understand that we are not now required to perform inspections on these businesses that would not be in interstate commerce, is that correct and your understanding?

PALMER: Yes.

RICE: Also we have heard testimony that OSHA does not perform inspections on boilers. With the redefinition in the proposed law, redefining employer as public entity would that not eliminate any inspections whatsoever in those private businesses in the state of Montana that are not involved in interstate commerce that have a boiler?

PALMER: There is a separate statute on boilers that we are not addressing here today and all boilers in the state of Montana, regardless of the OSHA law, are required to be inspected by the state, so OSHA law, regardless, the state would still have the responsibility to inspect boilers and we are not trying to address that here today.

THOMAS: Question of Clyde Smith. I just want to clear up some misinformation that was presented earlier by one of the

members in that this problem with our unfunded liability was due to subsidy to employers and that it seems to me that that is not the case and that the case is more of a situation that it was a political decision to keep people employed in the state. What would you say?

Closing by Sponsor:

SMITH: I'm afraid we may have lost that round, but I would like to make a comment on this. This is not the first time we have heard about coal inspectors and boiler inspectors and I think what we have done here is we have made a law and then we won't fund it. This is probably what is wrong. This bill may be attacking the wrong end of this.

RUSSELL: This closes the hearing on HB 156.

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HEARING ON HB 157

Presentation and Opening Statement by Sponsor:

CLYDE SMITH: This is on the subsequent injury fund. The subsequent injury program enables vocationally handicapped workers to obtain certification from the division of workers' compensation showing the handicap as a barrier to employment. The employer who hires such a handicapped worker is entitled to limit the liability of no more than 104 weeks, after which the benefits for the worker are reimbursed by the subsequent injury fund. Many workers, employers and insurers have difficulty using this program because eligibility criteria is not clear. The law requires applicants to have a medical impairment but does not define impairment. The law requires the impairment to be a barrier to employment but it is not clear what constitutes such a barrier. As a result it is difficult to make use of the advantages of the program. HB 157 clarifies the certification process; makes it easier for the worker to be certified and for the employer to make use of the program. Mr. Palmer will tell us all about it.

Testifying Proponents and Who They Represent:

Bill Palmer, Interim Administrator, Division of Workers' Compensation

Proponent Testimony:

BILL PALMER: You have before you today the amendments to the subsequent injury fund bill to do just that, amend the subsequent injury fund. The subsequent injury fund was created somewhere in the early 70's and the idea of that fund was to allow insurers to more or less have an insurance

company to take care of people who are vocationally handicapped and for some reason or other they can't return to work and this was a method to encourage those employers to hire those vocationally handicapped people in the work place, to get them back into the work place. What it did was limit the insurance company liability to 104 weeks, so with that as kind of a preface to what we are going to talk about in the bill, keep in mind what the purpose of the subsequent injury fund was -- to get vocationally handicapped workers, both injured on the job and off the job, back into the work place.

I want to take you through each section of this bill. It is a rather technical bill and I have some people with me today who work a lot of the technical parts of this thing and if you have questions later they can help to clear up any misunderstandings.

(Here Mr. Palmer went through the bill, from written pages, which are attached hereto as Exhibit #11). He also explained certain areas as follows:

Section 1: Clarifies when a worker may be certified and reflects the division's interpretation of the existing law. It also allows employees who have already returned to work to be certified under certain circumstances if they are participating in a formal on-the-job training program. The existing law does not currently permit certification after a worker has returned to work which then almost creates a "catch 22" situation. The existing law forces the employer or potential employer into waiting until a worker has been certified before allowing a worker to return to work. Under existing law certificates do not expire. The proposed amendments would require the expiration of a person's certificate every five years, so they would have to be renewed after five years. The certificates would only be renewed under the proposed law for unemployed individuals because if a certificate expires during an individual's employment with a particular employer and the individual remains with that employer, the employer would still be protected by the fund regardless of the expiration. The rationale for renewing certificates of unemployed workers only is because an employed worker is not truly vocationally handicapped if he or she is already on the job. The purpose of the fund is to encourage the initial hiring or employment of vocationally handicapped workers.

Section 2. Establishes the legislative intent for the subsequent injury fund. It stipulates (1) that the system is a self-administering system because insurers will continue to adjust claims which are reimbursed by the subsequent injury fund. (2) Benefits and entitlements are the same for injured employees who have been certified as they are for any other injured worker -- no more, no less. (3) The law is to be

construed in harmony with the Human Rights Act. We found that often if an employer discovers a congenital condition in a prospective worker's pre-employment physical and requires that the worker become certified by the subsequent injury fund as a condition of employment even though the prospective employee had never been aware that this condition ever existed or ever interfered with work. In effect, the employer creates an obstacle then to the person's employment by refusing to hire a qualified worker unless that person is certified.

Section 3. Defines impairment and permanent impairment. That definition is in accordance with the American Medial Association Guides on impairment. The second definition is that of on the job training which allows certification of individuals participating in OJT programs.

Section 4. Strikes some language that addresses a $1,000 assessment. That particular strike is really housekeeping because the legislature a few years back took that assessment out of the subsequent injury fund and put it into the uninsured employers fund. It was a $1,000 assessment against every insurer who had a fatality against them and once that fatality occurred, in the old days they used to be assessed $1,000, the money would come from the insurer and go into the subsequent injury fund; however, the subsequent injury fund because of interest earnings and some of the early assessments grew to such a point that the assessment was no longer needed there so the legislature put the money by statute into the uninsured employer's fund, where it is today. This language was never amended to recognize that -- that is what we are doing here.

Sections 4, 5 and 6. Section 6 just broadens the rule making authority. Sections 4 and 5 are pretty much housekeeping items.

Section 7. Deletes some unclear language discussed in Section 1. The current language referencing employment and re-employment is really unclear and difficult for us to interpret. It is particularly difficult to pinpoint when or under what circumstances a re-employment situation has to be made.

Section 7. (I think he made an error in saying the number of this section). Requires certificates to expire in five years; however, this does not mean that the employer who has already hired a certified worker will no longer receive protection from the fund. Quite the contrary. An employer under the proposed legislation who hires a certified worker will be protected by the fund for as long as that worker is an employee, regardless of when the certificate expires.

Section 8. In the existing law the fund has the liability to the injured worker after 104 weeks of benefits have been paid;

however, the insurer or possibly the self insurer is responsible for making the payments and then requesting reimbursement from the fund. The insertion of the language by the insurer clarifies that it is the insurer who is primarily responsible for adjusting the claim and not the subsequent injury fund. Under existing law the fund is liable for all benefits due. If the fund becomes temporarily or permanently insolvent, and we have seen this, injured workers will not be paid. However, under the proposed language the insurers will still obtain the same financial benefits as they do now; however, it will be clear that they are liable for making direct payments to injured workers and the fund will become liable for reimbursement. If the fund, for some unfortunate reason, became insolvent then the insurance companies would have the responsibility for continuing to pay the claim. It would not fall back on the certified worker.

Section 8. Talks about amending existing law where employers are required to notify the division within sixty days of hiring a certified worker in order to receive protection from the fund. At the time of hiring in most cases the insurer is not aware of hiring a certified worker and, therefore, is not in a position to notify the division that a worker has been hired. However, unless the division has been properly notified of hiring prior to an injury, the insurer is unable to take advantage of the fund. Elimination of the employer filing requirements will allow more insurers and potentially more employers to take advantage of the subsequent injury fund which will facilitate hiring the handicapped. Under the proposed changes an employer or insurer merely has to prove that the worker was certified at the time of hiring to receive protection from the subsequent injury fund.

Section 9. Simplifies and clarifies when the fund must be notified of its liability for reimbursement and ties it in with the benefit payments. The current language requires the fund to be notified between 90 and 150 days. The proposed language encourages the insurer to notify the fund as early as possible but certainly no later than the date by which 94 weeks of benefits had been paid.

Section 9. Also talks about and encourages the adjuster or the insurer, if it is a self insurer, to work with fund management to determine a reasonable settlement. In some cases where an amount is proven unreasonable the fund would not be liable for the full reimbursement. Under the existing law insurers have the possibility of not monitoring subsequent injury claims as carefully as they should because they really aren't dealing with their own money -- they are requesting reimbursement. Conceivably they could give away the store unless there is some incentive to actually monitor their claims.

Sections 10 and 11. They are more housekeeping than anything.

Section 12. Emphasizes that the insurer will only be reimbursed for benefits paid in accordance with law. Some insurers have tried to obtain reimbursement for non-related medical or medical bills in excess of the fee schedule. There is a fee schedule in the workers' compensation law which establishes the amount by which each medical provider will be reimbursed. We found that on occasion self insurers or maybe some of the private carriers are paying in excess of the fee schedule and expecting reimbursement from the subsequent injury fund according to what they paid rather than according to what the law allows.

Section 13. This allows the division to contract with an adjuster in handling claims rather than attempting to adjust a large pile of claims should that become the case. Generally an insurer is responsible and unless it becomes insolvent and unable to make the payments, so the insurer cannot merely discontinue the payments without good cause and obligate the fund to make payments directly to the workers.

Sections 14 and 15. Housekeeping items.

Testifying Opponents and Who They Represent:

GEORGE WOOD, Montana Self Insurers Association.

MIKE SHERWOOD, Montana Trial Lawyers Association.

JIM MURRY, Montana State AFL-CIO.

OLIVER GOE, Montana Municipal Insurance Authority.

Opponent Testimony:

GEORGE WOOD, opponent. We rise in opposition to HB 157. I think if the division will furnish you with statistics you will find that my group, the Self Insurers Association, has more of the certified employees employed by them, that is they have reported them to the division, and it probably has claims against the division larger than any of the other two plans. The reason is simple. We use the plan. We have employed more of the certified vocationally handicapped than have the other plans. The reason for this is not unique. Our special situation is that we have personnel selection and we have pre-employment physicals which identify the vocationally handicapped. We have these for one reason -- when we hire employees and even if they are hired for jobs that are relatively less strenuous than other jobs in the plan, they can progress to the more physical jobs and to the higher paid by seniority and application, so we may have a job they start in on that is one that they can perform with their handicap

and we wouldn't expect too much from them, but the progression and the aging of the person would cause the trouble. So we certify and we use the certification.

(Mr. Wood talked for quite some time about his personal experience from 1973 on the Governor`s advisory council).

This changing the law here is basically an attempt to put into the law what they already have operated on by administrative rule. Let's do it after the fact, but let's get it in there.

We disagree with what you are trying to do. We think there is a change in this law that could be made that would make it much more effective, but the rules should not be made to make it more difficult for a vocationally handicapped person to be certified but, if anything, probably made easier. The objection to that is maybe the fund will go broke, but if it does the employers of this state will have to make up the difference in money.

What should happen to this bill is that you should go back to the original language, not this bill, but the original language in the Act and make some minor changes. I call your attention to page 2, just for an example. The vocationally handicapped means a person who has a "medically certified impairment." You have been told that impairment wasn't in the Act so we have to put it in the Act. Impairment in medical terminology basically has to do with restrictive motion. My change would be that a person who has a permanent medical condition, which is a substantial obstacle to obtain employment and there I would make the change to the employment applied for. Under rules now there are certain people who cannot be certified even though they are applying for a job for which they have a physical handicap. An example is a school teacher who has a physical handicap and wants to be hired. Under the rule he can't be certified because he has other skills that won't allow certification. It should be "vocationally handicapped for the employment applied for".

Then the other standard says he has to be unemployed. This really discriminates against the sound injured worker who might be working at a minimum wage job just because he has to have <u>some</u> income. If he is then employed he can't be certified if he applies for a job somewhere that pays $9, $10, or $11 an hour. That "unemployed" should be changed, whether he is unemployed or <u>under</u>employed he should be allowed to be certified.

I think you can do what you should do by making changes in the original Act. One thing that should be called to your attention, though -- the two repealers. No. 906 is the 60 day notification. After you have hired a certified employee you have to notify the division within 60 days. This was put in

there after discussion and with much thought. What it basically says is that an employer has not hired a handicapped person unless that employer knew he was handicapped and unless the employer notifies the division of same. If an employer does not notify the division of hiring a handicapped employee, the employer has not hired a handicapped person, and the employer should not have access to the Act. I think that section should be back in the original way.

(Tape changed here so some testimony not recorded -- Wood talking about personal experiences with the program)

.... if we have no independent liability so if we did pay medical compensation then after the fact the division could not say we're not going to reimburse you because if they did they would put additional liability on this and the law doesn't allow this. Every claim I have handled in 39 years, six months later, with 20/20 hindsight, I can go back and say I made a mistake.

I don't think that anything should be done to make this more difficult for people to be certified, but the relaxation of those rules for the underemployed will be a benefit for those people that this bill is trying to help and this is a hire-the-handicapped bill.

For this reason, we recommend that this bill do not pass.

MICHAEL SHERWOOD, opponent. Our biggest objection to this problem is just a matter of viewpoint. What I have to say here goes much more to the welfare of the claimant and the complaints that attorneys hear although there isn't much we can do for them. Specifically, 39-71-1012 sets up a priority for rehabilitation indicating that the goal of the rehabilitation services is to return the disabled worker to work with the minimum of retraining as soon as possible after the injury occurs. That's not in here, that is the statute as it currently exists. With that in mind, I know there wasn't any testimony in this house but in the senate there was active testimony, a lot of the workers and what they had to say was typical of the 40 year old logger who had logged his whole life and now wasn't being provided any rehabilitation and was good enough to go back to work doing something and was being encouraged to be a day care assistant and he wasn't finding it particularly palatable. I would think that if line 17 of the first page of this bill dropped the requirement that this person be unemployed that might very well make things more palatable for the person who is finding that they are being forced back to work in a job they don't like but would, at least, have the option at some point later, say in this gentleman's case, of getting a physically low demanding job and wouldn't be disqualifying himself from this risk pool by taking a job that he didn't find particularly palatable but

was at least gainful employment.

So I support what Mr. Woods said, and would like to particularly highlight our resistance to line 17.

JIM MURRY, opponent. We want to go on record in opposition to HB 157. Our objections have been covered by the two previous people.

OLIVER GOE, opponent. I am speaking in opposition to this bill. I do not have any personal experience in the application of this bill, however I did discuss this bill with our claims management unit who was a bit involved in the application in many instances of the subsequent injury fund and how it works, and in their experience as it is written here prior to amendment it has worked very well. We really question the need for any significant amendment to its requirements. I would just mention that in section 1, in my opinion, appears to be somewhat too restrictive for the reasons that Mr. Wood indicated concerning the unemployed. In many instances you have the individual who has taken the part time or minimum wage job just to try to make ends meet and I still think that individual should be eligible for the certification requirements. Focusing on subsection (b) of that same new section, the terminology "off work due to an impairment" seems to be in conflict with section 3 which is codified at 39-71-901 which defines such a person as having a certifiable permanent impairment which is a substantial obstacle to obtaining employment.

I do a significant amount of workers' compensation defense work both for the NFIA and also for other insurers and in many instances an issue which arises is the fact that you have an impairment and whether that impairment is the real reason for this person's inability to get a job as opposed to general economic conditions in the community in which he lives. My feeling, getting back to section 1, it is very difficult to say to the injured worker or a worker who has an impairment that he is indeed off work solely due to that impairment. In most instances it is a combination of a number of different factors including, in many instances, that impairment. I would also indicate that in my experience working on the defense side of the workers' compensation system that I will see very few, if any, circumstances where an insurer is paying bills which are either inflated or otherwise unreasonable and, as Mr. Wood said, in hindsight you can always have a case where you think perhaps I shouldn't have paid that bill and perhaps I settled it for a little too much, however that does not mean that the insurer was acting in less than in good faith and in less than a reasonable manner.

In effect I think the Act as it is currently structured is working well and would urge you to carefully look at any

proposed amendments and how they might impact on the ultimate purpose of the Act.

Questions From The Committee:

None.

Closing by Sponsor:

SMITH: I am going to tell a little bit about the other side of the story because there is one. Many employers, particularly self insurers, discover congenital conditions in a prospective worker's pre-employment physical examination and requiring that worker become certified by the subsequent injury fund is a condition of employment, even though the prospective employee had never been aware of this condition and it had never interfered with his work. In effect the employer (could not understand part here) by refusing to hire a qualified worker unless he is certified. Figures:

Potential liability - ARCO	$ 30,000
Champion, George Wood	567,000
Montana Power	19,000
MMIA	69,000
Stoltz-Connor	5,000
Total	$688,000

George Wood, $567,000 -- you think for a minute that he would't like to re-write that? I think maybe he would.

What we are trying to do with this bill is to make it easier to certify workers by making it clear what the ground rules are. Self insurers can use the fund because they are the employers. Other insurers, private carriers, don't use the fund because they are not aware at the time of hiring a handicapped worker, therefore they don't meet the requirements and can't use the fund. However, the funding of that uninsured employers fund is done by all the insurers. Now you know why George Wood would like to have it the way it is.

RUSSELL: This closes the hearing on HB 156.

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RUSSELL: We have had a couple of our committee members who had to leave early and they asked if we might defer executive action until Tuesday. If that is okay with the committee we will take executive action on Tuesday.

ADJOURNMENT

Adjournment at 4:36 p.m.

REP. ANGELA RUSSELL, Chairman

AR/mo

2209.min

DAILY ROLL CALL

LABOR AND EMPLOYMENT RELATIONS COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date 1-26-89
HB1561157

NAME	PRESENT	ABSENT	EXCUSED
Rep. Angela Russell, Chairman	✓		
Rep. Lloyd "Mac" McCormick,VC	✓		
Rep. Vicki Cocchiarella	✓		
Rep. Duane Compton	✓		
Rep. Jerry Driscoll	✓		
Rep. Bob Pavlovich	✓		
Rep. Bill Glaser			
Rep. Tom Kilpatrick	✓		
Rep. Thomas Lee	✓		
Rep. Mark O'Keefe	✓		
Rep. Jim Rice	✓		
Rep. Richard Simpkins	✓		
Rep. Clyde Smith	✓		
Rep. Carolyn Squires	✓		
Rep. Fred Thomas	✓		
Rep. Timothy Whalen	✓		

EXHIBIT #1
DATE 1-26-89
HB 156

PROPOSED AMENDMENT TO HOUSE BILL NO. 156

1. Title, lines 6-7.

Following: "SAFETY LAW;"

Delete: "TO CLARIFY THAT THE MONTANA SAFETY ACT APPLIES ONLY TO PUBLIC EMPLOYERS;"

2. Title, line 11.

Following: "AMENDING SECTIONS"

Delete: "50-71-102,"

3. Page 1, lines 16-25; Page 2, lines 1-15.

Delete: Section 1.

Renumber: subsequent sections.

3536t

EXHIBIT #2
DATE 1-26-89
HB 156

pg 1 of 2

TESTIMONY ON H.B. 156

BY

Bill Palmer, Acting Administrator, Workers' Compensation Division
Department of Labor and Industry

The Division of Workers' Compensation is requesting changes in the Occupational Safety Laws. House Bill 156 identifies three areas of revision; clarification of jurisdiction of the Montana Safety Act, removal of statutory experience requirements from mining and boiler statutes, and accepting insurers safety inspection reports of public employers provided they meet the divisions minimum requirements.

It is generally acknowledged that federal law under the Occupational Safety and Health Administration preempts the states jurisdiction in areas where federal agency has jurisdiction. A redefining of "employees" and "employers" in the Montana Safety Act would clarify which employers are subject to the Montana Safety Act and remove any potential for liability in the event a court decision should not uphold past precedence

The statutory qualification for hiring coal mine and boiler inspectors have made it extremely difficult at times in obtaining personnel. These people having the necessary qualifications are generally employed as coal miners and boiler operators. In the past, the mining section has been without a coal mine inspector for periods of one year or more simply because no applicants were available having statutory requirements and willing to work for state government.

EXHIBIT #2
DATE 1-26-89
HB 156

2052

COAL MINE INSPECTORS

Employment periods for coal mine inspectors.

2-76 to 12-76	5 months vacant
5-77 to 10-78	2 years 5 months vacant
3-81 to 7-81	1 year 2 months vacant
9-82 to 10-82	2 months vacant
12-82 to 5-85	2 months vacant
7-85 to present	4 years 4 months total vacant period

The proposed legislative change would remove statutory requirements and place those particular positions in the state classification system. Applicants for the boiler inspector and mine inspector positions could then be considered based on experience requirements necessary to be effective inspectors without the unnecessary restrictions required in the current law.

The Montana Safety Act mandates inspections and enforcement of safety in the workplace. Loss Control staff time is limited to conducting an adequate number of inspections in these workplaces. The statutory change would allow the division to accept inspection reports from insurers of public employers provided they meet the requirements provided by the division.

William E. Palmer
DOC

if it describes the default in general terms." He was not allowed to present any evidence on that or any other theory in the proceeding before the District Court.

These are issues on which full opportunity for presenting testimony and cross-examining witnesses should have been allowed to all parties. Yet only Mr. Miller testified at the hearing, and his testimony was limited to the issue of whether the Millers were entitled to the benefit of the antiforfeiture statute. We conclude that this case should be remanded for full trial on the merits.

Mr. Eigeman has also raised the issues of whether he should have been allowed to present evidence of latent defects in the house used as a down payment on this contract, and whether the Millers were properly awarded their attorney fees. These issues need not be addressed at this stage because of the remand for trial.

Reversed and remanded.

TURNAGE, C.J., and HARRISON, GULBRANDSON, HUNT, SHEEHY and McDONOUGH, JJ., concur.

Larry D. THORNOCK, Plaintiff and Appellant,

v.

STATE of Montana, Defendant and Respondent.

No. 87-68.

Supreme Court of Montana.

Submitted Sept. 15, 1987.

Decided Nov. 4, 1987.

Injured party brought action against State, claiming that it negligently breached its statutory duty to inspect hazardous places of employment, leading to accident and "traumatic amputation" of claimant's arm in sawmill accident. The Judicial District Court, Lake County, C.B. McNeil, J., granted summary judgment for State and injured party appealed. The Supreme Court, Harrison, J., held that Occupational Safety and Health Act preempted State's duty to inspect imposed by State statute, and injured party could not recover from State for alleged breach of that duty.

Affirmed.

Hunt, J., dissented and filed opinion in which Sheehy, J., joined.

1. Negligence ⇐103

The tort of negligence arises when one has a duty recognized by law, he breaches that duty, the breach of the duty serves as a legal cause of another's injury and that injury is an actual loss or damage.

2. Negligence ⇐2

If no duty exists there can be no tort of negligence.

3. Labor Relations ⇐9.5
States ⇐18.45

Occupational Safety and Health Act preempted State's duty, under state law, to inspect hazardous places of employment and injured party could not recover from State for alleged violation of the state law, notwithstanding injured party's allegation that State's breach of duty to inspect, in action brought by sawmill, led to "traumatic amputation" of injured party's arm. MCA 50-71-321; Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

4. States ⇐18.7, 18.11

Congress may preempt State laws in either of two manners; the first occurs when Congress manifests an intent to occupy the field and the second occurs when Congress passes federal legislation not intended to occupy the field, in which case any contradictory State laws must yield to the federal legislation.

5. States ⇐18.11

Congress' intent to preempt State law may be either explicit in a statute or implic-

it in its structure and purpose. U.S.C.A. Const. Art. 6, cl. 2.

6. States ⇐18.3

In ruling on claim of alleged congressional preemption of contradictory State law, the interpretation and application of State law, vis-a-vis federal law, is as crucial as is the actual wording of the competing acts.

7. Labor Relations ⇐9.5
States ⇐18.45

Combination of effective federal standards for protection of workers' safety, set out in Occupational Safety and Health Act, and of state acquiescence to those standards despite fact that state could have recaptured power to set its own standards by submitting a state safety plan, demonstrated that federal government occupied the field of workers' safety and that OSHA preempted Montana Safety Act, for purposes of injured party's claim that State's failure to comply with its inspection duties under Safety Act led to "traumatic amputation" of his arm in sawmill accident. MCA 50-71-321; Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

8. Statutes ⇐188

In interpreting an act of Congress, a court may not depart from the statute's clear meaning.

9. Labor Relations ⇐9.5

Provision of Occupational Safety and Health Act purporting to limit its effect on State workmen's compensation law did not exempt from operation of the Act negligence claim of injured party based on a statutory duty of State to inspect hazardous work places, where State statute imposing that duty was superseded by OSHA. MCA 50-71-321; Occupational Safety and Health Act of 1970, §§ 2 et seq., 4(b)(4), 29 U.S.C.A. §§ 651 et seq., 653(b)(4).

Edward K. Duckworth, Ronan, Michael J. McKeon (argued), Anaconda, for plaintiff and appellant.

R. Scott Currey (argued) Agency Legal Services Bureau, Helena, for defendant and respondent.

HARRISON, Justice.

Plaintiff Larry D. Thornock appeals from an order of the District Court of the Twentieth Judicial District granting summary judgment for the State. He had claimed that the State had been negligent in failing to inspect hazardous places of employment as required by § 50-71-321, MCA. He argues that this inaction by the State allowed the sawmill at which Thornock worked to operate in a hazardous condition and led to an accident in which Thornock lost his left arm at the elbow. We are presented with the question of whether the federal Occupational Safety and Health Act (29 U.S.C. §§ 651 et seq.) preempted that statutory duty. The District Court ruled that it did and granted summary judgment for the State. We affirm. .

On December 1, 1982, Thornock injured his left arm while attempting to unjam a block of wood that had stalled a conveyor belt called a feed chain at the Flathead Lumber Company in Polson, Montana. He did not turn off the power that fed the machine. The result was that his arm was pulled into the drive chain and sprocket. Thornock filed a claim for Workers' Compensation benefits and received a full and final settlement in September 1984. One of the owners of the mill stated in his deposition that the State had never inspected that feed chain in the five years that the sawmill had been operating. Section 50-71-321, MCA, adopted as part of the Montana Safety Act in 1969, provides:

(1) The division [of Workers' Compensation] shall inspect from time to time all the places of employment defined in the Montana Workers' Compensation Act as being hazardous and the machinery and appliances therein contained for the purpose of determining whether they conform to law.

(2) A report of such periodic inspection shall be filed in the office of the division and a copy thereof given the employer. Such report shall not be open to public

inspection or made public except on order of the division or by the division in the course of a hearing or proceeding.

Mr. Thornock filed his claim against the State on January 10, 1985. In paragraph V of his complaint, he alleged that the State's failure to inspect the feed chain constituted negligence that was a proximate cause of the "traumatic amputation" of his arm. The State answered that it had no responsibility for the safety of working conditions at the Flathead Lumber Company in December 1982 because its authority had been preempted by the federal Occupational Safety and Health Act. Both parties moved for summary judgment and briefed the issue. On January 21, 1987, the District Court granted the State's motion for summary judgment, pursuant to Rule 54(b), M.R.Civ.P., and denied Thornock's motion. The District Court wrote:

> In 1970 the U.S. Congress enacted OSHA to assure safe and healthful working conditions and provides [sic] that states may assert jurisdiction where there are no federal standards in effect.
>
> 29 C.F.R., Sec. 1900.265 was adopted and set federal safety standards for sawmills and adopted specific construction, operation and maintenance standards for conveyors ... Since the adoption of OSHA and said regulations, the State of Montana has not followed the procedure provided therein for the state to assert jurisdiction over occupational safety in this area of conveyors in sawmills.
>
> The federal law and regulations adopted pursuant thereto have preempted the state law which is the basis of Plaintiff's complaint and Defendant is therefore entitled to summary judgment as a matter of law.

On appeal, Thornock concedes that OSHA preempts the promulgation of safety standards and enforcement of such standards from the State's purview. However, he argues that OSHA has not preempted the State's responsibility of gathering and compiling information as to safety in the work place. He argues also that the wording of OSHA does not meet the United States Supreme Court's test for the applicability of the doctrine of preemption as set forth in *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed. 2d 443. We shall consider these arguments in turn.

His first argument—that the State's duty to inspect hazardous work places and prepare reports on their safety is not preempted by OSHA—is founded on the premise that OSHA was intended to preempt states from setting and enforcing their own standards as to worker safety but not as to inspections. He notes that 29 U.S.C. § 667(a) allows state agencies to "[assert] jurisdiction under state law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title." He notes that 29 U.S.C. § 655 establishes the rulemaking procedure by which the Secretary of Labor may "promulgate, modify, or revoke any occupational safety or health standard," and claims this does not include the process of inspection. Because inspection is not included in 29 U.S.C. § 655, he claims that § 50-71-321, MCA, is still valid because of 29 U.S.C. § 667(a)'s provisions guarding state duties. Furthermore, he notes that 29 U.S.C. § 667(b) provides a means by which any state may petition the Secretary of Labor "to assume responsibility for development and enforcement ... of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated ..." He concedes, however, that the State of Montana has never completed such a petition.

Thornock relies on *P & Z Co., Inc. v. District of Columbia* (D.C.1979), 408 A.2d 1249, in which the Court of Appeals for the District of Columbia distinguished the three functions of OSHA as standard specification, standard enforcement, and information gathering and reporting. *P & Z Co.*, 408 A.2d at 1250. That court held that OSHA does not preempt state duties unless standards have been promulgated under 29 U.S.C. § 655. Thornock contends that since information gathering and reporting has not been considered to be a standard, information gathering and reporting are

not preempted by OSHA. *P & Z Co.*, 408 A.2d at 1250. The District of Columbia Court of Appeals found nothing in the legislative history of OSHA to support the appellant's claim that a statute requiring an employer to report employee injuries had been preempted by OSHA. *P & Z Co.*, 408 A.2d at 1251, n. 7. Similarly, in *Berardi v. Getty Refining & Marketing* (N.Y. 1980), 107 Misc.2d 451, 435 N.Y.S.2d 212, the court ruled that while OSHA was meant to be exclusive in the promulgation and enforcement of standards, a state may take jurisdiction over any safety issue on which there is no federal standard. *Berardi*, 435 N.Y.S.2d at 216. Thornock's reliance on these two cases, however, is misplaced because the holdings of these cases are at odds with the allegations of Thornock's complaint. In his complaint, Thornock cites § 50-71-321, MCA, as requiring the State to inspect the sawmill's feed chain and enforce standards. He claims it was the State's failure to inspect the premises along with the State's failure to require the sawmill to be operated safely that was the proximate cause of his injuries. Whereas *P & Z Co.* holds that a state or other local jurisdiction can exercise duties not preempted by OSHA, Thornock specifically incorporates into his complaint a duty preempted by OSHA—the right to enforce standards. The thrust of the holding in *P & Z Co.* is that the adoption and enforcement of work place safety standards by the states is preempted where federal standards have been promulgated. *P & Z Co.*, 408 A.2d at 1250.

Section 50-71-321, MCA, does not exist in a vacuum; it is an integral part of a state scheme to set and enforce safety codes, §§ 50-71-101 through 50-71-334, MCA. Thornock concedes, however, that the provisions in that state scheme for establishing and enforcing safety standards are preempted by OSHA, but contends the element of the scheme providing for state inspection is still vital. He argues, in effect, that the State still has a duty to inspect work sites even though its authority to set the standards to be inspected or to impose sanctions for discrepancies has been superseded.

[1-3] The tort of negligence arises when one has a duty recognized by law, he breaches that duty, the breach of the duty serves as a legal cause of another's injury, and that injury is an actual loss or damage. *Roy v. Neibauer* (Mont.1981), 623 P.2d 555, 556, 38 St.Rep. 173, 174; *Pretty on Top v. City of Hardin* (1979), 182 Mont. 311, 315, 597 P.2d 58, 60. If no duty exists there can be no negligence. *Ambrogini v. Todd* (1982), 197 Mont. 111, 118, 642 P.2d 1013, 1017, citing Prosser on the Law of Torts § 30; *Green v. Hagele* (1979), 182 Mont. 155, 158, 595 P.2d 1159, 1161. No duty on the part of the State lies here because of the federal government's usurpation of the Montana Safety Act when Congress passed OSHA in 1970. Congress declared its role in 29 U.S.C. § 651 as being "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions ..." by creating occupational health and safety standards, establishing an enforcement program, and providing appropriate reporting procedures. Subsection 11 of 29 U.S.C. § 651(b) allows states to assume administration of workers' safety programs if they submit plans approved by the Department of Labor.

State laws dealing with workers' safety are preempted once OSHA enacts similar standards. *New Jersey State Chamber of Commerce v. Hughey* (3rd Cir.1985), 774 F.2d 587, 592. In that case, the court refused to hold that OSHA preempted all of New Jersey's environmental protection laws since the Secretary of Labor's preemptive authority applies only to state occupational safety and health laws. *Chamber of Commerce*, 774 F.2d at 593. OSHA itself provides the Secretary of Labor and his agents with the authority to enter any factory, construction site or other work place to inspect and investigate machinery and working conditions. Such inspections are sanctioned under 29 U.S.C. § 657. See, 61 Am.Jur.2d Plant and Job Safety § 62 (1981). Since the federal legislation itself provides such inspection authority, it makes no difference whether standards for inspection have been approved under 29 U.S.C. § 655. In *Ohio*

Manufacturers' Association v. City of Akron (6th Cir.1986), 801 F.2d 824, the court interpreted the legislative history of OSHA. It determined that OSHA was intended to establish a national standard, which would be needed to insure that all states would at least meet certain minimum work safety requirements. To that degree, the court held that state workers' safety laws were preempted expressly. *Ohio Manufacturers' Association*, 801 F.2d at 831. It also concluded that OSHA standards on communication of hazards, 29 C.F.R. § 1910, impliedly preempted a city ordinance that regulated the presence of hazardous substances in the work place. *Ohio Manufacturers' Association*, 801 F.2d at 834. That court ruled that OSHA's desire to achieve uniformity would aid in the enforcement of, and compliance with, its standards.

The reasoning employed by the Sixth Circuit Court of Appeals in *Ohio Manufacturers' Association* is sound and is applicable to the question before this Court. Thornock must persuade this Court that federal powers granted in OSHA do not relieve the State of its burden to inspect dangerous work sites. As we have noted previously he bases that argument on the fact that OSHA expressly relieves the State of its right to set standards and to enforce standards, but fails to expressly relieve the State of its duty to inspect. Such an argument fails. Congress has stated expressly that formulation and enforcement of work place safety will be a prerogative of OSHA. The power to inspect the work place is part and parcel of the enforcement of standards. Without inspections, the governing agency has no grounds for enforcement. Similarly, without enforcement powers, which Thornock concedes the State no longer has, inspection privileges are meaningless.

[4] Congress may preempt state laws in either of two manners. The first occurs when Congress manifests an intent to occupy the field; the second occurs when Congress passes federal legislation not intended to occupy the field. In that case, any contradictory state laws must yield to the federal legislation. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission* (1983), 461 U.S. 190, 203–04, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752, 765; *State ex rel. Nepstad v. Danielson* (1967), 149 Mont. 438, 440, 427 P.2d 689, 691. The first of these scenarios controls this case.

It is plain from reading the Occupational Safety and Health Act that Congress intended to occupy the field of assuring worker safety. Congress accomplished this by setting minimum federal standards that all employers must meet. Thornock's argument that Congress did not occupy the field because it expressly included provisions in OSHA by which the various states could resume workers safety programs is not persuasive. In order to regain the right to set and enforce work safety rules, a state must submit to the Secretary of Labor a plan that is "at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 ..." 29 U.S.C. § 667(c)(2). So while states may choose to exercise work safety programs, they may do so only on the federal government's terms. This field has been occupied by federal law; as such we need not concern ourselves with whether § 50–71–321, MCA, is or is not contrary to OSHA. Such an analysis would be required only if the field had not been occupied by the federal government but one party claimed state law and federal law clashed.

[5, 6] The doctrine of preemption stems from Article VI, cl. 2 of the United States Constitution, which states that the United States Constitution and the laws of the United States "shall be the Supreme Law of the Land ..." Congress' intent to preempt state law may be either explicit in the statute or implicit in its structure and purpose. *Marshall v. Burlington Northern, Inc.* (9th Cir.1983), 720 F.2d 1149, 1152. In *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604, the United States Supreme Court ruled that when Congress has "unmistakably ordained" that its enactments alone will regulate a portion of commerce, any

state laws regarding that aspect must fall. *Jones*, 430 U.S. at 525–26, 97 S.Ct. at 1310, 51 L.Ed.2d at 614. The interpretation and application of state law, vis-a-vis federal law, is as crucial in this determination as is the actual wording of the competing acts. *Jones*, 430 U.S. at 526, 97 S.Ct. at 1310, 51 L.Ed.2d at 614.

[7] Montana law recognizes that it is not the wording that determines if a state law has been preempted by federal action. "It is well settled that the question of whether a statute is invalid under the supremacy clause depends upon the intent of Congress." *Mountain States Telephone & Telegraph Co. v. Commissioner of Labor and Industry* (1979), 187 Mont. 22, 41, 608 P.2d 1047, 1057, appeal dismissed 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754. As we have noted earlier Congress stated that OSHA was meant to assure every working person "safe and healthful working conditions." 29 U.S.C. § 651(b). Congress also has stated a desire to return the function of protecting workers' safety to the various states as soon as the state submits a plan at least as stringent as OSHA to the federal government for approval. 29 U.S.C. § 667(b). Montana has completed no such state plan. This combination of effective federal standards and State acquiescence to those standards despite the fact that the State could, if it wanted to, recapture those powers demonstrates that the federal government has occupied the field. Thus, Congress has preempted the Montana Safety Act.

As his second issue, Thornock claims OSHA falls short of the test for preemption established in *Silkwood*, supra. In *Silkwood*, an award of punitive damages under state law for the decedent's contamination by plutonium was not preempted even though Congress had passed the Atomic Energy Act in an effort "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes." *Silkwood*, 464 U.S. at 257, 104 S.Ct. at 626, 78 L.Ed.2d at 458, citing 42 U.S.C. § 2013(d). The Supreme Court also noted that punitive damages would not be contrary to the federal act since 42 U.S.C. § 2013(d) said such development and utilization of atomic power should be done "consistent with the health and safety of the public." The award of punitive damages did not contravene federal purposes. *Silkwood*, 464 U.S. at 257, 104 S.Ct. at 626, 78 L.Ed.2d at 458.

Such rationale does not comport well with the circumstances of this case. In 29 U.S.C. § 657, the Secretary of Labor is provided with means by which he may enter and inspect a work site. Subsection (d) says very specifically that any such inspections by federal agencies or by proper state agencies shall not be unnecessarily burdensome on the employer

> (d) Obtaining of Information
>
> *Any information obtained by the Secretary, [of Labor]* the Secretary of Health and Human Services, *or a State agency under this chapter shall be obtained with a minimum burden upon employers,* especially those operating small businesses. *Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible.* (Emphasis added.)

The intent of Congress is clear. It has created federal law by which to insure the safety of the work place. It has established an agency to set standards and to enforce them. This has been done to create a uniform minimal level of safety. Thus, state efforts to set and enforce standards have been superseded. In addition, Congress has realized that a plethora of inspectors from all sorts of agencies is not needed, and ordered that such inspections not be unduly repetitious. The State of Montana, with no standards of its own or any enforcement powers, decided not to inspect dangerous work places. It concluded that OSHA had assumed that responsibility.

[8, 9] As a last-ditch argument, Thornock cites 29 U.S.C. § 653(b)(4) and argues that it exempts his cause of action from OSHA preemption. That subsection reads:

> *Nothing in this chapter shall be construed to supersede* or in any manner affect *any workmen's compensation law or to enlarge or diminish or affect*

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in any other manner *the common law or statutory rights, duties, or liabilities of employers and employees* under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. (Emphasis added.)

This argument has little merit. In *United Steel Workers of America v. Marshall* (D.C.Cir.1980), 647 F.2d 1189, cert. denied *National Association of Recycling Industries, Inc. v. Secretary of Labor*, 453 U.S. 913, 101 S.Ct. 3149, 69 L.Ed.2d 997, an issue was whether the monitoring of blood-lead levels and the payment of benefits to those that exhibited high blood-lead levels was an attempt to federalize workers' compensation laws. The Circuit Court termed 29 U.S.C. § 653(b)(4) as "vague and ambiguous on its face," and further stated that OSHA's legislative history reveals "essentially nothing" about the section. *United Steel Workers*, 647 F.2d at 1234, see also n. 70. It is true that the general rule of statutory construction in Montana is that a court should interpret the statute so as to allow the intent of the legislature to control if possible. *Darby Spar, Ltd. v. Department of Revenue* (Mont.1985), 705 P.2d 111, 113, 42 St.Rep. 1262, 1264. In interpreting an act of Congress, a court may not depart from the statute's clear meaning. *Adams v. Morton* (9th Cir.1978), 581 F.2d 1314, 1320, cert. denied sub. nom. *Gros Ventre Tribe v. United States* (1978), 440 U.S. 958, 99 S.Ct. 1498, 59 L.Ed.2d 771. It can be clearly determined from the language of this section that Congress did not mean to interfere with the various states' workers' compensation schemes. Beyond that, Congress' intention is obscure. We conclude that Thornock's cause of action is not exempted from OSHA.

After a careful review of the record and a weighing of the arguments we agree that the State's duty to inspect had been superseded by the federal act. Thus, the fact that the State had not inspected the sawmill at which Thornock was injured does not make the State negligent for the most important element of negligence—duty—had been assumed by the federal government. We affirm the District Court's order granting summary judgment for the State.

TURNAGE, C.J., and WEBER, GULBRANDSON and McDONOUGH, JJ., concur.

HUNT, Justice, dissenting:

In this Opinion, as in *Thornock v. Pack River Management Co.* (1987), 740 P.2d 1119, the majority posits an argument which denies Larry Thornock any third party action recovery for the tragic amputation of his left arm. I disagree with the result of the majority opinion and would reverse the judgment of the District Court.

SHEEHY, J., concurs with the foregoing dissent of HUNT, J.

John G. BOWEN, Claimant and Appellant,

v.

SUPER VALU STORES, INC., Employer,

and

Liberty Mutual Insurance Company, Defendant and Respondent.

No. 86–253.

Supreme Court of Montana.

Submitted on Briefs Sept. 25, 1986.

Decided Nov. 5, 1987.

Workers' compensation claimant appealed and carrier cross-appealed from order of the Workers' Compensation Court, Timothy Reardon, J., denying reconsideration of orders vacating trial date for further pretrial discovery of medical information and denying dismissal of action. The Supreme Court, Sheehy, J., held that: (1) rules adopted by the Workers' Compensa-

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§ 652. Definitions

For the purposes of this Act—

(1) The term "Secretary" mean [means] the Secretary of Labor.

(2) The term "Commission" means the Occupational Safety and Health Review Commission established under this Act.

(3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof.

(4) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

(6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

(7) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

(9) The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1), has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

(10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act [enacted Dec. 29, 1970].

(11) The term "Committee" means the National Advisory Committee on Occupational Safety and Health established under this Act.

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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"; in (21), at end, substituted "reaches maximum healing" for "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"; and deleted former (20) and (21) that read: "(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."

39-71-117. Employer defined. "Employer" means:

(1) the state and each county, city and county, city school district, irrigation district, all other districts established by law, and all public corporations and quasi-public corporations and public agencies therein and every person, every prime contractor, and every firm, voluntary association, and private corporation, including any public service corporation and including an independent contractor who has any person in service under any appointment or contract of hire, expressed or implied, oral or written, and the legal representative of any deceased employer or the receiver or trustee thereof; and

(2) any association, corporation, or organization that seeks permission and meets the requirements set by the division by rule for a group of individual employers to operate as self-insured under plan No. 1 of this chapter.

History: En. 92-410.1 by Sec. 1, Ch. 154, L. 1973; R.C.M. 1947, 92-410.1(part); amd. Sec. 1, Ch. 480, L. 1985.

39-71-118. Employee, worker, and workman defined. (1) The terms "employee", "workman", or "worker" mean:

(a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. The terms include aliens and minors, whether lawfully or unlawfully employed, and all of the elected and appointed paid public officers and officers and members of boards of directors of quasi-public or private corporations while rendering actual service for such corporations for pay. Casual employees as defined by 39-71-116 are included as employees if they are not otherwise covered by workers' compensation and if an employer has elected to be bound by the provisions of the compensation law for these casual employments, as provided in 39-71-401(2). Household or domestic service is excluded.

(b) a recipient of general relief who is performing work for a county of this state under the provisions of 53-3-303 through 53-3-305 and any juvenile performing work under authorization of a district court judge in a delinquency prevention or rehabilitation program;

(c) a person receiving on-the-job vocational rehabilitation training or other on-the-job training under a state or federal vocational training program, whether or not under an appointment or contract of hire with an employer as defined in this chapter and whether or not receiving payment from a third party. However, this subsection does not apply to students enrolled in vocational training programs as outlined above while they are on the premises of a public school or community college.

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508 n. 6 (5th Cir. 1980); *United States v. Beer*, 518 F.2d 168 (5th Cir. 1975).[1] One is indeed reluctant to hold that Congress simply wasted its time by reducing the maximum penalty under section 7206.

Nevertheless, I do not believe that this problem goes to the sufficiency of the indictment. Counts two through five sufficiently allege facts constituting a violation of 26 U.S.C. § 7206. Defendants do not claim otherwise—indeed they claim that an offense *is* alleged under section 7206.[2] Under the express provisions of Rule 7(c)(3), Fed.R.Cr.P., citation of the wrong statutory provision is not grounds for dismissal of the indictment "if the error . . . did not mislead the defendant to his prejudice." Here there is no assertion that any of the defendants were prejudicially misled, nor does the record suggest such. *See United States v. Welch*, 656 F.2d 1039, 1059 n. 26 (5th Cir. 1981), *cert. denied*, — U.S. - - , 102 S.Ct. 1768, 72 L.Ed.2d 173 (1982); *United States v. Duncan*, 598 F.2d 839, 848 n. 4, 854 n. 11 (4th Cir.), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979).[3]

Accordingly, I would not dismiss any of counts two through five, nor that part of count one relating to these substantive counts.

AUSTIN ROAD COMPANY, Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and Raymond J. Donovan, Secretary of Labor, Respondents.

Nos. 78-2986, 81-4050.

United States Court of Appeals, Fifth Circuit.

Aug. 25, 1982.

Petitions were filed seeking review of an order of the Occupational Safety and Health Review Commission which upheld an OSHA citation given to a Texas contrac-

1. On the other hand, a similar contention favoring prosecution under the 1939 Internal Revenue Code analogue to section 7206 was rejected in *Cohen v. United States*, 201 F.2d 386, 392-93 (9th Cir. 1953) (note, however, that under the 1939 Code the penalty for a willfully false return was five years and a $2,000 fine, and there was no indication of a specific congressional intention to reduce the maximum sentence). In *United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), the prosecution was under section 1001 but the question of whether it should have been under section 7206(1) was neither raised nor discussed. In *United States v. Knox*, 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275 (1969), it does not appear whether the wagering tax return form was such as would be required for prosecution under section 7206(1). *See also United States v. Carter*, 526 F.2d 1276 (5th Cir. 1976) (however, the opinion seems to view each of the statutes involved as requiring proof of some element which the other did not).

2. Eisenberg is charged in counts two and three with aiding and abetting Tom and Mick Hajecate in the offenses respecting their 1977 income tax returns. Since the requisite mental state is alleged as to the Hajecates respectively, as well as to Eisenberg, Eisenberg would be chargeable under 18 U.S.C. § 2(a) for aiding and abetting the Hajecates' violation of 26 U.S.C. § 7206(1). Clearly 18 U.S.C. § 2(a) is not in terms restricted to offenses denounced in Title 18, and there is no reason to deny its application to the offenses denounced in Title 26. *See, e.g., United States v. Johnson*, 319 U.S. 503, 514-15, 63 S.Ct. 1233, 1238-39, 87 L.Ed. 1546, 1555-56 (1943). Eisenberg could alternatively be charged under 26 U.S.C. § 7206(2). The penalty in each instance would be the same.

While it is not expressly alleged that the returns were signed under penalties of perjury, it is alleged that in each instance the return signed was the "Individual Income Tax Return, Form 1040" for the respective years 1976 and 1977. These official forms, of which judicial knowledge can be taken, contain a printed declaration that the return is made under the penalties of perjury, and hence satisfy the requirement in this regard of section 7206(1).

3. There is no question of a guilty plea having been taken under a misapprehension of the maximum sentence, nor, of course, has the sentencing stage been reached.

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tor for failing to slope a trench. The Court of Appeals, Politz, Circuit Judge, held that Secretary of Labor failed to establish that Texas contractor's activities affected interstate commerce and therefore Secretary failed to demonstrate the applicability of Occupational Safety and Health Act to contractor's activities.

Petitions granted; enforcement denied.

Brown, Circuit Judge, filed concurring opinion.

1. Commerce ⇐62.20

In enacting Occupational Safety and Health Act, Congress intended to exercise the full extent of authority granted by commerce clause of Constitution; thus, an employer comes under the aegis of the Act by merely affecting commerce and it is unnecessary that employer be engaged directly in interstate commerce. U.S.C.A.Const.Art. 1, § 8, cl. 3; Occupational Safety and Health Act of 1970, §§ 2 33, 29 U.S.C.A. §§ 651 678.

2. Commerce ⇐62.20

Secretary of Labor failed to establish that Texas contractor's activities affected interstate commerce and therefore Secretary failed to demonstrate the applicability of Occupational Safety and Health Act to contractor's activities. Occupational Safety and Health Act of 1970, §§ 2 23, 29 U.S.C.A. §§ 651-678.

3. Administrative Law and Procedure ⇐791

In reviewing a decision by an administrative agency, appellate court accepts all factual findings supported by substantial evidence in the record considered as a whole.

Jenkens & Gilchrist, Steven R. McCown, Dallas, Tex., for petitioner.

Ann D. Nachbar, Dennis K. Kade, U. S. Dept. of Labor, Washington, D. C., Allen H. Sachsel, Atty., Dept. of Justice, Washington, D. C., for respondents.

Petitions for Review of an Order of the Occupational Safety and Health Review Commission.

Before BROWN, GOLDBERG and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

These petitions for review of an order of the Occupational Safety and Health Review Commission (commission) pose the threshold issue whether the record establishes that Austin Road Company is an employer within the meaning of 29 U.S.C. § 652(5),[1] a requisite for the commission's exercise of jurisdiction. Concluding that the Secretary of Labor failed to demonstrate the applicability of the Occupational Safety and Health Act, 29 U.S.C. §§ 651 678, and that the commission's ruling does not comport with the procedural requirements of 5 U.S.C. § 557(c),[2] we grant review and deny enforcement.

1. 29 U.S.C. § 652(5): "The term 'employer' means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State." Section 652(3) also provides that the "term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States . . . ."

2. 5 U.S.C. § 557(c) provides:

> Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.
>
> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

Facts

Austin Road Company is a Texas contractor engaged in building residential streets, storm drains, sanitary sewers, and water transmission lines. In 1974, the company received and did not contest a non-serious citation, issued under 29 C.F.R. § 1926.652(c), for its failure to slope the sides of a trench at a job site. In 1977, it was cited for a serious, repeated violation of 29 C.F.R. § 1926.652(c) for failing to slope a trench. Austin Road challenged jurisdiction and, on the merits, denied the offense. After a hearing, an Administrative Law Judge upheld the citation but reduced the monetary penalty from $1,620 to $950. On review, the commission remanded for reconsideration whether the violation was properly characterized as "repeated" in light of its intervening decision in *Potlatch Corporation*, 1979 CCH OSHD ¶ 23,294. On remand, the ALJ found that the violation constituted a repeat violation, a finding affirmed by the commission. Appeals from the initial order of the commission (our docket number 78–2986) and the order after remand (our docket number 81–4050) were consolidated.

[1] We agree with our colleagues who have previously considered the question that, in enacting the Occupational Safety and Health Act, Congress intended to exercise the full extent of the authority granted by the commerce clause of the Constitution. *See, e.g., Godwin v. Occupational Safety & Health Review Comm'n*, 540 F.2d 1013 (9th Cir. 1976); *United States v. Dye Construction Co.*, 510 F.2d 78 (10th Cir. 1975); *Brennan v. Occupational Safety & Health Review Comm'n*, 492 F.2d 1027 (2d Cir. 1974). Accordingly, an employer comes under the aegis of the Act by merely affecting commerce; it is not necessary that the employer be engaged directly in interstate commerce. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *United States v. Wrightwood Dairy*, 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed. 726 (1942); *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941). *See also* J. Nowak, R. Rotunda, & J. Young, *Handbook on Constitutional Law* 151–56 (1978).

[2] When the issue is contested, the burden of showing that the employer's activities affect interstate commerce rests upon the administrative representative involved—in the case at bar, the Secretary of Labor. The burden is, in the usual case, modest, if indeed not light. However, in the instant case, the Secretary experienced considerable difficulty with this essential element. As the ALJ noted:

> Compliance Officer Gerald K. Forrester testified, inconclusively, that Austin was using a Bucyrus Erie hydraulic boom crane which he *believed* was made in Bucyrus, Michigan. (Tr. 28). He also testified that the sewer line was to serve a new industrial complex.

(Emphasis in original.) As recognized by the ALJ, this evidence "would hardly be sufficient to carry the Secretary's burden of proof that Austin's business affected commerce." We agree. The ALJ looked to other evidence "to satisfy the jurisdictional requirements." Specifically, the ALJ referred to the testimony of Henry M. Cornelius, manager of loss control for Austin Road, and made these observations:

> Mr. Cornelius gave this picture of the corporate structure: Respondent is one of several corporations, including Austin Bridge Co., Austin Paving Co., Austin Commercial and Austin Power, which have interlocking directorates and are wholly owned by Austin Industries, a holding company, the stock of which is not publicly held. Two of this family of corporations (apparently not among those named) manufacture farm machinery in Texas and sell it outside the state. Austin Power builds power plants both within and without the state of Texas, including plants it was then building at St. Mary's, Kansas, and Gentry, Arkansas (Tr. 112–120). Cornelius said Austin Road Co. does not contract outside Texas. It builds residential streets, storm drains, sanitary sewers and water transmission lines (the latter including a line from Lake Granbury, Texas, to Texas Utilities Company's Comanche Peak nuclear power plant at Glen Rose, Texas).

From this factual redoubt, the ALJ concluded that Austin Road's "profits or losses affect the corporate well-being of its parent company, Austin Industries, and indirectly of its sister companies, including those which are engaged directly in interstate commerce." As a consequence, the ALJ continued, because "[t]his corporate conglomerate is under common ownership and control, [t]here is sufficient 'effect' on commerce to bring respondent within the ambit of the Act."[3] We do not agree.

[3] In reviewing a decision by an administrative agency, we accept all factual findings supported by substantial evidence in the record considered as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408 (5th Cir. 1981). However, consistent with the congressional mandate contained in 5 U.S.C. § 557 and the rubric evolved in *Federal Trade Comm'n v. Beatrice Foods Co.*, 587 F.2d 1225, 1235 (D.C.Cir.1978) (Appendix), *Anglo-Canadian Shipping Co. Ltd. v. Federal Maritime Comm'n*, 310 F.2d 606 (9th Cir. 1962), *Saginaw Broadcasting Co. v. Federal Communications Comm'n*, 68 U.S.App.D.C. 282, 96 F.2d 554, *cert. denied*, 305 U.S. 613, 59 S.Ct. 72, 83 L.Ed. 391 (1938), and similar cases, the accepted factual findings provide the basis for review: we need not glean the evidence, but look only to the administrative findings of fact.[4]

In the present case, the findings regarding Austin Road's impact on its corporate parent and siblings are not supported by the record; they are speculative and conclusionary. The conclusion that the Secretary met the jurisdictional challenge is not based upon adequate factual findings. And, although we are not obliged to examine the evidence presented before the ALJ (see note 4, *supra*), our examination of the record reveals that a finding of jurisdiction cannot be made. Perhaps Austin Road's business does affect interstate commerce; but that essential fact is not established in the record before us.

The Secretary and commission invite us to take judicial notice of Austin Road's effect on interstate commerce. We decline the invitation. *See* 5 U.S.C. § 557(c); Fed. R.Evid. 201(b). Jurisdiction not having been first established, the order of the commission cannot stand.

Austin Road's petitions for review are GRANTED; enforcement is DENIED.

JOHN R. BROWN, Circuit Judge, concurring.

I concur fully in Judge Politz's opinion but I would add these brief comments.

The case on this meager record ought never to have been appealed to this Court. The decision to do so reflects a disturbing misunderstanding of the agency's highest legal officer on the minimal proofs (and findings) needed to sustain "jurisdictional" application of OSHA and thereby justify imposing on this Court the burden of hear-

3. The ALJ also remarked: "Additionally, Austin's foreman testified that the pickup truck he drove (which belonged to Austin) was made in Chicago to (sic) Detroit." This "finding" has little persuasive effect.

4. As stated in the *Anglo-Canadian Shipping Co., Ltd.*, case, "the absence of required findings is fatal to the validity of an administrative decision regardless of whether there may be in the record evidence to support proper findings." 310 F.2d at 617. And, further, the reviewing court is "not required therefore to inquire as to what evidence there was which might have supported adequate findings ...." *Id.* Perhaps *Saginaw Broadcasting Co.* contains the best explanation of the rationale behind this rule:

> The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations .... When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality.
>
> 96 F.2d at 559.

ing, reviewing and deciding a case of obviously no appellate merit.

Nothing has been established by all of this "legal" effort save that the Secretary's prosecutor must establish by acceptable means the minimal showing that the employer's activities bring it within the Act. Everyone knew this all along. An appeal was not necessary to remind the agency of what it already knew and which we have stated so many many times.

Franklin D. EBELING, Ernest C. Ebeling and Ebeling Manufacturing Corporation, Plaintiffs-Appellants,

v.

PAK-MOR MANUFACTURING COMPANY, Defendant-Appellee.

No. 81-1341.

United States Court of Appeals, Fifth Circuit.

Aug. 25, 1982.

Rehearing Denied Oct. 12, 1982.

Patentee appealed from a judgment of the United States District Court for the Western District of Texas, H. F. Garcia, J., finding its patent invalid for obviousness and not infringed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that Patent No. 3,910,434, for a garbage container lifting and emptying device, was invalid for obviousness and was not infringed.

Affirmed.

1. Patents ⇐16(3)

Patent is invalid if subject matter sought to be patented would have been obvious at time invention was made to person having ordinary skill in art to which said subject matter pertains. 35 U.S.C.A. § 103.

2. Patents ⇐314(5)

Although question of obviousness of patent claim is one of law, its resolution requires factual inquiries and, in jury case, jury may properly resolve such factual questions as scope and content of prior art, differences between prior art and claim at issue, and level of ordinary skill in pertinent art. 35 U.S.C.A. § 103.

3. Patents ⇐36.1(1, 3, 4), 36.2(1)

Skepticism of experts, commercial success, long-felt but unresolved needs, and failure of others are relevant secondary considerations in determining obviousness of patent claim. 35 U.S.C.A. § 103.

4. Patents ⇐314(5)

In jury cases, district judge determines question of patent validity on results of factual inquiry made by jury. 35 U.S.C.A. § 103.

5. Patents ⇐314(5)

Although patent infringement is question of fact, construction of patent claim is question of law and, if infringement depends upon proper construction of claim, court may decide issue of infringement as one of law.

6. Patents ⇐324.55(1)

On appeal of judgment on jury verdict in patent case, it is not function of Court of Appeals to evaluate evidence de novo, but merely to determine whether there was substantial evidence to support jury's findings.

7. Patents ⇐328(2)

Patent No. 3,910,434, for a garbage container lifting and emptying device, was invalid for obviousness and was not infringed.

8. Patents ⇐238

Omission of any element of patent claim avoids infringement of that claim.

Gibson, Ochsenr & Adkins, S. Tom Morris, Amarillo, Tex., for plaintiffs-appellants.

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OSHA jurisdiction over alleged violation arising out of steam explosion in wet rotary kiln at employer's cement plant was preempted under 29 USCS § 653(b)(1) where at time of alleged violation Mining Enforcement and Safety Administration of Department of Interior was "exercising" its authority over employer's kilns pursuant to its regulations and Memorandum of Understanding with OSHA then in effect, notwithstanding that at time of explosion MESA might have temporarily ceased its inspections of kilns; any oversight of adequacy of another agency's enforcement activities is beyond scope of permissible inquiry under § 653(b)(1). Pennsuco Cement & Aggregates, Inc. (1980) OSHRC Docket No. 15462.

Enterprise established and operated by Indian tribe within Indian reservation is not subject to Occupational Safety and Health Act (29 USCS §§ 651 et seq.), since Act cannot abrogate tribe's rights under treaty and cannot be applied in manner which would detract from tribes's sovereignty. Navajo Forest Products Industries (1980) OHSRC Docket No. 76-5013.

Conditions in temporary labor camps are covered by Occupational Safety and Health Act (29 USCS § 653(a)) if residence of migrant farm workers in camp bears direct relationship to employment, and where farmers own, control, and maintain their camps, require migrant farm workers residing in camps to work on demand, and supply rent-free residence in camps in order to assure themselves of available labor supply, labor camps bear direct relationship to employment. C. R. Burnett & Sons, Inc. (1980) OSHRC Docket No. 78-1103.

§ 654. Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

(Dec. 29, 1970, P. L. 91-596, § 5, 84 Stat. 1593.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act Dec. 29, 1970, P. L. 91-596, 84 Stat. 1590, popularly known as the Occupational Safety and Health Act of 1970, which appears generally as 29 USCS §§ 651 et seq. For full classification of this Act, consult USCS Tables volumes.

Effective date of section:

For the effective date of this section, see the Other provisions note to 29 USCS § 651.

CODE OF FEDERAL REGULATIONS

Coordinated enforcement, 29 CFR Part 42.

Inspections, citations and proposed penalties, 29 CFR Part 1903.

Administrative requirements governing all grants and agreements by which Department of Labor agencies award funds to State and local governments, Indian and native American entities, public and private institutions of higher

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a corporation or other person violates any safety provision of this chapter or who directly or indirectly knowingly induces another to do so is guilty of a misdemeanor.

History: En. Sec. 23, Ch. 341, L. 1969; R.C.M. 1947, 41-1730.

Cross-References
Penalty when none specified, 46-18-212.

Part 2
Duties of Employer and Employee

Part Cross-References
Division of Workers' Compensation, 2-15-1702.
Workers' compensation, Title 39, ch. 71.
Occupational Disease Act of Montana, Title 39, ch. 72.
Silicosis benefits, Title 39, ch. 73.

50-71-201. Employer to furnish and require safety devices and practices. Every employer shall furnish a place of employment which is safe for employees therein and shall furnish and use and require the use of such safety devices and safeguards and shall adopt and use such practices, means, methods, operations, and processes as are reasonably adequate to render the place of employment safe and shall do every other thing reasonably necessary to protect the life and safety of employees.

History: En. Sec. 3, Ch. 341, L. 1969; R.C.M. 1947, 41-1710.

50-71-202. Employer to provide and maintain safe place of employment. (1) An employer who is the owner or lessee of any real property in this state shall not construct or cause to be constructed or maintained any place of employment that is unsafe.

(2) Every employer who is the owner of a place of employment or lessee thereof shall repair and maintain the same as to render it safe.

History: En. Sec. 4, Ch. 341, L. 1969; R.C.M. 1947, 41-1711.

50-71-203. Removal or refusal to use safety devices prohibited. No person shall remove, displace, damage, destroy, carry off, or refuse to use any safety device or safeguard furnished and provided for his use in any employment or place of employment or interfere in any way with the use thereof by any other person or interfere with the use of any method or process adopted for the protection of any employee in such employment or place of employment or fail to do any other thing reasonably necessary to protect the life and safety of such employees.

History: En. Sec. 5, Ch. 341, L. 1969; R.C.M. 1947, 41-1712.

Part 3
Safety Rules and Orders

Part Cross-References
Division of Workers' Compensation, 2-15-1702.
Workers' compensation, Title 39, ch. 71.
Occupational Disease Act of Montana, Title 39, ch. 72.
Silicosis benefits, Title 39, ch. 73.

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My name is John Scott Chaussee Sr., I live at 144 Burlington, Missoula, Montana 59801. I am employed at Stone Container Corp. and have been for over ten years. I am a member of U.P.I.U. Local 885, and currently hold the position of Standing Committee Chairman. I have been in the Power and Recovery Department for over ten years, and have had my First Class Boiler license for six years.

There are approximatly seven hundred people employed by Stone Container Corp. in Missoula. In the Power and Recovery Dept. there are three recovery boilers that burn black liquor gas or oil; two bark boilers that burn wood, gas, or oil; one power boiler that burns gas and one package boiler that burns gas. All of these with the exception of the package boiler generate six hundred pounds of steam pressure per square inch. The package boiler generates one hundred and fifty pounds pressure per square inch. There are approximatly seventy people that work in the Power and Recovery Dept.

I am against H.B. 156 because you would have less qualified boiler inspectors working for the state.

A boiler inspector should have the knowledge and experience to insure

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~~boilers~~

The law currently mandates that a person have up to six thousand hours and take a test in order to get a First Class Boiler License. This ensures the safe operation of the boiler. This is important for a great many reasons, but the most important reason being that this is a dangerous piece of equipment, and should not be taken lightly.

Private industry operates the biggest and most dangerous boilers in the State. Safe operation of these highly explosive boilers is ensured by the fact the the employee operating the boiler has the knowledge, and experience to keep them running safely, and be alert at all times to the hazards that go with the job.

The boiler inspector should be as qualified as those people that operated a boiler. So that the inspector knows what they are talking about in case of some kind problem arises.

To avoided having unqualified boiler inspector the law should remain the same.

I would know that if there was some kind of trouble with the boiler I could turn to a qualified inspector

Madam Chair Person - and Members of the House Labor Comm.

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My Name is Robert L. Culp, I reside at 16845 Mullan Road, P.O. Box 161 Frenchtown Mt. I am the safety Chairman of Local 885 of the United Paperworkers International Union in Missoula. I am employed By Stone Container Corporation, I have worked there for approx 18 years. I am also a licensed First Class engineer and have been for approx 14 years.

I am against House Bill 156
State Boiler inspectors should be highly qualified and experience people, they should have the expertise to evaluate a boiler p[illegible] a problem with a steam turbine and several Problem that Can Occure with Steam Related equipment. The State Boiler inspector is the person that gives the exam to see if a person is qualified and Competent to handle such Complex equiptment.

The Boilers that I work with are very Complex pieces of equiptment, one in particular #4 Recovery Boiler is aprox 200 ft tall 40 ft long 30 ft wide and Can produce approx 400,000 lbs of Steam per hour. this Boiler is fired by Natural Gas, Fuel Oil and Black Liquor which is a by product of the paper making process. Black Liquor fuel is a Composition of Spent acids, Caustic Sodium and wood residue. When these Chemicals are burned in the Boiler the residue - Smelt is

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appox 2000 °F. If a tube inside this boiler ruptures and water comes in contact with the steel an explosion can occure that can level a 10 story building. State boiler inspector must have the knowlege and expertise to identify potential problem with the kind of equiptment

Montana has a good program in place with its inspectors. Down Grading the requirements for Boiler inspectors would be a mistake that could cause more accident and deaths to montana's work force.

[redacted] to vote Against Home Bill [redacted] keep [redacted] in place for the [redacted]

Thank you

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House Bill 157: Subsequent Injury Fund

Department Testimony

The Department supports House Bill 157 because it will greatly simplify access of all parties to the Subsequent Injury program. There are numerous amendments because the various subsections interrelate. Many of the changes would fall under "housekeeping", although those changes do contribute to holding the sections together and making them consistent. A summary sheet has been provided the committee for your convenience.

Sections 1, 2 and 3 would be easier to follow if they were renumbered Sections 3, 1 and 2, and I will describe them in that order.

Section 2 describes legislative intent. The program should be equitable and self-administering. Insurer expertise is relied on to adjust claims instead of the Fund's management. The program coordinates with and encourages compliance with Human Rights laws.

Section 3 adds a definition of impairment and on-the-job training. OJT is defined so workers in OJT programs clearly can be certified while in training.

Section 1 clarifies the circumstances and requirements for certification, including OJT.

There has also been confusion over whether someone working can be certified for the program. Repeal of Section 39-71-906, plus the amendments make it clear which handicapped persons may be certified.

902, 903 and 904 are basically housekeeping measures.

905 coordinates with new Section 1 and sets an expiration date on certifications, enabling the Fund to better determine its liability.

It is important to note no employer who hired a certified worker will be deprived of coverage, even if the worker's certificate expires later on.

906 is repealed, eliminating the need for an employer to notify the Fund when a certified worker is hired, and any insurer can take advantage of the Fund simply by filing a claim after an injury occurs.

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907 establishes the insurer's liability in case the Fund would become temporarily or permanently insolvent.

908 is a notice requirement.

909 is housekeeping.

911 is repealed. It is covered in New Section 2.

912 is housekeeping.

913 specifies circumstances under which the Fund will make payments directly to a claimant. The current law conflicts with Sec. 909 which says the insurer shall make payments, where 913 says if the insurer doesn't make payments the Fund will.

William R. Palmer
Interim Administrator
DNC. 1/24/89

VISITORS' REGISTER

HOUSE LABOR AND EMPLOYMENT RELATIONS COMMITTEE

BILL NO. 156 DATE January 26, 1989

SPONSOR SMITH

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Nadeen Jensen	AFSCME		✓
Jim Mackler	MT. Coal Council		
Robert Culp	UPIU Local 885		✓
[illegible]	U.P.I.U. Local 88		✓
George Wood	MT Self Insurers Assn.		✓
Mike Sherwood	MTLA		✓
Tim BERGSTROM	Billings Fire Fighters Union		✓
Mary Wellwood	Montana Sulphur & Chemical Co.		✓
Jim Murry	Mont. State AFL-CIO		✓
Bill Palmer	Ins/Work Comp	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE LABOR AND EMPLOYMENT RELATIONS COMMITTEE

BILL NO. 157 DATE January 26, 1989

SPONSOR SMITH

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
George Wood	Mt Self Insurers Assn.		✓
Mike Sherwood	NTLA		✓
Jim Murry	Mont. State AFL-CIO		✓
Oliver Goe	Montana Municipal Insurance Authority		✓
Bill Palmer	Div of Work Comp	—	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.