HB

286

HOUSE COMMITTEE REPORT

(7)
Date Referred: April 13, 1989   FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 2/15/90

The [redacted] Committee considered: [redacted]

[redacted] [PENALTIES FOR OSHA VIOLATIONS]
"An Act relating to penalties for violation of workplace safety laws."

RECOMMENDATIONS:
[ ] be replaced with [redacted] ____________ [ ] the same title / [ ] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the ____________ Committee

ADOPTS: ____________ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact ________
[ ] zero fiscal note ________
[ ] zero with analysis ________

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) ________
[ ] zero fiscal note(s) ________
[ ] zero fn/analysis ________

SIGNING DO PASS:

SIGNING:
(Check approp. column)

	Do Not Pass	No Rec	Amend
		X	
		X	

Chairman's Signature

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 286
PUBLISH DATE:

FISCAL NOTE

REQUEST:
Revision Date:
Agency Affected: Labor
Title: "An Act relating to penalties for violation of workplace safety laws."
BRU: Labor Standards & Safety
Sponsor: Koponen, et al.
Components:
Requestor: House Labor & Commerce
Occupational Safety & Health

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES		14.6	14.6			
TRAVEL		8.0	8.0			
CONTRACTUAL		20.0	20.0			
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	42.6	42.6	0.0	0.0	0.0
CAPITAL						
REVENUE		100.0	50.0	35.0	15.0	0.0

FUNDING: (Thousands of Dollars)

GENERAL FUND		21.3	21.3			
FEDERAL FUNDS		21.3	21.3			
OTHER						
TOTAL	0.0	42.6	42.6	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME		1.0	1.0			
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See attached.

Prepared by: Tom Stuart, Director
Phone: 264-2452
Division: Labor Standards & Safety
Date: 4/24/89

Approved by Commissioner: Jim Sampson
Date: 4/24/89
Agency: Department of Labor

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Fiscal Note Analysis
for

"An Act relating to penalties for violation of workplace safety laws."

This bill would increase the penalties charged for the violation of workplace safety laws. Because of the large increase in penalties, we expect an increase in the number of contested violations and in the number of requests for informal conferences. This increased workload would result in additional travel for existing staff as well as the OSHA Review Board members. Additional legal support would also be required. In order to handle the increased clerical workload a part time Clerk Typist III would be hired. The additional costs are summarized as follows:

Personal Services For part time Clerk Typist III	$ 14.6
Travel OSHA Review Board (2.0) Existing staff (6.0)	$ 8.0
Contractual Legal support for Review Board (5.0) Legal support for department (15.0)	$ 20.0
Total Cost	$ 42.6

These costs should decrease after the first two years if the bill achieves its goal of providing more incentive for employers to voluntarily correct hazards so that we find fewer serious violations. Therefore we should have no additional costs beyond 1991.

The increase in penalties will increase the amount of revenue to the state. While we project this will be about $100.0 in the first year, that amount should decline as employers voluntarily correct hazards and less violations are issued. These revenues are deposited in the general fund as unrestricted receipts.

We have assumed an effective date of July 1, 1989.

Position Title	No.of Positions	Range/Step	Barg. Unit
Clerk Typist III	1	8A	GGU

Time Status	Staff Months	Location	Election Distuict
Part Time	6	Anchorage	

Type of Expenditure		Amount
1	2	3
Salary	$9,786	
Benefits	4,856	
Premium Pay		
Other		
Total Personal Services		$14,642
Travel		
Contractual		
Commodities		
Equipment		
Other		
Total Cost		$14,642

Funding Source for Total Cost		
Federal Receipts	1002	7,321
G. F. Match	1003	7,321
General Fund	1004	
GF Program Receipts	1005	
Other		

Justification

This position will handle the increased clerical work associated with the increase in contested violations and informal conferences. The position will provide support both for the department and the OSHA Review Board.

Non-personal services costs will be covered out of our existing budget.

Request For New Position

Agency: Labor

BRU: Labor Standards & Safety

Component: Occupational Safety & Health

Revised Date

FY 89

Bill No: House Bill No. 286 **Date:** April 24, 1989

Title: "An Act relating to penalties for violation of workplace safety laws."

Contact: Richard Arab
465-4855
Eileen Plate
465-2700

House Bill No. 286 proposes that the penalties the Department of Labor may assess for violations of Alaska's Occupational Safety and Health law and regulations be increased to keep pace with inflation.

Specifically, the provisions of this bill:

(1) increase the maximum penalty for a willful or repeat violation from $10,000 to $30,000;

(2) increase the maximum penalty for a serious or non-serious violation from $1,000 to $3,000;

(3) increase the daily penalty for not correcting a violation from $1,000 to $3,000;

(4) increase the maximum penalty for a willful or repeat violation which results in the death of a worker from $10,000 to $30,000; and increase from $20,000 to $60,000 the maximum penalty for a second conviction of a willful or repeat violation causing death;

(5) increase from $10,000 to $30,000 the maximum penalty for falsifying or otherwise misrepresenting occupational safety and health records or documents; and

(6) increase the maximum penalty for a violation of occupational safety and health posting requirements from $1,000 to $3,000.

The penalties currently in effect have not been increased since Alaska's occupational safety and health law was initially enacted in 1973. The state's penalty structure is based on the federal OSHA Act that was adopted in 1970. Since 1970, the rate of inflation has increased by 300 percent. This bill, therefore, reflects the inflationary increase that has occurred since the penalty amounts were established in 1970.

POSITION PAPER/Department of Labor

More important than providing for an overdue inflationary increase in the penalty structure, however, the increased penalties would serve as an effective deterrent to workplace safety and health violations. This, of course, will translate into safer workplaces, and a reduced risk of injury and illness to Alaska's workers. Alaska's occupational injury and illness rate is one of the highest in the nation. The latest available information indicates that the Alaska rate stands at 10.7 injuries and illnesses per 100 full-time workers. Only Oregon and Maine had higher rates in 1986. In addition, there are some industries in Alaska with some of the highest rates in the nation. For example in 1987, the injury and illness rate for logging was 51.8 which means that one out of two workers in this industry suffered an injury.

An increased emphasis on worker safety and health is particularly important in slower economic times, such as presently being experienced in Alaska. When cost-saving measures are implemented by employers during recessionary periods, equipment maintenance and replacement are diminished, and the need to increase worker productivity often results in unsafe "shortcuts" that would not be taken or even considered in more prosperous times. The deterrent effect of increased penalties would, therefore, help assure that implementation of cost-saving measures by Alaska business is not at the expense of or to the detriment of the safety and health of Alaska's workers.

The need for increasing the penalty amount for occupational safety and health violations is becoming evident throughout the nation. The states of Washington, Oregon, California, Arizona, and Utah have recently passed legislation to increase penalties, and legislation has been introduced in the U.S. Congress this year to increase federal OSHA penalties to the same amounts as proposed by HB 286.

The Department of Labor supports the increased penalties for violations of Alaska's occupational safety and health laws and regulations as provided in this bill.

APPROVED:

Jim Sampson, Commissioner
Department of Labor

Workplace cases go to criminal court

Battery. Manslaughter. Murder. The people charged with these crimes didn't lurk in alleyways; they oversaw workplaces that prosecutors said were so unsafe it was a crime. This is the final story in a series, "Danger at Work."

By SHARON COHEN
Associated Press Writer

ELK GROVE VILLAGE, Ill.—Imagine working in a factory where dense smoke and gases make it hard to see or breathe, toxic dusts coat the floor and the heat in some spots approaches 250 degrees—beyond boiling water.

This isn't a 19th-century sweatshop but, prosecutors

DANGER AT WORK

Associated Press

PROSECUTORS—Cook County prosecutors Frank Parkerson, left, and Jay Magnuson are taking five executives of the Chicago Magnet Wire Corp. to trial on criminal charges of alleged workplace injuries and illnesses.

claim, a modern-day plant, the Chicago Magnet Wire Corp., a place so hazardous that the people who ran it were nothing short of criminal.

Five current and former Chicago Magnet executives await trial on charges that they knowingly allowed conditions that gave more than 40 workers nerve and lung disorders and other ailments. The U.S. Supreme Court refused last month to hear their appeal, challenging local prosecutors' jurisdiction.

This case is among a small but growing number of criminal charges filed against company officials for workplace deaths and injuries. There have been others in California, Wisconsin, Michian, Indiana, New York, Texas and Illinois, the latter the site of the nation's first corporate murder convictions for an employee's cyanide poisoning.

"We're likely to see more criminal prosecutions in this area," said James Holzhauer, a University of Chicago law school lecturer.

Some prosecutors argue that monetary penalties imposed by the Occupational Safety and Health Administration are often too small to deter employers.

"Some people don't care if they're fined. They pass that along to the consumer," said Frank Parkerson, a Cook County prosecutor in the Chicago Magnet case. "People do care about going to jail for 25 years."

"This is not applying a different standard to employers than we apply to every other citizen," said Ken Oden, Travis County attorney in Texas. "You can't drive 120 miles an hour out of a school zone, run over a child and say you can't be criminally responsible because you didn't intend the results."

But opponents say this approach could lead to a patchwork of local and state safety standards and undercuts OSHA, which has referred 55 cases to the Justice Department for criminal prosecution since its formation in 1970. About a quarter were settled in pleas or trials, and the Justice Department declined prosecution in the rest, OSHA said.

OSHA rules not enough

Workplace prosecutions are "basically unfair to business and I don't think it advances workers' safety and health," said Stephen Bokat, U.S. Chamber of Commerce general counsel.

"Corporate executives have no warning of what's expected of them," added Bokat, who filed a brief in the Chicago Magnet case. "It's really an after-the-fact determination by a prosecutor that something's not safe."

A key contention in this debate—that OSHA pre-empts local prosecutions—reached the U.S. Supreme Court after being rejected by the Illinois Supreme Court, which said "state criminal law can provide a valuable and forceful supplement" for worker protection.

Attorneys for Chicago Magnet

(See DANGER, Page D-2)

DANGER: Prosecutors say OSHA fines aren't enough

(Continued from Page D-1)

argued that local prosecutors and juries, who may be "uninformed and . . . unconcerned," are less qualified to ensure safety than experienced federal officials who set uniform standards.

"Whether criminal laws should be applied is a legislative decision," added attorney Robert Stephenson. "If (you) want to do something, change the law."

But the Supreme Court let stand the Illinois ruling.

Sending strong signal

The pre-emption issue didn't stop the Los Angeles County district attorney's office, which has a special unit for such cases.

Four people convicted of involuntary manslaughter have served jail terms and nearly 30 misdemeanors have been prosecuted, said Fred Macksoud, deputy district attorney.

"These are cases where the employers were just cutting corners more than anything," he said. "They thought they could get away with it . . . (But) they kill people by cutting corners."

The average fine ranges from $11,000 to $30,000, Macksoud added, about five times higher than OSHA's civil penalties.

Despite some successes, prosecutors filing criminal charges in workplace accident cases are trying "to put new wine in an old bottle," in the view of Bill Maakestead, associate professor of business law and management at Western Illinois University, who does not expect a proliferation of prosecutions.

"These cases tend to be the more expensive, the more time consuming" and require investigative expertise often lacking in prosecutors' offices, he said, terming effective OSHA standards a better way to ensure safety.

Even so, he added, "in egregious cases, you need that kind of symbolic legal mechanism to send a strong signal."

Landmark conviction

Experts say that message was sent in the 1985 landmark murder conviction of three officials of Film Recovery Systems Inc. of Elk Grove Village in the cyanide poisoning of Stefan Golab, a Polish immigrant working in the silver recovery plant.

Golab had to work over open vats of cyanide solution but wasn't informed of the risks or given adequate protective gear—prosecutors said paper masks were provided. He also was refused a transfer after showing cyanide exposure symptoms.

Workers testified they suffered headaches, dizziness and vomiting. One said the only time respirators were provided was when an inspector visited.

Judge Ronald Banks called Golab's death "not accidental, but in fact murder." The convictions are being appealed.

In the Chicago Magnet case, the company and five officials are accused of aggravated battery, reckless conduct and conspiracy. Prosecutors said the plant was comparable to "the 'sweat shops' of the mid-19th century."

"Abominable" was prosecutor Parkerson's description of conditions at the plant where wire was coated with polyvinyl chloride and other chemicals.

Court papers claim temperatures on the catwalks approached 250 degrees, the air was smoky, workers weren't given adequate masks, gloves or boots, they were as weapons during World War I and were hit in the chest, face, head and neck with broken wire fragments.

Prosecutors claim 43 workers suffered nerve disorders, impotence, kidney failure, toxic hepatitis or other injuries. One doctor said the combination of aluminum dust on the floor and another chemical used at the hot plant causes brain damage and is associated with Alzheimer's disease.

Until 1982, Parkerson said, the plant averaged more than four times as many injuries as employees.

OSHA said it last inspected Chicago Magnet in August 1988 and no citations were issued. Four citations in the previous 12 years, alleging noise violations, failure to inspect respirators and other infractions, were settled for minimal amounts.

The defense has thus far addressed only pre-emption. But Bokat's brief says the state "has never contested the defendants' claim that working conditions were in compliance with OSHA standards."

Parkerson said the opportunity hasn't arisen yet.

"OSHA just can't deal with people who have no intention of following the law at all," he said.

"The basic problem is the whole mentality of the business, which deals only in money, profits and losses and accepts the idea implicitly that human health, safety and life is expendable to some degree. We've got to change that kind of

HOUSE LABOR AND COMMERCE COMMITTEE
ALASKA STATE LEGISLATURE
P.O. BOX Y, JUNEAU 99811
(907) 465-3892

November 23, 1989

M E M O R A N D U M

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: HB 286 - Workplace Safety

HB 286 increases the penalties for workplace safety violations by a factor of three to adjust for inflation since 1970 when the penalty structure was established in Alaska.

HB 286 addresses a concern that current penalties for even the most serious repeat or willful violations are so small in relation to today's dollar that they no longer serve as an effective deterrent against poor workplace safety practices. A Department of Labor fiscal note and position paper strongly endorsing HB 286 is included in your committee file along with several research reports dealing with workplace safety issues.

In addition to HB 286, the committee will be discussing other workplace safety issues during our November 30, 1989 public hearing.

dd/gbi89
b/hb286

HB286

How tough is that doggie in the window?

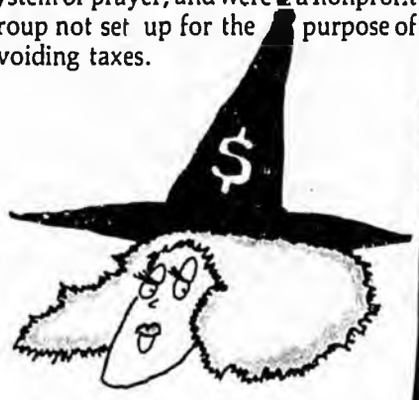
The case of two Cambodian refugees, who were prosecuted in California last spring for killing a German shepherd for food, was dismissed after a judge ruled that there was no law against eating dogs. There is now. Newly enacted California legislation makes it a misdemeanor to possess, sell or give away for the sole purpose of killing for food any animal "commonly kept as a pet or companion." Violators can receive up to six months in jail and a $1,000 fine. Livestock, poultry, fish and game are exempted; in case hasenpfeffer lovers wonder, rabbits are classified as livestock.

New ECS report surveys state plans for tuition programs

A new survey of state programs to help parents pay for their children's college education reports that 11 states (up from nine in 1988) have passed laws giving parents the opportunity to invest with the state a certain sum of money now in exchange for guaranteed payment of their children's tuition in the future. Three of these 11 states—Florida, Michigan and Wyoming—are already selling contracts. The survey is available at $5 per copy from the Education Commission of the States Distribution Center, 1860 Lincoln St., Suite 300, Denver, CO 80295.

Rhode Island grants tax exemption to witches' coven

In Rhode Island, a witches' coven has been granted a state sales tax break on the grounds that it is a church. In a reversal of an earlier ruling, the state exempted the Rosegate Coven, a.k.a. Our Lady of the Roses Church, from the sales tax on equipment and supplies for the church. Tax department officials decided that the witches had specific doctrines and a system of prayer, and were a nonprofit group not set up for the purpose of avoiding taxes.



Bush administration appoints legislators to executive posts

The Bush administration has named several state legislators to executive posts, among them John Turner, ex-president of the Wyoming Senate, director of the Fish and Wildlife Service; Deborah Anderson, former speaker of the South Dakota House, director of the Office of Intergovernmental Affairs; Paul Coverdell, ex-minority leader of the Georgia Senate, director, Peace Corps; Susan Engeleiter, ex-minority leader of the Wisconsin Senate, administrator of the Small Business Administration; Tom Stroock, vice president of the Wyoming Senate, ambassador to Guatemala; and Mary McClure of South Dakota, ex-Senate president pro tem, special assistant to the president for intergovernmental affairs. (Senator McClure is currently on leave because of an illness in her family.)

U.S. Supreme Court allows states to sue on workplace hazards

The U.S. Supreme Court, by declining in October to review an Illinois court ruling in *Asta vs. State of Illinois*, left the states free to prosecute corporate officials for workplace hazards that are also regulated by the federal Occupational Safety and Health Act (OSHA). The Illinois Supreme Court ruling of a year ago resulted in the reinstatement of criminal charges of aggravated battery against officers of the Chicago Magnet Wire Corporation. The firm and its executives had been indicted by a Chicago grand jury on charges of "knowingly and recklessly" failing to protect workers from hazardous chemicals, allowing injuries to 42 employees. Industry representatives have expressed concern that state criminal prosecution of corporate officers for injuries or deaths resulting from workplace conditions frustrates the operation of OSHA regulations. The state of Illinois, however, argued that federal law does not pre-empt state prosecution for murder or aggravated battery that happens to occur in the workplace and does not "immunize employers as a class from criminal prosecution."

Fatalities are up since speed limits rose to 65 mph

After Congress permitted states to raise the speed limit to 65 mph on rural interstate highways in 1987, 40 states did so. And in those 40 states, traffic fatalities on rural interstates have increased 21 percent in two years, according to the National Highway Traffic Safety Administration. Fatality rates on other roads showed only minor changes.

(2)

Alaska State Legislature

Representative Niilo Koponen

Pouch V
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House District 21

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*** Position Paper ***

HB 285

This legislation would reinforce the legislative findings in AS 18.60.010 which state that "...personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, the people of the state in terms of loss of production, wage loss, medical expenses and disability compensation payments."

According to the latest available statistics, Alaska has the third highest rate of occupational injuries in the nation. House Bill 286 is designed to reduce the incidence of work related hazards by increasing penalties for serious workplace safety violations. At present, the maximum amount that can be levied for a serious violation is $1,000. The same violation in the state of Washington carries a $50,000 fine.

Alaska's already small penalty is further reduced by the federal Occupational Safety and Health Administration (OSHA), taking into consideration such factors as the size of the employer's business, good faith of the employer and previous history of violations. Last year's average fine after such adjustments was $192. This penalty structure has been unchanged for 18 years.

This bill will triple the allowable level of fines. In addition, it makes the fines applicable to those who knowingly violate the law. Current statutes require the state to prove willful violation.

HB 286 is intended to encourage businesses to conform to workplace safety laws and regulations. As businesses adjust to a tight economic environment, it is important that worker health and safety not be sacrificed. There is no reason why an employer cannot abide by the standards established by federal and state statutes.

It is my sincere hope that this legislation will result in fewer injuries, fewer fines and lower workers' compensation insurance costs . The rising number of injuries and fatalities to Alaskan workers testifies to the insufficiency of our present statutes. So long as it is cheaper to pay the fine than to correct a dangerous situation we cannot expect improvement.

COMPARISON OF 1987 ALASKA AND NATIONAL
OCCUPATIONAL INJURY AND ILLNESS INCIDENCE RATES

	Alaska Rate	National Rate
Oil and Gas Extraction	9.0	8.3
General Building Construction	17.5	14.2
Heavy Construction	19.4	14.5
Special Trade Construction	15.0	15.0
Canned and Cured Fish Processing	35.2	26.4
Fresh/Frozen Fish Processing	35.3	18.8
Logging Camps and Contractors	51.8	19.3
Trucking and Warehousing	17.7	12.3
Water Transportation	13.2	12.9
Tranportation by Air	13.9	14.3
All Private Industries	10.9	8.3

TABLE A-11
Incidence rates of Occupational Injuries and Illnesses
Comparison of all States - Private Sector
1983 to 1987

	1983	1984	1985	1986	1987
USA	7.6	8.0	7.9	7.9	8.3
Alabama	7.9	8.3	8.4	8.7	
Alaska	10.6	10.3	10.7	10.2	10.9
Arizona	9.3	9.5	9.2	8.9	9.0
Arkansas	8.1	8.0	8.0	8.4	
California	9.1	9.3	9.1	8.9	8.8
Colorado	--	--	--	--	--
Connecticut	8.0	8.3	8.3	8.2	
Delaware	5.3	5.5	5.6	6.0	
Florida	8.7	8.9	8.8	8.8	
Georgia	--	--	--	--	--
Hawaii	10.6	10.0	9.6	9.5	9.8
Idaho	--	--	--	--	--
Illinois	--	--	--	--	--
Indiana	7.3	7.7	7.7	8.2	
Iowa	7.8	8.1	8.2	8.4	
Kansas	7.5	7.7	7.7	7.6	
Kentucky	7.6	8.3	8.3	8.4	
Louisiana	7.4	7.9	7.3	7.0	
Maine	11.0	13.2	12.5	12.9	
Maryland	7.6	7.8	7.9	7.8	
Massachusetts	--	--	--	--	--
Michigan	6.8	7.6	8.0	8.2	
Minnesota	7.3	7.7	7.6	7.3	
Mississippi	--	8.0	7.8	8.0	
Missouri	7.5	8.0	7.9	8.5	
Montana	--	8.5	8.0	8.2	
Nebraska	8.4	8.8	7.9	8.1	
Nevada	9.0	9.0	8.5	8.4	9.4
New Hampshire	--	--	--	--	--
New Jersey	--	--	--	--	--
New Mexico	7.8	8.7	8.4	7.7	
New York	--	--	--	--	--
North Carolina	6.8	7.2	7.4	7.2	
North Dakota	--	--	--	--	--
Ohio	--	--	--	--	--
Oklahoma	8.9	9.8	9.5	8.1	
Oregon	9.8	10.6	10.5	10.7	10.9
Pennsylvania	--	--	--	--	--
Rhode Island	8.3	8.4	8.9		
South Carolina	6.7	6.9	7.1	6.9	
South Dakota	--	--	--	--	--
Tennessee	7.9	8.6	8.2		
Texas	--	--	--	--	--
Utah	8.5	9.2	8.5	9.1	
Vermont	9.2	10.0	9.1	8.9	
Virginia	7.0	7.6	7.3	7.6	
Washington	9.7	9.9	9.4	9.8	10.6
West Virginia	6.7	7.2	7.2	7.7	
Wisconsin	--	--	--	--	--
Wyoming	7.9	8.6	7.4	7.6	
American Samoa	2.5	3.0	3.6	3.2	2.6
Guam	2.7	2.8	3.6	3.7	3.6
Puerto Rico	4.2	3.9	3.8	3.9	
Virgin Islands	2.8	2.4	2.4	2.4	

SOURCE: Bureau of Labor Statistics.
-- = Publishable Rate Unavailable.
X = 1987 data not available at time of publication.

A/o = EA

TABLE A-3
Incidence Rates of Recordable Occupational Injuries and Illnesses
Industry Data Time Series, Alaska 1978 to 1987

Industry	SIC Code	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
TOTAL PRIVATE AND PUBLIC SECTOR		9.4	9.2	9.1	9.2	9.5	9.9	9.7	10.1	9.6	10.1
TOTAL PRIVATE SECTOR		10.0	10.1	10.4	10.0	10.3	10.6	10.3	10.7	10.2	10.9
MINING		15.2	14.0	12.1	15.4	14.8	11.5	10.5	9.4	8.1	8.9
Oil and Gas Extraction	13	15.7	13.7	12.4	15.8	12.3	11.8	10.6	9.7	8.2	9.0
Petroleum & Gas Production	131	--	--	2.5	7.3	6.7	5.1	2.8	2.6	2.1	3.5
Oil & Gas Field Services	138	22.6	23.0	23.8	24.9	24.6	19.6	22.0	17.4	14.8	15.2
CONSTRUCTION		16.4	16.4	18.5	17.2	19.4	17.6	16.9	19.4	16.2	17.1
General Building Contractors	15	17.1	14.3	16.5	19.8	19.6	21.6	17.7	19.5	17.6	17.5
Residential Buildings	152	16.5	11.9	15.1	15.6	16.5	17.7	13.4	15.4	18.0	17.0
Nonresidential Buildings	154	18.0	16.8	18.0	23.7	21.9	26.0	22.0	22.9	17.3	17.7
Heavy Construction Contractors	16	14.2	16.6	17.3	15.1	20.9	14.9	15.7	18.9	16.5	19.4
Highway and Street Construction	161	9.7	18.8	19.2	17.8	27.6	19.0	19.8	16.6	20.8	14.4
Heavy Construction, Except Hwy	162	16.4	15.1	16.4	14.0	16.8	12.9	13.9	20.3	14.3	22.8
Special Trade Contractors	17	17.6	17.4	15.9	17.8	17.9	17.7	17.1	19.8	14.9	15.0
Plumbing, Heating & Air Condit	171	14.6	14.8	16.7	18.8	17.0	25.6	23.3	18.9	16.0	14.4
Electrical Work	173	17.0	10.8	16.5	15.4	16.6	13.2	14.3	16.4	15.9	15.4
Misc Special Trade Contractors	179	--	23.1	16.3	21.6	18.6	14.6	20.6	23.6	15.9	12.6
MANUFACTURING		21.4	24.1	23.3	19.1	17.9	23.2	23.0	26.3	28.3	29.5
Food and Kindred Products	20	2[illegible].8	25.7	26.7	22.2	20.2	29.5	25.0	32.5	33.3	34.5
Misc Food Prep & Kindred Prod	209	2[illegible].3	26.0	26.9	22.5	20.8	30.1	25.7	32.9	33.4	35.3
Canned & Cured Fish & Seafoods	2091	18.7	23.5	21.4	19.9	18.6	21.4	25.0	30.3	34.3	35.2
Fresh/Froz Pkgd Fish & Seafds	2092	27.4	29.2	31.7	24.6	21.8	32.9	26.1	33.9	33.0	35.3
Lumber & Wood Prod Except Furniture	24	31.8	31.0	32.5	26.8	26.9	31.2	43.0	38.6	50.9	48.5
Logging Camps & Contractors	241	38.6	39.1	37.3	27.2	30.8	35.7	45.6	45.0	56.6	51.8
Printing, Publishing & Allied Ind	27	--	--	2.5	3.1	5.7	6.3	6.2	5.1	6.5	5.8
TRANSPORTATION AND PUBLIC UTILITIES		11.4	11.4	12.2	11.6	10.7	11.4	12.1	11.3	11.3	10.9
Local & Interurban Passenger Transit	41	--	5.1	4.8	6.7	4.9	--	7.1	6.3	11.3	12.8
Trucking and Warehousing	42	21.4	20.6	21.7	17.8	14.0	20.7	24.2	17.4	19.5	17.7
Trucking, Local and Long Distance	421	21.3	21.0	22.1	18.0	13.8	19.8	23.9	17.5	19.7	17.9
Water Transportation	44	18.6	16.0	16.2	16.6	11.7	11.9	10.8	16.2	10.7	13.2
Transportation by Air	45	15.2	12.4	13.2	13.6	12.7	10.7	14.2	14.0	13.3	13.9
Communication	48	3.0	6.9	9.1	8.4	8.6	9.6	5.7	6.7	6.2	4.5
Electric, Gas and Sanitary Services	49	15.5	14.6	14.6	13.9	14.8	16.4	19.4	16.0	16.[illegible]	15.5
WHOLESALE AND RETAIL TRADE		8.2	7.9	7.7	8.0	9.3	10.2	9.9	10.0	8.9	9.3
WHOLESALE TRADE		12.2	11.[illegible]	10.9	9.8	9.6	12.3	11.7	10.9	8.0	9.4
Durable Goods	50	12.2	11.[illegible]	8.5	7.9	7.4	8.9	9.7	8.9	5.8	7.7
Nondurable Goods	51	8.[illegible]	11.0	15.4	12.8	13.4	18.0	15.[illegible]	14.4	11.5	11.5
RETAIL TRADE		7.4	6.9	6.8	7.4	9.3	9.6	9.5	9.8	9.2	9.3
Building Materials & Garden Supplies	52	8.9	6.2	9.4	12.3	13.7	20.5	17.7	17.6	11.3	12.7
Lumber & Bldg Materials	521	--	--	--	--	17.2	25.5	22.6	21.3	12.4	-
General Merchandise Stores	53	9.2	8.8	6.0	7.1	8.2	12.3	10.4	9.3	10.7	10.8
Food Stores	54	9.5	8.9	10.1	8.5	11.8	9.7	15.8	15.5	18.0	15.6
Auto Dealers and Service Stations	55	10.2	8.5	9.5	8.9	8.1	10.4	10.5	10.8	8.3	8.7
Apparel and Accessory Stores	56	3.4	2.7	2.1	2.4	1.0	1.0	1.5	2.5	0.4	3.3
Furniture, Home Furnishings	57	--	--	--	--	4.8	3.5	4.4	5.2	6.4	5.8
Eating and Drinking Places	58	6.6	7.2	6.5	8.1	11.2	9.8	6.6	8.5	8.3	8.9
Miscellaneous Retail	59	4.7	3.9	2.9	5.1	5.5	6.4	6.6	5.9	4.3	3.6
FINANCE, INSURANCE AND REAL ESTATE		0.7	1.4	1.3	1.5	1.5	2.0	1.7	2.1	3.3	2.8
Banking	60	1.1	2.1	1.9	2.2	1.8	2.9	2.1	2.6	2.6	3.3
Credit Agencies	61	--	--	--	--	1.5	1.1	1.6	0.7	1.7	3.2
Real Estate	65	0.8	0.1	2.8	1.9	2.3	2.1	2.4	4.1	4.9	2.7
Holding & Other Investment Offices	67	0.3	1.8	0.0	1.2	0.7	1.3	1.3	2.[illegible]	--	3.5
SERVICES		4.3	4.0	4.3	4.3	4.4	4.7	5.1	5.5	5.4	6.5
Hotels and Other Lodging Places	70	5.5	7.9	9.3	6.8	7.0	9.9	11.3	10.0	13.4	13.6
Personal Services	72	0.6	1.3	2.5	2.8	1.7	4.1	5.3	6.3	1.7	3.7
Business Services	73	7.2	3.8	6.7	3.7	6.7	3.9	3.4	2.6	4.5	5.0
Automotive Services	75	--	--	--	7.5	8.4	8.2	6.6	9.9	6.3	11.2
Health Services	80	4.0	3.7	3.6	5.4	4.1	5.5	7.9	8.9	6.3	8.0
Legal Services	81	0.5	1.0	0.2	--	0.3	0.1	0.1	0.8	1.1	0.7
Social Services	83	4.3	4.9	3.5	3.9	3.7	4.2	3.5	7.3	3.0	3.7
Membership Organizations	86	2.9	2.9	3.1	3.0	2.8	3.0	0.7	1.8	4.0	5.8
Miscellaneous Services	89	2.9	1.8	2.8	3.0	2.0	1.1	2.6	2.6	2.8	2.7
STATE AND LOCAL GOVERNMENT		7.1	6.3	4.9	6.5	6.7	7.3	7.7	8.1	7.7	7.3
STATE GOVERNMENT		6.2	3.8	3.3	4.7	4.6	5.5	5.5	5.2	6.0	6.0
LOCAL GOVERNMENT		8.1	8.7	6.3	8.1	8.6	8.7	9.5	10.5	9.0	8.4

See footnotes at end of section.
-- = Publishable rate unavailable.

U.S. A.E.D.

TABLE A-1
Incidence Rates of Recordable Occupational Injuries and Illnesses
U.S. Private Sector, Select Industries, 1978 to 1987

Industry	SIC Code	Incidence Rate for Total Cases (per 100 workers) 5/ 1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
TOTAL PRIVATE SECTOR		9.4	9.5	8.7	8.3	7.7	7.6	8.0	7.9	7.9	8.3
AGRICULTURE		11.6	11.7	11.9	12.3	11.8	11.9	12.0	11.4	11.2	11.2
MINING		11.5	11.4	11.2	11.6	10.5	8.4	9.7	8.4	7.4	8.5
Oil and Gas Extraction	13	13.9	13.6	13.4	14.1	12.1	9.8	11.8	10.1	8.1	8.3
Petroleum & Gas Production	131	6.4	5.4	5.8	6.1	6.3	5.5	5.0	3.7	3.6	3.5
Oil & Gas Field Services	138	20.0	18.9	19.3	19.7	16.8	14.3	18.2	15.8	13.4	14.0
CONSTRUCTION		16.0	16.3	15.7	15.1	14.6	14.8	15.5	15.2	15.2	14.7
General Building Contractors	15	15.9	16.3	15.5	15.1	14.1	14.4	15.4	15.2	14.9	14.2
Residential Buildings	152	13.3	13.0	11.9	11.9	10.8	11.9	12.6	12.3	12.5	10.9
Nonresidential Buildings	154	19.2	19.7	19.4	18.5	17.1	17.3	18.9	18.7	17.9	18.5
Heavy Construction Contractors	16	16.6	16.6	16.3	14.9	15.1	15.4	14.9	14.5	14.7	14.5
Highway and Street Construction	161	15.2	15.5	15.6	14.0	13.4	14.3	14.6	13.8	13.9	14.2
Heavy Construction, Except Hy	162	17.2	17.1	16.6	15.3	15.2	15.9	15.1	14.8	15.1	14.7
Special Trade Contractors	17	15.8	16.0	15.5	15.2	14.7	14.8	15.8	15.4	15.6	15.0
Plumbing, Heating & Air Condit	171	16.9	17.0	16.2	15.7	15.3	15.7	16.4	15.7	16.1	16.4
Electrical Work	173	16.0	16.0	16.2	14.9	13.9	13.7	14.6	14.3	15.2	13.8
Misc. Special Trade Contractors	179	16.9	17.5	16.2	17.1	15.9	15.1	15.8	16.5	15.7	14.8
MANUFACTURING		13.2	13.3	12.2	11.5	10.2	10.0	10.6	10.4	10.6	11.9
Food and Kindred Products	20	19.4	19.9	18.7	17.8	16.7	16.5	16.7	16.7	16.5	17.7
Misc. Food Prep. & Kind. Prod.	209	16.3	16.8	15.3	15.0	14.2	14.1	14.3	14.7	14.1	15.1
Canned & Cured Fish & Seafoods	2091	23.3	24.4	20.2	22.4	17.8	17.1	--	--	19.1	26.4
Fresh/Frozr. Pkgd.Fish & Seafds	2092	20.4	22.0	19.4	18.6	17.1	17.9	17.3	19.2	18.2	18.8
Lumber & Wood Prod. except Furniture	24	22.6	20.7	18.6	17.6	16.9	18.3	19.6	18.5	18.9	18.9
Logging Camps & Contractors	241	25.9	24.2	22.7	19.3	20.4	21.5	21.7	20.0	19.1	19.3
Paper and Allied Products	26	13.3	13.5	12.7	11.6	10.6	10.0	10.4	10.2	10.5	12.8
Printing, Publishing & Allied Ind	27	6.9	7.1	6.9	6.7	6.6	6.6	6.5	6.3	6.5	6.7
TRANSPORTATION AND PUBLIC UTILITIES		10.1	10.0	9.4	9.0	8.5	8.2	8.8	8.6	8.2	8.4
Local & Interurban Passenger Transit	41	8.7	9.3	9.5	9.3	9.3	9.7	9.0	9.4	9.3	9.2
Trucking and Warehousing	42	16.2	15.8	14.9	14.7	14.2	13.3	14.5	13.9	13.1	12.3
Trucking, Local and Long Distance	421	16.3	15.7	15.6	14.7	14.2	13.3	14.6	14.0	13.2	12.3
Water Transportation	44	14.4	14.1	14.2	12.5	11.4	10.8	13.2	13.0	12.7	12.9
Transportation by Air	45	13.4	13.7	13.3	13.5	13.6	12.7	13.1	13.1	13.0	14.3
Communication	48	2.7	2.8	2.8	2.7	2.8	2.9	2.7	2.9	2.7	2.8
Electric, Gas and Sanitary Services	49	9.0	8.9	8.6	8.3	7.6	7.2	7.4	6.9	6.8	7.6
WHOLESALE & RETAIL TRADE		7.9	8.0	7.4	7.3	7.2	7.2	7.4	7.4	7.7	7.7
WHOLESALE TRADE		6.9	6.8	6.2	7.7	7.1	7.0	7.2	7.2	7.2	7.4
Durable Goods	50	6.6	6.6	7.0	7.3	6.7	6.4	6.7	6.5	6.3	6.7
Nondurable Goods	51	9.3	9.1	8.7	8.3	7.8	7.9	8.0	8.2	8.7	8.5
RETAIL TRADE		7.5	7.7	7.1	7.1	7.2	7.3	7.5	7.5	7.8	7.8
Building Materials & Garden Supplies	52	9.8	9.5	8.4	8.3	8.4	8.5	9.6	9.8	10.2	10.2
General Merchandise Stores	53	9.1	9.8	9.3	9.0	9.2	9.7	9.8	10.0	10.4	10.0
Food Stores	54	10.7	11.7	10.6	10.4	10.3	10.4	10.8	10.4	10.7	10.9
Auto Dealers and Service Stations	55	6.0	7.9	7.2	6.8	6.9	6.8	7.0	6.9	7.1	6.8
Apparel and Accessory Stores	56	2.3	2.6	2.2	2.2	2.5	2.4	2.8	2.6	2.9	3.2
Furniture, Home Furnishings	57	5.1	4.7	4.7	4.3	3.9	3.7	4.3	4.2	4.9	4.6
Eating and Drinking Places	58	7.5	7.6	6.9	7.3	7.5	7.8	7.8	8.2	8.2	8.3
Miscellaneous Retail	59	3.8	3.8	3.5	3.5	3.7	3.6	3.9	3.7	4.2	4.3
FINANCE, INSURANCE AND REAL ESTATE		2.1	2.1	2.0	1.9	2.0	2.0	1.9	2.0	2.0	2.0
Banking	60	1.5	1.7	1.5	1.6	1.7	1.6	1.6	1.6	1.6	1.4
Credit Agencies	61	1.1	1.3	1.1	1.3	1.3	1.3	1.4	1.2	1.2	1.3
Insurance	63	1.9	2.0	1.7	1.8	1.9	1.8	1.7	1.8	1.9	1.8
Real Estate	65	4.9	4.7	4.4	4.0	4.4	4.4	4.5	4.2	4.8	4.7
Holding & Other Investment Offices	67	--	--	1.7	1.8	1.9	1.7	--	2.2	--	1.5
SERVICES		5.5	5.5	5.2	5.0	4.9	5.1	5.2	5.4	5.3	5.5
Hotels and Other Lodging Places	70	9.2	9.1	8.9	8.8	9.0	9.2	9.9	10.0	10.0	10.6
Personal Services	72	3.5	3.2	2.9	2.8	3.1	2.9	2.9	2.9	3.2	3.1
Business Services	73	4.9	5.0	4.4	4.6	4.4	4.7	4.9	4.7	4.9	4.6
Automotive Services	75	8.2	8.0	7.5	7.6	7.6	7.1	6.9	6.5	6.8	6.7
Health Services	80	6.8	6.8	6.4	6.1	5.9	6.3	6.3	7.1	6.6	7.2
Legal Services	81	--	--	0.4	0.4	0.5	0.5	0.5	0.6	0.5	0.6
Social Services	83	6.0	5.9	5.1	5.2	5.0	5.3	5.3	6.0	5.4	5.9
Membership Organizations	86	--	--	3.4	3.3	--	3.6	--	--	--	--
Miscellaneous Services	89	1.9	2.2	1.6	1.6	1.3	1.3	1.4	1.7	1.6	1.6

STATE OF ALASKA
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Mary Van Nimwegen

House Labor & Commerce
November 30, 1989
9:30 am

HB 284

POSITION PAPER

A.G.C. OF ALASKA

PRESENTED TO THE

HOUSE LABOR AND COMMERCE COMMITTEE

ON

HB 286

AN ACT RELATING TO PENALTIES FOR VIOLATIONS OF WORK PLACE SAFETY LAWS.

THANK YOU MR. CHAIRMAN. FOR THE RECORD, MY NAME IS RESA JERREL AND I AM THE DIRECTOR OF GOVERNMENTAL RELATIONS FOR THE ASSOCIATED GENERAL CONTRACTORS OF ALASKA (A.G.C.). ON BEHALF OF OUR OVER 600 MEMBER FIRMS WE APPRECIATE THE OPPORTUNITY TO TESTIFY ON HB 286 - PENALTIES FOR VIOLATIONS OF WORK PLACE SAFETY LAWS.

WHILE A.G.C. OF ALASKA IS A STRONG ADVOCATE FOR SAFETY IN THE WORK PLACE, WE DO HAVE SOME SERIOUS CONCERNS REGARDING THIS LEGISLATION. THERE IS NO EVIDENCE INDICATING THAT HIGHER OSHA FINES BRINGS ABOUT BETTER WORK PLACE SAFETY OR FEWER ON THE JOB INJURIES.

A.G.C. WOULD SUGGEST TWO WAYS TO IMPROVE WORK PLACE SAFETY: FINDING WAYS TO AVOID EMPLOYEE INADVERTENT OR CARELESS ACCIDENTS AND ASSIGNING THE PENALTY FOR A VIOLATION TO THE RESPONSIBLE PARTY.

FIRST A 1986 NATIONAL SURVEY OF EMPLOYEE ATTITUDES BY SIROTA AND ALPER ASSOCIATED, INC. OF NEW YORK FOUND THAT:

> "ONE IN FIVE EMPLOYEES SAY WORKPLACE DRUG USE SERIOUSLY AFFECTS THEIR ORGANIZATIONS ABILITY TO GET THE JOB DONE . . . MORE THAN TWO-THIRDS OF THOSE SURVEYED SUPPORT DRUG TESTING FOR NEW JOB APPLICANTS AND FOR SUSPECTED USERS."

IN RESPONSE TO THE INCREASED CONCERN REGARDING THE ISSUES OF POTENTIAL SAFETY HAZARDS, INCREASING ABSENTEEISM, LOWER PRODUCTIVITY, RISING HEALTH CARE COSTS AND DECLINING EMPLOYEE MORALE THE FEDERAL GOVERNMENT AND STATES HAVE PASSED LEGISLATION TO MINIMIZE THE NEGATIVE EFFECTS OF DRUG AND ALCOHOL ABUSE IN THE WORK PLACE. THE STATUTES VARY BUT SOME OF THE PROVISIONS REQUIRE WRITTEN ALCOHOL AND DRUG TESTING POLICY, NOTIFICATION OF COMPANY'S DRUG POLICY, JOB APPLICANT

TESTING, RANDOM TESTING, REASONABLE SUSPICION TESTING, DISCIPLINE AND DRUG AWARENESS PROGRAMS.

SECONDLY: IN BRITISH COLUMBIA THE PERSON THAT CAUSES A VIOLATION IS ASSIGNED THE PENALTY. THE EMPLOYER, SUPERVISOR, WORKER OR PERSON THAT IS NEITHER AN EMPLOYER NOR A WORKER IS LIABLE FOR THE PENALTY. A COPY OF THE BRITISH COLUMBIA STATUTE HAS BEEN GIVEN TO STAFF FOR YOUR REVIEW.

IN CONCLUSION, MR. CHAIRMAN, A.G.C. OF ALASKA WOULD URGE THIS COMMITTEE TO TAKE INTO ACCOUNT THAT THERE ARE NUMEROUS VARIABLES ON A CONSTRUCTION JOB SITE AND CONSIDER SOME OF THE ALTERNATIVES WE SUGGESTED IN INSTEAD OF RAISING THE PENALTIES IMPOSED UPON THE EMPLOYER.

(3) No appeal in itself shall operate as a stay in respect of any order or directive or penalty assessment.

INSPECTION REPORTS

Posting of inspection reports

2.14. (1) Where an inspection report is given or sent to an employer for posting at a place of employment, it shall be posted forthwith by the employer at the place of employment covered by the report in a location conspicuous to workers engaged at that place.

Period of posting

(2) An inspection report shall remain posted for a minimum of 7 days.

Transient operations

(3) Where, as in transient operations, the posting of an inspection report is not feasible, the employer shall adopt other measures, appropriate to the circumstances, to bring the contents of the report to the attention of the affected workers.

Distribution of inspection reports

(4) Where an Industrial Health & Safety Committee is required at the place of employment, the employer shall produce for the committee the inspection report or a copy thereof at or before the next meeting of the Committee.

CONTRAVENTION OF REGULATIONS

Contravention by persons subject to regulations

2.16 (1) Contravention of a regulation shall be deemed to be a contravention by the employer and shall make that employer liable for the penalty prescribed by the Workers' Compensation Act, but nothing in this clause shall relieve the supervisor or worker.

(2) Contravention of a regulation by a supervisor or a worker shall be deemed to be a contravention by the supervisor and shall make that supervisor liable for the penalty prescribed, but nothing in this clause shall relieve the worker.

(3) Contravention of a regulation by a worker shall make that worker liable for the penalty prescribed.

(4) Contravention of a regulation by a person working in or contributing to the production of an industry within the scope of Part I of the Workers' Compensation Act, being neither an employer nor a worker, shall make that person liable for the penalty prescribed.

"NOTICE TO WORKE

Posting of "Notice to Workers" placards

2.18. Every employer shall cau
conspicuous place at each place
ard or notice issued by the Boa
words "Notice to Workers".

PUBLISHED RE

Availability to employees

2.20. Every employer shall keep
readily available at each place o
by all employees.

Workers Compensation Board of British Columbia Industrial Health & Safety Regulations

ONE IN FIVE WORKERS SAY DRUGS ARE SERIOUS WORKPLACE PROBLEM

One in five employees say workplace drug use seriously affects their organizations' ability to get the job done, according to the 1986 National Survey of Employee Attitudes by Sirota and Alper Associates Inc. of New York.

David Sirota, chairman, said his firm's survey also shows that more than two-thirds of those surveyed support drug testing for new job applicants and for suspected users. The only form of testing the majority opposes is random testing, and only by a slim margin.

"The data show that employees for the most part share the concern of management to rid the workplace of drugs," he said.

The annual telephone survey measures employee attitudes toward 25 key dimensions of work life satisfaction which relate to performance and a variety of issues of current interest. It is conducted primarily for subscribers to compare their own employees' attitudes against the norm.

(For more information, write Sirota and Alper Associates, Inc., 1641 Third Ave., New York, NY 10128.)

7-15-87

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

December 15, 1989

MEMORANDUM

TO: Representative Dave Donley

FROM: Patricia Young
Legislative Analyst

RE: Criminal Prosecution of Employers for Workplace Safety Violations
Research Request 90.085

You asked this agency for information on criminal prosecution of executives of California companies in which safety violations have occurred. You also wished to know why companies in Scandinavian countries consistently have fewer workplace deaths and serious injuries than their American counterparts. Lastly, you requested copies of model workplace safety programs recognized by any states or by the federal government which could be adapted for use by Alaska companies.

Background Information

The Occupational Safety and Health Act (OSH Act, 29 U.S.C. 651-668), passed by Congress in 1970, was thought to be a landmark measure which would ensure safe working conditions throughout the United States.[1] To this end, the Occupational Safety and Health Administration (OSHA) was given broad authority and responsibility to establish appropriate standards and to enforce them through civil and criminal penalties.[2]

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[1]Although the OSH Act covers most workplace situations, mining operations, nuclear plants, and railroads are covered by other regulatory measures.

[2]States have the option of being governed by federal OSHA regulations or developing their own. State plans must be as or more effective and must provide workers with at least the same rights and protections as does the federal program.

According to John Hynan, OSHA counsel of general legal advice, criminal penalties were originally thought to be less effective than civil penalties (i.e., fines) in abating workplace hazards. Therefore, fines have generally been levied for violations. OSHA has authority to seek criminal prosecutions only in cases of willful violation of a standard resulting in a death, falsification of records, or giving advance notice of an OSHA inspection. Criminal penalties are not available to OSHA in cases of injuries or illnesses which do not result in fatalities.

In general, OSHA may asses maximum civil and criminal fines of no more than $10,000 and maximum jail sentences of no more than six months. Penalties are doubled for second convictions. Since passage of the Comprehensive Crime Control Act of 1984 (18 U.S.C 3571), under limited circumstances the maximum fine for a misdemeanor resulting in a fatality may be increased to $250,000 for an individual defendant and $500,000 for an organization which is a defendant. However, union representatives, among others, contend that the penalties are inadequate to deter violations. They point out that, unlike jail time, fines are easily passed on as business expenses, and they note that other regulatory acts provide for substantial fines as well as substantial terms of imprisonment for knowingly putting a person in imminent danger of death. For example, in such cases, the Resource Conservation and Recovery Act, which deals with hazardous waste, provides for up to $250,000 in fines or 15 years' imprisonment[3]

Statistics of job-related fatalities and illnesses tend to support union arguments. A recent special report, *Occupational Safety and Health: 7 Critical Issues for the 1990s*, published by the Bureau of National Affairs (a leading publisher of information on government and public policy issues), quotes studies showing that between 7,000 and 20,000 people die each year in the U.S. in job-related accidents, and that job-related diseases may account for as many as 50,000 to 70,000 deaths annually.[4] However, from 1970 through February of 1988, only 42 cases had been referred by OSHA to the Department of Justice for possible criminal action. Of those, 14 were prosecuted, resulting in ten convictions. Until this year, no one had ever been incarcerated for a criminal violation of the OSH Act. According to Mr. Hynan, this year, one person went to jail.

Believing that current OSHA regulations do not adequately protect workers, state and local prosecutors in many parts of the country are resorting to their

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[3]House Committee on Government Operations, *Getting Away With Murder in the Workplace: OSHA'a Nonuse of Criminal Penalties for Safety Violations*, 100th Congress, 2d session, 1988, House Report 100-1051, (Attachment A).

[4]*Occupational Safety and Health: 7 Critical Issues for the 1990s* (Washington D.C.: BNA, 1989), p. 2. Copies of this report are available for inspection in this agency's library and in the Legislative Library.

own police powers to criminally prosecute employers for serious OSHA violations and for willful conduct resulting in death or serious injury. The Los Angeles County District Attorney's Office, for example, has a unit which focuses specifically on criminal prosecutions for occupational violations. Several states, including Illinois, Michigan, New York, North Carolina, Texas and Wisconsin, have filed criminal suits in particularly egregious cases.

A critical question in these cases has been whether federal workplace safety laws preempt states and local jurisdictions from using states' historic police powers to prosecute employers for acts which are crimes under state laws. According to Jan Chatten-Brown, assistant district attorney in Los Angeles, although state convictions have been challenged on issues of preemption, supreme court rulings in Illinois, Michigan Texas, and Wisconsin have upheld states' rights to prosecute employers with criminal laws of general application, such as those against murder, manslaughter, and assault. The Illinois Supreme Court ruling in *State of Illinois v. Chicago Magnet Wire Corporation* was appealed to the U.S. Supreme Court, which denied a hearing of the case and, thus, upheld the lower court's decision that the state is not preempted from prosecuting. In addition, it is the opinion of the U.S. Department of Justice that

> . . . nothing in the OSH Act or its legislative history . . . indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by State criminal laws of general applicability.[5]

Although OSHA has taken no stand on whether state and local actions are appropriate, such actions appear to be an increasingly accepted trend. Attachment B includes a list of prosecution contacts in 17 states--Appendix D of the BNA report--as well as various articles related to this issue.

Workplace Safety in Scandinavian Countries

The Occupational Safety and Health Law Center, a public interest firm, monitors workplace legislation in the U.S. and abroad. According to J. Davitt McAteer, executive director, Scandinavian countries--which have labor governments of long standing--are highly unionized. As a whole, these governments have taken workplace health and safety very seriously and have adopted preventive approaches to industrial accidents and illnesses. Many

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[5]Letter from Thomas M. Boyd, U.S. assistant attorney general, Office of Legislative and Intergovernmental Affairs, to Tom Lantos, Chairman, Subcommittee on Employment and Housing, U.S. House Committee on Government Operations, published in *Occupational Safety and Health: 7 Critical Issues for the 1990s*, BNA, appendix B.

potential problems have been systematically eliminated through careful workplace design. For example, the Volvo company is noted for its person-oriented assembly process. Machinery, equipment, and work environments are designed to fit and complement workers. By comparison, in the U.S., workers generally accommodate and adjust to machinery.

Model Workplace Safety Programs

None of the sources contacted for this memorandum were aware of any recognized model programs which include both penalties for violations and specific incentives for compliance with workplace standards. However, according to Bruce Hillenbrand, OSHA director of Federal and State Operations, OSHA's Voluntary Protection Programs (VPPs)--in effect since 1982--have been relatively successful in raising corporate concern for safety and health standards closer to the level of concern for quality control and production. Inclusion in these programs depends, among other things, on a company's safety record within the previous three years. Random OSHA inspections are eliminated under these programs because joint labor and management committees help to create self-policing situations. Detailed information on OSHA's VPPs will be forwarded to you upon its arrival.

According to Mr. McAteer, California's scheme is widely recognized as being one of the more well-developed, having gone substantially beyond the federal standards. Ms. Chatten-Brown is forwarding copies of California's enabling legislation, articles from a number of law journals, and a District Attorney white paper report on OSHA standards which includes recommendations for both increased penalties and incentives. This information will also be forwarded to you upon its arrival.

I hope this information is useful to you. Please call if you have any questions or need further information.

Attachments

Attachment A

U.S. House Committee on Government Operations,
Getting Away With Murder in the Workplace:
OSHA's Nonuse of Criminal Penalties for Safety Violations,
100th Congress, 2d session, 1988, House Report 100-1051

Union Calendar No. 619

100th Congress, 2d Session - - - - - - - - - - House Report 100-1051

GETTING AWAY WITH MURDER IN THE WORKPLACE: OSHA'S NONUSE OF CRIMINAL PENALTIES FOR SAFETY VIOLATIONS

SIXTY-SIXTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

OCTOBER 4, 1988.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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(II)

LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, DC, October 4, 1988.

Hon. JIM WRIGHT,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's sixty-sixth report to the 100th Congress. The committee's report is based on a study made by its Employment and Housing Subcommittee.

JACK BROOKS, *Chairman.*

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GETTING AWAY WITH MURDER IN THE WORKPLACE: OSHA'S NONUSE OF CRIMINAL PENALTIES FOR SAFETY VIOLATIONS

OCTOBER 4, 1988.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

SIXTY-SIXTH REPORT

BASED ON A STUDY BY THE EMPLOYMENT AND HOUSING SUBCOMMITTEE

On September 27, 1988, the Committee on Government Operations approved and adopted a report entitled "Getting Away With Murder in the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations." The chairman was directed to transmit a copy to the Speaker of the House.

I. INTRODUCTION

At a March 19, 1987, hearing on the Occupational Safety and Health Administration's [OSHA] policy of exempting companies from inspections based on injury records, the Employment and Housing Subcommittee heard testimony about the tragedy of Stefan Golab, a 61-year-old immigrant worker who in 1983 died from inhaling cyanide fumes while working at the Film Recovery Systems plant in suburban Chicago.

Two months prior to Mr. Golab's death, an OSHA inspector visited the Film Recovery plant where the company was engaged in the business of reclaiming silver from used x-ray film, reviewed the company's injury records in the plant's front office, determined that the company's injury rate was below the national average, and left. Had the OSHA inspector come in and observed the conditions on the plant floor, he would have seen 70 boiling vats full of used film from which lethal cyanide vapors were being released, the floor covered with cyanide-contaminated solutions, warning

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labels on cyanide containers painted over, and immigrant workers, many unable to speak English, unaware of the unsafe conditions. Had the OSHA inspector conducted a wall-to-wall inspection of the plant, the deadly cyanide exposure would easily have been detected.[1]

However, the story does not end there. Upon investigating Mr. Golab's death, OSHA inspected the plant and discovered numerous health and safety violations. OSHA issued a citation and fined the company $4,855, which was subsequently bargained down to less than $2,400.

By comparison, the Cook County State's attorney charged the company and its officials with criminal conduct. Company officials were convicted of murder and 14 counts of reckless conduct and were sentenced to 25 years in prison. The company was convicted of manslaughter and reckless conduct and fined $24,000.

During the May 1986 Senate confirmation hearings on John Pendergrass to be Assistant Secretary of Labor for OSHA, Senator Paul Simon referred to a worker's death at the Film Recovery Systems plant and stated that in a precedent-shattering case the four owners of that plant had been found guilty of murder. Mr. Pendergrass commented:

> You bring up a case that brings forth a passion, I think, in many people, it certainly does in me. . . . It was an inexcusable set of circumstances that would allow people to be exposed to things that would damage their health, such as happened there. As a personal opinion, I think the owners and managers got what they deserved.[2]

The criminal convictions of Film Recovery officers are now under appeal in the Illinois courts on the issue of whether State criminal prosecutions for workplace safety violations are preempted by Federal OSHA law.

The *Film Recovery* case, and others like it, prompted the Employment and Housing Subcommittee to hold a hearing on February 4, 1988, to examine OSHA's apparent nonuse of criminal sanctions for workplace safety violations and efforts by State and local prosecutors to fill the vacuum by utilizing historic police powers and enforcing State criminal laws against employers who knowingly and recklessly expose workers to toxic substances and dangerous working conditions, causing them serious injury or death.

II. Background

The Federal Government has been involved in worksite safety since the first Congress. In 1790, Congress passed legislation which allowed merchant seamen to refuse to serve on unsafe ships.

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[1] In response in part to this committee's report, "Here's the Beef: Underreporting of Injuries, OSHA's Policy of Exempting Companies From Programmed Inspections Based on Injury Records, and Unsafe Conditions in the Meatpacking Industry," H. Rept. 100-542, Mar. 30, 1988, Forty-second report by the Committee on Government Operations, OSHA has changed its inspection policy. OSHA investigators are now required to inspect "high hazard" areas of the workplace even though an examination of the employer's injury and illness records shows a below average rate.

[2] Hearing on Nomination of John A. Pendergrass to be Assistant Secretary of Labor for Occupational Safety and Health before the Senate Committee on Labor and Human Resources, 99th Cong., 2d sess., S. Hrg. 99-864 at 27-28 (1986).

Through the decades, Federal laws evolved to address workplace safety issues, often targeting particular groups such as child labor, occupations such as railway workers, and industries such as mining.

In 1970, Congress passed the Occupational Safety and Health Act (OSH Act, 29 U.S.C. 651-668) to bring Federal interests in worksite safety standards and their enforcement within one new agency at the Department of Labor. The Occupational Safety and Health Administration [OSHA] was charged with assuring, ". . . so far as possible, every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." [OSH Act, Sec. 2(b).] To accomplish this goal, OSHA was given broad authority and responsibility to establish health and safety standards, and to enforce them through civil and criminal penalties.

Since the establishment of OSHA, more than 100,000 workers have lost their lives because of unsafe working conditions. It is estimated that annually 7,000-11,000 workers are killed on the job [3] and thousands more die from the long-term effects of occupational illnesses.

OSHA is charged with inspecting worksites and identifying unsafe practices and equipment to ensure that they meet industry-specific and general health and safety standards. OSHA has the authority to issue citations for violations and assess penalties. In addition, the Secretary of Labor is authorized to seek an injunction in U.S. district court when a condition of immediate danger is clear to OSHA inspectors.

OSHA may assess civil penalties of $1,000 for a serious violation (defined as one where there is a substantial probability that death or serious physical harm could result and the employer knew or should have known of the hazard) and up to $10,000 for a willful violation (defined as one where an employer knew that a hazardous condition or violation existed and made no reasonable effort to correct it).

OSHA has authority to seek criminal prosecution for workplace violations in three situations:

> (1) a willful violation of a specific OSHA standard that results in death to an employee (maximum penalty is a $10,000 fine plus 6 months imprisonment); [OSH Act, Sec. 17(e).[4]
>
> (2) giving advance notice of an OSHA inspection (maximum penalty is a $1,000 fine plus 6 months imprisonment); [OSH Act, Sec. 17(f)].
>
> (3) knowingly making a false statement or supplying false documents to OSHA (maximum penalty is a $10,000 fine plus 6 months imprisonment). [OSH Act, Sec. 17(g).]

Cases are referred by OSHA to the Department of Justice for possible criminal action. The criminal prosecution of cases requires the recommendation of the Justice Department and the agreement

[3] Preventing Illness and Injury in the Workplace, Office of Technology Assessment, Washington, D.C. (1985); Report of the National Safety Workplace Institute, Chicago, Illinois (1987).

[4] For a second conviction the maximum fine and term of imprisonment are doubled.

of the local U.S. attorney's office who is responsible for prosecuting the case.

Since the establishment of OSHA some 18 years ago, only 42 cases have been referred by OSHA for criminal prosecution.[5] Only 14 of those cases were prosecuted, resulting in 10 convictions, with fines or suspended sentences. Tr. 75, 83-88.[6] In the 18-year history of OSHA, no one has ever spent one day in jail for a criminal violation of the OSH Act.

During the 1980's, State and local law enforcement officials have with increasing frequency used the historic police powers of the State to prosecute company officials for knowingly and recklessly exposing employees to toxic substances, causing death and serious injuries. This stems from the State's interest in controlling conduct which endangers the lives of its citizens, whether it be recklessly operating an automobile or an automobile plant. In some cases where State and local prosecutors have obtained convictions against company officials and managers for acts against their employees that constitute crimes under State law, the convictions have been overturned on the ground that Federal worksite health and safety laws preempt a State from pursuing criminal actions.

III. Findings and Conclusions

1. OSHA's record with respect to seeking criminal penalties for workplace safety violations and fatalities is dismal. Since its creation by Congress in 1970, OSHA has referred only 42 cases to the Justice Department for possible criminal action. Only 14 of those cases were prosecuted, resulting in 10 convictions, but no jail sentences. No one has ever spent a day in jail for violating the OSH Act. OSHA's record of criminal referrals is even bleaker when compared to the growing number of State and local prosecutions for workplace related fatalities and serious injuries. For example, since 1973 the State of California has prosecuted over 250 cases involving workplace related deaths, injuries, and illnesses, and in the past 8 years there have been 112 successful prosecutions.

2. The criminal penalty provisions of the OSH Act, as presently written and as enforced by OSHA, provides no deterrent to employers violating the statute. A company official who willfully and recklessly violates Federal OSHA laws stands a greater chance of winning a State lottery than being criminally charged by the Federal Government for workplace safety violations. The current system, which relies primarily on citations, abatement, fines, and education and training, is insufficient to ensure that every workplace is safe and healthful. The weak criminal sanctions in the Federal OSH Act are outdated and need to be strengthened and utilized more by OSHA to be a deterrent. In most areas of the law, the prospect of criminal prosecution and imprisonment has a substantial deterrent effect whereas civil fines can often be passed on as part of the cost of doing business.

3. While much of the failure by the Federal Government to seek criminal sanctions for violating Federal OSH laws stems from re-

[5] These figures are as of February 1, 1988.

[6] Tr. refers to the printed record of the February 4, 1988, subcommittee hearing on "Criminal Penalties for OSHA Violations."

luctance by OSHA to proceed, part of the blame rests with the Justice Department. The Justice Department has been slow to act on cases referred by OSHA. Some cases have been pending at the Justice Department, without a response, since 1985. With a few exceptions the Justice Department and the U.S. Attorney's Office have consistently declined to prosecute these types of cases. Since 1981, of the 17 cases referred by OSHA for criminal action, there has been one guilty plea, one indictment, and in two cases action is pending by the U.S. Attorney. In seven cases prosecution was declined by either the Justice Department or the U.S. Attorney. In the remaining six cases there has been no response from the Justice Department or the U.S. Attorney.

4. By "backing off" in the *Film Recovery* case because there was an ongoing criminal investigation by the State of Illinois, by inaction and silence, and by sending mixed signals, OSHA hasn't helped to resolve the issue of whether the Federal OSH Act preempts the traditional police power of the State to prosecute criminal acts that occur in the workplace. This confusion surrounding the preemption question has discouraged some State and local prosecutors from bringing criminal charges in egregious cases, and may have had the effect of shielding employers from responsibility for criminal conduct.

IV. Recommendations

1. OSHA should take an official position on the preemption question and should issue a policy statement. That position should be that the Federal OSH Act, as written, does not preempt the use of historic police powers by the States to prosecute employers for acts against their employees that constitute crimes under State law.

2. There is a need for a real partnership between the Federal Government and the States in pursuing criminal action in workplace safety cases, similar to the partnership that exists in prosecuting drug dealers. This partnership should be premised on cooperation, sharing information and coordinating investigations of workplace accidents and fatalities.

3. Congress should increase the criminal penalties provided by the OSH Act and expand the application of criminal sanctions to include violations which result in serious injuries. Criminal penalties do not now apply to willful safety violations unless there is a resulting fatality. Thus, an employer who willfully and recklessly exposes workers to mercury poisoning, causing permanent brain damage and other serious injury, is not criminally liable under the OSH Act unless a worker dies. Permanent brain damage is not enough to trigger criminal penalties.

4. There is no real program in place at OSHA to handle criminal investigations. OSHA should establish a special criminal investigation unit in its regional offices. Modeled after programs set up in some State and local prosecutors' offices, this new OSHA unit should have necessary expertise in criminal investigations and be available to respond to workplace fatalities 24 hours a day. A prompt response to a workplace fatality or serious injury and a thorough investigation are key elements in building a successful criminal case.

V. Discussion

A. PYMM THERMOMETER

The *Pymm Thermometer* case dramatically illustrates the inadequacies of the present Federal regulatory scheme for dealing with workplace safety violations.

In January 1981, a worker at the Pymm Thermometer plant in Brooklyn, NY, wrote to OSHA:

> Mercury is being used, gas and ovens. Please, we don't know how to describe any more violations, but we are sure there are more. Please send an inspector down to see for himself. We only make the minimum wage, so at least we will know our health is okay.

In March 1981, OSHA inspected the Pymm plant and found serious violations. No protective gear was being used to reduce workers' exposure to mercury—no respirator masks, no aprons, and no gloves. Work surfaces were covered with mercury, and even the areas where workers ate their lunch were contaminated with mercury. OSHA issued a citation, assessed a fine of $1,400, and set a deadline of October 1981 for the company to clean up the factory. However, over the next few years, OSHA regularly extended the compliance deadline.

In 1984, the New York City Department of Health was alerted by a local doctor to elevated levels of mercury in the body of a Pymm worker. The NYC Health Department went to the Pymm factory, inspected it, conducted tests, found violations of the health code and discovered elevated levels of mercury in the workers.

In October 1985, tipped off by a former Pymm worker, an OSHA inspector discovered a hidden cellar operation at the Pymm plant—a cellar virtually without ventilation, filled with broken thermometers, with pools of mercury on the floor, and noxious vapors in the air, which produced permanent brain damage in one employee, Vidal Rodriguez, and exposed many others to serious health risks.

In 1986, OSHA issued citations against Pymm for exposing workers to dangerous levels of mercury and assessed fines of over $100,000. To date, the company has paid just $22,410 in fines, contesting the remainder.

Two months later, the Kings County (Brooklyn) district attorney, in cooperation with the New York State attorney general, brought a criminal prosecution, charging Pymm Thermometer, its owners and officers, William and Edward Pymm, with criminal assault and reckless endangerment for knowingly and continually exposing workers to a toxic substance, mercury.

Kings County District Attorney Elizabeth Holtzman explained:

> The theory of the Pymm prosecution was that assaulting a worker with a toxic substance, such as mercury, is as serious and criminal as assaulting a person with a knife or gun. (Tr. 11.)

New York State Attorney General Robert Abrams told the subcommittee:

> I can assure you, however, that the injured workers in these cases are fully aware that they have been the victims of violent crimes. People sometimes recover from the most terrible of beatings. People never recover from mercury poisoning. (Tr. 18.)

In November 1987, after a 4-week trial, the jury in the New York criminal prosecution returned a guilty verdict, finding the company and two of its executives guilty of assault and reckless endangerment by exposing workers to mercury. Under New York law these crimes are punishable by up to 15 years in prison. However, the guilty verdict was subsequently overturned by the trial judge on the ground that State prosecution was preempted by the Federal OSH Act. That decision is under appeal in the New York courts.

B. THE NEED TO BEEF UP CRIMINAL PROVISIONS OF THE FEDERAL OSH ACT

The criminal provisions of the OSH Act are limited to a willful violation of a standard that results in a fatality, falsification of records, and giving advance notice of an OSHA inspection. Criminal sanctions are not applicable to cases of injuries or illnesses that do not result in a death. Thus, in the case of *Pymm Thermometer* where a worker suffered permanent brain damage from mercury, OSHA could not statutorily pursue criminal prosecution. It is simply unacceptable to have death as the trigger point. In comparison, under the Mine Safety and Health Act [MSHA], death is not required for there to be criminal action.

Even in workplace safety violation cases where there is a fatality, under the OSH Act the maximum penalty is only a $10,000 fine and 6 months' imprisonment. This "slap on the wrist" penalty is so low that motivation is taken from the Justice Department to pursue criminal prosecution in workplace safety cases. By contrast, the Resource Conservation and Recovery Act [RCRA], which deals with hazardous waste provides for a penalty of up to $250,000 or up to 15 years' imprisonment for knowingly putting a person in imminent danger of death.

While the primary emphasis of the OSH Act is on civil not criminal penalties, there is a need to beef up and strengthen the criminal provisions of the statute.

The threat or imposition of jail time can have a substantial deterrent effect not achieved through other mechanisms. Jan Chatten-Brown, a special assistant for occupational safety and health protection in the Los Angeles district attorney's office, testified:

> Civil penalties can simply be passed on as part of the cost of doing business. For a corporate officer to face even a few days of jail time is generally of greater consequence than long prison sentences for most criminals. (Tr. 43.)

Cook County State's Attorney Richard Daley told the subcommittee:

> The fines being levied against corporations have not been enough to deter serious neglect and abuse. Corporations such as Film Recovery have protected themselves from fines by filing for bankruptcy. . . . Instead, we need

to deter corporate officers, such as the Film Recovery executives, with criminal sanctions. Imprisonment is one penalty that cannot be passed on to others. (Tr. 87.)

The criminal provisions of the 18-year-old OSH statute are outdated and need to be strengthened so that the Federal Government can effectively and meaningfully prosecute cases of murder and serious injury that result from willful disregard for worker safety.

C. OSHA AND THE PREEMPTION QUESTION

While OSHA has failed to seek criminal penalties for workplace safety violations, State and local prosecutors in dozens of jurisdictions across the coun : have used the States' historic police powers to prosecute employers for willful conduct that has caused workers to be killed or injured on the job.

In the past 2 years the Los Angeles district attorney's office has prosecuted 18 such cases. Los Angeles Assistant District Attorney Jan Chatten-Brown describes one such prosecution:

> Our first involuntary manslaughter prosecution was against the president of a small drilling company who sent a worker down a 33-foot hole—if you can envision this—that was only 16 to 18 inches in diameter.
>
> The worker was lowered into the hole that was being drilled for an elevator shaft with his foot through a sling. He had no safety harness. The air was not tested. And the sides of the well were not encased.
>
> When the worker went into seizures and the rescue personnel responded, they were told that they could not pump oxygen into the hole because the sides of the wall might collapse. Therefore, by the time they were able to remove the victim, he was dead. (Tr. 41.)

Many of the resulting State court convictions have been challenged or appealed on the ground that the Federal OSH Act preempts State prosecution for workplace injuries and fatalities. The preemption claim has been raised in State courts by defendant employers who seek to use the Federal OSHA law as a shield against criminal prosecution. While an enormous amount of time and money is being spent on appeals on the preemption issue, OSHA and the Department of Labor have not taken an official position on the preemption question.

By its inaction and silence in some cases, and mixed signals in others, OSHA is only adding to the confusion. This confusion and uncertainty have had the effect of thwarting criminal prosecutions in some jurisdictions.

In the *Film Recovery* case, OSHA investigators backed off and deferred to the State of Illinois. As Jerry Thorn, Deputy Solicitor of Labor for National Operations, explained to the subcommittee:

> [T]he investigation that went on in *Film Recovery*, as I understand it, we were there—OSHA's inspectors were there either simultaneously with Mr. Daley's people, but when our OSHA inspectors found out that there was clear interest on the part of the State of Illinois and the county prosecutor's office with respect to the death, they some-

> what backed off their investigation and simply let them, as I understand it, take over. (Tr. 89.)

By "backing off" in *Film Recovery* because the State of Illinois was involved in the case, OSHA tacitly acknowledged the State's right to act in terms of criminal prosecutions.

OSHA is not a disinterested bystander in this matter. OSHA should take an official position on the preemption question and should issue a policy statement. In addition, OSHA should not wait for a particular case to work its way up to the U.S. Supreme Court, but rather should file *amicus* briefs in various cases pending on appeal in State courts, including the *Chicago Magnet Wire Corp* case, which is pending before the Illinois Supreme Court.

OSHA should take the position that the States have clear authority under the Federal OSH Act, as it is written, to prosecute employers for acts against their employees which constitute crimes under State law.

Nothing in the OSH Act or its legislative history suggests that Congress intended to shield employers from criminal liability in the workplace or to preempt enforcement of State criminal laws of general application, such as murder, manslaugher, and assault.

Generally speaking, preemption is not read into a statute, and must be unmistakable. It would be most unusual for Congress to displace ordinary criminal laws. Further, the OSH Act is basically an antipreemption statute. Section 8(b)(4) provides:

> Nothing in this act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, disease, or death of employees arising out of, or in the course of employment.

It would have been most illogical for Congress specifically to authorize a private right to employees to pursue claims under State tort law for injuries incurred in the course of employment while at the same time prohibiting States from using their police power and criminal laws to punish the intentional acts that caused these same injuries.

Section 18 of the OSH Act, however, provides that "[n]othing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6" and that "Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards . . . with respect to which a Federal standard has been promulgated . . . shall submit a State plan. . . ." In this provision forbidding States without an approved plan from setting or enforcing occupational safety and health standards, Congress' focus was on administrative regulation of standards and was not meant to apply to or to deprive employees of the longstanding protection provided by State criminal laws.

As Cook County State's Attorney Richard Daley stated:

> We are not enforcing Government standards, as OSHA does. Rather, we are enforcing our criminal code to protect the people of Cook County from gross misconduct. I submit to you that there is no conflict of jurisdiction on the issue. On the contrary, the responsibilities and objectives of OSHA and local prosecutors can complement each other quite effectively. (Tr. 32)

Daley cited an example of how absurd and detrimental to public safety it would be if Congress had intended to preempt State criminal prosecutions of employers acts against their employees:

> For example, if there was an explosion in a factory stemming from hazardous conditions and dozens of workers died, local prosecutors would be preempted from prosecution.
>
> Yet if the explosion resulted in the deaths of residents in the surrounding area, or a passerby, or a delivery person, we would not be preempted from prosecution.
>
> All these deaths would occur due to the same reckless or negligent conduct. But we could prosecute only for the deaths of those who were not employed by the factory. (Tr. 32.)

Further, the imbalance of criminal penalties would mean that in the above example, the employer, under State law, could face up to 25 years in prison for the death of a nonemployee, but under the OSH Act, could receive only 6 months in prison for a worker's death. We cannot imagine that Congress intended such a result.

The States have an interest in controlling conduct that endangers the lives of their citizens whether it be at home, at work, or on the road. State and local prosecutors should be commended and encouraged to continue their efforts to protect people in their workplaces by utilizing the historic police power of the State to prosecute workplace injuries and fatalities as criminal acts.

D. COOPERATION WITH THE STATES

OSHA's record with respect to cooperation with State and local prosecutors has been spotty. Cook County State's Attorney Richard Daley told the subcommittee:

> Unfortunately, cooperation is not the current norm. OSHA has been reluctant, at best, to cooperate in our State prosecution of these cases. (Tr. 32.)

It is absurd that local OSHA offices do not routinely fully cooperate with local law enforcement officials who seek to prosecute crimes that occur at the workplace. There is a need for a real partnership between the Federal Government and State and local prosecutors in the area of worker safety, similar to the partnership that exists in prosecuting drug dealers and environmental polluters.

At the urging of subcommittee members, on June 15, 1988, OSHA belatedly issued a memorandum to its field offices concerning cooperation with State and local prosecutors in cases where employees have been killed or injured on the job. While the memoran-

dum encourages cooperation in State or local prosecutions "to the fullest extent appropriate" and is a step in the right direction, more coordination is needed to achieve a real partnership.

VI. Summary

OSHA's record in referring cases for criminal action is dismal. Part of the problem is that OSHA "cannot" and part is it "will not." Deficiencies in the Federal OSH statute preclude OSHA from seeking criminal sanctions in cases such as *Pymm Thermometer*, where there was no fatality. In cases such as *Film Recovery*, where there was a fatality, OSHA has regularly and consistently chosen not to seek criminal penalties. There is an institutional reluctance by OSHA, the Justice Department, and the U.S. Attorney's Office to pursue criminal prosecutions in workplace safety cases.

There is a need for OSHA to be more aggressive and timely in using available criminal sanctions. Unless the OSH statute is beefed up and vigorously enforced by OSHA to punish criminally those who show willful disregard for worker safety, some employers will continue "to get away with murder."

O

Attachment B

List of State Prosecution Contacts
and
various articles relating to state prosecution for
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THE LAW

THIS SAFETY RULING COULD BE HAZARDOUS TO EMPLOYERS' HEALTH

Illinois' OSHA decision opens business up to more criminal charges

Mercury is certainly lethal enough. To Brooklyn District Attorney Elizabeth Holtzman, it looked like a deadly weapon. In 1987 her prosecutors convinced a New York jury that two Pymm Thermometer Co. executives were guilty of assault and reckless endangerment for exposing their workers to the poisonous metal. One employee suffered permanent brain damage. But the judge had a last-minute change of heart. He set aside the verdict, ruling that job safety could be regulated only by the federal Occupational Safety & Health Act.

Holtzman is hardly the only D. A. to be rebuffed on this issue. But as she pursues her appeal of the decision, she and other prosecutors who want to crack down on unsafe work conditions have some new ammunition. On Feb. 2 the Illinois Supreme Court ruled that OSHA does not bar states from prosecuting corporate officials for work-related injuries and deaths. The decision gives the state the go-ahead to prosecute five executives of Chicago Magnet Wire Co. While the Illinois decision doesn't apply outside that state, other state courts where appeals of such cases are pending could be influenced by the ruling and by a December Justice Dept. opinion that reached the same conclusion (table).

FILLING A GAP. The Illinois ruling buoyed prosecutors who have had little success in appeals of overturned convictions for workplace offenses. In Chicago, State's Attorney Richard M. Daley says he will use the decision to seek extradition from Utah of a defendant in a murder case the state has brought against Film Recovery Systems Inc. Utah had balked at extraditing company President Michael MacKay until the state supreme court ruling clarified that Illinois had the right to prosecute him. Daley has already won convictions and 25-year prison sentences against three other FRS executives who exposed their employees to cyanide fumes, resulting in one death.

In Milwaukee, County District Attorney E. Michael McCann is weighing criminal charges against a contractor and others in the deaths of three workers who died in a methane explosion on Nov. 10. "My message to business," he warns, "is you better care about safety or be prepared to go to jail."

Business is worried. Employer groups contend that it's unfair for companies that comply with OSHA regulations to be prosecuted for criminal conduct. They assert that the whole point of OSHA was to codify an explicit set of regulations to guide employers. "The issue here is whether we have a clear standard for employers to follow or whether we are going to be at the mercy of the whims and caprices of every county state attorney in the U.S.," says Thomas L. Reid, vice-president of the Illinois Manufacturers Assn. The IMA filed a brief in the Illinois case supporting Chicago Magnet, a unit of North American Philips Inc.

MORE CLOUT. Local prosecutors, for their part, claim they're filling a void. Since 1970 the Occupational Safety & Health Administration has referred 44 cases to Justice for criminal prosecution, and charges have been filed in only a few of them. Prosecutors complain that criminal penalties of up to six months in jail are so weak that Justice is reluctant to go to court. And OSHA rarely gets prosecutions because it can pursue criminal cases only when a worker has died. "I have to face families of victims and tell them I have a legal problem—that an OSHA fine of several hundred dollars may stand in the way of holding these people truly accountable," says Austin (Tex.) D. A. Kenneth Oden.

Local prosecutors dismiss OSHA's civil penalties as a toothless deterrent. They "are just passed on to the consumer as a cost of business," says Jan E. Chatten-Brown, a D. A. in Los Angeles County's occupational safety and health unit.

Congress may give OSHA more clout. Representative Tom Lantos (D-Calif.) plans to introduce legislation that would strengthen criminal penalties for worker safety violations. And at some point, the U. S. Supreme Court is likely to rule on the state-federal dispute. In the meantime, prosecutors say that managers should be able to figure out when they are committing potentially criminal acts in the workplace. "If mercury can put holes in someone's brain," says Holtzman, "that's not much different from a gun putting a hole in someone's brain."

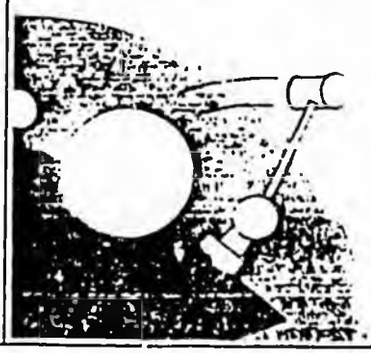
By Susan B. Garland in Washington

COURTROOM CONFLICT OVER WORKER SAFETY

CHICAGO MAGNET WIRE CO. Elk Grove Village, Ill. On Feb. 2 the Illinois Supreme Court upheld Cook County's criminal prosecution of five senior executives for allegedly allowing workers to become ill from exposure to hazardous chemicals. A lower appeals court, ruling that OSHA preempted the state criminal code, supported a trial judge's dismissal of the case.

FILM RECOVERY SYSTEMS INC. Elk Grove Village, Ill. The Cook County state's attorney successfully prosecuted three senior officials on murder and reckless conduct charges in 1985 after a worker died from inhaling cyanide fumes. The officials have appealed, arguing in part that OSHA preempted state law.

PYMM THERMOMETER Brooklyn, N.Y. In 1987 the Kings County district attorney won convictions against the company's two owners on charges of assault and reckless endangerment by exposing workers to mercury. The trial judge overturned the verdict on the ground that OSHA preempted state prosecution. The decision is on appeal.

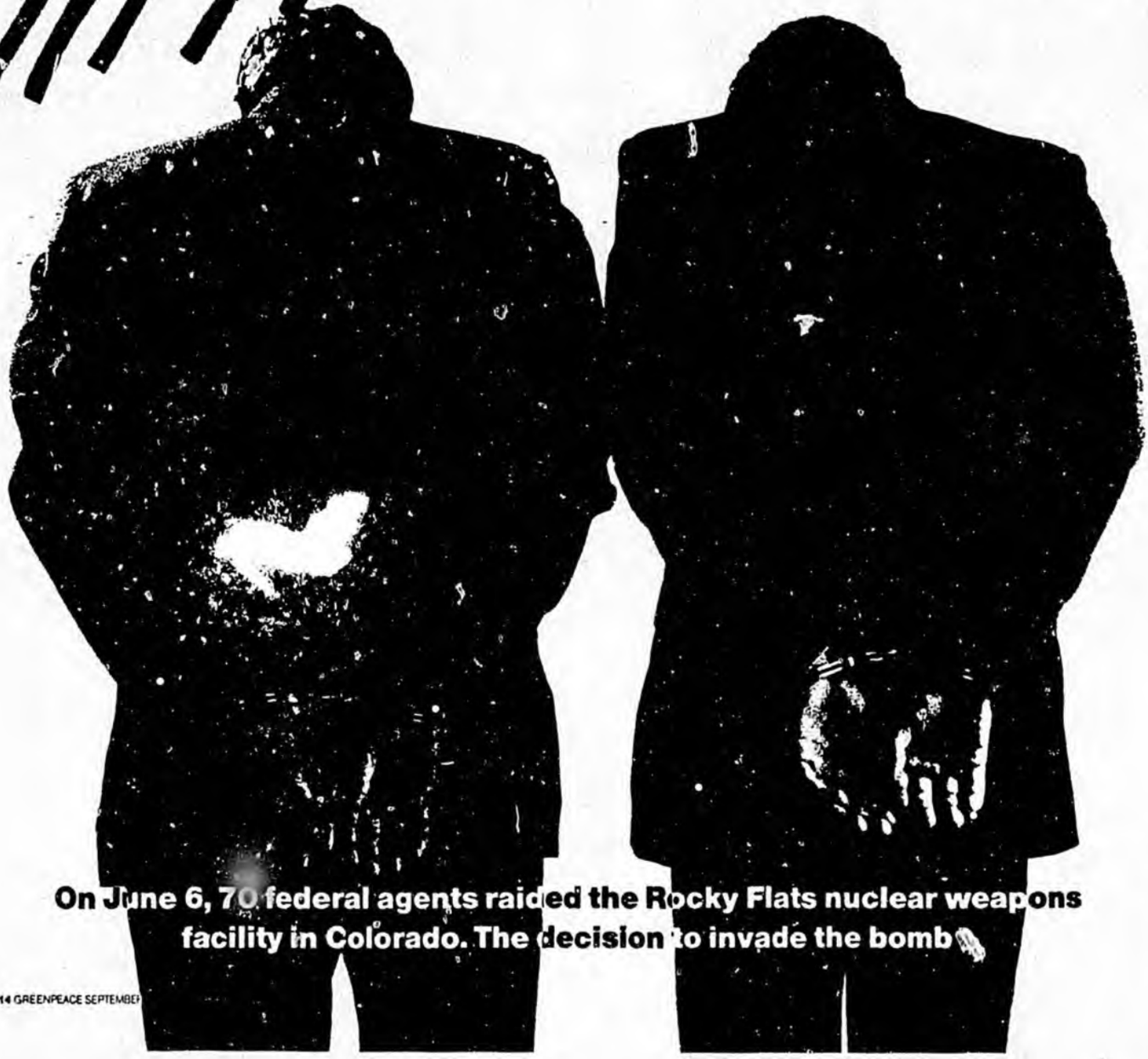


SABINE CONSOLIDATED INC. Austin, Tex. The state prosecutor won a conviction of criminally negligent homicide against the company president in connection with the death of two employees in a trench collapse. An appeals court said the state had no jurisdiction. The state has taken its case to the Texas Court of Criminal Appeals.

DATA: BW

CRIME in the...

BY RUSSELL MOKHIBER



On June 6, 70 federal agents raided the Rocky Flats nuclear weapons facility in Colorado. The decision to invade the bomb

plant came on the heels of a lengthy investigation described in FBI agent Jon S. Lipsky's 116-page affidavit, which convinced a federal judge to unleash the agents. In his report, Lipsky accused Rockwell International and the U.S. Department of Energy (DOE) of "knowingly and falsely" stating that the plutonium-processing plant complied with this country's environmental laws. In doing so, the contractor and its government client concealed "serious contamination" at the site. Lipsky charged that Rockwell and DOE secretly dumped hazardous waste into public drinking water and surreptitiously operated an incinerator they said had been shut down.

While scandal at nuclear weapons plants seems almost a regular news feature of late, the capacity demonstrated by the Justice Department in Colorado to deploy an environmental police force—replete with FBI agents, investigators, prosecutors, wiretaps and aerial surveillance—is in fact an unusual thing. The government rarely flexes its legal muscle to prosecute major environmental crimes or, for that matter, corporate crimes generally. For every Rocky Flats, there are dozens of corporate environmental crimes that go undetected, unprosecuted and unpunished.

"CRIME IS A SOCIOPOLITICAL ARTIFACT, NOT a natural phenomenon," writes legal scholar Herbert Packer in *The Limits of the Criminal Law*. "We can have as much or as little crime as we please, depending on what we choose to count as criminal." In this country, we have chosen to have very little corporate crime. Most corporate wrongs against humans and the environment are not considered criminal in the traditional sense—that is, activity that is prohibited by the state and prosecuted to conviction. While corporations like Rockwell International can be criminally prosecuted for serious violations of environmental laws, they usually face less demanding and less visible civil procedures.

On the face of it, this leniency is grossly out of proportion to the effects of the corporate crime wave. Every year, roughly 28,000 deaths and 130,000 serious injuries are caused by dangerous products. At least 100,000 workers die from exposure to deadly chemicals and other safety hazards. Workplace carcinogens are estimated to cause between 23 and 38 percent of all cancer deaths. More than 45,000 Americans die in automobile crashes every year. Many of those deaths either are caused by defects or are easily preventable by a simple redesign.

The financial cost to society is staggering. The National Association of Attorneys General reports that fraud costs the nation's businesses and individuals upwards of $100 billion each year. The Senate Judiciary Committee has estimated that faulty goods, monopolistic practices and other such violations annually cost consumers $174 to $231 billion. Added to this is the $10 to $20 billion a year the Justice Department says taxpayers lose when corporations violate federal regulations. As a rule of thumb, the Bureau of National Affairs estimates that the dollar cost of corporate crime in the United States is more than 10 times greater than the combined total from larcenies, robberies, burglaries and auto thefts committed by individuals.

The full extent of the corporate crime wave is hidden. Although the federal government tracks street crime month by month, city by city through the FBI's Uniform Crime Reports, it does not track corporate crime. So the government can tell the public whether burglary is up or down in Los Angeles for any given month, but it cannot say the same about insider trading, midnight dumping, consumer defrauding or illegal polluting.

Still, we do know that corporate crime is pervasive. A 1979 Justice Department study, "Illegal Corporate Behavior," found that 582 corporations surveyed racked up a total of 1,554 law violations in just two years. A 1980 *Fortune* magazine survey revealed that 11 percent of 1,043 large companies had been convicted on criminal charges or consent decrees for five offenses: bribery, criminal fraud, illegal political contributions, tax evasion and criminal antitrust. A *U.S. News & World Report* study of the 500 largest corporations found that "115 have been convicted in the last decade of at least one major crime or have paid civil penalties for serious misbehavior" in excess of $50,000. And in 1985, George Washington University Professor Amitai Etzioni found that roughly two-thirds of America's 500 largest companies were involved to some extent in illegal behavior over the preceding 10 years.

BY THE MID-1930s, EVIDENCE WAS MOUNTING that exposure to asbestos was a threat to human health. In 1982, the Manville Corporation (previously Johns Manville), the nation's largest manufacturer of asbestos, filed for bankruptcy to shelter its assets from 16,500 personal injury lawsuits. In the intervening 50 years, the corporation actively suppressed asbestos studies and hid information from its employees on the dangers of working with asbestos. They even cut workers off from their own health records. "As long as [the employee] is not disabled," rationalized the company's medical director in 1963, "it is felt that he should not be told of his condition so that he can live and work in peace, and the company can benefit from his many years of experience."

Over the next 30 years, 240,000 people—8,000 per year, almost one every hour on average—will die from asbestos-related cancer. The company will pay some $2.5 billion to its victims, a hefty civil penalty. But no asbestos executive has ever been prosecuted for reckless homicide.

Likewise, it was not a "crime," in the traditional sense of the word, for Union Carbide's Bhopal, India, subsidiary to operate a pesticide manufacturing plant so incompetently that in 1984, clouds of deadly methyl isocyanate gas escaped, killing 2,000 to 5,000 persons and injuring 200,000.

And it is not a "crime" for the tobacco companies knowingly to market a highly addictive drug that kills more than 365,000 Americans a year, 1,000 every day. This toll is higher than the number of Americans killed annually by AIDS, heroin, crack, alcohol, car accidents, fire and murder combined.

And it is not a "crime" to market known cancer-causing pesticides such as Alar. Nor

CORPORATE CRIME-BUSTING: SOME LEGAL AND SOCIAL REMEDIES

✗ Congress should pass an executive responsibility statute making it a criminal offense for a corporate supervisor willfully or recklessly to fail to oversee an assigned activity that results in criminal conduct. The globe-trotting chief executive, like Exxon's Lawrence G. Rawl, would have a new incentive to monitor the safe conduct of his corporation.

✗ Corporate managers should be required to report to federal authorities a product or process that may cause death or serious injury. This would ensure that R&D departments keep worker health and safety in mind. A bill to this effect, introduced by Representative George Miller (D-CA) in 1979, was defeated thanks in part to corporate lobbying.

✗ Congress should require publicly held corporations to report their litigation records—indictments, convictions, sentences, fines and product-liability lawsuits—to the FBI. This corporate crime database could then be used by communities and prosecutors to inform their fights against criminally inclined companies.

✗ At the local level, corporate crime-watch committees should be formed to keep an eye on the activities of neighboring corporations and to keep police and prosecutors on their toes. Victims of corporate crime, such as those who have been injured by the Dalkon Shield, Agent Orange and asbestos, have formed organizations to lobby for just compensation, strong laws and, where applicable, effective prosecution and strict sentences.

✗ Creative penalties should be devised, such as court-ordered adverse publicity. As a condition of probation, for example, a judge could order a company to take out network television advertisements telling viewers about its long criminal record.

✗ More than anything else, corporate criminals should do time. They should be jailed alongside the mugger and drug dealer, not in the posh "Club Feds" usually reserved for white-collar crooks.

is it a "crime" to dump toxins into the air and water. General Motors (GM), among others, has been campaigning actively against public health for decades. In 1949, the company was convicted of conspiracy to destroy the nation's mass transit systems by buying up and then dismantling electrical transit systems in urban areas around the country.

The environmental consequences of this crime are still felt today. Los Angeles, which in the 1930s boasted an efficient system of electrified public transit that served 56 cities, saw the system destroyed and replaced with diesel buses and a freeway network for GM's cars. The city now has one of the worst air pollution problems in the country, and the Bush administration has proposed exempting it from some provisions of the Clean Air Act.

"What is good for General Motors is not necessarily good for the country," former San Francisco Mayor Joe Alioto told senators in a hearing about the destruction of the electric transit system in the Bay Area. "In the field of transportation, what has been good for General Motors has, in fact, been very, very bad for the country."

With the enormous resources available to them, companies like General Motors can ensure that the laws protecting us from them remain weak. During the last decade, for example, General Motors has successfully opposed amendments that would strengthen federal clean air and federal fuel-efficiency standards. GM has spent more than $1.8 billion lobbying Congress against clean air amendments since 1981, the year the Clean Air Act came due for reauthorization. In addition, GM's political action committee made more than $750,000 in campaign contributions, much of it to legislators who sit on committees with jurisdiction over clean air issues.

LACK OF ACCOUNTABILITY IS DEEPLY EMBEDded in the concept of the corporation. Shareholders' liability is limited to the amount of money they invest. Managers' liability is limited to what they choose to know about the operations of the company. And the corporation's liability is limited by Congress (the Price-Anderson Act, for example, caps the liability of nuclear power companies in the aftermath of a nuclear disaster), by insurance and by laws allowing corporations to duck liability by altering their corporate structure (the Manville bankruptcy dodge, for example).

In addition, since the turn of the century, most laws governing corporate behavior give regulators the option of avoiding criminal charges and proceeding with less burdensome and less noticeable civil enforcement. In this way, corporations avoid either admitting or denying that they violated the law and are let off with slap-on-the-wrist fines and consent decrees. For environmental, labor, securities, energy, and food and drug violations, the civil injunction is today the primary method of enforcing the law against big business.

Fines, dismissed by criminologists as "license fees to violate the law," are the customary civil penalty for corporate wrongdoing. "One jail sentence is worth 100 consent decrees," said one federal judge. "Fines are meaningless because the defendant in the end is always reimbursed by the proceeds of his wrongdoing or by his company."

Under civil enforcement, the executives of criminal corporations are freed from the stigma of prosecution and possible jail sentences. "The violations of these laws are

crimes," wrote Edwin Sutherland in his 1949 classic, *White-Collar Crime*, "but they are treated as though they are not crimes, with the effect and probably the intention of eliminating the stigma of crime."

Sanctions for egregious corporate crimes rarely match the gravity of the offense, nor do they compare well with the punishment meted out for common street crimes. Not one corporate executive went to jail for marketing thalidomide, a drug that caused severe birth defects in 8,000 babies during the 1960s, but Wallace Richard Stewart of Kentucky was sentenced in July 1983 to 10 years in prison for stealing a pizza. Not one Hooker Chemical manager went to jail, nor was Hooker charged with a criminal offense after the company exposed its workers and Love Canal neighbors to toxics, but under a Texas habitual offenders statute, William Rummel was sentenced to life in prison for stealing a total of $229.11 over a period of nine years. And General Motors was fined a mere $5,000 for its mass transit conspiracy, which set back the country's environmental standards for decades.

"No amount of money paid out of corporate assets can address the wrongful acts of the individuals responsible within the organization," says Kenneth Oden, a District Attorney in Austin who has prosecuted a number of occupational homicide cases. "Sometimes the boss needs to be placed in handcuffs and taken to jail." While incarceration of street criminals may have a limited deterrent effect, jail time for corporate executives has a markedly different impact. "I would starve before I would do it again," said one General Electric official, convicted and jailed in a price-fixing scandal.

IN FEBRUARY 1983, A WORKER AT FILM RECOVery Systems' silver extraction plant became nauseated while working in a room with open vats of hydrogen cyanide. He staggered outside the plant, collapsed and died. The medical examiner reported that he died of "acute cyanide toxicity." A month later the state attorney for Cook County, Chicago, charged three executives of Film Recovery Systems with homicide.

Prosecutors argued that plant employees were forced to work in the equivalent of a huge gas chamber, that the company hired mostly illegal aliens who spoke little English, that the company had scraped skull and crossbones warnings off the side of the cyanide drums, and that ventilation was so inadequate that a thick yellow haze hung inside the plant.

After a two-month trial, each of the three executives was found guilty of murder and reckless conduct, fined $10,000 and sentenced to 25 years in prison for murder and 364 days for reckless conduct. Two operating corporations were found guilty of reckless conduct and involuntary manslaughter and fined $11,000 each.

The Film Recovery Systems case represents the first time a corporate executive has been found guilty of murder in an occupational death case, and public sentiment seems to be calling for more such legal actions. Earlier this year in Torrance, California, the city attorney, citing the fear of a "disaster of Bhopal-like proportions," filed an unusual lawsuit against Mobil Oil. He sought to have Mobil's giant Torrance refinery declared a public nuisance, thus giving the city the authority to regulate it. The lawsuit cites the plant's appalling safety record—127 accidents at the refinery since December 1979, including the fiery deaths of three persons, among them a passing motorist, in an explosion and fire at the tank farm.

The district attorney (DA) for Los Angeles County requires prosecutors to investigate the circumstances of every occupational death or serious injury on the job. In the past four years, the DA has investigated more than 100 such cases and has brought criminal charges in more than two dozen cases. And in Austin, Milwaukee and New York City, activist prosecutors are hitting employers with homicide charges for death on the job.

In early 1989, the Commonwealth of Massachusetts announced the creation of a statewide Environmental Crimes Task Force that will use prosecutors, scientists, investigators and police officers to target high-priority threats to public health and natural resources. The 34-member strike force will specialize in major cases involving threats to drinking water supplies, harm to wetlands, illegal dumping and toxic discharges into sewage systems.

"This should send a clear message to everyone across the state: If you pollute, we're going to catch you and you'll pay the price," said Massachusetts Environmental Affairs Secretary John DeVillars. "Poisoning someone's water supply or illegally dumping material isn't a victimless crime. It's a costly crime that has a major impact on individuals whose health may suffer. It damages our quality of life."

At the federal level, the Justice Department's Environmental Crimes Section, which was created in 1983, has recorded 520 indictments and more than 400 convictions, bringing in $22 million in fines and more than 240 years of actual jail time. Earlier this year, Ashland Oil was found guilty of violating federal environmental laws in connection with the collapse of an Ashland storage tank that spilled more than 500,000 gallons of oil into the Monongahela River outside of Pittsburgh on January 2, 1988.

The developments described above point to a new willingness on the part of the public and the judicial system to see corporate crime punished fairly. Until now, the law has taught that if you are strong, rich and corporate, you can inflict the most egregious wrongs on society and continue business as usual. There is no reason why this cannot change. In a just society, the criminal law should also teach that those who poison the air, water and land, injure and kill others, or inflict cancer and birth defects are criminals and should be justly punished. □

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Deterring Death in the Workplace: The Prosecutor's Perspective

Ira Reiner and Jan Chatten-Brown

Introduction

In 1970, when Congress was debating the Occupational Safety and Health Act, it was argued that:

> The problem of assuring safe and healthful workplaces for our working men and women ranks in importance with any that engages the national attention today . . .

Congress cited some grim statistics necessitating vigorous action:

> . . . 14,500 persons are killed annually as a result of industrial accidents . . . more than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 215 million man days of work . . .

The human tragedy associated with the loss of lives, adverse health impacts, and serious injuries were the focus of legislative hearings, but Congess also addressed the economic impact of industrial deaths and disability.

> Over $1.5 billion is wasted in loss of wages, and the annual loss to the gross national product is estimated to be over $8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses. And this grim 'current scene' . . . represents a worsening trend . . .[1]

These deaths and injuries were the catalyst for adoption of OSHA, despite strong opposition from industry. The Act was heralded as providing a legal and institutional framework for achieving greater safety in the workplace. Unfortunately, expectations have not been fulfilled.

Although the exact numbers are subject to debate, it is clear that enforcement of federal and state laws has failed to turn the tide, and workplace deaths, serious injuries, and occupational illnesses are on the rise. In response, there is a growing national trend to use criminal prosecutions as one weapon in the battle to achieve safe workplaces for all Americans. This article will explore the scope of the problem created by unsafe working conditions, contrast the federal and state responses, describe the specialized prosecution program within the Los Angeles District Attorney's Office, discuss some of the obstacles to effective local enforcement, and articulate the reasons we believe such prosecutions are an essential element of any plan to reduce the rash of untimely and unnecessary workplace deaths.

The Widespread Failure to Provide Safe Workplaces

The purpose of the Occupational Safety and Health Act adopted in 1970[2] was to "assure so far as possible every working man and woman in the nation safe and healthful working conditions."[3] Despite this lofty objective, the tragic toll taken in the workplace in lives, safety and health continues.

There have been no comprehensive national surveys of occupational fatalities. As a result, figures range widely. For example, the Bureau of Labor Statistics estimated the number of occupational fatalities in 1984 at 3,750, while the National Safety Council calculated the figure at 11,500. In a report entitled *National Traumatic Occupational Fatalities, 1980–1984*, the National Institute for Occupational Safety and Health estimates that approximately 7,000 traumatic occupational fatalities occurred each year during 1980–1984. This figure,

which represents 8.8 persons per 100,000 workers, excludes deaths from asbestos exposure and other occupationally related diseases which do not result in traumatic or immediate death. The National Safe Workplace Institute, in a 1987 report entitled *Safety at Bay—The Failure of the Department of Justice to Enforce Federal Occupational Safety and Health Laws*, estimated that 120,000 men and women had died in American workplaces since July of 1971, when the Occupational Safety and Health Act was signed into law.

While a wide range of estimates of occupational fatalities exists at the national level, the Los Angeles County Coroner's Office tracks deaths with considerable care. Each year there have been over 100 such deaths in Los Angeles County.

For every one death, there are hundreds, and perhaps thousands, of serious injuries each year, including amputations, blindings, hearing losses, disfiguring burns, and disabling injuries such as back pain. The illnesses and deaths attributable to workplace exposures to carcinogens, and the birth defects, still-births, and cases of sterility resulting from exposure to chemicals that cause reproductive hazards remain unquantified.

While quantification is difficult, what is clear is that the regulatory structure and penalties provided in the Federal Occupational Safety and Health Act have not achieved an acceptable level of deterrence of unsafe working conditions. As a result, since the early 1980s, there has been a national trend toward imposing corporate and individual liability for deaths resulting from unsafe working conditions.

The National Trend toward Imposing Criminal Liability on Corporations and Individual Managers

Since three corporate officers were sentenced to twenty-five years in state prison in the Film Recovery Systems case, there has been a national trend toward local prosecutions for OSHA violations. This recent surge in the number of cases against corporations and their managers for occupational fatalities has not taken place in a vacuum. Prosecutions for occupational safety and health violations increase as society focuses more attention on white collar, business, and corporate crime.

The use of civil, and sometimes criminal sanctions to maintain minimal standards of business ethics was first accepted to protect the integrity of the stock market. Increasingly, violations of anti-trust laws and insider trading laws, among others, have been prosecuted. Health and Safety Code violations prosecuted as part of consumer protection efforts emerged in the 1970s. In 1975, the U.S. Supreme Court held that the president of a company could be liable for Health Code violations, even though he has no specific knowledge of such violations, if he exercised responsibility, management, and control over the company's operation.[4] Such health and safety violations were held punishable, even without criminal intent, because of society's need for protection. Persons with responsibility over such operations could be held "strictly liable" if the violation were in that class of crimes sometimes referred to as "*malum prohibitum*."

It was a significant development in the effort to achieve responsible corporate conduct when a local prosecutor attempted to hold Ford Motor Co. liable for deaths resulting from the explosion of the gas tanks of Pintos, but that prosecution proved unsuccessful.[5] In the 1980s, in the areas of environmental crimes, and particularly hazardous waste disposal, the public's demand for aggressive enforcement has led to an explosion in criminal prosecutions for violations of environmental laws. The Los Angeles District Attorney's Office, and the Los Angeles City Attorney's Office before it, have been the most active in the country in terms of the number and scope of such crimes prosecuted. Prosecutions for occupational safety and health violations should be viewed in the context of other efforts to deter irresponsible corporate conduct.

Criminal Enforcement under the Federal Occupational Safety and Health Act

When Congress passed the Federal Occupational Safety and Health Act in 1970, the primary enforcement mechanism was civil penalties. The Secretary of Labor may impose a civil penalty of up to $1,000 for each serious violation.[6] Willful or repeat violations of the general duty on employers to provide a place of employment free from hazards which are likely to cause death or serious physical harm, or for any specific safety standards, can result in imposition of a civil penalty of not more than $10,000.[7] Failure to abate a hazard for which the employer has been cited may result in a civil penalty of up to $1,000 for each day the hazard continues.[8] With the exception of criminal penalties for giving advance notice of a safety inspection, or for falsification of documents, criminal penalties were reserved for willful violations of a specific standard which results in death. A fine of up to $10,000, and/or not more than 6 months imprisonment could be imposed after a first offense. A second offense could result in a fine of not more than $20,000, and/or not more than one year's imprisonment.[9]

Since enactment of the criminal penalties in the Federal Occupational Safety and Health Act, many commentators have questioned the efficacy of utilizing criminal sanctions. In fact, the experience with such prosecutions has been disappointing. According to the Labor Department, between 1970 and 1988 there were only

41 referrals from the Department of Labor to the Department of Justice.[11] An additional 3 cases were requested of the Department of Labor by the U.S. Attorney. Of those 44 cases, not a single case resulted in the imposition of jail time. In at least two cases, individual defendants were dismissed. In 4 cases, the action was unsuccessful in that the Grand Jury did not return an indictment, there was an acquittal, or there was a hung jury. Seven cases were declined by the Department of Justice, and 15 by the U.S. Attorney. Seven cases resulted in fines, and in an additional 3 cases, the corporation was convicted, but the Department of Labor does not report that a fine was imposed. In one case, an indictment was returned, and as of February 1988, the action was still pending. In 8 cases, either the Department of Justice or the U.S. Attorney has not yet acted. Some of those cases go back to 1985. The likelihood of obtaining a successful prosecution, even if the U.S. Attorney decided to go forward, becomes more remote with the passage of time.

To some extent, the Department of Justice's reluctance to commit the necessary resources for successful criminal prosecutions may be explained by reviewing its early experiences with such actions. A summary of such prosecutions follows.

In 1974, the U.S. Attorney prosecuted the first criminal action under the OSHA Act.[11] The case involved a death resulting from failure to shore a trench. The corporation had been cited by state inspectors for lack of trench shoring 11 times, and had trench jobs closed down as imminent hazards six times in the nine months preceding the fatal incident. Immediately after the worker's death, the president of Dye Construction Co. informed an OSHA inspector that compliance with trenching requirements would be too expensive. The fact that he had knowledge of such requirements was never denied. In fact, he had signed several of the earlier state citations. Despite this terrible history, the U.S. District Court dismissed all counts against the president of Dye Construction Co. The court further dismissed two of the three counts against the corporation, and imposed a fine of only $3,500 on the remaining count.

An industrial cleaning company and its two operating officers were charged with two counts of having willfully failed to provide necessary air supplies and related safety equipment to employees who died after entering confined spaces containing poisonous gases in *United States v. Crosby and Overton*.[12] The officers of the corporation were personally aware of the assignment and the fact that the air compressor they provided was unreliable and inadequate because it tended to draw carbon monoxide from its own engine exhaust. The officers were aware of the death of employees of some of their competitors, and yet they decided not to provide standby rescue equipment. An attempt was made to cover up the violation after the deaths. When the violations were discovered, the individuals and the corporation pled *nolo contendere*. At sentencing, the U.S. Attorney argued for jail terms and fines as a "signal" to industry. The district court declined to impose either, but simply placed the individual defendants on four years parole on condition that they implement a safety program.

Early experiences with jury trials were as disappointing as those with the courts. In *United States v. Pinkston-Hollar*, employees under the direct supervision of the corporate vice president were installing roofing insulation 35 feet above a concrete floor. Winds were so high that one of the employees fell through an opening, catching himself moments before he would have dropped 35 feet. He then warned the vice president that continued work without protection from falling would be deadly. The vice president was aware that the company twice had been cited for failure to provide fall protection. Nevertheless, he ordered work to proceed. A short time later, a worker fell through an opening to his death. Despite all of this evidence, the jury acquitted both the individual and the corporation.[13]

United States V. Turcon Co. resulted in the acquittal of the president of a corporation for a death from a violation which had been cited before the fatal incident. Although the corporation was fined $5,000, the money was never collected since the corporation filed for bankruptcy.[14]

U.S. v. Jones was decided in 1978.[15] A large grain elevator in Galveston, Texas, exploded, killing eighteen and injuring twenty-two. Two on-site managers were indicted for willfully violating OSHA requirements to keep the grain elevators clean and safe. A 3½ week trial resulted in a hung jury.

Perhaps as a result of adverse experiences in litigating these cases, a number of less than satisfactory plea bargains were negotiated. For example, in *U.S. v. Huey Construction Corporation*, a plea bargain resulted in a guilty plea by the corporation for a death from a trenching collapse in exchange for dismissal of charges against two individuals.[16]

In 1980, a plea bargain resulted in the dismissal of charges against the president of *Port Allen Marine Services* in exchange for a plea from the corporation.[17] That prosecution was for improperly erected guardrails, and the president previously had been informed that such rails constituted a safety violation.

Of the cases which have been "successfully completed," only three resulted in imposition of the maximum fine of $10,000. In a number of cases, the fines imposed have been less than would, in all likelihood, be imposed through civil penalties.

More importantly, there appears to be a reluctance to prosecute fatality cases. Three of the cases considered

by the Department of Justice since 1985 have been for violations of record keeping requirements,[18] and one for interference with an OSHA inspection."[19]

As a result of the failure to use the criminal enforcement provisions of the Federal OSHA Act effectively, commentators question the efficacy of these criminal sanctions. Many attribute the lack of successful prosecution to the fact that jurors were unwilling to attach the moral stigma of a conviction to individuals who are often leaders in the community. A related concern, which Stephen Redin refers to as a "spillover problem," is the concern that a corporate fine would penalize shareholders, creditors, employees, and consumers.[20] As to whether the reliance the OSHA Act places upon criminal sanctions is appropriate, at least one commentator concludes the jury is still out.[21]

Recent prosecutions in state courts, however, support the conclusion that criminal prosecutions of corporations and managing officials and supervisors can play an important role in efforts to achieve safer work places.

The Focus Shifts to Local Prosecutions

An active field presence by the regulatory agencies, actions to abate, and civil penalties are all critical elements of an effective regulatory scheme. However, most prosecutors believe criminal prosecution is a substantially more effective deterrent than civil penalties for altering conduct that normally is dependent upon economic considerations. Far more than with street criminals, plant managers may radically change their behavior if they believe failure to do so may result in imposition of even a short period of jail time.

The generally accepted objectives of criminal prosecution are punishment, incapacitation, rehabilitation, and deterrence. Rehabilitation and incapacitation are objectives rarely applicable to criminal conduct by corporate managers. Punishment in some cases is clearly appropriate. Normally, however, the most important objective is to deter unsafe conduct by other industries which may otherwise treat the possibility of the civil penalty or a fine as a cost of doing business.

Increasingly, prosecutors are convincing juries that a homicide can be committed by a manager wielding nothing more deadly than a pen. However, major legal obstacles to successful prosecutions still remain in many parts of the country.

The first reported homicide prosecution against an employer for the death of employees resulted in dismissal of the grand jury's indictment in *People v. Warner-Lambert Co.* (1980) 434 New York Supplement 2nd Series, p. 159.) Defendants in the *Warner-Lambert* case were a chewing gum manufacturer and several of its officers and employees. They were charged with manslaughter and criminally negligent homicide for the death of six employees in an explosion and fire in the corporate defendant's manufacturing plant. The grand jury indicted defendants after the People presented evidence that Warner-Lambert's insurance carrier had advised defendants that the use of magnesium stearate and liquid nitrogen could result in a dust explosion hazard. The insurance carrier recommended installation of a dust exhaust system and modification of certain electrical equipment. Although some work was done, defendants declined to shut down the operation pending modifications. The evidence showed that the cause of the explosion was related to the dust hazard, but the exact catalyst was the subject of considerable speculation. As a result, the Court of Appeal held that the corporation and individual defendants could not be held criminally liable, because the triggering mechanism was not identified. The Court said that despite the defendant's awareness of the risk of explosion from the use of magnesium stearates, the risk was "undifferentiated," and therefore the explosion was "neither foreseen or foreseeable." (*People v. Warner-Lambert Co.* (1980) 434 NYS 2d 159 at 160.)

The *Warner-Lambert* decision constituted a regrettable setback in the effort to achieve more responsible corporate conduct. It appears to misconstrue legal principles relating to foreseeability.[22]

In California in 1983, the State Court of Appeal specifically held that a corporation could be charged with manslaughter for the workplace deaths of its employees (*Granite v. Superior Court* (1983) 149 Cal. App. 3d 465). More importantly, in a prosecution by the Los Angeles District Attorney's Office, the superintendent of the City of Burbank's water reclamation system was found guilty of involuntary manslaughter for the deaths of two workers who were allowed to enter confined spaces as part of the plant's maintenance. The defendant repeatedly had been warned of the inadequacy of the plant's safety procedures.[23]

While a few successful prosecutions were taking place, national attention did not focus on the viability of criminal prosecutions for OSHA violations until June of 1985. Then, three management officials from Film Recovery Systems were found guilty of murder for the cyanide poisoning of one of their employees, 59-year-old Polish immigrant Stephen Golab.[24] The evidence showed that the managers knew of the hazards of cyanide and the appropriate antidote. A ventilation system had been recommended. Numerous employees suffered nausea, vomiting, and bleeding from the nostrils before Stephen Golab's death. When office workers became ill, they were protected by moving the office to a building next door. More large vats utilized in the recovery of silver from used film were crammed into the plant area. Ironically, Federal OSHA inspectors had come to in-

spect the facility several months before the death. Unfortunately, they only conducted a review of the records, which were not properly maintained, and did not go into the plant.[43]

On February 10, 1984, Steven Golab went into convulsions as a result of exposure to cyanide fumes. He was one of many employees who physically entered the vats to remove residue. No antidote was administered and Golab died. According to Jay Magnuson, the lead prosecutor on the case, the turning point in the trial was when another former employee raised his pants leg during trial to expose the scar tissue where cyanide had eaten the flesh down to the bone.

Defense counsel waived jury in the Film Recovery Systems Case. The court found defendants guilty, sentenced the three individuals to 25 years in state prison, and fined the company $24,000. At last, corporate managers were on notice that they may be held criminally liable for unsafe working conditions. The consequences might no longer be a mere slap on the wrist.

The Film Recovery Systems prosecution quickly was followed by several other newsworthy cases. The Milwaukee District Attorney obtained a jury verdict finding defendants guilty of homicide after an employee was crushed to death when a bulldozer he was driving fell off a cliff. The employer had prior notice that the young driver had a history of epilepsy. In *People v. Pymm Thermometer*, the jury likewise reached a quick verdict that defendants were guilty of assault for the mercury poisoning of employees.[46] In *Pymm Thermometer*, employees worked in an unventilated basement which was closed off and hidden from view when health officials conducted inspections. Unfortunately, the judge set aside the verdict, holding that state prosecution violations were preempted by the Federal OSHA Act, a subject discussed below.

Despite some reversals, prosecutors around the country are expressing a heightened interest in investigating and prosecuting the more egregious violations of occupational safety and health laws. Nowhere has the effort been institutionalized as completely as in the County of Los Angeles.

The Los Angeles District Attorney's OSHA Prosecution Program

In December of 1985, Ira Reiner, a co-author of this article, took office as Los Angeles District Attorney. At that time, the first occupational safety and health section in a local prosecutor's office in the country was established.

After several months of relying upon referrals from Cal/OSHA, the state agency with responsibility for occupational safety and health, the District Attorney concluded that a more aggressive program was needed to identify and investigate cases potentially appropriate for criminal prosecution. Letters were sent to all police chiefs and the County Sheriff, asking that all occupational fatalities be investigated as potential homicides. A one-day occupational fatality investigation seminar was conducted for approximately eighty homicide investigators. Subsequently, OSHA fatality investigation training videotapes were prepared and distributed county-wide to law enforcement.

In September of 1985 the District Attorney initiated a program in which a deputy District Attorney and an investigator are on call 24 hours a day, 7 days a week, to respond to the scene of traumatic occupational fatalities in Los Angeles County. District Attorney personnel are notified by law enforcement, the fire department, or the Coroner's Office. They in turn notify the appropriate state or federal occupational safety and health agency. The program is known as the "roll-out" program, and is the linchpin of the District Attorney's OSHA prosecution efforts.

Upon arrival at the scene, the responsibility of the deputy district attorney and district attorney investigator is to obtain the necessary physical and testimonial evidence to determine whether the fatality was due to employee negligence, was an accident, or was the result of a criminal act of the employer. Without prompt investigation, important physical evidence can be lost. Of even greater concern is the fact that, in most cases, key witnesses continue working for the employer. If statements are not promptly obtained from such witnesses, their concern over the death of a worker may be superseded by their own concern for job security.

Since establishment of the OSHA Section, District Attorney personnel have responded to over 100 workplaces. At several of the locations there were multiple deaths. Twenty-two cases have been filed thus far. All but two of those cases involve fatalities. Of the nonfatal cases, one concerned a chlorine leak which sent over 80 people to the hospital. Approximately half of those hospitalized were students and teachers from a nearby school. The other nonfatality was due to safety violations at an oil refinery which resulted in third degree burns over approximately 90 percent of the body of a plant worker.

The first involuntary manslaughter case filed by the OSHA Section was against Michael Maggio.[47] Mr. Maggio was president of a small drilling company, and was personally present when a shaft for an elevator was being drilled. At approximately 15 feet in depth, an obstruction was hit. Maggio directed the victim to go to the bottom of the shaft and remove the obstruction. After doing so, the victim was lifted out of the shaft. Drilling continued with a 16 inch diameter drill bit. At about 33 feet, another obstruction was hit. Maggio again sent the victim down to remove the obstruction.

The victim was lowered by cable to the bottom of the hole with his foot inserted in a sling. The air was not tested, the walls or sides of the hole were not encased or shored, and the victim was not placed in a safety harness. Almost immediately the victim went into convulsions. The fire department was called. When they arrived, they sought to blow fresh air into the hole. Maggio told them they could not do so, since the walls of the well were not encased and might collapse, burying the victim. By the time the victim was removed, he was dead.

After the defendant was held to answer at a preliminary hearing, he pled *nolo contendere* to the charge of involuntary manslaughter. He was sentenced to 60 days in county jail and was required as a condition of probation to adopt and implement a comprehensive accident prevention plan for his company.

Two other involuntary manslaughter cases involved deaths caused by unshored excavations. In *People v. Gonterman*,[28] Gonterman, who was the manager of the trenching company, was personally present when the excavation was being made. A cave-like undercut was made under a street, with no shoring. A series of small cave-ins refilled the excavation. Shoring materials were present, but were not of adequate size. Gonterman directed the workers to continue to dig. The entire embankment collapsed, burying the victim. After Gonterman was held to answer at a preliminary hearing, he pled guilty. He was sentenced to 90 days in county jail and was required as a condition of probation to adopt and implement a comprehensive accident prevention plan.

In the third excavation case, charges were filed against five defendants, including the soils engineer on the project. This case is believed to be the first time in the United States that a professional consultant was charged with involuntary manslaughter for the death of a worker based upon gross negligence in the exercise of his professional responsibilities.[29] Also charged were the owner and foreman of the construction firm employing the victim, the construction company, and the corporate general contractor. In this case, the victim was removing dirt from a trench where footings were to be poured. The dirt apparently was in the trench as a result of a slide that had occurred the night before. While he was working in the trench, a 14-foot embankment collapsed and buried the victim. The investigation showed that the soils report was grossly inadequate because it failed to recommend shoring for a vertical cut when exposed planes of rock angled toward the excavation area into the hillside at almost a 45 degree angle. There is substantial evidence of the personal knowledge of the soils engineer regarding the conditions and warnings from the excavation contractor who did the work. In addition, G.A.L. Concrete Construction Company, the employer, had received 40 citations from Cal/OSHA for violations at 10 different construction sites. At least three of the citations were for the same type of hazards which led to the victim's death.

The fourth involuntary manslaughter case was filed against the owner of an unreinforced brick building and the contractor who was doing remodeling work on the building.[30] Representatives from the concrete coring company who made the cuts in the walls of the building repeatedly warned defendants that bricks should not be removed without the bricks above the cut being shored. After a portion of the bricks were so removed, the brick wall collapsed, burying the victim, who was an undocumented day laborer.

All of the other cases prosecuted by the section have been filed under either Labor Code Section 6425, which makes it a misdemeanor to willfully violate an OSHA regulation when such violation results in death or permanent or prolonged impairment;[31] Labor Code Section 6423(a), which makes it a misdemeanor to knowingly or negligently violate a Cal/OSHA regulation, when that violation is serious;[32] or Penal Code Section 385, which makes it a misdemeanor to work within six feet of a high voltage line.[33] Under all of these sections, a supervisor or management official who exercises responsibility, management, custody or control of the place of employment can be charged. As a result, all of the cases except one have resulted in the naming of an individual as well as the corporation. The only case which was filed solely against a company was for an electrocution of an employee of Southern California Gas Co.[34] The death occurred before the District Attorney instituted the roll-out program. The referral from Cal OSHA came so late that it was impossible to investigate the case adequately to determine which individuals were responsible prior to the running of the statute of limitations.

A major concern of critics considering the effectiveness of occupational safety and health prosecutions has been the ability of prosecutors to determine the culpability of higher level corporate officials in large companies. Although a number of the defendants in those cases have been small employers and supervisors from those companies, several have been large employers. These include Golden State Foods Co., which is the nationwide distributor of meat for McDonalds restaurants, and one of its general managers;[35] Reliance Steel and Aluminum Co., which is one of the largest metal processing companies in the Southwest United States and its president;[36] and GTE, a large electrical supplier.[37]

OSHA prosecutions include several for violation of California requirements for a lock-out device or some means of preventing inadvertent movement of equipment during cleaning and operation. Those deaths include situations where an individual was literally

ground up in a meat blender,[38] crushed to death in a poultry blender,[39] and cut in half in a steel scrapping machine.[40] Federal OSHA has no equivalent standard mandating equipment lock-out.

Two cases have been filed based upon electrocutions where an individual was allowed to work too close to a high voltage line. In one of those cases, the evidence showed that the tree trimmers employed by defendants were not trained regarding the dangers of touching anything that fell on high voltage lines. Moments before the victim was electrocuted, a fellow employee removed a palm frond from the line. The supervisor was present, but took no action. When the victim attempted to remove a similar palm frond, he was electrocuted.[41] The supervising partner of the tree trimming company was sentenced to 30 days in county jail. The other partner was required to institute a comprehensive safety program and pay a fine of $8,500 as a condition of probation.

On April 5, 1988, a jury found Reliance Steel and Aluminum Co. and two corporate managers guilty of failing to train employees on the unique hazards of their job. The case arose after an employee was killed when caught in the recoiler of a steel slitter. A recoiler acts like a large spindle to rewind the steel after it is slit on a steel slitting machine. The standard practice of the company had been to have the employees insert pieces of cardboard at the pinchpoint where the steel was rewound. The slitter had the capacity to run at over 1,100 feet per minute, although the actual speed at which the steel was normally running was substantially less.

There had been no policy against wearing gloves when inserting cardboard. The victim apparently was pulled into the machine when his gloves became caught. In *Reliance Steel*, evidence obtained during execution of a search warrant showed repeated prior recommendations from Reliance's insurance company regarding the need for more safety training, and prior injuries of a nature that should have put the company on notice of safety hazards. What was more shocking was that normally 30 days of training was provided to a new operator on the machine. In this case, the victim was given only three to four hours of training, and was then left to operate the machine with a Spanish speaking helper. The victim did not speak Spanish.[42]

Thus far only one of the cases, against Dial Corporation,[43] involved health issues. However, the District Attorney's Office anticipates that there will be a substantial number of prosecutions for illegal exposure of workers to asbestos, in violation of various asbestos business practice requirements set forth in the California Labor Code and California Business and Professions Code. Further, the provisions of California's Proposition 65, which prohibits discharges of known carcinogens and reproductive hazards into drinking water and also requires all persons to warn individuals exposed to such hazards, went into effect at the end of February, 1988. This law will be very useful as applied to chemicals in the workplace.

In addition to the 22 cases the District Attorney's Office has filed, a substantial number of cases are referred to local city attorneys for misdemeanor prosecutions. Approximately one dozen of these cases have been filed, including a second death of a tree trimmer, utilizing the investigation conducted by the District Attorney's Office.

The Los Angeles District Attorney's Occupational Safety and Health enforcement program has made a substantial difference in convincing corporate managers and supervisors that safety in the workplace should be given high priority. This conclusion has been confirmed by the comment of numerous safety engineers and industrial hygienists located throughout the County of Los Angeles.

Defendants Attempt to Use the OSHA Act as a Shield from Criminal Prosecution

Despite encouraging signs regarding the potential for using criminal prosecutions to deter unsafe work practices, prosecutions in a number of jurisdictions have been thwarted by arguments of federal preemption.

In 1970, business interests opposed enactment of the Federal OSHA Act, arguing that it provided an unnecessary federal sword for forcing changes in the workplace. State regulation was preferable, according to many of these interests. Ironically, it is largely these same interests which now argue the Federal OSHA law provides a shield against state prosecutions, except in those states with federally approved State OSHA plans.

Although the District Attorney believes the argument is unfounded, thus far it has achieved considerable success in the courts, prompting a recent Harvard Law Review article entitled "Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents."[44]

Essentially, defendants argue that section 18 of the Act precludes states from exercising jurisdiction over occupational safety and health, unless Federal OSHA has approved a state plan. Such a plan must be at least as effective as the federal plan to be approved by Federal OSHA. Section 18 provides:

> a. Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.
>
> b. Any State which, at any time, desires to assume responsibility for development and enforcement

> therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement. 29. USCS Section 667.

This preemption argument was rejected by a trial court in Texas but accepted by a Texas court of appeals in *State v. Sabine Consolidated, Inc.*[45] Shortly thereafter, however, an appellate court in Illinois, in *People v. Chicago Magnet Wire Corporation*,[46] held that the Act preempted a state prosecution for aggravated battery and reckless conduct. The People appealed, and the Los Angeles District Attorney, Brooklyn, New York District Attorney; and Middlesex, Massachusetts District Attorney filed an amicus curiae brief in support of the Illinois prosecutor. The U.S. Chamber of Commerce, and others, filed an amicus curiae brief supporting the preemption arguments of the defendants. A decision is currently pending.

Another decision adverse to the interest of the People was handed down by a New York trial court when it set aside a jury verdict that defendants were guilty of assault, conspiracy, and reckless endangerment for the mercury poisoning of their employees at a thermometer plant.[47]

The sole appellate court decision rejecting preemption came on April 21, 1988, when the Wisconsin Court of Appeals, District 4, ruled that the Federal Occupational Safety and Health Act does not preempt a homicide by reckless conduct prosecution against an officer of a fireworks company for the death of an employee.[48]

Our position, and that of other prosecutors, is that the Act neither expressly nor implicitly preempts criminal prosecutions for safety and health violations through applicable state criminal laws. Rather, Section 18 of the Act is designed to preclude adoption of weaker state regulatory standards. This same position is fully articulated in the Harvard Law Review article, "Getting Away With Murder."[49]

On February 4, 1988, before the U.S. House of Representatives, Housing and Labor Subcommittee of the Government Organizations Committee, regarding use of criminal prosecutions for safety and health violations, we recommended that Congress attempt to determine whether President Reagan would sign legislation making it absolutely clear that the Act does not preclude state prosecutors from using criminal laws of general applicability to pursue cases involving employee illnesses, injuries, and death. It is believed Congress would quickly pass such legislation, but a Presidential veto would only muddy the legal waters. Absent enactment of such legislation, the issue undoubtedly will not be resolved until it is ultimately decided by the U.S. preme Court.

Conclusion

Legal and practical hurdles impede the more exten use of criminal prosecutions to achieve safety in t workplace. Small prosecution offices often lack the sources to file and try this type of case, which is oft technically complex and generally requires expert w nesses. Most offices will await resolution of the preem tion issue before proceeding. However, the Los Ange District Attorney's Office, and a few others, are co mitted to pursuing these cases. We hope to make t path easier for those prosecutions yet to come.

References

1. S. Rep. No. 1282, 91st Congress, Second Sess. 1970), Leg. Hist. Note 6, at 142–144.
2. 29 USC Section 651–678.
3. 29 USC Section 651(b).
4. *U.S. v. Park* (1975) 421 U.S. 658.
5. *State v. Ford Motor Co.* (filed February 2, 1979 N 5324 Indiana Superior Court.
6. 29 USC Section 666(j).
7. 29 USC Section 666(a).
8. 29 USC Section 666(d).
9. 29 USC Section 666(e).
10. *Criminal Referrals by OSHA to the Department Justice and Cases Initiated by U.S. Attorneys* as of Februa 2, 1988), attached to testimony of Jerry G. Thorn, Depu Solicitor of Labor, before the subcommittee on Employme and Housing, Committee on Government Operations, U. House of Representatives, February 4, 1988.
11. *United States v. Dye Construction Co.* No. 7 CR-417 (Denver, Colorado, February 6, 1974), affd. 510 F 2 78 (10th Cir. 1975).
12. Cr. No. 74-1832 F. (C.D. Cal. Jan 14, 1975).
13. *United States v. Pinkston-Hollar, Inc.*, No. 7 33-CR6 (D. Kan., February 26, 1976, verdict entered Octobe 12, 1976).
14. Cr. No. 72-0-239 (D. Neb., January 27, 1974).
15. Cr. No. G-80-11 (S.D., Tex., November 13, 1981).
16. Cr. No. 81-16 D (W.D., Oklahoma, February 27 1982).
17. Cr. No. 81-71A (M.D., Louisana, October 26, 1981
18. 29 USC Section 666(g).
19. 18 USC Section 1001 and 1505.
20. Stephen Redin, "Corporate Criminal Liability for Em ploy : Endangering Activities," *18 Columbia Journal of Law and Social Problems (1983)*, 39, at 52–54.
21. Michael H. Levin, "Crimes Against Employees: Sub stantive Criminal Sanctions Under the Occupational Safety and Health Act," *American Criminal Law Review*, 1977 Vol. 14: 717.
22. The *Warner-Lambert* decision was strongly, and we believe properly, criticized by Stephen Redin in "Corporate Criminal Liability for Employee Endangering Activities," su pra. Perhaps as a result of the *Warner-Lambert* decision, crim inal sanctions were not sought to be imposed upon employers due to unsafe working conditions with any regularity until the

mid 1980s. An exception to this was prosecution under specific laws applicable to employers in California.

23. *People v. Guglione* (1982) 138 CA3d32.

24. *People v. Film Recovery Systems Inc.*, et al., Nos. 84 C5084 and 84CR10031 Cir. Ct. of Cook County, Ill., June 14, 1985. This case, and criminal prosecutions of OSHA violations in general, is discussed at length in "Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.," Notre Dame Law Review [illegible] Vol. 62:1009.

25. Over the past several years, Federal OSHA has adopted a policy favoring "records inspections." Under that policy, where records show that the employer has fewer than average injuries and illnesses, inspections of that operation are waived. As a result, there is an increased incentive for employers to under-report. In fact, the largest fines imposed by Federal OSHA of late have been for such recordkeeping violations, rather than substantive safety and health violations.

26. *People v. Pymm Thermometer*, No. 930-86. Appeal filed March 21, 1988.

27. *People v. Michael Charles Maggio*, #A780779, filed March 26, 1986.

28. *People v. Jeffrey Gonterman*, #A919972, filed July 21, 1987.

29. *People v. Dr. Richard Hu, Benjamin Lowe, Michael Berry, G.A.L. Concrete Construction Co., and Panda Development and Construction Company*, #A962219, filed January 6, 1988. A preliminary hearing was scheduled for May 31, 1988.

30. *People v. Charles Wilson and James Lee*, #A954496, filed July 21, 1987.

31. Labor Code Section 6425—Any employer, and every employee having direction, management, control, or custody of any employment, place of employment, or other employee, who willfully violates any occupational safety or health standards, order, or special order, or Section 25910 of the Health and Safety Code, and that violation caused death of any employee, or caused permanent or prolonged impairment of the body of any employee, shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000), or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than twenty thousand dollars ($20,000) or by imprisonment for not more than one year, or by both.

32. Labor Code Section 6423(a)—Except where another penalty is specifically provided, every employer, and every officer, management official, or supervisor having direction, management, control, or custody of any employment, place of employment, or other employee, who does any of the following shall be guilty of a misdemeanor:

a. Knowingly or negligently violates any standard, order, or special order, or any provision of this division, or of any part thereof in, or authorized by, this part the violation of which is deemed to be a serious violation pursuant to Section 6432

33. Penal Code Section 385.b —Any person who either personally or through an employee or agent, or as an employee or agent of another, operates, places, erects or moves any tools, machinery, equipment, material, building or structure within six feet of a high voltage overhead conductor is guilty of a misdemeanor.

34. *People v. Southern California Gas Company* #M864456, filed July 18, 1985.

35. *People v. Golden State Foods, Jack Reily, Stan Hanley and Armando Hernandez* #31386211, filed June 11, 1985.

36. *People v. Reliance Steel and Aluminum Company Inc., Joseph D. Crider, Mark Dehl, Ed Kniewski, and Dennis Conway*, #S34359, filed July 22, 1985.

37. *People v. GTE Products Corporation, John Wayne Lansford, and Dale Niezgocki*, #M270690, filed November 13, 1985.

38. *People v. Golden State Foods*, supra.

39. *People v. California Pacific Poultry Inc., Robert Ferro, Larry Posik, and Armando Velasquez*, #M139709, filed January 27, 1986.

40. *People v. Star Scrap Metal Co. Inc., Allen Richard Stein, and Rose Starow Stein*, #M96482, filed January 31, 1986.

41. *People v. Steve Lymon and Robert L. Henderson*, #M48042, filed October 24, 1985.

42. Sentencing in *Reliance Steel* has been delayed pending a ruling on a motion for a new trial.

43. *People v. Dial Corporation, Skip Foster, Daniel [illegible] King, and Nelson Landman*, #87-M00849, filed February 21, 1986.

44. *Harvard Law Review* (1987) Vol. 101: 535.

45. *Lovelace v. Sabine Consolidated* (1988, 736 S.W. 2nd 865.

46. 147 Ill. App. 3d 797, 510 NE2d 1173 (1987).

47. *People v. Pymm Thermometer*, N.Y. Sup. Ct. November 13, 1987.

48. *State of Wisconsin ex rel. Cornellier v. Black* No. 87-1120-W.

49. Supra, note 41.

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Law Review

WHEN IT IS NOT AN ACCIDENT, BUT A CRIME: PROSECUTORS GET TOUGH WITH OSHA VIOLATIONS

*Ira Reiner** *and Jan Chatten-Brown***

I. Introduction

In 1911, more than 100 workers, all women, were killed in the Triangle Shirt Waist fire. All exit doors to the factory were bolted closed, preventing the employees escape. Some jumped to their death. Others burned in the fire or died from the smoke. The inhumane conditions in which the women worked caused public outcry. The New York District Attorney charged the owners of the factory with manslaughter. Despite the fact that the defendants were eventually acquitted, employers were put on notice that their white-collar status was not a shield of immunity from criminal prosecution for failure to eliminate work-place hazards.

Since the Triangle Shirt Waist fire, public interest in seriously attacking the causes of occupational deaths, injuries, and disease has waxed and waned. Measured by legislative activity and media coverage, it currently has reached a new high.

In 1970, unions achieved a long-term objective by persuading Congress to pass the Occupational Safety and Health Act. Optimism regarding OSHA's potential slowly turned to disappointment, however, as the agency's staff was cut, new standards delayed, civil penalties compromised, and criminal prosecutions of the most egregious offenders thwarted.

By the mid-1980s, much of the battle to deter unsafe working conditions moved to another arena — the state courts. Though but one of the tools for improving working conditions, criminal prosecution is an important option, and is the focus of this article.

Before turning to the emerging area of criminal prosecutions, however, it is useful to have some sense of the scope of the problem.

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II. Scope of the Problem

Workplace-related deaths, injuries, and disease are far more pervasive than often perceived. There is no comprehensive national survey of occupational fatalities, nor is there a standardized state reporting system. As a result, estimates of deaths range widely. The Bureau of Labor Statistics, which relies solely on employer surveys, estimated the number of occupational fatalities in 1984 at 3,750. The National Safety Council, on the other hand, calculated the figure for the same year at 11,500. In a report entitled *National Traumatic Occupational Fatalities, 1980-1984*, the National Institute for Occupational Safety and Health estimates that approximately 7,000 traumatic occupational fatalities occurred each year during 1980-1984. This figure, which represents 8.8 persons per 100,000 workers, excludes deaths from asbestos exposure and other occupationally related diseases which do not result in traumatic or immediate death. The National Safe Workplace Institute, in a 1987 report,[1] estimated 120,000 men and women died traumatic deaths in American workplaces since July 1971, when the OSH Act was signed into law. The Bureau of National Affairs concludes that more than 100,000 workers may have died nationally in job-related accidents since 1984.[2]

Occupational disease estimates are higher, and at least as uncertain. A recent congressional report found that occupational health surveillance is "fragmented, unreliable, and 70 years behind communicable disease surveillance."[3] Despite the statistical uncertainties, there is no question that the magnitude of the problem of occupational disease is great. Many experts believe that 50,000 to 70,000 workers die each year from occupational diseases.[4]

According to John Moran, former Director of Safety Research at the National Institute of Occupational Safety and Health:

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1. J. Holzhauer & J. Kinney, Safety at Bay — The Failure of the Department of Justice to Prosecute Criminal OSHA Cases (National Safe Workplace Institute 1987).

2. Bureau of National Affairs, Occupational Safety and Health: Seven Critical Issues for the 1990s at 9 (July 1989) (hereinafter Seven Critical Issues).

3. Committee on Government Operations, Occupational Illness Data Collection: Fragmented, Unreliable, and Seventy Years Behind Communicable Disease Surveillance (1984).

4. Statement of Dr. Phillip Landrigan, Mount Sinai School of Medicine, to the Senate Comm. on Labor and Human Relations (Apr. 1988).

> [D]eaths caused by work-related injuries result in more years of human life lost than those caused by cancer and heart disease combined. In fact, from ages 1 through 44, injury is the leading cause of death in the nation. The cost to our nation exceeds $100 billion annually.
>
> Every day of the year an average of 32 workers die on the job, and 5,500 suffer a disabling injury. In addition, an average of 165 workers die of illness that is work-related while another 1,000 new cases of work-related illness develop. The cost to our nation exceeds $50 billion annually.[5]

Behind each statistic there is a face and a family. There is more than economic loss; there is human suffering. *Faces — The Toll of Workplace Deaths On American Families*[6] tells the story of a few of those deaths, but most go untold. They are deaths Congress had hoped to prevent when enacting the OSH Act in 1970.

III. The Criminal Sanctions in the OSH Act Are Rarely Applied

The purpose of the OSH Act was to "assure so far as possible every man and woman in the nation safe and healthful working conditions."[7] To do so, the Act established a standard setting and regulatory process intended to be prophylactic. Punitive measures for failure to comply were primarily contained in the civil penalty provisions of the Act.[8] However, the Act also included limited provision for criminal prosecution; willful violations of the Act can be prosecuted if the violation results in death.[9]

Unfortunately, even this limited tool has been extremely underutilized. As a congressional committee recently concluded:

> The criminal penalty provisions of the OSH Act, as presently written and as enforced by OSHA, provides no deterrent to employers violating the statute. A company official who willfully and recklessly violates Federal OSHA laws stands a greater chance of

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5. National Safe Workplaces Institute, Faces — The Toll of Workplace Deaths on American Families 21 (April 1989).

6. Faces, *supra* note 5, was released contemporaneously with the AFL-CIO-sponsored first national day of mourning for workers killed on their jobs. The National Day of Mourning, held April 28, 1989, marked the anniversary of Congress' passage of the Occupational Safety and Health Act.

7. 29 U.S.C. § 651(b) (1982).

8. 29 U.S.C. § 666(a-d).

9. 29 U.S.C. § 666(e).

> winning a State lottery than being criminally charged by the Federal Government for workplace safety violations.[10]

For good reasons this congressional committee concluded the likelihood of federal prosecution is slight. Between 1970 and 1988, a mere 42 cases were referred by OSHA to federal prosecutors. Of those, only 14 were prosecuted. The reasons for the scant number of prosecutions are several. First, early efforts to prosecute under the OSH Act were often unsuccessful. In four federally prosecuted cases, either the grand jury did not return an indictment, or there was an acquittal or a hung jury. In at least two cases, the individual defendants were dismissed so that only the corporate defendant remained charged.[11]

Second, the deterrent value of a successful prosecution under the federal Act is perceived as small. The maximum penalty under the Act is a fine of $10,000 and up to six months imprisonment. A second conviction could result in a fine of up to $20,000 and not more than one year in jail.[12] More important than the amount of the maximum fine available is the limited jail time that can be imposed. To federal prosecutors accustomed to seeking and obtaining long prison terms, six months in jail must seem short indeed. Nevertheless, while jail time is provided as an option at sentencing, the reality is, no one has ever spent a day in jail for a criminal violation of the OSH Act.[13] It is unclear whether a U.S. Justice Department Official has ever sought the sanction of jail time.

Third, federal case law defining "willful" places a heavy burden on prosecutors. Essentially, the employer's action must exhibit an intentional disregard of a standard, or a "knowing, conscious, and deliberate flaunting of the Act."[14] According to outgoing OSHA Assistant Secretary, John Pendergrass, before making a referral the agency reviews their records to determine whether the employer:

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10. HOUSE COMMITTEE ON GOV'T OPERATIONS, GETTING AWAY WITH MURDER IN THE WORKPLACE: OSHA'S NONUSE OF CRIMINAL PENALTIES FOR SAFETY VIOLATIONS at 4 (Oct. 4, 1988) [hereinafter GETTING AWAY WITH MURDER].

11. *Id.*

12. However, it is the opinion of some Department of Justice officials that higher fines for violations of OSHA standards resulting in death would be available under the 1984 statute, increasing the maximum fine for misdemeanors to $250,000 for individuals and $500,000 for corporations. 18 U.S.C. § 3623. However, that theory has yet to be tested.

13. GETTING AWAY WITH MURDER, *supra* note 10.

14. Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1207 (3d Cir. 1974).

a) had a prior history of similar violations; b) was responsible for other injuries and/or deaths in connection with similar conduct; c) was apprised of the hazardous conditions by recent events or some other person; and d) lacked a safety program designed to inform employees of hazards and methods by which those hazards could be eliminated.[15]

Fourth, a federal OSHA inspector in the field focuses his or her attention on whether an employer violated a standard, rather than garnering evidence of an individual's willful misconduct. While OSHA has a staff of industrial hygienists and safety compliance officers, the federal government has not committed any resources specifically to the investigation of safety crimes. In contrast, the federal government in 1988 had 50 criminal investigators, 20 FBI agents, and eight Department of Justice attorneys assigned to investigate and prosecute environmental crimes.[16] Unlike federal OSHA, California law provides for a criminal bureau of investigations within California OSHA.[17]

IV. State Prosecutors Fill the Void

After a decade of federal inaction under the criminal provisions of the Act, state prosecutors nationwide began to pursue workplace deaths.[18] In 1980, prosecutors in New York charged an employer, Warner-Lambert, and its managers with manslaughter for the death of six employees in an explosion and fire in a chewing-gum manufacturing plant. The grand jury indicted defendants after the state presented evidence that Warner-Lambert's insurance carrier had advised defendants that the use of magnesium stearate and liquid nitrogen could result in a dust explosion hazard. The insurance carrier recommended installation of a dust exhaust system and modification of certain electrical equipment. Although some work was done, defendants declined to shut down the operation pending modifications. The evidence showed that the cause of the explosion was related to a dust

15. Statement of John Pendergrass to the House Comm. on Government Operations, Subcomm. on Employment and Housing (Feb. 4, 1988).

16. National Safe Workplace Institute, Ending Legalized Workplace Homicide, Barriers to Job Safety Prosecutions in the U.S. (July 1988).

17. Cal. Lab. Code § 6315 (West 1984).

18. As will be discussed *infra* in Section VI, California has been unique in its approach to OSHA violations, with prosecutions since the early 1970s.

hazard, but the exact catalyst was the subject of considerable speculation. As a result, the New York Court of Appeals held that the corporation and individual defendants could not be held criminally liable, because the triggering mechanism was not identified. The court said that despite the defendants' awareness of the risk of explosion from the use of magnesium stearates, the risk was "undifferentiated," and therefore the explosion was "neither foreseen or foreseeable."[19]

In our opinion, the court in Warner-Lambert misconstrued principles relating to foreseeability. Nationally, the decision had a chilling effect on prosecutors contemplating use of criminal sanctions to redress deaths caused by employer negligence.

Things changed drastically in June 1985, when three management officials from Film Recovery Systems were found guilty of murder for the cyanide poisoning of one of their employees, a 59-year-old Polish immigrant, Stefan Golab.[20] Film Recovery was a processing firm that used cyanide to recover silver from film put into large vats. The evidence showed that the managers knew of the hazards of cyanide and were aware of the appropriate antidote. A ventilation system had been recommended. Numerous employees suffered nausea, vomiting, and bleeding from the nostrils before Stefan Golab's death. When office workers became ill, they were protected by moving the office to a building next door. More large vats utilized in silver recovery were crammed into the plant area. Ironically, federal OSHA came to inspect the facility several months before the death. Unfortunately, they conducted only a review of the records, which were not properly maintained, and did not inspect the plant.[21]

On February 20, 1983, Stefan Golab went into convulsions as a result of the exposure to cyanide fumes after repeatedly going

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19. People v. Warner-Lambert Co., 51 N.Y.2d 295, 414 N.E.2d 749, 431 N.Y.S.2d 159 (1980), *cert. denied*, 450 U.S. 1031 (1981).

20. People v. Film Recovery Systems, Nos. 84-5064, 83-11001 (Cir. Ct. Cook County, Ill., June 14, 1985), *appealed docketed*, Nos. 85-1853, 85-1854, 85-1952, 85-1953 (1st Dist. July 1, 1985). This case, and criminal prosecutions of OSHA violations in general, is discussed at length in Magnuson & Leviton, *Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.*, 62 NOTRE DAME L. REV. 913 (1987).

21. For several years, federal OSHA had a policy favoring "records inspections." Under that policy, where records show that the employer has fewer than average injuries and illnesses, inspections of that operation are waived. As a result, there was an increased incentive for employers to under-report. Fortunately, the policy was reversed in 1987.

into vats to remove residue. No antidote was administered. After being convicted of murder, the three managers were sentenced to 25 years in state prison. With extensive national coverage of the convictions, notice of the potential criminal prosecutions spread from courtrooms to boardrooms.

A number of other newsworthy prosecutions soon followed the Film Recovery case. One of the most egregious set of facts involved Pymm Thermometer. The situation at Pymm Thermometer was well described in the congressional report *Getting Away with Murder:*

> In January 1981, a worker at the Pymm Thermometer plant in Brooklyn, New York, wrote to OSHA:
> "Mercury is being used, gas and ovens. Please, we don't know how to describe any violations, but we are sure there are more. Please send an inspector down to see for himself. We only make the minimum wage, so at least we will know our health is okay."
> In March 1981, OSHA inspected the Pymm plant and found serious violations. No protective gear was being used to reduce workers' exposure to mercury — no respirator masks, no aprons, and no gloves. Work surfaces were covered with mercury, and even the area where workers ate their lunch was contaminated with mercury. OSHA issued a citation, assessed a fine of $1,400, and set a deadline of October 1981 for the company to clean up the factory. However, over the next few years, OSHA regularly extended the compliance deadline.
> In 1984, the New York City Department of Health was alerted by a local doctor to elevated levels of mercury in the body of a Pymm worker. The New York City Health Department went to the Pymm factory, inspected it, conducted tests, found violations of the health code and discovered elevated levels of mercury in the workers.
> In October 1985, tipped off by a former Pymm worker, an OSHA inspector discovered a hidden cellar operation at the Pymm plant — a cellar virtually without ventilation, filled with broken thermometers, with pools of mercury on the floor, and noxious vapors in the air, which produced permanent brain damage in one employee, Vidal Rodriguez, and exposed many others to serious health risks.[22]

Based upon these facts, the Brooklyn District Attorney and New York Attorney General prosecuted Pymm Thermometer and its owners and managers for criminal assault and reckless en-

22. GETTING AWAY WITH MURDER, *supra* note 10, at 6.

dangerment for exposing employees to mercury.[23] After a four-week trial, the jury was quick to convict, but the triai judge set aside the conviction, on grounds of preemption.[24]

Chicago Magnet Wire,[25] like *Film Recovery*, was prosecuted by the Cook County, Ill., District Attorney. The charge involved not a death but, rather, exposure of 42 employees to various hazardous substances during the coating of wire. Charges filed included aggravated battery, reckless conduct, and conspiracy.

Aside from the prosecutions in California, which are based on unique criminal provisions for OSHA violations, perhaps a dozen other prosecutions for workplace safety violations have occurred across the country since 1985.[26] However, the momentum for criminal prosecutions has been delayed, if not derailed, by the contention that the existence of the federal OSHA law preempts state criminal prosecutions.

V THE PARADOX OF ASSUMING PREEMPTION

The Appellate Division of the New York Supreme Court subsequently overturned the trial judge's ruling and reinstated the jury indictment

People v. Union Pacific Corp., App. Div. N.Y. Sup. Ct. 3d Dept. Sept. 1989, N.Y. Law Journal Sept. 20, 1989.

24. *Id.*

25. People v. Chicago Magnet Wire Corp., 126 Ill. 2d 356, 534 N.E.2d 962, *cert. denied sub nom.* ASTA v. Illinois, 58 U.S.L.W. 3202 (U.S. Oct. 3, 1989).

26. Reported cases include Wisconsin *ex rel.* Cornellier v. Black, 144 Wis. 2d 745, 425 N.W.2d 21 (Wis. Ct. App. 1988) (prosecution of a fireworks manufacturer for reckless homicide, based upon knowledge of numerous fire hazards); People v. Hegedus, 169 Mich. App. 62, 425 N.W. 2d 729 (1988), *rev'd*, 432 Mich. 598, 443 N.W.2d 129 (1989) (cable TV splicer's supervisor was charged with involuntary manslaughter for the carbon monoxide poisoning of the slicer in a defective truck); and Sabine Consol., Inc. v. Texas, 756 S.W.2d 865 (1988) (company and its managers charged with negligent homicide for two trenching deaths).

employees of the longstanding protections provided by state criminal law.[27]

Yet, so some courts have ruled.[28]

The basic argument of the defendants is that § 18 of the OSH Act[29] expressly preempts state prosecution under a general criminal statute for a death arising out of a working condition over which federal OSHA has jurisdiction, unless the state has a federally approved plan that allows such prosecution. Section 18 states, in pertinent part:

> (a) Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.
>
> (b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.

Proponents of preemption argue § 18(a) precludes states, including local prosecutors, from exercising authority over any subject for which federal OSHA has adopted a standard, unless the state has submitted, and gained approval for, a state plan.[30] Prosecutors believe that § 18 refers only to the process of standard-setting.[31] Furthermore, the savings clause found in the

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27. Cohen, *Preemption: A Union Lawyer's View*, SEVEN CRITICAL ISSUES, *supra* note 2, at 43. Mr. Cohen's article is reprinted in its entirety in this volume, 17 N. KY. L. REV. 149, (Fall 1989).

28. Sabine Consol., Inc., v. Texas, 756 S.W.2d 865 (1988); People v. Hegedus, 169 Mich. App. 62, 425 N.W. 2d 729 (1988) *rev'd*, 432 Mich. 598, 443 N.W.2d 127 (1989); Colorado v. Kehran Constr. Inc., 13 O.S.C. 1998 (Colo. Dist. Ct. 1988); and the intermediate appellate court in People v. Chicago Magnet Wire, 157 Ill. App. 3d 797, 510 N.E.2d 1173, *rev'd*, 126 Ill. 2d 356, 534 N.E.2d 962 (1989), *cert. denied sub nom.* ASTA v. Illinois, 58 U.S.L.W. 3202 (U.S. Oct. 3, 1989).

29. 29 U.S.C. § 667.

30. Approximately half the states have their own plans.

31. 29 U.S.C. § (emphasis added). The Illinois Supreme Court, in *Chicago Magnet Wire* agreed:

> [W]e cannot say that the language of section 18 of OSHA can reasonably be construed as explicitly preempting the enforcement of the criminal law of the States as to conduct governed by OSHA occupational health and safety standards. The language of section 18 refers only to a State's development and enforcement of "occupational health and safety standards." 29 U.S.C. § 667(a) (1982)). Nowhere

Act precludes an interpretation of § 18(a) that would result in express preemption. Section 4(b)(4) of the Act provides:

> *Nothing in (the Act) shall be construed* to supersede or in any manner affect workmen's compensation law or *to enlarge or diminish or affect in any manner the common law* or statutory rights, duties, or liabilities of employers with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.[32]

We believe the right to prosecute an employer for murder, manslaughter, battery, or any similar crimes found at common law would be retained under § 4(b)(4), while defendants argue this section should be construed only as saving tort and worker compensation laws. In reconciling and interpreting these sections, an important principle is the presumption against preemption.[33] This presumption is particularly strong when the historic police powers of the states are at issue, where preemption is allowed only if it was the "clear and manifest purpose of Congress."[34] Further, the U.S. Supreme Court rejected a similar preemption argument like that made by defendants in a case regarding state action for injuries in areas regulated under the Federal Atomic Energy Act of 1954.[35] In light of these presumptions against preemption, and the language of §§ 18(a) and 4(6)(4), it is difficult to see how the argument of express preemption can prevail.

However, proponents of preemption are not limited to arguments regarding express preemption pursuant to § 18(a). There are three other theories under which courts may preclude state action.[36] Courts imply preemption, even in the absence of express legislative language, when the Congress intended to occupy the field,[37] when state regulation conflicts with federal law by making compliance with both laws impossible,[38] or when preemption can

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in section 18 is there a statement or suggestion that the enforcement of State criminal law as to federally regulated workplace matters is preempted unless approval is obtained from OSHA officials.

126 Ill. 2d at [illegible], 534 N.E.2d at 965.

32. 29 U.S.C. § 653(b)(4) (emphasis added).

33. Roy v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

34. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1946).

35. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

36. The rationale applies with equal force when state legislation preempts local regulation.

37. Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982).

38. Hillsborough County, Fla. v. Automated Medical Laboratories, 471 U.S. 707, 712-13 (1985).

be inferred by the legislative history of the act.[39] None of these theories apply to the OSH Act.

By maintaining state authority under § 18(a), providing for submission and adoption of more stringent state plans under §§ 18(b) and 6,[40] and enacting the savings clause under § 4(b), Congress made it clear that it did not intend to occupy the field.

> [T]he purpose underlying section 18 was to ensure that OSHA would create a nationwide floor of effective safety and health standards and provide for the enforcement of those standards. (*See United Airlines, Inc. v. Occupational Safety & Health Appeals Board*, 82 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387 (1982)). It was not fear that the States would apply more stringent standards or penalties than OSHA that concerned Congress but that the States would apply lesser ones which would not provide the necessary level of safety.[41]

Likewise, criminal prosecution of workplace safety violations support and complement, rather than conflict with the federal Act.

> [P]rosecutions of employers who violate State criminal law by failing to maintain safe working conditions for their employees will surely further OSHA's stated goal of assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions. (29 U.S.C. Section 651(b)(1982)).[42]

Finally, there is no legislative history to support the conclusion that Congress intended to preempt the field. Indeed, in light of the dearth of earlier prosecutions, it is unlikely that state prosecutors were a matter of concern, and discussion of such prosecutions is absent from the Act's legislative history.

We agree with the Illinois Supreme Court in *Chicago Magnet Wire:*

> To adopt the defendants' interpretation of OSHA would, in effect, convert the statute, which was enacted to create a safe work environment for the nation's workers, into a grant or immunity for employers responsible for serious injuries or deaths of employ-

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39. Malone v. White Motor Corp., 435 U.S. 497, 504-505 (1978).

40. 29 U.S.C. § 655.

41. People v. Chicago Magnet Wire Corp., 126 Ill. 2d at ___, 534 N.E.2d at 967. (The Los Angeles District Attorney joined the Brooklyn and Middlesex District Attorneys as *amicus curiae* in support of the People.)

42. *Id.* at ___, 534 N.E.2d at 969.

ees. We are sure that that would be a consequence unforeseen by Congress.[43]

We believe the decisions in *Chicago Magnet Wire* and *Wisconsin ex rel. Cornellier v. Black*[44] bode well for a successful resolution of the preemption question.[45]

Fortunately, prosecutions under California law do not need to await resolution of the preemption issue.

VI. The Los Angeles District Attorney's OSHA Prosecution Program

California law contains two criminal provisions far more expansive than that provided under the federal Act. Labor Code § 6425 makes it a misdemeanor to willfully violate an OSHA regulation when such violation results in death or permanent or prolonged impairment.[46] Labor Code § 6423(a) makes it a misdemeanor to knowingly or negligently violate a Cal-OSHA regulation, when that violation is serious.[47] Both of these provisions

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43. *Id.*

44. 144 Wis. 2d 745, 425 N.W.2d 21 (Wis. Ct. App. 1988)

45. We note that the U.S. Department of Justice in a letter to Congressman Tom Lantos dated December 9, 1988, opined that they, "see nothing in the OSH Act or its legislative history which indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by State criminal laws of general applicability." The letter is reproduced in Seven Critical Issues, *supra* note 2, at B3-B6 (1989). *See also* the well-reasoned analysis of this preemption question in Note, *Getting Away With Murder: Federal OSHA Preemption of State Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535 (1987).

46. Cal. Lab. Code § 6425 (West 1977):

> Any employer, and every employee having direction, management, control, or custody of any employment, place of employment, or other employee, who willfully violates any occupational safety or health standards, order, or special order, or section 25910 of the Health and Safety Code, and that violation caused death of any employee, or caused permanent or prolonged impairment of the body of any employee, shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000), or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by fine of not more than twenty thousand dollars ($20,000) or by imprisonment for not more than one year, or both.

47. Cal. Lab. Code. § 6423(a) (1973):

> Except where another penalty is specifically provided, every employer, and every officer, management official, or supervisor having direction, management, control, or custody of any employment, place of employment, or other employee, who does any of the following shall be guilty of a misdemeanor: (a) Knowingly or negligently violates any standard, order, or special order, or any provision of this division, or of any part thereof in, or authorized by, this part of the violation of which is deemed to be a serious violation pursuant to Section 6432.

are incorporated in California's state plan. Additionally, Penal Code § 385 makes it a misdemeanor to work within six feet of a high-voltage line.[48]

Under the Labor Code sections, a supervisor or management official who exercises responsibility, management, custody, or control of the place of employment can be charged in addition to the corporate employer. Pursuant to these sections, California prosecutors long have charged corporate and individual employers for OSHA violations. However, nowhere have the prosecutions been as fully institutionalized as in the Los Angeles District Attorney's Office.

In December 1984, Los Angeles District Attorney Ira Reiner established the first occupational safety and health section in a local prosecutor's office in the country. Initially, the OSHA Section relied upon referrals from Cal-OSHA, the state agency with responsibility for occupational safety and health. After several months, the District Attorney concluded a more aggressive program was needed to identify and to investigate cases potentially appropriate for criminal prosecution. Letters were sent to all police chiefs, and the County Sheriff, asking that all occupational fatalities be investigated as potential homicides. A one-day occupational fatality investigation seminar was conducted for approximately 80 homicide investigators. Subsequently, training tapes on OSHA fatality investigations were prepared and distributed county-wide to law enforcement.

In September 1985, a program was initiated in which a deputy district attorney and an investigator are on call 24 hours a day, seven days a week, to respond to the scene of traumatic occupational fatalities in Los Angeles County. District Attorney personnel are notified by law enforcement, the fire department, or the Coroner's Office. We in turn notify Cal-OSHA.[49] The program is known as the "roll-out" program and is the linchpin of the District Attorney's OSHA prosecution efforts.

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48. CAL. PENAL CODE § 385(b) (West 1988):

> Any person who either personally or through an employee or agent, or as an employee or agent of another, operates, places, erects, or moves any tools, machinery, equipment, material, building or structure within six feet of a high-voltage overhead conductor is guilty of a misdemeanor.

49. Between July 1987 and May 1989, while federal OSHA exercised jurisdiction for private-sector enforcement, we notified federal OSHA.

Upon arrival at the scene, the responsibility of the deputy district attorney and district attorney investigator is to obtain the necessary physical and testimonial evidence to determine whether the fatality was due to employee negligence, was an accident, or was the result of a criminal act of the employer. Without prompt investigation, important physical evidence can be lost. Of even greater concern is the fact that in most cases key witnesses continue working for the employer. If statements are not promptly obtained from such witnesses, their concern about the death of a worker may be superseded by their own concern for job security.

Since establishment of the OSHA Section, District Attorney personnel have responded to more than 140 workplaces. At many of the locations, there were multiple deaths. Twenty-five criminal cases had been filed by the Los Angeles District Attorney as of May 1989. Most of the cases involve multiple defendants. More than 15 other cases investigated by the Los Angeles District Attorney have been filed by local city attorneys with authority for misdemeanor prosecutions in their jurisdiction. All but five of the cases filed by the Los Angeles District Attorney's Office involve fatalities. Of the nonfatal cases, one concerned a chlorine leak that sent more than 80 people to the hospital.[50] Approximately half of those hospitalized were students and teachers from a nearby school. Another nonfatality prosecution was due to safety violations at a refinery[51] and a third at a metal forging plant.[52] Both resulted in third-degree burns to workers. A fourth filing was for amputation of fingers on a punch press.[53] A recent case involved an 18-foot unshored trench cited by OSHA as a willful violation. We filed even though the trench had not collapsed and no one was injured.[54] Deaths from unshored trenches are so frequent that it is very important to prosecute whenever we learn of a violation in order to maximize the deterrent effect.

The first involuntary manslaughter case filed by the OSHA Section was against Michael Maggio.[55] Maggio was president of

50. People v. Dial Corp., No. 87-M00849 (Feb. 21, 1986).
51. People v. American Plant Services, No. 31296587.
52. People v. Weber Metals, No. 89M04226 (Apr. 10, 1989).
53. People v. Inwesco, No. 88M17974 (Dec. 29, 1989).
54. People v. Pagnborn Plumbing Corp., No. 89M00594 (June 15, 1989).
55. People v. Maggio, No. A780779 (Mar. 26, 1986).

a small drilling company and was personally present when a shaft for an elevator was being drilled. At approximately 15 feet in depth, an obstruction was hit. Maggio directed the victim to go to the bottom of the shaft and remove the obstruction. After doing so, the victim was lifted out of the shaft. Drilling continued with a 16-inch-diameter drill bit. At about 33 feet, another obstruction was hit. Maggio again sent the victim down to remove the obstruction. The victim was lowered by cable to the bottom of the hole with his foot inserted in a sling. The air was not tested, the walls or sides of the hole were not encased or shored, and the victim was not placed in a safety harness. Almost immediately, the victim went into convulsions. Firefighters were called. When they arrived, they sought to blow fresh air into the hole. Maggio told them they could not do so since the walls of the well were not encased and might collapse, burying the victim. By the time the victim was removed, he was dead.

After the defendant was held to answer at a preliminary hearing, he pleaded nolo contendere to the charge of involuntary manslaughter. He was sentenced to 60 days in county jail and required as a condition of probation to adopt and implement a comprehensive accident prevention plan for his company.

Two other involuntary manslaughter cases involved deaths caused by unshored excavation. In *People v. Gonterman*,[56] Gonterman was the manager of a trenching company and was present when a cave-like excavation was made under a street with no shoring. A series of small cave-ins partially refilled the excavation. Shoring materials were present but were not of adequate size. Gonterman directed the workers to continue to dig. The entire embankment collapsed, burying the victim. After Gonterman was held to answer at a preliminary hearing, he pleaded nolo contendere to involuntary manslaughter. He was sentenced to 90 days in county jail and required as a condition of probation to adopt and implement a comprehensive accident prevention plan.

In a third excavation case,[57] charges were filed against five defendants, including the owner and foreman of the construction firm employing the victim, the construction company, the corpo-

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56. People v. Gonterman, No. A91972 (July 21, 1987).
57. People v. Hu, No. A962219 (Jan. 6, 1988).

rate general contractor, and the projects soils engineer. In this case, the victim was removing dirt from a trench where footings were to be poured. The dirt apparently was in the trench as a result of a slide that had occurred the night before. While working in the trench, a 14-foot embankment immediately above the worker collapsed and buried the victim. The investigation showed that the soils report was grossly inadequate because it failed to recommend shoring for a vertical cut when exposed planes of bedrock angled toward the excavation area at almost a 45-degree angle. Despite substantial evidence of the personal knowledge of the soils engineer regarding the conditions, and warnings from the excavation contractor who did the work, the soils engineer was not held to answer to the criminal charge. As of June 1989, of the remaining defendants, one pleaded nolo contendere to a violation of Labor Code § 6423 and was sentenced. The rest await trial.

The fourth involuntary manslaughter case was filed against the owner of an unreinforced brick building and the contractor who was doing remodeling work on the building.[58] Representatives from the concrete coring company, who made the cuts in the walls of the building, repeatedly warned defendants that bricks should not be removed without the bricks above the cut being shored. After a portion of the bricks were so removed, the brick wall collapsed, burying the victim, who was an undocumented day laborer. Both defendants pleaded nolo contendere to involuntary manslaughter, were fined, required to adopt safety programs, and sentenced to 90 days in jail.

All of the cases filed except two, named one or more individuals as well as the corporation. One of the cases which was filed solely against a company was for an electrocution of an employee of Southern California Gas Company.[59] The death occurred before we instituted our roll-out program. The referral from Cal-OSHA came so late that it was impossible to adequately investigate the case to determine which individuals were responsible prior to the running of the statute of limitations.

The other case where no individual was charged was against eight corporations for violations of the Labor Code and Fire

58. People v. Wilson, No. A954496 (July 1, 1987).

59. People v. Southern Calif. Gas Co., No. M864456 (July 18, 1985).

Code, resulting in the death of a maintenance worker during the First Interstate Bank Building fire in May 1988.[60] At the time, the First Interstate Bank Building was the tallest building in Los Angeles. It was completed in 1972, before the Fire Code required sprinkler systems. Although not legally required to retrofit, the building management decided to do so, and the installation of the sprinkler system was proceeding for approximately a year before the fire. Because the construction work involving the installation of the sprinkler system generated dust, between 30 and 40 false alarms occurred a month. In order to avoid the audible alarms, the electronic alarm system was modified. The modification allowed lights to show alarms without an audible signal. The modification also resulted in overriding the fire safety return of all elevators to the mezzanine level.

When the warning alarm was bypassed, communications were by hand-held radio with engineers working in the building. The engineers were asked to check the areas in which the alarms were activated to see if there was actually a fire. It was a routine practice for the engineers to utilize the elevators in responding to an alarm.

The City Fire Code requires audible alarm and that the alarm immediately be transmitted from the place at which it occurs to the Fire Department. Several notices of violation were issued by the Fire Department. In December 1987, First Interstate management and the Fire Department agreed on a procedure to avoid false alarms during construction or repair work by removing the smoke detectors in the work area and replacing them when the work was complete. However, the procedure was not followed.

On May 4, 1988, installation of sprinklers was taking place during the night shift on the fourth, fifth, and 58th floors. The smoke detectors were not disconnected. Instead, the alarm system was overridden. When a series of alarms went off, a security officer asked for a maintenance person to check the 12th floor for a possible fire. Alexander Handy responded and was engulfed in flames when the elevator doors opened on the 12th floor. The fire doors to the elevator vestibule had been propped open by the cleaning crews with combustible materials, and the "fire

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60. People v. Equitable Life Assurance Soc'y, (May 1989).

mode" (where the elevator doors would not automatically open) was not operative. Many other workers and tenants were trapped for hours in the worst high-rise fire in Los Angeles history. No individual was charged because the culpability was so diffused amongst the various corporate defendants.

A major concern of critics considering the effectiveness of occupational safety and health prosecutions has been the ability of prosecutors to determine the culpability of higher level corporate officials in large companies. Although a number of the defendants in our cases have been small employers and supervisors from those companies, several have been large employers. These include Golden State Foods Company, which is the nationwide distributor of meat for McDonald's restaurants, and its vice president;[61] GTE, a large electrical supplier;[62] and one of the largest metal processors in the Southwest.[63]

Deaths resulting in prosecution include several for violation of California requirements for a lockout device or some means of preventing inadvertent movement of equipment during cleaning and operation. Those deaths include situations where an individual was literally ground up in a meat blender;[64] crushed to death in a poultry blender;[65] and cut in half in a steel scrapping machine.[66]

Four cases have been filed in Los Angeles County based on electrocutions, where an individual was allowed to work too close to a high-voltage line. In one of those cases, the evidence showed that the tree-trimmers employed by defendants were not trained regarding the dangers of touching anything that fell on high voltage lines. Moments before the victim was electrocuted, a fellow employee removed a palm frond from the line. The supervisor was present but took no action. When the victim attempted to remove a similar palm frond, he was electrocuted.[67] The supervising partner of the tree-trimming company was sentenced to 30 days in county jail. The other partner was required to institute a comprehensive safety program and pay a fine of $8,500

61. People v. Golden State Foods, No. 31386211 (June 11, 1985).
62. People v. GTE Prod. Corp., No. M270690 (Feb. 6, 1986).
63. People v. Reliance Steel, No. S34359 (July 22, 1985).
64. *Golden State Foods*, No. 31386211 (June [illegible], 1985).
65. People v. California Pacific Poultry, Inc., No. M139709 (Jan. 27, 1986).
66. People v. Star Scrap Metal Co., No. M96482 (Jan. 31, 1986).
67. People v. Lymon, No. M48042 (Oct. 24, 1985).

on guarding and safety training and to develop a model safety and health program, which includes:

(a) employment of a full time, qualified safety and health professional;
(b) designation of a plant safety chairperson;
(c) creation of a comprehensive joint employer-employee health and safety committee;
(d) a requirement for a safety consultant to conduct a detailed job safety analysis for each piece of equipment;
(e) daily safety inspections;
(f) a prohibition on the insertion of cardboard in steel slitters; and
(g) detailed training requirements.[69]

Thus far, only two prosecutions have been based on health hazards in the workplace. These were against Dial Corporation,[70] for a chlorine exposure, and *People v. Federated-Weiner Metals, Inc.*,[71] for lead exposures. However, several State Hazardous Waste Control Act prosecutions for illegal disposal of asbestos have involved the exposure of employees to asbestos. In one such asbestos case,[72] the defendant was sentenced to six months in jail. We anticipate that over the next several years there will be a substantial number of prosecutions for illegal exposure of workers to asbestos (in violation of various asbestos business practice requirements set forth in the California Labor Code and California Business and Professions Code) and other hazardous substances. Further, the provisions of California's Proposition 65, which prohibits discharges of known carcinogens and reproductive hazards into drinking water and also requires all persons to warn individuals exposed to such hazards, went into effect as to the first group of substances listed in February 1988.[73] It goes into effect as to the warning requirement for specific substances 12 months after they are identified by the state as known carcinogens or reproductive toxins. Eighteen months after such listing, the discharge of such substances is prohibited where it may contaminate drinking water. We anticipate utilizing the provisions of Proposition 65 in conjunction with the California Worker's Right to Know Law.

69. *Id.*
70. *See supra* note 50 and accompanying text.
71. People v. Federated-Weiner Metals, (May 23, 1989).
72. People v. Industrial Salvage, Inc., No. 790399 (Oct. 8, 1989).
73. CAL. HEALTH & SAFETY CODE § § 25249.5-25249.13 (West 1986).

VII. Conclusion

None of the cases prosecuted by the OSHA Section involved intentional deaths. They were all the result of either a reckless or negligent act, or a failure to act. Nonetheless, in each case the defendant violated his duty of care to another human being. Under California law, the acts or omissions were criminal. The deaths or injuries were not accidents.

It is our belief, confirmed by the comments of numerous safety engineers and industrial hygienists throughout the County of Los Angeles, that the Los Angeles District Attorney's Occupational Safety and Health enforcement program has made a substantial difference in convincing corporate managers and supervisors that safety in the workplace should be given high priority. We believe this is true of similar prosecution programs across the country.[74] The number of prosecutions may be small, but, like a barking dog, their very presence may deter thousands of violations.

74. Strong commitments to OSHA prosecutions also have been made by prosecutors in Cook County, Ill.; Brooklyn, N.Y.; Milwaukee, Wis.; and Austin, Tex.

The Job Safety and Health Act of 1989

Title One: Joint Worker/Management Committees

A. Worker/Management Committees must be authorized to:
   1. Stop work until hazardous conditions are abated.
   2. Review appointment and employment of safety and health personnel.
   3. Conduct monthly inspections.
   4. Obtain employer's information concerning safety and health practices.
   5. Investigate accidents.

B. Worker participation must be legitimate.

C. Committee members must receive sufficient training.

D. All businesses with eleven or more employees must designate a safety and health officer.

Title Two: Rights of Victims and Whistleblowers

A. Victims must have:
   1. The right to obtain copies of OSHA investigative files and citations quickly and free of charge.
   2. The right to participate in appropriate deliberations and adjudicative processes, personally or through their representatives, as proposed in the Construction Safety and Health Improvement Act, S. 2518.

B. Whistleblowers must have:
   1. The right to disclose hazards which violate federal law or threaten health and safety.
   2. The right to participate in a federal agency proceeding relating to the dangerous activities of an employer.
   3. The right to refuse to perform dangerous work, as proposed in the Uniform Health and Safety Whistleblower Act, S. 2095.

Title Three: Civil and Criminal Penalty Structures

A. Civil penalty changes.
   1. Minimum penalty increases should:
      a. Adjust all civil penalties for inflation (a maximum willful violation penalty would be increased from $10,000 to $29,700).
      b. Tie future penalties to the cost-of-living index, as proposed in the Federal Civil Penalties Inflation Adjustment Act, S. 1014.
   2. NSWI recommends penalty increases of:
      a. $50,000 (up from $10,000) for a willful violation.
      b. $10,000 (up from $1,000) for a serious violation.

B. Penalty settlement guidelines.
   1. Penalty reductions must not exceed 30%.
   2. Settlement discussions must not occur until after abatement of hazardous conditions.

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3. Written rationalizations for any reduction must be made available to all concerned parties.
4. Settlements over $100,000 should be entered into U.S. District Court records.

C. Criminal penalties.
1. Current maximum fine of $10,000 and a six month prison sentence for an individual or a corporation are too weak.
2. An increased fine of $250,000 for an individual and $500,000 for a corporation (as proposed by former Assistant Attorney General William Weld) should set the new standard.

D. Willfulness.
1. The current willfulness standard, requiring an employer to have a history of previous citations, and subsequently to have a repeat violation involving a fatality, makes it very difficult to convict serious offenders.
2. A new definition of willfulness, based on the California penal code, should be adopted.

E. Reckless endangerment.
1. A new standard for reckless endangerment should be based on the following criteria:
   a. Any violator with one serious or willful violation during the previous four years would potentially be liable of reckless endangerment.
   b. Willfulness would not be considered in applying the reckless endangerment test.
   c. Reckless endangerment would carry a maximum fine of $100,000 and a prison sentence of one-to-five years.

F. Fatalities.
1. Increase penalties for violations involving fatalities to a maximum prison sentence of 20 years, as proposed in S. 2518.

Title Four: Public Welfare Cost Recovery

A. In cases where federal funds provide support for victims of job-related injury or illness, the government should litigate to recover costs from employers for standards-related violations.
B. The Departments of Labor and Justice would litigate under this provision.

Title Five: Rights of Local and State Governments

A. Current case law discourages a state or local government from pressing criminal charges against an employer in a federally-regulated OSHA state.
B. Federal preemption of state or local laws, including criminal laws, which provides more stringent job safety and health standards should be prohibited, as proposed in S. 2518.

Title Six: State-Plan States

A. State-Plan States should be encouraged to experiment in developing safer workplaces by providing a grant program for special initiatives.
B. The Secretary of Labor should develop standard reporting measures for State-Plan States and make reports available to the public.
C. Workers in State-Plan States should have the right to demand inspections by federal officials when state inspections fail to eliminate hazardous conditions.
D. The Secretary of Labor should terminate inadequate State-Plan programs.

Title Seven: **Safety and Health Standards**

A. The revision of existing standards and promulgation of new standards lags far behind sound scientific knowledge.
B. The Secretary of Labor's responsibility to promulgate standards should be strengthened by:
    1. Reasserting the right to propose individual standards.
    2. Reasserting the right to promulgating consensus standards.

Title Eight: **Licensed Technicians**

A. In oversight of all high-risk activities, the law should:
    1. Require licensing of all key supervisory personnel.
    2. Provide general definitions of the work functions to be supervised by licensed technicians.
B. An employer's failure to comply with this provision should constitute a serious violation.

HOUSE LABOR AND COMMERCE COMMITTEE
ALASKA STATE LEGISLATURE P.O. BOX Y, JUNEAU 99811
(907) 465-3892

November 27, 1989

M E M O R A N D U M

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: Van Biene V. Era Helicopters, Inc.

Attached is a copy of the Van Biene case, an August 18, 1989 Alaska Supreme Court ruling regarding liability for workplace safety programs.

The question before the Supreme court was whether the lower court erred when it held that workers' compensation insurers were covered by the "exclusive remedy" of workers' compensation as far as liability for negligence in performing a safety inspection was concerned.

In Van Biene, the Supreme court ruled that Employers of Wausau, the workers' compensation carrier for Era Helicopters, Inc., did not fall under the "exclusive remedy", and that nothing in Alaska statutes prevents an employee from suing a compensation carrier for negligent performance. The Supreme court reversed the dismissal of the claims against Wausau and remanded them back to the superior court for further proceedings.

In doing so, the court noted that in states were insurers were included in the "exclusive remedy" insurers were specifically included in the workers' compensation statutes, along with employers. That is not the case under Alaska statute were insurers and employers are defined under two different sections of law.

Concern has been expressed that the Van Biene decision will discourage insurers from offering risk management services or workplace safety inspections. Specific concern has been expressed about the adverse effects of the Van Biene decision on safety programs developed by reciprocal insurers such as the Alaska Timber Exchange.

The potential effect of the Van Biene decision on workplace safety programs will be discussed during our November 30, 1989 public hearing.

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NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

HOLLIS VAN BIENE, Personal Representative of the Estate of Michael Brian Van Biene, and STANLEY THOMSON, Personal Representative of the Estate of Stanley Mark Thomson,	File No. S-2571 3AN-87-8195 Civil O P I N I O N
Appellants,	
v.	
ERA HELICOPTERS, INC.; EMPLOYERS INSURANCE OF WAUSAU; ROWAN COMPANIES, INC.; INTERCONTINENTAL DYNAMICS CORPORATION; GATES LEARJET,	[No. 3485 - August 18, 1989]
Appellees.	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Robert H. Wagstaff, Wagstaff, Pope & Clocksin, Anchorage, for Appellants. Clark Reed Nichols, Perkins, Coie, Anchorage, for Appellees.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton and Moore, Justices.

MOORE, Justice.

I. INTRODUCTION

This appeal arises out of litigation by the estates of two airline pilots who died in an airplane crash while employed by ERA Helicopters, Inc. (ERA). The estates seek recovery against ERA for the intentional tort of "overworking" the two deceased pilots and against Employers Insurance of WAUSAU (WAUSAU), ERA's workers' compensation carrier, for its negligence in the inspection, certification, authorization, and approval of ERA's working conditions.

For the reasons set forth below, we affirm the trial court's dismissal of the claims against ERA and the claims against the "Doe defendants." We reverse the trial court's dismissal of the claims against WAUSAU.

II. FACTS AND PROCEEDINGS

Stanley Thomson and Michael Van Biene were pilots employed by ERA. At 2:00 a.m. on August 20, 1985, ERA dispatched them to fly a Learjet to Gulkana, Alaska. By completing this mission, Thomson and Van Biene would necessarily violate the Federal Aviation Administration's (FAA) flight time and duty regulations. The Learjet crashed on approach to the Gulkana airport, killing both pilots. WAUSAU paid compensation for the pilots' deaths.

In the investigation of the accident, other ERA pilots told the National Transportation Safety Board (NTSB) of lengthy on-duty periods and exhausting flight schedules. Three captains reported ERA's disapproval of pilots' refusals to fly because they were fatigued. One captain believed that ERA intentionally overworked its pilots to increase its profits.

On September 14, 1987, the estates filed their Second Amended Complaint alleging negligence against WAUSAU in their inspection, certification, authorization, and approval of ERA's working conditions. The complaint made the following allegations against ERA:

> On or about August 20, 1985, at 0205 AKDT, Stanley Thomson and Michael Van Biene were Captain and First Officer of Learjet N455JA which was dispatched by defendants ERA, Jet Alaska, and ROWAN for a night flight to Gulkana, Alaska. The mission dispatch was accomplished without obtaining current weather information and would necessarily exceed the flight time and duty requirements of Plaintiffs, and the aircraft was overweight for appropriate landing. The dispatch of the aircraft under the conditions described and given the preceding flying time of Plaintiffs without rest or sleep, constitutes negligence and gross negligence.

The estates contended at oral argument before the trial judge, and on appeal, that this language alleges an "intentional tort of dispatching [the deceased pilots] for a night flight . . . without adequate rest or sleep." ERA

argues that the complaint only alleges negligence against it as an employer, and that therefore, the claim is barred by the exclusivity provision of the Alaska Workers' Compensation Act, AS 23.30.055.

The estates argue that WAUSAU is a separate legal entity from the employer and thus may be sued for its own negligence as a third party pursuant to AS 23.30.015(a). In response, WAUSAU argues that the exclusivity doctrine also protects it from such a negligence claim and that regardless of any immunity protection, WAUSAU did not owe a duty to the decedents to inspect, certify, authorize or approve ERA's working conditions.

The superior court granted ERA and WAUSAU's motions to dismiss under Civil Rule 12(b)(6) on the ground that the Alaska Workers' Compensation Act provides the workers' exclusive remedy against an employer or its compensation insurer. The estates appeal.

III. DISCUSSION

A. Did the Court Err in Dismissing the Estates' Claims Against ERA under Civil Rule 12(b)(6) Instead of Treating It as One for Summary Judgment Under Civil Rule 56?

The estates argue that the trial judge should have treated ERA's motion to dismiss as one for summary judgment because ERA submitted affidavits and the court did not

expressly or affirmatively rule that it was not considering this evidence outside the pleadings.

Civil Rule 12(b) states that when "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56." When material outside the pleadings is presented to the trial court, a motion to dismiss "is automatically converted into one for summary judgment unless the court 'affirmatively' and 'expressly' rules that it is not considering evidence outside of the pleadings." Adkins v. Nabors Alaska Drilling, Inc., 609 P.2d 15, 21 n.11 (Alaska 1980).

From our review of the remarks of the judge and counsel during oral argument, we conclude that Judge Ripley expressed his intention not to rely on the affidavits when granting the motion to dismiss. Consequently, the court correctly dismissed the claims under Rule 12(b)(6) rather than Rule 56.

B. Did the Court Err in Holding that the Estates' Claim Against ERA Was Barred by the Exclusivity Doctrine of AS 23.30.055?

1) Standard of Review

"A motion to dismiss for failure to state a claim is viewed with disfavor and should rarely be granted." Mattingly v. Sheldon Jackson College, 743 P.2d 356, 359

(Alaska 1987) (citing Knight v. American Guard & Alert, Inc., 714 P.2d 788, 791 (Alaska 1986)). "In determining the sufficiency of the stated claim it is enough that the complaint set forth allegations of fact consistent with and appropriate to some enforceable cause of action." Linck v. Barokas & Martin, 667 P.2d 171, 173 (Alaska 1983). The court "is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Mattingly, 743 P.2d at 359 (emphasis deleted).

2) Application of Exclusivity Doctrine to Intentional Torts of the Employer

Under AS 23.30.055, the liability of an employer under the Workers' Compensation Act "is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee." See Wright v. Action Vending Co., Inc., 544 P.2d 82, 85 (Alaska 1975).

In Elliott v. Brown, 569 P.2d 1323 (Alaska 1977), we recognized an exception to the exclusivity doctrine in cases of intentional torts committed by a fellow employee or employer. We found that the socially beneficial purposes of the workers' compensation law "would not be furthered by allowing a person who commits an intentional tort to use the

compensation law as a shield against liability." Id. at 1327. The court concluded that the fellow employee's assault on the worker fell outside the purview of the accidental injuries covered by the act. The worker was therefore permitted to pursue a common-law tort action against the fellow employee.[1] Similarly, in Stafford v. Westchester Fire Insurance Co., 526 P.2d 37, 43 n.29 (Alaska 1974), overruled on other grounds, 556 P.2d 525 (Alaska 1976), we noted that:

> In suits for other intentional torts committed by the employer, recovery is permitted on the theory that the harm is not accidental and therefore not covered by the act. A stiff burden is placed on the employee to demonstrate intent to harm by the employer, or in some cases by his agents.

The estates argue that the trial court erred in dismissing their claims against ERA since they allege an intentional tort which is not barred by the exclusivity doctrine. ERA argues that the complaint fails to allege an intentional tort by ERA.

The estates' Second Amended Complaint alleges that ERA violated a number of FAA regulations and that "given the

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1. The Elliott court, however, held that the corporate employer was not liable in tort on a theory of respondeat superior for the intentional tort of its supervisor. 569 P.2d at 1325-26.

preceding flying time of Plaintiffs without rest or sleep, [dispatching the flight] constitute[d] negligence and gross negligence." (Emphasis added). Paragraph IX generally alleges:

> Defendants' actions as described and in other particulars as to be shown at trial constitute wilful misconduct and were jointly and separately negligent, gross, and wanton.

The estates contend that the complaint alleges an intentional tort of dispatching the deceased pilots for a night flight without adequate rest or sleep.

We conclude that these allegations fail to constitute the type of intentional tort actionable outside the workers' compensation system. Liberally construed, the facts alleged fail to make out an intentional tort. At best, the complaint alleges gross negligence or wilful and knowing violation of FAA regulations.

The vast majority of courts have held that such allegations do not constitute an intentional act allowing suit outside of the workers' compensation act. As Professor Larson notes:

> Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of

> statute, or other misconduct of the employer short of genuine intentional injury.
>
> . . .
>
> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.

2A A. Larson, Larson Workmen's Compensation § 68.13, at 13-8 to -26 (1983 & Supp. 1985) (footnotes omitted).

In Stafford we recognized this majority rule. As the court explained, suits for intentional torts have been permitted on the grounds that the harm is not accidental but "[a] stiff burden is placed on the employee to demonstrate intent to harm by the employer, or in some cases by his agents." 526 P.2d at 43 n.29.

Even under a liberal interpretation of the allegations made by the complaint, the estates fail to allege an intent to harm the pilots so as to overcome the exclusivity provision of the act. In conclusion, we affirm the trial court's dismissal of the claims against ERA under Rule 12(b)(6).

C. Did the Court Err in Holding that the Exclusivity Doctrine Contained in AS 23.30.055 Bars a Negligence Action Against the Employer's Workers' Compensation Carrier, WAUSAU?

The estates argue that WAUSAU is a separate legal entity from the employer and thus may be sued for its own negligence as a third party pursuant to AS 23.30.015(a). In response, WAUSAU argues that the exclusivity doctrine protects it from such a negligence claim.

The issue of whether a workers' compensation carrier can be sued for its own negligence ir inspecting the employer's workplace is a question of first impression in Alaska. This court considered a related but distinctly different issue in Stafford. The court considered whether an employee was barred from suing his or her employer's compensation carrier for intentional torts. Stafford had alleged that the carrier wilfully and maliciously withheld compensation benefits resulting in infliction of emotional distress. The court concluded that "[u]nder our compensation act the carrier is considered a separate entity from the employer." 526 P.2d at 42. The court, however, then noted:

> Stafford recognizes that the principle of subrogation may be utilized to conclude that the carrier derives immunity from the exclusive remedy provisions in a damage action brought by the employee. However, Stafford argues that this immunity should not extend to intentional torts. This is supported by the decision of the Supreme Court of

> California in Unruh v. Truck Insurance Exchange, in which suit for an intentional tort by an injured employee against her employer's compensation carrier was allowed.

Id. (footnote omitted). After discussing the reasoning in Unruh v. Truck Insurance Exchange, 498 P.2d 1063 (Cal. 1972), the court concluded:

> We believe that AS 23.30.155 was envisioned by Alaska's legislature to cover situations where the employer or carrier negligently, or wilfully, failed to make timely compensation payments, but that this section was not intended to operate as the exclusive remedy for all intentional wrongdoings. In so holding we adopt the reasoning of Unruh. In circumstances where there is tortious conduct that goes beyond the bounds of untimely payments, the immunity from suit provided by the Workmen's Compensation Act is lost. Normally the carrier must investigate claims in order that the compensation scheme of payments for actual injuries will be properly administered. However, intentional torts committed in connection with the investigation of claims and payment thereof are not to be protected. Stafford has alleged that Westchester did more than delay in making benefit payments; he has asserted that it intentionally and maliciously misled him about his right to compensation and discouraged him from exercising his rights, resulting in emotional injury. We conclude that Stafford is not precluded, by virtue of AS 23.30.155, from a trial on the merits of his claims.

526 P.2d at 43-44.

We conclude that the Stafford court did not decide the issue in this case: whether the exclusivity provision

bars suit against an insurance carrier for negligent inspection of an employer's workplace. First, the court did not expressly hold that the immunity extends to a carrier. Rather, the court accepted arguendo that the doctrine of subrogation might be utilized to conclude that the carrier derives immunity from the exclusive remedy provisions. However, the court held that regardless of whether such immunity existed, intentional torts committed in the investigation of claims and payment thereof were actionable. Id. at 43-44.

While Stafford relied on the reasoning of Unruh, this should not be construed as an acceptance of the California courts' interpretation of its workers' compensation scheme since the Alaska scheme differs significantly from the California scheme.[2] Unlike the Alaska scheme, the California statute explicitly defines "employer" to include "insurer." Cal. Lab. Code § 3850(b) (West Supp. 1987). In Unruh, this identification was held forfeited when the insurer stepped outside the proper bounds of an investigation of the nonmedical facts of the case. 498 P.2d at 1069,

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2. Unruh cites two California Court of Appeal cases holding that a carrier may not be sued for negligence in performing work place inspections. Burns v. State Comp. Ins. Fund, 71 Cal. Rptr. 326 (Cal. App. 1968); State Comp. Ins. Fund v. Superior Court (Breceda), 46 Cal. Rptr. 891 (Cal. App. 1965).

1073. Because the California statute specifically identified the insurer with the employer, the court resorted to a negligence/intentional tort distinction to hold that the insurer no longer was the employer's alter ego when it committed intentional torts.

Other jurisdictions confronting this question of third-party actions against insurers for alleged negligence in either safety inspections or medical services have reached differing results.[3] These decisions are of limited value since each state's statutory scheme differs greatly. We therefore turn to the specific language of the Alaska Act.

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3. For decisions allowing suit against carriers as third-parties in the absence of express statutory language, see Beasley v. MacDonald Eng. Co., 249 So. 2d 844 (Ala. 1971); Nelson v. Union Wire Rope Corp., 199 N.E.2d 769 (Ill. 1964); Fabricius v. Montgomery Elevator Co., 121 N.W.2d 361 (Iowa 1963); Andrews v. Insurance Co. of N. Am., 230 N.W.2d 371, 374 (Mich. App. 1975); Corson v. Liberty Mut. Ins. Co., 265 A.2d 315 (N.H. 1970); Rothfuss v. Bakers Mut. Ins. Co., 257 A.2d 733 (N.J. Super. App. Div. 1969); Derosia v. Duro Metal Products Co., 519 A.2d 601 (Vt. 1986).

For decisions prohibiting suit against an insurer as a third party, see Kifer v. Liberty Mut. Ins. Co., 777 F.2d 1325 (8th Cir. 1985) (Arkansas law); Gerace v. Liberty Mut. Ins. Co., 264 F. Supp. 95 (D.D.C. 1966); Mustapha v. Liberty Mut. Ins. Co., 268 F. Supp. 890 (D.R.I. 1967), aff'd, 387 F.2d 631 (1st Cir. 1967); Barrette v. Travelers Ins. Co., 246 A.2d 102 (Conn. Super. 1968); Reid v. Employers Mut. Liab. Ins. Co., 319 N.E.2d 769 (Ill. 1974); Flood v. Merchants Mut. Ins. Co., 187 A.2d 320 (Md. 1963); Matthews v. Liberty Mut. Ins. Co., 238 N.E.2d 348 (Mass. 1968).

The Alaska Workers' Compensation Act does not mention an insurer in the exclusivity provision of AS 23.30.055, the definition of employer in AS 23.30.265(13), or in the third-party suit provision in AS 23.30.015(a). A "carrier" is defined in AS 23.30.265(5) as "a person authorized to insure under this chapter and includes self-insurers." Thus, as noted in Stafford, the Act defines "employers" and "insurers" as separate, distinct entities. 526 P.2d at 42.

Alaska Statute 23.30.015(i) subrogates an insurer to all the rights of the employer after the carrier has assumed the payment of compensation. WAUSAU argues that this provision provides them with the employers' immunity from a negligence action. Other courts have been hesitant to allow suit against a carrier due to the related problem of a subrogated carrier suing itself.[4] The concern is that since the carrier is subrogated to the injured employee's cause of action against a third-party tortfeasor, "if the carrier can be a third-party tortfeasor, the carrier will end by suing

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4. See Mustapha v. Liberty Mut. Ins. Co., 268 F. Supp. 890 (D.R.I.), aff'd, 387 F.2d 631 (1st Cir. 1967); Kotarski v. Aetna Cas. & Sur. Co., 244 F. Supp. 547 (E.D. Mich. 1965), aff'd, 372 F.2d 95 (6th Cir. 1967); Schultz v. Standard Acc. Ins. Co., 125 F. Supp. 411 (E.D. Wash. 1954) (Idaho law); Flood v. Merchant Mut. Ins. Co., 187 A.2d 320 (Md. 1963).

itself" -- an incongruous result that the legislature could not have intended. 2A A. Larson § 72.95, at 14-321. However, as Larson points out:

> This argument has been rejected on several grounds by the courts finding carrier liability. One is that the subrogation provisions are purely procedural and thus cannot be held to modify the definition of "employer." Another is that the subrogation passage "does not deal with the subject matter" in issue, which is the question whether the employee's common-law right is taken away from him. The original Smith case invoked a sort of dual capacity doctrine, saying that the carrier was being sued not as compensation carrier but as an independent third party. All such cases made short work of the spectre of double recovery by pointing out that the carrier would or course be entitled to set off in a judgment against itself as a tortfeasor the amount of compensation paid by it as insurance carrier. And running through all these opinions was the thought that this kind of result was really not all that preposterous. Increasingly common is the spectacle of an insurance carrier acting as compensation subrogation plaintiff and as defendant insurer on a third party's automobile liability risk. Problems of conflict of interest and of public policy may arise; but no one worries much anymore about the conceptual problem whether the carrier can sue itself.

Id. at 14-322 (footnotes omitted). We similarly conclude that the subrogation provision in AS 23.30.015(i) does not bootstrap an insurer into the definition of an employer in subsection (a). We therefore conclude that there is nothing in the statutory language of the Alaska scheme which

prevents an employee from bringing a negligence action against a carrier for negligent inspection of the employer's workplace.[5]

WAUSAU contends that such a result is contrary to public policy since the threat of potential tort liability will discourage carriers from inspecting employers' workplaces.[6] We decline to judicially amend the Act on the basis of such a policy argument. This type of policy determination is appropriately left for the legislature.

In conclusion, we find that there is nothing in the statutory language of the Alaska scheme which prevents an employee from bringing suit against a compensation carrier for the negligent performance of a safety inspection. Therefore, Judge Ripley erred in dismissing the estates' claims against WAUSAU.

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5. In the absence of express legislative intent to the contrary, "[s]tatutes . . . that establish rights . . . in derogation of the common law are construed in a manner that effects the least change possible in the common law." Hugo v. City of Fairbanks, 658 P.2d 155, 161 (Alaska App. 1983) (citing 3 C. Sands, Sutherland Statutory Construction § 59.03, at 6-7 (4th ed. 1973)).

6. Some courts have extended immunity to carriers from third-party suits since they believed imposing liability on carriers would create a great disincentive to their carrying out the socially useful function of independent safety inspections. See Kifer, 777 F.2d at 1335, 1338-39; Nelson, 199 N.E.2d at 796 (Schaefer, J., dissenting); Matthews, 238 N.E.2d at 348; Kotarski, 244 F. Supp. at 558-59 (Michigan law); 2A A. Larson § 72.98.

D. Did WAUSAU Owe a Duty to the Pilots to Inspect ERA's Working Conditions in a Non-negligent Manner?

WAUSAU argues that even if a carrier is not immune from suit for its negligent inspection of an employer's work place, dismissal was proper on the alternative ground that WAUSAU owed no duty to the decedents to inspect ERA's working conditions. The estates contend that, even in the absence of contractual obligation between WAUSAU and ERA, WAUSAU may be held liable for "negligent performance of undertaking to render services" if WAUSAU actually inspected the working conditions of ERA prior to the accident.

The estates' argument is well taken. The Restatement (Second) of Torts § 324A (1965) imposes liability on a defendant to a third party when the defendant negligently performs an undertaking to render services:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

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See Adams v. State, 555 P.2d 235, 240 n.7 (Alaska 1976) (citing § 324A of the Restatement). In Adams, the court held that victims of a hotel fire had a cause of action against the state for failure to take action after fire inspectors discovered extremely dangerous fire conditions. Id. at 240-42. The court noted that "once an inspection has been undertaken the state has a further duty to exercise reasonable care in conducting fire safety inspections, and that liability will attach where there is a negligent failure to discover fire hazards which would be brought to light by an inspection conducted with ordinary care." Id. at 240. The court then cited a number of cases in which employees were allowed to sue workers' compensation carriers for negligent safety inspections.[7]

The second amended complaint alleges that "WAUSAU . . . did inspect, certify, authorize, and approve the working conditions of Defendants Jet Alaska, ERA and Rowan" and that WAUSAU's actions "were accomplished negligently." This language is sufficient to make out a cause of action for negligent performance of an undertaking. As a result, it would be improper to dismiss the allegations against WAUSAU

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7. Beasley, 249 So. 2d at 847; Sims v. American Cas. Co., 206 S.E.2d 121 (Ga. 1974); Nelson, 199 N.E.2d at 779; Fabricius, 121 N.W.2d at 365.

for failure to state a cause of action. We, therefore, reverse the trial court's dismissal of the claims against WAUSAU under Civil Rule 12(b)(6) and remand the issue to the trial court for further proceedings.

E. Did the Court Err in Dismissing the Allegations Against the John Doe Defendants?

We initially note that since all claims against the Doe defendants were dismissed by the trial judge, this question is ripe for review and properly before us.[8]

Judge Ripley dismissed the allegations against the "John Doe" defendants on the grounds that such use of fictitious defendants is not permissible under our rules of civil procedure.

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8. ROWAN contends that the issue is not ripe for review since the superior court had not entered final judgment with respect to the "John Doe" defendants. In Greater Anchorage Area Bor. v. City of Anchorage, 504 P.2d 1027, 1030 (Alaska 1972), this court stated that the "basic thrust of the finality requirement is that the judgment must be one which disposes of the entire case. . . ." "[T]he reviewing court should look to the substance and effect, rather than the form, of the rendering court's judgment, and focus primarily on the operational or 'decretal' language therein."

We conclude that since Judge Ripley's order dismisses the Does from the case, the order disposes of the entire case as to the Does and the finality requirement is thereby satisfied.

At common-law, it was essential that a person's name appear in the complaint before he or she could be made a defendant in the action.[9] The majority of courts considering this issue have held that juridiction to sue unknown or fictitious persons must be obtained pursuant to some express rule or statute.[10] However, at least one state has judicially adopted Doe pleading without an express statute or rule.[11]

The estates argue that there has been a long standing practice of Doe pleading in this state. While we

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9. Note, Designation of Defendants by Fictitious Names--Use of John Doe Defendants, 47 Iowa L. Rev. 773, 775 (1961). This requirement has been eliminated in certain situations by statutes which allow the pleading of fictitious or John Doe defendants. Id. at 776. However, as the above commentator noted "[t]his is not to say that the rule requiring the true name of the defendant to be stated in the complaint is without force; John Doe complaints are still an exception to the rule and used only under exceptional circumstances." Id.

10. Hailey v. Interstate Machinery Co., 459 N.E.2d 346, 347 (Ill. App. 1984) (citing 59 Am.Jur.2d Parties § 17 (1971)); Hutchinson v. Fish Engineering Corp., 153 A.2d 594 (Del. Ch. 1959); Grantham Realty Corp. v. Bowers, 22 N.E.2d 832, 836 (Ind. 1939); Hill v. Henry, 57 A. 554 (N.J. Eq. 1904); 59 Am. Jur. 2d Parties § 16, at 401 (1987) ("In actions or proceedings which are not strictly in rem but are in personam or only quasi in rem, there is generally no authority to proceed against unknown persons in the absence of statute or rule. Jurisdiction to sue such persons must be obtained pursuant to some statute or rule."); Note, supra note 9, at 776.

11. Maddux v. Gardner, 192 S.W. 14, 18 (Mo. App. 1945).

acknowledge this past use of Doe pleading, we note that we have never been called upon to consider the propriety of this practice. We decline, however, to address the general propriety of Doe pleading in this case.[12] In the action before us, we find that Judge Ripley did not abuse his discretion in dismissing the claims against the Doe defendants since the estates are unable to identify which allegedly defective component of the Learjet was manufactured by the Doe defendants.[13] We therefore affirm the superior court's dismissal of the Doe defendants.

F. Did the Court Abuse Its Discretion in Awarding ERA and WAUSAU $14,476 in Attorney's Fees, which Represented 80 Percent of Their Actual Attorney's Fees?

The trial court awarded ERA and WAUSAU 80 percent of their fees, finding that the plaintiffs' claims "bordered

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12. We acknowledge the potential importance of this issue and have referred its consideration to the Civil Rules Committee.

13. The Second Amended Complaint contains the following allegations against the "John Doe" defendants:

> Defendants Doe I, II, and III negligently manufactured and designed other equipment used in Learjet N455JA, which items were not manufactured and designed in accordance with generally accepted standards.

very closely upon the nonmeritorious and the frivolous." Since we reversed the court's dismissal of the claim against WAUSAU, the award of fees to them is vacated. As to the award of fees to ERA, we conclude that the trial court did not abuse its discretion in awarding fees.

In State v. University of Alaska, 624 P.2d 807, 817-18 (Alaska 1981), this court held that an award of "substantially full attorneys fees" is manifestly unreasonable in the absence of a claim that is "frivolous, vexatious or devoid of good faith." The court held that an award over 90 percent of actual costs was a substantially full award of fees. Id.

However, this court has affirmed partial awards of fees as high as 86 percent of actual fees even when the claims were not frivolous. See Hansam v. Wodrich, 574 P.2d 805, 811 (Alaska 1978) (court affirmed award of 86 percent of actual attorney's fees even though the case involved no improper conduct by the losing party); see also O'Buck v. Cottonwood Village Condominium Ass'n, Inc., 750 P.2d 813, 821 (Alaska 1988) (court affirmed award of approximately 80 percent of actual attorney's fees to prevailing defendants); Steenmeyer Corp. v. Mortenson-Neal, 731 P.2d 1221, 1226 (Alaska 1987) (court affirmed award of 75 percent of actual attorney's fees); Crook v. Mortenson-Neal, 727 P.2d 297, 306

(Alaska 1986) (court affirmed award of 80 percent of actual attorney's fees).

We conclude that in this case an award of 80 percent of actual attorney's fees is not manifestly unreasonable. We therefore decline to interrere with the trial court's exercise of discretion and affirm the award of attorney's fees to ERA.

IV.

In conclusion, we affirm the superior court's dismissal of the claims against ERA and the John Doe defendants. We reverse the dismissal of the claims against WAUSAU and remand the claims back to the superior court for further proceedings consistent with this opinion. We vacate the award of attorney's fees to WAUSAU and affirm the award of fees to ERA.

AFFIRMED in part, REVERSED in part, VACATED in part and REMANDED for further proceedings consistent with this opinion.

State Government Impact on Job Fatalities in California

Testimony before the
California General Assembly
October 27, 1988

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Background

The National Safe Workplace Institute (NSWI) is a 501(c)3 not-for-profit organization based in Chicago. The NSWI's primary activities include investigative research, intervention, and social service dedicated to safer and healthier workplaces. The NSWI's primary funders are the Joyce Foundation, the J. Roderick MacArthur Foundation, and the Chicago Resource Center.

Since the NSWI was established in 1987, it has engaged in a number of national and regional job safety and health studies. The NSWI has established a national reputation for its work in evaluating a wide variety of occupational safety and health issues and for its leadership in changing public policy.

Introduction

The NSWI fully supports restoring California's private sector job safety and health jurisdiction to state government. In the U.S., 20 state governments have successfully petitioned the Secretary of Labor for the right to regulate job safety and health. In turn for this responsibility, the federal government will pay up to 50% of the cost of program administration.

The NSWI neither favors nor opposes the idea of state job safety regulation. The NSWI believes that state programs should

be evaluated on a case-by-case basis. In fact, tomorrow the NSWI will release a report which is highly critical of a state run program of a Midwest state. If that particular program does not show immediate improvement, the NSWI will recommend that the Secretary of Labor take action to return it to federal control.

For the record, NSWI favors Proposition 97 which will provide a mandate to return job safety and health in California's private sector to state jurisdiction. The NSWI takes this position because of its professional judgment that federal jurisdiction, unless drastically changed from its present form, will result in substantially more job-related fatalities and injuries. Moreover, state job safety and health regulation in California was clearly economically beneficial to both employers and to the state's taxpayers.

The remainder of this testimony is divided into two parts. First, the NSWI will focus on its criticisms of the U.S. Occupational Safety and Health Administration (OSHA). This examination will demonstrate why regulatory programs that existed until July 1, 1987, were particularly effective in reducing job-related injuries. Second, the NSWI will examine what levels of job-related fatalities and costs California would have experienced if safety regulation had been under federal jurisdiction. This review will consider overall fatalities with a more detailed look

at the construction industry. While NSWI hopes otherwise, it is difficult to envision a scenario for the next five years where the federal government would adopt a regulatory system as comprehensive and as effective as that which existed here until 1987.

In closing this part of this testimony, it is imperative that the reader understand that regulatory posture is only one of several elements that influences job-related fatality, injury, and disease levels. An important factor is workers' compensation. As a general rule, there is an inverse relationship between the level of workers' compensation benefits and job-related fatalities. In other words, higher average compensation claims yields to the recipients correspond to lower fatality levels in the state. In other words, a state can almost assuredly reduce fatality (and injury) levels by increasing workers' compensation benefits.

California is an exception to this important rule. California, at best, provides only average workers' compensation benefits. As we can see in Table 1 below, California has very modest benefit levels.

Table 1. 1984 Workers' Compensation Average Benefit Levels

State	Average per Case
CALIFORNIA	$ 7,192.29
Illinois	$ 15,079.93
Indiana	$ 2,850.72
Virginia	$ 10,056.89
Washington	$ 3,421.33

As Table 1 shows, California trails two of the five states considered in terms of workers' compensation benefit levels. However, California workers are much less likely to die on-the-job than are workers in any of the states included in this group. Incidentally, Indiana, Virginia, and Washington are states, like California, where the state government has jurisdiction over job safety and health.

California has demonstrated a very important lesson for job safety and health advocates. The lesson is that strong enforcement and moderate workers' compensation benefit levels are strong inducements to employers to prevent job injuries. In fact, it is reasonable to project, absent a return to a strong regulatory regime, that job-injury and fatality levels in California will eventually rise to the levels of states with comparable workers' compensation benefit levels.

Federal OSHA

One lesson can be learned from federal OSHA's performance over the last eight years. The lesson: Leadership is critical to sound regulation. There can be no question that the federal government backed away from strong regulation in the early and mid-1980s. Since 1986, federal OSHA has engaged in some widely visible penalty actions against major corporations, a reversal of its "bended-knee" approach during the early years of the departing Administration. However, this reversal is far less than

what meets the eye. The NSWI researched federal OSHA's mega-fines. As NSWI reported (1), federal OSHA's mega-fines nearly always resulted in mega-sweetheart deals. Indeed, OSHA seldom gains meaningful abatement in turn for penalty reduction. It is possible that this dealmaking strategy has greatly weakened the respect employers have for OSHA. In reviewing fine collection data compiled by the Department of Labor's Inspector General, NSWI found-out that less than 24% of U.S. employers cited by OSHA paid their fines in a timely fashion(2). No business or state government could tolerate such a debt collection record.

CAL/OSHA Versus Federal OSHA

There are several key differences in the operations of federal OSHA and what was CAL/OSHA. In general, federal OSHA lacks the tools and/or the will to exercise the level and scope of enforcement that existed in California. As we will see later in this testimony, that difference can be measured in lives.

There are key elements in any program designed to gain safety and health compliance. These elements really can be grouped into three areas: standards, enforcement, and education. For the purpose of this report, education will not be considered. However, the education function takes on special meaning when employers know that the standards which have been promulgated are sound and will be faithfully enforced. Economists have demonstrated that employers want to inject as much certainty as possible into their

business operations. Safety-oriented employers strongly favor sound regulation and enforcement, particularly if the regulation results in an even playing field, forcing unsafe competitors to invest in safety measures.

Standards. The record of federal OSHA in promulgating effective standards is poor. Indeed, nearly all of the standards promulgated by OSHA in recent years came as a result of litigation by public interest groups or organized labor. Testimony before the U.S. Senate earlier this year demonstrated that OSHA has suffered from a shortage of will to regulate and sufficient resources (3). Likewise, the U.S. Office of Management and Budget began demanding, in the early 1980s, extensive cost-benefit analysis for each regulation, an intervention which effectively stalled OSHA's rulemaking process (4).

The story in California was substantially different. Until recently, there appeared to be strong, bipartisan support for CAL/OSHA. The differences that emerged over time were dramatic. CAL/OSHA successfully promulgated stricter exposure limits for 267 chemicals, including 23 reproductive hazards, 29 cancer-causing agents, and 34 pesticides (5).

More importantly, CAL/OSHA promulgated effective standards for the construction industry. CAL/OSHA has a construction permit system, and regulations concerning logging, petroleum drilling

and production, crane operation, high hazard tunneling, accident prevention programs, and high voltage line work. By comparison, the federal government has not promulgated standards for any of these areas.

The absence of federal regulations does not mean that federal OSHA does not regulate. However, the absence of standards forces OSHA to rely on what is known as the general duty clause. The general duty clause has been inconsistently applied by federal OSHA, a source of irritation for many employers. Employers are entitled--and should demand--clear rules.

Enforcement. California authorities learned several years ago that strict enforcement is an important tool for achieving compliance. Clearly, neither the federal government nor CAL/OSHA have proposed a level of fines which could force employers into bankruptcy. For the federal government, the absence of significant penalties means that the government must rely, in large part, on the good intentions of those employers who consistently avoid compliance. Here, once again, CAL/OSHA has differentiated itself from the federal government in two very important ways. First, CAL/OSHA could demand immediate abatement or correction of unsafe working conditions. By comparison, the federal government, if required, must seek a court order. That difference alone has probably cost lives. The right to seek immediate abatement is critical and cannot be adequately emphasized.

The second enforcement-related issue concerns the use of criminal prosecutions. The National Safe Workplace Institute has studied the federal government's record in considerable detail. The record is shockingly weak. Since 1981, the federal government has indicted only two firms. One firm was convicted and another was acquited. A third, non-indicted firm arranged for a plea bargain. During that same period, the State of California achieved 112 successful prosecutions. The message: California will enforce the law when employers take actions that threaten lives. The federal government does not.

So What?

To this point, we have reviewed important differences in job safety enforcement between what was CAL/OSHA and the federal government. This left that task of evaluating the impact of these two strategies on: (1) Lives-saved; and (2) Potential costs. The analysis conducted by NSWI indicates that continued jurisdiction by the federal government, given current trends, will result in substantially more job-related fatalities in California is future years. Indeed, short of restoring CAL/OSHA, the only way for California lawmakers to prevent an increase in fatalities will be to sharply increase workers' compensation. Otherwise, there will not be adequate incentive for California employers to prevent job-related fatalities and injuries.

A word of caution is in order. The analysis that follows

relies heavily on death certificate data. Other job safety and health related statistics are unreliable. For example, both the Bureau of Labor Statistics (BLS) and the National Safety Council (NSC) rely, to some extent, on employer surveys, which is a poor way to collect such important data. While death certificates provide the best information available, we do not know how much underreporting by cornoners of proper cause of death may exist. For the purpose of this analysis, there is no reason to believe that California coroners underreport proper cause of death more than coroners in other states.

NIOSH Fatality Data

The best available source of information concerning job related fatality data is the National Institutes of Occupational Safety and Health (NIOSH) which purchases death certificates from all states. NIOSH has analyzed the cause of death in each instance. Recently, NIOSH released a survey report covering job related fatalities from 1980-1985. NSWI used NIOSH data to assess California's experience as compared with selected State Plan (state regulated) states and with selected federally regulated states. Table 2 (page 10) reveals that California would have experienced 203 additional deaths per year during the NIOSH reporting period if it had been under federal jurisdiction.

It is likely that future fatalities will significantly outpace the 203 annual fatality rate reported in Table 2, since

California's actual reduction in job-related fatalities was dropping at a much faster rate during the end of the reporting period (1984-1985). During that same period, the weak enforcement of the departing federal Administration was resulting in an increase in the rate of fatalities, particulary for high-risk workers (7). Again, it is important to emphasize that strong enforcement will stimulate investments in safety equipment, worker training, and safety personnel, causing a ripple effect in fatality and injury reductions.

Table 2. Fatality Comparisons Between California and Selected States, 1980-1985

Category	Fatality Rate Per 100,000 Workers	Average Annual Fatalities
California	7.1	739
Federal Group*	8.4	876
State Group*	9.7	1,008
Fed/State Average	9.1	942
Difference		203

*Federal Group: Florida, Illinois, Ohio, Pennsylvania, and Texas.

**State Group: Indiana, Kentucky, Michigan, Oregon, and Washington.

Compiled by NSWI from NIOSH Data.

There is reason to believe that California's coroners do a more accurate job in recording the cause of death. California has a strong Department of Public Health and coroners receive primary medical reports. In general, other states are far less

systematic and complete. Preliminary results from a study being conducted in Oklahoma indicate that coroners there underreport job-related deaths by 50% (8). If one were to assume that California coroners record the cause of death more accurately, then it is possible that the difference could be an additional 50 or more deaths per year.

Construction

Probably the most important research on safety-related fatalities was done in 1987. This study considered only safety related deaths in the 35 most populous U.S. cities. This analysis ranked these cities by fatalities per billion dollars worth of construction (9). The economic value of the construction was regionally weighted to eliminate distortions from high cost of living cities. California's major cities (San Francisco, Long Beach, San Diego, Los Angeles, and San Jose) ranked at the bottom.

Table 3. Urban Construction Fatality Rates, 1979-1986

Category	Safety-Related Fatalities	Deaths Per Billion Dollars
California	56	1.26
Federal Group*	272	5.89
State Group*	79	4.26
Fed/State Average	176	5.08
Difference		.170

*Federal Group: New York, Denver, Jacksonville, Houston, and Kansas City.

**State Group: Memphis, Seattle, Baltimore, Honolulu, and Detroit.

Compiled by NSWI from data collected by The New York Times

Table 3 clearly suggests that under federal regulation, we can expect 170 additional construction fatalities each year just in California's major cities! If just the fatality level from federally regulated cities were considered, then California fatalities would have increased by 206 or by 467%! This data and analysis is important because construction remains the most significant source of occupational death in the U.S. Also, it demonstrates the impact that CAL/OSHA, with its thoughtful and effective programs, had on the lives of California workers.

Economics of Job Safety

Job safety and health programs have important economic implications for workers, employers, and government. In the U.S., the cost of a job-related injury is seldom internalized to the business environment that generated the injury. When costs are successfully internalized, employers have sufficient incentive to invest in injury-prevention strategies. Until 1987, California adopted a program of strong regulation and enforcement, featuring immediate hazard abatement and the potential for criminal enforcement. Unlike other states, California has avoided dramatic increases in workers' compensation levels as a means of injury prevention.

The National Safety Council (NSC) has estimated the cost of a job-related fatality at $460,000 and the cost of a job-related injury at $12,600 (10). Since the NSC is largely industry funded,

there is reason to believe that costs are not over-stated. We can assume that 25% of these costs are externalized to the public. Table 4 shows the cost impact of job-related fatalities over one-year and five-year time horizons.

Table 4. Job-Related Fatality Costs
(In million dollars)

Fatality Level	Total One Year Costs	Public One Year Costs	Total Five Year Costs	Public Five Year Costs
100	$ 46	$ 11.5	$ 230	$ 57.5
150	$ 69	$ 17.3	$ 345	$ 86.3
200	$ 92	$ 23.0	$ 460	$115.0
300	$138	$ 34.5	$ 690	$172.5

Source: NSWI calculations based on National Safety Council injury cost estimates.

Based on the preceding analysis of fatalities in federally regulated environments, it is highly possible that California's fatalities could increase by 300 per year. Fatalities are only a small part of total job-injury costs. One should expect that injuries will increase by at least 30,000 a year. By using the NSC's $12,600 cost estimate, the projected cost of injuries will be $378 million annually. The externalized cost of injury in California can be calculated by multiplying the average workers' compensation claim ($7,200) by the number of injuries (30,000) which equals $216 million. One-fourth of that cost, $54 million, is probably absorbed by the public.

There is little doubt that increases in job-related injuries will result in enormous increases in workers' compensation costs.

Moreover, the insurance industry believes that a 1% increase in injuries will increase the cost of workers' compensation to California employers by at least $40 million. Workers' compensation costs in California could easily increase by $250 million annually.

Conclusion

This analysis has not touched upon the social costs associated with job-related fatalities and injuries. Each day children will wait at the dinner table for a parent who will never arrive. The agony associated with that experience simply cannot be quantified or justly compensated. Unless one believes that the federal government is going to drastically alter its regulatory and enforcement strategies, there will be sharp increases in injuries and fatalities and children without a parent. CAL/OSHA's impact cannot be disputed. Without question, the future costs of increased fatalities and injuries will greatly exceed the $8 million that CAL/OSHA cost California taxpayers in 1987. The NSWI trusts that this testimony will assist Californians in coming to an informed judgment on Proposition 97.

FOOTNOTES

1. See **Failed Opportunities** (NSWI, September 2, 1988), pages 18-20.

2. Semiannual Report: Office of Inspector General, U.S. Department of Labor, page 45.

3. Testimony of several witnesses before the Committee on Labor and Human Resources, U.S. Senate, April 18-20.

4. See hearing report, OSHA Oversight, pages 18-20.

5. There are "riders" on the appropriations bill for OSHA that prohibit the Secretary of Labor from taking action to terminate California's State Plan.

6. Interviews and correspondence, including Freedom of Information Act requests, with Ron Medeiros, Senior Counsel, Division of Occupational Safety and Health, State of California, San Francisco.

7. See Footnote #1 above.

8. Interview with Anthony Suruda, M.D., M.P.H., NIOSH, October 17.

9. See **The New York Times**, September 21, 1987.

10. **Accident Facts** (National Safety Council, 1987), page 31.

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The National Safe Workplace Institute was founded in 1987. The Institute is funded by foundations, contributions from individuals, and through the sale of publications. The Board of Directors supports the use of appropriate tools to achieve the Institute's goals, including:

Research and Education ...

The Institute examines workplace conditions and policies and educates the public on issues relating to safety and health.

Intervention...

The Institute intervenes on behalf of individuals with regulators, law enforcement agencies, and the social welfare system to secure justice and pursues compensation and other remedies.

Acknowledgement...

Each year the Institute acknowledges, with its "Commitment to Life" award, people who have made important contributions in advancing workplace safety and health.

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Expendable Hoosiers

Job Safety & Health Problems in Indiana

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October 28, 1988

Expendable Hoosiers

Job Safety & Health Problems in Indiana

Foreword

This report has been some time in the making. Several months ago, representatives from the Foundation for the Advancement of Industrial Research (FAIR), a not-for-profit corporation concerned about protecting Indiana workers' safety and health, contacted us after the horrible industrial disaster at Bastian Plating in Auburn which claimed five lives.

Growing out of this initial contact was a recognition that FAIR and the National Safe Workplace Institute (NSWI) shared an interest in promoting workplace safety.

Since we wanted to study a state that was not under federal OSHA jurisdiction, we quickly had a convergence of interest. Thus, FAIR commissioned us to prepare a report evaluating Indiana's record of protecting worker safety and of compensating the victims of workplace accidents.

In the ensuing period, we learned that many men and women care deeply about the job safety crisis in Indiana. In conducting our study, we benefited from the insights of numerous individuals, both on and off-of-the record.

FAIR was enormously helpful in tracking down documents and in getting to know those who make a difference and those who do not. This project, we trust, will be the starting point of an enduring relationship. While the National Safe Workplace Institute's origins are substantially different from those of FAIR, we have a common bond in our dedication to dramatically reduce job-related deaths and injuries and to protect the dignity of Indiana workers and their families.

This project benefited from the special skills of David L. Nichols who recently resigned as NSWI's Director of Program Development to accept a new position with the Jacobs Engineering Group. Mr.

Nichols added greatly to NSWI and will be missed.

Both men and women are the victims of workplace homicide in Indiana. Anytime someone dies, it is a tragedy. It is our utmost responsibility to learn from those deaths, to make sure that the same does not happen again. Shamefully, Indiana's leaders have not learned these important lessons. This report must help. That is our duty.

We invite Indiana's political leaders, particularly the new Governor, to join with us in meeting the victims and family members in Indiana's sorry job safety legacy. Perhaps the new Governor will learn the lessons which his predecessors did not.

In closing, we dedicate this report to the children of victims whose lives will be shortchanged by this leadership breakdown. May their children not be so cheated.

Sincerely,

Joseph A. Kinney
Executive Director

Chapter One
Introduction

The working men and women of Indiana are not meaningfully protected from unsafe workplace conditions and once they are injured, compensation is at poverty levels.

In 1970, the U.S. Congress passed the Occupational Safety and Health Act (Job Safety Act), a law designed to ensure men and women safe and healthy workplaces. Passage of the Job Safety Act, combined with state workers' compensation laws, offered workers the promise of workplaces free of job-related injury or death.

On a national level, the U.S. has fallen far short of that goal. For Indiana, the results have been even more dismal. The working men and women of Indiana are not meaningfully protected from unsafe workplace conditions and once they are injured, compensation is at poverty levels.

The Job Safety Act provides state officials with a choice. Under law a state can gain jurisdiction of job safety and health regulation if that state can assure the Secretary of Labor that it is willing and able to provide its workers with job safety protection equal to that offered by the federal government. In turn, the federal government will make grants of up to 50% of the costs of the program. Indiana is one of 20 states which has assumed jurisdiction for job safety and health.

In this report, we strive to accomplish several objectives. We will evaluate Indiana's job safety statistics relative to its neighboring states—Michigan, Ohio, Kentucky, and Illinois.

These are the states which will compete with Indiana for new jobs and economic growth. Indeed, Indiana business groups argue that excessive regulations or a "generous" workers' compensation program will jeopardize future economic opportunities for Indiana businesses and workers alike. These claims will be examined during the course of this report.

Also, this report will focus on the effectiveness of the state agency charged with protecting workplace

safety and health, the Indiana Occupational Safety and Health Administration (IOSHA). We have scrutinized the effectiveness of IOSHA. We especially focus on the tragic community of Auburn and the unwillingness and inability of IOSHA to come to grips with problems in northwest Indiana.

Enforcement, in our view, is an important element of prevention. The second leg of prevention is the compensation system. Clearly, as long as the costs of enforcement and compensation are less than the costs of prevention, employers will have little incentive to take corrective action.

Before we begin our examination, it is important to note that safe and healthy workplaces are not a "government only" question. Many employers have worked constructively with workers to achieve reasonably safe and healthy work environments.

Clearly, as long as the costs of enforcement and compensation are less than the costs of prevention, employers will have little incentive to take corrective action.

The role of government concerns employers who have not made workplace safety and health a high priority. Effective regulation can stir those employers with whom safety and health are not priorities and engage them in initiatives which are essential for making workplaces safer and healthier. If the existence of regulation is not enough, then the enforcement agency must have the legal muscle to effectively regulate. If an agency cannot effectively regulate, then one must question the desirability of maintaining that organization.

Chapter Two
How Does Indiana Rate in the Midwest?

Public official have boasted that Indiana is the tenth safest state in the U.S.[1] Hoosiers could be proud of such a ranking—if only it were true. The favorable Indiana ranking depends upon a 1984 U.S. Bureau of Labor Statistics (BLS) study. A study that BLS officials have acknowledged as flawed because it depends on voluntary reporting by employers with 11 or more employees.

U.S. job safety and health statistics are significantly flawed, as a 1987 National Academy of Sciences report revealed.[2] Recent government action shows that employers dramatically underreport workplace injuries and even fatalities.[3]

The most reliable study available was published by the National Institute of Occupational Safety and Health (NIOSH). It paints a far different picture of Indiana. The NIOSH study used a form of evidence which is hard to refute, death certificates.[4] The NIOSH study team looked at death certificates in all 50 states and found Indiana to be far above average for the U.S.

Indiana's fatality results are even less impressive when one considers that the states with the highest death rates are heavily rural states such Alaska, Idaho, Montana, South Dakota, and Wyoming. These states have high fatalities because of population dispersion and the problems which exist in getting proper medical treatment to seriously injured workers. In other words, a Montana worker has a much higher chance of dying from a workplace accident than a similarly injured worker in Indiana, since travel time to hospitals is longer. Improved trauma and health care in rural areas, especially in states like Montana, would reduce job-related fatalities.

Indiana and Its Neighbors-- Who is Safe?

An objective determination of how safe Indiana workplaces are can be made by comparing actual workplace deaths in Indiana with its neighboring states: Michigan, Ohio, Kentucky, and Illinois.

Compared with bordering states, Indiana ranks only above Kentucky and substantially worse than Michigan, Ohio, or Illinois. While it is difficult to determine, it is very likely that Kentucky's higher death rate is due to mining fatalities.

As we can see from Table 2.1, the average fatality rate in Illinois is 13.5% below that in Indiana. The comparison is even more dramatic for Michigan, 33% below Indiana, and Ohio, which is 37% below Indiana. This means that three Indiana workers die for every two in Michigan and Ohio. Michigan and Kentucky are state-regulated, while Ohio and Illinois are federally-regulated.

Table 2.1

Traumatic Occupational Fatalities, 1980-85

Average Annual Number & Fatality Rate, for Private Sector Workers

State	*Average Annual Number*	*Fatality Rate per 100,000*
Illinois	309	7.1
INDIANA	**160**	**8.2**
Kentucky	160	14.0
Michigan	167	5.5
Ohio	200	5.2

Source: NIOSH

Construction

The largest source of job-related deaths in the U.S. is the construction industry. Only Kentucky has a higher construction death rate than Indiana of the five states reviewed in this study. Once again, however, Indiana's death rate is substantially higher than that in Michigan, Ohio, or Illinois. In this instance, Indiana's fatality rate of 34.1 per 100,000 construction workers is much higher than the national average of 24.1.

This means that three construction workers in Indiana are dying for every two in Michigan and Ohio.

Table 2.2

Traumatic Occupational Fatalities, 1980-85
in the Construction Industry

State	*Average Annual Number*	*Fatality Rate Per 100,000*
Illinois	42	26.0
INDIANA	**26**	**34.1**
Kentucky	19	42.0
Michigan	20	20.5
Ohio	30	21.4

Source: NIOSH

As we can see from Table 2.2, the construction death rate in Illinois, the next closest state is 24% lower than the death rate in Indiana. The comparison is even more dramatic for Michigan and Ohio.

The construction death rate in Michigan is 40% below Indiana's and the death rate in Ohio is 37% below its neighbor, Indiana. Again, this means that three construction workers in Indiana are dying for every two in Michigan and Ohio.

Manufacturing

Indiana has a slightly better record in manufacturing than in construction. There are a number of large, highly unionized auto manufacturing plants in Indiana which tend to provide safer workplaces than non-union manufacturing. Kentucky, consistent with trends in other areas, has a higher death rate than Indiana. Indiana and Illinois have the same death rates, but Michigan and Ohio, which are heavily unionized in relative-terms, have much lower death rates.

Table 2.3

Traumatic Occupational Fatalities, 1980-85
in Manufacturing

State	*Average Annual Number*	*Fatality Rate Per 100,000*
Illinois	39	3.4
INDIANA	**21**	**3.4**
Kentucky	13	5.1
Michigan	24	2.5
Ohio	34	2.9

Source: NIOSH

The manufacturing death rate in Michigan is 23.5% below Indiana, while that of Ohio is 14.8% below Indiana.

Public Utilities

In the fourth category which we examined, transportation, communications, and public utilities, the same pattern prevails—only Kentucky has a worse death rate than Indiana. However, Indiana's death rate of 37.8 per 100,000 Indiana workers is much higher

than its midwest neighbors.

Indiana workers are far more likely to die than their counterparts in neighboring Michigan, Ohio, and Illinois.

Table 2.4

Traumatic Occupational Fatalities, 1980-85
in Transportation, Communications, and Public Utilities

State	*Average Annual Number*	*Fatality Rate Per 100,000*
Illinois	51	21.9
INDIANA	**35**	**37.8**
Kentucky	30	57.4
Michigan	28	20.8
Ohio	46	24.9

Source: NIOSH

The relative statistics from transportation, communications, and public utilities are dramatic. An Indiana worker employed in the area of public utilities has a much higher chance of being killed than his or her counterparts in Michigan, Ohio, or Illinois. A worker in this category has a 42.1% less chance of being killed in Illinois, a 45% less chance in Michigan, and a 34.2% less chance in Ohio.

Conclusion

As we have seen, Indiana workers are far mo e likely to die than their counterparts in neighboring Michigan, Ohio, and Illinois. Unfortunately, mine-related fatalities tend to make it difficult to compare Kentucky with Indiana.

Furthermore, it is likely that Indiana's state job fatality statistics are inaccurate. Aforthcoming study reveals that one-fifth of Indiana's job-related deaths do

not yield workers' compensation claims[5] when death certificate data are matched with workers' compensation claims.

This means that fatalities are either underreported or do not involve workers' compensation claims. In the case of individuals who do not have dependents, Indiana law limits workers' compensation to only burial expenses.

Finally, this review has not considered agricultural fatality data. Purdue University has an outstanding farm safety program which benefites thousands of Indiana farmers. Generally, agriculture is not regulated in the U.S., even though agriculture may have a higher death rate than mining.[6]

Chapter Three

Auburn, Indiana
A Tragedy Waiting to Happen

It is a shame anytime someone dies. But in this case, that shame is magnified by the youth of the five workers who died. Everything that they would have produced or done in their lifetime is lost.

Auburn, Indiana has become infamous over the past five months and for some time to come it will be remember as the town where "those workers died." On June 28, 1988 tragedy struck Bastian Plating Company. It is a day that few in Auburn will ever forget.

It is a shame anytime someone dies. But in this case, that shame is magnified by the youth of the five workers who died. Everything that they would have produced or done in their lifetime is lost. It is also a shame because their deaths were needless and preventable.

The Indiana Occupational Safety and Health Administration had warning signals regarding the problems in Auburn several years before this five-person tragedy occurred. On April 4, 1986, Darrell Bland, a worker at the Auburn Foundry, was killed while working with solvents. Bland's death was the fifth at that plant since 1974.

•The first death occurred in October 1974 when Leroy Funk, 30, was killed when a casting fell through the roof striking him on the head.

•The second occured in April 1976, when John Mann, 32, died after a grinding wheel exploded and pieces struck him in the abdomen.

•The third occured in September 1978, when Thomas Takacks, 19, was killed in a conveyor belt accident.

•The fourth occured in May 1979, when Willis Chrisman, 46, was checking the electrical hook-up on a furnace and he was electrocuted. Bland's death was the fifth in a never-ending litany of death in Auburn.

A news release reported Bland's wife as saying, "What is going on where my husband and five other employees died in a 13-year period?" [7]

But apparently the warning signals were not bright enough for IOSHA to see, as citations were issued in some of those instances but the unsafe situations were allowed to remain.

On June 28, 1988, five workers at the Bastian Foundry died. They were Jeff Link, 25, Barney Sweet, 21, Larry O. Hensinger, 29, Bill M. Freeze, 19, and Craig Fogle, 19. Link was cleaning sludge out of a tank when he was overcome by hydrogen cyanide. The other workers died attempting to rescue Link or each other. Bastian had a history of problems which IOSHA ignored.

The Bastian deaths were the topic of news stories as authorities tried to get to the bottom of this tragedy. Family members lashed out at the different parties who they blamed for the accident, namely IOSHA and the company, Bastian Plating.

IOSHA issued Bastian Plating four knowing citations, two serious citations, and six non-serious citations. The total proposed fine was $41,700 for the five deaths.

For those who have had a workplace accident or for those who have had a family member die, there are many different reactions. Often these victims either want to shut themselves away and forget. Others want to prevent the same thing from happening to someone else. IOSHA has used the former approach for too long. They should begin to adopt the latter approach.

In most instances, mistakes can be a positive influence if something is learned. But IOSHA apparently did not learn from the first five deaths. One can only hope that the same cannot be said about these recent five deaths.

Chapter Four
IOSHA
A Safety Agency in Disguise?

In Indiana, the primary agency which has the task of protecting workplace safety and health is the Indiana Occupational Safety and Health Administration (IOSHA). IOSHA combined with the Indiana Occupational Safety Standards Commission (OSSC), should form an effective partnership which would lead to a reduction in job injuries and diseases.

Unfortunately, it does not work that way in Indiana. IOSHA is understaffed and lacks the political and legal clout that is essential for a meaningful program. As we saw in Chapter Two, Indiana clearly has a poor safety and health record, especially in comparison with comparable Midwest states.

As we saw in Chapter Three, the recent tragedy in Auburn is an example of what can happen if safety and health conditions are neglected over time.

In this chapter, we focus on evaluating the performance of IOSHA and its sister standards-setting agency, the OSSC. Despite the dedication of its employees, IOSHA has failed to live-up to its commitment in promoting safer and healthier workplaces for Hoosiers.

A job safety and health agency, whether at the federal or state level, maintains and increases its effectiveness and credibility depending upon its ability to:

1) *enforce the safety and health standards though the use of inspections and civil and criminal penalties;*

2) *commit adequate resources to the task; and*

3) *set standards which protect the safety and*

health of workers under its jurisdiction.

The Indiana record is shown to be less than what meets the eye—much less.

With regards to each of the aforementioned three measures upon which effectiveness and credibility rests, Indiana's Occupational Safety and Health Administration (IOSHA) falls short.

Inspections: A Cover-up?

At first glance, statistics appear to show that IOSHA is performing its inspection function at a level which exceeds federal OSHA and which compares favorably to other state administered job safety programs.

In 1986, for example, Indiana conducted 96 inspections per IOSHA inspector and inspected a total of 4% of the state's workplaces. By comparison, federal OSHA's record for that year, was 62.5 inspections per federal OSHA inspector. Only 2.8% of the workplaces under its jurisdiction were inspected.[8]

However, on closer examination, the Indiana record is shown to be less than what meets the eye—much less. As Table 4 shows, Indiana has shifted its inspection resources from private sector companies, which employ 86.8% of the state's workers and account for 92.3% of the occupational injuries and illnesses, to the public sector.

From 1982 to 1986, public sector inspections grew by 745% while private sector inspections fell by 11.6%. Workers employed by the state and local governments are now nearly 4.5 times more likely to see an IOSHA inspector than are workers on construction sites, in factories, or in private offices. The private sector employs more than 80% of the Indiana's citizens.

In addition, Indiana seriously lags behind other

Table 4.1

IOSHA Inspection Totals
1982 & 1986

1982

Type of Workplace	*Number*	*% of Total*
Industrial	1,957	44.6
Construction	1,898	43.2
Health	765	3.8
Totals		
Private Sector	4,620	91.6
Public Sector	369	8.4

1986

Type of Workplace	*Number*	*% of Total*
Industrial	651	9.5
Construction	3,080	45.1
Health	354	5.2
Totals		
Private Sector	4,085	59.8
Public Sector	2,744	40.2

Source: Legislative Services Agency, p. 22

state OSHA programs and federal OSHA in addressing the problems of occupational health inspections. In 1986, IOSHA conducted 354 health inspections. This number represented only 5.2% of the total inspections done by IOSHA in 1986.

Other state-plan states generally devote 10% or more of their inspection resources to health inspections and federal OSHA completed nearly three times the number of health inspection as Indiana. Federal OSHA devoted 15.3% of its total inspections to health inspections.[9]

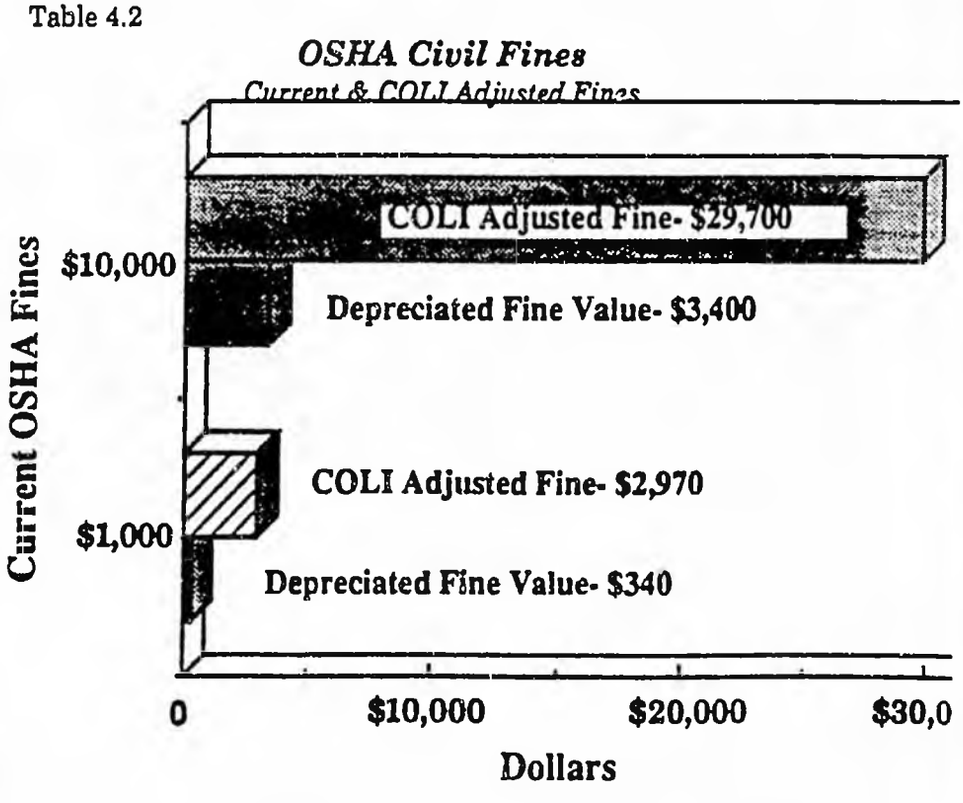
Civil Penalties

To make employers comply with health and safety standards and to deter violations, job safety programs assess civil penalties against violators. As with safety and health standards, Indiana has followed the federal standard by adopting meager penalties which, at best, represent a slap on the wrist.

Penalties range from $1,000 for non-serious, serious, and failures to abate safety problems to $10,000 for employers who knowingly violate standards.[10]

The penalties for workplace safety violations have remained unaltered since 1971 when workplace safety was first regulated. If penalties had been adjusted for inflation, a $10,000 knowing citation would, in 1988, cost employers $29,700. A serious citation would carry a fine of $2,970. Inflation has eroded the value of IOSHA fines by 68%, as shown in Table 4.2.

Table 4.2



Beyond failing to keep civil penalties at a pace with inflation, IOSHA has been reluctant to impose civil penalties. From 1984 to 1986, IOSHA inspectors issued an average of $5,197 in total penalties per year. When divided by the 96 average inspections per inspector in 1986, the average fine amounts to $54.14 per inspection.

IOSHA has never referred a case to prosecutors for the consideration of a job safety and/or health prosecution.

The IOSHA record, as shown in table 7, falls 34.3% below that of federal OSHA inspectors who averaged $7,910 in fines per year during the same period. An federal OSHA inspector completes an average of 62.5 inspections in 1986. The average fine per inspection by federal OSHA was $126.56.

Table 4.3

Penalties per Inspector
Federal OSHA v. Indiana OSHA

	1984	1985	1986	1983-86
Federal OSHA	$5,544	$7,142	$11,044	$7,910
Indiana OSHA	$4,229	$5,028	$ 6,334	$5,197

Source: LSA and U.S. Department of Labor Report to President for 1986

Criminal Penalties

In addition to civil penalties, federal occupational safety and health law permits the criminal prosecution of employers who commit a willful violation of safety and/or health standards which contributes to the death of an employee.

Indiana's state OSHA law is silent on criminal prosecutions. In fact, IOSHA has never referred a case to prosecutors for the consideration of a job safety and/or health prosecution. State officials have indicated that they believe that IOSHA had no authority to do so.

By abdicating the state's role in prosecuting violations of workplace safety and health, Indiana has

slammed the door on justice for workplace safety victims and their family members.

Moreover, it is possible that this gap in enforcement powers may constitute a failure by the state to maintain a safety program which is at least as effective as the federal government's OSHA program.

Since 1980, California has prosecuted 292 cases and secured 112 convictions for workplace safety violations.[11] The result has been a construction death rate which is almost 3 times lower than other state-plan states and almost 4 times lower than the fatality rate in federal OSHA states. See table 4.4.

Table 4.4

Workplace Safety Fatality Rates
in Major Cities

	Deaths Per Billion Construction $
Federal OSHA States	4.22
State-Plan States	3.25
California	1.14

Compiled by NSWI from The New York Times, September 21, 1987

IOSHA Resources

Funding constraints on IOSHA play an important role in limiting its effectiveness. In 1986, Indiana spent 37.5% less per worker than other state OSHA program and 46.3% less than federal OSHA.

The federal government is partly responsible for the underfunding of IOSHA. However, Indiana also shares the blame. The problem is two-fold:

1) *federal OSHA grants to Indiana are disproportionately smaller than grants to other state-plan states; and*

2) *Indiana appropriates proportionately less to its OSHA program than do other states.*

Table 4.5

Comparison of OSHA Funding
Fiscal Year 1986

	Total $ Per Worker	Federal Share	State Share
Indiana	$1.73	83¢	90¢
State-Plan States	$2.77	$1.66	$1.11
Federal OSHA	$3.22	$3.22	----

The pattern of underfunding by federal OSHA is long standing. In FY 1981, Indiana received 65¢ per worker in federal OSHA funding. Funding for other states ranged from 67¢ per worker in North Carolina to $2.21 per worker in Washington. While the gap has narrowed in recent years, it remains excessive.

Despite its difficulties in obtaining federal funding, Indiana cannot escape scrutiny. The state has failed to fill the gap created by insufficient federal support.

The Legislative Service Administration reported that low-salary levels have contributed to a high turnover rate among IOSHA inspectors. Entry level safety inspectors have a base pay of $15,132 compared to $16,619 in Ohio and $22,195 in Michigan.[12]

OSSC

The Occupational Safety Standards Commission (OSSC) in Indiana is charged with setting standards which will protect the state's workers from safety and health violations. Like the 19 other state-plan states,

Indiana is obligated, as a minimum level of enforcement, to enforce federal standards.

Only once, in 1983, has the OSSC adopted a standard which was not previously mandated by the federal government.

Clearly, the OSSC is seriously understaffed and underfunded. If state leaders do not want the OSSC to fulfill a needed mission, then the commission should be terminated. Otherwise, the OSSC should be properly funded and mandated to address critical regulatory opportunities designed to promote job safety and health in Indiana.

Only once, in 1983, has the OSSC adopted a standard which was not previously mandated by the federal government.

Conclusion

The problems experienced by IOSHA are threefold.

1) *Both civil and criminal penalties against job safety and health violators are little or under used in Indiana.* The penalties have never been altered to reflect the changing economy or to impose the severity needed to keep employers in line.

2) *Both the federal government and the state of Indiana have devoted too little of their total resources to IOSHA.* Without funding, the agency can hardly be expected to draw top-notch, experienced inspectors or administrators. And, if IOSHA receives neither federal nor state backing, then the agency can hardly be expected to fulfill its mission.

3) *The standard-setting commission has basic flaws in its organization,* funding, and mission which have led to its present day inert form of only approving what the federal government passes down the pipeline.

Chapter Five

Indiana Workers' Compensation A Benefit Program or A Shield to Justice?

Workers' compensation can actually reduce public expenditures by serving as an incentive for employers to reduce injuries, fatalities, and disease.

If a worker is hurt or injured, they must rely on workers' compensation insurance for income protection during the period during which they are out of work. Workers' compensation programs, which date back to the early 1900s, are designed to provide workers with modest income protection in the case of injury or illness, while at the same time, protecting employers against liability litigation.

In many respects, the trade-off implicit in workers' compensation is a Devil's bargain for workers—modest income protection in exchange for the right to recover the true costs.

Workers' compensation is more than an insurance and benefit program. Workers' compensation can actually reduce public expenditures by serving as an incentive for employers to reduce injuries, fatalities, and disease. The way that the program should work is simple.

First, the benefits must meaningfully compensate for the cost of a job injury. Since employers must pay the cost, higher costs provide greater incentives for employers to reduce claims (injuries).

Second, sensible programs must be as "experienced" based as possible. If a state regulates the insurance industry in such a way so the premiums (cost of insurance) do not reflect actual losses (benefits paid), then employers in that state have limited reason to reduce injuries.

The workers' compensation system in Indiana provides firms with little reason to reduce injuries. Indiana has the lowest workers' compensation costs,

based on average annual benefit costs per employee, in the entire U.S., as shown in Table 5.1.

Table 5.1

1985 Benefit Cost Per Covered Employee

State	*Benefit Cost Per Employee*
Alabama	$198.00
California	$314.00
Florida	$233.00
Illinois	$231.00
INDIANA	**$ 90.00**
Kentucky	$276.00
Michigan	$255.00
Mississippi	$157.00
New Mexico	$318.00
Ohio	$365.00
West Virginia	$558.00

Source: National Foundation for Unemployment Compensation and Workers' Compensation

Indiana is the only state where costs are double digit. Since the cost of workers' compensation is such a small part of the cost of doing business in Indiana, incentives to prevent injuries are correspondingly low.

Indeed, state officials use this argument as an inducement to attract new business. State officials should think through the implications of the message they are sending.

Indeed, that message, to the extent it persuades employers concerned about workers' compensation costs, really involves the importation of death and injury from other states. If anything, state officials should impose high licensing fees on employers with high Experience Modification Ratings (EMRs, the rela-

tive rating of that firm versus other firms in the industry) which wish to relocate to Indiana.

Indiana has outrageously low benefits as compared with neighboring states. Illinois, the highest of the states, has an average benefit per claim which is 5.3 times higher than Indiana's.

Another example of the parsimonious cost of workers compensation in Indiana can be seen in an analysis of base rates in the construction industry. The base, per $100 payroll, for those involved in electrical wiring in Indiana is only $1.78. Indiana's border states are Michigan ($5.75), Kentucky ($3.54), and Illinois ($7.38). Once again, Indiana is at the bottom of the 50 states.[13]

An analysis of average workers' compensation benefits (see Table 5.2) shows that Indiana has outrageously low benefits as compared with neighboring states. Illinois, the highest of the states, has an average benefit per claim which is 5.3 times higher than Indiana's. Meager compensation results in lessened incentive on the part of employers to reduce injury and disease.

Table 5-2

Average Workers' Compensation Payout Levels

1984

State	*Caseload*	*Total Compensation Paid*	*Average Per Case*
Illinois	54,723	$824,872,000	$15,079.93
INDIANA	**47,031**	**$133,984,000**	**$ 2,850.72**
Kentucky	37,145	$193,854,000	$ 5,239.30
Michigan	75,045	$629,560,000	$ 8,394.13
Ohio	111,772	$1,121,001,000	$10,029.35

Compiled from Accident Facts, 1987, Page 34, National Safety Council, Chicago, Illinois

Indiana's workers' compensation program is stacked in favor of employers and against workers in every important respect. Indeed, the Japanese External Trade Organization (JETRO), which advises

Japanese firms on industrial location decisions, counsels Japanese firms against locating plants in Indiana because of its poor workers' compensation levels.[14] JETRO officials point out in interviews that Japanese managers feel a high degree of responsibility for their workers. Partly as a result of this concern, many major Japanese plants have been built in Michigan and Illinois, states which have far more generous injury compensation programs.

Recently, the Indiana Legislature made modest improvements in workers' compensation benefits. More importantly, Indiana has scheduled significant increases in total disability payments, which will rise from $190 a week to $294 a week in 1990. Also, the duration of benefits is important, particularly to those who have permanent disabilities. Table 5.3 shows how Indiana compares with neighboring states.

Table 5.3

Maximum Total Disability Benefit Levels Under Workers' Compensation

State	*Maximum Benefit Per Week*	*Benefit Limitations*
Illinois	$554.00	Life
INDIANA	**$294.00**	**500 Weeks**
Kentucky	$331.00	Duration
Michigan	$397.00	Duration
Ohio	$385.00	Life

What happens to Indiana workers who are permanently disabled after their benefits are exhausted? That is a critical question. Unfortunately, there are no surveys which provide definitive information. However, it is likely that many of these individuals end-up on public welfare. Indeed, as case payments can help generate overwhelming financial problems which may in turn lead to family and/or societal problems.

Termination Hearings

Indiana workers' compensation laws allow employers or insurance companies the right to terminate benefits without a hearing. While comprehensive data are not available, Indiana is alone among its neighbors in adopting such an arbitrary and capricious policy.

Since insurance is both mandated and regulated by the state, the state condones such use of power. The unilateral termination of benefits by the state of Indiana is currently being challenged in U.S. District Court as a violation of due process.[15]

Indiana workers' compensation laws allow employers or insurance companies the right to terminate benefits without a hearing.

Moreover, Indiana procedures allow the employer the right to select an injured worker's doctor. While it is impossible to determine, it is only logical that some doctors may tilt their medical judgement in an employer's favor.

The doctor's inducement for such decisions is simply future business. It is only logical that employers retain doctors who provide them with favorable services. In this context, it is important to emphasize that Indiana's compensation levels are hardly high enough to induce individuals to deliberately stay out of work.

Indiana's permanent partial disability is 257% below the national average.

Other Benefit Issues

Indiana is consistently cheap in virtually every category—in the amount of compensation paid for a lost limb or in the duration of benefits for partial disabilities, for example. Indeed, the Legislative Services Agency has reported that Indiana's permanent partial disability is 257% below the national average.

Nor does Indiana law require that benefits be paid in a timely fashion, allowing employers and insurance companies an opportunity to hold onto capital, earning interest at the expense of the injured. In every conceivable respect, the Indiana workers' compensation system is stacked in favor of the employers at the expense of those injured or ill.

Furthermore, the State of Indiana does not require employers to pay for the cost of vocational rehabilitation. Indiana is one of only seven states whose workers' compensation laws contain no vocational rehabilitation component. The result, as we will see in the next chapter, is a tragic saga for workers and their families.

Chapter Six
The Human Dimension

Each day, Indiana suffers a human toll of job-related death, injury, and sickness. The numbers, if they could be accurately calculated, would be numbing. As citizens, we have grown numb to the steady drumbeat of death, injury, disease, and disfigurement. We, as a society, accept job injury and disease as a necessary if unwanted part of industrial life.

If society is numb to job injury, individual families are not. Real men and women are really injured. Their story tells of the human dimension of the pain and suffering and the costs, economic and social, that families and society bears. We will let them tell their story.

Elizabeth Groves, Hagerstown

"I keep pretending he is still coming," said Elizabeth Grovers. "Each Sunday, we used to go out and see our friends and family. Now, when Sundays come, I don't put on my clothes."

Mrs. Groves, 59 years old, was happily married to Richard Groves, a lineman for Henderson Electric of Louisville, Kentucky. On June 16, 1987, Mrs. Groves got some terrible news. Richard had been electrocuted.

The tragic news of Richard's death foreshadowed worse events to come. "I have never received the full story of what happened. Indiana OSHA never called me. I never did hear a word from Henderson Electric. I heard that Henderson Electric received a fine of $1,700."

For Mrs. Groves, life had suddenly taken a turn for the worse.

"I went five months without a check," Mrs. Groves remarked. "The hospital where Richard died and the lab both threatened to sue. I begged Hender-

son Electric and the insurance people to straighten out the situation. Things changed only when Congressman (Phillip) Sharp intervened on my behalf."

"My husband was a lineman for 35 years," continued Mrs. Groves. "I now have to live on for a month what I used to budget for a week. I get $720 a month. Of that, I spend $200 right-away for my medical (insurance)."

"I don't know what I will do when my benefits run-out at the end of the 500 weeks. The thought of it scares me. I just don't know what I will do."

Peggy Hoffelder, Auburn

On December 16, 1986, Peggy Hoffelder's hand was crushed when the machine she was operating malfunctioned.

Ms. Hoffelder worked making small rubber parts for automobiles. The machine she operated had been designed so that she had to reach into the machine during the machine's cycle to remove each part.

Although Ms. Hoffelder had had the machine previously checked-out, it malfunctioned on that day and came down upon her hand while she was reaching into the machine to remove a part.

Looking back, Peggy Hoffelder says the company where she worked was not unlike a foreign land. "They can do anything to those people in there (their workers), and there is nothing anyone can do about it.

"I never knew anything about (workers') compensation laws before. Unfortunately, I have become very well acquainted with them during the past few years." After the accident, Ms. Hoffelder was simultaneously undergoing medical treatments and trying to receive retribution. She learned that she was, and still is, at the mercy of her former employers.

First, if she wanted her medical treatments to be paid for, she had no voice in choosing the doctors she saw or the treatments she received. The company doctor met her at the hospital over an hour after the accident and he decided which surgeon would reconstruct her hand.

If she wanted her medical treatments to be paid for, she had no voice in choosing the doctors she saw or the treatments she received.

After six months, she still could not return to work, so she was sent to two other specialists for two more operations.

Last November, the doctors decided that no more could be done for Ms. Hoffelder. "I have just recently gotten so I can use my hand." With a lot of aspirin and a splint, Ms. Hoffelder says she can do some things with her hand. "I think it is as good as it is going to get."

Second, the company she worked for is self-insured and the doctors who treated her were hired by the company. Ms. Hoffelder's compensation payments continue to be based upon the evaluation of her condition by those doctors. While working, Ms. Hoffelder made about $400 a week. Now she receives $190 a week in workers' compensation.

At one point, from November 1987 to May 1988, her payments stopped. "At the time, I was under the impression that they did not have to pay me anything." Then the checks began again without any prompting on her part.

Ms. Hoffelder's doctors said that there is no more that can be done for her. She fully expects compensation payments to end at any moment. "I guess I will just worry about that tomorrow," said Ms. Hoffelder, who feels that she had no choice but to quit her job after being told that she could not continue with the same type of work. She is still not working.

"I think companies need to be held accountable, not taxpayers."

Third, under the workers' compensation system

employees are not able to sue their employers. One option left open to individuals is a third party lawsuit.

Ms. Hoffelder investigated the possibility of a third-party lawsuit against the manufacturer of the machine which malfunctioned and crushed her hand. She was told by a lawyer that it was impossible as the company she worked for had designed and made the machine she used and she could not sue her employer.

"Nobody should be able to get by with what that company is getting by with," said Ms. Hoffelder.

Eric Fogle, Auburn

"I will never forget the look on Jeremy's face when he came to get me."

That was a few short months ago. Eric Fogle, just 21-years old, was working as a cook at a Hardees Restaurant in Auburn. His younger brother, Jeremy, had come to get Eric when their brother, Craig, had been injured at the Bastian Plating plant in Auburn.

"We went down to the hospital to be with Craig. He was just 19-years old. He was too young to die. But the doctors told us he would not make it. I had hope, but I knew that Craig would die."

Two days later, life was over for Craig. "I was hoping for a miracle. We didn't get it.

"Craig had worked at Bastian for about a year. He went there after working for Auburn Foundry where he started work just after graduating from high school," recalled Eric.

"Craig was scared to work at Bastian. He came home with burns and rashes.

"Life is tough in Auburn. We have too many people hurt and killed. We need to stop this. We need good safety programs. We need to protect our people."

Craig Fogle died in a valiant yet tragic effort trying to rescue fellow workers. A total of five men suffered a common demise at Basitan Plating. The people of Auburn– their family and friends– will not forget them.

Rod Warren, Hobart

Rod Warren can remember the accident just like it was yesterday. The bridge which he was working on simply collapsed. The question in Rod's mind was not avoiding injury, but how to escape alive.

Mr. Warren awoke in a Gary hospital after the bridge collapse. He was alive, but he was only beginning to discover the hell of a job injury. As a 29-year old carpenter, he thought his life was in front of him. After the collapse and the loss of his right leg, his cracked pelvic bone and other serious injuries seemed meager by comparison.

The bridge collapse happened at midday on Thursday. His employer, Superior Construction, paid him for Thursday and Friday. Then Superior terminated his pay. That was only the beginning of his difficulties.

"My family received $140 per week the first year, then $75 a week the second year. Without my parents, the carpenters' union, and social security, we would have been in absolute poverty.

"Social security was critical, especially for a family with children. However, it took us a year to get the $960 a month we received. But with house payments, we needed it to survive.

"I don't know what so many people do," said Mr. Warren. "I borrowed $10,000 from my parents during the first year. We needed it because I couldn't work for two years."

Mr. Warren has a poor impression of IOSHA. His feeling about the Indiana's workers' compensation

The workers' compensation system...seems only to shield employers and leave workers in poverty.

system are worse. "I have very little respect for IOSHA. They seem almost like a bad joke to me. When they do come around, they seldom get tough. When they get tough, they back-off and reduce their fines.

"The workers' compensation system is worse. It is a disgrace. It seems only to shield employers and leave workers in poverty."

Mr. Warren's accident took place over six years ago. "It is a day I will never forget."

Sheila Grider, Indianapolis

Sheila hates paying Indiana taxes.

This is because these taxes support a system which failed to protect her husband and which did not adequately support her and her child who was born after his death.

Her husband, Charlie, was excited to begin training as a lineman for the Indiana Power and Light company in the summer of 1986. Mrs. Grider had concerns about the safety of this new job.

"He told me that as long as he was careful that everything would be okay." But the one thing neither of them counted on, according to Mrs. Grider, was that someone else would not be careful.

On a windy January 6, 1987, at the age of 23, Charlie Grider was electrocuted and died. On that day, Mr. Grider was installing some new equipment on a pole as two supervisors watched him from below.

Mrs. Grider, who obtained a copy of the Indiana OSHA file, said that it states that the two supervisors knew of the danger yet they left him on the pole and gave him no warning about an unblanketed wire which was behind him.

"The wire blew into by husband's back, he never saw it coming," said Mrs. Grider.

The company was cited for having Mr. Grider work outside of his job description, for undersupervision, and for leaving that wire unblanketed. The fine was $1,000. Mrs. Grider expressed deep disappointment in Indiana OSHA. "It seems that they should be on sites like this before (an accident), instead of after."

At the time, Mrs. Grider was expecting, Jessica, their first child. Following the accident, Mrs. Grider received $2,000 from her husband's union and $2,000 from the company to cover funeral expenses. "It was helpful, but not adequate...I remember sitting there, about to deliver and thinking this is it. This is all we get?"

A representative from the company came and visited Mrs. Grider to give her the $2,000 and to offer her a job at the company. Mrs. Grider said that for her own sanity she could not work for her husband's company. "I would have been Charlie Grider's widow."

When she requested that the company pick up health insurance for Jessica until the age of 18 or let her buy it at the rate paid by her husband, they refused. Mrs. Grider remembers them saying that by giving her the money and offering her a job they had fulfilled their legal and moral obligations to her.

At present, she recieves about $760 a month in workers' compensation and $500 a month in social security disability benefits attributed to Jessica. "If they are not going to raise it (the compensation level), then they should open up the right to sue."

Mrs. Grider has gone back to work. "I couldn't live on social security and workers' comp."

With the death of her husband nearly two years past and her daughter one year old, Mrs. Grider considers herself a survivor and not a victim. She still owns

the house which she and her husband bought together, but this is due to her efforts and not as a result of help from the Indiana workers' compensation system.

She is still bitter about the way the system did not protect Jessica's father and then left the two of them holding the bag with no recourse to receive retribution.

"It is just not fair. My child deserves the life she could have had..not just getting by."

Quentin Erwin, Muncie

On October 20, 1986, Quentin Erwin's livelihood took a severe turn for the worse.

On that day, Mr. Erwin was unilaterally terminated from receiving Indiana workers' compensation benefits. Mr. Erwin, however, was not notified of the termination until November 4.

"I was only receiving $96 a week," Mr. Erwin recalled. "My wife, at that time, and I had to move in with my in-laws to make things work.

"The cut-off left everyone confused. My doctor said that I should not go back to my original job at Procare. He did say that I could work at a job which did not require lifting. Yet he would not release me from disability."

The situation was a true Catch-22. Mr. Erwin was disabled, yet he wasn't. He could not go back to his original job. Although he could work somewhere else. No one would employ Mr. Erwin until he was released from his doctor's care.

"The circumstances left my life in a horrible situation. My in-laws couldn't understand it," Mr. Erwin said. "I ultimately got divorced."

Mr. Erwin was injured when his shoulder was severely dislocated when he was manhandled by a patient at Procare, a Muncie-based firm which treats emotionally disturbed patients. Mr. Erwin, who is 5-foot 4-inches tall, was beaten on several occasions by much larger patients.

To this day, Mr. Erwin remains outraged that his workers' compensation payments were terminated without a hearing. He has filed suit in U.S. District Court to constitutionally test Indiana's procedures for such terminations. Mr. Erwin cannot recover funds under his suit, but a favorable ruling would prevent the state from treating others in a similar manner.

"I intend to win the suit," said Mr. Erwin. "I will fight it will all that I have. It is outrageous that the state of Indiana treats people in such a manner. What the state did to me nearly ruined my life. The situation should not happen to someone else."

Chapter 7
How Many More Must Die?
Conclusions & Recommendations

The State of Indiana must no longer condone legalized workplace homicide. Indiana has not enforced its job safety laws and it has pushed those injured or the family members of those who have been killed on-the-job into poverty.

As we saw earlier in this report, Indiana workers are dying in much larger numbers than their neighbors in Michigan, Ohio, or Illinois. Other data presented in this report show that Indiana is especially parsimonious in the way it handles workers' compensation. The combination of lax enforcement and low workers' compensation has produced a deadly result--business environments which produce excessive death and injury. This is the only possible explanation for the large differences between Indiana and neighboring states in selected job fatality rates.

Hoosiers have heard from industry and political leaders that low workers' compensation costs help lure jobs to Indiana. Indeed, any firm which buys this argument is precisely the type of firm that Indiana should not want. Such firms simply externalize the costs of job-injury to the injured, their families, and the public welfare system. In a report which will be released October 30, 1988, the National Safe Workplace Institute on shows that the costs of job injuries, in terms of increased welfare benefits by the federal government, to be $9 billion a year.[16] Those costs should be absorbed by the business environments which create the problems in the first place, not by the already hard-pressed taxpayers.

The gap between benefits and costs is outrageous. The maximum benefits paid for an Indiana fatality are less than $100,000. What is the cost? According to the National Safety Council, an industry group, the cost of a job related fatality is $460,000.[17]

The difference between the benefits paid by workers' compensation and the actual cost of $360,000 is absorbed by families, private charity, and public welfare.

How Many More Deaths?

Indiana has experienced a much higher death rate in construction than neighboring Michigan and Ohio. According to the National Safety Council, about one-third of job-related deaths occur in construction.[18] The National Institute of Occupational Safety and Health reports that Indiana had at least 133 job related fatalities in 1984,[19] which translates into 44 construction deaths. Table 7.1 demonstrates how many deaths would have occured if Indiana had fatality rates similar to Michigan or Ohio.

Table 7.1

Relative Death Rates

Indiana Alone, Assuming Michigan and Ohio Rates
Construction Industry

State	Fatality Rate per 100,000	Number of Fatalities	Fatality Gap
Indiana	34.1	44	—
Michigan	20.5	26	18
Ohio	21.4	28	16

As we can see from Table 7.1, Indiana would save 18 lives a year if the state operated programs which had the same effect as Michigan, or 16 if the state had the same programs as Ohio. Indiana's economy would have saved $8.3 million if it had experienced the same rate as Ohio--using $460,000 as the cost of a job related death. These estimates obviously do not bring into consideration the social costs of fatalities. Moreover, injuries occur almost in relation to fatalities. Hence, the total bill for Indiana could be a staggering, in the hundreds of millions of dollars each year.

Conclusions & Recommendations

Soon, the people of Indiana will have a new Governor. That Governor should immediately establish worker safety and health protection as a high priority in this administration.

It is time that meaningful protection be offered to the working men and women of Indiana or time that job safety and health jurisdiction be retuned to the federal government.

The new Governor should appoint a "Hoosier Job Safety and Health Gubernatorial Task Force." This effort should be comprised of labor and industry members, victims, and others who clearly have a stake in workplace safety and health issues. This Task Force should be required to report to the Governor within 90 days specifying both administrative and legislative reforms which should be made early next year.

This Task Force needs to consider reforms in workplace safety and health and in workers' compensation. The Task Force should conduct hearings, to maximize public input.

The goal which should drive the Task Force is the need for Indiana to have a system which prevents injuries rather than tolerates injuries.

The remainder of this chapter will focus on minimum goals for reforming IOSHA and the workers' compensation system in Indiana.

Enforcement/Regulation

IOSHA badly needs to be reformed. IOSHA needs competent personnel and the resources to compensate it personnel. Perhaps as importantly, IOSHA enforcement officers need a mandate.

They need to know that they will have support from the highest offices of the state to conduct their responsibilities.

IOSHA clearly needs to shift its enforcement activities from the public sector to the private sector. IOSHA should develop a special targeting system to identify those firms with high rates of injury and death.

Injury prevention strategies typically involve the potential of substantial penalties. IOSHA must be ready to impose such penalties in order for Indiana businesses to fully understand that the state will enforce the law.

Clearly, IOSHA has not been fairly treated by the federal government in the budget process for state grants. The federal government has consistently requested higher appropriations for federal programs than it has for state-plan grants.

Finally, the OSSC must have the resources and the authority to establish the safety and health standards which are critical to protecting Indiana workers. The OSSC should not rely on the federal government to promulgate effective standards.

Workers' Compensation

The Indiana workers' compensation system, in spite of recent modification, is a disgrace. Minimum reforms should include:

1) *The right to a hearing prior to having benefits terminated;*

2) *The adoption of benefits which are comparable to the average benefits in border states (Michigan, Ohio, Kentucky, and Illinois); and*

3) *The right to litigate against employers who have demonstrated recklessness.*

As we discussed in this report, there is no evidence to support the claim that firms move to Indiana because of the low-cost of workers' compensation insurance. Indeed, if it is true that firms that move

to Indiana because of lower insurance costs, then these firms would be precisely the firms which Indiana does not want. They would be all too willing to have the workers and taxpayers share the costs of mismanagement and recklessness.

The people of Indiana should be proud of their state. However, that pride should not extend to the way state government enforces job safety and health laws. Nor should that pride extend to Indiana's poverty-level workers' compensation programs.

The people of Indiana should demand that their government operate programs which prevent injury and which justly compensates people when injury occurs. With modest steps, Hoosiers will no longer be expendable people, but people with a future free from excessive death and injury.

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Mr. Kinney the National Safe Workplace Institute's founder and Executive Director.

Mr. Kinney holds graduate degrees from the University of Pennsylvania and Syracuse University. He previously served as a senior adviser to two U.S. Senators. Mr. Kinney has also served as a Staff Director of the National Governors' Association.

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Footnotes

1. See Legislative Services Agency, Sunset Review Report, Executive Summary, Page 2.

2. See report of the National Academy of Sciences, Panel on Occupational Safety and Health Statistics, October 1987.

3. "National Traumatic Occupational Fatalities," 1980-1985, National Institute of Occupational Safety and Health, June 1988.

4. Death certificate data are more reliable for traumatic injuries than for occupationally-related diseases. Death certificate data provide a minimum count since under-reporting is highly likely.

5. See Anthony Suruda, M.D., M.P.H., "Counting Recognized Occupational Deaths in the United States," Journal of Occupational Medicine, Vol. 30, No. 11, November 1988.

6. See Accident Facts, National Safety Council, p. 34.

7. See news release of the International Molders Union, September 22, 1987.

8. Department of Labor, OSHA Annual Report, 1986.

9. Ibid.

10. See Occupational Safety and Health Act (Public Law 91-596), Section 17.

11. "Ending Legalized Workplace Homicide", National Safe Workplace Institute, July 15, 1988, p. 6.

12. Legislative Services Agency, Sunset Review Report, p. 21.

13. Engineering News Record, September 15, 1988, pages 58-59.

14. Conversation with officials of the Japanese External Trade Organization, Chicago, during October 1988.

15. Case involves Quentin Erwin, this report, pages 32-33.

16. See "Safer Work", NSWI, October 30, 1988.

17. See Accident Facts, National Safety Council, p. 31.

18. This statistic does not include accidents involving motor vehicles. Moreover, NIOSH has estimated that one-third of construction-related deaths go unreported to regulators.

19. See Suruda, op. cit., Table 1.

COMPARISON OF 1987 ALASKA AND NATIONAL
OCCUPATIONAL INJURY AND ILLNESS INCIDENCE RATES

	Alaska Rate	National Rate
Oil and Gas Extraction	9.0	8.3
General Building Construction	17.5	14.2
Heavy Construction	19.4	14.5
Special Trade Construction	15.0	15.0
Canned and Cured Fish Processing	35.2	26.4
Fresh/Frozen Fish Processing	35.3	18.8
Logging Camps and Contractors	51.8	19.3
Trucking and Warehousing	17.7	12.3
Water Transportation	13.2	12.9
Tranportation by Air	13.9	14.3
All Private Industries	10.9	8.3

TABLE A-11
Incidence rates of Occupational Injuries and Illnesses
Comparison of all States - Private Sector
1983 to 1987

	1983	1984	1985	1986	1987
USA	7.6	8.0	7.9	7.9	8.3
Alabama	7.9	8.3	8.4	8.7	
Alaska	10.6	10.3	10.7	10.2	10.9
Arizona	9.3	9.5	9.2	8.9	9.0
Arkansas	8.1	8.0	8.0	8.4	
California	9.1	9.3	9.1	8.9	8.8
Colorado	--	--	--	--	--
Connecticut	8.0	8.3	8.3	8.2	
Delaware	5.3	5.5	5.6	6.0	
Florida	8.7	8.9	8.8	8.8	
Georgia	--	--	--	--	--
Hawaii	10.6	10.0	9.6	9.5	9.8
Idaho	--	--	--	--	--
Illinois	--	--	--	--	--
Indiana	7.3	7.7	7.7	8.2	
Iowa	7.8	8.1	8.2	8.4	
Kansas	7.5	7.7	7.7	7.6	
Kentucky	7.6	8.3	8.3	8.4	
Louisiana	7.4	7.9	7.3	7.0	
Maine	11.0	13.2	12.5	12.9	
Maryland	7.6	7.8	7.9	7.8	
Massachusetts	--	--	--	--	--
Michigan	6.8	7.6	8.0	8.2	
Minnesota	7.3	7.7	7.6	7.3	
Mississippi	--	8.0	7.8	8.0	
Missouri	7.5	8.0	7.9	8.5	
Montana	--	8.5	8.0	8.2	
Nebraska	8.4	8.8	7.9	8.1	
Nevada	9.0	9.0	8.5	8.4	9.4
New Hampshire	--	--	--	--	--
New Jersey	--	--	--	--	--
New Mexico	7.8	8.7	8.4	7.7	
New York	--	--	--	--	--
North Carolina	6.8	7.2	7.4	7.2	
North Dakota	--	--	--	--	--
Ohio	--	--	--	--	--
Oklahoma	8.9	9.8	9.5	8.1	
Oregon	9.8	10.6	10.5	10.7	10.9
Pennsylvania	--	--	--	--	--
Rhode Island	8.3	8.4	8.9		
South Carolina	6.7	6.9	7.1	6.9	
South Dakota	--	--	--	--	--
Tennessee	7.9	8.6	8.2		
Texas	--	--	--	--	--
Utah	8.5	9.2	8.5	9.1	
Vermont	9.2	10.0	9.1	8.9	
Virginia	7.0	7.6	7.3	7.6	
Washington	9.7	9.9	9.4	9.8	10.6
West Virginia	6.7	7.2	7.2	7.7	
Wisconsin	--	--	--	--	--
Wyoming	7.9	8.6	7.4	7.6	
American Samoa	2.5	3.0	3.6	3.2	2.6
Guam	2.7	2.8	3.6	3.7	3.6
Puerto Rico	4.2	3.9	3.8	3.9	
Virgin Islands	2.8	2.4	2.4	2.4	

SOURCE: Bureau of Labor Statistics.
-- = Publishable Rate Unavailable.
X = 1987 data not available at time of publication.

Alaska

TABLE A-3
Incidence Rates of Recordable Occupational Injuries and Illnesses
Industry Data Time Series, Alaska 1978 to 1987

Industry	SIC Code	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
TOTAL PRIVATE AND PUBLIC SECTOR.....		9.4	9.2	9.1	9.2	9.5	9.9	9.7	10.1	9.6	10.1
TOTAL PRIVATE SECTOR.....		10.0	10.1	10.4	10.0	10.3	10.6	10.3	10.7	10.2	10.9
MINING.....		15.2	14.0	12.1	15.4	14.8	11.5	10.5	9.4	8.1	8.9
Oil and Gas Extraction.....	13	15.7	13.7	12.4	15.8	15.3	11.8	10.6	9.7	8.2	9.0
Petroleum & Gas Production.....	131	--	--	2.5	7.3	6.7	5.1	2.8	2.6	2.1	3.5
Oil & Gas Field Services.....	138	22.6	23.0	23.8	24.9	24.6	19.6	22.0	17.4	14.8	15.2
CONSTRUCTION.....		16.4	16.4	18.5	17.2	19.4	17.6	16.9	19.4	16.2	17.1
General Building Contractors.....	15	17.1	14.3	16.5	19.8	19.6	21.6	17.7	19.5	17.6	17.5
Residential Buildings.....	152	16.5	11.9	15.1	15.6	16.5	17.7	13.4	15.4	18.0	17.0
Nonresidential Buildings.....	154	18.0	16.8	18.0	23.7	21.9	26.0	22.0	22.9	17.3	17.7
Heavy Construction Contractors.....	16	14.2	16.6	17.3	15.1	20.9	14.9	15.7	18.9	16.5	19.4
Highway and Street Construction...	161	9.7	18.8	19.2	17.8	27.6	19.0	19.8	16.6	20.8	14.4
Heavy Construction, Except Hwy....	162	16.4	15.1	16.4	14.0	16.8	12.9	13.9	20.3	14.3	22.8
Special Trade Contractors.....	17	17.6	17.4	15.9	17.8	17.9	17.7	17.1	19.8	14.9	15.0
Plumbing, Heating & Air Condit....	171	14.6	14.8	16.7	18.8	17.0	25.6	23.3	18.9	16.0	14.4
Electrical Work.....	173	17.0	10.8	16.5	15.4	16.6	13.2	14.3	16.4	15.9	15.4
Misc Special Trade Contractors....	179	--	23.1	16.3	21.6	16.6	14.6	20.6	23.6	15.9	12.6
MANUFACTURING.....		21.4	24.1	23.3	19.1	17.9	23.2	23.0	26.3	28.3	29.5
Food and Kindred Products.....	20	21.8	25.7	26.7	22.2	20.2	29.5	25.0	32.5	33.3	34.5
Misc Food Prep & Kindred Prod.....	209	22.3	26.0	26.9	22.5	20.8	30.1	25.7	32.9	33.4	35.3
Canned & Cured Fish & Seafoods..	2091	18.7	23.5	21.4	19.9	18.6	21.4	25.0	30.3	34.3	35.2
Fresh/Froz Pkgd Fish & Seafds...	2092	27.4	29.2	31.7	24.6	21.8	32.9	26.1	33.9	33.0	35.3
Lumber & Wood Prod Except Furniture	24	31.8	31.0	32.5	26.8	26.9	31.2	43.0	38.6	50.9	48.5
Logging Camps & Contractors.....	241	38.6	39.1	37.3	27.2	30.8	35.7	45.6	45.0	56.6	51.8
Printing, Publishing & Allied Ind...	27	--	--	2.5	3.1	5.7	6.3	6.2	5.1	6.5	5.8
TRANSPORTATION AND PUBLIC UTILITIES...		11.4	11.4	12.2	11.6	10.7	11.4	12.1	11.3	11.3	10.9
Local & Interurban Passenger Transit	41	--	5.1	4.8	6.7	4.9	--	7.1	6.3	11.3	12.8
Trucking and Warehousing.....	42	21.4	20.6	21.7	17.8	14.0	20.7	24.2	17.4	19.5	17.7
Trucking, Local and Long Distance.	421	21.3	21.0	22.1	18.0	13.8	19.8	23.9	17.5	19.7	17.9
Water Transportation.....	44	18.6	16.0	16.2	16.6	11.7	11.9	10.8	16.2	10.7	13.2
Transportation by Air.....	45	15.2	12.4	13.2	13.6	12.7	10.7	14.2	14.0	13.3	13.9
Communication.....	48	3.0	6.9	9.1	8.4	8.6	9.6	5.7	6.7	6.2	4.5
Electric, Gas and Sanitary Services.	49	15.5	14.6	14.6	13.9	14.8	16.4	19.4	16.0	16.2	15.5
WHOLESALE AND RETAIL TRADE.....		8.2	7.9	7.7	8.0	9.3	10.2	9.9	10.0	8.9	9.3
WHOLESALE TRADE.....		12.2	11.4	10.9	9.8	9.6	12.3	11.7	10.9	8.0	9.4
Durable Goods.....	50	12.2	11.6	8.5	7.9	7.4	8.9	9.7	8.9	5.8	7.7
Nondurable Goods.....	51	8.1	11.0	15.4	12.8	13.4	18.0	15.1	14.4	11.5	11.5
RETAIL TRADE.....		7.4	6.9	6.8	7.4	9.3	9.6	9.5	9.8	9.2	9.3
Building Materials & Garden Supplies	52	8.9	6.2	9.4	12.3	13.7	20.5	17.7	17.6	11.3	12.7
Lumber & Bldg Materials.....	521	--	--	--	--	17.2	25.5	22.6	21.3	12.4	-
General Merchandise Stores.....	53	9.2	8.8	6.0	7.1	8.2	12.3	10.4	9.3	10.7	10.8
Food Stores.....	54	9.5	8.9	10.1	8.5	11.8	9.7	15.8	15.5	18.0	15.6
Auto Dealers and Service Stations...	55	10.2	8.5	9.5	8.9	8.1	10.4	10.5	10.8	8.3	8.7
Apparel and Accessory Stores.....	56	3.4	2.7	2.1	2.4	1.0	1.0	1.5	2.5	0.4	3.3
Furniture, Home Furnishings.....	57	--	--	--	--	4.8	3.5	4.4	5.2	6.4	5.8
Eating and Drinking Places.....	58	6.6	7.2	6.5	8.1	11.2	9.8	6.6	8.5	8.3	8.9
Miscellaneous Retail.....	59	4.7	3.9	2.9	5.1	5.5	6.4	6.6	5.9	4.3	3.6
FINANCE, INSURANCE AND REAL ESTATE		0.7	1.4	1.3	1.5	1.5	2.0	1.7	2.1	3.3	2.8
Banking.....	60	1.1	2.1	1.9	2.2	1.8	2.9	2.1	2.6	2.6	3.3
Credit Agencies.....	61	--	--	--	--	1.5	1.1	1.6	0.7	1.7	3.2
Real Estate.....	65	0.8	0.1	2.8	1.9	2.3	2.1	2.4	4.1	4.9	2.7
Holding & Other Investment Offices..	67	0.3	1.8	0.0	1.2	0.7	1.3	1.3	2.3	--	3.5
SERVICES.....		4.3	4.0	4.3	4.3	4.4	4.7	5.1	5.5	5.4	6.5
Hotels and Other Lodging Places.....	70	5.5	7.9	9.3	6.8	7.0	9.9	11.0	10.0	13.4	13.6
Personal Services.....	72	0.6	1.3	2.5	2.8	1.7	4.1	5.3	6.3	1.7	3.7
Business Services.....	73	7.2	3.8	6.7	3.7	6.7	3.9	3.4	2.6	4.5	5.0
Automotive Services.....	75	--	--	--	7.5	8.4	8.2	6.6	9.9	6.3	11.2
Health Services.....	80	4.0	3.7	3.6	5.4	4.1	5.5	7.9	8.9	6.3	8.0
Legal Services.....	81	0.5	1.0	0.2	--	0.3	0.1	0.1	0.8	1.1	0.7
Social Services.....	83	4.3	4.9	3.5	3.9	3.7	4.2	3.5	7.3	3.0	3.7
Membership Organizations.....	86	2.9	2.9	3.1	3.0	2.8	3.0	0.7	1.8	4.0	5.8
Miscellaneous Services.....	89	2.9	1.8	2.8	3.0	2.0	1.1	2.6	2.6	2.8	2.7
STATE AND LOCAL GOVERNMENT.....		7.1	6.3	4.9	6.5	6.7	7.3	7.7	8.1	7.7	7.3
STATE GOVERNMENT.....		6.2	3.8	3.3	4.7	4.6	5.5	5.5	5.2	6.0	6.0
LOCAL GOVERNMENT.....		8.1	8.7	6.3	8.1	8.6	8.7	9.5	10.5	9.0	8.4

See footnotes at end of section.
-- = Publishable rate unavailable.

LD : A.E5

TABLE A-8
Incidence Rates of Recordable Occupational Injuries and Illnesses
U.S. Private Sector, Select Industries, 1978 to 1987

Industry	SIC Code	Incidence Rate for Total Cases (per 100 workers) 5/ 1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
TOTAL PRIVATE SECTOR		9.4	9.5	8.7	8.3	7.7	7.6	8.0	7.9	7.9	8.3
AGRICULTURE		11.6	11.7	11.9	12.3	11.8	11.9	12.0	11.4	11.2	11.2
MINING		11.5	11.6	11.2	11.6	10.5	8.4	9.7	8.4	7.4	8.5
Oil and Gas Extraction	13	13.9	13.6	13.4	14.1	12.1	9.8	11.8	10.1	9.1	8.3
Petroleum & Gas Production	131	8.6	5.4	3.8	4.1	4.3	3.5	3.0	2.7	2.6	2.5
Oil & Gas Field Services	138	20.0	18.9	19.3	19.7	16.8	14.3	18.2	15.8	13.4	14.0
CONSTRUCTION		16.0	16.2	15.7	15.1	14.6	14.8	15.5	15.2	15.2	16.7
General Building Contractors	15	15.9	16.3	15.5	15.1	14.1	14.4	15.4	15.2	14.9	16.3
Residential Buildings	152	13.3	13.0	11.9	11.9	10.8	11.9	12.6	12.3	12.5	13.9
Nonresidential Buildings	154	19.2	19.7	19.6	18.5	17.1	17.3	18.9	18.7	17.9	18.5
Heavy Construction Contractors	16	16.6	16.6	16.3	14.9	15.1	15.4	14.9	14.5	14.7	14.5
Highway and Street Construction	161	15.2	15.5	15.6	14.0	13.4	14.3	14.6	13.8	13.9	14.2
Heavy Construction, Except Hwy.	162	17.2	17.1	16.6	15.3	15.7	15.9	15.1	14.1	15.1	14.7
Special Trade Contractors	17	15.8	16.0	15.5	15.2	14.7	14.8	15.8	15.4	15.6	15.0
Plumbing, Heating & Air Condit.	171	16.9	17.0	16.2	15.7	15.3	15.7	16.4	15.7	16.1	16.4
Electrical Work	173	14.0	14.0	14.1	14.0	13.9	13.7	14.4	14.3	15.2	13.8
Misc. Special Trade Contractors	179	16.9	17.5	16.2	17.1	15.9	15.1	15.8	16.5	15.7	14.8
MANUFACTURING		13.2	13.3	12.2	11.9	10.3	10.0	10.6	10.4	10.6	11.9
Food and Kindred Products	20	19.4	19.9	18.7	17.8	16.7	16.5	16.7	16.7	16.6	17.7
Misc. Food Prep. & Kind. Prod.	209	16.3	16.8	15.3	15.0	14.2	14.1	14.3	14.7	14.1	15.1
Canned & Cured Fish & Seafoods	2091	22.3	24.4	20.2	22.6	17.8	17.1	--	--	19.1	26.6
Fresh/Froz. Pkgd.Fish & Seafds.	2092	10.4	12.0	13.4	12.6	12.1	12.9	12.3	13.2	11.2	11.8
Lumber & Wood Prod. except Furniture	24	22.6	20.7	18.6	17.6	16.9	18.3	19.6	18.5	18.3	18.9
Logging Camps & Contractors	241	25.9	24.2	22.7	19.3	20.4	21.5	21.7	20.0	19.1	20.3
Paper and Allied Products	26	13.3	13.5	12.7	11.6	10.6	10.0	10.4	10.2	10.5	11.8
Printing, Publishing & Allied Ind.	27	6.9	7.1	6.9	6.7	6.6	6.6	6.5	6.3	6.5	6.7
TRANSPORTATION AND PUBLIC UTILITIES		10.1	10.0	9.6	9.0	8.5	8.2	8.8	8.6	8.5	8.6
Local & Interurban Passenger Transit	41	9.7	9.3	9.5	9.3	9.3	9.7	9.0	9.4	9.3	9.2
Trucking and Warehousing	42	16.2	15.8	14.9	14.7	14.2	13.3	14.5	13.9	13.1	12.3
Trucking, Local and Long Distance	421	16.3	15.7	14.8	14.7	14.2	13.3	14.6	14.0	13.2	12.3
Water Transportation	44	14.4	14.1	14.2	12.5	11.4	10.8	13.2	11.0	12.7	12.9
Transportation by Air	45	13.4	13.7	13.3	13.5	13.6	12.7	13.1	13.1	13.3	14.3
Communication	48	2.7	2.5	2.8	2.7	2.8	2.9	2.7	2.9	2.7	2.8
Electric, Gas and Sanitary Services	49	9.0	8.9	8.6	8.3	7.6	7.2	7.4	6.9	6.8	7.6
WHOLESALE & RETAIL TRADE		7.9	8.0	7.4	7.3	7.2	7.2	7.4	7.4	7.7	7.7
WHOLESALE TRADE		8.9	8.8	8.2	7.7	7.1	7.0	7.2	7.2	7.5	7.6
Durable Goods	50	8.6	8.6	7.8	7.3	6.7	6.4	6.7	6.5	6.3	6.7
Nondurable Goods	51	9.3	9.1	8.7	8.3	7.8	7.9	8.0	8.2	8.7	8.5
RETAIL TRADE		7.5	7.7	7.1	7.1	7.2	7.3	7.5	7.5	7.8	7.8
Building Materials & Garden Supplies	52	9.8	9.5	8.8	8.3	8.8	8.5	9.6	9.8	10.1	10.2
General Merchandise Stores	53	9.1	9.8	9.3	9.0	9.2	9.7	9.8	10.0	10.4	10.0
Food Stores	54	10.7	11.7	10.6	10.4	10.3	10.4	10.8	10.4	10.7	10.9
Auto Dealers and Service Stations	55	6.0	7.9	7.2	6.8	6.9	6.8	7.0	6.9	7.1	6.8
Apparel and Accessory Stores	56	2.3	2.6	2.2	2.2	2.5	2.4	2.8	2.6	2.9	3.2
Furniture, Home Furnishings	57	5.1	4.7	4.7	4.3	3.9	3.7	4.3	4.2	4.9	4.6
Eating and Drinking Places	58	7.5	7.6	6.9	7.3	7.6	7.8	7.8	8.2	8.2	8.3
Miscellaneous Retail	59	3.8	3.8	3.5	3.5	3.7	3.6	3.9	3.7	4.2	4.3
FINANCE, INSURANCE AND REAL ESTATE		2.1	2.1	2.0	1.9	2.0	2.0	1.9	2.0	2.0	2.3
Banking	60	1.5	1.7	1.5	1.6	1.7	1.6	1.6	1.6	1.6	1.6
Credit Agencies	61	1.1	1.3	1.1	1.3	1.3	1.3	1.4	1.2	1.2	1.3
Insurance	63	1.9	2.0	1.7	1.8	1.9	1.8	1.7	1.8	1.9	1.8
Real Estate	65	4.9	4.7	4.6	4.0	4.4	4.4	4.5	4.2	4.8	4.7
Holding & Other Investment Offices	67	--	--	1.7	1.8	1.9	1.7	--	2.2	--	1.5
SERVICES		5.5	5.5	5.2	5.0	4.9	5.1	5.2	5.4	5.3	5.5
Hotels and Other Lodging Places	70	9.2	9.1	8.9	8.8	9.0	9.2	9.8	10.0	10.0	10.6
Personal Services	72	3.5	3.2	2.9	2.8	3.1	2.9	2.9	2.9	3.2	3.1
Business Services	73	4.9	5.0	4.4	4.6	4.4	4.7	4.9	4.7	4.9	4.6
Automotive Services	75	8.2	8.0	7.5	7.6	7.6	7.1	6.9	6.5	6.8	6.7
Health Services	80	6.8	6.8	6.4	6.1	5.9	6.3	6.3	7.1	6.6	7.2
Legal Services	81	--	--	0.4	0.4	0.5	0.5	0.5	0.6	0.5	0.6
Social Services	83	6.0	5.9	5.1	5.2	5.0	5.3	5.3	6.0	5.4	5.9
Membership Organizations	86	--	--	3.4	3.3	--	3.6	--	--	--	--
Miscellaneous Services	89	1.9	2.2	1.6	1.6	1.3	1.3	1.4	1.7	1.6	1.6

STATE OF ALASKA

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

P.O. BOX 21149
JUNEAU, ALASKA 99802-1149
PHONE: (907) 465-2700

FAX: (907) 465-2784

October 19, 1989

House Labor and Commerce Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Committee Members:

Enclosed is a Notice of Proposed Changes in the regulations of the Alaska Department of Labor, together with a copy of the specific changes we are proposing.

If you have any questions or comments concerning the action we are proposing, please contact the Occupational Safety and Health Section in the Division of Labor Standards and Safety at (907) 465-4856.

Sincerely,

Jim Sampson
Commissioner

Enclosures

07-G9LH

NOTICE OF PROPOSED CHANGES
IN THE REGULATIONS OF THE
ALASKA DEPARTMENT OF LABOR

Notice is given that the Alaska Department of Labor, under authority vested by AS 18.60.020, proposes to amend regulations in Title 8 of the Alaska Administrative Code dealing with occupational safety and health standards which are adopted by reference and proposes to repeal and adopt safety and health standards in Subchapter 05, Construction Code, dealing with the construction of underground tunnels, shafts, chambers, and passage ways, to implement AS 18.60.010 as follows:

8 AAC 61.010 is proposed to be amended to reflect amendments to Subchapter 05, Construction Code, therein adopted by reference.

Section 190 of Subchapter 5, Construction Code is proposed to be repealed and readopted.

The proposed regulations prescribe requirements for:

1. Safe access and egress to all work stations.

2. The check-in/check-out system that must be maintained to ensure that above-ground personnel have an accurate count of persons underground.

3. Safety instruction to be given to employees.

4. Notifying employees at the beginning of a workshift of any hazardous occurrences or conditions that might affect employee safety.

5. Safety instruction for all employees to recognize and avoid hazards associated with underground activities.

6. Methods of communications between the work face, the bottom of the shaft, and the surface.

7. Actions to be taken in case of emergencies.

8. Recognizing conditions under which operations are classified as "gassy" or "potentially gassy" and the work restrictions that accompany such classifications.

9. Air monitoring and atmospheric testing for all underground construction operations.

10. Ventilation and illumination.

11. Fire prevention and control.

12. Welding, cutting and other hot work.

13. Inspecting the work area for ground stability.

14. Blasting.

15. Inspecting drilling and haulage equipment before use.

16. Electrical safety.

17. Hoisting operations unique to underground construction.

The foregoing proposed changes in the regulations of the Alaska Department of Labor are intended to establish minimum safety and health requirements for places of employment in the State, and to be at least as effective as those promulgated by the U.S. Secretary of Labor.

Notice is also given that any person interested may present oral and written statements or arguments relevant to the proposed action at a hearing to be held on

November 28, 1989, 9:30 a.m.

Department of Labor Building
1111 W. 8th Street
Room 303
Juneau, AK

November 29, 1989, 9:30

Department of Labor Building
3301 Eagle Street
Room 304
Anchorage, AK

November 30, 1989, 9:30 a.m.

Division of Labor Standards and Safety
Regional Office Building
675 Seventh Street
Fairbanks, Alaska

In addition, written statements or arguments may be sent to the Commissioner of Labor, P.O. Box 21149, Juneau, Alaska 99802-1149, to be received no later than November 30, 1989.

This action is not expected to require an increased appropriation.

Copies of the proposed regulations may be obtained by writing to the following offices of the Department of Labor:

Division of Labor Standards and Safety
P.O. Box 21149
Juneau, Alaska 99802-1149

Division of Labor Standards and Safety
P.O. Box 107022
Anchorage, Alaska 99510-7022

Division of Labor Standards and Safety
Regional Office Building
675 Seventh Street
Fairbanks, Alaska 99701-4596

The Alaska Department of Labor, upon its own motion or at the instance of any interested person, may at the hearing or after it adopt proposals within the scope of this notice without further notice or may decide to take no action on them.

Date 10/6/89

Jim Sampson, Commissioner

CHAPTER 61.
OCCUPATIONAL SAFETY AND HEALTH

ARTICLE 1.
ADOPTION OF STANDARDS.

* Section 1. 8 AAC 61.010 is amended to read:

8 AAC 61.010. STANDARDS. The Alaska Department of Labor adopts by reference subchapters 1 (effective 6/30/73, as amended as of 5/21/89); 2 (effective 9/26/74, as amended as of 2/4/89); 3 (effective 6/30/73, as amended as of 2/4/89); 4 (effective 6/30/73, as amended as of 8/23/89); 5 (effective 9/26/74, as amended as of / /); 6 (effective 8/21/78, as amended as of 4/15/87); 7 (effective 3/27/76, as amended as of 2/4/89); 8 (effective 1/26/78, as amended as of 5/22/88); 9 (effective 1/26/78, as amended as of 2/4/89); 10 (effective 6/18/87, as amended as of 12/13/87); 11 (effective 8/11/76, as amended as of 8/23/80); 12 (effective 8/11/76, as amended as of 8/23/80); 13 (effective 8/11/76); 14 (effective 9/30/76, as amended as of 10/14/87); 15 (effective 9/12/84, as amended as of 10/1/88); and 16 (effective 9/1/88) of the Alaska Occupational Safety and Health Standards (AOSAHS), as outlined below. These standards are adopted in accordance with AS 18.60.020, as the minimum standards to be followed throughout the State of Alaska. The standards are adopted by reference pursuant to a finding by the lieutenant governor that a detailed printing of the regulations in the Alaska Administrative Code would be impractical.

(Eff. 6/30/73, Register 46; am 9/26/74, Register 51; am 5/7/75, Register 54; am 11/22/75, Register 56; am 3/27/76, Register 57; am 5/7/76, Register 58; am 8/11/76, Register 59; am 9/30/76, Register 59; am 12/16/76, Register 60; am 4/23/77, Register 62; am 1/26/78, Register 65; am 8/21/78, Register 67; am 11/19/78, Register 68; am 12/24/78, Register 68; am 5/2/79, Register 70; am 10/21/79, Register 72; am 6/13/80, Register 74; am 7/25/80, Register 75; am 8/23/80, Register 75; am 5/30/82, Register 82; am 12/16/82, Register 84; am 3/20/83, Register 85; am 3/25/83, Register 85; am 6/26/83, Register 86; am 9/30/83, Register 87; am 2/19/84, Register 89; am 6/16/84, Register 90; am 9/12/84, Register 91; am 12/16/84, Register 92; am 2/1/85, Register 93; am 6/9/85, Register 94; am 1/8/86, Register 97; am 5/10/86, Register 98; am 7/12/86, Register 99; am 1/9/87, Register 101; am 1/11/87, Register 101; am 1/16/87, Register 101; am 1/18/87, Register 101; am 1/30/87, Register 101; am 4/15/87, Register 102; am 6/18/87, Register 102; am 8/13/87, Register 103; am 10/14/87, Register 104; addt'l am 10/14/87, Register 104; am 12/13/87, Register 104; am 3/26/88, Register 105; am 3/30/88, Register 105; am 4/21/88, Register 106; am 5/22/88, Register 106; am 6/19/88, Register 106; am 9/1/88, Register 107; am 9/30/88, Register 107; am 10/1/88, Register 107; am 2/4/89, Register 109; am 4/21/89, Register 110; am 5/21/89, Register 110; am 8/23/89, Register 111; am / / , Register)

Authority: AS 18.60.020
AS 18.60.030
AS 18.60.075
AS 44.62.130

Note to Publisher: Outline of standards remains unchanged.

05.190 is repealed and readopted to read:

05.190 Underground construction. (a) Scope and application.

(1) This section applies to the construction of underground tunnels, shafts, chambers, and passageways. This section also applies to cut-and-cover excavations which are both physically connected to ongoing underground construction operations within the scope of this section, and covered in such a manner as to create conditions characteristic of underground construction.

(2) This section does not apply to the following:

(A) Excavation and trenching operations covered by 05.160, such as foundation operations for above-ground structures that are not physically connected to underground construction operations, and surface excavation; nor

(B) Underground electrical transmission and distribution lines, as addressed in 05.220.

(b) Access and egress.

(1) The employer shall provide and maintain safe means of access and egress to all work stations.

(2) The employer shall provide access and egress in such a manner that employees are protected from being struck by excavators, haulage machines, trains and other mobile equipment.

(3) The employer shall control access to all openings to prevent unauthorized entry underground. Unused chutes, manways, or other openings must be tightly covered, bulkheaded, or fenced off, and must be posted with warning signs indicating "Keep Out" or similar language. Completed or unused sections of the underground facility must be barricaded.

(c) Check-in/check-out. The employer shall maintain a check-in/check-out procedure that will ensure that above-ground personnel can determine an accurate count of the number of persons underground in the event of an emergency. However, this procedure is not required when the construction of underground facilities designed for human occupancy has been sufficiently completed so that the permanent environmental controls are effective, and when the remaining construction activity will not cause any environmental hazard or structural failure within the facilities.

(d) Safety instruction. All employees shall be instructed in the recognition and avoidance of hazards associated with

underground construction activities including, where appropriate, the following subjects:

(1) Air monitoring;

(2) Ventilation;

(3) Illumination;

(4) Communications;

(5) Flood control;

(6) Mechanical equipment;

(7) Personal protective equipment;

(8) Explosives;

(9) Fire prevention and protection; and

(10) Emergency procedures, including evacuation plans and check-in/check-out systems.

(e) Notification.

(1) Oncoming shifts shall be informed of any hazardous occurrences or conditions that have affected or might affect employee safety, including liberation of gas, equipment failures, earth or rock slides, cave-ins, floodings, fires or explosions.

(2) The employer shall establish and maintain direct communications for coordination of activities with other employers whose operations at the jobsite affect or may affect the safety of employees underground.

(f) Communications. (1) When natural unassisted voice communication is ineffective, a power-assisted means of voice communication must be used to provide communication between the work face, the bottom of the shaft, and the surface.

(2) Two effective means of communication, at least one of which must be voice communication, must be provided in all shafts which are being developed or used either for personnel access or for hoisting. Additional requirements for hoist operator communication are contained in paragraph (t)(3) of this section.

(3) Powered communication systems must operate on an independent power supply, and must be installed so that the use of or disruption of any one phone or signal location will not disrupt the operation of the system from any other location.

(4) Communication systems must be tested upon initial entry of each shift to the underground, and as often as necessary at later times, to ensure that they are in working order.

(5) Any employee working alone underground in a hazardous location, who is both out of the range of natural unassisted voice communication and not under observation by other persons, must be provided with an effective means of obtaining assistance in an emergency.

(g) Emergency provisions.

(1) Hoisting capability. When a shaft is used as a means of egress, the employer shall make advance arrangements for power-assisted hoisting capability to be readily available in an emergency, unless the regular hoisting means can continue to function in the event of an electrical power failure at the jobsite. Such hoisting means must be designed so that the load hoist drum is powered in both directions of rotation and so that the brake is automatically applied upon power release or failure.

(2) Self-rescuers. The employer shall provide self-rescuers having current approval from the National Institute for Occupational Safety and Health and the Mine Safety and Health Administration to be immediately available to all employees at work stations in underground areas where employees might be trapped by smoke or gas. The selection, issuance, use, and care of respirators must be in accordance with section 05.050(d)(2) and (3) of this subchapter.

(3) Designated person. At least one designated person must be on duty above ground whenever any employee is working underground. This designated person must be responsible for securing immediate aid and keeping an accurate count of employees underground in case of emergency. The designated person must not be so busy with other responsibilities that the counting function is encumbered.

(4) Emergency lighting. Each employee underground must have an acceptable portable hand lamp or cap lamp in his or her work area for emergency use, unless natural light or an emergency lighting system provides adequate illumination for escape.

(5) Rescue teams.

(A) On jobsites where 25 or more employees work underground at one time, the employer shall provide (or make arrangements in advance with locally available rescue services to provide) at least two 5-person rescue teams, one on the jobsite or within one-half hour travel time from the entry point, and the other within 2 hours travel time.

(B) On jobsites where less than 25 employees work underground at one time, the employer shall provide (or make arrangements in advance with locally available rescue services to provide) at least one 5-person rescue team to be either on the jobsite or within one-half hour travel time from the entry point.

(C) Rescue team members shall be qualified in rescue procedures, the use and limitations of breathing apparatus, and the use of firefighting equipment. Qualifications shall be reviewed at least annually.

(D) On jobsites where flammable or noxious gases are encountered or anticipated in hazardous quantities, rescue team members shall practice donning and using self-contained breathing apparatus monthly.

(E) The employer shall ensure that rescue teams are familiar with conditions at the jobsite.

(h) Hazardous classifications.

(1) Potentially gassy operations. Underground construction operations must be classified as potentially gassy if either:

(A) Air monitoring discloses 10 percent or more of the lower explosive limit for methane or other flammable gases measured at 12 inches (304.8 mm) $\pm$ 0.25 inch (6.35 mm) from the roof, face, floor or walls in any underground work area for more than a 24-hour period; or

(B) The history of the geographical area or geological formation indicates that 10 percent or more of the lower explosive limit for methane or other flammable gases is likely to be encountered in such underground operations.

(2) Gassy operations. Underground construction operations must be classified as gassy if:

(A) Air monitoring discloses 10 percent or more of the lower explosive limit for methane or other flammable gases measured at 12 inches (304.8mm) $\pm$ 0.25 inch (6.35 mm) from the roof, face, floor or walls in any underground work area for more than a 24-hour period; or

(B) There has been an ignition of methane or of other flammable gases emanating from the strata that indicates the presence of such gases; or

(C) The underground construction operation is both connected to an underground work area which is currently

classified as gassy and is also subject to a continuous course of air containing the flammable gas concentration.

(3) Declassification to potentially gassy operations. Underground construction gassy operations may be declassified to Potentially Gassy when air monitoring results remain under 10 percent of the lower explosive limit for methane or other flammable gases for three consecutive days.

(i) Gassy operations-additional requirements.

(1) Only acceptable equipment, maintained in suitable condition, may be used in gassy operations.

(2) Mobile diesel-powered equipment used in gassy operations shall be either approved in accordance with the requirements of 30 CFR Part 36 (formerly Schedule 31) by MSHA, or must be demonstrated by the employer to be fully equivalent to such MSHA-approved equipment, and must be operated in accordance with that Part.

(3) Each entrance to a gassy operation must be prominently posted with signs notifying all entrants of the gassy classification.

(4) Smoking is to be prohibited in all gassy operations and the employer shall be responsible for collecting all personal sources of ignition, such as matches and lighters, from all persons entering a gassy operation.

(5) A fire watch as described in 05.100(c)(5) must be maintained when hot work is performed.

(6) Once an operation has met the criteria in (h)(2) of this subsection warranting classification as gassy, all operations in the affected area, except the following, must be discontinued until the operation either is in compliance with all of the gassy operation requirements or has been declassified in accordance with (h)(3) of this subsection:

(A) Operations related to the control of the gas concentration;

(B) Installation of new equipment, or conversion of existing equipment, to comply with this subsection; and

(C) Installation of above-ground controls for reversing the air flow.

(j) Air quality and monitoring.

(1) General. Air quality limits and control requirements for construction are found in 05.040(f), except as modified by this subsection.

(A) The employer shall assign a competent person to perform all air monitoring required by this subsection.

(B) Where this subsection requires monitoring of airborne contaminants "as often as necessary," the competent person shall make a reasonable determination as to which substances to monitor and how frequently to monitor, considering at least the following factors:

(i) Location of jobsite: Proximity to fuel tanks, sewers, gas lines, old landfills, coal deposits, and swamps;

(ii) Geology: Geological studies of the jobsite, particularly involving the soil type and its permeability;

(iii) History: Presence of air contaminants in nearby jobsites, changes in levels of substances monitored on the prior shift; and

(iv) Work practices and jobsite conditions: the use of diesel engines, use of explosives, use of fuel gas, volume and flow of ventilation, visible atmospheric conditions, decompression of the atmosphere, welding, cutting and hot work, and the employees physical reactions to working underground.

(C) The atmosphere in all underground work areas must be tested as often as necessary to assure that the atmosphere at normal atmospheric pressure contains at least 19.5 percent oxygen and no more than 22 percent oxygen.

(D) Tests for oxygen content must be made before tests for air contaminants.

(E) The atmosphere in all underground work areas must be tested quantitatively for carbon monoxide, nitrogen dioxide, hydrogen sulfide, and other toxic gases, dusts, vapors, mists, and fumes as often as necessary to ensure that the permissible exposure limits prescribed in 05.040(f) are not exceeded.

(F) The atmosphere in all underground work areas must be tested quantitatively for methane and other flammable gases as often as necessary to determine:

(i) Whether action is to be taken under (1)(O), (P), and (Q), of this subsection; and

(ii) Whether an operation is to be classified potentially gassy or gassy under (h) of this section.

(G) If diesel-engine or gasoline-engine driven ventilating fans or compressors are used, an initial test must be made of the inlet air of the fan or compressor, with the engines operating, to ensure that the air supply is not contaminated by engine exhaust.

(H) Testing must be performed as often as necessary to ensure that the ventilation requirements of (k) of this section are met.

(I) When rapid excavation machines are used, a continuous flammable gas monitor shall be operated at the face with the sensor(s) placed as high and close to the front of the machine's cutter head as practicable.

(J) Whenever air monitoring indicates the presence of 5 ppm or more of hydrogen sulfide, a test must be conducted in the affected underground work area(s), at least at the beginning and midpoint of each shift, until the concentration of hydrogen sulfide has been less than 5 ppm for 3 consecutive days.

(K) Whenever hydrogen sulfide is detected in an amount exceeding 10 ppm, a continuous sampling and indicating hydrogen sulfide monitor must be used to monitor the affected work area.

(L) Employees shall be informed when a concentration of 10 ppm hydrogen sulfide is exceeded.

(M) The continuous sampling and indicating hydrogen sulfide monitor must be designed, installed, and maintained to provide a visual and aural alarm when the hydrogen sulfide concentration reaches 20 ppm to signal that additional measures, such as respirator use, increased ventilation, or evacuation, might be necessary to maintain hydrogen sulfide exposure below the permissible exposure limit.

(N) When the competent person determines, on the basis of air monitoring results or other information, that air contaminants may be present in sufficient quantity to be dangerous to life, the employer shall:

(i) Prominently post a notice at all entrances to the underground jobsite to inform all entrants of the hazardous condition; and

(ii) Ensure that the necessary precautions are taken.

(O) Whenever five percent or more of the lower explosive limit for methane or other flammable gases is detected in any underground work area(s) or in the air return, steps must be taken to increase ventilation air volume or otherwise control the gas concentration, unless the employer is operating in accordance with the potentially gassy or gassy operation requirements. Such additional ventilation controls may be discontinued when gas concentrations are reduced below five percent of the lower explosive limit, but must be reinstituted whenever the five percent level is exceeded.

(P) Whenever 10 percent or more of the lower explosive limit for methane or other flammable gases is detected in the vicinity of welding, cutting, or other hot work, such work must be suspended until the concentration of such flammable gas is reduced to less than 10 percent of the lower explosive limit.

(Q) Whenever 20 percent or more of the lower explosive limit for methane or other flammable gases is detected in any underground work area(s) or in the air return:

(i) All employees, except those necessary to eliminate the hazard, shall be immediately withdrawn to a safe location above ground; and

(ii) Electrical power, except for acceptable pumping and ventilation equipment, must be cut off to the area endangered by the flammable gas until the concentration of such gas is reduced to less than 20 percent of the lower explosive limit.

(2) Additional monitoring for potentially gassy and gassy operations. Operations which meet the criteria for potentially gassy and gassy operations set forth in (h) of this section must be subject to the additional monitoring requirements of this paragraph.

(A) A test for oxygen content must be conducted in the affected underground work areas and work areas immediately adjacent to such areas at least at the beginning and midpoint of each shift.

(B) When using rapid excavation machines, continuous automatic flammable gas monitoring equipment must be used to monitor the air at the heading, on the rib, and in the return air duct. The continuous monitor must signal the heading, and shut down electric power in the affected

underground work area, except for acceptable pumping and ventilation equipment, when 20 percent or more of the lower explosive limit for methane or other flammable gases is encountered.

(C) A manual flammable gas monitor must be used as needed but at least at the beginning and midpoint of each shift, to ensure that the limits prescribed in (h) and (j) of this section are not exceeded. In addition, a manual electrical shut down control must be provided near the heading.

(D) Local gas tests must be made prior to and continuously during any welding, cutting, or other hot work.

(E) In underground operations driven by drill-and-blast methods, the air in the affected area must be tested for flammable gas prior to re-entry after blasting, and continuously when employees are working underground.

(3) Recordkeeping. A record of all air quality tests must be maintained above ground at the worksite and be made available to the Commissioner upon request. The record must include the location, date, time, substance and amount monitored. Records of exposures to toxic substances must be retained in accordance with Title 8, sections 61.260 and 270 of the Alaska Administrative Code. All other air quality test records must be retained until completion of the project.

(k) Ventilation.

(1) Fresh air must be supplied to all underground work areas in sufficient quantities to prevent dangerous or harmful accumulation of dust, fumes, mists, vapors or gases.
Mechanical ventilation must be provided in all underground work areas except when the employer can demonstrate that natural ventilation provides the necessary air quality through sufficient air volume and air flow.

(2) A minimum of 200 cubic feet (5.7 m^3) of fresh air per minute must be supplied for each employee underground.

(3) The linear velocity of air flow in the tunnel bore, in shafts, and in all other underground work areas must be at least 30 feet (9.15 m) per minute where blasting or rock drilling is conducted, or where other conditions likely to produce dust, fumes, mists, vapors, or gases in harmful or explosive quantities are present.

(4) The direction of mechanical air flow must be reversible.

(5) Following blasting, ventilation systems must exhaust smoke and fumes to the outside atmosphere before work is resumed in affected areas.

(6) Ventilation doors must be designed and installed so that they remain closed when in use, regardless of the direction of the air flow.

(7) When ventilation has been reduced to the extent that hazardous levels of methane or flammable gas may have accumulated, a competent person shall test all affected areas after ventilation has been restored and shall determine whether the atmosphere is within flammable limits before any power, other than for acceptable equipment, is restored or work is resumed.

(8) Whenever the ventilation system has been shut down with all employees out of the underground area, only competent persons authorized to test for air contaminants may be allowed underground until the ventilation has been restored and all affected areas have been tested for air contaminants and declared safe.

(9) When drilling rock or concrete, appropriate dust control measures must be taken to maintain dust levels within limits set in 05.040(f). Such measures may include, but are not limited to, wet drilling, the use of vacuum collectors, and water mix spray systems.

(10) Internal combustion engines, except diesel-powered engines on mobile equipment, are prohibited underground. Mobile diesel-powered equipment used underground in atmospheres other than gassy operations must be either approved by MSHA in accordance with the provisions of 30 CFR Part 32 (formerly Schedule 24), or shall be demonstrated by the employer to be fully equivalent to such MSHA-approved equipment, and must be operated in accordance with that Part. (Each brake horsepower of a diesel engine requires at least 100 cubic feet (28.32 m^3) of air per minute for suitable operation in addition to the air requirements for personnel. Some engines may require a greater amount of air to ensure that the allowable levels of carbon monoxide, nitric oxide, and nitrogen dioxide are not exceeded.)

(11) Potentially gassy or gassy operations must have ventilation systems installed which shall:

(A) Be constructed of fire-resistant materials; and

(B) Have acceptable electrical systems, including fan motors.

(12) Gassy operations must be provided with controls located above ground for reversing the air flow of ventilation systems.

(13) In potentially gassy or gassy operations, wherever mine-type ventilation systems using an offset main fan installed on the surface are used, they must be equipped with explosion-doors or a weak-wall having an area at least equivalent to the cross-sectional area of the airway.

(l) Illumination.

(1) Illumination requirements applicable to underground construction operations are found in Table D-3 of 05.040(g).

(2) Only acceptable portable lighting equipment may be used within 50 feet (15.24 m) of any underground heading during explosives handling.

(m) Fire prevention and control. Fire prevention and protection requirements applicable to underground construction operations are found in 05.060, except as modified by the following additional standards:

(1) Open flames and fires are prohibited in all underground construction operations except as permitted for welding, cutting and other hot work operations in (n) of this section.

(2) Smoking may be allowed only in areas free of fire and explosion hazards.

(3) Readily visible signs prohibiting smoking and open flames must be posted in areas having fire or explosion hazards.

(4) The employer may store underground no more than a 24-hour supply of diesel fuel for the underground equipment used at the worksite.

(5) The piping of diesel fuel from the surface to an underground location is permitted only if:

(A) Diesel fuel is contained at the surface in a tank which has a maximum capacity of no more than the amount of fuel required to supply for a 24-hour period the equipment serviced by the underground fueling station;

(B) The surface tank is connected to the underground fueling station by an acceptable pipe or hose system that is controlled at the surface by a valve, and at the shaft bottom by a hose nozzle;

(C) The pipe is empty at all times except when transferring diesel fuel from the surface tank to a piece of equipment in use underground; and

(D) Hoisting operations in the shaft are suspended during refueling operations if the supply piping in the shaft is not protected from damage.

(6) Gasoline may not be carried, stored, or used underground.

(7) Acetylene, liquefied petroleum gas, and Methylacetylene Propadiene Stabilized gas may be used underground only for welding, cutting and other hot work, and only in accordance with 05.100 and (j), (k), (m) and (n) of this section.

(8) Oil, grease, and diesel fuel stored underground must be kept in tightly sealed containers in fire-resistant areas at least 300 feet (91.44 m) from underground explosive magazines, and at least 100 feet (30.48 m) from shaft stations and steeply inclined passageways. Storage areas must be positioned or diked so that the contents of ruptured or over-turned containers will not flow from the storage area.

(9) Flammable or combustible materials may not be stored above ground within 100 feet (30.48 m) of any access opening to any underground operation. Where this is not feasible because of space limitations at the jobsite, such materials may be located within the 100-foot limit, provided that:

(A) They are located as far as practicable from the opening; and

(B) Either a fire-resistant barrier of not less than one-hour rating is placed between the stored material and the opening, or additional precautions are taken which will protect the materials from ignition sources.

(10) Fire-resistant hydraulic fluids must be used in hydraulically-actuated underground machinery and equipment unless such equipment is protected by a fire suppression system or by multi-purpose fire extinguisher(s) rated at sufficient capacity for the type and size of hydraulic equipment involved, but rated at least 4A:40B:C.

(11) Electrical installations in underground areas where oil, grease, or diesel fuel are stored must be used only for lighting fixtures.

(12) Lighting fixtures in storage areas, or within 25 feet (7.62 m) of underground areas where oil, grease or diesel fuel

are stored, must be approved for Class I, Division 2 locations, in accordance with 05.110.

(13) Leaks and spills of flammable or combustible fluids must be cleaned up immediately.

(14) A fire extinguisher of at least 4A:40B:C rating or other equivalent extinguishing means must be provided at the head pulley and at the tail pulley of underground belt conveyors.

(15) Any structure located underground or within 100 feet (30.48 m) of an opening to the underground must be constructed of material having a fire-resistance rating of a least one hour.

(n) Welding, cutting, and other hot work. In addition to the requirements of 05.100, the following requirements apply to underground welding, cutting, and other hot work:

(1) No more than the amount of fuel gas and oxygen cylinders necessary to perform welding, cutting or other hot work during the next 24-hour period may be permitted underground.

(2) Noncombustible barriers must be installed below welding, cutting, or other hot work being done in or over a shaft or raise.

(o) Ground support.

(1) Portal areas. Portal openings and access areas must be guarded by shoring, fencing, head walls, shotcreting or other equivalent protection to ensure safe access of employees and equipment. Adjacent areas must be scaled or otherwise secured to prevent loose soil, rock or fractured materials from endangering the portal and access area.

(2) Subsidence areas. The employer shall ensure ground stability in hazardous subsidence areas by shoring, by filling in, or by erecting barricades and posting warning signs to prevent entry.

(3) Underground areas.

(A) A competent person shall inspect the roof, face, and walls of the work area at the start of each shift and as often as necessary to determine ground stability.

(B) Competent persons conducting such inspections must be protected from loose ground by location, ground support or equivalent means.

(C) Ground conditions along haulageways and travelways must be inspected as frequently as necessary to ensure safe passage.

(D) Loose ground that might be hazardous to employees must be taken down, scaled or supported.

(E) Torque wrenches must be used wherever bolts that depend on torsionally applied force are used for ground support.

(F) A competent person shall determine whether rock bolts meet the necessary torque, and shall determine the testing frequency in light of the bolt system, ground conditions and the distance from vibration sources.

(G) Suitable protection must be provided for employees exposed to the hazard of loose ground while installing ground support systems.

(H) Support sets must be installed so that the bottoms have sufficient anchorage to prevent ground pressures from dislodging the support base of the sets. Lateral bracing (collar bracing, tie rods, or spreaders) must be provided between immediately adjacent sets to ensure added stability.

(I) Damaged or dislodged ground supports that create a hazardous condition must be promptly repaired or replaced. When replacing supports, the new supports must be installed before the damaged supports are removed.

(J) A shield or other type of support must be used to maintain a safe travelway for employees working in dead-end areas ahead of any support replacement operation.

(4) Shafts.

(A) Shafts and wells over 5 feet (1.53 m) in depth that employees must enter must be supported by a steel casing, concrete pipe, timber, solid rock or other suitable material.

(B) The full depth of the shaft must be supported by casing or bracing except where the shaft penetrates into solid rock having characteristics that will not change as a result of exposure. Where the shaft passes through earth into solid rock, or through solid rock into earth, and where there is potential for shear, the casing or bracing must extend at least 5 feet (1.53 m) into the solid rock. When the shaft terminates in solid rock, the casing or bracing must extend to the end of the shaft or 5 feet (1.53 m) into the solid rock, whichever is less.

(C) The casing or bracing must extend 42 inches (1.07 m) plus or minus 3 inches (8 cm) above ground level, except that the minimum casing height may be reduced to 12 inches (0.3 m), provided that a standard railing is installed; that the ground adjacent to the top of the shaft is sloped away from the shaft collar to prevent entry of liquids; and that effective barriers are used to prevent mobile equipment operating near the shaft from jumping over the 12 inch (0.3 m) barrier.

(D) After blasting operations in shafts, a competent person shall determine if the walls, ladders, timbers, blocking, or wedges have loosened. If so, necessary repairs must be made before employees other than those assigned to make the repairs are allowed in or below the affected areas.

(p) Blasting. This subsection applies in addition to the requirements for blasting and explosives operations, including handling of misfires, which are found in Subchapter 09, Alaska Explosive Code.

(1) Blasting wires must be kept clear of electrical lines, pipes, rails, and other conductive material, excluding earth, to prevent explosives initiation or employee exposure to electric current.

(2) Following blasting, an employee may not enter a work area until the air quality meets the requirements of (j) of this section.

(q) Drilling.

(1) A competent person shall inspect all drilling and associated equipment prior to each use. Equipment defects affecting safety must be corrected before the equipment is used.

(2) The drilling area must be inspected for hazards before the drilling operation is started.

(3) Employees may not be allowed on a drill mast while the drill bit is in operation or the drill machine is being moved.

(4) When a drill machine is being moved from one drilling area to another, drill steel, tools, and other equipment must be secured and the mast must be placed in a safe position.

(5) Receptacles or racks must be provided for storing drill steel located on jumbos.

(6) Employees working below jumbo decks shall be warned whenever drilling is about to begin.

(7) Drills on columns must be anchored firmly before starting drilling, and must be retightened as necessary thereafter.

(8) The employer shall provide mechanical means on the top deck of a jumbo for lifting unwieldy or heavy material.

(9) When jumbo decks are over 10 feet (3.05 m) in height, the employer shall install stairs wide enough for two persons.

(10) Jumbo decks more than 10 feet (3.05 m) in height must be equipped with guardrails on all open sides, excluding access openings of platforms, unless an adjacent surface provides equivalent fall protection.

(11) Only employees assisting the operator may be allowed to ride on jumbos, unless the jumbo deck meets the requirements of (r)(11) of this section.

(12) Jumbos must be chocked to prevent movement while employees are working on them.

(13) Walking and working surfaces of jumbos must be maintained to prevent the hazards of slipping, tripping and falling.

(14) Jumbo decks and stair treads must be designed to be slip resistant and secured to prevent accidental displacement.

(15) Scaling bars must be available at scaling operations and must be maintained in good condition at all times. Blunted or severely worn bars may not be used.

(16) Blasting holes may not be drilled through blasted rock (muck) or water.

(17) Employees in a shaft must be protected either by location or by suitable barrier(s) if powered mechanical loading equipment is used to remove muck containing unfired explosives.

(18) A caution sign reading "Buried Line," or similar wording must be posted where air lines are buried or otherwise hidden by water or debris.

(r) Haulage.

(1) A competent person shall inspect haulage equipment before each shift.

(2) Equipment defects affecting safety and health must be corrected before the equipment is used.

(3) Powered mobile haulage equipment must have suitable means of stopping.

(4) Powered mobile haulage equipment, including trains, must have audible warning devices to warn employees to stay clear. The operator must sound the warning device before moving the equipment and whenever necessary during travel.

(5) The operator shall assure that lights which are visible to employees at both ends of any mobile equipment, including a train, are turned on whenever the equipment is operating.

(6) In those cabs where glazing is used, the glass shall be safety glass, or its equivalent, and must be maintained and cleaned so that vision is not obstructed.

(7) Anti-roll back devices or brakes must be installed on inclined conveyor drive units to prevent conveyors from inadvertently running in reverse.

(8) Employees may not be permitted to ride a power-driven chain, belt, or bucket conveyor unless the conveyor is specifically designed for the transportation of persons.

(9) Endless belt-type manlifts are prohibited in underground construction.

(10) General requirements applicable to conveyors used in underground construction are found in 05.140(f).

(11) No employee may ride haulage equipment unless it is equipped with seating for each passenger and protects passengers from being struck, crushed, or caught between other equipment or surfaces. Members of train crews may ride on a locomotive if it is equipped with handholds and nonslip steps or footboards. Requirements applicable to underground construction for motor vehicle transportation of employees are found in 05.150(b).

(12) Powered mobile haulage equipment, including trains, may not be left unattended unless the master switch or motor is turned off; operating controls are in neutral or park position; and the brakes are set, or equivalent precautions are taken to prevent rolling.

(13) Whenever rails serve as a return for a trolley circuit, both rails must be bonded at every joint and crossbonded every 200 feet (60.96 m).

(14) When dumping cars by hand, the car dumps must have tiedown chains, bumper blocks, or other locking or holding devices to prevent the cars from overturning.

(15) Rocker-bottom or bottom-dump cars must be equipped with positive locking devices to prevent unintended dumping.

(16) Equipment to be hauled must be loaded and secured to prevent sliding or dislodgement.

(17) Mobile equipment, including rail-mounted equipment, must be stopped for manual connecting or service work.

(18) Employees may not reach between moving cars during coupling operations.

(19) Couplings may not be aligned, shifted or cleaned on moving cars or locomotives.

(20) Safety chains or other connections must be used in addition to couplers to connect man cars or powder cars whenever the locomotive is uphill of the cars.

(21) When the grade exceeds one percent and there is a potential for runaway cars, safety chains or other connections must be used in addition to couplers to connect haulage cars or, as an alternative, the locomotive must be downhill of the train.

(22) Such safety chains or other connections must be capable of maintaining connection between cars in the event of either coupler disconnect, failure or breakage.

(23) Parked rail equipment must be chocked, blocked, or have brakes set to prevent inadvertent movement.

(24) Berms, bumper blocks, safety hooks, or equivalent means must be provided to prevent overtravel and overturning of haulage equipment at dumping locations.

(25) Bumper blocks or equivalent stopping devices must be provided at all track dead ends.

(26) Only small handtools, lunch pails or similar small items may be transported with employees in man-cars, or on top of a locomotive.

(27) When small hand tools or other small items are carried on top of a locomotive, the top must be designed or modified to retain them while traveling.

(28) Where switching facilities are available, occupied personnel cars must be pulled, not pushed. If personnel cars must be pushed and visibility of the track ahead is hampered, then a qualified person shall be stationed in the lead car to give signals to the locomotive operator.

(29) Crew trips must consist of personnel loads only.

(s) Electrical safety. This subsection applies in addition to the general requirements for electrical safety which are found in 05.110.

(1) Electric power lines must be insulated or located away from water lines, telephone lines, air lines, or other conductive materials so that a damaged circuit will not energize the other systems.

(2) Lighting circuits must be located so that movement of personnel or equipment will not damage the circuits or disrupt service.

(3) Oil-filled transformers may not be used underground unless they are located in a fire-resistant enclosure suitably vented to the outside and surrounded by a dike to retain the contents of the transformers in the event of rupture.

(t) Hoisting unique to underground construction. Except as modified by this subsection, the following provisions of 05.140 apply: Requirements for cranes are found in 05.140. Section 05.140(a)(8) applies to crane-hoisting of personnel, except that the limitation in 05.140(a)(8)(B) does not apply to the routine access of employees to the underground via a shaft. Requirements for material hoists are found in 05.140 (c)(1)(A) and (2)(A). Requirements for personnel hoists are found in the personnel hoist requirements of 05.140(c)(1)(A) and (c)(3)(A) and in the elevator requirements of 05.140(c)(1) and (4).

(1) General requirements for cranes and hoists.

(A) Materials, tools, and supplies being raised or lowered, whether within a cage or otherwise, must be secured or stacked in a manner to prevent the load from shifting, snagging or falling into the shaft.

(B) A warning light suitably located to warn employees at the shaft bottom and subsurface shaft entrances must flash whenever a load is above the shaft bottom or subsurface entrances, or the load is being moved in the shaft. This subsection does not apply to fully enclosed hoistways.

(C) Whenever a hoistway is not fully enclosed and employees are at the shaft bottom, conveyances or equipment must be stopped at least 15 feet (4.57 m) above the bottom of the shaft and held there until the signalman at the bottom of the shaft directs the operator to continue lowering the load, except that the load may be lowered without stopping if the

load or conveyance is within full view of a bottom signalman who is in constant voice communication with the operator.

(D) Before maintenance, repairs, or other work is begun in the shaft served by a cage, skip, or bucket, the operator and other employees in the area shall be informed and given suitable instructions.

(E) A sign warning that work is being done in the shaft must be installed at the shaft collar, at the operator's station, and at each underground landing.

(F) Any connection between the hoisting rope and the cage or skip must be compatible with the type of wire rope used for hoisting.

(G) Spin-type connections, where used, must be maintained in a clean condition and protected from foreign matter that could affect their operation.

(H) Cage, skip, and load connections to the hoist rope must be made so that the force of the hoist pull, vibration, misalignment, release of lift force, or impact will not disengage the connection. Moused or latched open-throat hooks do not meet this requirement.

(I) When using wire rope wedge sockets, means must be provided to prevent wedge escapement and to ensure that the wedge is properly seated.

(2) Additional requirements for cranes. Cranes must be equipped with a limit switch to prevent overtravel at the boom tip. Limit switches are to be used only to limit travel of loads when operational controls malfunction and may not be used as a substitute for other operational controls.

(3) Additional requirements for hoists.

(A) Hoists must be designed so that the load hoist drum is powered in both directions of rotation, and so that brakes are automatically applied upon power release or failure.

(B) Control levers shall be of the "deadman type" which return automatically to their center (neutral) position upon release.

(C) When a hoist is used for both personnel hoisting and material hoisting, load and speed ratings for personnel and for materials must be assigned to the equipment.

(D) Material hoisting may be performed at speeds higher than the rated speed for personnel hoisting if the hoist and components have been designed for such higher speeds and if shaft conditions permit.

(E) Employees may not ride on top of any cage, skip or bucket except when necessary to perform inspection or maintenance of the hoisting system, in which case they must be protected by a body belt/harness system to prevent falling.

(F) Personnel and materials (other than small tools and supplies secured in a manner that will not create a hazard to employees) may not be hoisted together in the same conveyance. However, if the operator is protected from the shifting of materials, then the operator may ride with materials in cages or skips which are designed to be controlled by an operator within the cage or skip.

(G) Line speed may not exceed the design limitations of the system.

(H) Hoists must be equipped with landing level indicators at the operator's station. Marking of the hoist rope does not satisfy this requirement.

(I) Whenever glazing is used in the hoist house, it must be safety glass, or its equivalent, and be free of distortions and obstructions.

(J) A fire extinguisher that is rated at least 2A:10B:C (multi-purpose, dry chemical) must be mounted in each hoist house.

(K) Hoist controls must be arranged so that the operator can perform all operating cycle functions and reach the emergency power cutoff without having to reach beyond the operator's normal operating position.

(L) Hoists must be equipped with limit switches to prevent overtravel at the top and bottom of the hoistway.

(M) Limit switches are to be used only to limit travel of loads when operational controls malfunction and may not be used as a substitute for other operational controls.

(N) Hoist operators must be provided with a closed-circuit voice communication system to each landing station, with speaker-microphones so located that the operator can communicate with individual landing stations during hoist use.

(O) When sinking shafts 75 feet (22.86 m) in depth, cages, skips, and buckets that may swing, bump, or snag

against shaft sides or other structural protrusions must be guided by fenders, rails, ropes, or a combination of those means.

(P) When sinking shafts more than 75 feet (22.86 m) in depth, all cages, skips, and buckets must be rope or rail-guided to within a rail length from the sinking operation.

(Q) Cages, skips, and buckets in all completed shafts, or in all shafts being used as completed shafts, must be rope or rail-guided for the full length of their travel.

(R) Wire rope used in load lines of material hoists must be capable of supporting, without failure, at least five times the maximum intended load or the factor recommended by the rope manufacturer, whichever is greater. (See 05.140(c)(3)(N)(iii) for safety factors for wire rope used in personnel hoists.) The design factor must be calculated by dividing the breaking strength of wire rope, as reported in the manufacturer's rating tables, by the total static load, including the weight of the wire rope in the shaft when fully extended.

(S) A competent person shall visually check all hoisting machinery, equipment, anchorages, and hoisting rope at the beginning of each shift and during hoist use, as necessary.

(T) Each safety device must be checked by a competent person at least weekly during hoist use to ensure suitable operation and safe condition.

(U) In order to ensure suitable operation and safe condition of all functions and safety devices, each hoist assembly must be inspected and load-tested to 100 percent of its rated capacity: at the time of installation; after any repairs or alterations affecting its structural integrity; after the operation of any safety device; and annually when in use. The employer shall prepare a certification record which includes the date each inspection and load-test was performed; the signature of the person who performed the inspection and test; and a serial number or other identifier for the hoist that was inspected and tested. The most recent certification record must be maintained on file until completion of the project.

(V) Before hoisting personnel or material, the operator shall perform a test run of any cage or skip whenever it has been out of service for one complete shift, and whenever the assembly or components have been repaired or adjusted.

(W) Unsafe conditions must be corrected before using the equipment.

(4) Additional requirements for personnel hoists.

(A) Hoist drum systems must be equipped with at least two means of stopping the load, each of which must be capable of stopping and holding 150 percent of the hoist's rated line pull. A broken-rope safety, safety catch, or arrestment device is not a permissible means of stopping under this paragraph.

(B) The operator must remain within sight and sound of the signals at the operator's station.

(C) All sides of personnel cages must be enclosed by one-half inch (12.70 mm) wire mesh (not less than a No. 14 gauge or equivalent) to a height of not less than 6 feet (1.83 m). However, when the cage or skip is being used as a work platform, its sides may be reduced in height to 42 inches (1.07 m) when the conveyance is not in motion.

(D) All personnel cages must be provided with a positive locking door that does not open outward.

(E) All personnel cages must be provided with a protective canopy. The canopy must be made of steel plate, at least 3/16-inch (4.76 mm) in thickness, or material of equivalent strength and impact resistance. The canopy must be sloped to the outside, and so designed that a section may be readily pushed upward to afford emergency egress. The canopy must cover the top in such a manner as to protect those inside from objects falling in the shaft.

(F) Personnel platforms operating on guide rails or guide ropes must be equipped with broken-rope safety devices, safety catches or arrestment devices that will stop and hold 150 percent of the weight of the personnel platform and its maximum rated load.

(G) During sinking operations in shafts where guides and safeties are not yet used, the travel speed of the personnel platform may not exceed 200 feet (60.96 m) per minute. Governor controls set for 200 feet (60.96 m) per minute must be installed in the control system and must be used during personnel hoisting.

(H) The personnel platform may travel over the controlled length of the hoistway at rated speeds up to 600 feet (182.88 m) per minute during sinking operations in shafts where guides and safeties are used.

(I) The personnel platform may travel at rated speeds greater than 600 feet (182.88 m) per minute in completed shafts.

(u) Definitions.

(1) "Acceptable"--Any device, equipment, or appliance that is either approved by MSHA and maintained in permissible condition, or is listed or labeled for the class and location under 05.110.

(2) "Self-rescuer" --escape only, self-contained breathing apparatus using mouthpiece oxygen meeting MSHA and NIOSH certification requirements under 30 CFR, Part II and duration requirements of one hour.

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE P.O. BOX Y, JUNEAU 99811

(907) 465-3892

September 26, 1989

To: David Teal, Director
House Research Agency

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: Research request - Workplace Safety information

In preparation for consideration of legislation dealing with workplace safety issues, I'm writing to ask that your agency gather information on the following:

1. Los Angeles, California criminally prosecutes executives of companies where workplace safety violations have occurred that resulted in the death of a worker and the number of workplace deaths has subsequently dropped. I would like any information you can find on this issue, including copies of legislation, articles, publications, and background information for any other state where such prosecutions occur.

2. Scandinavian countries are highly industrialized with many hazardous occupations such as shipbuilding and iron work. Historically they have far fewer workplace deaths or serious injuries than their American counterparts. I would like any information you can find as to what is unique about the way these countries deal with workplace safety that may account for their excellent record and any articles, studies, publications or model legislation that may be useful to Alaska in trying to develop workplace safety programs.

3. Is there a "model" workplace safety program that is recognized by 1) Alaska, 2) any other state, or 3) the federal government, that could be used by Alaska businesses? In working with the workers' compensation reform package last year, we considered mandating a five percent rate decrease for any company that instituted a workplace safety program. The problem is we couldn't find a "model" program that was recognized by insurers or easily adopted into various workplace situations. If you can not find an existing program, please forward to me any articles, publications or studies you locate that could help us develop a model program.

Please contact Ginger Baim at 561-7629 if you have any questions or need additional information.

The Job Safety and Health Act of 1989

Title One: Joint Worker/Management Committees

A. Worker/Management Committees must be authorized to:
   1. Stop work until hazardous conditions are abated.
   2. Review appointment and employment of safety and health personnel.
   3. Conduct monthly inspections.
   4. Obtain employer's information concerning safety and health practices.
   5. Investigate accidents.

B. Worker participation must be legitimate.

C. Committee members must receive sufficient training.

D. All businesses with eleven or more employees must designate a safety and health officer.

Title Two: Rights of Victims and Whistleblowers

A. Victims must have:
   1. The right to obtain copies of OSHA investigative files and citations quickly and free of charge.
   2. The right to participate in appropriate deliberations and adjudicative processes, personally or through their representatives, as proposed in the Construction Safety and Health Improvement Act, S. 2518.

B. Whistleblowers must have:
   1. The right to disclose hazards which violate federal law or threaten health and safety.
   2. The right to participate in a federal agency proceeding relating to the dangerous activities of an employer.
   3. The right to refuse to perform dangerous work, as proposed in the Uniform Health and Safety Whistleblower Act, S. 2095.

Title Three: Civil and Criminal Penalty Structures

A. Civil penalty changes.
   1. Minimum penalty increases should:
      a. Adjust all civil penalties for inflation (a maximum willful violation penalty would be increased from $10,000 to $29,700).
      b. Tie future penalties to the cost-of-living index, as proposed in the Federal Civil Penalties Inflation Adjustment Act, S. 1014.
   2. NSWI recommends penalty increases of:
      a. $50,000 (up from $10,000) for a willful violation.
      b. $10,000 (up from $1,000) for a serious violation.

B. Penalty settlement guidelines.
   1. Penalty reductions must not exceed 30%.
   2. Settlement discussions must not occur until after abatement of hazardous conditions.

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122 South Michigan Avenue
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Chicago, Illinois 60603
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3. Written rationalizations for any reduction must be made available to all concerned parties.
4. Settlements over $100,000 should be entered into U.S. District Court records.

C. Criminal penalties.
1. Current maximum fine of $10,000 and a six month prison sentence for an individual or a corporation are too weak.
2. An increased fine of $250,000 for an individual and $500,000 for a corporation (as proposed by former Assistant Attorney General William Weld) should set the new standard.

D. Willfulness.
1. The current willfulness standard, requiring an employer to have a history of previous citations, and subsequently to have a repeat violation involving a fatality, makes it very difficult to convict serious offenders.
2. A new definition of willfulness, based on the California penal code, should be adopted.

E. Reckless endangerment.
1. A new standard for reckless endangerment should be based on the following criteria:
   a. Any violator with one serious or willful violation during the previous four years would potentially be liable of reckless endangerment.
   b. Willfulness would not be considered in applying the reckless endangerment test.
   c. Reckless endangerment would carry a maximum fine of $100,000 and a prison sentence of one-to-five years.

F. Fatalities.
1. Increase penalties for violations involving fatalities to a maximum prison sentence of 20 years, as proposed in S. 2518.

Title Four: Public Welfare Cost Recovery

A. In cases where federal funds provide support for victims of job-related injury or illness, the government should litigate to recover costs from employers for standards-related violations.
B. The Departments of Labor and Justice would litigate under this provision.

Title Five: Rights of Local and State Governments

A. Current case law discourages a state or local government from pressing criminal charges against an employer in a federally-regulated OSHA state.
B. Federal preemption of state or local laws, including criminal laws, which provides more stringent job safety and health standards should be prohibited, as proposed in S. 2518.

Title Six: State-Plan States

A. State-Plan States should be encouraged to experiment in developing safer workplaces by providing a grant program for special initiatives.
B. The Secretary of Labor should develop standard reporting measures for State-Plan States and make reports available to the public.
C. Workers in State-Plan States should have the right to demand inspections by federal officials when state inspections fail to eliminate hazardous conditions.
D. The Secretary of Labor should terminate inadequate State-Plan programs.

Title Seven: Safety and Health Standards

A. The revision of existing standards and promulgation of new standards lags far behind sound scientific knowledge.
B. The Secretary of Labor's responsibility to promulgate standards should be strengthened by:
    1. Reasserting the right to propose individual standards.
    2. Reasserting the right to promulgating consensus standards.

Title Eight: Licensed Technicians

A. In oversight of all high-risk activities, the law should:
    1. Require licensing of all key supervisory personnel.
    2. Provide general definitions of the work functions to be supervised by licensed technicians.
B. An employer's failure to comply with this provision should constitute a serious violation.

Alaska Loggers Association, Inc.

111 STEDMAN, SUITE 200
KETCHIKAN, ALASKA 99901
Phone 907-225-6114

May 23, 1989

The Honorable Dave Donley, Chairman
Labor and Commerce Committee
House of Representatives
Alaska State Legislature
3111 "C" Street
Anchorage, Alaska 99501

Dear Chairman Donley:

It is the understanding of the Alaska Loggers Association that your Committee may work on legislation during the interim which may be of interest to ALA. In particular, we understand that the Committee may focus on H.B. 286, legislation regarding penalties for workplace safety violations.

As you may know, ALA is vitally interested in making the workplace as safe as possible, and has an active and effective training program to accomplish this objective. Therefore, we are interested in any legislation which advances workplace safety. However, we are concerned about legislation which takes a punitive approach towards workplace safety, instead of a positive one. The legislative goals articulated in H.B. 286 are worthy of support, but we are concerned that emphasis on increasing penalties alone may not be as effective as other alternatives.

In closing, we want to emphasize that the ALA is interested in working in a constructive manner with the Committee on H.B. 286, and other workplace safety legislation. Would you please be sure to inform us of any meetings or work sessions which the Committee plans to hold during the interim on this type of legislation? Thank you for your time and cooperation on this matter.

Sincerely,

D.L. Finney
General Manager

DLF:es

Publications from the

National Safe Workplace Institute

NATIONAL REPORTS

Failed Opportunities: The Decline of U.S. Job Safety in the 1980s

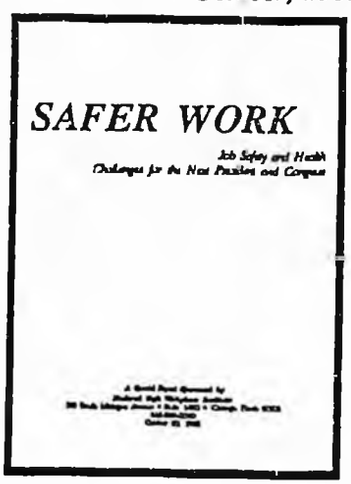
An evaluation of the effectiveness of OSHA's civil enforcement programs, key OSHA management issues, and recommendations for improving the nation's job safety programs.
September, 1988.

The Rising Wave: Death and Injury Among High Risk Workers in the 1980s

An examination of the deterioration of workplace safety in the 1980s, the administration of the nation's safety and health laws by OSHA, and recommendations to provide for safer working conditions.
September, 1987.

SAFER WORK: Job Safety and Health Challenges for the Next President and Congress

Comprehensive proposals to set a challenging job safety and health agenda for the next President and the 101st Congress.
October, 1988.



Safety at Bay: The Failure of the Department of Justice to Enforce Federal Occupational Safety Laws

An evaluation of the U.S. Department of Justice's performance in enforcing the criminal provisions of OSH Act and proposals to improve the execution of the law by the federal government.
June, 1987.

Summary Outline of COUNTING INJURIES AND ILLNESSES IN THE WORKPLACE

An outline summarizing the highlights of the National Academy of Sciences' study of the adequacy of workplace safety and health data.
November, 1987.

Ending Legalized Workplace Homicide

An examination of federal and state prosecutions for workplace safety and health violations and recommendations for improving the nation's criminal justice system.
July, 1988.

REGIONAL & OTHER REPORTS

Tunnel of Death -- Interim Report on the Metropolitan Sanitary District's Tunnel and Reservoir Project

An examination of the safety record of the U.S. EPA's largest public works project and steps needed to make a safer workplace.
January, 1988.

Information Sources on Workplace Safety and Health Issues

A directory of public and private sources for workplace safety and health information.
November, 1988.

Expendable Hoosiers: Job Safety & Health Problems in Indiana

An appraisal of the deplorable conditions of Indiana's workers' compensation and state-run OSHA program, and recommendations to improve Hoosier worksites.
October, 1988.

Safety and Health Voice

NSWI's periodic publication. Published at least six times annually.

Price Lists Are Available

About the National Safe Workplace Institute ...

BOARD OF DIRECTORS

OBJECTIVES

The National Safe Workplace Institute was founded in 1987. The Institute is funded by foundations, contributions from individuals, and through the sale of publications. The Board of Directors supports the use of appropriate tools to achieve the Institute's goals, including:

Research and Education ...

The Institute examines workplace conditions and policies and educates the public on issues relating to safety and health.

Intervention...

The Institute intervenes on behalf of individuals with regulators, law enforcement agencies, and the social welfare system to secure justice and pursues compensation and other remedies.

Acknowledgement...

Each year the Institute acknowledges, with its "Commitment to Life" award, people who have made important contributions in advancing workplace safety and health.

The National Safe Workplace Institute
122 South Michigan Avenue
Suite 1450
Chicago, Illinois 60603
312-939-0690

National Safe Workplace Institute

How We Make a Difference

Education

Inform opinion leaders and the general public on workplace safety and health issues. Informed individuals can take steps to reduce workplace injuries and fatalities. NSWI has:

- Contributed to greater public understanding of job safety and health problems through reports and by providing the media with information at their request. NSWI's work has been covered by every major U.S. news organization.
- Participated and supported a successful public proposition to restore job safety jurisdiction in California to state government. For this, NSWI prepared an issue analysis and testified before the California General Assembly.
- Worked with Congressional and state legislative committees in their consideration of job safety regulation, enforcement, and workers' compensation issues.
- Spoke at the 1988 Investigative Editors & Reporters National Conference in Minneapolis. Prepared an information guide for the media.
- Participated in "talk shows" in virtually every major media market.
- Provided hundreds of injured workers, victim's families, and interested citizens with job safety information.

Government Accountability

Scrutinize government programs and policies to identify ways in which public servants can more effectively reduce workplace injuries and fatalities. NSWI has conducted extensive research and issued reports on federal, state, and local public agencies. NSWI's reporting has highlighted mismanagement and influenced reforms. NSWI has:

- Revealed that the U.S. Department of Justice has failed to attain imprisonment of a single individual for job safety violations.
- Exposed massive abuse of victims--injured workers and their family members--by the U.S. Occupational Safety and Health Administration (OSHA).
- Revealed that OSHA's mega-fine strategy (fines over $100,000) has resulted in unintended consequences that potentially undermine OSHA's effectiveness.
- Evaluated and informed the public of the significant weakening of OSHA enforcement during the 1980s (OSHA often reduced its penalties for serious violations by two-thirds).
- Researched and reported on how Indiana workers are dying--due to pitifully weak state enforcement--at a much higher rate than workers in neighboring states.
- Showed that prosecutors in most states are ignoring criminal prosecution as an injury prevention tool.

Intervention

Intervene with appropriate parties in workplace safety and health issues to advance the cause of injury prevention. NSWI has:

- Successfully persuaded the U.S. Department of Justice to impose much higher penalties in workplace safety and health criminal cases.
- Battled to expand the categories of workers and types of firms regulated by OSHA.
- Recommended changes in federal job safety policy.
- Encouraged cooperation between the U.S. Environmental Protection Agency (EPA) and OSHA on EPA's wastewater construction projects. As a result of our work, EPA engineers now receive hazard training. Also, EPA has developed procedures to debar contractors with safety violations.
- Intervened in individual cases where safety-advancing precedents can be established. Intervention by NSWI has led to numerous OSHA policy changes.
- When appropriate, sought investigations by Congress, the U.S. General Accounting Office, and the Inspector General's Office.

National Safe Workplace Institute
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What Others Say

National Safe Workplace Institute*

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Hon. William E. Brock,
Former U.S. Secretary of Labor

"Any accomplishments we made to improve workplace safety were due in large measure to you and your organization...you have made a tremendous difference for which all American workers are grateful."

The Christian Science Monitor

"The Environmental Protection Agency is taking a new tack on worker safety...the work of a new Chicago organization called the National Safe Workplace Institute, brought increasing pressure on EPA...."

Hon. Edward M. Kennedy,
United States Senate

"I want to thank you for your assistance to the Senate Labor and Human Resources Committee in connection with the recent oversight hearings concerning the Occupational Safety and Health Administration. Your efforts and those of the National Safe Workplace Institute have made a significant contribution to the cause of worker safety. I commend you for your activities in this regard."

Dr. Philip Landrigan, M.D.
Director
Environmental & Occupational Medicine
The Mount Sinai Medical Center

"[SAFER WORK] is an extremely important and timely document. In large measure, its importance derives from its specificity. This is not just a fluff piece espousing generalities; it is instead concrete, well documented and hard hitting. My congratulations on a very nice piece of work."

John B. Moran
Former Director of Safety Research
National Institute of Safety and Health

"In a very short period of time, the National Safe Workplace Institute has established itself as one of the nation's most effective injury prevention organizations."

Peggy Holly
Fort Lauderdale, Florida
Sister of a Workplace Accident Victim

"I was very enthused to learn that there is an organization...concerned about the safety standards of high risk workers."

The Daily Herald

"We also appreciate the dogged determination of the Chicago-based National Safe Workplace Institute. Worker safety on the Deep Tunnel project has gained the attention of the EPA and OSHA, in part, because NSWI has challenged those agencies to examine and evaluate the safety issue on the MSD's huge public works project."

Lee Doyle
Bloomington, Illinois
Father of a Workplace Accident Victim

"Again, thank you so much for your help and support."

Hon. Jim Edgar
Secretary of State, Illinois

"Your leadership in focusing public attention on safety in the workplace is admirable."

The Chicago Tribune

"The Midwest's top federal environment official Friday asked his department's inspector general to investigate allegations of unsafe construction...A prime catalyst for the federal investigation [is], the National Safe Workplace Institute..."

*From letters to the Institute or news articles about the Institute.

Alaska State Legislature
Representative Niilo Koponen
House District 21

Pouch V
Juneau, Alaska 99811
(907) 465-4992

119 N. Cushman, Suite 207
Fairbanks, Alaska 99701
(907) 456-8172

MEMORANDUM

To: Representative Dave Donley
Chair, Labor & Commerce Committee

From: Representative Niilo Koponen

Re: House Bill 286

Date: 4/19/89

House Bill 286, increasing penalties for workplace safety violations, is now in your committee. I would appreciate a hearing at your earliest convenience.

Thank you for your consideration of this matter.

Representative Dave Donley, Chair
House Labor & Commerce Committee

DATE: 4/25

PLACE: CH17

SUBJECT OF MEETING:

HJ445 HB204 HB166
SL 51 HB 286
HB 245 HB284

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
Richard Arab	Dept of Labor	Box 21149, Juneau, AK 9981	99802		465-2886	(Y)	N	HB 286
Willis F Kirkpatrick	Div Corporations	DCED			465 2501	(Y)	N	HB 204
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

Representative Dave Donley, Chair
House Labor & Commerce Committee

DATE: 5-2-89

PLACE: C#17

SUBJECT OF MEETING:

SJR 8 — HB 286
SB 191 — HB 225
SCR 27 — HB 166
SCR 28

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
						Y	N	
Judy Knight	Dept of Lab	P.O. Box 21149 Jnu 998	99811	465-2712	→	(Y)	N	SB 191
Richard Arab	Dept of Labor	Box 21149, Juneau	99802		465-4857	(Y)	N	HB 286
Rick Jarvi	A.G.C.	134 No. Franklin	99801		586-1748	(Y)	N	HB286
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

STATE NEWS

State fines Juneau in worker's death

JUNEAU — The state has fined Juneau $1,000 for violating safety rules in the death of a city worker. Donald A. Anderson, 58, died after he fell 24 feet from a roof he and other workers were replacing at a community center in August. None of the workers was wearing safety equipment, in violation of state law. The workers should have been provided some protection such as a cable or rope to work as a lifeline, a fall net or a guardrail, said Eric Shortt of the state Division of Labor Standards and Safety in Anchorage.

Mill worker dies

The Associated Press

SITKA — A worker died early Wednesday in an accident at the Alaska Pulp Corp. mill, the company reported.

Joseph E. Lau, 28, of Sitka was killed at 6 a.m. as he was changing a 16-foot-wide pulp roll. Police said Lau was killed when he fell or got caught on rollers.

He is survived by his wife, Sheila, and two children.

ADN 10/10/89

get info on

Pilot, mill worker die in separate accidents

By BARBARA ROGERS
Times Writer

9/28/89 - Times

Separate accidents killed two men as an Anchorage pilot in a homebuilt airplane crashed in Palmer and a sawmill employee was crushed in a Ketchikan industrial accident Wednesday.

The pilot, whose name was not released this morning pending notification of his family, took off from Anchorage International Airport about 8 p.m. Wednesday en route to the Birchwood Airstrip, Palmer and then back to Anchorage, said Paul Steucke of the Federal Aviation Administration.

He was reported overdue by his wife at 10 p.m. and a helicopter search was begun by Alaska State Troopers this morning, Steucke said.

The wreckage of his homebuilt Long-Eze was found spread over a swampy area of the Matanuska River Park about 8:30 a.m. today after searchers picked up a signal from the aircraft's emergency locator transmitter, said Palmer Police Department Sgt. Greg Carpenter.

The body of the pilot was found in the cockpit of the single-seater, Carpenter said. He was pronounced dead at the scene.

In Ketchikan, a 60-year-old man died Wednesday afternoon when he was crushed between a gate and an upper structural bar at Ketchikan Sawmill, troopers report.

Dead is Francis K. Glover, who was leaning on a hydraulically operated gate when the gate lifted him, crushing his body, troopers and a Ketchikan Pulp Co. spokesman said.

Also Wednesday, in a traffic accident on Minnesota Drive just south of Tudor Road, two small boys were injured when the station wagon they were riding in was struck from the rear by another car.

Michael Nichols, 5, was in fair condition this morning while Justin Bushre, 7, was in serious condition at Providence Hospital, a spokeswoman said today. Both received head injuries in the accident, said Sgt. Greg Stewart of the Anchorage Police Department.

Stewart said the station wagon was southbound on Minnesota Drive when its engine quit as the car was about halfway up the bridge over the Alaska Railroad tracks.

Driver Terry Risinger, 32, turned on the emergency flashers and was trying to restart the car when it was struck from behind by a car driven by Afualo Uatisone, Stewart said.

The force of the accident collapsed the rear of the station wagon, pinning the seatbelted boys inside, Stewart said. Rescue workers got them from the car and took them to the hospital, where they originally were listed in critical condition.