VOLUME NO. 45 OPINION NO. 21

COAL - Applicability of criminal penalties for ten-hour shifts;
HOURS OF WORK - Applicability of criminal penalties for ten-hour shifts;
LABOR RELATIONS - Applicability of criminal penalties for ten-hour shifts;
LABOR RELATIONS - Appropriateness of attorney general's opinion construing collective bargaining agreement;
STATUTES - Repeal by implication;
MONTANA CODE ANNOTATED - Title 39, chapter 3, part 4; sections 2-15-501(6), 39-4-104;
MONTANA CONSTITUTION OF 1889 - Article XVIII, section 4;
MONTANA CONSTITUTION OF 1972 - Article XII, section 2;
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 35 (1981), 38 Op. Att'y Gen. No. 83 (1980), 37 Op. Att'y Gen. No. 16 (1977).

HELD: A company engaged in the strip mining of coal is not subject to criminal prosecution under Mont. Code Ann. § 39-4-104 for scheduling its employees to a workweek consisting of four ten-hour days.

December 30, 1993

Ms. Christine Cooke
Big Horn County Attorney
Drawer H
Hardin, MT 59034

Dear Ms. Cooke:

You have requested my opinion on a question which I have phrased as follows:

> Is a company engaged in the strip mining of coal subject to criminal prosecution under Mont. Code Ann. § 39-4-104 for scheduling its employees to a workweek consisting of four ten-hour days?

The Decker Coal Company ["Decker"] operates a strip mine for the extraction of coal in Big Horn County. Its mining employees are represented by the United Mine Workers of America ["UMW"]. The union and management have entered into a collective bargaining agreement which contains the following provision:

> Eight (8) consecutive hours, exclusive of a thirty (30) minute lunch period . . . will constitute a regular work day for all employees covered by this agreement.
>
> . . . .
>
> At its discretion, the company may schedule employees to work four (4) consecutive days of ten (10) hours per day.

Contract Between United Mine Workers of America and Decker Coal Company Effective September 30, 1991 to January 1, 1995, § V (C) [hereafter "Contract"].

Pursuant to this provision, Decker has elected to adopt a workweek consisting of four ten-hour days for its mining employees. UMW objects to this practice, citing another provision of the collective bargaining agreement which states:

> Nothing in this agreement shall be construed to require either party to this Agreement to act in violation of any state or federal law and in the event any such condition arises, it is agreed that this Agreement shall be modified in respect to either or both parties to the extent necessary to comply with the law. In the event any portion of this Agreement is held to be invalid, it shall not affect the validity of any other portion of this Agreement, which shall remain in full force and effect.

Contract, § IX. UMW relies on Mont. Code Ann. § 39-4-104, which provides in pertinent part:

> (2) A period of not more than 8 hours will constitute a day's labor of all employees working in strip mining, except in cases of emergencies for the protection of life or property when the same is in danger.

> (3) Any person, company, corporation, or lessee of the same who shall violate the provisions of this section shall upon conviction be punished by a fine of not less than $50 or more than $600 or by imprisonment of not less than 30 days or more than 7 months or both such fine and imprisonment. Each and every day that such person, company, corporation, or lessee may continue to violate the provisions of this section shall be considered a separate and distinct offense and shall be punished as such.

You inquire whether the criminal penalties provided by the statute may be imposed against Decker for the work schedule it has adopted.

Montana's 1889 Constitution contained a clause providing that eight hours constitutes a normal workday for underground miners. Mont. Const. art. XVIII, § 4 (1889). The Constitution was amended in 1936 to make the eight-hour day applicable to "all industries, occupations, undertakings and employments, except farming and stock raising." The 1972 Constitution contains a similar provision, found in article XII, section 2.

In the early part of this century, the legislature implemented the original constitutional provision by enactment of a number of statutes establishing eight hours as a day's work in various employments and providing in several cases a criminal penalty for violations. Mont. Code Ann. § 39-4-104 is one such statute. In construing one of the earliest incarnations of the eight-hour-day statutes, the Montana Supreme Court held that the criminal penalties applied both to the employer who assigned the workers to a work shift of more than eight hours and to the employees who worked the longer shift. State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. 570, 577-78, 81 P. 980, 982 (1906); cf. Waller v. Engelke, 227 Mont. 470, 480, 741 P.2d 385, 392 (1987) (criminal penalty for violation of eight-hour day by employee not applicable in light of modern labor law).

Several prior Attorney General's Opinions have addressed the issue of the continued efficacy of criminal penalties for violations of various eight-hour-day statutes. Recent opinions have concluded that the criminal penalties enacted in the early part of this century for violation of the eight-hour-day laws have been repealed by implication from the later enactment of wage and hour protection laws requiring premium pay for overtime hours worked. In 38 Op. Att'y Gen. No. 83 at 288 (1980), Attorney General Greely held that the eight-hour-day provision applicable to state and local governments did not preclude a local government from scheduling law enforcement officers, with the officers' consent, to a workweek

consisting of four ten-hour days, relying on decisions of the Montana Supreme Court recognizing that employees could work more than eight hours in a day and be compensated for the extra hours under the applicable overtime laws, state and federal. Glick v. Department of Institutions, 162 Mont. 82, 509 P.2d 1 (1973); Butte Miner's Union v. Anaconda Copper Mining Co., 112 Mont. 418, 118 P.2d 148 (1941).

Attorney General Greely explained this ruling further in 39 Op. Att'y Gen. No. 35 at 138 (1981), holding that the criminal penalties for work in excess of eight hours in a day had been repealed by implication by later statutes providing premium pay for overtime worked. His analysis bears repeating in response to your question:

> The Legislature has enacted several statutes dealing with wages and hours. Such statutes are in pari materia with the eight hour day statutes, and all must therefore be read together. State ex rel. McHale v. Ayers, 111 Mont. 1, 5, 105 P.2d 686 (1940). Title 39, chapter 3, part 4, MCA, is Montana's version of the [federal Fair Labor Standards Act]. Like the eight-hour day provision of section 39-4-107, MCA, its purpose is to promote the general well-being of the worker. 1971 Mont. Laws, ch. 417, § 1. It provides that workers are entitled to additional compensation when employed in a work week of more than forty hours. § 39-3-405, MCA. Since a statutory work week is forty hours, § 39-3-405, MCA, the overtime statute is obviously inconsistent with the criminal penalties provided in section 39-4-107, MCA. It is ridiculous to suggest that the Legislature intended to prohibit a person, on pain of criminal penalty, from exceeding eight hours of work per day or forty hours of work per week, as section 39-4-107, MCA, provides, while at the same time providing that employee with a premium in the form of one and one-half times his usual rate of compensation for overtime hours. The provisions relate to the same subject matter and they support the same objective, but they simply cannot be reconciled. While repeals by implication are not favored, . . . I cannot escape the conclusion that by its later enactment of the overtime provision in section 39-3-405, MCA, the Legislature has implicitly repealed the earlier criminal penalties for overtime work in Title 39, chapter 4.

39 Op. Att'y Gen. No. 35 at 140-41.

The criminal penalties for overtime work are vestiges of an earlier era of labor management relations. The Montana Supreme Court has recognized this shift in emphasis, noting in dicta that in light of modern labor relations law, violations of the eight-hour-day law by employees would not be deemed to be so serious a matter as to merit criminal prosecution of the employees. Waller v. Engelke, 227 Mont. 470, 480, 741 P.2d 385, 392 (1987), overruling Melville v. Butte-Balaclava Copper Co., 47 Mont. 1, 130 P. 441 (1913). The modern view, expressed in the Fair Labor Standards Act and the Montana Minimum Wage and Overtime Compensation Law, Mont. Code Ann. tit. 39, ch. 3, pt. 4, is that hours worked in excess of eight in a day or forty in a week are not criminally proscribed, but are in appropriate cases to be compensated through premium pay at rates in excess of those paid for the normal work period. This does not mean, as some have suggested, that hours worked in excess of eight in a day entitle the employee to premium pay. Attorney General Greely rejected this view in 37 Op. Att'y Gen. No. 16 at 66 (1977), and his opinion is clearly correct under Montana law.

Several interested parties have suggested that I overrule or modify the earlier opinions. While I believe the conclusions expressed in the opinions are sound, the issue is a difficult one and the result is hardly free from doubt. However, even if I were not convinced of the soundness of the opinions, I would be reluctant to overrule an opinion which turned on issues of statutory construction and which touches, as this one does, matters in which others have likely acted in reliance upon the earlier opinion. Employers and employees in Montana have been arranging their work schedules in reliance on these opinions for more than ten years. The legislature has met several times since these opinions were issued and has taken no action to change their effect. To the contrary, the first regular legislative session after the issuance of 39 Op. Att'y Gen. No. 35 (1981) produced two amendments to the statute involved which in effect codified the holdings of Attorney General Greely's opinion. One of these amendments repealed the criminal penalty in Mont. Code Ann. § 39-4-107 in its entirety. 1983 Mont. Laws, ch. 640. If the legislature had disagreed with Attorney General Greely and felt that the criminal penalties were an important facet of the State's labor relations policy, the logical move would have been to reenact the penalties, not to repeal them.

A decision to issue an Attorney General's Opinion reversing an established prior interpretation of these statutes at this time would create substantial uncertainty in this area and would probably lead to litigation. The legislature retains the power to act in this area. If it disagrees with this opinion, it can reenact the criminal penalties. If it does make changes in the law, it can protect existing employment relations through

provisions for delayed effective dates or provisions for retroactive application. I lack the same flexibility in the issuance of opinions. Moreover, the employees affected by the work schedules at the Decker mine retain the option of filing a grievance seeking an interpretation of the collective bargaining agreement which would protect them from ten-hour shifts, as I explain below. I therefore concur in the prior opinion by Attorney General Greely holding that the criminal penalties for hours worked in excess of eight in any day have been repealed by implication by the adoption of Montana's overtime compensation laws.

Various interested parties have corresponded with this office with reference to your opinion request. Some of them have suggested that I should issue an opinion on the issue of whether the provision of the Contract allowing Decker to schedule a workweek consisting of four ten-hour days has been overcome by the contract provision that the Contract cannot be read to require a party to violate state or federal law. I must decline to do so for two reasons.

Initially, Mont. Code Ann. § 2-15-501(6) defines my authority to issue opinions with reference to questions posed by certain state and local officials relating to the authority of their respective offices. Your opinion request does not ask my opinion on the interplay between these provisions of the collective bargaining agreement. You have asked only that I give an opinion on the question answered above relating to the continued vitality of the criminal penalty found in Mont. Code Ann. § 39-4-104. It has been the practice of this office, consistent with Mont. Code Ann. § 2-15-501(6), to confine opinions to the questions presented by the requesting party, and to any issues fairly contained therein, and to decline to address other issues which are not presented by the requesting party. I believe this is an appropriate practice, and it leads me to decline the invitation to address issues which you have not raised.

A second reason also leads to this conclusion. The employment relationship between Decker and its mining employees is governed by a collective bargaining agreement negotiated pursuant to the federal labor laws which govern employees employed in businesses engaged in interstate commerce. The Contract contains a clause subjecting disputes as to the interpretation of the Contract to a grievance process culminating in binding arbitration. The Contract provides, in pertinent part:

> Should any difference arise between the Union and the Company regarding application or interpretation of the provisions of this Agreement, . . . an earnest effort shall be made to settle such difference, in the following manner:
>
> [The agreement then describes a three-step internal grievance procedure, culminating in referral of the dispute to the Union District President and a representative of the Company.]
>
> (E) Fifth, in the event such difference shall not be resolved within ten (10) days after being referred to the parties in step three, the matter shall be referred, at the option of either party, to an arbitrator, as provided in (F) below.
>
> (F) [The agreement then provides a method of selection of an arbitrator.] Thereafter, the difference arising as to the application or interpretation of the Agreement shall be submitted to the arbitrator and the parties shall proceed with the arbitration in a prompt and diligent manner. The arbitrator's decision shall be final and binding on both parties.
>
> The arbitrator shall have no power to add to, delete, modify or change any of the provisions of this agreement.

Contract, § IV.

Where parties have entered into a collective bargaining agreement under which they agree to submit issues of contract interpretation to grievance and arbitration, the grievance procedure must be followed, and the issues cannot be addressed in the first instance in another forum. Allis Chalmers Corp. v. Lueck, 471 U.S. 202, 219-20 (1985). The question of whether a ten-hour shift is authorized by the Contract, in light of the above-quoted contract language, is largely a matter of interpretation of the collective bargaining agreement. Cf. Barrantine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) (wage claim under FLSA not subject to grievance and arbitration). Like the employer and union in Lueck, Decker and UMW have agreed to submit differences as to the interpretation of the Contract to a grievance procedure culminating in binding arbitration at the instance of either party. Since the parties to the Contract have agreed to this method of resolving disputes as to the interpretation of the Contract, it would not be appropriate, and in fact would be inconsistent with

federal labor law, for me to issue a purportedly binding opinion construing the contract.

It is my opinion, in light of the earlier Attorney General's Opinions on the subject, that establishment of a work schedule consisting of four ten-hour days does not subject Decker to criminal prosecution under Mont. Code Ann. § 39-4-104. The legislature would be well advised to revisit this area and clarify the laws dealing with hours of work and overtime to eliminate the conflicting provisions highlighted in the several opinions in this area.

THEREFORE, IT IS MY OPINION:

> A company engaged in the strip mining of coal is not subject to criminal prosecution under Mont. Code Ann. § 39-4-104 for scheduling its employees to a workweek consisting of four ten-hour days.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/cdt/brf