LEGISLATIVE

RESEARCH COMMISSION

FIRE AND OCCUPATIONAL SAFETY AT COMMERCIAL AND INDUSTRIAL FACILITIES

REPORT TO THE
1993 GENERAL ASSEMBLY
OF NORTH CAROLINA

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STATE OF NORTH CAROLINA

LEGISLATIVE RESEARCH COMMISSION

STATE LEGISLATIVE BUILDING

RALEIGH 27611

January 15, 1993

TO THE MEMBERS OF THE 1993 GENERAL ASSEMBLY:

The Legislative Research Commission herewith submits to you for your consideration its final report on workplace safety in North Carolina. The report was prepared by the Legislative Research Commission's Committee on Fire and Occupational Safety at Industrial and Commercial Facilities pursuant to the directive of the Legislative Research Commission. The Legislative Research Commission accepted the Committee's report as submitted but deleted the proposed increase in building code fines originally contained in the Committee's eighth recommendation.

Respectfully submitted,

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Henson P. Barnes
President Pro Tempore

Cochairmen
Legislative Research Commission

1991-1992

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PREFACE

The Legislative Research Commission, established by Article 6B of Chapter 120 of the General Statutes, is a general purpose study group. The Commission is cochaired by the Speaker of the House and the President Pro Tempore of the Senate and has five additional members appointed from each house of the General Assembly. Among the Commission's duties is that of making or causing to be made, upon the direction of the General Assembly, "such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" (G.S. 120-30.17(1)).

At the direction of the 1991 General Assembly and the cochairs of the Legislative Research Commission, the Commission has undertaken studies of numerous subjects. These studies were grouped into broad categories and each member of the Commission was given responsibility for one category of study. The Cochairs of the Legislative Research Commission, under the authority of G.S. 120-30.10(b) and (c), appointed committees consisting of members of the General Assembly and the public to conduct the studies. Cochairs, one from each house of the General Assembly, were designated for each committee.

The study of fire and occupational safety was authorized by the Legislative Research Commission in 1991, pursuant to G.S. 120-30.17(1), in response to the tragic fire at the Imperial Foods Processing Plant in Hamlet, North Carolina. The Legislative Research Commission grouped this study in its Labor area under the direction of Representative Pete Cunningham. The Committee was chaired by Senator Aaron Plyler and Representative Milton ("Toby") Fitch. The full membership of the Committee is listed on pages iii and iv of this report. A committee notebook containing the

committee minutes and all information presented to the committee is filed in the Legislative Library.

COMMITTEE PROCEEDINGS

Note: A summary of the Committee's proceedings from December, 1991 through April, 1992 is contained in the Committee's interim report to the 1992 session. In addition, a summary of all workplace safety legislation enacted by the General Assembly during the 1992 short session is contained in a publication entitled **"Workplace Safety Legislation: 1992 Session."** Both publications are available from the Legislative Library.

SEPTEMBER 28, 1992

The Committee held its first meeting since the short session on September 28, 1992. The Committee briefly reviewed the legislation that was enacted during the 1992 session of the General Assembly.

Labor Commissioner John Brooks, chairman of the Inter-agency Task Force established by the Committee to review the State's safety responsibilities, updated the Committee on the work of the Task Force. The Task Force had conducted several meetings and had begun the process of identifying the various responsibilities of State and local agencies as they relate to workplace safety. The Task Force would be making an interim report to the Committee by October 1, 1992 (ATTACHMENT C), with a final report to the General Assembly on March 1, 1993.

Commissioner Brooks also commented on the proposed adoption of portions of the State Building Code by the Department of Labor. Commissioner Brooks contended that a recent Supreme Court decision (**Gade**) requires State OSHA programs to have enforcement authority over all laws that relate to workplace safety.

Several speakers addressed the issue of the OSHA Review Board and its independent authority over OSHA penalties. The OSHA Review Board is a 3-member panel that operates independently of the Department of Labor and has authority to overrule the Commissioner of Labor's findings of a violation, the classification of the violation, and/or the penalty proposed for the violation.

Commissioner Brooks spoke against abolishing the Board, but felt that there should be some type of restriction on the ability of the OSHA Review Board to "arbitrarily" reduce penalties. Mr. Ralf Haskell, of the Attorney General's Labor Section, spoke in favor of a more professionalized board with full-time hearing officers (see ATTACHMENT B). Mr. Tom Farr, a local attorney who practices before the OSHA Review Board, also spoke in favor of retaining the OSHA Review Board. Mr. Kenneth Kiser, Chairmen of the OSHA Review Board, also spoke in favor of the current system and shared information with the Committee on caseload, procedure, etc. Mr. Julian Mann, Director of the Office of Administrative Hearings (OAH), noted that while he was not taking a position on whether the OSHA Review Board should be abolished, his office possessed the staff and expertise to handle the OSHA appeals should the General Assembly shift the responsibility to OAH. Mr. Mann noted that OAH already reviews OSHA appeals involving agricultural workers.

Committee members were also briefed on the OSHA Review Boards in other states by the staff (ATTACHMENT E/Jones Memo #1). Virtually every state with a State OSHA program has an independent review board. Maryland and Virginia were the exceptions: Maryland uses its Office of Administrative Hearings for OSHA appeals and Virginia allows such appeals to go directly into court after informal review by the Commissioner of Labor. All states under the federal OSHA program are subject to the federal OSHA Review Commission.

Committee staff also noted that in virtually every state, the abatement periods specified in the OSHA citations are automatically stayed (suspended) once the citation is appealed to the Review Board (ATTACHMENT E/Jones Memo #2). North Carolina also provides for an automatic stay. Mr. Farr also spoke in favor of retaining the automatic stay, noting that otherwise an employer may make expensive changes at the worksite only to find out on appeal that they were unnecessary. Committee staff also noted that there is a special provision already in the OSHA law providing for immediate injunctive relief against an employer for imminently dangerous hazards.

OCTOBER 27, 1992

The Committee held its second meeting on October 27, 1992, to consider comments from a representative of the Building Code Council. Ms. Clem Peterson, an assistant attorney general representing the Building Code Council, presented draft legislation concerning changes to one section of the Building Code law. (Additional changes to Chapter 160A, as it relates to municipalities' authority to levy civil penalties for violation of the Building code, was also considered later in the meeting). Ms.

Peterson agreed to have the Building Code Council review the legislation again for additional changes and to present a new draft at the next committee meeting.

Mr. Charles Jeffries with the Labor Department and Ms. Peterson discussed with the Committee the issue of the two building codes that are now in effect -- one enforced by the State Building Code Council and one enforced by the Department of Labor. The Committee expressed grave concerns about two **different** versions of the code being in effect and asked that the Building Code Council and the Labor Department try to resolve this issue soon and to make a progress report back to the Committee at its next meeting.

Committee staff briefly reviewed the timetable for adopting legislation for the 1993 session. Staff also noted that the committee had in fact already adopted one piece of legislation in the spring for recommendation to the 1993 session; the adopted bill would have extended the products liability statute of repose from 6 years to 25 years. The Committee reconsidered this bill and agreed to look at a bill changing the statute of repose to 10 years. The Committee also requested various drafts of the machine safety guard bill and drafts of some of the other issues that had been under consideration.

Committee staff provided information concerning a review of OSHA cases for determinations whether those cases involved arbitary reductions of OSHA penalties (ATTACHMENT E/Watson Memo). Ongoing discussions with the Department of Insurance concerning the percentage of workers comp premium dollars spent on workplace safety were also noted (ATTACHMENT D).

DECEMBER 14, 1992

The Committee held its final meeting on December 14, 1992. Ms. Robin Hudson, an attorney with Taft, Taft & Haigler, spoke to the Committee on behalf of the Hamlet Response Workplace Reform Coalition. Ms. Hudson presented the remainder of the Coalition's proposed recommendations. The proposed recommendations not already on the Committee's list of items to review included allowing employees to choose their own physicians for workplace injuries, requiring all publicly-funded job training programs to include safety and health training, and providing for increased employee participation in enforcement proceedings.

Mr. John Campion, Assistant General Counsel for Burroughs Wellcome, spoke on the history and purpose of the workers' compensation system and discouraged the Committee from taking action to "import" fault into the system by allowing employees to sue their employers for workplace injuries (ATTACHMENT A). Mr. Campion specifically addressed the machine safety guard legislation under review by the Committee and questioned how broadly it might be applied, especially since it did not define what types of machines are covered.

Miss Gann Watson and Mr. Linwood Jones, committee staff counsels, briefed the Committee on several draft bills that the Committee had requested to be drawn for review. The proposals were as follows: (1) repeal the workers' compensation death benefits statute of repose; (2) extend the products liability statute of repose from 6 to 10 years; (3) allow employees to sue employers for injuries resulting from employer's intentional removal of machine safety guard; (4) increase penalties for violations of the Building Code and clarify cities' authority to levy civil penalties for fire code violations;

(5) require written findings of fact, conclusions of law, and grounds for decision in Safety and Health Review Board decisions and require the Commissioner of Labor and the Board to jointly agree on guidelines for the interpretation of the statutory penalty reduction factors; (6) reauthorize the study committee for the next biennium; (7) require the Rate Bureau and Commissioner of Insurance to jointly develop a safety services plan to be made available by workers compensation carriers to their insureds. Two more proposals were also discussed by the Committee: (1) requiring publicly-funded job training programs to have safety and health training and (2) allowing injured workers their choice of physician, in the first instance, without seeking the approval of the Industrial Commission.

Each bill was voted on separately by the Committee and approved. On the motion of Senate Co-Chair Aaron Plyler, it was requested that the opposition of some members of the Committee to some of the proposed legislation be reflected in this report, particularly the divided vote on the safety guard bill (7 to 6 in favor). A transcript of the minutes of the meeting is available for review as part of the Committee's notebook on file with the Legislative Library. The minutes of the other meetings are also included in the Notebook.

The final report was approved by the Committee to be forwarded to the Legislative Research Commission.

LRC ACTION

At its January 15, 1993 meeting, the Legislative Research Commission objected to the increased Building Code fines and voted to delete the proposed fines from the

recommendations (and to make necessary conforming chnages throughout the report). The remaining recommendations were accepted by the LRC for transmittal to the 1993 General Assembly.

RECOMMENDED LEGISLATION AND EXPLANATIONS

RECOMMENDED LEGISLATION AND EXPLANATIONS

The Committee recommended the 9 bills listed below. The text of the bills appear in this section in the same order as listed below. A summary follows each bill.

(1) Eliminate the 6-year statute of repose on workers compensation death benefits.

(2) Impose civil liability on employers for injuries to employees caused by the employer's removal of or failure to install machine safety guards.

(3) Increase the products liability statute of repose from 6 to 10 years.

(4) Require detail in the decisions and reports of the OSHA Review Board.

(5) Continue the Fire and Occupational Safety Committee through 1993-94.

(6) Require the Rate Bureau and Commissioner of Insurance to develop a plan, for review only, requiring workers compensation carriers to provide certain loss control services to their insureds.

(7) Clarify authority of local municipalities to levy civil penalties for Building Code violations.

* See "**LRC ACTION**" concerning this proposal.

(8) Require publicly-funded job training programs to have health and safety training.

(9) Allow injured employees their choice of physician without Industrial Commission approval.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

H 1

FOS-DRAFT 1
THIS IS A DRAFT AND NOT READY FOR INTRODUCTION

Short Title: Workers Comp. Changes. (Public)

Sponsors:

Referred to:

December 14, 1992

A BILL TO BE ENTITLED

AN ACT TO REPEAL THE STATUTE OF REPOSE FOR THE COLLECTION OF DEATH BENEFITS UNDER THE WORKERS COMPENSATION ACT.

The General Assembly of North Carolina enacts:

Section 1. G.S. 97-38 reads as rewritten:

"**§ 97-38. Where death results proximately from compensable injury or occupational disease; dependents; burial expenses; compensation to aliens; election by partial dependents.**

If death results proximately from a compensable injury or occupational ~~disease and within six years thereafter, or within two years of the final determination of disability, whichever is later,~~ disease, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 2/3%) of the average weekly wages of the deceased employee at the time of the accident, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29, nor less than thirty dollars ($30.00), per week, and burial expenses not exceeding two thousand dollars ($2,000), to the person or persons entitled thereto as follows:

(1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable.

(2) If there is no person wholly dependent, then any person partially dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive a weekly payment of compensation computed as hereinabove provided, but such weekly payment shall be the same proportion of the weekly compensation provided for a whole dependent as the amount annually contributed by the deceased employee to the support of such partial dependent bears to the annual earnings of the deceased at the time of the accident.

(3) If there is no person wholly dependent, and the person or all persons partially dependent is or are within the classes of persons defined as 'next of kin' in G.S. 97-40, whether or not such persons or such classes of persons are of kin to the deceased employee in equal degree, and all so elect, he or they may take, share and share alike, the commuted value of the amount provided for whole dependents in (1) above instead of the proportional payment provided for partial dependents in (2) above; provided, that the election herein provided may be exercised on behalf of any infant partial dependent by a duly qualified guardian; provided, further, that the Industrial Commission may, in its discretion, permit a parent or person standing **in loco parentis** to such infant to exercise such option in its behalf, the award to be payable only to a duly qualified guardian except as in this Article otherwise provided; and provided, further, that if such election is exercised by or on behalf of more than one person, then they shall take the commuted amount in equal shares.

When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments. Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18.

Compensation payable under this Article to aliens not residents (or about to become nonresidents) of the United States or Canada, shall be the same in amounts as provided for residents, except that dependents in any foreign country except Canada shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to the surviving father or mother whom the employee has supported, either in whole or in part, for a period of one year prior to the date of the injury; provided, that the Commission may, in its discretion, or, upon application of the employer or insurance carrier shall commute all future installments of compensation to be paid to such aliens to their present value and payment of one half of such commuted amount to such aliens shall fully acquit the employer and the insurance carrier."

Sec. 2. This act is effective upon ratification and applies to deaths occurring on or after that date; provided that this act shall not be construed to revive a claim for benefits that has terminated prior to the effective date of this act.

EXPLANATION OF FOS-DRAFT 1

Repeal of Statute of Repose on Workers Compensation Death Benefits

Section 1 of this act repeals the 6-year statute of repose on death benefits under the Workers Compensation Act. Section 2 provides that the act takes effect upon ratification and applies only to deaths occurring on or after that date. Section 2 also makes clear that claims that have already expired because of the 6-year statute of repose are not revived by this act.

The workers compensation act provides death benefits to the dependents of deceased employees who die from their occupational injuries or illnesses within 6 years thereafter. For example, if an employee suffered a compensable work injury in 1980 and died as a result of the injury in 1985, his dependents would be entitled to receive death benefits. If the same employee died as a result of the injury in 1987, his dependents would not be entitled to death benefits.

The Workers Compensation Act establishes a priority list for receipt of death benefits. The person or persons wholly dependent on the deceased employee at the time of his or her death have first priority for the benefits. Widows, widowers, and children of the deceased are conclusively presumed to be wholly dependent. If there are no such persons, then those partially dependent have priority; if there are none, then the next of kin are entitled to the benefits. "Next of kin" under the Workers Compensation Act includes only the deceased employees' children, parents, or siblings. If there are no next of kin, no death benefit is paid (although burial expenses up to $2,000 are still covered).

The amount of the death benefit is calculated from the deceased employee's average weekly wages. The deceased employee's dependents are entitled to 2/3 of his average weekly wage for a period of 400 weeks, up to a maximum amount. These payments are continued beyond 400 weeks for a spouse who is unable to support himself or herself because of physical or mental disability that existed at the time of the death; they continue until the spouse's remarriage or death. Children under 18 receiving payments are entitled to continued benefits beyond 400 weeks until their 18th birthday.

It appears that although several states have statutes of repose for the collection of workers compensation benefits, most do not. Among the states that have repose statutes, there is a great deal of diversity in the length of the repose periods. Many of these states have different repose periods for occupational injuries and occupational diseases. There are even different repose periods for different types of occupational diseases. Among the states with repose statutes, the repose periods range from 1 year to approximately 10 years. Some are outright cut-offs; others create a rebuttable presumption that the death is not a result of the injury if it occurs beyond the prescribed time. Some grant a longer repose period if the disability from the injury is continuous

and the death occurs during this disability period. (North Carolina's previous repose statute was 2 years, with an extension to 6 years if the death occurred during the period of disability).

The southern states' repose periods, as they relate to deaths from work injuries, are listed below:

Death Benefits Statutes of Repose in Southern States

State	Repose Period	Statutory Cite
Alabama	3 years	Alab. Code §25-5-117
Arkansas	1 year (or 3 years if during disability period); creates rebuttable presumption	Ark. Stat. §11-9-527
Florida	1 year (or 5 years if during disability period)	Fla. Stat. §440.16
Georgia	No limit as long as death occurs during disability	Ga. Code §34-9-265(b)
Kentucky	No limit	Ky. Stat. 342.750
Louisiana	2 years	La. Stat. 23:§1231
Maryland	No limit	Md. Code §9-678
Mississippi	No limit	Miss. Code 71-3-25
North Carolina	**6 years**	**N.C. Stat. §97-38**
South Carolina	2 years (or 6 years if during period of total disability)	S.C. Code §42-9-290
Tennessee	No limit	Tenn. Code §50-6-209
Texas	No limit	Tx. WC&CVC Code 8308-7.05
Virginia	9 years	Va. Code §65.2-512
West Virginia	No limit as long as death occurs during disability	W.Va. Stat. §23-4-10

As noted earlier, North Carolina's previous statute of repose for death claims resulting from occupational injuries and illnesses was 2 years (or 6 years if the employee had been continuously and totally disabled from the time of the accident until the time of death). This was changed to the current provision in 1987 as part of a package of workers' compensation amendments.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

D

FOS-DRAFT 2
THIS IS A DRAFT AND NOT READY FOR INTRODUCTION

Short Title: Machine Safety Guards (Public)

Sponsors:

Referred to:

December 14, 1992

A BILL TO BE ENTITLED

AN ACT TO PROVIDE A CAUSE OF ACTION TO EMPLOYEES INJURED BY THE INTENTIONAL REMOVAL OF OR FAILURE TO INSTALL A MACHINE SAFETY GUARD.

The General Assembly of North Carolina enacts:

Section 1. G.S. 97-10.1 reads as rewritten:

"**§97-10.1. Other rights and remedies against employer excluded.**

(a) If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

(b) Notwithstanding subsection (a), an employee, or his or her representative in the event of the employee's death, may bring an action at law for damages against the employer, subject to common law defenses, for injury or death proximately caused by the employer's removal of, or failure to install, a machine safety guard or safety device. An employer is not liable under this subsection unless:

(1) the safety guard or safety device is required by the North Carolina Occupational Safety and Health Act or standards adopted thereunder, or the manufacturer designed, installed, required, or otherwise provided by specification for the safety guard or device and informed the employer of same; and

(2) the employer specifically authorized the removal of or failure to install the safety guard or safety device with knowledge that injury or death would likely result therefrom.

(c) An award for damages in a civil action brought pursuant to subsection (b) shall be reduced by the amount of compensation paid or payable under the provisions of this Chapter to the employee or the employee's estate. Subsection (b) shall not impair or repeal any other rights available to the employee or the employee's representative against the employer, co-employees, or third parties.

(d) For purposes of subsection (b):

(1) 'Employer' means an owner or a supervisor having managerial authority to direct and control the acts of employees.

(2) 'Removal' includes physical removal and any other act that is intended to and does render the safety guard or safety device inoperable, except (i) for purposes of repair or (ii) for effecting an improvement to the machine that renders the safety guard or safety device unnecessary for the protection of the operator.

(3) 'Specifically authorized' means an affirmative instruction issued by the employer prior to the time of the employee's physical injury or death, but does not mean any subsequent acquiescence in, or ratification of, removal of the safety guard or safety device.

Sec. 2. This act is effective upon ratification and shall apply to causes of action arising on or after that date.

EXPLANATION OF FOS-DRAFT 2

Employer Liability for Removing Machine Safety Guards

This bill makes employers liable for injuries to employees caused by the employer's removal of machine safety guards. The employer is liable only if the guard was required by OSHA regulations or by manufacturer's specifications and the employer specifically ordered its removal. The intentional failure to install a safety guard is equivalent in this bill to its removal..

Employees generally cannot sue their employers for work injuries. Their exclusive recourse is to collect workers compensation benefits. Our courts have created an exception for intentionally-inflicted injuries, allowing employees injured by an employer's intentional actions to seek damages in court. "Intentional," for purposes of the Workers Compensation Act, has traditionally referred to conduct such as an employer's assault on an employee. Recently, however, the courts have expanded the definition of "intentional" to include instances where the employer intentionally created an unsafe workplace environment and knew with substantial certainty that serious injury or death could result (***Woodson v. Rowland***). Draft 2 is a statutory application of the *Woodson* principle to a particular type of workplace injury -- injury caused by machines from which safety guards have been removed.

An earlier version of this bill was debated in the House during the 1992 session. The new draft is based on the same premise as the earlier draft: an employee may sue the employer for injuries sustained from the intentional removal of the safety guard. Several changes have been made to clarify portions of the bill, however. Most of these changes are based on a review of similar safety guard laws in Alabama and California and cases construing those laws. California's safety guard law, for example, is a result of a compromise about ten years ago on workers compensation reform (Jones v. Keppeler, 279 Cal.Rptr. 168 (1991).

The most significant changes embodied in the new draft are as follows:

(1) The standard is now explicitly stated that the employer, in removing the safety guard, must have known of the likelihood of injury or death to the employee. This was left unaddressed in the earlier version. It may be considered a more relaxed standard than the *Woodson* "substantially certain" test and is consistent with the standards used in the Alabama and California laws.

(2) The word "device" is used in addition to the word "guard" since "guard" might be narrowly construed to mean only a physical barrier. Some safety features, such as a feature requiring operating controls to be pressed with both hands simultaneously, are best described as safety "devices." (Bingham v. CTS Corp., 282 Cal.Rptr. 161 (1991)).

(3) The failure to install the safety guard is equivalent to removing it. This is explicit in the California law (Calf. Labor Code §4558(b)). Although the Alabama law refers only to "removal" of guards, the Alabama courts have found failure to install the guards to be just as dangerous and have therefore interpreted the word "removal" to include "failure to install" (Bailey v. Hogg, 547 So.2d 498 (Ala. 1989).

(4) The removal of or failure to install the safety guard must be either a violation of OSHA regulations or contrary to the manufacturer's specifications on safety devices. The earlier version of the bill referred only to OSHA violations. The reference to manufacturer's specifications comes from the California law (Calf. Labor Code §4558(c)). This draft is broader than the California law since it is the manufacturer's specifications, not the OSHA standards, that determine the employer's liability at law for safety guard removal in California (Swanson v. Matthews Products, Inc., 221 Cal.Rptr. 84 (1985).

(5) If the guard is removed for purposes of repairing the machine or for purposes of making an improvement to the machine that renders the safety guard unnecessary, the employer is not liable. This comes from the Alabama law (Alab. Code §25-5-11(c)).

(6) The term "removal" includes not only physical removal, but also any action taken to render a safety device or guard inoperable. This is consistent with the California courts' judicial interpretation of their law's reference to "removal" (Bingham v. CTS Corp., 282 Cal.Rptr. 161 (1991).

(7) The term "employer" includes the employer's managerial employees, such as plant managers, supervisors, and foremen. The bill makes clear that an employer is not liable for acquiescing in the removal of a safety guard after the fact; the employer must have affirmatively ordered its removal beforehand in order to be held liable.

Other features of the earlier version remain intact in this draft. First, the removal of the safety guard must be the proximate cause of the injury. If the employee is injured by a machine, but the removal of the guard was not a proximate cause of the injury, the employer is not liable for damages. Second, the employee is not forced to an election of remedies; in other words, the employee can immediately obtain workers compensation benefits and then file suit against the employer for damages. Under this version, the earlier version, and the principles of *Woodson*, the damages obtained in the lawsuit by the employee, if any, must be offset by the workers compensation benefits. Third, the employer is entitled to avail itself of all common law defenses in the employee's lawsuit.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

D

FOS-DRAFT 3

Short Title: Products Liability Repose. (Public)

Sponsors:

Referred to:

December 14, 1992

A BILL TO BE ENTITLED

AN ACT TO AMEND THE STATUTE OF REPOSE FOR PRODUCTS LIABILITY ACTIONS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 1-50 reads as rewritten:

"**§ 1-50. Six years.** Within six years an action --

(1) Upon the official bond of a public officer.

(2) Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.

(3) For injury to any incorporeal hereditament.

(4) Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to the holder of the certificate or duplicate certificate of stock in the corporation.

(5) a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

b. For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

1. Actions to recover damages for breach of a contract to construct or repair an improvement to real property;
2. Actions to recover damages for the negligent construction or repair of an improvement to real property;
3. Actions to recover damages for personal injury, death or damage to property;
4. Actions to recover damages for economic or monetary loss;
5. Actions in contract or in tort or otherwise;
6. Actions for contribution indemnification for damages sustained on account of an action described in this subdivision;
7. Actions against a surety or guarantor of a defendant described in this subdivision;
8. Actions brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest therein;
9. Actions against any person furnishing materials, or against any person who develops real property or who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

c. For purposes of this subdivision, "substantial completion" means that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended. The date of substantial completion may be established by written agreement.

d. The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition.

e. The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of fraud, or willful or wanton negligence in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement

to real property, or a repair to an improvement to real property, or to a surety or guarantor of any of the foregoing persons, or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence.

f. This subdivision prescribes an outside limitation of six years from the later of the specific last act or omission or substantial completion, within which the limitations prescribed by G.S. 1-52 and 1-53 continue to run. For purposes of the three-year limitation prescribed by G.S. 1-52, a cause of action based upon or arising out of the defective or unsafe condition of an improvement to real property shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant. However, as provided in this subdivision, no action may be brought more than six years from the later of the specific last act or omission or substantial completion.

g. The limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c), G.S. 1-52(16) and G.S. 1-47(2).

(6) No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than ~~six~~ ten years after the date of initial purchase for use or consumption.

(7) a. No action against any registered land surveyor as defined in G.S. 89C-3(9) or any person acting under his supervision and control for physical damage or for economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting shall be brought more than 10 years from the last act or omission giving rise to the cause of action.

b. For purposes of this subdivision, 'surveying and platting' means boundary surveys, topographical surveys, surveys of property lines, and any other measurement or surveying of real property and the consequent graphic representation thereof.

c. The limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c) and G.S. 1-52(16)."

Sec. 2. This act becomes effective October 1, 1993 and applies to causes of action arising on or after that date; provided, however, this act shall not apply to a cause of action involving a product initially purchased for use or consumption prior to October 1, 1987.

EXPLANATION OF FOS-DRAFT 3

Lengthening Products Liability Statute of Repose

Section 1 of this draft lengthens the products liability statute of repose from 6 years to 10 years. It is a revision to an earlier recommendation by the Fire and Occupational Safety Committee to extend the period to 25 years. The statute of repose serves as an absolute cut-off on an injured plaintiff's claim against a manufacturer for a defective product. The current 6-year period begins to run when the product is first purchased and may expire before the plaintiff is injured. For example, a person injured in 1992 by a defective product purchased in 1985 may not be able to sue the product manufacturer because the 6-year statute of repose has already run, terminating the person's right to sue before the injury occurred.

Section 2 makes this act effective October 1, 1993 and states that it applies only to causes of action (injury or death) arising on or after that date. Since amendments to repose statutes cannot constitutionally affect claims that have already expired (see Colony Hill Condominium Assoc. v. Colony Co., 70 N.C.App. 390 (1984)), section 2 specifically provides that the act does not apply to products first sold prior to October 1, 1987 (i.e., 6 years prior to the October 1, 1993 effective date).

Products liability statutes of repose were enacted by many states in the late 1970s in response to a reported crisis in the ability of products manufacturers to obtain liability insurance for their products. (The existence and extent of the crisis is subject to dispute). Among the states that adopted these statutes, the most commonly chosen period was 10 years (see below). Several states have had their repose statutes declared unconstitutional, but North Carolina's has been upheld (Tetterton v. Long Mfg. Co., 314 N.C. 44 (1985)).

The General Assembly adopted the products liability statute of repose in 1979 as part of a products liability reform package. The enactment of the products liability statute of repose followed similar repose statutes for architectural and contractor work (6 years) and medical malpractice (previously 10 years; now 10 years for foreign objects and 4 years for nonapparent injuries) and a 10-year "discovery" statute for latent injuries and damages.

When it enacted the products liability legislation in 1979, the General Assembly prohibited an employee injured on the job by a defective machine from suing the machine's manufacturer, thus restricting the employee solely to workers' compensation benefits. This prohibition was removed in 1989. Now an employee can collect workers' compensation benefits from the employer and bring suit for damages against the machine manufacturer, although the workers compensation benefits will be deducted from the employee's damages award. The 6-year repose period applies to all product liability claims, regardless of whether the claimant is an employee.

Listed below are the repose periods adopted by the various states. Generally, the repose is an absolute cut-off, but a few states equate the running of the repose period with a rebuttable presumption that the product's useful life has ended. Some of the

states have 2 or more "triggers" for repose: for example, Tennessee's statute runs 6 years from date of injury, 10 years from first purchase, or 1 year after expiration of product's anticipated life, whichever occurs first. The list below measures the limit primarily from date of purchase (the same act that triggers the North Carolina statute of repose).

A few of the states have had their statutes of repose declared unconstitutional (as noted below). Other states may have been discouraged from adopting products liability repose statutes because of prior constitutional challenges to their architect and contractor repose statutes and medical malpractice repose statutes.

Products Liability Statutes of Repose

State	Repose Period (in years)	
Alabama	10	Unconstitutional
Arizona	12	
Colorado	10	
Florida	12	Repealed
Georgia	10	
Idaho	10	
Illinois	10	
Indiana	10	
Kansas	10	
Kentucky	8	
Louisiana	10	
Minnesota	15	
Nebraska	10	
New Hampshire	12	Unconstitutional
NORTH CAROLINA	6	
North Dakota	10	Unconstitutional
Ohio	10	
Oregon	8	
Rhode Island	10	Unconstitutional
South Dakota	10	
Texas	12	
Utah	6	Unconstitutional

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

S/H D

FOS-DRAFT 5
(THIS IS A DRAFT AND NOT READY FOR INTRODUCTION)

Short Title: OSHA Rev. Bd. Decisions. (Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED

AN ACT REQUIRING CERTAIN DETAIL IN THE DECISIONS AND REPORTS OF THE OSHA REVIEW BOARD.

The General Assembly of North Carolina enacts:

Section 1. G.S. 95-135(i) reads as rewritten:

"(i) A hearing examiner appointed by the chairman of the Board shall hear, and make a determination upon, any proceeding instituted before the Board and may hear any motion in connection therewith, assigned to ~~such~~ the hearing examiner, and shall make a report of ~~any such~~ the determination which constitutes ~~his~~ the hearing examiner's final disposition of the proceedings. A copy of the report of the hearing examiner shall be furnished to the Director and all interested parties involved in any appeal or any proceeding before the hearing examiner for ~~his~~ the hearing examiner's determination. The report of the hearing examiner shall become the final order of the Board 30 days from the date of ~~said~~ the report as determined by the hearing examiner, unless within ~~such~~ the 30-day period any member of the Board had directed that ~~such~~ the report shall be reviewed by the entire Board as a whole. Upon application for review of any report or determination of a hearing examiner, before the 30-day period expires, the Board shall schedule the matter for hearing, on the record, except the Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue. All interested parties to the original hearing shall be notified of the date, time and place of ~~such~~ the hearing and shall be allowed to appear in person or by attorney at ~~such~~ the hearing. Upon review of ~~said~~ the report and determination by the hearing examiner the Board may adopt, modify or vacate the report of the hearing examiner and notify the interested parties.

The report of the hearing examiner, and the report, decision, or determination of the Board upon review shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record. The report, decision or determination of the Board upon review shall be final unless further appeal is made to the courts under the provisions of Chapter 150B of the General Statutes, as amended, entitled: 'Judicial Review of Decisions of Certain Administrative Agencies.'"

Sec. 2. G.S. 95-138(a) reads as rewritten:

"(a) Any employer who willfully or repeatedly violates the requirements of this Article, any standard, rule or order promulgated pursuant to this Article, or regulations prescribed pursuant to this Article, may upon the recommendation of the Director to the Commissioner be assessed by the Commissioner a civil penalty of not more than seventy thousand dollars ($70,000) and not less than five thousand dollars ($5,000) for each willful violation. Any employer who has received a citation for a serious violation of the requirements of this Article or any standard, rule, or order promulgated under this Article or of any regulation prescribed pursuant to this Article, shall be assessed by the Commissioner a civil penalty of up to seven thousand dollars ($7,000) for each ~~such~~ serious violation. If the violation is adjudged not to be of a serious nature, then the employer may be assessed a civil penalty of up to seven thousand dollars ($7,000) for each ~~such~~ nonserious violation. Any employer who fails to correct a violation for which a citation has been issued under this Article within the period allowed for its correction (which period shall not begin to run until the date of the final order of the Board in the case of any appeal proceedings in this Article initiated by the employer in good faith and not solely for the delay or avoidance of penalties), may be assessed a civil penalty of not more than seven thousand dollars ($7,000). ~~Such~~ The assessment shall be made to apply to each day during which ~~such~~ the failure or violation continues. Any employer who violates any of the posting requirements, as prescribed under the provision of this Article, shall be assessed a civil penalty of not more than seven thousand dollars ($7,000) for ~~such~~ the violation. The Commissioner upon recommendation of the Director, or the Board in case of an appeal, shall have authority to assess all civil penalties provided by this Article, giving due consideration to the appropriateness of the penalty with respect to the following factors:

(1) size of the business of the employer being charged,

(2) the gravity of the violation,

(3) the good faith of the ~~employer~~ employer, and

(4) the record of previous violations.

The Commissioner and the Board shall jointly adopt uniform standards which the Commissioner, the Board, and the hearing examiner shall apply when considering the four factors for determining appropriateness of the penalty. The report of the hearing examiner and the report, decision, or determination of the Board on appeal shall specify the standards applied in determining the reduction or affirmation of the penalty assessed by the Commissioner."

Sec. 3. This act is effective upon ratification and applies to citations issued on or after that date.

EXPLANATION OF FOS-DRAFT 5

OSHA Review Board Decisions

Section 1 of this draft requires that reports of the OSHA Review Board hearing examiners, and Board decisions on review, be in writing and include findings of fact, conclusions of law, and the reasons and bases for them. It also makes technical changes in the law to conform to accepted drafting principles. Section 2 requires the Commissioner of Labor and the OSHA Review Board to adopt uniform standards for determining the appropriateness of a penalty imposed for an OSHA violation, and also requires the hearing examiner's report or Review Board's decision to specify the standard applied. Section 3 makes the act effective upon ratification and applies it to citations issued on or after that date.

Written opinions of the OSHA Review Board and its hearing examiners vary in the amount of detail they provide with respect to the reasons behind reducing penalties imposed by the Commissioner of Labor, when such penalties have been appealed. The absence of this detail has led to speculation by some persons that the penalty reduction was arbitrary rather than based on uniformly applicable standards for reviewing violations and penalties. Of particular concern is the apparent additional factor considered on appeal, that factor being "economic hardship" to the employer. The Commissioner of Labor does not use this as a discreet factor, but views it as part of the statutory mitigating factor relating to size of the business being charged with the violation. Thus, if "economic hardship" and "size of the business" are identical mitigating factors, the penalty is being reduced once by the Commissioner and again on appeal, for exactly the same reason. The purpose of this legislation is twofold: (1) to ensure that decisions on appeal clearly state the basis for upholding or reducing penalties imposed by the Commissioner so that employers and employees can be relatively certain of the consequences of particular violations; and (2) to ensure that the standards applied to determine the appropriateness of a penalty are uniform, and to avoid multiple reductions of a penalty for identical mitigating factors.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

H D

FOS-DRAFT 6
HOUSE JOINT RESOLUTION
(THIS IS A DRAFT AND NOT READY FOR INTRODUCTION)

Sponsors:

Referred to:

A JOINT RESOLUTION REQUESTING THE LEGISLATIVE RESEARCH COMMISSION TO CONTINUE ITS STUDY OF FIRE AND OCCUPATIONAL SAFETY ISSUES.

Whereas, the 1991 LRC Study Committee on Fire and Occupational Safety at Commercial and Industrial Facilities was established in response to the industrial fire at the Imperial Foods plant and for the purpose of determining the status of occupational safety in public and private sector workplaces in North Carolina; and

Whereas, the 1991 Study Committee heard testimony regarding workplace safety hazards and violations, as well as testimony of effective workplace safety practices and programs; and

Whereas, in response to the information it received, the Committee recommended fourteen bills for consideration by the 1991 General Assembly, Regular Session 1992, eleven of which were enacted; and

Whereas, although the Committee accomplished much of its initial task, the Committee finds that there is still work to be done, including monitoring the effectiveness of recently enacted legislation, in order to ensure the establishment and maintenance of a safe work environment for citizens of the State;

Now, therefore, be it resolved by the House of Representatives, the Senate concurring:

Section 1. The Legislative Research Commission is authorized to continue its study of fire and occupational safety at commercial, industrial, and State operated facilities and worksites. The Commission is further authorized to prepare an interim report of its study, and to make final recommendations, including recommendations to the 1993 General Assembly, Regular Session 1994.

Sec. 2. This resolution is effective upon ratification.

EXPLANATION OF FOS-DRAFT 6

Fire and Occupational Safety Study Continued

This joint resolution authorizes the Legislative Research Commission to continue its study of fire and occupational safety issues at State and private workplaces through the 1993-94 biennium. The resolution is effective upon ratification.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

D

FOS-DRAFT 7

Short Title: Comp Carrier Safety Services (Public)

Sponsors:

Referred to:

December 14, 1992

A BILL TO BE ENTITLED

AN ACT TO REQUIRE THE COMMISSIONER OF INSURANCE AND THE RATE BUREAU TO DEVELOP A PROPOSED PLAN FOR WORKERS' COMPENSATION CARRIERS LOSS CONTROL SERVICES.

The General Assembly of North Carolina enacts:

Section 1. The North Carolina Rate Bureau and the Commissioner of Insurance shall jointly develop a plan for loss control and accident prevention consultation services that requires all insurers writing workers compensation insurance in this State to provide or make available services to their insureds regarding workplace safety, loss control, and accident prevention.

The plan shall address the types of services to be provided or made available and may distinguish the prescribed services by the hazards of the industry, employer size, and other relevant factors.

The plan shall be filed by December 1, 1993, with the Legislative Research Commission's committee studying fire and occupational safety issues, if then in existence; otherwise, the recommended plan shall be filed with the Joint Legislative Commission on Governmental Operations by December 1, 1993.

Sec. 2. The purpose of this legislation is to provide a plan for review only. Approval of or acquiescence in the plan by the Legislative Research Commission or its committees or the Joint Legislative Commission on Governmental Operations does not make the plan effective; provided, however, that this legislation shall not be construed as impairing the authority of the Rate Bureau to make the plan effective pursuant to Chapter 58 of the General Statutes.

Sec. 3. This act is effective upon ratification.

EXPLANATION OF FOS-DRAFT 7

Workers Comp Carriers Safety Services

This draft requires the North Carolina Rate Bureau and the Commissioner of Insurance to jointly develop a proposed plan that will require all insurance carriers writing worker compensation insurance coverage in this State to provide loss control and accident prevention services to its insured employers. The plan would determine what types of services would be provided and could distinguish the required services based on the size of the employer, the hazards of the risk insured, or other relevant factors. The proposed plan would be submitted to the Legislative Research Commission's committee studying workplace safety issues or, if no such committee is in existence, to the Joint Legislative Commission on Government Operations. The committee cannot, through its "approval" of the proposal, put it into effect; instead, it is contemplated that the committee would recommend the necessary implementing legislation to the 1994 short session or the 1995 session of the General Assembly.

The North Carolina Rate Bureau is a legislatively-established commission governed primarily by a self-appointed committee of insurance industry representatives. Workers compensation is one of three types of risks for which the Rate Bureau promulgates rates for the industry. In addition to rate-making, the Bureau also approves policy forms and adopts other rules and criteria under which carriers must operate.

The Rate Bureau already subjects assigned risk claims to certain loss control standards. These standards provide that an employer in an assigned risk plan may request loss control consultation (such as safety seminars, accident prevention programs, safety literature) from their carriers. Consulting surveys must also be provided by carriers for assigned-risk employers with large risks or who generate a specified premium volume; otherwise, the survey is optional with the carrier.

This legislation requires the Rate Bureau and the Commissioner of Insurance to jointly develop a proposed plan under which all employers would be entitled to assistance from their workers compensation insurance carriers. The plan could establish different levels of services; for example, large employers might be required to be inspected annually while smaller employers might have safety literature or advice made available to them.

This would only be a proposed plan, submitted for review to the Legislative Research Commission's workplace safety committee, if in existence; otherwise, to the Joint Legislative Commission on Governmental Operations. The reviewing committee would then decide whether to recommend legislation to the General Assembly to actually implement these plans.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

S/H D

FOS-DRAFT 8A
(THIS IS A DRAFT AND NOT READY FOR INTRODUCTION)

Short Title: Bldg. Code Fines Up. (Public)

Sponsors: .

Referred to:

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT LOCAL GOVERNMENTS HAVE THE AUTHORITY TO IMPOSE CIVIL PENALTIES FOR VIOLATIONS OF THE STATE BUILDING CODE.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143-138(h) reads as rewritten:

"(h) Violations. -- Any person who shall be adjudged to have violated this Article or the North Carolina State Building Code, except for violations of occupancy limits established by either, shall be guilty of a misdemeanor and shall upon conviction be liable to a fine, not to exceed fifty dollars ($50.00), for each offense. Each 30 days that such violation continues shall constitute a separate and distinct offense. Violation of occupancy limits established pursuant to the North Carolina State Building Code shall be a misdemeanor subject to a one hundred dollar ($100.00) fine for a first offense, a two hundred fifty dollar ($250.00) fine for a second offense, and a five hundred dollar ($500.00) fine and up to 30 days imprisonment for a third and any subsequent offenses. Any violation incurred more than one year after another conviction for violation of the occupancy limits shall be treated as a first offense for purposes of establishing and imposing penalties. ~~In case any building or structure is erected, constructed or reconstructed, or its purpose altered, so that it becomes in violation of the North Carolina State Building Code or if the occupancy limits established pursuant to the North Carolina State Building Code are exceeded, either the local enforcement officer or the State Commissioner of Insurance or other State official with responsibility under G.S. 143-139 may, in addition to other remedies, institute any appropriate action or proceedings including the civil remedies set out in G.S.~~

~~160A-175 and G.S. 153A-123, (i) to prevent such unlawful erection, construction or reconstruction or alteration of purpose, or overcrowding, (ii) to restrain, correct, or abate such violation, or (iii) to prevent the occupancy or use of said building, structure or land until such violation is corrected."~~

Sec. 2. G.S. 143-139 reads as rewritten:

"**§ 143-139. Enforcement of Building Code.**

(a) Procedural Requirements. -- Subject to the provisions set forth herein, the Building Code Council shall adopt such procedural requirements in the North Carolina State Building Code as shall appear reasonably necessary for adequate enforcement of the Code while safeguarding the rights of persons subject to the Code.

(b) General Building Regulations. -- The Insurance Commissioner shall have general supervision, through the Division of Engineering of the Department of Insurance, of the administration and enforcement of all sections of the North Carolina State Building Code pertaining to plumbing, electrical systems, general building restrictions and regulations, heating and air conditioning, fire protection, and the construction of buildings generally, except those sections of the Code, the enforcement of which is specifically allocated to other agencies by subsections (c) and (d) below. The Insurance Commissioner, by means of the Division of Engineering, shall exercise his duties in the enforcement of the North Carolina State Building Code (including local building codes which have superseded the State Building Code in a particular political subdivision pursuant to G.S. 143-138(e)) in cooperation with local officials and local inspectors duly appointed by the governing body of any municipality or board of county commissioners pursuant to Part 5 of Article 19 of Chapter 160A of the General Statutes or Part 4 of Article 18 of Chapter 153A of the General Statutes, or any other applicable statutory authority.

(b1) Remedies. -- In case any building or structure is maintained, erected, constructed or reconstructed or its purpose altered, so that it becomes in violation of this Article or of the North Carolina State Building Code, either the local enforcement officer or the State Commissioner of Insurance or other State official with responsibility under this section may, in addition to other remedies, institute any appropriate action or proceeding to: (i) prevent the unlawful maintenance, erection, construction or reconstruction or alteration of purpose, or overcrowding, (ii) restrain, correct, or abate the violation, or (iii) prevent the occupancy or use of the building, structure, or land until the violation is corrected. In addition to the civil remedies set out in G.S. 160A-175 and G.S. 153A-123, a county, city, or other political subdivision authorized to enforce the North Carolina State Building Code within its jurisdiction may, for the purposes stated in (i) through (iii) of this subsection, levy a civil penalty for violation of the North Carolina State Building Code, which penalty may be recovered in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time after the offender has been cited for the violation.

(c) Boilers. -- The Bureau of Boiler Inspection of the Department of Labor shall have general supervision of the administration and enforcement of those sections of the North Carolina State Building Code which pertain to boilers of the types enumerated in Article 7 of Chapter 95 of the General Statutes.

(d) Elevators. -- The Department of Labor shall have general supervision of the administration and enforcement of those sections of the North Carolina State Building Code which pertain to elevators, moving stairways, and amusement devices such as merry-go-rounds, roller coasters, Ferris wheels, etc."

Sec. 3. G.S. 143-138(e) reads as rewritten:

"(e) Effect upon Local Codes. -- The North Carolina State Building Code shall apply throughout the State, from the time of its adoption. However, any political subdivision of the State may adopt a building code or building rules and regulations governing construction or a fire prevention code within its jurisdiction. The territorial jurisdiction of any municipality or county for this purpose, unless otherwise specified by the General Assembly, shall be as follows: Municipal jurisdiction shall include all areas within the corporate limits of the municipality and extraterritorial jurisdiction areas established as provided in G.S. 160A-360 or a local act; county jurisdiction shall include all other areas of the county. No such code or regulations, other than those permitted by G.S. 160A-436, shall be effective until they have been officially approved by the Building Code Council as providing adequate minimum standards to preserve and protect health and safety, in accordance with the provisions of subsection (c) above. While it remains effective, such approval shall be taken as conclusive evidence that a local code or local regulations supersede the State Building Code in its particular political subdivision. Whenever the Building Code Council adopts an amendment to the State Building Code, it shall consider any previously approved local regulations dealing with the same general matters, and it shall have authority to withdraw its approval of any such local code or regulations unless the local governing body makes such appropriate amendments to that local code or regulations as it may direct. In the absence of approval by the Building Code Council, or in the event that approval is withdrawn, local codes and regulations shall have no force and effect. Provided any local regulations approved by the local governing body which are found by the Council to be more stringent than the adopted statewide fire prevention code and which are found to regulate only activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion or related hazards, and are not matters in conflict with the State Building Code, shall be approved. Local governments may enforce the State Building Code using civil remedies authorized under G.S. 143-139, G.S. 153A-123, and G.S. 160A-175."

Sec. 4. G.S. 160A-175 is amended by adding the following new subsection to read:

"(c1) An ordinance may provide for the recovery of a civil penalty by the city for violation of the State Building Code as authorized under G.S. 143-139."

Sec. 5. G.S. 153A-123 is amended by adding the following new subsection to read:

"(c1) An ordinance may provide for the recovery of a civil penalty by the county for violation of the State Building Code as authorized under G.S. 143-139."

Sec. 6. This act is effective upon ratification and applies to violations committed on or after that date.

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EXPLANATION OF FOS-DRAFT 8

Building Code Changes

Sections 1 and 2 of this act clarifies the authority of local governments to levy civil penalties for violations of the State Building Code in their jurisdiction. Sections 3-5 make conforming changes to other relevant statutes, and Section 6 makes the act effective upon ratification and applicable to citations issued on or after that date.

Effective July 1, 1991, the General Assembly authorized the Building Code Council to adopt and incorporate a fire prevention code into the State Building Code. Prior to this date, fire code ordinances were adopted and enforced by local governments. Local governments use the permit process as an effective means of enforcing State and local building code provisions. This enforcement means, however, is not applicable to fire code provisions. G.S. 153A-123, and G.S. 160A-175 provide statutory authority for county and city ordinances to impose penalties for violations of local ordinances. Since the new statewide fire code is not established by local ordinance, there is some question as to whether local governments have the statutory authority to enforce the statewide fire code via civil penalty. There is authority in other sections of the statutes pertaining to local governments (e.g. local governments have the authority to adopt by reference published technical codes or standards or regulations adopted by public agencies, G.S. 153A-47; G.S. 160A-76.) Statutes also authorize local inspection departments to enforce State and local laws pertaining to buildings, G.S. 153A-352; G.S. 160A-412. These statutes do not specifically authorize enforcement via civil penalty. The statutory changes proposed in this draft clarify that local governments have the authority to levy civil penalties for violations of the State Building Code, including the statewide fire code.

GENERAL ASSEMBLY OF NORTH CAROLINA

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S/H D

FOS-9
(THIS IS A DRAFT AND NOT READY FOR INTRODUCTION)

Short Title: Health and Safety Training. (Public)

Sponsors: .

Referred to:

A BILL TO BE ENTITLED

AN ACT TO REQUIRE THAT PUBLICLY FUNDED JOB TRAINING PROGRAMS INCLUDE HEALTH AND SAFETY TRAINING.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143B-438.3 reads as rewritten:

"**§ 143B-438.3. Declaration of the State policy on employment and training.**

(a) It is the policy of this State that all federal, State and local government resources provided for employment and job training programs be coordinated to effect an efficient employment and training service delivery system.

(b) The goals of the State employment and training programs are:

(1) To assist North Carolinians in obtaining gainful employment;

(2) To reduce dependence upon public assistance and unemployment insurance programs;

(3) To develop a well trained, productive work force that meets the needs of the State's changing economy; and

(4) To make maximum use of existing institutions and organizations with demonstrated effectiveness in employment and training service delivery.

(c) The State's goals shall be accomplished by:

(1) Preparing economically disadvantaged unskilled youth and adults for entry into the work force;

(2) Retraining people who are structurally unemployed, who are jobless through no fault of their own, or who must upgrade or retrain for job skills in other fields;

(3) Removing barriers to employment and designing programs that will be responsive to the special needs of offenders, the handicapped, public assistance recipients, school dropouts, single parents, women 35 years of age or older, and other appropriate groups;

(4) Insuring that timely and accurate statewide labor market data are available;

(5) Linking employment and training services with economic development efforts;

(6) Providing employment and training opportunities to meet the needs of industries utilizing advanced technology; and

(7) Avoiding unnecessary duplication of employment and training services by State agencies.

(8) Requiring instruction on worker safety and health standards and practices as a part of employment and job training programs administered under this Part."

Sec. 2. G.S. 115D-5(d) reads as rewritten:

"(d) Community colleges shall assist in the preemployment and in-service training of employees in industry, business, agriculture, health occupation and governmental agencies. Such training shall include instruction on worker safety and health standards and practices applicable to the field of employment. The State Board of Community Colleges shall make appropriate regulations including the establishment of maximum hours of instruction which may be offered at State expense in each in-plant training program. No instructor or other employee of a community college shall engage in the normal management, supervisory and operational functions of the establishment in which the instruction is offered during the hours in which the instructor or other employee is employed for instructional or educational purposes."

Sec. 3. This act becomes effective October 1, 1993.

EXPLANATION OF FOS-DRAFT 9

Safety and Health Instruction in Job Training Program

This legislative proposal establishes as an additional goal of the State employment and training programs to require instruction on worker safety and health standards and practices as part of job training programs administered by the State. The proposal also directs the State community colleges to include in their preemployment and in-service training of certain employees instruction on worker safety and health standards and practices.

Section 1 amends the statute that declares policy and goals for State employment training programs to include as a goal instruction on worker safety and health standards and practices as part of employment and job training programs administered under the statute.

Section 2 amends a section of the Chapter on Community Colleges to direct the colleges to include in their employee inservice and preemployment training programs instruction on worker safety and health standards and practices applicable to employment fields.

Section 3 makes the act effective October 1, 1993.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

S/H D

FOS-10
(THIS IS A DRAFT AND NOT READY FOR INTRODUCTION)

Short Title: Workers' Comp./Physician Selection. (Public)

Sponsors: .

Referred to:

A BILL TO BE ENTITLED

AN ACT TO ALLOW INJURED EMPLOYEES TO SELECT OR CHANGE TREATING PHYSICIANS IN WORKERS' COMPENSATION CASES.

The General Assembly of North Carolina enacts:

Section 1. G.S. 97-25 reads as rewritten:

"**§ 97-25. Medical treatment and supplies.**

Medical compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employer is called

to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission.

Provided, however, if he so desires, an injured employee who is dissatisfied with an employer provided physician may select a physician of his own choosing a single time. Second and subsequent changes of physicians shall be subject to the approval of the Industrial Commission. ~~to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.~~"

Sec. 2. This act is effective upon ratification and applies to workers' compensation cases pending or filed on or after that date.

EXPLANATION OF FOS-DRAFT 10

Injured Employees/Choice of Physician

This legislative proposal allows injured employees who have filed a claim under Workers' Compensation to select their own physician for treatment of the injury, without the approval of the Industrial Commission.

Under the Worker's Compensation Act, medical compensation is paid by the employer for injuries sustained by the employee. Current practice is that the physician is chosen by the employer. However, subject to the approval of the Industrial Commission, the law allows an injured employee to select his or her own physician to attend, prescribe and assume the care and charge of the employee's case. FOS-DRAFT 10 amends G.S. 95-27 to provide that an injured employee who is dissatisfied with a physician provided by the employer may select a physician of the employee's choosing one time, without the approval of the Commission. If the employee wishes to make subsequent changes of physicians, such changes must be approved by the Commission.

APPENDICES

A

LEGISLATIVE RESEARCH COMMITTEE

FIRE AND OCCUPATIONAL SAFETY AT INDUSTRIAL AND COMMERCIAL FACILITIES

Remarks of

John E. Campion

on behalf of

The North Carolina Citizens for Business and Industry

December 14, 1992

Good morning. My name is John Campion. I am Assistant General Counsel for Burroughs Wellcome Co. but I am appearing here today on behalf of the North Carolina Citizens for Business and Industry, an association of North Carolina employers with whom I am sure you are all familiar.

You are considering a proposed bill that would exclude from the exclusivity provisions of North Carolina Workers' Compensation law injuries caused by an employer removing a machine guard. In effect, this legislation proposes to use the workers' compensation system as a device to enforce safety regulations. To embark on such a course has serious policy ramifications for the workers' compensation system, for the employees who are served by the workers' compensation system, and for the economic well-being of our state and its citizens. I would like to explore these with you this morning so that your decision does not have unanticipated consequences.

I have been a labor lawyer all of my professional life and have represented and counseled employers regarding employee safety and health. I know and understand the importance of our public policy requiring employers to provide a safe and healthful workplace and the importance of the Occupational Safety and Health regulatory scheme that embodies this policy. There are, however, other public policies of great importance to workers and care must be taken before one policy is subordinated to another.

Professor Arthur Larson at Duke University, the man who "wrote the book" on workers' compensation, articulates the public policy underlying workers' compensation this way:

> The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

1 WORKMEN'S COMPENSATION LAW, DESK EDITION §2.20 (1992) (emphasis added).

North Carolina's Workers' Compensation law, originally adopted in 1929, reflects the same policy concerns, that is, to provide expeditious and certain compensation to injured workers. In Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 N.E.2d 458, 461 (1982), the North Carolina Supreme Court noted:

> The purpose of the Workers' Compensation Act is twofold. It was enacted to provide swift and sure compensation to injured workers without the necessity of protracted litigation.

The Act effects these purposes first by eliminating fault as a condition to recovery and second by limiting the amount of recovery. In this way, claims processing need not get bogged down with employers trying to protect themselves against the potentially huge liabilities attendant on a finding of tort liability in a civil trial. In other words, employers and their liability insurers do not need to involve lawyers and investigators in claims processing and investigations to their interests in anticipation of future litigation. Since payment of compensation is not affected by fault and the amounts of those payments are predictable and reasonable, there is simply no need to complicate matters.

When fault is allowed to infect the system , then the need to prepare for tort suits comes into claims processing, investigation, and hearings. With large verdicts and contingent fees in the picture, the Industrial Commission process becomes a phase of discovery in civil litigation with the parties looking not to the swift and certain compensation of injured employees but to building their cases for the later jury trial in the court action.

The legislature has already struck the balance between the need for swift and certain compensation of injured employees with the need to incent employers to provide safe

and healthful workplaces. The legislative decision was to preserve the workers' compensation system by providing, in N.C.G.S. Section 97-12, for a percentage increase in the workers' compensation recovery where there is a "willful failure of the employer to comply with any statutory requirement...." This balancing avoids infecting the system with the risks and uncertainties inherent in the civil tort process that would undermine the workers' compensation system while providing incentives to lawful action.

The fact that the machine guarding bill is intended to be of limited scope does not diminish the importance of its policy implications. First, the current drafts may not be of such limited scope. Draft 2C (December 14, 1992) applies to "a machine safety guard or safety device." (line 15) It is not clear that "machine" modifies "safety device." If "safety device" is interpreted as standing alone, that is, that the bill applies to any "safety device" required by law or by a manufacturer, the reach and impact of the law is vast.

Even if the bill only applies to guards or devices on "machines," the law does not define "machine" or "device." For example, automobiles and typewriters are both machines. Could a video display terminal be considered a "machine?" What devices attendant on the operation of these or other "machines" would be viewed as "safety devices?" When I think of guards or devices I think of metal or plastic pieces over blades or two-handed controls on punch presses. But as a lawyer, with a little imagination I can come up with many less obvious parts of a machine that could arguably be called "safety devices" so that the issue could be left for a jury. As an employer, each worker's injury would have to be investigated to determine whether the possibility existed that it could turn into a "safety devices" lawsuit.

Even if the bill is successfully limited in scope to actual guards on industrial machinery like saws and punch presses, I suggest that the legislature will be under continual pressure to further erode workers' compensation exclusivity in the name of safety. Once you have decided that you will accept safety as a more pressing policy concern than swift and certain compensation, then you will be asked to extend the exception granted guards to other areas of concern, like confined space entry, electrical lockouts, chemical exposure, and scaffolding. Indeed, can one distinguish machine guarding as a more pressing safety concern than many of the other areas of regulation in OSHA's vast set of standards?

In the final analysis, you must consider whether the interests of the workers of this state are best served by a return to the system of civil tort liability that our fathers and grandfathers rejected in favor of the workers' compensation system with its swift and certain compensation for the injured worker. You must decide whether the interests of the few who will prove their cases and receive handsome jury awards in civil law suits should outweigh the interests of the many injured employees who may loose both the swiftness and the certainty of recovery that they now enjoy.

As you have seen, there is little precedent among the other states for undermining workers' compensation. Even legislatures in such states as Michigan and West Virginia have shied away from subordinating workers' compensation to other policy concerns. I urge you to consider thoroughly the underlying implications of this legislation and not to let its superficial appeal hide from you its underlying infirmity. It would be sad for North Carolina and its workers to find that in attempting to be in the forefront of worker protection we instead wandered into a stagnant backwater.

B

REMARKS TO THE LRC COMMITTEE ON FIRE AND OCCUPATIONAL SAFETY

Ralf F. Haskell
Special Deputy Attorney General
Labor Section, Attorney General's Office

This office has been asked to address a proposal to abolish the Safety and Health Review Board. Under the proposal, as we understand it, the functions and duties of the Review Board would be assumed by the Office of Administrative Hearings.

Since 1973, and until recent years, the Safety and Health Review Board--as constituted--has been able to carry out its statutory responsibilities to hear and decide appeals by employers from citations issued under the Occupational Safety and Health Act [hereinafter the "OSH Act"]. Cases decided since 1974 have been published. Opinions by the Board have been fairly consistent, and have addressed the issues presented by the parties.

Recent developments in the area of Occupational Safety and Health, however, have made it clear that the current Review Board is unable to effectively fulfill its statutory duties as constituted. Citations issued under the OSH Act are unlike other types of lawsuits and claims, which seek redress or damages for past wrongs, and which may linger in the courts for months and years. An employer who contests the existence of a hazardous condition is not required to abate safety or health violations alleged by the Department of Labor until such time as a final

Order is entered by the Board.[1] Workers may continue to be exposed to hazardous conditions while appeals are processed. It is taking longer and longer for the Review Board to hear cases, and the pressure to issue decisions quickly, once a case is heard, has resulted in a diminishment of the quality of opinions. When cases are heard on appeal to the Board, many assigned errors are not being addressed in the written opinions.

In the past three years, there has been a significant increase in the number of contested cases to be heard before the Review Board. In fiscal year 1989-90, only 9.5% of inspections where citations were issued were being contested. At the end of Fiscal Year 1990-91, the percentage increased to 24%. Two hundred fifty four (254) cases were pending at the end of that year. At the end of the 1991-92 fiscal year, these figures had increased to over 30% of inspections with citations being contested, and 297 cases pending.

The increase in contestments can be traced to a variety of factors. Primarily, the number of contestments is driven by the number of inspections. In fiscal year 1991, there were 1,426 inspections done by the Department of Labor. With the recent authorized increase in the number of health and safety inspectors to a total of 112, it has been projected that 4,200 inspections

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[1] Upon petition of the Commissioner of Labor, the Superior Courts of this State have jurisdiction to restrain any conditions or practices in places of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by the OSH Act.

per year will result. Even if the percentage of inspections with citations that are contested remains at 30%, which we doubt, it can be expected that more than 1,200 cases will be opened before the Review Board for hearing in the near future.

A 30% figure is probably low. The amount of penalties for violations under the Act has been increased by the legislature twice in a 16 month period. The maximum penalty for a serious violation is now $7,000, up from $1,500 in 1990. The maximum penalty for willful violations has increased from $10,000 to $70,000 in the same time frame. Cases have become more complex; ergonomic issues, such as workers suffering carpal tunnel syndrome from repetitive motion in the workplace, are being litigated--including cases involving workers using video display terminals.

The Review Board currently has only six Hearing Examiners, who are practicing attorneys and who are available part-time to hear cases. The Attorney General's Office is now receiving 40-50 cases per month, and soon may be receiving 100 cases per month. Many individual cases take an entire day to hear. Some cases require three or even four days for a hearing. There are currently three or four major cases which will take a week or more to hear.

Some of the cases being heard by Hearing Examiners this month are from inspections which occurred in May through July of 1991. Two of these cases involved fatalities. With the anticipated explosion in contested cases, the time delay can only

be compounded. There is a serious question as to whether the State OSHA program can be effective in reducing hazards in the workplace due to the inability of the review system to properly function.

The Hearing Examiners, who have no staff to assist them, generally do a good job, but are required to issue an opinion within 30 days. Most of the Hearing Examiners have gained specialized knowledge in the area, which is of extreme importance in evaluating these cases. But it is becoming increasingly apparent that six part-time Hearing Examiners are an insufficient number to devote the necessary time and research into the issues when deciding cases.

The increase in litigation has also increased the amount of pre-hearing motion practice--far beyond what can be effectively handled by commissioners who are available only on a part-time basis. The Chairman of the Review Board, who is not legally trained, and works on a part-time, per diem basis, makes decisions without the benefit of a professional staff. As a result, many of these rulings have to be appealed to the full Review Board, which is comprised of two other members, who are attorneys.

The burden on the two other commissioners is also apparent. Several times this year, a Hearing Examiner had to sit, by designation, due to the inability of all three commissioners to be present.

The pressure on the Board is evident in some of the language used in the opinions. In one opinion, the Hearing Examiner had created a "public policy" basis for reducing a $4,500 penalty to $500. The company had 17.3 million dollars of gross revenue in 1991. No "public policy" basis has been created by the legislature for the Review Board to consider when assessing penalties. The Department of Labor appealed. Although the Review Board fully confirmed the Department's position that the Hearing Examiner was wrong, as a matter of law, in that there was no public policy exception, it still affirmed the penalty reduction. The Board stated that although the Hearing Examiner did not state the basis for the reduction, the business was granted reduction of penalties due to "obviously valid mitigating factors," and that the Department "should not further burden the Board's heavy load with needless argument." While we are concerned about the Board's heavy caseload, limiting the rights of a party for relief allowed under the Act--especially where the Review Board found legal error--is not the appropriate remedy.

Despite deficiencies in the operation of the Review Board, the answer to the problem is not to shift the statutory duties for managing a burgeoning caseload of specialized litigation to another agency. A Safety and Health Review Board is still preferable for several reasons:

(1) Litigation under the Occupational Safety and Health Act is a specialized area of law; many scientific principles are involved. A judge who has developed an expertise in this

field should be able to quickly and efficiently resolve issues. If safety and health issues are addressed in the same forum with other types of legal issues, that expertise--and efficiency in the administration of justice--will be lost.

(2) Opinions by the Review Board have been published since 1974. The availability of prior case law, stare decisis, to guide the courts is invaluable. It provides a consistency in treatment for both parties to the litigation. Employers cited by the State, and the Department, can discover what the Review Board has ruled in previous cases with similar issues, and involving the same regulations.

(3) The State OSHA law directly follows the federal regulatory scheme. The State is required to adopt federal regulations, or regulations as effective as those federal regulations. The federal Safety and Health Review Commission opinions are published as well, and provide a wealth of specialized legal research on the same regulations which are cited by the State. The procedures and practices are much the same. Corporate employers are able to retain out-of-state counsel who are familiar with OSHA litigation before a Review Commission.

(4) The current procedure for docketing a case with the Review Board is a simple one. Once an employer sends in a letter which contests citations, the Board sends the company a Statement of Position. The employer can check off various

blocks on the form to indicate whether it is contesting the violations, the designation as willful, serious, or repeat, the amount of the penalty--or any combination of the above. A box can be checked to ask for formal pleadings, and all citations and penalties are deemed contested. In non-complex cases, hearings are less formal than would be before other forums, allowing the small businessman to assert his rights without incurring substantial costs. Although the rules of evidence apply, Hearing Examiners have great latitude in modifying the rules in the interest of justice.

The Review Board should consist of a Chairman, and two commissioners. Members of the Review Board should be appointed by the Chief Justice of the State Supreme Court, on the basis of their legal abilities. The Review Board is a specialized judiciary, where the rights of parties are decided--including the rights of employees to a place of employment free of recognized hazards. The Chairman and commissioners should be legally trained, be available to hear oral argument on a regular basis, and have sufficient time to properly review and decide cases.

The Review Board should also have a full-time professional staff, consisting of a Chief Administrative Law Judge, an Administrative Assistant, a secretary, and a judicial clerk. The Chief Administrative Law Judge would be in charge of the day-to-day administrative functions of the Board, and could hear those cases which will require several days or longer for

hearing. The Chief Administrative Law Judge would rule on pre-hearing motions by the parties, and his orders could be appealed to the full Board.

Hearing Examiners should have the same status as an Administrative Law Judge, and have formalized legal training and education. They would remain under contract to hear cases on a part-time, per diem basis. This would result in budgetary savings, as a full-time hearin aff would not be required.

In the first nine months of 1991, the Labor Section received 165 new cases for hearing before the Review Board. In the first nine months of 1992, it received 286 new cases. This month, September 1992, 42 cases were received by the Labor Section, but only 19 cases were set for hearing. Unless some dramatic changes are made, the backlog of cases will continue to grow, and the pressures to issue decisions promptly will continue, resulting in a lack of protection to employees in this State.

In summary, we recommend that this Committee explore ways to improve the Review Board and its operational procedures so that the Board may continue to hear and decide OSH cases.

la:revbd

C

Department of Labor
State of North Carolina
4 West Edenton Street
Raleigh 27601

John C. Brooks
Commissioner

October 1, 1992

The Honorable Aaron Plyler
2170 Concord Avenue
Monroe, North Carolina 28110

The Honorable Toby Fitch
615 East Nash Street
Wilson, North Carolina 27893

Dear Toby and Aaron:

Enclosed is the October 1, 1992 interim report from the Task Force on State Agency Oversight of Workplace Safety and Health as required by House Bill 1395.

The task force is meeting weekly in an effort to accomplish the task set out for us. In addition to this report and the final report required by March 1, 1993, we plan to have another interim report at the end of this calendar year to inform you of our progress at that time.

Please let me know if you have questions about any of the matters in this report.

Sincerely,

John C. Brooks

JCB:CNJ:swh

enclosure

cc: The Honorable Pete Cunningham
Post Office Box 16209
Charlotte, North Carolina 28297

Mr. Linwood Jones
North Carolina General Assembly
Legislative Services Office
LOB, 300 North Salisbury Street
Raleigh, North Carolina 27603-5925

INTER-AGENCY TASK FORCE

ON STATE AGENCY OVERSIGHT

OF WORKPLACE SAFETY AND HEALTH

August 28, 1992

AGENDA

I. Welcome and introductions

II. Review of charge

III. Proposed plan of action

IV. Initial presentations

A. Ken Kiser
Occupational Safety and Health Review Board

B. Dascheil Propes
Department of Insurance
Building Code Council

V. Suggestions for future presentations

VI. Set meeting dates

VII. Adjourn

INTER-AGENCY TASK FORCE

ON STATE AGENCY OVERSIGHT

OF WORKPLACE SAFETY AND HEALTH

September 4, 1992

AGENDA

I. Welcome

II. Review of materials

III. Presentations

A. Ned Vaughan-Lloyd
Industrial Commission

B. Ed Cash
Department of Crime Control and Public Safety
Division of Emergency Management

IV. Suggestions for future presentations

V. Set meeting dates

VI. Adjourn

INTER-AGENCY TASK FORCE

ON STATE AGENCY OVERSIGHT

OF WORKPLACE SAFETY AND HEALTH

September 11, 1992

AGENDA

I. Welcome

II. Review of materials

III. Presentation

James A. Oppold
Safety and Health Institute Project

IV. Discussion of ideas to be included in the interim report

V. Adjourn

9/8/92

CATEGORIES OF WORKPLACE SAFETY AND HEALTH ACTIVITIES

General occupational safety and health regulation

OSH Division, Department of Labor
Engineering Division, Department of Insurance

General safety and health education

OSH Division, Department of Labor
Safety Department, Industrial Commission
Occupational Health Section, Department of Environment, Health, and Natural Resources

Specialized safety regulation

Elevator Division, Department of Labor
Boiler Division, Department of Labor
Mine and Quarry Division, Department of Labor
Right to Know Division, Department of Labor
Pipeline Safety Section, Utilities Commission
Rail Safety Section, Utilities Commission
Pesticide Administration, Department of Agriculture
LP Gas Section, Department of Agriculture
Division of Emergency Management, Department of Crime Control and Public Safety
Radiation Protection Division, Department of Environment, Health, and Natural Resources
Food and Lodging Sanitation Branch, Department of Environment, Health, and Natural Resources
Asbestos Control Branch, Department of Environment, Health, and Natural Resources
State Bureau of Investigation, Department of Justice
Motor Carrier Safety Branch, Department of Transportation
Employee Safety and Health Workplace Requirements, Office of State Personnel

Specialized Safety Education

All of the above specialized safety regulation agencies also have some educational component
Environmental Epidemiology Section, Department of Environment, Health and Natural Resources
Fire and Rescue Services, Department of Insurance
N.C. Fire Commission, Department of Insurance
School Facility Services Division, Department of Public Instruction

POSSIBLE TOPICS FOR TASK FORCE CONSIDERATION

As discussed at task force meetings to date, September 8, 1992

1. Review the membership and responsibilities of the State Emergency Response Commission.

2. Review the organization of the Occupational Safety and Health Review Board.

3. Review the relationship between the Industrial Commission and the Department of Labor, especially the education and training functions.

4. Review the relationship between the Occupational Safety and Health Division of the Department of Labor and the Occupational Health Branch of the Division of Health Services of the Department of Environment, Health and Natural Resources.

5. Review the relationship of the Building Code Council and the Department of Labor.

6. Review the need for a safety and health training institute.

7. Review the organization of fire safety responsibilities at the State level, the delivery of fire inspection services, and the relationship of State-level standard setting and local code enforcement of fire safety.

8. Review the laboratory services available for analysis of chemical samples.

9. Review the responsibility for securing disaster sites after the immediate emergency has passed in order to preserve the integrity of evidence.

10. Review the coordination between the rehabilitation nurses of the Industrial Commission and the duties of Vocational Rehabilitation within the Department of Human Resources.

INTER-AGENCY TASK FORCE

ON STATE AGENCY OVERSIGHT

OF WORKPLACE SAFETY AND HEALTH

September 16, 1992

AGENDA

I. Welcome

II. Review of materials

III. Presentations

A. Dan Baucom
Occupational Health Branch
Department of Environment, Health, and Natural Resources

B. Kay Slaughter
Office of State Personnel

IV. Review of ideas for interim report

V. Adjourn

INTERAGENCY TASK FORCE

ON WORKPLACE SAFETY AND HEALTH

September 29, 1992

AGENDA

I. Welcome

II. Approval of minutes

III. Report on Study Committee meeting

IV. Review and adoption of Interim Report

V. Schedule for October meetings

October 1, 1992

Interim Report to the North Carolina General Assembly
Pursuant to House Bill 1395 (Chapter 1008)

Concerning

An Act to establish an inter-agency task force to study the reorganization of state agencies involved with occupational safety and health and fire safety responsibilities and to file a report with the General Assembly.

INTRODUCTION

The task force membership was designated by the General Assembly as follows.

1) The Commissioner of Labor, who shall also chair the Task Force.
2) The Commissioner of Insurance or a designee.
3) The Secretary of the Department of Environment, Health, and Natural Resources or a designee.
4) The Chairman of the Industrial Commission or designee.
5) The Chairman of the Public Utilities Commission or a designee.
6) The Secretary of the Department of Transportation or a designee.
7) The Chairman of the State Personnel Commission or a designee.
8) A community college representative appointed by the President of the North Carolina System of Community Colleges.
9) Two local officials, one selected by the North Carolina League of Municipalities and the other selected by the North Carolina Association of County Commissioners.
10) One employee selected by the Speaker of the House of Representatives from a list of recommendations submitted by the AFL-CIO and one business owner selected by the President Pro Tempore of the Senate from a list of recommendations submitted by the North Carolina Citizens for Business and Industry.

MEMBERSHIP

Following is a list of the task force members.

CHAIRMAN COMMISSIONER OF LABOR
John C. Brooks
Labor Building
733-0360

MEMBERS

COMMISSIONER OF INSURANCE
The Honorable James E. Long
Mr. Dascheil Propes (Alternate)
Senior Deputy Commissioner
N.C. Department of Insurance
Dobbs Building
733-3901

DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES REPRESENTATIVE
Dr. Thad B. Wester
Deputy State Health Director
N.C. Dept. of Environmental, Health and Natural Resources
Archdale Building
733-4984

INDUSTRIAL COMMISSION REPRESENTATIVE
Mr. W.E. (Ned) Vaughan-Lloyd, Jr.
Safety Director
N.C. Industrial Commission
Dobbs Building
733-5290

PUBLIC UTILITIES COMMISSION REPRESENTATIVE
Mr. William R. (Bill) Gilmore
Natural Gas Industry Analyst
N.C. Utilities Commission
Dobbs Building
733-6000

DEPARTMENT OF TRANSPORTATION REPRESENTATIVE
Mr. Berry G. Jenkins, Jr., PE
State Construction & Materials Engineer
N.C. Dept. of Transportation
Highway Building
733-7174

STATE PERSONNEL COMMISSION REPRESENTATIVE
Ms. Kay K. Slaughter
Director, Employee Safety and Health Workplace Requirements
Office of State Personnel
Administration Building
733-6316

COMMUNITY COLLEGE REPRESENTATIVE
Mr. Ken Farmer
Director of Fire Training
N.C. Department of Community Colleges
Caswell Building
733-7051

N.C. LEAGUE OF MUNICIPALITIES REPRESENTATIVE
Mr. William (Bill) Carstarphen
City Manager, City of Greensboro
P.O. Box 3136
Greensboro, NC 27402-3136
919-373-2002

N.C. ASSOCIATION OF COUNTY COMMISSIONERS REPRESENTATIVE
The Honorable M. Jackson (Jack) Nichols
Wake County Commissioner
Attorney at Law
4011 Westchase Blvd., Suite 400
Raleigh, NC 27607
664-8200

AFL-CIO REPRESENTATIVE
Mr. John May
AFL-CIO Legislative Laision
Route 4, Box 386-B
Louisburg, NC 27709
919-853-2449

N.C. CITIZENS FOR BUSINESS AND INDUSTRY REPRESENTATIVE
Mr. William S. (Chan) Chandler
Vice President Corporate Development
Glen Raven Mills, Inc.
1831 North Park Avenue
Burlington, NC 27215
919-227-6211

CONSULTANT
Mr. L.A. (Al) Weaver
308 East Jones Street
Raleigh, NC 27601
919-832-6242

ACTIVITIES

Representatives from the agencies and other parties as noted on the attached minutes attended sessions held on August 28, September 4, September 11, September 16, and September 29, 1992 in Raleigh. Minutes as approved for sessions held on August 28, September 4, and September 11, 1992 are attached. Also attached are agendas for the five (5) meetings held to date.

The task force has sought information from various agencies with responsibilities in the area of workplace safety and health to identify if there are coordination or duplication problems. Seven presentations have been made and six more are scheduled at this time. The task force has not yet discussed as a group any of the issues presented. After the task force receives all the information requested, there will be discussions of any recommended changes.

It is the consensus of the task force that the General Assembly needs to provide for an educational component to effectively implement occupational safety and health and fire safety responsibilities in North Carolina. The task force acknowledges these educational concerns as set forth in items six (6) and eight (8) of the issues directed by the General Assembly to be addressed by the task force. The task force recognizes these issues concerning education and will include detailed recommendations in a final report for implementation.

Due to the time available, no recommendations are offered at this time.

Submitted October 1, 1992

John C. Brooks, Chairman

Interagency Task Force

on Workplace Safety and Health

Minutes, August 28, 1992

Commissioner of Labor John C. Brooks called to order the first meeting of the Interagency Task Force on Workplace Safety and Health and asked the members to introduce themselves. Present were Ned Vaughan-Lloyd, Bill Carstarphan, Jack Nichols, Chan Chandler, Dascheil Propes, Ken Farmer, Berry Jenkins, Bill Gilmore, John May, Kay Slaughter, and Dan Baucom representing Thad Wester. Also present were Al Weaver, who was nominated as a consultant to the task force, Charles Jeffress of the Department of Labor, Randy Ward of the Industrial Commission, Ken Kiser of the Safety and Health Review Board, and Paul Hash, safety director of the Department of Environment, Health, and Natural Resources.

Charles Jeffress reviewed the legislation creating the task force and the task force's responsibilities. The task force has three primary charges: recommending a reorganization of the workplace safety and health responsibilities of state government; developing an educational component for workplace safety and health, and reviewing the fire safety responsibilities and coordination between state and local governments.

Commissioner Brooks proposed that, in addition to the interim report envisioned by the legislation to be completed by October 1 and the final report of the task force due March 1, 1993, that an additional interim report be filed at the end of the year. This will enable the new Commissioner of Labor, who will become the new chairperson of the task force, to have a clear understanding of where the task force stands. Commissioner Brooks further proposed weekly meetings of the task force, given the amount of work to be accomplished and the short time allowed for completion. No public hearings were proposed, but members could add anything to the agenda for a meeting at any time.

A brief review of the OSHA Reform Bill pending in Congress was provided by Commissioner Brooks, highlighting the provision of the bill which will extend OSHA coverage to public employees at the state and local level. No such coverage currently exists in those states without state programs. Commissioner Brooks also noted the preemptive nature of OSHA regulations, which by law preempt any other state or local safety and health regulation of the workplace, and the lack of federal funds available for enforcement of OSHA regulations.

In considering procedures that the task force will follow, Commissioner Brooks proposed that the task force vote at least twice on any proposal any member wants to make as a recommendation from the task force. If the proposal passes on the first vote, it will be considered a tentative recommendation,

and will be a final recommendation if it passes a second vote at a later meeting. Any final recommendation would be subject to be reconsidered one time, should a member move for reconsideration. All votes will be decided by a majority vote. Dasch Propes moved approval of this process, and the task force voted approval without dissent.

Jack Nichols stated that one of his primary considerations during the deliberations of the task force would be how much was it going to cost and who was going to pay for it. Local government is always on the receiving end of mandates without funds to pay for them, and he will be striving to avoid any new mandates from this group unless funds are provided.

Chan Chandler requested copies of organizational charts of the agencies involved in workplace safety and health regulation. Commissioner Brooks asked that those agencies represented send copies of their organizational charts to the Labor Department and the department would distribute them to members.

Kay Slaughter asked that, in addition to organizational charts, a descriptive narrative of each agency's program also be included.

Bill Carstarphan asked that, rather than having endless presentations by every agency, that someone provide the task force with an independent overview of the workplace safety and health activities of State government. Commissioner Brooks indicated that is the type of assignment that he would expect Al Weaver to handle.

The task force then heard a presentation on the Safety and Health Review Board. Commissioner Brooks began by explaining that the Review Board is located within the Department of Labor but is independent of it and that the board hears appeals of contested OSHA citations. He recommended that the board be relocated outside of the department and that it be staffed by full-time hearing officers rather than the part-time attorneys who hear cases now.

Ken Kiser, Chairman of the Review Board, continued with the presentation. He described the Review Board as three members who are appointed by the Governor to hear appeals of OSHA cases. The Review Board also has seven part-time attorneys around the state who serve as hearing officers, each attorney scheduling three hearing dates each month. The board has a 300-case backlog, and it takes 4 to 6 months for an appeal to be heard. The number of appeals has increased from 5 per month to 40 per month over the past five years.

In response to questions, Mr. Kiser indicated that about 10% of the cases go beyond the Review Board to court, but very few get overturned. The biggest reason for the appeals is the size of the fine. All fines, once collected, go to the General Fund.

Jack Nichols noted that the Review Board seems to duplicate the hearing function of the Office of Administrative Hearings. Commissioner Brooks noted that some OSHA appeals, those involving agricultural employers, already go to the Office of Administrative Hearings, but that the special knowledge of the Review Board hearing examiners was helpful in their work. Mr. Nichols pointed out that the administrative law judges of the Office of Administrative Hearings did well with appeals of environmental fines and a host of other types of hearings, and that whatever specialized knowledge was needed could be quickly acquired. He asked, and Ken Kiser agreed, to provide information to the task force on the structure and procedures of the Review Board and the volume of cases handled.

Dasch Propes then presented some of the responsibilities of the Department of Insurance with respect to workplace safety and health, focusing on the State Building Code. The code is developed by the Building Code Council and sets standards for all building, not just workplaces. The council has been in place since 1957, and all members are appointed by the Governor representing specific constituencies.

Commissioner Brooks noted that the building code and OSHA have some overlapping jurisdiction, as evidenced in the Hamlet fire investigation, and that, to avoid any question in the future of preemption of the building code by a lesser OSHA standard, the Department of Labor has just adopted Volumes One and Five of the Standard Building Code as an OSHA standard. The code adopted by the department is slightly different from the North Carolina Building Code, which is based upon the Standard code but not identical to it.

Mr. Propes indicated that the Department of Insurance was opposed to the adoption of the Standard code by the Department of Labor, because it appears to create duplication and confusion, not resolve it.

The Code Officials Qualification Board certifies local inspectors to enforce the code. North Carolina is unique in having a statewide code with local enforcement by state-certified inspectors. The code requires inspections of all new buildings and requires inspections of existing buildings on a regular basis after January 1, 1993 for compliance with the fire code, which is a part of the building code. The frequency of the inspections depends upon the hazardous nature of the contents or activity being conducted in the building.

In response to a question, Mr. Propes indicated that public schools were inspected every two years. Kay Slaughter noted that the Department of Public Instruction also conducts fire inspections of local schools. Mr. Propes also noted that elevator regulations were set by the Department of Labor, not the Building Code Council. He noted that the building code function is usually organized with the fire marshal function in most states, and in North Carolina the Insurance Commissioner is the state fire marshal.

Following a question by Commissioner Brooks, Mr. Propes said that accident inspections are conducted by the Insurance Department pursuant to statutory authority and in conjunction with the SBI during an arson investigation. In response to Mr. Nichols, Mr. Propes stated that localities had the authority to charge a fee for building code and fire code inspections.

Berry Jenkins noted that improving workplace safety was an issue of limited resources and questioned how big the problem was of insufficient or uncoordinated workplace safety regulation.

Commissioner Brooks agreed with Mr. Jenkins that the problem was one of limited resources, and noted that questions of jurisdictional problems may be ones that the task force develops no consensus on. However, consensus was not necessary. If the task force voted for a particular recommendation but someone wanted to file a dissent or minority report as part of the task force report, that option would be preserved and welcomed.

Mr. Propes, in response to Mr. Jenkins, stated that there is a large problem in fire and safety education, and that the State could greatly profit from an increase in education before further increase in enforcement.

Kay Slaughter asked if a legislator could be invited to speak to the task force to address specifically what the legislature would like from the task force.

John May asked if a list existed or could be developed listing all required inspections done of any workplace for any reason.

The next meeting was set for 9:00 am, September 4, in the offices of the Building Code Council, 410 N. Boylan Avenue.

The meeting adjourned at 4:00 p.m.

Officially adopted September 29, 1992

John C. Brooks

John C. Brooks, Chairman

Interagency Task Force

on Workplace Safety and Health

Minutes

September 4, 1992

Commissioner Brooks called the meeting to order at 1:00 pm in the conference room of the Engineering Division of the Department of Insurance. Present were Commissioner Brooks, Ned Vaughan-Lloyd, Daschiel Propes, Bill Gilmore, Kay Slaughter, Ken Farmer, Al Weaver, Charles Jeffress, and Paul Hash representing Thad Wester.

Following introductions, Charles Jeffress reviewed the materials which had been inserted into members' notebooks, including a preliminary list of agencies which are involved with workplace safety (not including licensing boards), a list of potential topics for the task force to address, and a set of organizational charts submitted to Commissioner Brooks.

Ned Vaughan-Lloyd presented an overview of the work of the Industrial Commission. He distributed copies of literature describing the workers' compensation system and an organizational chart outlining the departments of the commission.

In addition to the judicial responsibilities of deciding workers' compensation cases, the Industrial Commission assists employers in safety and health education and assists in evaluating employees to achieve maximum rehabilitation possible following a severe occupational injury or illness. The department is not regulatory in any way, having no oversight over insurance companies or their loss control procedures.

Mr. Vaughan-Lloyd explained what constitutes a compensable injury and explained the administrative operations of the Industrial Commission.

The safety department of the commission has three professional employees and a secretary. This department provides safety services in the form of safety training and workers'

compensation management courses. They also help coordinate eight safety councils around the State and put on the Statewide Safety Conference each spring.

In response to a question from Al Weaver, Mr. Vaughan-Lloyd explained that the medical services nurses of the Claims Department of the commission coordinate medical services of claimants with severe, permanent, medical disabilties. Their work is different from the work of Vocational Rehabilitation in the Department of Human Resources. The Industrial Commission helps someone to get as much improvement as possible following an accident, while Vocational Rehabilitation seeks to retrain workers for a different job when their disability demands it. The Claims Department employs six nurses and two disease claim specialists among their 17 employees.

Kay Slaughter indicated that the area of rehabilitation, both the type of work done by the Industrial Commission and that done by Vocational Rehabilitation, is increasingly being contracted out to private contractors. The Industrial Commission staff does a good job, but the numbers of people being served by the Commission and Vocational Rehabilitation is so great that employers cannot always get as expeditious service as they need.

Mr. Vaughan-Lloyd explained in detail how workers' compensation claims are reported by employers and insurance companies. The costs of workers' compensation are expected to continue to increase significantly as the result of increased medical costs, increased processing costs, and increased types of injuries and illnesses being made compensable. Mr. Vaughan-Lloyd also presented statistics showing the number of claims filed under workers' compensation in the past two years. Over a period of several years, the statistics are not comparable because the reporting requirements have changed. The statistics do show an increase in the number of controverted claims.

Al Weaver expressed concern over whether all companies are reporting claims in the same way and what impact the different reporting might have on the rating used by the General Assembly in the legislation passed last summer. Mr. Vaughan-Lloyd indicated that the reporting differences were concentrated in minor claims, which Mr. Propes indicated did not affect the rating assigned by the Rate Bureau.

Next, Ed Cash, area planner for the Division of Emergency Management, explained the operations of the division and the State Emergency Response Team. The division has 96 people, 70 in Raleigh and 26 in the field. Each of eight areas of the State are assigned a coordinator, planner, trainer, and a

secretary. To assist with emergency coordination, each county also appoints someone to act as the emergency coordinator for that county.

To assist the division in responding to emergencies, the State has established the State Emergency Response Team, which consists of representatives of 26 different agencies which might be called upon to assist in different types of emergencies. It was noted that the SERT was so broad as to include even the Department of Revenue.

Mr. Cash discussed the response to the emergency in Hamlet and how the SERT reacted. Questions were asked about who is in charge at the scene of an emergency when the Division of Emergency Management responds. Mr. Cash indicated that local officials are in charge, but as soon as they ask for help from the SERT, then the SERT takes charge. The State, if it cannot handle the emergency, then may call for help from the Federal Emergency Management Agency (FEMA) to take charge, which usually doesn't happen until the recovery phase of the operation.

Commissioner Brooks pointed out that the question of coordination at the scene of an emergency is one of the questions raised by the legislation creating the task force. Mr. Cash stated that initially on the local level, the chairman of the board of commissioners is ultimately in charge of coordination at the local level. During the actual emergency, the local fire chief is in charge until and unless he turns responsibility over to the State. While the State may then take command, the local agencies are still much involved in and essential to the response. In response to a question from Commissioner Brooks, Mr. Cash stated that once the Governor calls in the National Guard, they do control access to the scene of the emergency, but they act under the general direction of the emergency response person in charge, such as in Florida, where the National Guard is working under the direction of FEMA.

Mr. Propes pointed out that the Governor can utilize his police powers and supersede the emergency response agencies at any time. In response to questions, Mr. Cash explained the role of the SBI as determining the cause and origin of the fire if there is a question about arson. Commissioner Brooks asked about whose responsibility it was at the scene of a disaster to protect the integrity of the evidence. Mr. Cash explained that the local plan gave broad outlines as to each agency's responsibilities, and the incident commander was in overall charge. Following the initial response to the incident, law enforcement agencies would appear to be the appropriate agencies to be in charge of the physical evidence. Mr. Vaughan-Lloyd pointed out that, in terms of industrial accidents, the Hamlet disaster was the first major test of the emergency response team's abilities.

Commissioner Brooks pointed out that some federal law assigns responsibility in cases of disaster, and federal authority will supersede State authority. For instance, the federal OSHA law expects federal OSHA to inspect and control the scene of an industrial disaster. There needs to be an understanding and coordination so that the various responsibilities do not get confused. In Hamlet, for instance, some evidence was removed from the scene by private individuals immediately after the emergency because there was no clear responsibility established for the protection of that evidence. The evidence was recovered, but there was a problem which needs to be examined and clarified.

Mr. Propes asked what specific responsibilities needed to be clarified. Commissioner Brooks stated the clear responsibility existed with emergency responders to control the scene during the actual emergency, but the responsibility may shift once the emergency is over, and this is what needs to be clarified. It may depend upon whom is called in, for instance the National Guard or the U.S. Army or whomever, but some clarification is needed. Kay Slaughter asked if OSHA should be in charge following an industrial disaster rather than the SBI or law enforcement personnel. Commissioner Brooks responded that the SBI had clear authority whenever they were investigating a question of arson or criminal responsibility, but other agencies might have authority in other areas or at different times, and the issue needs to be clarified.

Ken Farmer stated that, since one of the charges is to look at the issue of coordination of the fire safety network, clearly the issue of agency responsibility at the scene of a disaster is an issue that ought to be addressed.

John May asked if the responsibility of the SERT was primarily coordination of response to an event. Mr. Cash indicated that a large part of their responsibility was to plan for emergency responses. Trying to get local authorities to make preparedness plans was a big challenge. The Division of Emergency Management has developed a certification program for emergency management coordinators to assist in the training necessary for local officials.

Mr. Cash concluded his presentation by discussing the issue of transportation of hazardous materials and the need for better knowledge and coordination in accidents involving hazardous chemicals. In one case in Rowan County, local responders, even though trained to respond, waited for the State Division of Emergency Response to get to the scene of an accident involving radioactive materials before anyone decided what to do.

Al Weaver suggested that a future item for the task force's agenda might be a review of the laboratory services available to state agencies. Commissioner Brooks suggested that a presentation on the need for a safety and health institute would be an appropriate topic, and Charles Jeffress indicated that Dan Baucom had been asked to make a presentation on the responsibilities of the Environmental Health and Epidemiology sections of the Division of Health Services.

The meeting adjourned at 11:30 a.m.

Officially adopted September 29, 1992

John C. Brooks, Chairman

Interagency Task Force

on Workplace Safety and Health

September 11, 1992

Minutes

Commissioner Brooks called the meeting to order at 1:00 p.m. in the conference room of the Engineering Division of the Department of Insurance. Members present were Commissioner Brooks, John May, Berry Jenkins, Ken Farmer, Dan Baucom attending for Thad Wester, Carl Goodwin attending for Kay Slaughter, Chan Chandler, and Ned Vaughan-Lloyd. Also present were Al Weaver, Charles Jeffress, Jim Oppold, and Paul Hash.

Commissioner Brooks announced that a contract had been agreed to with Al Weaver to staff the task force and it would be appropriate for the task force to give him instructions as to the work he is expected to perform. The task force will address that at the end of the meeting.

Commissioner Brooks began the discussion of the need for a safety and health institute by discussing the training currently available to State OSHA inspectors to learn their jobs. Since there are so few opportunities available for people to learn the OSHA inspector's job, the State is continually training people then losing them to private industry as soon as they are trained. Since a large need apparently exists in the private sector for people with this type of training, Commissioner Brooks believes it necessary for the State to see that some form of training is made available in this field.

The availability of other training opportunities was discussed, including a four day institute put on in Williamsburg each summer by Triangle universities on safety and health. The tuition for just one course at that institute was $800. A need exists for training on safety and health to be more available around the state, perhaps through community colleges, at a reasonable cost. A difficulty with providing the training is that the instructors are likely to be professionals who command higher status and salaries than are likely to be available at community colleges. The university system appears to be the most appropriate home for such an institute, even though the delivery sites for the training might be community colleges or other locations throughout the State.

In order to get a new proposal for the university on the legislative agenda, the Department of Labor has proposed the institute. The process of a proposal coming up through the system and getting all the necessary layers of approval is likely to take many years, especially with the backlog of needs of the university system. By the department proposing it, even though it is not to be a departmental unit, the issue can be placed on the agenda more quickly.

Commissioner Brooks explained the function of the education and training bureau of the Occupational Safety and Health Division as being primarily a referral center, since the division has no training staff of its own. The division will help people seeking training to find other, perhaps private, sources for that training. The division does cosponsor three schools of two days duration each on selected topics each year, but these schools do not begin to address the needs for continuing training on a large variety of safety and health topics.

The need for training is even more pronounced now that the General Assembly has reinforced the OSHA enforcement staff, according to Commissioner Brooks. The need will become even more pronounced if the OSHA Reform Act now before Congress passes, as it will mandate the establishment of employee safety committees in every workplace, which has the potential of affecting 500,000 people in North Carolina.

Commissioner Brooks introduced Jim Oppold, who has served as director of the Occupational Safety and Health Division, and who now is on special assignment to develop a proposal for a safety and health institute in North Carolina.

Dr. Oppold distributed a narrative which has been prepared to explain the need for the institute. Engineering, education, and enforcement he described as the "three E's" of safety, all of which are essential to providing safe workplaces. While major advances have been made in engineering in the past few years in terms of new standards and new protections, and major initiatives are planned in enforcement in North Carolina, there have been few major advances in the area of education. There are over 100 OSHA standards that require some training for employees.

At the federal OSHA institute in Des Plaines, Illinois, about 7500 to 9000 students are trained each year. Most of those people are OSHA compliance officers; the federal institute has done no training for the private sector for several years. The institute has only six classrooms to serve the entire nation. They are trying to establish regional training centers and six colleges around the country have been selected as possible places

for expansion. The closest to us is Georgia Tech. In North Carolina, East Carolina and Central Piedmont Community College applied for consideration as regional institutes but were not selected.

The federal OSHA Institute has a basic three week course for safety inspectors, a basic three week course for industrial hygienists, three other two-week courses essential for OSHA inspectors, and a series of single-subject courses.

A discussion ensued about the extent of safety and health training at colleges and universities in North Carolina. The known courses at the universities are extremely limited and offered only to university students, and the known courses at community colleges appear to be limited to fire safety training.

Al Weaver reported on a task force appointed by Dr. Monteith at NC State University about how better to integrate safety and health into the university curriculum. Chan Chandler indicated that the Executive Education curriculum at UNC has no safety and health component.

Courses need to be developed for students at four levels, according to Dr. Oppold. First is for employees themselves, second is for managers and supervisors. Third is for designated safety and health representatives, people who are assigned the safety responsibilities for a firm but who have no background for the job. The fourth group is safety and health professionals, such as OSHA inspectors or full-time safety and health professionals.

Reaching the typical worker will be the most difficult. According to ESC, 75% of all businesses have 10 or fewer employees, and these people can only be reached by going to them, not waiting for them to come to an institute.

Al Weaver suggested that training at the secondary education level would also be important to prepare people entering the workforce after high school. Dr. Oppold commented that elementary and secondary schools had done a wonderful job helping to educate students about recycling and environmental issues, and perhaps they could promote safety in the same way. Ned Vaughan-Lloyd emphasized the importance of teaching workplace safety at the lower grade levels.

Chan Chandler commented upon the fact that a basic safety training activity, driver training, was just taken out of the high school curriculum, so it may be difficult to introduce any other safety curriculum.

John May commented that the most important thing in safety is the attitude brought to safety on the job by the employer and the supervisor. Where safety is emphasized and valued, the workplace will be safer. The telephone company is an excellent example of a company where safety has been maintained over the years as a primary consideration. One charge for this task force is to find a way to help small employers to develop this attitude given their lack of time and resources.

Berry Jenkins pointed out that the proposal by Dr. Oppold leaves out perhaps the most important element in safety training - the chief executive officer. The Department of Transportation has just completed a major safety program development effort, and it would not have happened if the Secretary of Transportation had not insisted upon it.

Chan Chandler emphasized that the best thing that can be done to achieve safe working conditions is to emphasize safety education at all levels.

Al Weaver pointed out that education for the chief elected official did not need to be detailed safety education but needed to be a course in how to manage the safety function - how to set goals and interpret the results.

Commissioner Brooks suggested that the vision of the Institute is one where a faculty teaches some residential courses but also plans curricula that could be distributed through community college classes, VCR home study, or any other distribution means. Mr. Chandler suggested that perhaps the community college system rather than a centralized institute might be a better model. Berry Jenkins drew a parallel with the Institute for Transportation Research and Education in the university system which develops the education but then gets it delivered through a variety of delivery systems.

Ken Farmer explained that the community colleges' mission is to serve the needs of the people and industry in an area, not to develop special programs for statewide application. Individual community colleges do develop special programs for their area, but most programs tend to be standard curricula that are replicated across the state.

Commissioner Brooks pointed out that the professionals that are needed to produce the curricula for the technical aspects of safety and health education are the kind of faculty who also want access to research facilities to do research that will advance their careers. Such research centers are not widely available.

The task force then discussed the types of recommendations that would be included in the interim report of the task force to the legislative study committee.

Chan Chandler stated that to him the task force seemed to have developed a general consensus that the direction which the State needed to pursue was to emphasize occupational safety and health education as the highest priority for State investment at this time. John May agreed as to the importance of education, but reminded members that an emphasis also needed to be placed on insuring that individual business owners in the state had the right attitude towards safety and health, since attitude of management seems to be the most important factor in having an effective safety program.

Charles Jeffress commented that the legislation pushed by the study committee in the legislature last summer emphasized enforcement, and it would be appropriate to emphasize education this year. Mr. Chandler said that the study committee had mentioned education, and if the General Assembly did not pick up on that point it needed to be repeated.

Ned Vaughan-Lloyd stated that emphasizing safety compliance through positive motivation techniques rather than simply enforcement would be the best policy for the State. Mr. Chandler pointed out that, through education, we had made it socially unacceptable to litter or harm the environment, and we need to make the same progress in making it unacceptable for people to create unsafe conditions like locking fire doors.

Ken Farmer suggested that the task force recommend to the study committee a mission statement and a set of goals for the task force so that the study committee could understand the direction which the task force is headed in.

Commissioner Brooks stated that the interim report could include this general thrust as well as a survey of what agencies are doing in this area. Al Weaver said that he would draft a report for the task force to consider at its next meeting. Commissioner Brooks indicated that the report was simply a progress report, not a report to be approved or disapproved by the study committee. The decisions by the task force down the road as to specific actions which the State should take in the area of safety and health will be decisions which the study committee will have to review and decide whether or not to recommend to the legislature.

Commissioner Brooks called for any motions which anyone wanted to make regarding any tentative recommendations to be made by the task force. No motions were made, and Commissioner Brooks asked Al Weaver to draft a statement outlining the general philosophy of the task force at this time. Mr. Chandler repeated

that if in fact the study committee did not make it clear to the General Assembly that education is the most important component to be addressed in the State's safety program, then the study committee needs to emphasize that this year.

The task force adjourned at 3:00 pm.

Officially adopted September 29, 1992

John C. Brooks

John C. Brooks, Chairman

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STATE OF NORTH CAROLINA

LEGISLATIVE RESEARCH COMMISSION

STATE LEGISLATIVE BUILDING

RALEIGH 27611

TO: Members, LRC Commission on Fire and Occupational Safety at Commercial and Industrial Facilities

FROM: Gann Watson, Committee Co-Counsel
Linwood Jones, Committee Co-Counsel

Attached for your information are copies of correspondence between Charles Hassell and representatives of the Department of Insurance concerning risk management activities being conducted by carriers. At its October meeting the Committee requested the Cochairmen to send a memo to Commissioner Long indicating its interest in the information requested by Mr. Hassell. A copy of the letter to Mr. Long is enclosed as the first piece of correspondence attached. As of December 9, 1992, Mr. Quang Nguyen, a member of the Department's actuarial division, had received responses from about one-half of those surveyed. Mr. Nguyen hopes to have information available for the Committee from all respondents by the December 14 meeting.

/gw
enc.

DEPARTMENT OF INSURANCE
State of North Carolina
P. O. BOX 26387
RALEIGH, N. C. 27611

JIM LONG
COMMISSIONER OF INSURANCE

COMPANY SERVICES GROUP
ACTUARIAL SERVICES
(919) 733-3284

December 14, 1992

Mr. Charles R. Hassel, Jr.
Attorney at Law
P.O. Box 1246
Raleigh, NC 27603

Re: **Increased Expenditures by Insurers to Improve Workplace Health and Safety; LRC Study Committee on Fire and Occupational Safety.**

Dear Mr. Hassel:

This letter is to respond your request to Ms. Ann W. Spragens, Senior Deputy Commissioner and General Counsel of the Department of Insurance on the above subject.

On the December 1, 1992, the Actuarial Services Division of the NC Department of Insurance faxed and mailed out the attached survey to the 25 largest writers of Workers' Compensation Insurance in North Carolina which accounts for more than 67% of written premium. So far there are 16 replies. Those companies whose data are being used in this report accounts for approximately 50% of the written premium in North Carolina. The list of such companies is also attached for your information.

Following is an attempt to summarize the companies' responses:

1. **Has your company implemented any program to increase the awareness of health and safety or to promote accident/risk prevention in your policyholders' work place?**

   All companies responded Yes.

2. **List all of activities in such programs.**

   With their full time loss prevention personnel work throughout the state, they provide a wide variety of loss control consulting services (e.g., general loss control assistance, environmental service, products liability, property, transportation, construction, healthcare...) In addition, the companies also provide safety educational materials (pamphlets, posters, signs, films) to their policyholders and its employees.

3. **What activities have been implemented on mandatory basis? How often are these activities performed?**

None of companies have implemented activities on the mandatory basis, but rather at the request of the policyholders and/or on the determination of the company's loss control and underwriting personnel, or the service plans are agreed upon with loss control personnel and the policyholders. Two companies indicate that the service frequency depends on the premium volume of their insured policy, and the policyholders must implement some of the companies' recommendations in order to have continued coverage.

4. **Provide amount of expense for each activity listed in #2. and total expenses of such programs. If actual figures are not available, provide estimates.**

No company could provide itemized expenses for each available program in their company. The total expenses follow:

1989	$5,580,641
1990	5,594,406
1991	6,057,152

5. **Has your company considered expenses on #4. as a part of "production and general expenses" as reported in the Special call from the North Carolina Rate Bureau? If not, how has it considered them?**

All responded Yes but one company has considered it as loss adjustment expense.

6. **Provide total amount of production and general expenses.**

Data of one of the responding companies is missing in this section and the total production and general expenses follow:

1989	$26,017,489
1990	30,564,345
1991	34,822,008

7. **Provide the written premium of your company for workers' compensation insurance.**

1989	$251,599,488
1990	274,589,369
1991	314,337,227

The portion of health and safety expense in written premium can be estimated with the above information and the following three assumptions:

1) Health and safety program expense is a part of general expenses which has an annual trend of 6% as assumed in the Workers's Compensation filing this year;
2) The rate change in 1992 was 18.9%, assuming that 2/3 of it effected the 1991 calendar year premium and the remaining 1/3 effected the 1992 calendar year premium; this assumption also holds for the 1992

rate change;

3) Assuming that companies will implement the 58.4% rate change they requested this year.

	(1) Health and Safety Program Expense	(2) Written Premium	(3) Ratio of (1)/(2)
1989	$5,580,641	$251,599,488	2.218%
1990	5,594,406	274,589,369	2.037
1991	6,057,152	314,337,227	1.927
1992	6,420,581*	353,943,718*	1.814*
1993	6,805,816*	514,044,260*	1.324*

* predicted figures based on the above data and assumptions.

From the above table, one conclusion can be drawn that the expense for health and safety programs will increase in the future, but its increasing rate will be much lower than the increasing rate in premium.

Please keep in mind that these health and safety programs exist due to the interest of the individual insurance company and/or its policyholders. A company may conform to the performance standards as required by law, but there's no uniform procedure imposed by the Rate Bureau; neither can the Rate Bureau guarantee, on the behalf of its members, the amount of expense for these programs in the future.

Please let me know if I can be of further assistance.

Thank you.

Sincerely,

Quang C. Nguyen

Quang C. Nguyen
Actuarial Assistant

QCN/jbe
Attachment
cc: Honorable James E. Long
Honorable Milton F. Fitch, Jr.
Senator Aaron W. Plyler, Sr.
Ms. Jan Watson, General Assembly
Mr. Linwood Jones
Mr. Roy Wood, NCCI
Mr. Jerry Hamrick, NCRB
Mr. Sam Watson, NCDOI
Mr. Roger Langley, NCDOI
Ms. Ann W. Spragens, NCDOI
Mr. John P. Donaldson, NCDOI

Survey on health and safety or accident/risk prevention programs for workers' compensation insurance in North Carolina

For each of the following questions, please answer separately for each of the years 1989, 1990 and 1991 and use North Carolina only data.

1. Has your company implemented any program to increase the awareness of health and safety or to promote accident/risk prevention in your policyholders' work place?

2. List all of activities in such programs.

3. What activities have been implemented on mandatory basis? How often are these activities performed?

4. Provide amount of expense for each activity listed in #2. and total expenses of such programs. If actual figures are not available, provide estimates.

5. Has your company considered expenses on #4. as a part of "Production and general expenses" as reported in the Special Call from the North Carolina Rate Bureau? If not, how has it considered them?

6. Provide the total amount of production and general expense.

7. Provide the written premium of your company for workers' compensation insurance.

1991 NORTH CAROLINA PAGE 14
TOP 25 COMPANIES WRITING WORKERS' COMPENSATION INSURANCE

	COMPANY	WRITTEN PREMIUM	PERCENT OF TOTAL WRITTEN PREMIUM
1 ✓	LIBERTY MUTUAL FIRE INSURANCE CO	55190150	8.64
2 ✓	AETNA CASUALTY & SURETY COMPANY	50495000	7.91
3 ✓	LIBERTY MUTUAL INSURANCE COMPANY	34125320	5.34
4	INSURANCE CO OF NORTH AMERICA	27616620	4.32
5 ✓	HARTFORD UNDERWRITERS INS CO	23129450	3.62
6	NATIONAL UNION FIRE INSURANCE CO	22328110	3.50
7	TRAVELERS INSURANCE COMPANY	21494200	3.37
8 ✓	EMPLOYERS INS OF WAUSAU A MUTUAL	19819940	3.10
9 ✓	UNITED STATES FIDELITY & GUARANTY	19130110	3.00
10 ✓	TWIN CITY FIRE INSURANCE COMPANY (#10)	14614610	2.29
11	TRAVELERS INDEMNITY COMPANY OF IL	13969100	2.19
12	LUMBERMENS MUTUAL CASUALTY CO	12277420	1.92
13 ✓	HARLEYSVILLE MUTUAL INS CO	10942270	1.71
14 ✓	ST PAUL FIRE & MARINE INS CO	10756390	1.68
15	MICHIGAN MUTUAL INSURANCE CO	10050750	1.57
16 ✓	MANUFACTURERS ALLIANCE INS CO	10025110	1.57
17 ✓	NATIONWIDE MUTUAL INSURANCE CO	9654288	1.51
18 ✓	HOME INDEMNITY COMPANY	9598875	1.50
19	PACIFIC EMPLOYERS INSURANCE CO	9572066	1.50
20 ✓	TRANSPORTATION INSURANCE CO	8202385	1.28
21 ✓	AMERISURE INSURANCE COMPANY	8113555	1.27
22	STANDARD FIRE INSURANCE COMPANY	8111745	1.27
23	AMERICAN MOTORISTS INSURANCE CO (Same as # 12)	8011900	1.25
24 ✓	NORTH CAROLINA FARM BUREAU MUT INS	7951285	1.25
25 ✓	PENNSYLVANIA MANUF INDEMNITY CO (same as # 16)	7779625	1.22
		433,960,272	67.78%

STATE OF NORTH CAROLINA

LEGISLATIVE RESEARCH COMMISSION

STATE LEGISLATIVE BUILDING

RALEIGH 27611

November 12, 1992

Hon. Jim Long
Commissioner
North Carolina Department of Insurance
Dobbs Building
Raleigh, N. C. 27611

Dear Commissioner Long:

As you know, the LRC Study Committee on Fire and Occupational Safety has been conducting meetings since December, 1991 to study workplace safety in State employment and in business and industry. As a result of these meetings the Committee has identified areas of strength and weaknesses in ensuring workplace safety, and has recommended legislation some of which was enacted by the General Assembly in the 1992 short session. One of the issues in which the Committee has an ongoing interest is health and safety training and accident/risk prevention programs that are or need to be conducted by employers and by insurance underwriters and carriers.

One of our Committee members, Mr. Charles Hassell, has recently requested information from Mr. Roger Langley of your office on what activities are being conducted by carriers in the areas of accident prevention, inspections, education materials, and other related programs, and what portion of the premium dollar is allocated to these types of activities. The Committee is very interested in receiving this information. Also, the Committee would be interested in knowing whether and how much of the most recently requested rate increase will be spent on health and safety or accident prevention programs by carriers.

The Committee appreciates the information and assistance you have provided during its study. At its next meeting on December 14 the Committee will be considering legislation providing for the continuation of the study of fire and occupational safety issues. Information that you can provide pursuant to this letter and to Mr. Hassell's request would be quite useful to the Committee in its final deliberations and to a continuing study committee on workplace safety, in the event it is established by the General Assembly.

Thank you again for your assistance and cooperation. If you have any questions about our request please feel free to contact Committee staff, Gann Watson (733-6660) or Linwood Jones (733-2578).

Sincerely,

Rep. Milton Fitch
CoChairman

Sen. Aaron W. Plyler
CoChairman

/gw

TELEPHONE:
(919) 828-8746

FAX:
(919) 828-5386

CHARLES R. HASSELL, JR.
ATTORNEY AT LAW
115 SOUTH ST. MARY'S STREET
RALEIGH, NORTH CAROLINA 27603

MAILING ADDRESS:
P.O. BOX 1246
RALEIGH, NC 27602

December 3, 1992

Ms. Gann Watson
Co-Counsel
LRC Committee on Fire &
Occupational Safety
State Legislative Bldg.
300 N. Salisbury Street
Raleigh, NC 27611

RE: LRC Study Committe on Fire & Occ. Safety

Dear Gann:

I believe you have copies of recent correspondence from the Department of Insurance. I was also contacted by Department actuary Mr. Nguyen who prepared the enclosed survey he proposes to send out to the 10 major comp writers. My concern is getting any useful information before we conclude our business.

On the workers' compensation death claim issue, I looked at some neighboring state statutes and the Model Act proposed by the Commission on Uniform State Laws.

The Official Code of Georgia, annotated, Sec. 34-9-265, allows death claims of surviving dependents if injured employee dies "...during the period of disability." Disability awards can be limited to 400 weeks or can be unlimited in cases of "catastrophic injury" or total disability according to Title II standards (Social Security).

The Code of Virginia, sec. 65.2-512, allows claims if death results "...within 9 years of the accident." Sec. 65.2-513 provides that there is no limit if death is due to coal miner's pneumoconiosis or "...other occupational lung disease."

The Code of the Laws of South Carolina, Sec. 42-9-290, allows death claims "...within 2 years of the accident or while total disability continues and within 6 years of the accident."

The West Virginia Code, Sec. 23-4-15, imposes no time limit on the filing of a death claim following an accident or disability, or a requirement of continuous disability. An attorney in Wheeling promised to send me some materials which have not been received.

My interpretation of the Tennesee Code was that there are no specific time limitations on filing death claims although there may be some deductions from the benefit commensurate with the amount of compensation paid out during the claimant's lifetime. I discussed it with a lawyer there and he advised that Tennessee just enacted a reform law effective in August, repealing many of the sections I reviewed. He agreed to study how the changes would affect death claims and get back to me. I have not heard from him.

The Model Act contemplates death claims in Sec. 26. There is no time limitation on occurrence of death following injury or disability. The only limitation is that the claim be filed within 3 years from date of death or knowledge of work-related cause of death, whichever is later.

I will forward additional information as it is received.

With best regards, I am

Very truly yours,

Charles R. Hassell, Jr.

CRH/h

Enclosure

Survey on health and safety/accident prevention programs for Workers' Compensation insurance in North Carolina

For each of the following questions, please answer separately for each of the years 1989, 1990 and 1991 and use North Carolina only data.

1. Has your company implemented any program to increase the awareness of health and safety or to promote accident/risk prevention in your policyholders' work place?

2. List all of activities in such programs.

3. What activities have been implemented on mandatory basis? How often are these activities performed?

4. Provide amount of expense for each activity listed in #2) and total expenses of such programs. If actual figures are not available, provide estimates.

5. Has your company considered expenses on #4) as a part of "Production and general expenses" as reported in the special call from the North Carolina Rate Bureau? If not, how has it considered them?

6. Provide the total amount of Production and general expense.

7. Provide the written premium of your company for workers' compensation insurance.

Mr. Hassel

Please let me know ASAP if you have any comment about this survey -

Thanks

Chuong Nguyen

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 1

To Charles Hassell	From Chuong C. Nguyen
Co.	Co. NCDOI
Dept.	Phone # (919) 733-3914
Fax # (919) 821-5316	Fax # (919) 733-0065

DEPARTMENT OF INSURANCE
State of North Carolina
P. O. Box 26387
RALEIGH, N. C. 27611

JIM LONG
COMMISSIONER OF INSURANCE

REGULATORY SERVICES GROUP
(919) 715-0011

November 25, 1992

Charles R. Hassell, Jr.
Attorney at Law
P. O.Box 1246
Raleigh, NC 27603

Re: Increased Expenditures by Insurers to Improve Workplace Health and Safety; LRC Study Committee on Fire and Occupational Safety

Dear Mr. Hassell:

The Insurance Department is continuing to gather the data you requested in your letter of October 21, 1992. Thus far, we have reviewed the filing and conveyed to you on November 13, 1992 what it contained on the subject set forth above. A copy of that letter is attached for your convenience. It is not anticipated that any additional information from the ratemaking proceeding will be available until the Commissioner issues his order. We have outlined an additional avenue to pursue, however, to obtain useful data.

As promised in our letter, a member of our actuarial staff has been assigned to continue to develop information to assist the LRC by developing the text of a special report to be sent to ten companies listed in your request. His name is Quang Nguyen and he will send you a copy of the proposed text in the next few days. We will make every effort to obtain the information in time for its consideration at your meeting scheduled December 14, 1992.

AN EQUAL OPPORTUNITY/AFFIRMATIVE ACTION EMPLOYER

Please contact us if we may be of further service.

Sincerely,

Ann W. Spragens
Senior Deputy Commissioner
and General Counsel

AWS/ja
Attachment
cc: Honorable James E. Long
Honorable Milton F. Fitch, Jr.
Senator Aaron W. Plyler, Sr.
Mr. Linwood Jones
Mr. Roy Wood, NCCI
Mr. Jerry Hamrick, NCRB
Mr. Sam Watson, NCDOI
Mr. Roger Langley, NCDOI
Mr. Quang Nguyen, NCDOI

DEPARTMENT OF INSURANCE
State of North Carolina
P. O. Box 26387
RALEIGH, N. C. 27611

JIM LONG
COMMISSIONER OF INSURANCE

REGULATORY SERVICES GROUP
(919) 715-0011

November 13, 1992

Charles R. Hassell, Jr.
Attorney at Law
P. O.Box 1246
Raleigh, NC 27603

Dear Mr. Hassell:

Our Actuarial Services Division has looked at the workers' compensation rate filing to see what it reveals concerning how much of the 58.4% rate increase will be earmarked for health and safety or accident prevention programs. As one would expect from the type of calculations involved, the filing makes no commitment of the kind about which you inquire. We can say that the most the filing implies about new moneys that could be used for health and safety or accident prevention is that the amount would increase by as much as 38%. However, the Bureau cannot guarantee on behalf of its member companies how much money any company will use for such a purpose, nor how much the industry will use in the aggregate.

Where such future expectations enter ratemaking most meaningfully is in trends, and as to that general topic considerable hearing time will be devoted.

The most productive way to assist the LRC would be to use a special report directed at the ten companies you have listed. It would be more informative to the Committee than general components of the ratemaking calculation.

Someone from our Actuarial Division will be in touch with you to develop the text of your question to assure you receive the data you seek, and to set up a timetable for obtaining it.

Thank you for your interest in the work place safety of North Carolina's workers and the workers' compensation rates in use in this state.

Sincerely,

Ann W. Spragens
Senior Deputy Commissioner
and General Counsel

AWS/ja
cc: John Donaldson
Chief Actuary

DEPARTMENT OF INSURANCE

State of North Carolina

P. O. BOX 26387

RALEIGH, N.C. 27611

JIM LONG
COMMISSIONER OF INSURANCE

(919) 733-7343

November 19, 1992

Mr. Charles R. Hassell, Jr.
Attorney at Law
115 South St. Mary's Street
Raleigh, NC 27603

Re: LRC Committee on Fire and Occupational Safety

Dear Mr. Hassell:

This letter references the above and your letter of October 26, 1992.

Senior Deputy Langley advises that your request to him of October 21, 1992 has been referred to Ms. Ann Spragens, Senior Deputy and General Counsel for the Department for reply.

The Workers' Compensation Study Committee has met monthly since April and heard from virtually every "player" in the system. Much of the discussion has involved directly or indirectly the issue of workplace safety. I do not, however, recall any specific discussion of NCCI's "Safety Policy". By copy of this letter, I'm asking Mr. Roy Wood, Director of Government, Consumer and Industry Affairs of NCCI, who represents NCCI on the Study Committee in an advisory capacity to respond to your questions in the third paragraph of your October 26, 1992 letter (copy attached).

I am sure you are aware that many self-insureds already have safety committees and operate good safety programs. If your committee chooses to recommend mandated safety committees for self-insureds, it would require significant changes to the current data exchange system between the N.C. Industrial Commission and the N.C. Rate Bureau in addition to legislation.

For your further information I'm also enclosing copies of summaries of all committee meetings held thus far. I sincerely appreciate your and the LRC Committee's interest in this subject and pledge my continued efforts to assist in developing solutions to workers' compensation problems we currently face.

Very truly yours,

Jim Long

JEL/RL/jg

Enclosures

cc: Honorable Milton F. Fitch, Jr.
Senator Aaron W. Plyler, Sr.
Mr. Linwood Jones
Mr. Roy Wood, NCCI
Mr. Jerry Hamrick, NCRB
Ms. Ann Spragens, NCDOI
Mr. Sam Watson, NCDOI

TELEPHONE:
(919) 828-8746

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CHARLES R. HASSELL, JR.
ATTORNEY AT LAW
115 SOUTH ST. MARY'S STREET
RALEIGH, NORTH CAROLINA 27603

MAILING ADDRESS:
P.O. BOX 1246
RALEIGH, NC 27602

November 16, 1992

Ms. Gann Watson
Co-Counsel
LRC Committee on Fire &
Occupational Safety
State Legislative Bldg.
300 N. Salisbury Street
Raleigh, NC 27611

Dear Gann:

I received the enclosed from the Department of Insurance. I assume there will be follow-up. You may wish to call someone there in view of our time constraints.

With best regards, I am

Very truly yours,

Charles R. Hassell, Jr.

CRH/mjc

Enclosure

RECEIVED NOV 16 1992

DEPARTMENT OF INSURANCE
State of North Carolina
P. O. Box 26387
RALEIGH, N. C. 27611

JIM LONG
COMMISSIONER OF INSURANCE

REGULATORY SERVICES GROUP
(919) 715-0011

November 13, 1992

Charles R. Hassell, Jr.
Attorney at Law
P. O.Box 1246
Raleigh, NC 27603

Dear Mr. Hassell:

Our Actuarial Services Division has looked at the workers' compensation rate filing to see what it reveals concerning how much of the 58.4% rate increase will be earmarked for health and safety or accident prevention programs. As one would expect from the type of calculations involved, the filing makes no commitment of the kind about which you inquire. We can say that the most the filing implies about new moneys that could be used for health and safety or accident prevention is that the amount would increase by as much as 38%. However, the Bureau cannot guarantee on behalf of its member companies how much money any company will use for such a purpose, nor how much the industry will use in the aggregate.

Where such future expectations enter ratemaking most meaningfully is in trends, and as to that general topic considerable hearing time will be devoted.

The most productive way to assist the LRC would be to use a special report directed at the ten companies you have listed. It would be more informative to the Committee than general components of the ratemaking calculation.

Someone from our Actuarial Division will be in touch with you to develop the text of your question to assure you receive the data you seek, and to set up a timetable for obtaining it.

Thank you for your interest in the work place safety of North Carolina's workers and the workers' compensation rates in use in this state.

Sincerely,

Ann W. Spragens
Senior Deputy Commissioner
and General Counsel

AWS/ja
cc: John Donaldson
Chief Actuary

11 NCAC 10.1103 - WORKERS COMPENSATION

Item
1(h) Provide the latest available written and earned premiums and ma
for the ten largest writers of North Carolina workers compensation

Response

Company	1990 Page 14 Written Premiums	Market Share	1990 Page Earned Prem
Liberty Mutual Fire Insurance Company	$54,819,297	9.9%	$56,024,0(
Aetna Casualty & Surety Company	44,407,524	8.0	44,178,1(
Liberty Mutual Insurance Company	29,865,459	5.4	28,264,2(
Travelers Insurance Company	20,829,694	3.8	21,193,02
Insurance Company of North America	19,645,023	3.5	19,789,32
National Union Fire Insurance Company	19,145,287	3.5	20,484,65
Hartford Underwriters Insurance Company	17,261,507	3.1	11,041,57
Travelers Indemnity Company of Illinois	15,364,484	2.8	22,205,20
Employers Insurance of Wausau	15,099,989	2.7	16,482,73(
Pennsylvania Mfg Association Ins Co	14,450,702	2.6	14,503,44(
Total (All Companies)	$553,568,374		$557,052,377

Source: Annual Statements, Page 14

TELEPHONE:
(919) 828-8746

FAX:
(919) 828-5386

CHARLES R. HASSELL, JR.
ATTORNEY AT LAW
115 SOUTH ST. MARY'S STREET
RALEIGH, NORTH CAROLINA 27603

MAILING ADDRESS:
P.O. BOX 1246
RALEIGH, NC 27602

October 26, 1992

Honorable Jim Long
Commissioner of Insurance
Department of Insurance
State of North Carolina
P. O. Box 26387
Raleigh, NC 27611

Re: LRC Committee on Fire and Occupational Safety

Dear Commissioner Long:

Earlier this year you kindly assisted the LRC Committee on Fire and Occupational Safety in our efforts to obtain data from compensation carriers showing how much of the premium dollar generally, and of a rate increase then being considered by your Department, was or would be used for health and safety promotion, or loss control, activities. Unfortunately, the rate hearings concluded before figures could be obtained. The carriers are back seeking a 58.4% increase and we have, under separate cover, written Senior Deputy Commissioner Langley asking that the inquiry be revisited. A copy of that letter is enclosed.

We also understand that meetings of your Study Committee on Workers' Compensation are ongoing. In some published reports of the sessions it has been written that industry witnesses have pointed to multiple factors responsible for increased costs and alleged lower profits. The material your office sent to me on March 23, 1992, including Mr. Hamrick's letter of March 20, with enclosures, indicates that the NCCI decided in 1992 to develop a safety policy.

Our Committee would be interested in knowing what your Study Committee has learned about NCCI's recent decision to look at safety in the workplace and, in particular, what carriers have done to implement the policy. Are there mandatory inspections, periodic consultations, reports, educational programs? Are carriers doing anything in North Carolina in this regard?

Another important issue concerns self-insured employers. The recent session of the General Assembly enacted a law mandating safety committees for certain employers. One criteria for applicability of this law was the experience rate modifier generated by the Rate Bureau. Unfortunately, self-insured

employers escape this regulation altogether. These employers are numerous, and are some of the largest, in North Carolina. Your office has jurisdiction over self-insureds. Can you offer us suggestions as to how they can be brought under this law?

If these topics have been addressed by witnesses appearing before you, perhaps transcripts or summaries of pertinent testimony could be made available to our Committee staff. If not, certainly both committees could benefit from further inquiry at your upcoming sessions. Workers' compensation carriers must play a key role if North Carolina is to achieve its goal of reasonably safe and healthy workplaces. Our Committee believes that a commitment to action from the insurance industry is essential if we are to prevent the occurrence of future disasters like the Imperial Foods fire in Hamlet.

Thank you in advance for your cooperation in developing this information. With best regards, I am

Very truly yours,

Charles R. Hassell, Jr.

CRH/mjc

Enclosure

cc: Hon. Milton F. Fitch, Jr.
Sen. Aaron W. Plyler, Sr.
Mr. Linwood Jones

TELEPHONE:
(919) 828-8746

FAX:
(919) 828-5386

CHARLES R. HASSELL, JR.
ATTORNEY AT LAW
115 SOUTH ST. MARY'S STREET
RALEIGH, NORTH CAROLINA 27603

MAILING ADDRESS:
P.O. BOX 1246
RALEIGH, NC 27602

October 21, 1992

Mr. Roger Langley
Senior Deputy Commissioner
Property and Casualty Division
North Carolina Department of Insurance
P. O. Box 26387
Raleigh, NC 27611

RE: LRC Committe on Fire & Occupational Safety

Dear Mr. Langley:

When we last corresponded the rate hearings involving workers' compensation carriers had concluded. Our request for information about the accident prevention activities for carriers, including inspections, education materials, regulations, directives, and other programs, the cost of same (percentage of premiums used for this purpose), and what portion of the rate increase sought would be allocated to risk prevention, could not be answered before the sessions were finished. We did later receive Commissioner Long's letter of March 23, 1992, and material forwarded to you by Mr. Hamrick. The material was interesting and useful as background, but did not answer the questions we had posed. It does indicate that the NCCI and its member companies wholeheartedly recognize and support the concept of workplace safety.

At this writing we understand that compensation carriers have filed another rate increase request (58.6%) which will be heard later this year. In view of the universal policy among carriers supporting active loss prevention activities, it would seem that the companies involved in this most recent filing would be able to provide figures on how much of the requested increase will be earmarked for health and safety or accident prevention programs. The Commissioner has previously indicated his interest in this inquiry and has gone on record as favoring required inspections by providers of workers' compensation for certain occupations in North Carolina.

We request that those handling this rate hearing for the Department assist our Committee in obtaining the information described herein. A listing of the leading writers in our State is enclosed. Individual responses from these major writers as well as the compensation industry as a whole, would be useful.

We appreciate your continued interest in the work of our Committee. Thank you in advance for your cooperation. Please do not hesitate to contact me for clarification or additional information.

With best regards, I am

Very truly yours,

Charles R. Hassell, Jr.

CRH/h

Enclosure

cc: Rep. Milton F. Fitch, Jr.
Sen. Aaron W. Plyler, Sr.
Mr. Linwood Jones

North Carolina General Assembly
Legislative Services Office
Legislative Office Building
300 N. Salisbury Street, Raleigh, N. C. 27603-5925

GEORGE R. HALL, JR., Legislative Admin
(919) 733-7044

E

M. GLENN NEWKIRK, Director
Automated Systems Division
Suite 400, (919) 733-6834

GERRY F. COHEN, Director
Bill Drafting Division
Suite 100, (919) 733-6660

THOMAS L. COVINGTON, Director
Fiscal Research Division
Suite 619, (919) 733-4910

TERRENCE D. SULLIVAN, Director
Research Division
Suite 545, (919) 733-2578

September 28, 1992

MEMORANDUM

TO: Members of the Fire and Occupational Safety Committee

FROM: Linwood Jones, Committee Counsel

RE: State OSHA Review Boards

The federal Occupational Safety and Health Act of 1970 allows states to run their own OSHA programs provided that the programs are at least as effective as the federal program. "Enforcement" of the State program is one of the criteria used by the U.S. Secretary of Labor in evaluating the effectiveness of state programs. More specifically, the Secretary requires that a State plan:

> "provide for an employer to have the right of review of violations alleged by the State, abatement periods, and proposed penalties and for employees or their representatives to have an opportunity to participate in review proceedings, by such means as providing for administrative or judicial review, with an opportunity for a full hearing on the issues" (29 CFR §1902.4(c)(xii).

For states under federal OSHA jurisdiction, Congress created an independent 3-member Occupational Safety and Health Review Commission to hear appeals of contested OSHA citations, penalties, and abatement periods. The creation of an independent review commission was a principal compromise between those in Congress who wanted OSHA rule-making, enforcement, and adjudication all in the hands of the Secretary of Labor and those who wanted these three functions completely separated. The compromise left the Secretary of Labor with the rule-making and enforcement functions, but created the Review Commission to perform the adjudication function.

Most states administering their own OSHA programs copied this system by creating their own review boards. In a few of these states, the review boards also hear workers compensation and/or employment security appeals. The state OSHA review boards range in size from 3 to 7 members and are usually appointed by the respective state governors. Many of the states require representation from management, labor, and the public on the review board.

Two states administering their own OSHA programs have no review board. Virginia provides for no administrative review of contested OSHA cases. A party dissatisfied with an OSHA decision in Virginia appeals directly to the courts; there is no involvement by a hearing officer or by a review board. Although the U.S. Department of Labor initially expressed concerns about this arrangement in the mid-1970s, it eventually approved it after acknowledging that the regulations require either administrative or judicial review, not both.

In Maryland, OSHA cases are heard by an administrative law judge from a centralized Office of Administrative Hearings. The ALJ's decision may be appealed to the Commissioner; the Commissioner may review the decision on the record and affirm, modify, or reverse the decision. An appeal from the Commissioner goes to the Maryland state courts.

Attached are the following documents:

(1) August 7, 1992 letter written on behalf of this Committee to the U.S. Department of Labor, inquiring about the elimination of the State's Safety and Health Review Board;
(2) September 23, 1992 response by the U.S. Department of Labor;
(3) September 24, 1992 letter asking South Carolina to respond to the U.S. Labor Department's letter and to comment on its experiences with and without a review board
(4) September 25, 1992 response from South Carolina Department of Labor
(5) Legislative History of the federal Occupational Safety and Health Review Commission.

North Carolina General Assembly
Legislative Services Office
Legislative Office Building
300 N. Salisbury Street, Raleigh, N. C. 27603-5925

GEORGE R. HALL, JR., Legislative Administrative Officer
(919) 733-7044

M. GLENN NEWKIRK, Director
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Fiscal Research Division
Suite 619, (919) 733-4910

TERRENCE D. SULLIVAN, Director
Research Division
Suite 545, (919) 733-2578

August 7, 1992

Ms. Dorothy Strunk, Acting Assistant Secretary
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Assistant Secretary Strunk:

A committee of the North Carolina General Assembly studying workplace safety in North Carolina is considering abolishing the State's Safety and Health Review Board.

The Committee has expressed interest in replacing the Board and its hearing officers with administrative law judges from the State's Office of Administrative Hearings ("OAH"). The OAH and its judges are completely independent of the Department of Labor. Under the Committee's proposal, appeals of OSHA citations, penalties, and abatement periods would be heard by an OAH administrative law judge pursuant to Article 3 of the North Carolina Administrative Procedures Act.

A copy of Article 3 of the Act is enclosed. It provides for a hearing before an OAH administrative law judge. The ALJ issues a recommended decision to the agency. If the agency does not follow the ALJ's recommendations in making the final decision, it must state its reasons for not doing so. No new evidence is taken by the agency when it renders the final decision. The final decision may be appealed to the state courts of North Carolina.

The proposal, if implemented, would allow OSHA citations, penalties, and abatement periods to be appealed to an OAH administrative law judge, who would, after an opportunity for a hearing, recommend a decision to the Commissioner of Labor. The Commissioner would then make the final decision, subject to further review by the courts. This proposal could be altered to provide the ALJs with final authority over the decision, subject to judicial review, if necessary to meet federal requirements.

We understand that the Department cannot pre-approve this proposal, but we would appreciate your comments on any problems it presents for North Carolina in meeting the criteria required of State OSHA plans under Part 1902 of Title 29 of the Code of Federal Regulations. We have noted in particular that the State of Maryland uses administrative law judges instead of a review board and the State of Virginia provides for direct appeals of OSHA citations into its courts, with no intermediate involvement by a review board or administrative law judges.

If you have any questions, please feel free to contact me at (919) 733-2578. Thank you for your consideration.

Sincerely,

Linwood Jones

Linwood Jones
Staff Attorney

90LLJ-389
cc. Senator Aaron Plyler
Representative Milton Fitch
Representative Pete Cunningham
Mr. Davis Layne, Regional OSHA Administrator
Mr. Russ Dugger, Assistant Regional Administrator
Mrs. Suzanne Street, Area OSHA Director

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

SEP 23 1992

Mr. Linwood Jones
Staff Attorney
North Carolina General Assembly
Legislative Services Office
Legislative Office Building
300 N. Salisbury Street
Raleigh, North Carolina 27603-5925

Dear Mr. Jones:

This is in response to your letter of August 7, 1992, concerning proposed elimination of the North Carolina Occupational Safety and Health Review Board.

Based on experiences with state plan review systems (Maryland and South Carolina) in which the Commissioner plays a dual role, we would discourage the conversion to such a review system. One of the principal compromises which lead to the enactment of the Occupational Safety and Health Act of 1970 was the establishment of an independent Review Commission to hear and decide employer and employee contests. Congress specifically created the Federal Occupational Safety and Health Review Commission to be an impartial adjudicator with independent authority to review citations, penalties, and other orders issued by the Secretary of Labor. Where a State plan provides a dual role for the Commissioner as both enforcer and adjudicator, such impartiality could be subject to question. Moreover, it is difficult to develop a coherent body of law without a corps of specialized judges devoted to OSHA cases. As a result, South Carolina found its dual system unworkable after many years and changed it finally to an independent system.

As you are aware, the Occupational Safety and Health Administration (OSHA) has approved similar review systems in Maryland and South Carolina with the requirement that strict separation must be maintained between the Commissioner's staff that issues citations and the staff that handles contested cases. In addition, the compliance staff must also have the right to object to the administrative law judge's decision.

Therefore, while technically such a review system is approvable subject to some restrictions, we would strongly discourage such a conversion, particularly when there is evidence that the proposed new system could prove unworkable.

Sincerely,

D. L. Strunk

Dorothy L. Strunk
Acting Assistant Secretary

North Carolina General Assembly
Legislative Services Office
Legislative Office Building
300 N. Salisbury Street, Raleigh, N. C. 27603-5925

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September 24, 1992

Ms. Sharon Danztler
General Counsel
Occupational Safety and Health
South Carolina Department of Labor

BY FAX: (803) 734-9716

Dear Sharon:

I appreciate your willingness to review the attached letter from the United States Department of Labor concerning a proposal to abolish the North Carolina Safety and Health Review Board. Under the proposal, contested OSHA cases would be heard by administrative law judges from our centralized Office of Administrative Hearings.

The letter notes that South Carolina found its system (without a Review Board) "unworkable." We would appreciate any comments you have on South Carolina's experience with that system.

I would be most grateful if you could respond by fax by tomorrow afternoon so that I can share your comments with our committee on Monday morning. My fax number is (919) 733-3113.

If you have any questions, please call me at (919) 733-2578. Again, thank you for your help on this matter.

Sincerely,

Linwood Jones

Linwood Jones
Staff Attorney
North Carolina General Assembly

90LLJ-418

State of South Carolina
Department of Labor
3600 Forest Drive • P.O. Box 11329 • Columbia, S.C. 29211-1329
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Virgil W. Duffie, Jr. • Commissioner

September 25, 1992

Mr. Linwood Jones, Staff Attorney
North Carolina General Assembly
Legislative Services Office
Legislative Office Building
300 N. Salisbury Street
Raleigh, NC 296703-5925

Re: South Carolina Experience with inhouse administrative review of OSHA citations

Dear Linwood:

From the beginning of its state plan in 1972 until 1983, South Carolina used an administrative review model for contested OSHA cases which involved hearing before an Administrative Law Judge who was on contract with the Department of Labor. The judge's decision was made in the form of a "Recommendation" to the Commissioner of Labor. If neither party filed objections to the recommendation, it was issued by the Commissioner as a final order. Upon objection, the Commissioner personally heard oral argument and issued his order. The system was cost effective and prevented discord between two state agencies concerning what the policies of the Division of Occupational Safety and Health should be. It is quite an overstatement to say that we found it "unworkable."

In 1983, South Carolina changed its system by establishing an independent Review Board. Its organization and operation are very different from the commissions used in North Carolina or by the USDOL. The decision to change was made for two interrelated reasons. The South Carolina constitution, Article 1, Section 22, requires that no person "be subject to the same person for both prosecution and adjudication" in procedure before administrative agencies. This is a difficult provision for all agencies in the state since our administrative procedures act is, like most acts, predicated on an agency's self-review of decisions. In 1983, the Department knew that it had recently had a "near miss" when an employer had raised the constitutional issue. The case was eventually resolved on other grounds but several regular OSHA practitioners had been peripherally involved and we could anticipate that the issue would reappear. In addition, the Department had come to recognize that the system created a problem for us in one class of cases.

Although very few OSHA cases involve issues of first impression and even fewer involve enforcement policies which have not been decided on well before the citation is issued, an occasional case does present such issues. In that situation a major policy decision must be made when deciding how to pursue the contested case. If the OSH Division is prohibited from ex parte communication with the Commissioner of Labor concerning the case on which he will be the final decision maker, then this policy decision must be made without the input of the very person who is held accountable for the policies of the agency. While the Commissioner has the final say, the division's resources may be extended and its reputation tarnished by its strong public advocacy of a position later repudiated by its own leader. Again, in 1983, we had recently experienced a near miss.

There are certainly also problems with an independent board. Differences in policy and priorities can result in waste of agency resources and in policy making by courts. However, much of that problem could be alleviated by a legislative statement that in matters of standard interpretation, the Board must defer to the reasonable interpretations of the Commissioner. The doctrine is supported by recent federal case law. Martin v. OSHRC, 111 S.Ct. 1171 (1991). South Carolina is only now being faced with the need to establish such a rule judicially.

In summary, South Carolina has operated with few problems under both types of review. We have never operated under a system which uses full time employed administrative law judges and have no experience with such a system. Since our docket has seldom exceeded 200 contested cases in a year and approximately 80% of them are resolved without hearing, it is unlikely that we will ever use full-time OSHA hearing officers. We do not have any evidence that our practice, under either system, has prevented us from developing a coherent body of law. I cannot see that the change to an independent system had any effect on the coherence of our case of law.

I am very interested in the ongoing discussion on OSHA reform in North Carolina. If our experience can be of any other help to you or the study committee, you have only to ask.

Sincerely,

Sharon A. Dantzler
General Counsel

SAD:aes

16

The Occupational Safety and Health Review Commission

I. Legislative History[1]

One of the principal issues that concerned Congress when the OSH Act was under consideration was whether the Act should follow the usual administrative model of vesting authority for rulemaking, enforcement, and adjudication[2] in a single agency, or whether these powers should be divided between three separate agencies. As often happens during the legislative process, Congress ultimately resolved the conflict by a series of compromises. The primary result was the creation of the Occupational Safety and Health Review Commission. The struggle to reach this compromise, however, provides essential insight into the role envisioned by Congress for the Review Commission.

A. In the Senate

The original bill introduced in the Senate by Senator Williams, S. 2193, gave authority for all three functions—rule-

[1]For the legislative history of the OSH Act as a whole, see Chapter 2.

[2]As used in this chapter, rulemaking means the establishment of substantive occupational safety and health standards; enforcement refers to the investigation and prosecution of alleged violations of the Act; and adjudication means the resolution of disputes arising out of such enforcement actions.

making, enforcement, and adjudication—to the Secretary of Labor.[3] This bill was considered by the Senate Committee on Labor and Public Welfare together with two other bills, S. 2788 and S. 4404, both of which contained provisions dividing the three functions between separate agencies. S. 2788, introduced by Senator Javits, would have given the Secretary of Labor enforcement authority only, with rulemaking and adjudicatory responsibilities lodged in a five-member National Occupational Safety and Health Board.[4] The other bill, S. 4404, introduced by Senator Dominick, contained a more far-reaching separation-of-powers proposal: enforcement powers would reside in the Secretary, standards-setting authority would be given to a five-member National Occupational Safety and Health Board, and the adjudicatory function would be assigned to a three-member Occupational Safety and Health Appeals Commission.[5]

The Committee on Labor and Public Welfare favorably reported S. 2193, the Williams bill, to the Senate floor. The Committee Report explained that a separate board for setting standards had been rejected because

> "the committee believes that a sounder program will result if responsibility for the formulation of rules is assigned to the same administrator who is also responsible for their enforcement and for seeing that they are workable and effective in their day-to-day application, thus permitting cohesive administration of a total program."[6]

The Committee gave the following reasons for rejecting the proposal for establishing a separate adjudicatory agency:

> "[S]ounder policy would be to place the responsibility and accountability for administration of the total program in the Secretary of Labor, rather than to establish a new agency and create an unnecessary division of responsibility. While the argument has been made that due process considerations would be better served if the investigative and adjudicative functions were separated between two different agencies, the fact is that the pro-

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[3]S. 2193, 91st Cong., 2d Sess. §§3(b)–(f), 5, and 6(a)(1) (1970), *reprinted in* Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 4–7, 10–12 (Comm. Print 1971) (hereafter cited as LEGIS. HIST.).

[4]S. 2788, 91st Cong., 2d Sess. §§4–7 (1970), *reprinted in* LEGIS. HIST. at 36–49.

[5]S. 4404, 91st Cong., 2d Sess. §§6 and 9–11 (1970), *reprinted in* LEGIS. HIST. at 80–86, 92–106.

[6]S. REP. NO. 1282, 91st Cong., 2d Sess. 8 (1970), *reprinted in* LEGIS. HIST. at 148.

> visions of the Administrative Procedure Act insure that under the bill as reported by the committee there will be a separation of functions within the Department of Labor between those subordinates of the Secretary who are engaged in investigation and prosecution, and those who are engaged in adjudication. The overwhelming majority of other regulatory programs are administered in just this fashion, and the requirements of due process are fully observed."[7]

The proponents of independent standards-setting and adjudicatory panels carried their fight to the floor of the Senate. In attempting to substitute his own bill, S. 4404, for the Williams bill on the Senate floor, Senator Dominick argued in favor of the complete separation of the three powers of rulemaking, enforcement, and adjudication.[8] Senator Williams countered the Dominick argument by stressing the "time-honored" structure (all three powers in one agency) employed in his bill, S. 2193.[9] Senator Dominick's effort was defeated in a 41 to 39 vote.[10]

Senator Javits, however, continued to press for an independent adjudicatory body and also offered an amendment to that effect. Senator Javits stressed the increased confidence that the business community would have in the Act if adjudication were placed in a body independent of the Secretary of Labor:

> "The important thing is to inspire confidence in the community that we expect to obey this law ***. [T]he community will be considerably reassured in the difficult, and one might say dangerous situation, by the adoption of this amendment.
>
> ***
>
> "This is a situation which can disturb very seriously and be very costly to the business community. I feel very strongly that a great element of confidence will be restored in how this very new and very wide-reaching piece of legislation will be administered if the power to adjudicate violations is in the hands of an autonomous body, more than one man, and more than in the Department of Labor itself. *** We have a difficult piece of legislation reaching the whole of American business, involving millions of employees and tens of thousands of employers. This will give them a greater measure of confidence."[11]

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[7] *Id.* at 15, LEGIS. HIST. at 155.

[8] Senate debate on OSH Act of 1970 (Nov. 16, 1970), LEGIS. HIST. 420.

[9] *Id.* at 435.

[10] *Id.* at 449.

[11] Senate debate on OSH Act of 1970 (Nov. 17, 1970), LEGIS. HIST. 469–470.

Speaking in support of Senator Javits's amendment, Senator Holland stressed the concern among employers that decisions by the Department of Labor would tend to favor organized labor in disputes between labor and management, adding: "[W]hen we are setting up a body to judge the controversies between the employers and the labor groups, we certainly should require the setting up of an agency that will be respected and is capable, impartial, and objective in its approach."[12]

The Senate adopted the Javits amendment by a vote of 43 to 38.[13] Thus, the bill ultimately adopted by the Senate placed authority for rulemaking and enforcement in the Secretary of Labor, but established an independent three-member panel, called the Occupational Safety and Health Review Commission, to adjudicate disputes arising out of the Secretary's enforcement actions.

B. In the House of Representatives

The proceedings in the House of Representatives largely paralleled those in the Senate with respect to the separation-of-powers issue. The House Committee on Education and Labor favorably reported a bill introduced by Representative Daniels, H.R. 16785, that vested rulemaking, enforcement, and adjudication authority in the Secretary of Labor.[14] The Committee considered and rejected two other bills: H.R. 13373, which was introduced by Representative Ayers on behalf of the administration, and H.R. 19200, introduced by Representative Steiger. H.R. 13373 proposed to establish an independent board that would have authority for both setting standards and adjudication,[15] while the Steiger bill would have established separate and independent agencies for these two purposes.[16]

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[12]*Id.* at 476.

[13]*Id.* at 478–479.

[14]H.R. 16785, 91st Cong. 2d Sess. §§6, 7, and 11 (1970), *reprinted in* LEGIS. HIST. at 727–732, 739–742.

[15]H.R. 13373, 91st Cong., 2d Sess §§4, 5, and 7 (1970), *reprinted in* LEGIS. HIST. at 684–693, 695–696.

[16]H.R. 19200, 91st Cong., 2d Sess., §§6, 10, and 11 (1970), *reprinted in* LEGIS. HIST. at 770–776, 785–796.

On the floor of the House, Representative Steiger offered H.R. 19200 as a substitute (referred to as the Steiger-Sikes substitute) for the Committee bill. Although there were other differences between the two bills, Representative Steiger referred to the separation-of-powers provisions as the "most basic and most important difference."[17] As in the Senate, the relative virtues of vesting all authority in the Secretary of Labor as opposed to dividing the functions between different agencies were extensively debated. The proponents of the Steiger-Sikes substitute stressed the danger of too much concentration of power in the Secretary of Labor, particularly in view of the perceived pro-labor bias on the part of the Secretary.[18] The representatives who spoke in favor of H.R. 16785, the Committee bill, were primarily concerned that fragmenting the powers would unnecessarily complicate enforcement of the Act and lead to a lack of accountability.[19] When the question came to a vote, the Steiger-Sikes substitute prevailed by a vote of 220 to 172.[20]

Thus, the bills passed by both houses of Congress provided for a three-member independent agency to adjudicate disputes arising out of enforcement actions brought by the Secretary of Labor. The House bill also established an independent board to set standards, while the Senate version gave the power to establish standards to the Secretary.

C. Conference Committee

A conference committee was convened to resolve the differences between the two bills. The committee adopted the provision in the Senate bill that vested authority for setting standards in the Secretary of Labor rather than an independent board.[21] The committee retained, however, the provision contained in both bills for an independent adjudicatory agency

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[17]House of Representatives debate on OSH Act of 1970 (Nov. 23, 1970), LEGIS. HIST. 989.

[18]*Id.* at 981 (Rep. Anderson); 991 (Rep. Steiger); 1014 (Rep. Scherle); 1050 (Rep. Michel).

[19]House of Representatives debate on OSH Act of 1970 (Nov. 24, 1970), LEGIS. HIST. 1074 (Rep. Perkins); 1079 (Rep. Pucinski); 1090–1091 (Rep. Randall).

[20]*Id.* at 1112–1113.

[21]H.R. REP. No. 1765 (Conference Report), 91st Cong., 2d Sess. 33 (1970), *reprinted in* LEGIS. HIST. at 1186.

and gave it the name that appeared in the Senate bill—the Occupational Safety and Health Review Commission.[22] Thus, the proponents of separation of powers achieved a partial victory, and a new independent agency—whose only function was to adjudicate contested enforcement actions under the Occupational Safety and Health Act—was born.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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OFFICE OF
THE CHAIRMAN

(202) 634-7970
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October 29, 1992

RECEIVED
NOV 6 1992
GENERAL RESEARCH DIVISION

Mr. Linwood Jones
Staff Attorney
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300 N. Salisbury Street
Raleigh, NC 27603-5925

Dear Mr. Jones:

It was a pleasure speaking with you recently regarding the North Carolina Occupational Safety and Health Review Board.

I believe there are many positive reasons why the North Carolina Board should not be eliminated. One of the principal reasons being the enactment of the Occupational Safety & Health Act was contingent upon the establishment of an independent review board. I have reviewed a copy of the letter sent to you by Acting Assistant Secretary of Labor for OSHA on the matter and believe that it accurately reflects the need for the Review Board.

As I indicated to during our phone conversation, I feel the Review Board has certain expertise which would be lost if these duties were reassigned. In addition, the time periods for handling contested citations, most likely, would increase if the present system was eliminated.

Again, it was a pleasure speaking with you and thank you for taking an active role in your state and national government. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Edwin G. Foulke, Jr.
Chairman

STATE OF NORTH CAROLINA

LEGISLATIVE RESEARCH COMMISSION

STATE LEGISLATIVE BUILDING

RALEIGH 27611

October 15, 1992

MEMORANDUM

TO: Members, LRC Committee on Fire and Occupational Safety

FROM: Gann Watson, Committee Co-Counsel

RE: OSHA Review Board Decisions: Arbitrary Reduction of Penalties

A recommendation was made to the Committee to abolish the N.C. Occupational Safety and Health Review Board and to transfer to OAH the Board's responsibility to hear appeals from OSHA citations. Among the information received by the Committee on this matter was a list of OSHA Review Board decisions where, in the opinion of the Department of Labor, penalties were reduced arbitrarily (Appendix A). At the Committee's September 28 meeting, representatives from the Review Board disputed the Department's contention that penalties were arbitrarily reduced. Staff was directed to review the cases and report back to the Committee. Following are findings based on review of cases, and other pertinent information on the assessment of civil penalties for OSHA violations.

STAFF REVIEW OF CASES

Based on a definition of 'arbitrary' to mean that the written opinion contained "no detailed explanation of the reasons for the penalty reduction",[1] staff concluded that in 20 of the 33 opinions reviewed, penalties were reduced arbitrarily. The designation of arbitrary was applied in most cases where the opinion stated that penalties were reduced either "in the sole discretion of the Undersigned" (hearing examiner or Review Board) without further explanation, or, based on financial hardship to the employer without specifying what evidence, such as financial data, was presented to demonstrate hardship. For example, if in the opinion financial hardship was discussed in terms of respondent's testimony alone, with no indication as to whether respondent provided documentary evidence to support the testimony, and the penalty was reduced based at least in part on financial hardship,[2] then this was counted as an arbitrary reduction. It may be, however, that documentary evidence demonstrating financial hardship was, in fact, presented to the hearing examiner in the relevant cases; the determination of arbitrariness for purposes of this review was based solely on the fact that such evidence was not discussed in the opinion as an explanation for the ruling.

It is noteworthy that the Review Board has stated the following with respect to the necessity for written explanations of rulings: "[i]t is clear that normally neither judges nor hearing examiners are required by law, regulation or policy to explain the

various rulings that are made in trials and hearings. Nevertheless, there are occasions when explanations can be instructive to the parties and generally enhancing to the legal process." Brooks v. L. P. Cox, et. al,, 2NCOSHD 680 (1990). However, in the same opinion, the Board left "to the discretion of hearing examiners the decision of whether to place on the record an explanation of any particular ruling." Id.

SAMPLE OSHA OPINIONS

Copies of three opinions are attached to this memorandum. One is an opinion that reduces penalties based on financial hardship but without description of the evidence, if any, that was presented to support a finding of hardship (Appendix B); one is an opinion in which the penalty was reduced 'in the discretion of the undersigned' without further explanation (Appendix C); and one is an opinion which reduced penalties and described the evidence presented to support the reduction (Appendix D).

INFORMATION ON ASSESSMENT OF CIVIL PENALTIES

A. Statutory Authority: Department of Labor, G.S. 95-138.

The categories of violations and penalties are:

(1) Willful (may assess not less than $5,000, not more than $70,000);
(2) Repeat (up to $70,000 may be assessed);
(3) Serious (up to $7,000 shall be assessed);
(4) Nonserious (up to $7,000 may be assessed);
(5) Failure to correct (up to $7,000 may be assessed);
(6) Posting violation (up to $7,000 shall be assessed).
(7) Deminimus - no penalty authorized

A "Serious violation" exists if substantial probability that death or serious physical harm could result (unless employer did not and could not know of presence of violation). G.S. 95-127(18).

B. Statutory Authority: Review Board

The Review Board in case of an appeal has the authority to assess civil penalties, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the record of previous violations. G.S. 95-138(a). This language has been interpreted as authorizing the Board to assess a penalty different from that recommended by the Commissioner, and also to initiate a penalty where none was proposed.[3]

C. Calculation of Penalties by Department

The OSHA inspector calculates the penalty amount based on criteria set out in the compliance officer's Operations Manual.[4] This penalty is reviewed before it gets to the Director of the OSHA Division,[5] who then recommends the imposition and penalty amount to the Commissioner. G.S. 95-133(b)(9).

There are two steps in calculating the penalty:[6]

(1) Formula applied for determining the gravity of the violation (applies numerical quotients for severity of the injury that could result and the probability that injury could occur); and

(2) Penalty amount resulting from application of the formula may then be reduced for (emphasis added):
a. Size of business - possible reduction = 40%

b. Good faith - possible reduction = 30%
c. History of violations - possible reduction = 10%

D. Assessment of Penalties by Hearing Examiner/Board

The hearing examiner may initiate or assess a penalty different from that proposed by the Commissioner.[7] The burden is on the Commissioner to demonstrate that the penalty was calculated in accordance with the Operations Manual; the burden then shifts to the employer to show why the penalty should be reduced or the employer otherwise treated differently.[8]

In reviewing the penalty, the hearing examiner considers the same four factors required of the Department: gravity, size of business, good faith, and history of violations. The hearing examiner is not bound by the Operations Manual,[9] and may consider evidence of financial capacity of the business to pay the penalty.[10] Decisions indicate, however, that "financial incapacity claims must be supported by substantive evidence. Additionally, the evidence must be persuasive, else the claim will probably fail."[11] An example of persuasive evidence is found in Brooks v. Triple I Industries, 2 NCOSHD 793 (1986). The evidence included "(1) bona fide financial sheets revealing the extent of the previous year's loss; (2) an account of the numerical reduction in employees due to the company's near-bankrupt condition; (3) testimony concerning the distribution of income generated by the business, including evidence that no dividends had been distributed and that one of the principals had forfeited his salary for six months; and testimony concerning the contemplated effect of paying the penalty upon the continued viability of the business."[12]

The Review Board's standard for reviewing a penalty assessed/reduced by the hearing examiner is whether the hearing examiner's decision was an abuse of discretion.[13]

SUMMARY

Although no explanation was provided for penalty reductions in 20 of the opinions reviewed, given that hearing examiners are not required to provide such detail, it is difficult to state unequivocally that in those cases penalties were reduced arbitrarily. It could be that such evidence was presented at hearing but not discussed on the record. For example, one opinion provided a parenthetical reference to confirmation [of respondent's testimony] by "appropriate financial statements."[14] A cursory review of more recent opinions indicates that hearing examiners are more frequently providing written explanations for penalty reductions, particularly those based on economic hardship.[15] However, the extent of detail varies among hearing examiners and it is unclear whether hearing examiners have a uniform standard for the amount and type of evidence that is sufficiently persuasive to justify a penalty reduction.[16]

FOOTNOTES

1. At the September 28 meeting of the Committee, Charles Jeffress, Assistant Commissioner of Labor, stated that this was the definition applied by the Department in designating a penalty reduction as arbitrary.
2. Brooks v. Frank David Zimmerman, Grower, 3 NCOSHD 192, 195 (1988).
3. Smith, "Penalties Under the Occupational Safety and Health Act of North Carolina", 19 N.C. Cent. L.J. 34 (1990).
4. Id. at 30-32.
5. Id.
6. Id.
7. Id. at 34.
8. Id.
9. Id.
10. Id. at 35.
11. Id.
12. Id. citing Triple I Industries, 2 NCOSHD 793 (1986).
13. Id. at 38.
14. Brooks v. Randleman Manufacturing Corp., 3 NCOSHD 960 (1991).
15. Brooks v. Durham Auto Body, Inc., OSHANC 91-1954 (1992), 15 Brooks v. Earthmoving Corporation, OSHANC 91-2015 (1991), Brooks v. Brightmoor Nursing Center, OSHANC 91-2175 (1992).
16. Brooks v. Taylors Workshop, Inc., OSHANC 91-2065 (1992).

APPENDIX A

FROM THE NORTH CAROLINA DEPARTMENT OF LABOR

FINDINGS OF THE FINAL DECISIONS OF THE OSHA REVIEW BOARD 1987-1991*

TOTAL Final Decisions	196		100.0%
Cases Upheld	87		44.4%
Cases Partially Overturned	43	21.9%	
Cases Overturned	33	16.8%	
Cases Fully or Partially Overturned	76		38.8%
Cases Where Penalties were Arbitrarily Reduced	33		16.8%

*Final Decisions filed with the OSHA Review Board as of 12/11/91

All decisions made by Hearing Examiners of the OSHA Review Board except where noted:

- RB - decision made by the Chairman of the OSHA Review Board
- Sup Ct - decision made by Justice of the Superior Court of North Carolina
- DOL code - decision made by Administrative Law Judge

LIST OF CASES

CASE	UPHELD	PART. OVERTURN	OVERTURN	ARBITRARILY REDUCED
86-1268	x			
87-1341		x		
87-1345		x		
87-1349	x			
87-1350				x
87-1351:RB				x
87-1352	x			
87-1362			x	
87-1366	x			
87-1368:RB			x	

CASES	UPHELD	PART. OVERTURN	OVERTURN	ARBITRARILY REDUCED
87-1376		x		
87-1377			x	
87-1380				x
87-1381:RB			x	
87-1382		x		
87-1383	x			
87-1386		x		
87-1387	x			
87-1393			x	
87-1396			x	
87-1397				x
87-1403	x			
87-1405	x			
87-1406	x			
87-1408	x			
87-1409	x			
87-1410	x			
87-1411				x
87-1412	x			
87-1413			x	
87-1416:RB		x		
87-1418			x	
87-1419		x		
87-1426		x		
87-1427			x	
87-1428:RB	x			
87-1430	x			
87-1432	x			
87-1433		x		
87-1434	x			
87-1435	x			
87-1436			x	
87-1438	x			
88-1439	x			
88-1447:RB		x		
88-1448		x		
88-1449			x	
88-1450		x		
88-1453	x			
88-1459	x			
88-1460				x
88-1463		x		
88-1464	x			
88-1465		x		
88-1466	x			
88-1471:RB	x			
88-1475:RB		x		
88-1476:RB		x		
88-1477:RB		x		
88-1483			x	

CASE	UPHELD	PART. OVERTURN	OVERTURN	ARBITRARILY REDUCED
88-1485				x AE
88-1487:RB	x			
88-1489	x			
88-1490	x			
88-1493:RB			x	
88-1495:RB	x			
88-1496	x			
88-1498	x			
88-1507:RB				x
88-1510:Amended				x
88-1515		x		
88-1519	x			
88-1521	x			
88-1522			x	
88-1523	x			
88-1524				x
88-1526:RB				x
88-1527	x			
88-1532	x			
88-1534		x		
88-1543:RB			x	
88-1544:RB				x
88-1546	x			
88-1547	x			
88-1549	x			
88DOL1348	x			
89-1552	x			
89-1559	x			
89-1560:RB				x
89-1564				x
89-1566	x			
89-1571	x			
89-1574	x			
89-1576				x
89-1579		x		
89-1583:RB				x
89-1587				x
89-1592			x	
89-1596		x		
89-1597	x			
89-1599	x			
89-1601:RB				x
89-1603	x			
89-1604	x			
89-1606:RB	x			
89-1608		x		
89-1609	x			
89-1617:RB				x
89-1620	x			
89-1625				x

CASE	UPHELD	PART.OVERTURN	OVERTURN	ARBITRARILY REDUCED
89-1628				x
89-1629:RB				x
89-1631	x			
89-1633:RB	x			
89-1634				x
89-1636				x
89-1638:RB			x	
89-1639	x			
89-1644			x	
89-1646	x			
89-1648	x			
89-1651	x			
89-1652:RB			x	
89-1657		x		
89-1658:RB			x	
89-1660:RB			x	
89-1662			x	
89-1666:RB			x	
89-1669:RB	x			
89-1670				x
89-1673:Sup Ct	x			
89-1674				x
89-1677:RB			x	
89-1678				x
89-1680	x			
89-1681	x			
89-1683:RB		x		
89-1686:RB	x			
89-1692			x	
89-1693:RB	x			
89-1694		x		
89-1696		x		
89DOL0009:RB				x
89DOL0182	x			
90-1703	x			
90-1704	x			
90-1706		x		
90-1707	x			
90-1708		x		
90-1712			x	
90-1713				x
90-1714	x			
90-1715:RB			x	
90-1717	x			
90-1720		x		
90-1723		x		
90-1724:RB	x			
90-1725		x		
90-1730	x			
90-1732				x

CASE	UPHELD	PART. OVERTURN	OVERTURN	ARBITRARILY REDUCED
90-1733		x		
90-1735		x		
90-1738	x			
90-1743		x		
90-1744				x
90-1747			x	
90-7152		x		
90-1756		x		
90-1757		x		
90-1761		x		
90-1763		x		
90-1769		x		
90-1770	x			
90-1772	x			
90-1780	x			
90-1783	x			
90-1784		x		
90-1785		x		
90-1797	x			
90-1800			x	
90-1803		x		
90-1810	x			
90-1816	x			
90-1820	x			
90-1822			x	
90-1833	x			
90-1841	x			
90-1843	x			
90-1855				x
90-1876			x	
90DOL0038:RB	x			
91-1911			x	
91-1919	x			
91-1929	x			
91-2015				x

APPENDIX B

This the 29th day of September, 1988.

R. Joyce Garrett
Administrative Law Judge

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA, Complainant, v. FRANK DAVID ZIMMERMAN, GROWER, Respondent.	OSHANC NO. 88-1460 9-9-88

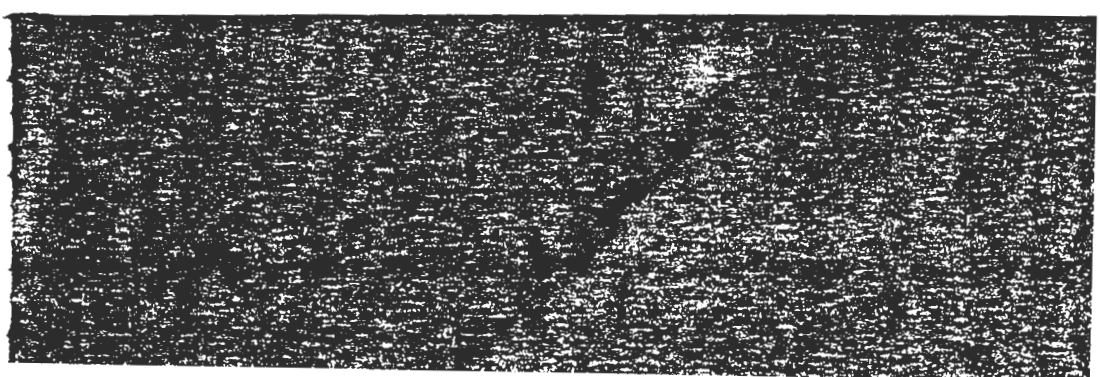
APPEARANCES Complainant: Ralf F. Haskell
Special Deputy Attorney General

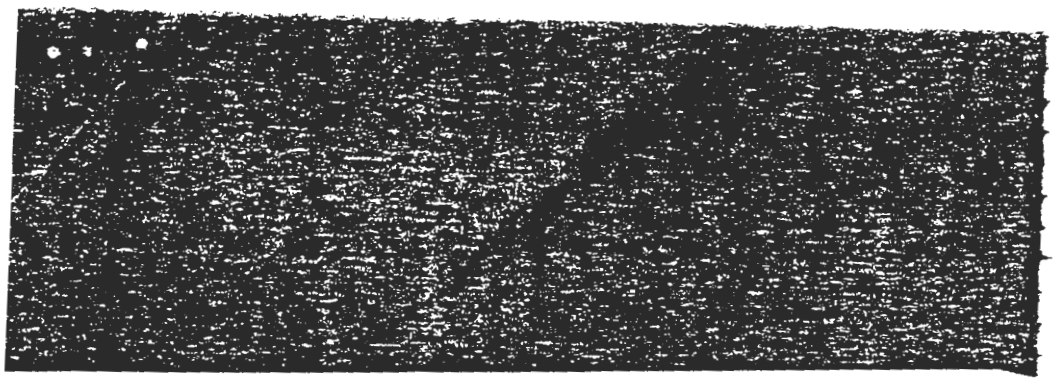
Respondent: Frank David Zimmerman

BEFORE Hearing Examiner: R. Joyce Garrett

THIS MATTER came on for hearing before the Undersigned Administrative Law Judge on August 31, 1988 in the Guilford County Courthouse Grand Jury Room, Greensboro, North Carolina. Complainant was represented by Mr. Ralf Haskell, Special Deputy Attorney General, Raleigh, North Carolina. Respondent appeared *pro se*.

Respondent moved to dismiss the action on the basis that OSHA is not applicable to his situation since he does not have 10 or more employees and that NCGS 130A-238 precluded the applicability of OSHA to migrant labor camps.





North Carolina OSHA law is not limited to be applicable to employers having 10 or more employees. Further, NCGS is applicable to public health standards and does not in any way negate the applicability of OSHA standards. OSHA has been found to encompass the entire gamut of migrant farm worker protection, including housing standards. Respondent's motion to dismiss is DENIED.

Both Complainant and Respondent presented evidence in this cause by oral testimony of witnesses and by documents admitted into evidence. Based upon the record and the evidence presented at the hearing, the Undersigned makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Complainant is an agency charged with inspection for compliance with and enforcement of the Occupational Safety and Health Act of North Carolina.

2. Respondent is an entity which was transacting business in the State of North Carolina and is subject to the Occupational Safety and Health Act of North Carolina.

3. An inspection of Respondent's worksite was conducted on September 17, 1987 at the Third House on right North Bound Brann Road, Browns Summit, North Carolina. The house was the living residence of 4 workers who were employees of Respondent.

4. As a result of the inspection, one citation designated serious, containing four items was issued; also, one citation designated nonserious, containing eleven items was issued.

5. Respondent timely filed a notice of contest. The matters for consideration at the time of the hearing were contest of the following: Citation 1, Item 1 [29 CFR 1910.142(b)(2)]; Item 2 [29 CFR 1910 .142(g)(1)]; Item 3 [29 CFR 1910.142(f)(1)(ii)]; and Item 4 [29 CFR 1910.142(f)(3)]; Citation 2, Item 1 [29 CFR 1910.142(b)(1)]; Item 2 [29 CFR 1910.142(b)(2)]; Item 3 [29 CFR 1910.142(b)(3)]; Item 7 [29 CFR 1910.142(d)(4)]; Item 8 [29 CFR 1910.142(d)(10)]; Item 9 [29 CFR 1910.142(h)(1)]; and Item 11 [29 CFR 1910 .142(k)(1)].

6. Respondent admitted violations as alleged on Citation 2, Item 5 [29 CFR 1910.142(b)(8)]; Item 6 [29 CFR 1910.142(d)(2)]; and Item 10 [29 CFR 1910.142(h)(1)].

7. Respondent and Complainant stipulated that the penalty calculated for Citation 1 was calculated in accordance with the formulae in the Field Operations Manual. Respondent contended the penalty was too severe.

8. There were four Spanish speaking men living in the house which was the subject of the inspection. Respondent contended that the house was "rented" to one of the men and that the other men were friends and were allowed to live there by the man who rented the house. Evidence shows, however, that all the men were employed by Respondent, that they only worked during the agricultural season, that Respondent had, and exercised the authority to tell visitors to the house to leave the house, and the Respondent compensated the man who "rented" the house if he carried the other three men to the laundry or took them to the grocery store.

9. With reference to Citation 1, Item 1, there were boards missing on the back porch and in the kitchen; such missing board created a tripping hazard the result of which would be bruises and/ or fractures.

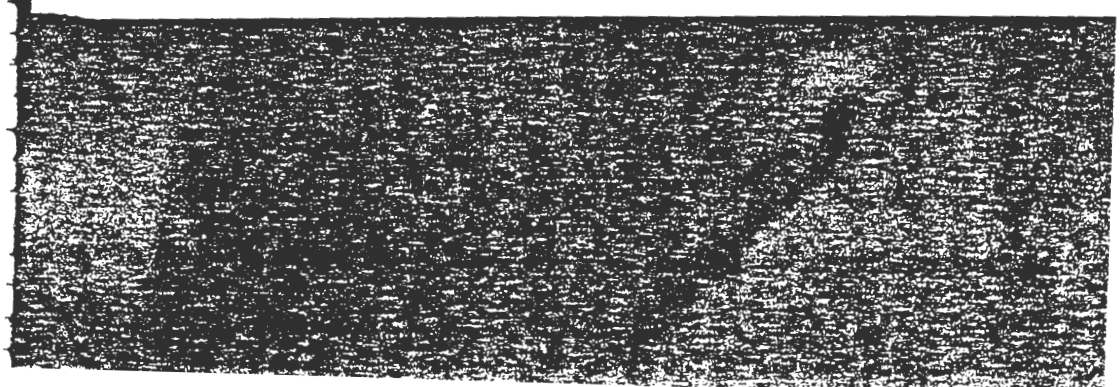
10. With reference to Citation 1, Item 2 there was no evidence of approval of the water by the health department; the water source was within a short distance of the outdoor privy which was the only toilet facility available; unmonitored water leads to the possibility of contamination with resulting serious disease to those who consume the water.

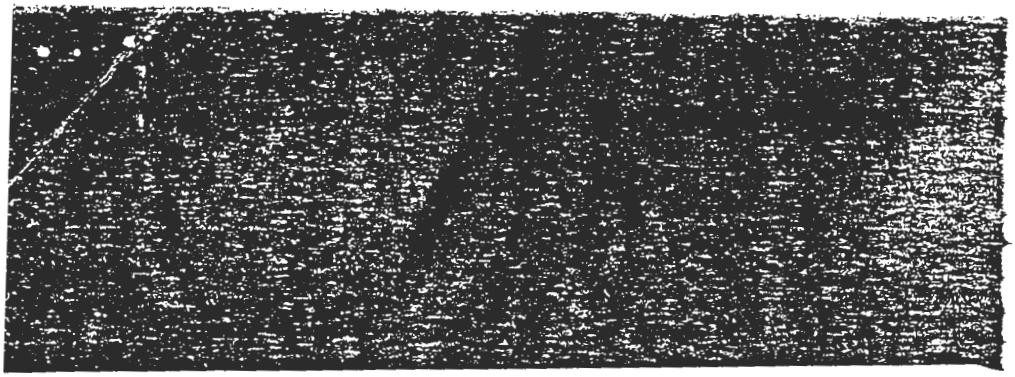
11. With reference to Citation 1, Item 3 there was a shower stall but the water was not hooked up and there was no shower head; the employees bathed with a garden hose in the yard; there was a possibility of injury to the workers because of inadequate bathing facilities and the result could be serious illness.

12. With reference to Citation 1, Item 4, no hot water was available for bathing or laundry; there was a possibility of injury to the workers because of inadequate hot water in bathing facilities and the result could be serious illness.

13. With reference to Citation 2, Item 1, there were holes in the tin roof in the sleeping area, the hazard being exposure to the elements.

14. With reference to Citation 2, Item 2, there were inadequate sleeping facilities in that there were 3 beds in 120 square feet, the hazard being overcrowding and possible spread of disease by sputum, etc.





15. With reference to Citation 2, Item 3, on the ground floor there was only a portion of a storage area for storage of personal clothing, the hazard being unsanitary condition with no place to store clean clothing.

16. With reference to Citation 2, Item 4, a bed was not 12 inches from the floor, the hazard being insects on floor and resulting bites, etc.

17. With reference to Citation 2, Item 7, there was only one outside toilet and both men and women were sleeping in the house, the hazard being lack of privacy.

18. With reference to Citation 2, Item 8, the outside toilet was at a 70 degree angle to the ground and was dirty, the result of which was that the workers did not use the toilet but rather used the ground surrounding the toilet, the hazard being odor and spread of E coli.

19. With reference to Citation 2, Item 9, there was no refuse container that could be sealed, the hazard being spread of disease.

20. With reference to Citation 2, Item 11, there was no first-aid facility on site, the hazard being increased likelihood of permanent injury should an accident occur.

21. Respondent testified that he is in a dire financial situation and that there is about a 90% chance that he will be foreclosed on because of his inability to pay his debts.

CONCLUSIONS OF LAW

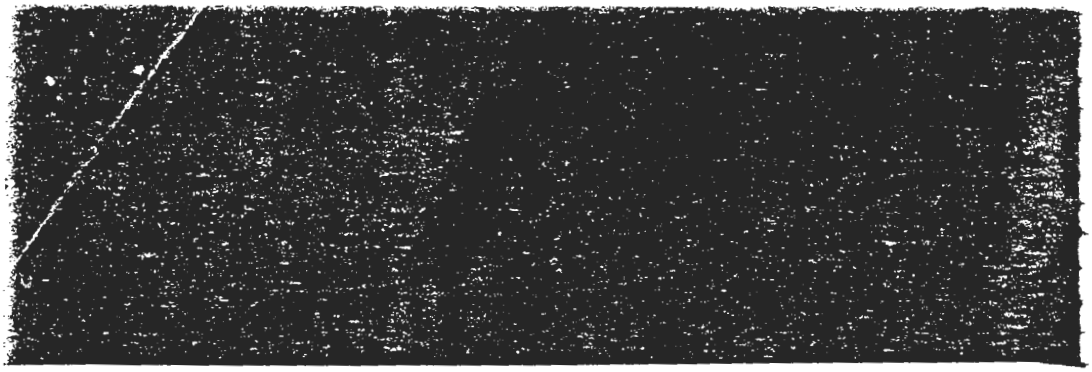
1. This action was properly brought and jurisdiction lies with the Undersigned to hear this action.

2. Respondent is in violation of the Items set forth in Citation 1, and Citation 2.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the violations set forth in Citation 1 and Citation 2 are hereby AFFIRMED, but in the sole discretion of the Undersigned the penalty is reduced to $1.00, based upon the financial hardship of the Respondent.

This the 9th day of September, 1988.

R. Joyce Garrett
Administrative Law Judge



APPENDIX C

After an informal pre-hearing conference between Respondent and Complainant, Respondent made a motion to withdraw its Notice of Contest which is the subject of this Hearing and asking that it be made part of the record that Respondent continues to be of the opinion that the violation was not serious. Complainant did not object to Respondent's motion to withdraw.

It appearing to the Undersigned that there are no third parties involved in this matter, and

It further appearing that Respondent may withdraw its Notice of Contest provided that there has been abatement, and there has been abatement.

IT IS THEREFORE ORDERED THAT Respondent is allowed to withdraw its Notice of Contest, and the Citation and Notification of Penalty issued February 3, 1989 shall become a Final Order.

This the 30th day of June, 1989.

R. Joyce Garrett
Administrative Law Judge

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA, Complainant, v. DIXON FOODS DBA McDONALD'S, Respondent.	OSHANC NO. 89-1576 6-30-89

APPEARANCES Complainant: Robert J. Blum
Associate Attorney General

Respondent: Larry T. Winbourne
Area Supervisor
Dixon Foods dba McDonald's

BEFORE Hearing Examiner: R. Joyce Garrett

THIS CAUSE CAME ON FOR HEARING and was heard before the Undersigned on June 21, 1989 in N. C. State Bar Building, Council Chambers - 3rd Floor, 208 Fayetteville Street Mall, Raleigh, N.C.

Complainant was represented by Mr. Robert J. Blum, Associate Attorney General, North Carolina Department of Justice. Respondent was represented by Mr. Larry T. Winbourne, Area Supervisor, Dixon Foods dba McDonald's.

After an informal pre-hearing conference between Respondent and Complainant, Respondent moved to withdraw its Notice of Contest which is the subject of this Hearing and requested the Undersigned in her discretion to reduce the penalty based on the following facts:

Respondent has been in business for approximately 18 years and has not previously been cited for any violation of OSHA regulation.

Respondent employs approximately 900 persons.

There was another exit door within 18 feet of the door which was the subject of the violation.

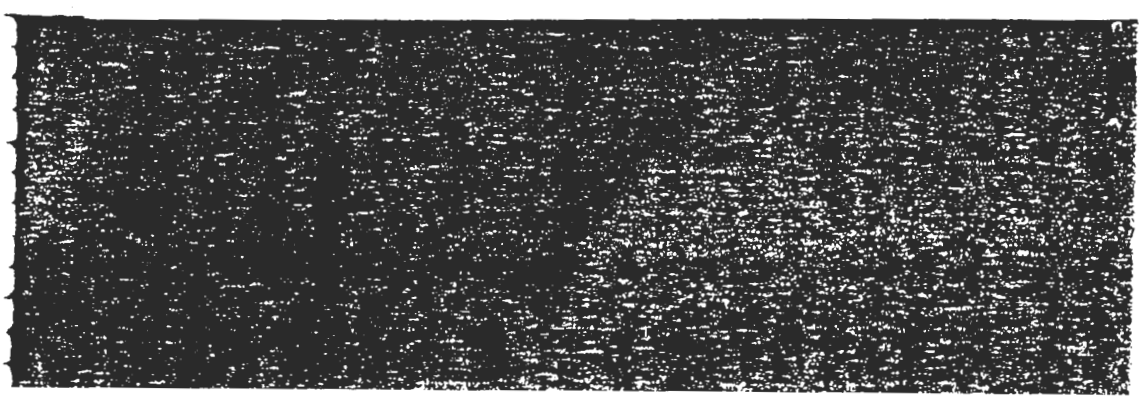
Only 3 employees were exposed to a potential danger resulting from the blocked exit door.

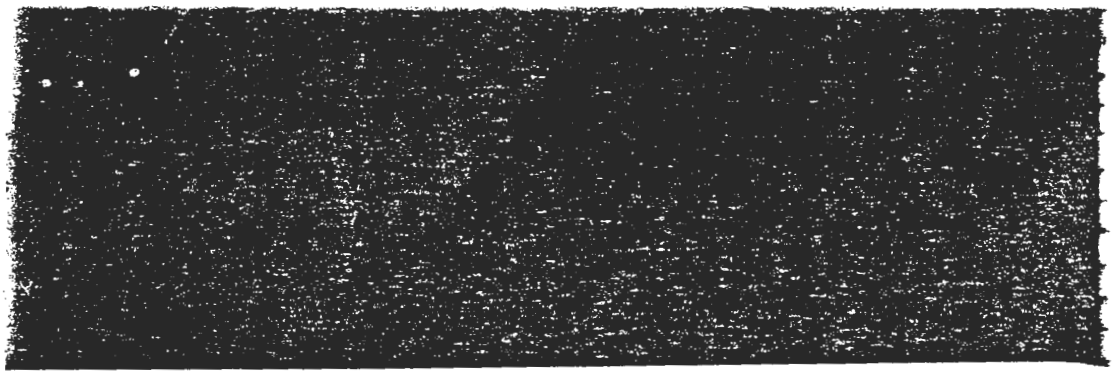
There were two other exit doors available to the employees.

The door which was blocked and which was the subject of the violation was not required to be an exit door.

An "exit" sign was over the door at the time the building was first occupied by Respondent and Respondent had not removed the sign.

The fact that the door was locked was an oversight on the part of the assistant manager who was on duty on the day of the inspection -being newly assigned to the day shift.





The "exit" sign was immediately removed from over the door, and such removal brought the door, even though locked, into full compliance with OSHA laws.

Complainant did not object to Respondent's Motion to Withdraw and presented no evidence in rebuttal to the facts stated by Respondent and on which Respondent asked the Undersigned to consider as mitigation factors in calculation of the penalty. Complainant restated its position that the penalty was properly calculated and should remain as originally assessed.

Based upon the record and the unrebutted facts asserted at the Hearing, the Undersigned makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for compliance and with enforcement of the Occupational Safety and Health Act of North Carolina.

2. Respondent is an entity which was transacting business in the State of North Carolina and is subject to the Occupational Safety and Health Act of North Carolina.

3. The facts stated by Respondent listed above are incorporated herein by reference and made Findings of Fact.

4. No third parties are involved in this matter.

5. The violation was immediately abated.

CONCLUSIONS OF LAW

1. This action was properly brought pursuant to the North Carolina Statutes and Respondent properly contested the Citation and Notification of Penalty alleging a serious violation of 29 CFR 1910.36(b)(4) [exit was locked or fastened, preventing free escape from inside of the building].

2. There was a serious violation of the standard cited and the penalty as set forth in said Citation was calculated in accordance with the formula applicable to all employers similarly situated in North Carolina based on information then available to the Complainant.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED AND ADJUDGED:

1. Respondent's Motion to Withdraw its Notice of Contest is granted.

2. The Citation and Notification of Penalty are affirmed with respect to the violation set forth therein.

2 [sic - 3]. The penalty assessed in the Citation and Notification of Penalty is, in the sole discretion of the Undersigned, reduced to $180.00.

This the 30th day of June, 1989.

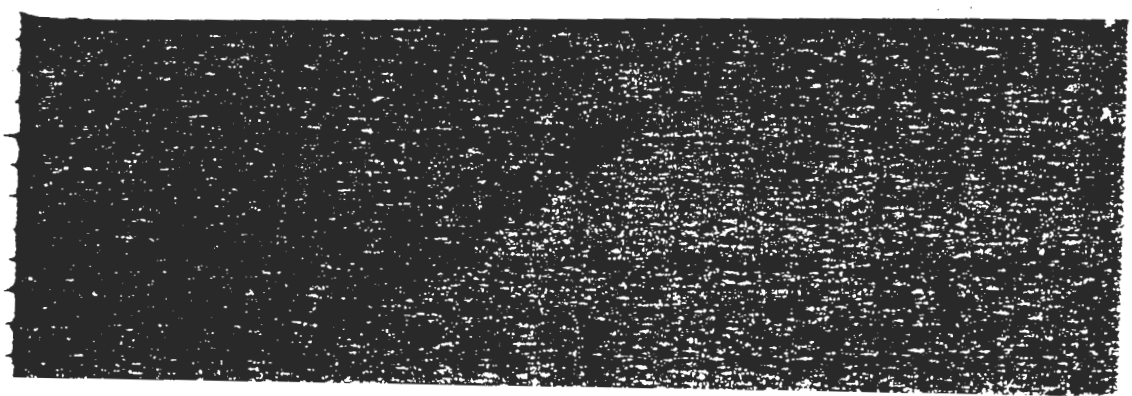
R. Joyce Garrett
Administrative Law Judge

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA, Complainant, v. PERFECT FIT INDUSTRIES, INC., Respondent.	OSHANC NO. 89-1579 3-27-90

APPEARANCES
Complainant: Robert J. Blum
Assistant Attorney General

Respondent: Richard F. Kane
Attorney at Law
Charlotte, North Carolina

BEFORE
Hearing Examiner: Richard M. Koch



APPENDIX D

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA, Complainant, v. RANDLEMAN MANUFACTURING CORPORATION, Respondent.	OSHANC NO. 91-2076 5-4-92

APPEARANCES Complainant: Ranee S. Sandy
Associate Attorney General

Respondent: Wallace C. Thompson
President
Randleman Manufacturing Corporation

BEFORE Hearing Examiner: Fred S. Hutchins, Jr.

This cause came on for hearing at the Guilford County Courthouse, Greensboro, North Carolina on May 1, 1992. Mrs. Ranee Sandy, Associate Attorney General, State of North Carolina, represented Complainant and Mr. Wallace Thompson, President of Respondent, represented Respondent.

After a pretrial conference and conference between the parties the respective representatives entered into the following stipulations:

1. Respondent admits violation of both citations for which it was cited and agrees that Complainant need not present evidence of said violations.

2. Respondent contests only the proposed penalties. Respondent presented evidence which tended to show:

(a) that for fiscal year 1990 the Respondent had a loss of approximately $390,000.00; that in fiscal year 1991 the Respondent had a profit of $8,000.00. See Respondent's Exhibits 1 and 2.

(b) Respondent owes the Internal Revenue Service approximately $140,000.00 which it is paying at the rate of $4,000.00 a month.

(c) Respondent owes Wachovia Bank and Trust Company approximately $132,000.00 which it is paying at the rate of $3,500.00 per month, plus interest at the prime rate plus three percent (3%).

(d) Respondent employs approximately 220 people in a sewing operation. It can barely meet its weekly payroll which is about $65,000.00 per week.

(e) Mr. Thompson is the President and sole shareholder of the company and his salary is $26,000.00 a year out of which he has to pay $890.00 alimony and $200.00 child support each month.

In addition he has a child in college and will have to pay off loans for the child's college education.

(f) Respondent owes approximately $120,000.00 to general creditors, $85,000.00 of which is more than thirty days old.

(g) Respondent's attitude has been excellent with the Inspector and had installed the necessary machine guard on its pressing machines but had removed them due to employee complaints. Respondent immediately after the inspection reinstated the guards and abated the citation.

CONCLUSIONS OF LAW

1. Respondent is in violation of 29 CFR 1910.242(a) as a repeat nonserious violation.

2. Respondent is in violation of 29 CFR 1910.212(a)(3)(ii) as a serious violation.

3. Respondent is unable financially to pay the penalties proposed by Complainant.

4. Under all of the circumstances, including Respondent's extremely good attitude and spirit of cooperation, a penalty of $100 for the nonserious violation and $300 for the serious violation appears to be reasonable in this case.

Now, therefore, it is ORDERED that Respondent is in violation of 29 CFR 1910.242(a) and 29 CFR 1910.212(a)(3)(ii) and shall pay a total of $400 to the North Carolina Department of Labor within ten days of the receipt of this Order.

This the 4th day of May 1992.

Fred S. Hutchins, Jr.
Administrative Law Judge

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NOTE: The exhibits referred to above are on file at the office of the Safety and Health review Board of North Carolina in Raleigh.

North Carolina General Assembly
Legislative Services Office
Legislative Office Building
300 N. Salisbury Street, Raleigh, N. C. 27603-5925

GEORGE R. HALL, JR., Legislative Administrative Officer
(919) 733-7044

M. GLENN NEWKIRK, Director
Automated Systems Division
Suite 400, (919) 733-6834

GERRY F. COHEN, Director
Bill Drafting Division
Suite 100, (919) 733-6660

THOMAS L. COVINGTON, Director
Fiscal Research Division
Suite 619, (919) 733-4910

TERRENCE D. SULLIVAN, Director
Research Division
Suite 545, (919) 733-2578

October 19, 1992

MEMORANDUM

TO: Members of the Fire and Occupational Safety Committee

FROM: Linwood Jones

RE: OSHA Abatement
Note on Products Liaiblity Statute of Repose

This memo follows up the discussion at the September meeting of the Committee concerning abatement of OSHA violations.

When an employer is cited for an OSHA violation, he is given a specified period of time in which to "abate" the violation. The employer may contest the entire citation, just the penalty, or just the time period of abatement by filing an appeal with the Safety and Health Review Board. If either the citation itself or the abatement period are contested, the contest automatically stays the abatement. In other words, once the appeal is filed, the employer is not required to abate the violation until the Safety and Health Review Board has issued a final decision. If only the amount of the penalty is contested, there is no stay of the abatement order.

The question was raised at the last meeting whether it is legal and practical to require employers to abate a violation before a final decision from the Review Board. Mr. Farr addressed one of the primary practical concerns at that meeting when he noted that the Review Board may overturn the citation or determine that a different method of abatement was appropriate, thus rendering the employer's changes unnecessary. This same concern is also expressed in a recent GAO Report that examines the new abatement procedures proposed in the congressional OSHA reform bills.

There is no constitutional requirement that an abatement order automatically be stayed pending a final decision by the Review Board. However, if the automatic stay is eliminated, there should be some avenue of relief available to the employer to promptly seek a stay. For example, in the OSHA reform bill in Congress (HR 3160), the automatic stay would be eliminated, but the employer would be able to petition the federal Safety and Health Review Commission to stay abatement until a final decision by the Commission. In determining whether to stay the abatement, the Commission would consider whether the employer has demonstrated a likelihood of success on the merits, whether the employer will suffer irreparable harm without the stay, whether the issuance of the stay will substantially injure the other parties interested in the proceeding, and the public interest.

Among states administering their own OSHA plans, all but one (Kentucky) provide for an automatic stay of abatement until a final decision by their review board. In Kentucky, the stay is discretionary with the review board. The stay is also automatic in the 29 states under the jurisdiction of federal OSHA.

Our State OSHA law also contains an "imminent danger" provision that allows the Commissioner to seek a court order to counteract imminent dangers. Modeled after the federal OSHA law, it allows the superior court, on petition of the Commissioner, to issue a restraining order (for up to 5 days) without notice and hearing to the employer to restrain "conditions or practices...which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through (regular) enforcement procedures." The order can require the employer to avoid, correct, or remove the imminent danger; it can also prohibit employees in the dangerous area with certain exceptions. If the Commissioner arbitrarily or capriciously fails to seek a court order to restrain an imminent danger, any employee exposed to the danger can seek a writ of mandamus from the courts to compel the Commissioner to petition for a restraining order.

Imminent danger laws are also used for other regulatory actions outside of OSHA. Local health departments, for example, can enter property and take any action necessary to abate imminent health hazards, including suspension of any permits it has issued to the property owner (G.S. §130A-21, §130A-23(d)). The Department of Agriculture can stop shipments of adulterated foods or drugs (G.S. §106-125). DEHNR can take any necessary action in an emergency situation under the Radiation Protection Act. In each of these instances, the opportunity for a hearing follows the action taken. Post-deprivation hearings have generally been held constitutional when imminent danger and emergency situations exist.

As noted above, our State OSHA imminent danger law is modeled after the federal law, which requires the Secretary of Labor to obtain a court order to restrain an imminent workplace danger. Many of the states administering their own OSHA plans give their labor commissioners and OSHA inspectors authority to restrain imminent dangers in the workplace without having to first obtain a court order. These states generally provide the employer an opportunity to seek prompt judicial review of the order. This concept is also part of the proposed congressional federal OSHA reform package.

***NOTE ON PRODUCTS LIABILITY STATUTE OF REPOSE:** During the spring, when the Committee was deciding what to recommend for the short session, it voted to recommend to the 1993 session the draft bill extending the products liability statute of repose from 6 years to 25 years. This note is just a reminder of the action taken by the Committee.

The products liability statute of repose is completely separate from the statute of repose governing workers compensation death benefits. The workers compensation statute of repose was debated this summer as part of HB 1387 but was not enacted.

FISCAL RESEARCH DIVISION

OSHA REVIEW BOARD

AUTHORIZED BUDGET FOR 1992-93

(As of August 31, 1992)

	1992-93
Salaries and Benefits	$60,591
Legal and Accounting Fees	76,174
Consultant Fees	5,900
Witness Fees	1,100
Court Reporter Fees	21,700
Office Supplies and Materials	1,250
Travel	17,938
Communication	5,819
Printing	250
Rental of Real Property	1,200
Rent of Equipment	247
Service and Maintenance Contracts	1,000
Office Furniture and Equipment	1,900
Books	2,050
TOTAL EXPENDITURES	**$197,119**
RECEIPTS	**70,058**
APPROPRIATION	**127,061**

NOTES:

(1) The OSHA Review Board has two permanent full-time positions: Administrative Assistant II and Clerk Typist III.

(2) The three members of the OSHA Review Board are paid $200 per day plus their travel expenses when they are acting in this capacity. They are paid from the Legal and Accounting Fees and Travel line items.

(3) The seven hearing examiners are paid $50 per hour plus travel expenses when they are acting in this capacity. They are paid from the Legal and Accounting and Travel line items.

(4) The Board contracts with court reporters in the areas where hearings are taking place.

STATISTICS FOR THE PERIOD
JULY 1, 1984 THROUGH JUNE 30, 1992

Fiscal Year	Cases Received	Cases Closed	Cases Set for Hearing	Cases Appealed To Board	Board Meetings Held	Cases Appealed to Supreme Court/ Court of Appeals
1984-85	75	76	69	3	5	3
1985-86	91	121	144	17	6	3
1986-87	100	124	101	13	9	5
1987-88	138	93	74	9	5	4
1988-89	133	163	144	16	4	0
1989-90	139	98	95	19	6	0
1990-91[1]	241	167	133	24	5	7
1991-92[2]	277	207	202	37	6	9
	1,194	1,049	962	138[3]	46	31

NOTES:

[1] Civil penalties increased effective October 1, 1990

[2] Civil penalties increased again effective January 1, 1992

[3] Of the 138 cases appealed to the Board, as of June 30, 1992:
106 - closed
21 - on appeal to Board
11 - on appeal to Superior Court or Court of Appeals
138

[4] The average amount of money spent per case set for hearing was $443.46

[5] 95 cases are to be set for hearing as of September 24, 1992

SOURCE: OSHA REVIEW BOARD

FISCAL RESEARCH DIVISION

NORTH CAROLINA DEPARTMENT OF LABOR

OSHA Penalty Collections

Fiscal Year	Amount
1984-85	$226,360.17
1985-86	205,053.15
1986-87	297,927.37
1987-88	348,591.44
1988-89	428,273.68
1989-90	469,017.50
1990-91*	621,576.09
1991-92**	1,032,655.00
1992-93 (through 8-31-92)	384.055.00

NOTES:

* Effective October 1, 1990, civil penalties were increased from a minimum of $1,000 and maximum of $10,000 to a minimum of $2,500 and a maximum of $14,000 for each willful violation.

** Effective January 1, 1992, civil penalties were increased from a minimum of $2,500 and a maximum of $14,000 to a minimum of $5,000 and a maximum of $70,000 for each willful violation.

SOURCE: NORTH CAROLINA DEPARTMENT OF LABOR