

# ARTICLES

## A Discussion of the Washington Industrial Safety and Health Act of 1973

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#### I. INTRODUCTION

A more appropriate name for the Washington Department of Labor and Industries (Labor and Industries) might be the "department of labor injuries" because most of Labor and Industries' resources are committed to dealing with the consequences of accidents, illness, and death in the workplace and to trying to reduce the frequency of each.

Labor and Industries has many responsibilities, including the administration of the Washington Industrial Safety and Health Act of 1973 (WISHA).<sup>1</sup> The Act establishes state jurisdiction over workplace safety and health matters as provided under the federal Occupational Safety and Health Act of 1970 (OSH Act).<sup>2</sup>

WISHA, however, constitutes a set of laws that merely should serve as a guideline to employers and employees for workplace safety and health—it cannot possibly address every hazardous work situation. Even with the Act and its enforceable provisions, it is the responsibility of Washington employers and their employees to set out the best plan possible for the

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1. Washington Industrial Safety and Health Act, ch. 80, 1973 Wash. Laws 212 (codified as amended at WASH. REV. CODE § 49.17 (1992)).

2. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678 (1988)).

prevention of injury and illness. Compliance with WISHA should not be based on the fear of enforcement and fines, but on the belief that a safe and healthy work force is in the best interests of any work environment. Labor and Industries stands willing to take part in this change by strengthening our resolve to educate employers and workers alike so everyone wins by working toward the prevention of accidents and sickness, rather than by merely controlling losses.

This Preface briefly describes WISHA, the problems of worker safety in Washington, and the role of Labor and Industries in working to solve those problems. In Section II, this Preface addresses the status of worker health and safety in Washington. Section III describes some unique Washington programs that are to be used to combat the problems of worker safety. Section IV describes the cooperative steps that employers and workers are taking to help solve safety problems. Section V identifies new legal standards that are coming to bear on the issue of worker safety. Section VI identifies new frontiers upon which worker safety is being challenged. Finally, Section VII addresses the future direction of worker safety and injury prevention programs.

## II. THE STATUS OF HEALTH AND SAFETY IN WASHINGTON

Once every three minutes, a Washington worker is injured badly enough, or becomes ill enough, on the job to file a claim with Labor and Industries' workers' compensation fund.<sup>3</sup> A worker's death resulting from workplace injury or illness is reported to Labor and Industries at the astonishing rate of nearly one every four days.<sup>4</sup> Collectively, the hours lost by injured workers in Washington would be more than enough to staff the Boeing Company, the state's largest employer, for a full six months.<sup>5</sup>

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3. See DEPARTMENT OF LABOR AND INDUS., INDUSTRIAL INSURANCE MONTHLY MANAGEMENT REPORT 1 (December 1992). This figure is based on a monthly average of 16,024 claims, or 192,048 claims per year. Dividing this figure by minutes per year (365 days x 24 hours x 60 = 525,600 minutes) produces an average of one claim each 2.73 minutes. This figure does not include injuries reported to firms that self-insure, which represent another one third of the state work force.

4. DIVISION OF INDUS. SAFETY AND HEALTH, DEP'T OF LABOR AND INDUS., 1992 FATALITY REPORT (1992). In reality, the figure is much higher because of deaths from illnesses that are never reported as job related.

5. JOINT LABOR MANAGEMENT TASK FORCE FOR THE PREVENTION OF LONG TERM DISABILITY, 1993 REPORT TO THE LEGISLATURE (1993).

In fact, despite some of the toughest safety standards in the country, Washington has the highest reported accident rate of any western state.<sup>6</sup> For example, one out of every ten workers in the private sector will suffer an injury or illness that requires more than first aid or results in time lost from work.<sup>7</sup> Washington's figures are also greater than the national average.<sup>8</sup> The current status of worker protection is clearly unacceptable. There is a big job ahead.

The economic cost of worker injury is high: Labor and Industries pays approximately \$1 billion each year to compensate workers for lost wages and medical benefits. This does not account for the financial loss from lost productivity to our economy and the loss to our tax base. Nor does it tell of the personal, emotional cost to an injured worker when a moment of misfortune denies him or her a lifetime of livelihood.

I offer these statistics to express the formidable mission facing the people who administer WISHA and to indicate the Act's importance in protecting workers. Without the Act, the numbers of injured and killed would be far higher.

I also want to emphasize that Washington workers are laboring in some of the most hazardous industries in the country, including forestry, construction, agriculture, mining, fishing, and heavy manufacturing. The prevalence of high-hazard occupations underscores the need for maximum accountability for employers and workers in the interest of on-the-job safety and health, and provides incentive for government, management, and labor to cooperate toward achieving a safe work environment. Perhaps the prevalence of high-hazard occupations is why Washington has some of the most advanced safety and health standards in the nation.

Washington was an excellent candidate to become a "state plan" state after Congress passed the OSH Act in 1970. The Act created the Occupational Safety and Health Administration (OSHA)<sup>9</sup> and allowed states to establish their own plans if they could demonstrate programs "at least as effective" as the fed-

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6. U.S. BUREAU OF LABOR STATISTICS, INJURY AND ILLNESS (1990) (based on OSHA Form 200 data from Arizona, California, Nevada, Hawaii, Alaska, Oregon, and Washington).

7. *Id.*

8. *Id.*

9. 29 U.S.C. § 667 (1988); THE OCCUPATIONAL SAFETY AND HEALTH STATE PLAN ASS'N, GRASSROOTS WORKER PROTECTION: THE CASE FOR STATE OCCUPATIONAL SAFETY AND HEALTH PROGRAMS 1 (1990) [hereinafter GRASSROOTS WORKER PROTECTION].

eral program.<sup>10</sup> These state occupational safety and health programs are called "state plans" in the OSH Act.

The effectiveness of Washington's program stems from a long tradition of concern for industrial safety and a desire for local control. Washington had a state safety program in place well before passage of WISHA in 1973. Labor and Industries has had a safety division since 1922. Workplace safety laws can be traced to the state's constitution: "The Legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same."<sup>11</sup> For forty-two years, Washington State has convened the Governor's Industrial Safety and Health Conference, an annual symposium attended by thousands of workers and safety and health professionals from both the public and private sector.

Labor unions, specifically the Washington chapter of the AFL-CIO, were instrumental in gathering support for Washington to become an OSH Act state plan state. The unions' feeling was that they could have more input in the creation of state, rather than federal, worker protection policies, and would be provided better access to compliance services under state control.

Over the years, attention to safety and health in the workplace has become a part of doing business in Washington. A bill currently before Congress to reform the OSH Act is modeled, in part, after three programs that have been law in Washington since 1945.<sup>12</sup> These include the requirement that employers have a written accident prevention plan, employer-employee safety and health committees, and the authority of Labor and Industries to issue orders of immediate restraint.

Washington is one of twenty-one states that operate their own safety and health programs covering both the private and public sector. The territories of Puerto Rico and the Virgin Islands also have state plans. Two other states, Connecticut and New York, have plans covering only public sector workplaces, which are excluded by coverage under the OSH Act. Together, state plans conduct almost seventy percent of the

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10. *Id.*

11. WASH. CONST. art. II, § 35.

12. H.R. 1280, 103d Cong., 1st Sess. (1993).

OSHA enforcement inspections in the United States.<sup>13</sup> By 1991, almost nine percent of the nation's total OSHA inspections were in Washington.<sup>14</sup> The state has just two percent of the nation's work force.<sup>15</sup> It is clear from these statistics that Washington State, with its prevalence of high-hazard industries, has placed a premium on worker protection.

Approximately one hundred Labor and Industries employees conduct safety and health enforcement inspections and investigations in the workplace. Collectively they made 7,622 inspections in 1992, citing 30,759 violations that year alone.<sup>16</sup> Other units in the safety and health program are responsible for providing compliance assistance to employers, including inspections free from the risk of penalty to employers who request help. Another unit investigates complaints from employees who believe they have been discriminated against after voicing concerns over safety and health issues. Beyond worker protection, the safety and health program focuses on protecting the general public in the areas of marine and dock safety, explosives, charter boat operations, electrical utilities, telecommunications, and asbestos and contractor certification.

All of this activity allows Labor and Industries to provide a full-service safety and health program known in workplaces across Washington. Labor and Industries' intention is to make resources available to help both labor and management develop the best means of worker protection for each specific work site.

### III. UNIQUE WASHINGTON PROGRAMS

Washington is unique in the nation because its workers' compensation and worker protection programs are in the same agency. Labor and Industries is the direct provider of workers' compensation insurance to about 140,000 employers in Washington.

This linkage of insurance and safety and health services permits better tracking of worker injury data and allows Labor and Industries to use that data to target its enforcement inspections and assistance programs to the most hazardous occupa-

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13. GRASSROOTS WORKER PROTECTION, *supra* note 9, at 1.

14. *Hearings on H.R. 3160 Before the House Comm. on Education and Labor*, 102d Cong., 2d Sess. 5 (1992) [hereinafter *Hearings*] (statement of Joseph A. Dear, Former Director of the Washington State Department of Labor and Industries).

15. *Id.*

16. DIVISION OF INDUS. SAFETY AND HEALTH, DEP'T OF LABOR AND INDUS., BRIEFING BOOK 25-28 (1993).

tions and work sites. Such leverage would be difficult, if not impossible, if accident information had to be culled from private insurers or if the federal government administered safety and health standards. The alternative would be to adopt OSHA's system of targeting inspection activities by using data collected from the Bureau of Labor Statistics based on employer surveys.

The features of the WISHA program support a powerful argument that workers are better protected by having a state-administered plan. For example, because of the requirement to be at least as effective as the OSH Act, Washington workers are guaranteed legal protections that exceed federal standards. The state has established more comprehensive work site safety and health standards for timber products, explosives, telecommunications, agriculture, noise, asbestos worker training, and fire fighting, to name only a few. Civil penalties for WISHA violations are identical to that of the OSH Act, with a maximum fine of \$7,000 for each initial violation of safety and health standards and up to \$70,000 for willful violations.<sup>17</sup>

Besides setting more comprehensive standards for workplace safety than its federal counterpart, the WISHA program has included special features to better protect worker safety. For example, the WISHA program has established a geographically disbursed hazardous chemical response team. WISHA sets up and provides free chemical hazard communication seminars for employer associations and employee organizations. OSHA provides hazard communication seminars only to employer groups on request. WISHA has a toll-free number for assistance, while OSHA has none, and WISHA, unlike OSHA, responds to formal and informal telephone complaints.

With an annual budget of \$20 million, Labor and Industries' safety and health program receives about seventy-five percent of its funding from industrial insurance premiums and the remaining twenty-five percent (\$5.89 million) from federal sources.

In support of the WISHA prevention effort, Labor and Industries established a research program called Safety and Health Assessment and Research for Prevention (SHARP). Created by the 1990 legislature at Labor and Industries' request, this program is designed to identify and research methods to prevent occupational health problems in the workplace. The SHARP team includes experts in epidemiology, industrial

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17. WASH. REV. CODE § 49.17.180 (1992).

hygiene, occupational medicine, occupational health nursing, toxicology, and ergonomics.

To date, SHARP has identified and studied high-risk industries for cumulative trauma disorders, conducted a two-year study on the office environment in a new building, established a statewide registry for lead poisoning, studied reproductive hazards in the workplace, and issued a report on patient assaults in state psychiatric hospitals.

Research conducted by SHARP, as well as the strategies SHARP recommends to prevent workplace-related illness and injuries, have improved Labor and Industries' ability to help employers assess and develop their own worker protection programs. Future research projects may delve into occupational exposure to electro-magnetic fields, heat stress reduction, and health and safety issues in agriculture. Understanding the causes of workplace injury is critical if Labor and Industries is to assist with the prevention of workplace injuries and illness.

#### IV. COOPERATION WITHIN INDUSTRY

Labor and Industries has found that it takes more than enforcement to be effective in reducing workplace injuries and fatalities. The success of any accident prevention program is dependent on labor and management working together. For employers, there are obvious financial incentives: reduced industrial insurance premiums, reduced risk of civil penalty under WISHA, and lower administrative costs associated with employee turnover due to injury. Workers are motivated by a desire to perform their tasks without risk.

The construction industry has enjoyed particular success in the arena of labor-management cooperation. The Construction Advisory Committee (CAC), made up of representatives from labor, contractors, and Labor and Industries, formed in 1988 after construction-related deaths jumped to twenty-two from fifteen in 1987.<sup>18</sup> By using cooperative methods to tackle workplace safety and health problems, the industry was able to reduce the number of fatalities to nineteen in 1989, twelve in 1990, and ten each for the years 1991 and 1992.<sup>19</sup> This decrease was much more significant than the numbers reveal because it occurred during a time of immense growth in employment in

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18. *Hearings*, *supra* note 14, at 6.

19. *See id.*

the construction industry, from around 89,000 workers in 1987 to more than 120,000 in the work force today.<sup>20</sup>

#### V. MORE TARGETED STANDARDS FOR INDUSTRY

Part of the decrease in construction-related fatalities also can be attributed to better targeting of standards and compliance activities, such as the passage of new rules for fall protection and excavation, and more emphasis on better housekeeping at individual work sites. The CAC has endorsed each of these activities.

In other construction-related matters, OSHA issued new federal regulations pertaining to lead exposures, personal protective equipment such as respirators, hygiene practices, and employee training.<sup>21</sup> These federal regulations were adopted by WISHA in 1993.<sup>22</sup> In addition to new regulations, recent state court decisions have had a substantial impact on the construction industry.

In *Stute v. P.B.M.C., Inc.*,<sup>23</sup> the Washington Supreme Court held that general contractors must comply with WISHA regulations to protect not only their own employees, but all employees on the job site.<sup>24</sup> By finding a duty of care under Revised Code of Washington (RCW) 49.17.060,<sup>25</sup> the *Stute* court paved the way for a subcontractor's injured employee to bring a personal injury action against the general contractor for injuries sustained on the job. Prior to *Stute*, except for limited exceptions, the Washington Court of Appeals held that general contractors owed no duty to protect subcontractors' employees.<sup>26</sup> Although the *Stute* court held that liability could be found against a general contractor, the court was silent on the duty of care a general contractor owes to assure that WISHA violations do not occur on the job site.

Because the courts have not yet articulated the duty of care owed by general contractors to protect all employees on the job site, in January 1993, a task force was created to establish a WISHA regional directive (WRD) to identify the duty of care and to further identify any defenses available to a general con-

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20. *See id.*

21. 57 Fed. Reg. 42,101 (1992).

22. Wash. St. Reg. 93-21-075.

23. 114 Wash. 2d 454, 788 P.2d 545 (1990).

24. *Id.* at 457, 788 P.2d at 547.

25. WASH. REV. CODE § 49.17.060 (1992).

26. *See, e.g., Epperly v. Seattle*, 65 Wash. 2d 777, 785, 399 P.2d 591, 597 (1965).



tractor.<sup>27</sup> Labor and Industries has embarked on a new era of working collectively with the major players in the construction industry to obtain voluntary compliance with the WISHA regulations in a manner that is conducive to the needs of the industry.

One of the toughest challenges faced by Labor and Industries is to convince employers that an aggressive safety and health program works to their advantage. Labor and Industries will never have the staff to ensure full compliance with the WISHA standards. Employers must understand that meeting or exceeding the standards, as well as enforcing their own safety plan that covers their particular operation, may well be in their best financial interests and is certainly in the best interests of their work force.

## VI. NEW FRONTIERS IN SAFETY AND HEALTH

One new frontier of worker protection is in the prevention of cumulative trauma disorders (CTD) caused by repetitive or sustained motions. The numbers and costs of such injuries are growing each year.

Washington State workers' compensation data from 1992 showed an eight percent decrease in the total number of claims filed compared to 1991.<sup>28</sup> However, claims from CTD remained about the same as the year before, meaning there was an effective increase in the claims relative to CTD.<sup>29</sup>

The data from 1992 indicates that at any given time there are 33,000 open claims resulting from CTD.<sup>30</sup> The workers' compensation fund paid \$225,630,000 in benefits (time loss and medical aid) to claimants with CTD in 1992, a full quarter of all benefits paid by Labor and Industries.<sup>31</sup>

Several factors are responsible for the increase in CTD claims. For example, while personal computers have sped the flow of information, rapid and repetitive keyboarding has also escalated the incidence of carpal tunnel syndrome, a painful

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27. DIVISION OF INDUS. SAFETY AND HEALTH, DEP'T OF LABOR AND INDUS., WISHA REGIONAL DIRECTIVE (Sept. 29, 1993) (Draft No. 12).

28. Memorandum from Dale Sunday, Loss Control Consultant, Department of Labor and Industries, to Dave Sebesta, Ergonomist, Department of Labor and Industries (1993).

29. *Id.*

30. *Id.*

31. *Id.*

compression of a nerve in the wrist.<sup>32</sup> To combat this problem, computer keyboards need to be designed to reduce stress on the wrists and hands, and workloads need to be altered to reduce worker exposure and risk.

Workers in the food processing industry have been particularly plagued by CTD.<sup>33</sup> OSHA developed new ergonomic guidelines for red meat packing in 1990 after finding an alarming increase in CTD from increased production rates during the past two decades.<sup>34</sup> Washington is in the process of developing similar guidelines for general industry, which likely will include the need for assessments of jobs to reduce exposure to repetitive injuries and improved worker training and education.

Many corporations have demonstrated that an investment in ergonomic programs to prevent CTD claims is worthwhile. The Grumman Corporation, for example, launched an ergonomics program between 1989 and 1990.<sup>35</sup> Between 1990 and 1992, Grumman's incidence of CTD dropped from one hundred and five cases to fifty-four cases, while back injuries dropped from seventy-two cases to eleven cases.<sup>36</sup> Losses related to ergonomic problems in 1990 totaled \$1.5 million, but the company was able to cut its losses to \$876,000, saving \$660,000.<sup>37</sup> The company found that over a three-year period, an investment of \$300,000 in improvements saved \$657,000, realizing a 119% return on investment.<sup>38</sup>

The Kaiser Corporation has also initiated an extensive ergonomics program at its aluminum rolling mill in the Spokane Valley.<sup>39</sup> The company was plagued by sprain and strain injuries afflicting workers who lift, push and pull, or have tasks requiring the same motions all day.<sup>40</sup> In 1990, the plant attributed seventy percent of its total lost or restricted days to CTD.<sup>41</sup>

32. SAFETY AND HEALTH ASSESSMENT AND RESEARCH PROGRAM, DEP'T OF LABOR AND INDUS., SHARP: REPORTING A YEAR OF PROGRESS 1 (1992) [hereinafter SHARP].

33. *Id.*

34. R. Blake Smith, *Industry Profile: Food Processing Ergonomic Controls Cut the Shackles of Meatpackings's Cumulative Traumas*, OCCUPATIONAL HEALTH & SAFETY, August 1993, at 32.

35. *Cumulative Trauma Disorders, Ergonomic Problems Dominate Sessions at This Year's Industrial Hygiene Conference*, O.S.H. Daily (BNA) (June 4, 1993), available in DIALOG, File No. 612.

36. *Id.*

37. *Id.*

38. *Id.*

39. SHARP, *supra* note 32, at 2.

40. *Id.*

41. *Id.*

Labor and Industries' SHARP division helped Kaiser with an ergonomics program, which included training for ergonomics issues and workplace evaluations.<sup>42</sup>

Rather than develop specific standards for ergonomic programs at this time, however, Labor and Industries is trying to persuade industries that developing their own programs is in their best interest. To that end, Labor and Industries has established an advisory committee made up of business, labor, and other interested parties to help develop voluntary ergonomic guidelines for employers. Labor and Industries hopes that this approach will further the spirit of labor-management cooperation, and that the role of Labor and Industries will be to assist employers and employees with ergonomic issues.

Another issue on the safety and health frontier is the protection of workers from chemically related illnesses such as multichemical sensitivity (MCS). An increasing number of workers' compensation claims are related to chemical exposures. In certain cases, employees have developed a susceptibility to the slightest contact with chemicals common in the environment, a condition that drastically affects their lives.

Labor and Industries and other state agencies in the health care business are working together to develop a multidisciplinary approach to chemical illness.<sup>43</sup> For example, farmworkers are vulnerable to chemically related illness due to the use of pesticides in the field.<sup>44</sup> In 1993, Labor and Industries joined the Departments of Agriculture and Health in ordering tree fruit farms to halt use of Phosdrin, a toxic pesticide used to fight aphids. The emergency order came after an investigation determined that at least eighteen farm workers required treatment in emergency rooms and a review of data indicated that the chemical had been a problem in California.

While ordering the ban of a pesticide is an unusual action, Labor and Industries has paid much more attention to farm worker safety since the early 1990s. On March 4, 1993, Labor and Industries adopted significant changes in agricultural safety standards. Among the changes were requirements for decontamination facilities (water for flushing) for pesticide han-

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42. *Id.*

43. See DEPARTMENT OF LABOR AND INDUS., DRAFT INTERIM AGREEMENT ON CHEMICALLY RELATED ILLNESSES (CRI) (1993).

44. See Memorandum from Dan Lock, Industrial Hygienist Department of Labor and Industries, to Suzanne Mager, Acting Assistant Director, Division of Industrial Safety and Health, Department of Labor and Industries (August 13, 1993).

dlers; the laundering of pesticide protective clothing or equipment; the appropriate use, maintenance, and replacement of respirators including fit testing; and the requirement to follow general safety standards on machine guarding and electrical safety. Furthermore, Labor and Industries is also reviewing the need for roll-over bars on tractors built before 1976.<sup>45</sup>

Improving indoor air quality for office workers is another issue being targeted by the WISHA program. Over the past two years, Labor and Industries has developed proposed standards that focus on improving the air in the office environment. As proposed, the standards would have required the evaluation and control of specific indoor air pollutant sources and indoor air quality problems. The standards also sought more stringent controls for heat, ventilation, and air conditioning systems in buildings. Perhaps the most controversial of these standards was to require employers to eliminate smoking from the workplace or to delineate separately ventilated smoking rooms in an office building. Following public hearings on the proposed standards in December, 1993, I determined that Labor and Industries should establish a voluntary standard concerning the building air circulation systems to avoid replication with OSHA standards for indoor air quality expected to be promulgated in 1994. But after being presented with strong public testimony and overwhelming evidence on the health effects of second-hand tobacco smoke on the nonsmoking population, I felt compelled as director to sign a revision to the Washington Administrative Code (WAC) that will protect office workers from environmental tobacco smoke.<sup>46</sup> More protections are also on the way for those who work in the forest products industry, although not necessarily through the use of more stringent safety and health standards. Labor and Industries recently established a forestry focus team to better assess hazards and risks among loggers, to promote the necessity of strong safety practices in the woods to help timber companies control their claims' costs, and to reduce injuries and save human lives.

Labor and Industries is committed to improve its ability to target specific industries and certain types of injury prevention. This is a job that cannot end until the number of injuries incurred at work drops to zero.

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45. Wash. St. Reg. 93-07-012.

46. *Id.* 94-07-086 (to be codified at WASH. ADMIN CODE §§ 296-62-12000, -12003, -12005, -12007, -12009).

## VII. THE FUTURE OF SAFETY AND INJURY PREVENTION

As for the future, Washington industries could see more cases of criminal action brought against employers who violate safe work practices, coupled with stiffer civil penalties for willful disregard of safety and health standards. At the federal level, the appointment of my predecessor at Labor and Industries, Joseph A. Dear, as Director of OSHA may lead to the adoption of federal policies that have proved successful in Washington State, such as greater emphasis on labor-management cooperation on safety and health issues.

The real future of safety and health prevention is not rooted in enforcement inspections, but in voluntary actions and programs on the part of the employer to minimize the risks of on-the-job injuries. It is in developing the expectation among the work force that they will be protected while on the job. It is in the training and education of workers, even before they begin work. And it is in strengthening our resolve to educate employers and workers alike so everyone wins by working toward preventing accidents, rather than by merely controlling losses.

Too little emphasis is made in the schools toward preventing injuries at work. In my view, with more than 700,000 worker injuries and illnesses a year, courses on industrial safety training and accident prevention should be required curriculum in high schools, in our vocational colleges, and even in our public universities. Many people do not concern themselves with on-the-job injuries until after they are injured. Only when it is too late do they approach Labor and Industries as a new claimant in pain.

The future of industrial safety and health lies in changing attitudes to reflect a new emphasis on safety and health. Labor and Industries stands willing to take part in this change. Labor and Industries' resources are best spent on preventing injuries, not merely paying for them.