REPORT OF THE COMMITTEE
ON LABOR
ON ITS STUDY OF
THE LAW RELATING TO OCCUPATIONAL DISEASE

State of Maine

One Hundred and Tenth Legislature

JOINT STANDING COMMITTEE ON LABOR

Senate	House
Charlotte Zahn Sewall, Senate Chairperson	Edith S. Beaulieu, House Chairperson
Dennis L. Dutremble	Harlan Baker
Roland L. Sutton	Catharine L. Damren
	Ruth S. Foster
	Martin Hayden
	Richard Laverriere
	Harriet B. Lewis
	Antoinette C. Martin
	Edward A. McHenry
	John L. Tuttle, Jr.

January 19, 1982

William E. Saufley,
Legislative Assistant

D. OF R.

STATE OF MAINE

In House

~~Ordered~~,

Whereas, the problem of occupational disease and hearing loss is an important and complex subject; and

Whereas, it is the policy of the Legislature and the State to protect Maine's workers from these hazards and to provide adequate relief from subsequent loss of earning capacity; and

Whereas, these objects would best be met through a comprehensive and integrated Occupational Disease Law; now, therefore, be it

Ordered, the Senate concurring, subject to the Legislative Council's review and determinations hereinafter provided, that the Joint Standing Committee on Labor shall study the area of occupational disease and hearing loss; and be it further

Ordered, that the committee report its findings and recommendations, together with all necessary implementing legislation in accordance with the Joint Rules, to the Legislative Council for submission in final form at the Second Regular Session of the 110th Legislature; and be it further

Ordered, that the Legislative Council, before implementing this study and determining an appropriate level of funding, shall first ensure that this directive can be accomplished within the limits of available resources, that it is combined with other initiatives similar in scope to avoid duplication and that its purpose is within the best interests of the State; and be it further

D. OF R.

Ordered, upon passage in concurrence, that a suitable copy of this Order shall be forwarded to members of the committee.

Rules Suspended

IN SENATE CHAMBER

JUN 9 1981

READ AND PASSED
IN CONCURRENCE

MAY M. ROSS, Secretary
Ordered Sent Forthwith

HP1629

HOUSE OF REPRESENTATIVES
READ AND PASSED

JUN 9 1981
SENT UP FOR CONCURRENCE

ORDERED SENT FORTHWITH CLERK

(Mrs. A. Martin)
NAME:

TOWN: Brunswick

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INTRODUCTION

The Joint Standing Committee on Labor, pursuant to Study Order H.P. 1629, undertook a study of Maine's laws relating to occupational disease and proposes revisions of the law. According to the study order, the Committee on Labor was directed to "study the area of occupational disease and hearing loss," and to "report its findings and recommendations, together with all necessary implementing legislation..."

A subcommittee was formed to meet with representatives of employees, employers, insurance interests, medical experts and the public. The subcommittee was composed of the following legislators:

Members	Ex officio
Rep. Harlan Baker	Sen. Charlotte Zahn Sewall, Senate Chairperson
Rep. Ruth S. Foster	
Rep. Harriet B. Lewis	Rep. Edith S. Beaulieu, House Chairperson
Rep. John L. Tuttle, Jr.	

The subcommittee met on three occasions: September 10, October 26, and November 5, 1981. The first and last meetings were held in Room 438 of the State House in Augusta, and were open to the public. The second meeting, on October 26, entailed visits of the subcommittee to two plants: Scott Paper Company's Somerset plant and Carlton Woolen Mills in Winthrop.

In all, the subcommittee solicited and obtained information from over 70 sources, including representatives of industry, labor, insurance and medical groups, and departments of Maine, other states and the federal government.

On December 22, 1981, the full committee met at the State House to review proposals and take final actions.

I. Findings, Recommendations and Proposals of the Committee

A. Findings

1. Generally

(a) Data. Presently, there is a widespread lack of reliable data on the incidence and prevalence of occupational disease, both in Maine and elsewhere. For example, the U.S. Public Health Service has estimated the incidence of occupational disease nationwide at 400,000 cases per year, and fatalities at or above 100,000 per year. For a similar period, the U.S. Department of Labor reported some 168,000 cases, almost two-thirds of which were skin disorders.

In Maine, present reporting consists of a count of first reports of disease under the Occupational Disease Law or Workers' Compensation Act. This system will of course only detect illnesses where compensation is being

sought under present law. In addition, further sources of such information include:

(i) Occupational Disease reporting law (22 M.R.S.A. §1481 et seq.), which was repealed by P.L. 1977, c. 304, §8;

(ii) Maine Occupational Health Surveillance Project, operated by the Maine Department of Human Services, Bureau of Health Planning and Development under a recent grant from the National Institute for Occupational Safety and Health (NIOSH);

(iii) Maine Cancer Registry, now being implemented by the Department of Human Services under 22 M.R.S.A. §1404 (as enacted by P.L. 1981, c. 507, §1).

(b) Prevention: safety rules and devices. In Maine, regulation of workplace safety in private businesses is governed by the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA). Under the terms of its enabling legislation, OSHA safety requirements are enforced only against employers. Where OSHA requires that employees are to follow certain procedures or to use certain safety devices, enforcement for noncompliance is against the employer alone, who in turn is responsible for assuring worker compliance.

This enforcement scheme leaves open the possibility that, for example, a worker may deliberately fail to use employer-provided hearing protection devices, and subsequently claim compensation for occupational hearing loss under the Occupational Disease Law.

(c) Prevention: hiring practices. In order to prevent workplace injury or occupational disease, pre-employment medical screening could be a valuable tool, if used to detect conditions which predispose an individual to certain injuries or diseases. Indeed, 39 M.R.S.A. §190 provides for such examinations, and bars recovery for occupational disease if a person refuses to submit to one.

Under former 39 M.R.S.A. §191 (repealed by P.L. 1981, c. 164), an employee or prospective employee already affected by an occupational disease could be allowed to waive any right to compensation for aggravation of the condition. This section was repealed when it was shown that the commission would not approve such waivers, since the person's short-term interest in gaining employment could not be allowed to outweigh his long-term interest in being free from

aggravation of the disease, or at least being compensated for that aggravation.

However, employment practices which seek to prevent the onset or aggravation of workplace injury and disease may violate the Maine Human Rights Act (5 M.R.S.A. §4551 et seq.), according to recent decisions of the Maine Human Rights Commission. In those cases, the employer was found to have violated the act by screening potential employees for a certain back condition which its physician judged extremely hazardous in a certain occupation, and by making its hiring decisions accordingly. The Commission found this procedure constituted discrimination on the basis of physical handicap.

2. Chronic diseases with latency periods

(a) Generally. Many occupational diseases may become manifest in a manner similar to injuries governed by the Workers' Compensation Act. Indeed, according to statistics for 1979, a large proportion of reported conditions are of this more apparent type, as is shown in the following list.

Illness	% of reported occupational illnesses, 1979
Dermatitis	34.7%
Inflamation of Joints, etc.	19.3%
Poisoning, systemic	12.9%
Infective or Parasitic diseases	4.3%
TOTAL	71.2%

Other occupational diseases are more insidious. These diseases may exist for long periods of time before becoming symptomatic or being diagnosed. Examples of such conditions are tumors, cancer, certain effects of radiation, heart conditions, and pulmonary conditions such as pneumoconiosis, or dust diseases.

(b) Present law. The present occupational disease law contains several provisions which severely limit the ability of an individual to obtain compensation for diseases with periods of latency. Many of these provisions survive from the inception of the law in the late 1940's.

(i) General limitation. 39 M.R.S.A. §189, second sentence, provides that for a disease to be compensable, incapacity must result within 3 years of "the last injurious exposure to such disease in the employment."

Modern medical knowledge, however, indicates that exposure to certain carcinogens today will not result in a diagnosable condition, much less incapacity, for perhaps 20 years. In the case of mesothelioma, a condition caused solely by exposure to asbestos, the latency period may reach 25 years. This requirement may thus serve to encourage workers to remain in proximity to the hazard for longer periods of time in an attempt to assure compensation for a latent affliction already contracted or simply to bar compensation.

(ii) Filing requirement. Under 39 M.R.S.A. §187, once the worker becomes incapacitated, he has 30 days to give notice of injury, and 2 years to file a petition for compensation. These limits apply regardless of the time the disease is diagnosed or the employee knows the disease to be work-related. The only potential argument the employee has in such a case is to prove he operated under a "mistake of fact," pursuant to 39 M.R.S.A. §§64, 95.

(iii) Exposure requirements. The provisions on silicosis (§194) and asbestosis (§194-A) have particularly stringent requirements for exposure; these are discussed below (sub, Finding 3, at page 5). By contrast, the provision on disability due to radioactive properties (§195) specifically provides that there is no exposure period requirement, opting instead for the so-called "discovery rule," as follows:

> "...the time for filing claims shall not begin to run in cases of incapacity until the person claiming benefits knew, or by exercise of reasonable diligence should have known of the casual [sic] relationship between his employment and his incapacity, or after incapacity, whichever is later."

39 M.R.S.A. §195.

3. Dust diseases

(a) Generally. The term "dust diseases" is applied to an array of diseases caused by exposure to or inhalation of various types of airborne particles. Some of the more well-known types include:

(i) Coal-miners' pneumoconiosis (Black Lung);

(ii) Cotton-workers' byssinosis (Brown Lung);

(iii) Asbestosis; and

(iv) Silicosis.

Of these, the last two are specifically provided

for in Maine's Occupational Disease Law (39 M.R.S.A. §§194-A and 194, respectively).

In addition to asbestosis, a particular lung fibrosis, other medical conditions may be caused by asbestos exposure, including cancer, skin diseases, or a specific malignant tumor known as mesothelioma.

Silicosis is a pneumoconiosis characterized by the growth of fibrous nodules in the lungs. Exposure to silica, which is present in most forms of rock, may result in simple silicosis, complicated silicosis, or tuberculosilicosis. Unlike the other forms, simple silicosis is non-disabling, since it does not usually result in any loss of pulmonary function.

(b) Present law. In addition to other requirements of the law, including the recency of exposure requirement in 39 M.R.S.A. §189 (See, Finding 2(b)(i), supra at page 3f), claimants of compensation for silicosis or asbestosis are presumed not to be suffering an occupational disease unless they prove that:

> "...during the 15 years immediately preceding the date of disability the employee has been exposed to the inhalation of... [silica/asbestos] dust over a period of not less than 2 years."

39 M.R.S.A. §§194, 194-A. In addition, either the exposure must be entirely in this state, or the worker must have been employed by the same employer and worked at least partly in this state.

The combination of all requirements may effectively preclude most cases of silicosis, asbestosis, and other asbestos diseases such as mesothelioma from being compensated.

4. Occupational hearing loss

(a) Generally. Hearing loss is generally attributable to infection, noise exposure (both occupational and nonoccupational), otosclerosis, aging (presbycusis), or a combination of factors. The loss may be one or both of the following:

> (i) volumetric loss: a problem with loudness alone, which usually stems from problems of the middle or outer ear, and can be helped by the use of hearing aids; or

(ii) discriminatory loss: problems with clearness, typifying sensioneural damage, or harm to the nerve endings of the inner ear, not assisted by the use of hearing aids. Sensioneural damage is the type compensated under the present law (39 M.R.S.A. §193(1)).

Early hearing loss starts in frequencies above 1000 cycles per second (cps), and eventually spreads into the lower, conversational tones. Loss at the higher levels tends to cause problems in discriminating between certain consonant sounds, such as "t", "p", "sh", "ch".

Noise exposure is measured in units called "decibels" (dB). When geared to the sensitivity of the human ear, the "A-weighted sound level" is given in units designated as dB(A). The diagram on the next page illustrates this system.

(b) Prevention: noise exposure control. The regulation of workplace noise exposure is undertaken by OSHA (29 CFR §1910.95). Nonoccupational noise is generally unregulated, although some specific controls may exist through the U.S. Environmental Protection Agency (EPA) attempts to control "noise pollution," and through local zoning ordinances.

OSHA regulations provide that workers should not be exposed to noise above a given Permissible Exposure Level (PEL); that reasonable administrative or engineering controls must first be used to reduce noise to within the PEL; and that, finally, hearing protective devices may be used after those methods have failed. The PEL is determined according to the following chart:

Duration per day, hours	Sound level, dBA Slow response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

29 CFR §1910.95, Table G-16.

In addition to these exposure limits, OSHA provides that whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level of 85 dB(A), the employer must institute for those employees a Hearing Conservation Program. This program calls for baseline audiograms, subsequent annual audiograms, worker information, training in the use of protective equipment, and possible other measures.

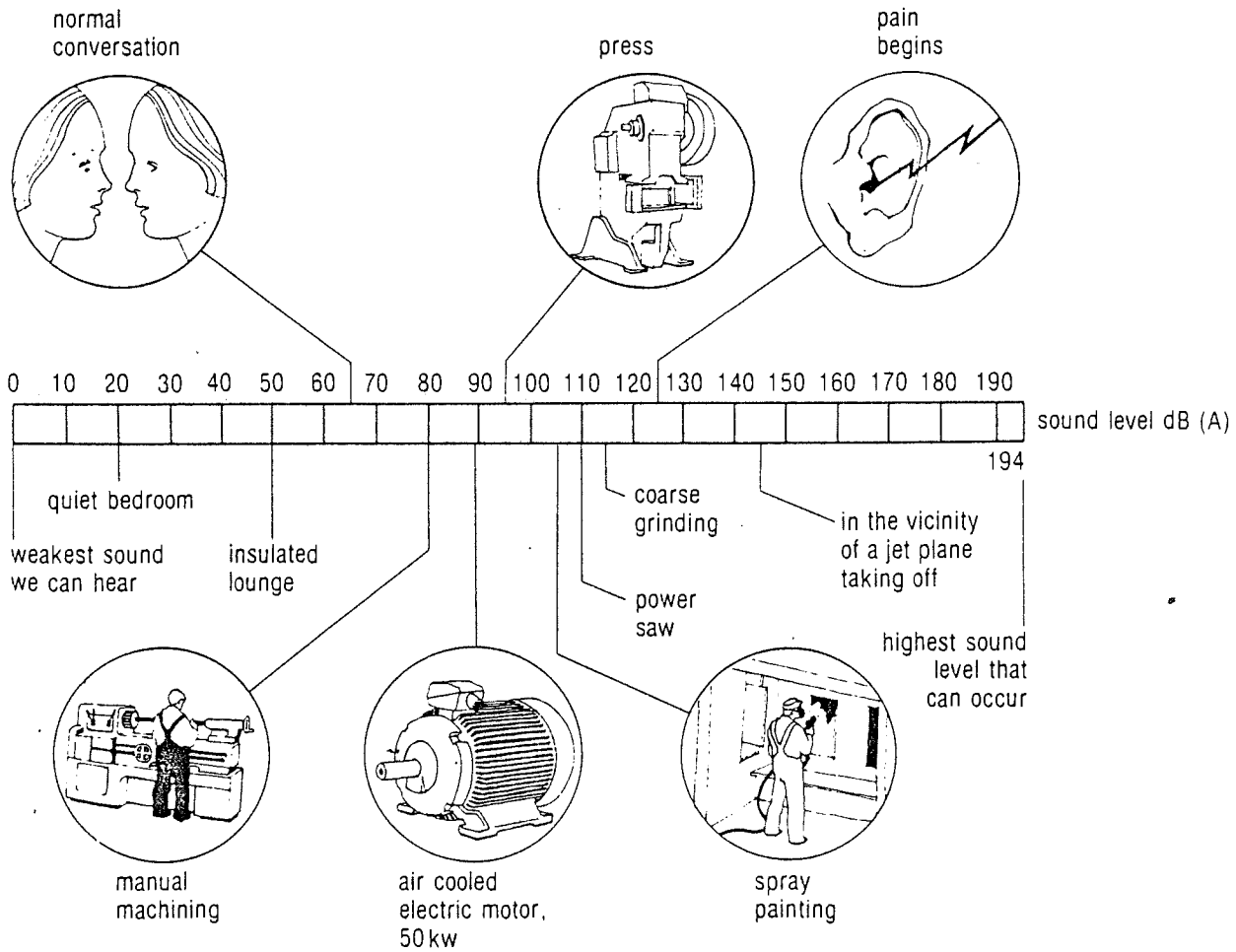
Decibel (dB)

Sound levels are measured in units of decibels (dB). If sound is intensified by 10 dB, it seems to the ears approximately as if the sound intensity has doubled. A reduction by 10 dB makes it seem as if the intensity has been reduced by half.

Noise level measurement

In measuring sound levels, instruments are used which resemble the human ear in sensitivity to noise composed of varying frequencies. The instruments measure the "A-weighted sound level" in units called dB(A).

Workplace noise measurements indicate the combined sound levels of tool noise from a number of sources (machinery and materials handling) and background noise (from ventilation systems, cooling compressors, circulation pumps, etc.).



SOURCE: Noise Control: A guide for workers and employers, U. S. Dept. of Labor, Occupational Safety & Health Administration (OSHA), 1980, at p.7.

Enforcement is against the employer, with up to $1,000 penalty for a violation, and up to $10,000 for a willful or repeat violation. Employers are to enforce rules governing employee conduct by disciplinary measures including dismissal.

Noise hazards outside the workplace include general environmental noise (traffic, airplanes), home power tools and engines (chain saws, machinery) and entertainment (live, recorded music). One industry representative noted that he took an audiometer reading where a rock group was performing and found a noise level of 110 dB(A).

(c) Present compensation law. 39 M.R.S.A. §193 sets out compensation liability for sensioneural damage due to occupational noise exposure resulting in hearing loss. No compensation is payable for temporary loss (39 M.R.S.A. §193(10)), and loss resulting from traumatic injury would presumably come under the other provisions of the Workers' Compensation Act (39 M.R.S.A. §51).

The extent of compensable hearing loss is based on audiometric testing at frequencies of 500, 1,000 and 2,000 cps, and loss of hearing for frequencies higher than 2,000 cps is not compensable (39 M.R.S.A. §193(2)). If the loss of hearing at the 3 levels averages 15 dB or less (15 dB "low fence"), there is no compensable hearing disability; if the average loss equals or exceeds 82 dB (82 dB "high fence"), then there is 100% compensable hearing loss (39 M.R.S.A. §193(3)). By way of comparison, a list of formulas used in the compensation laws of other states appears on the next page (Note, however, that the list misstates the low and high fences for Maine).

Along with about a dozen other states, Maine provides a deduction for hearing loss associated with age and nonoccupational causes (presbycusis (39 M.R.S.A. §193(7)). Like many other states, liability is also limited to hearing loss incurred during the employment, which may beestablished by the results of pre-employment testing (39 M.R.S.A. §193(9)).

Permanent partial benefit levels are based upon a ratio of hearing loss to the benefits for total hearing loss, which are 50 weeks of compensation for total loss in one ear, and 200 weeks for total loss in both ears (39 M.R.S.A. §193(4)).

Specific testing standards are set out (39 M.R.S.A. §193(3)). No claim may be filed until the employee has been separated from the noise (by use of protective devices or otherwise) for at least 30 days. There is a 90 day exposure requirement.

Hearing Loss Formulas Used in U.S., State and Federal Workers's Compensation Programs

Formula	Audiometric Frequencies Used (Hz)	Method of Calculation	Low Fence (ANSI-1969)	High Fence	Percent Per Decibel Loss	Better Ear Correction	States That Use Formula
AMA - 1947	500, 1,000, 2,000 4,000	weighted average	20 dB	105 dB	varies	7/1	KS, NJ
AAOO - 1959	500, 1,000, 2,000	average	25 dB	92 dB	1.5	5/1	AZ, CT, GA, HI, KY, MD, ME, MO, MT, NE, NH, NY, NC, RI, TX, VA, WA, WV
AAOO - 1979[1]	Same as California	average	25 dB	92 dB	1.5	5/1	CA
NIOSH Recommendation	1,000, 2,000, 3,000	average	25 dB	92 dB	1.5	5/1	FEC
CHABA Recommendation	1,000, 2,000, 3,000	average	35 dB	92 dB	1.75	4/1	WI
California Formula (Now 1979 AAOO)	500, 1,000, 2,000 3,000	average	25 dB	92 dB	1.5	5/1	CA
Oregon Formula	500, 1,000, 2,000 4,000, 6,000	average	25 dB	92 dB	1.5	5/1	OR
Berney Formula	500, 1,000, 2,000 4,000	average	25 dB	92 dB	1.5	5/1	NJ

Note: Data are from Table 1.

1. States with no formula listed leave decision to examining physician (medical evaluation), who will probably now use the 1979 AAOO.

SOURCE: Occupational Hearing Loss: Workers Compensation Under State and Federal Programs, U.S. Environmental Protection Agency (EPA), Office of Noise Abatement & Control, 1979,p.29.

(d) Proposals. During the First Regular Session of the 110th Legislature, two proposals were introduced which would have altered the hearing loss provisions of the Occupational Disease Law. L.D.513 proposed compensating loss at levels of 2,000, 3,000 and 4,000 cps instead of the levels already provided; L.D.798 would have changed the levels to 1,000, 2,000 and 4,000 cps.

Dr. Joseph Sataloff of Philadelphia is an expert in the field of occupational hearing loss, having authored several books on the subject, participating in the drafting of several states' laws, and serving as a consultant to a number of groups. He noted that despite high benefit levels in Maine, there are very few claims for compensation. He also said that on the other hand, even relatively minor changes, if not carefully considered, could have a substantial cost impact on employers. His suggestion to the subcommittee was to bring together representatives of industry management, labor and the Legislature to work out an optimum law for Maine. Some of these representatives were in fact assembled during the closing days of 1981.

B. Recommendations

With regard to the proposal in Appendix B, "AN ACT to Create a Defense of Employee Non-compliance With Safety Procedures Under the Workers' Compensation Act," the Committee reached no agreement. These differences are outlined in the statements of the majority and minority, infra at page 16 and following.

Otherwise, the Committee makes no specific recommendations that certain legislation be enacted. Rather, as a result of information gathered in the course of the study and outlined in the foregoing findings, the committee is submitting proposed legislation which addresses these areas. It is the sense of the committee that the appropriateness of each specific proposal can best be judged after public hearing and discussion.

C. Proposals

1. General

(a) Data. No bill is being submitted on the subject at this time, since programs which have been recently instituted are expected to address this problem. However, it should be noted that in order to make informed decisions about comprehensive changes in the laws relating to occupational diseases, the Legislature needs far more information on the incidence and prevalence of such diseases than exists today. Present efforts, such as the newly created cancer registry and the Maine Occupa-

tional Health Surveillance Project, have great potential in this area. These activities should be monitored by the Legislature, and if future needs demand it, supported or expanded by necessary legislation and funding.

APPENDIX B

(b) Safety rules defense. "AN ACT to Create a Defense of Employee Noncompliance With Safety Procedures Under the Workers' Compensation Act" is submitted to address this issue. Some 33 states have a provision in this regard (See Appendix A).Under this proposal, it would be a complete defense to payment of compensation for disease or injury if the employer proved that the disease or injury occurred as a result of the employee's deliberate failure or refusal to follow a reasonable safety rule or to utilize a safety device. Statements of the committee on this bill appear infra at page 16 et seq. an employer's earnest efforts to reduce the costs of injuries or disease to the workers and the business itself would not be thwarted by the willful efforts of employees.

At the same time, the defense would not prevail to the detriment of the claimant if the safety rule or device constituted a veiled attempt by the employer to subvert the policies of the compensation laws, or if compliance with the rule or use of the device, under the circumstances, would itself constitute or contribute to a hazard in the employment.

APPENDIX C

(c) Hiring policies. "AN ACT to Clarify the Provision of the Maine Human Rights Act Relating to Employment Discrimination Which is Not Prohibited." The Maine Human Rights Act would be amended to ensure that employer classifications of employment eligibility on the basis of preexisting medical conditions would be permissible, if the classifications are based upon reasonable medical grounds. Rather than compelling an employer to go to great lengths to obtain a medical assessment of each individual's personal susceptibility to injury or disease, the employer would be allowed to establish reasonable, limited categories of conditions which, if detected in an employee or job applicant, may legitimately result in his removal from the position or consideration for the position.

Such a provision might help implement the policy enunciated in 39 M.R.S.A. §190 of the occupational disease law, and support the preventative aspect of the entire compensation law.

2. Chronic diseases with latency periods

APPENDIX D To address the issue of barriers which exist to filing claims for diseases with latency periods, "AN ACT to Change the Compensation of Occupational Disease" is submitted. If enacted, the proposal would provide as follows:

(a) Discovery rule. The date of injury for purpose of notice and filing requirements for all diseases would be the date when the claimant knew, or by the exercise of reasonable diligence should have known, that the cause of the incapacity was related to the employment.

(b) Period for claim. All requirements of a certain maximum period between exposure and incapacity would be repealed, except that for certain dust diseases, action would need to be taken within 20 years.

(c) Dust diseases. There would be no required minimum period of exposure in order to recover for disabling silicosis or asbestos diseases. Only disabling silicosis, as determined by pulmonary function tests, and asbestos diseases would be covered by these special provisions.

4. Occupational hearing loss

(a) Prevention. The statutory defense of willful employee noncompliance with safety rules or failure to use an employer-provided safety device, discussed above (Proposal 1(b) at page 10f., supra) has particular relevance for employer attempts to conserve hearing under OSHA or other plans.

APPENDIX E In addition, "AN ACT to Regulate the Sound Level of Entertainment on Premises Licensed to Sell Liquor" addresses the issue of nonoccupational noise exposure. In conjunction with workplace exposure, the noise generated by, for example, night club entertainment may be disabling and generate both personal loss and costs to industry and government. Presently, liquor licensing laws regulate several environmental aspects of licensed establishments, including the lighting of premises (28 M.R.S.A. §854); the regulation of sound levels for the protection of both employees and customers is at least arguably of no less importance.

APPENDIX F

(b) Compensation. "AN ACT to Revise the Provision of the Occupational Disease Law Relating to Occupational Hearing Loss" would provide for altering the parameters of compensable hearing loss to conform to modern medical knowledge. The bill would include higher frequency loss, i.e., 3000 cycles per second. Further, it would raise the level of minimum compensable impairment.

II. Background

A. History. Workers' Compensation developed in Europe in the late 19th century, and was adopted in most American jurisdistions in the early 20th century. It was a recognition that the price of a product should more accurately reflect the costs of its manufacture; i.e., that the burden of injury to the worker should be alleviated through compensation.

The so-called "great compromise" of the compensation law was that, in return for prompt, no-fault, assured medical and disability benefits, the worker would agree to forego the right to a civil action, and potentially sizeable damage awards. Risk spreading was accomplished through various schemes of insurance and self-insurance. Administration was set up to be primarily outside of the judicial system.

Under most systems, compensation was payable only for personal injury and not for disease. Thus, victims of occupational disease could presumably bring civil actions against their employers, and if victorious, secure large damage awards.

In the late 1930's, public attention became focused on part of the problem of occupational disease when hundreds of workers were reported killed by silicosis while digging a tunnel in West Virginia. Congressional hearings investigated the Gauley Bridge incident, which stimulated both interest and litigation in the area of occupational disease. In the 1930's and 1940's, state legislatures were urged by industry to take action in order to avoid the potentially ruinous effects of litigation in this area.

In 1937-38, a Recess Committee of the 88th Maine Legislature conducted a study on "the necessity and desirability of legislation designed to compensate employees of Maine industries for...occupational diseases" (Resolves 1937, c.132). The committee issued both majority and minority reports which detail the debate of those times. Although the bill proposed by the majority was not accepted in the next Legislature, an occupational disease law was adopted in 1945.

The Occupational Disease Law in 1981 bears a remarkable resemblance to the proposed bill of the 1937 Recess Committee

majority. The major differences between the two are that the present law contains provisions for occupational hearing loss and disability due to radioactive properties, and as of last year, the employee waiver has been abolished (P.L.1981, c.164).

In the late 1960's and early 1970's, nationwide interest in the compensation laws was rekindled. Federal action was considered, including setting mandatory guidelines for state programs. In 1972, the National Commission on State Workmen's Compensation Laws made a number of recommendations for state laws; those 19 which it labeled "essential", it was suggested, might form the basis for federal guidelines. In 1974, the Interdepartmental Workers' Compensation Task Force (IWCTF) was established by the President; its Policy Group included high officials from the Departments of Labor, Commerce, HEW and HUD.

In 1976, the IWCTF held a conference on occupational diseases and workers' compensation; the proceedings were published as a Joint Committee Print for the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor. The proceedings of this conference comprise a lengthy analysis of both the problems inherent in the occupational disease laws generally in force, and of the obstacles to comprehensive reform. The IWCTF completed its report and work in 1977, and in its place the U.S. Department of Labor maintains Workers' Compensation Advisors within the Employment Standards Division.

B. First Regular Session, 110th Legislature. In the legislative session commencing in December, 1980, the Maine Legislature was faced with about 55 bills on the subjects of Workers' Compensation and occupational disease compensation. Approximately 20 proposals were enacted, whether as separate bills or combined with other proposals into a single bill.

This heavy legislative activity was stimulated by increasing costs of insurance to employers due to rate increases approved by the Bureau of Insurance. Proposals included bills to limit benefit increases, alter the benefit structure, improve administration, make self-insurance more readily available, change insurance company practices, and to institute a state insurance fund.

Several bills were introduced to address perceived problems in the Occupational Disease Law. In the cost-conscious atmosphere of the session, only one measure was passed: P.L. 1981, c. 164 (L.D. 642), repealing the waiver provision of the Occupational Disease Law (39 M.R.S.A. §191). Other bills, dealing with integration of the Occupational Disease Law into the Workers' Compensation Act (L.D. 730), claim limitations (L.D. 643, 677), and occupational hearing loss (L.D. 513, 798), were left to further study, pursuant to the study order, H.P. 1629.

III. Conclusions

It is clear both from testimony and from written materials made available to the committee that the compensation of victims of occupational diseases is a severe one facing the legislatures of many states and the federal government, as well as employees, employers and insurers. It is equally evident that comprehensive change which results in increased benefits may create excessive burdens on all parties to the system, and leave Maine business unable to maintain a competitive edge against industries in other areas.

The legislation proposed by the committee thus seeks to address these competing concerns of the welfare of the worker and the costs of compensation. Its components are as follows:

(1) Information. Increased attempts to gather the data required to evaluate the needs of Maine's workers and industry;

(2) Prevention. Measures to encourage labor and management to step up cooperative efforts to curtail the incidence of incapacity due to occupational disease; and

(3) Compensation. Amendment of the Occupational Disease Law to address those areas where medical knowledge and practical experience demonstrate the need for change.

We believe that these proposals address the major concerns which have been expressed. Through public hearings and further discussion, these proposals may be further explored, and refined if warranted, to most adequately provide for the interests of all concerned parties.

STATEMENT OF THE MAJORITY OF THE COMMITTEE ON LABOR REGARDING THE PROPOSAL TO INSTITUTE A SAFETY RULES DEFENSE

While it has been the stated purpose of the main report of this study to set out proposals for consideration without taking a position either for or against the bills, these members of the committee feel it is incumbent upon them to take exception to one of the proposed measures. This report is in opposition to the proposal entitled, "AN ACT to Create a Defense of Employee Noncompliance With Safety Procedures Under the Workers' Compensation Act." [APPENDIX B]

We object to this bill for the following reasons:

1. Reintroduction of fault. The Workers' Compensation Act has traditionally been a "no-fault" law, where the liability of the employer (or insurer) is absolute, once a work-related injury is demonstrated. Historically, this arose out of the employee's need for prompt and certain recovery, for which he forfeited his rights to proceed in a civil action, and to secure a larger damage award in the courts. This bill, by reintroducing the employee's work procedures as an issue of controversy, returns the system of liability to one based on fault or comparative negligence.

2. Litigation. Another purpose of the "no-fault" system of compensation is to minimize the controvertible issues in all cases, and thus to maintain a low level of litigation. In any civil action, the two principal issues are fault and damages; to date, neither of these issues is of major importance in workers' compensation cases, where there is no fault and damages are determined by statute.

The reintroduction of the concept of fault would constitute a major step backward for the system, and at least holds the potential to create more and longer litigation over a very obscure issue. Indeed, whereas the defense for the employer totally absolves him from payment, many attorneys would feel ethically bound to assert it on any but the flimsiest evidence. Maine does not need to encourage the proliferation of protracted cases in this area.

While we were presented with no direct evidence of the effect on litigation rates of such a provision in other states, it may be instructive to compare the percentage of cases contested in Maine to those contested in states having a complete defense such as the bill envisions. The following table is derived from a comprehensive study on the subject of litigation, incorporated in the federal government's IWCTF Research Report.

State	Percentage of Cases Contested
GROUP I states [See Appendix]	
Alabama	3.2%
Arizona	8.6%
Delaware	7.2%
Georgia	7.3%
Indiana	6.7%
Kentucky	9.8%
Louisiana	12.2%
South Dakota	14.3%
Tennessee	8.5%
Virginia	7.0%
West Virginia	unavailable
GROUP I: Average	8.48%
GROUP II states	
Kansas	18.1%
Oklahoma	20.6%
Vermont	unavailable
GROUP II: Average	19.35%
GROUP III states	
Connecticut	7.6%
Massachusetts	9.3%
Michigan	35.1%
Nebraska	8.0%
New Hampshire	5.0%
New Jersey	50.6%
Pennsylvania	4.7%
Wyoming	unavailable
GROUP III: Average	17.18%
GROUPS I, II, III: Average	12.83%
MAINE	4.8%

SOURCE: Document 3, "Promptness of Payment in Workers' Compensation." Samers, B.N. and Kelly, D.I., in Research Report of the Interdepartmental Workers' Compensation Task Force, volume 3 (U.S. Dept. of Labor, 1979), page 79.

3. Prevention. While it is an expressed purpose of the statutory defense to encourage workers to comply with safety rules, it in fact does not operate in that fashion. Rather, any incentive to comply with rules or to use safety devices only occurs after an injury has been sustained.

By contrast, where compliance with such procedures is a condition of employment, the employee has a true incentive. This already is generally the case with rules promulgated by OSHA, and with procedures determined by an employer. We heard testimony from representatives of organized labor indicating that violation of safety procedures is universally recognized as a proper subject for sanctions, ultimately resulting in the suspension or firing of the worker. It was also pointed out that in many cases, by keeping records on employee violations an employer would be documenting his own OSHA violations, since he is responsible for enforcing OSHA's promulgated regulations in the workplace.

4. Policy of the law and the study. At bottom, the Workers' Compensation Act and the Occupational Disease laws are sensible and humane attempts to secure a safe workplace and fair compensation for workers who nonetheless suffer injury or disease from doing their jobs. The purpose of the study, as stated in the study order (H.P. 1629), was to assure that these humane goals were met by protecting the worker from the hazards of occupational disease or hearing loss.

The bill under discussion fails to further this noble goal, and may in fact serve to thwart it by providing only less protection, at greater costs in terms of time and expenses of litigation. In addition, it extends beyond the scope of the study, into the provisions of the Workers' Compensation Act.

CONCLUSION

On the basis of the unjustifiable risks engendered by this proposal to the health of Maine's workers and the efficient operation of Maine's compensation system, we respectfully voice our dissent to the proposal. "AN ACT to Create a Defense of Employee Noncompliance With Safety Procedures Under the Workers' Compensation Act" represents a hollow promise to our state's employers, and a threat to our state's workers.

STATEMENT OF THE MINORITY
OF THE COMMITTEE ON LABOR
REGARDING THE PROPOSAL TO INSTITUTE
A SAFETY RULES DEFENSE

On December 22, 1981, the full committee was summoned to take final action on proposals initiated by the subcommittee on this subject. It was the determination of the majority of those present that the proposal in Appendix B, entitled, "AN ACT to Create a Defense of Employee Noncompliance With Safety Procedures Under the Workers' Compensation Act," should be considered by the Legislature in the Second Regular Session. In response to the opposition which subsequently culminated in the preceding "statement," these members of the committee feel obliged to make the following comments.

1. The Problem. Under present law, the full burden of preventing industrial accidents and disease is placed on the employer. This is true, first, because under its enabling legislation, OSHA's enforcement mechanisms are directed solely at management. So it is that even when management takes all reasonable precautions against injury -- e.g., by making available hearing protection equipment and ordering its proper use -- it is only against management that OSHA may proceed if workers choose not to take advantage of those precautions.

The problem is exacerbated by the compensation laws. If, returning to the previous example, a worker deliberately fails to use employer-provided hearing protection, the employer or his insurer may also be subsequently found liable for the employee's hearing loss.

The proposal in question seeks to address the problem by giving the employee some incentive to conform to reasonable safety requirements.

2. The Question of Fault. While workers' compensation acts are generally "no-fault" in character, there are universal or nearly universal exceptions for the intentional wrongdoings of employees. A worker who commits suicide, or who one day decides to operate heavy machinery while heavily intoxicated, is not compensated even under our present law (39 MRSA §61). It is the intentional, or "willful" character of the employee's act which forms the basis of the employer's defense.

The proposal is in line with this policy. Liability under it is not determined on the basis of the employee's negligence or ignorance or poor judgment; rather, it is based on the employee's willful violation of a reasonable safety rule, without a good reason for doing so.

3. Litigation. Since the proposal carves a narrow, albeit important, exception to employer liability, there is no reason to assume a great impact on the amount or length of litigation. Proper case administration by the presiding commissioner should be sufficient assurance that the defense is not frivolously interposed.

On the other hand, where the employer has a legitimate point, he should not be barred from presenting it simply because the truth requires time for its determination. In another context, this might be compared to denying the innocent man his right to a trial on the grounds that an acquittal consumes more resources than does a guilty plea.

Parenthetically, it should be noted that the figures presented in the opposing "statement," concerning litigation rates are at best inconclusive and at worst, highly misleading. We would note that that report made no assessment of the impact of the statutory defense on litigation rates; nor, indeed, should it have, since:

(a) two states with the defense have still lower rates than Maine (i.e., Alabama and Pennsylvania);

(b) the same study showed that the average length of Maine cases was much greater than that of other states; and

(c) the litigation rate does not correspond to the existence of this defense; rather, there are many states without the defense who have equally greater rates than does Maine.

4. Policy. In our view, the proposal represents a rather benign exception to liability, based upon the control of the situation by the parties. The only employee who stands to lose is the one who, not carelessly or negligently, but willfully refuses to conform his conduct to reasonable safety regulations. A safe workplace has as its prerequisite a worker concerned and motivated by safety.

CONCLUSION

The workers' compensation system in Maine is being threatened by spiralling costs. If our industry is to keep providing jobs, it is clear that the line must be held on costs. Fair compensation to injured and diseased workers is one of those costs, imposed by statute. It is the duty of the Legislature to assure that this cost factor is not bloated by unfair claims. The well-being of Maine's workers, no less than Maine's industries, demands that we carefully examine our alternatives.

This proposal, if enacted, will not likely be a panacea. However, it might provide an ounce of prevention by encouraging worker safety, and a more optimal allocation of scarce resources by compensating only those workers who earnestly strive for safer workplaces.

STATUTORY DEFENSE OF FAILURE TO OBEY SAFETY RULES

Group I: COMPLETE DEFENSE if employee willfully violates safety regulation or willfully fails to use employer-provided safety device. (* indicates statute referring to safety regulations made by law or, in some cases, employer rules approved by WC Commission.)

Alabama, Ala.Code tit.25,§25-5-51
Arizona, Ariz.Rev.Stat.Ann. §23.901.04
*Delaware, Del.Code Ann. tit.19, §2353(b)
*Georgia, Ga.Code Ann. §114-105
Indiana, Ind.Code Ann. §22-3-2-8 (Burns)
*Kentucky, Ky.Rev.Stat. §342.015(3),(4)--(OD only) violation of approved rule
*Louisiana, La.Rev.Stat.Ann. §23:1081
*South Dakota, S.D.Comp.Laws Ann. §62-4-37--(WC only, not OD)
Tennessee, Tenn.Code Ann. §50-910
Virginia, Va.Code §65.1-38
West Virginia, W.Va.Code §23-4-2

South Dakota, S.D.Comp.Laws Ann. §62-8-22--unlike WC provision, rule violated need not be statutory duty

Group II: COMPLETE DEFENSE if injury results from willful employee failure to use employer-provided safety device.

Kansas, Kan.Stat. §44-501
Oklahoma, Okla.Stat.Ann. tit.85, §11
Vermont, Vt.Stat.Ann. tit.21, §649

Group III: COMPLETE DEFENSE for injuries caused by serious employee misconduct--no specific reference to safety rules or devices. (** refers to parallel provision regarding additional liability of employer for his failure to follow safety procedure or to provide required safety device.)

Connecticut, Conn.Gen.Stat. §31-284(a)--"wilful and serious misconduct"
Massachusetts,Mass.Gen.Laws Ann.ch.152,§27--"serious and wilful misconduct"
** §28--double comp for E misconduct
Michigan, Mich.Comp.Laws Ann. §412.2--"intentional and wilful misconduct"
Nebraska, Neb.Rev.Stat. §§48-101,48-110--"willfully negligent"
New Hampshire, N.H.Rev.Stat.Ann. §281:15--"serious and wilful misconduct"
New Jersey, N.J.Stat.Ann. §34:15-1 --"willfully negligent"
-- §34:15-36--(Definition)deliberate,reckless,intoxicated
Pennsylvania, Pa.Stat.Ann. tit.77,§431--self-inflicted or "violation of law"
Wyoming, Wyo.Stat. §27-12-102(a)(xii)--"culpable negligence"

Group IV: REDUCE COMPENSATION BY SPECIFIED PERCENTAGE for willful violation of safety regulation or willful failure to use employer-provided safety device. (* indicates statute referring to safety regulations made by law or, in some cases, employer rules approved by WC Commission.)(** refers to parallel provision regarding additional liability of employer for his failure to follow safety procedure or to provide required safety device.)

10% Reduction
*New Mexico, N.M.Stat.Ann. §52-1-10(A)
** §52-1-10(B)--E failure to provide, add 10%
*North Carolina, N.C.Gen.Stat. §97-12
*South Carolina, S.C.Code §42-9-50
** §42-9-50 --E fails stat. req. or WCC order, add 10%

15% Reduction

Kentucky, Ky.Rev.Stat. §342.165--(WC) E rule or WC Board rule/order
** §342.165--E violation, add 15%
Missouri, Mo.Ann.Stat. §287.120(5)
** §287.120(4)--E violation of law, add 15%
Utah, Utah Code Ann. §35-1-14 --except death cases
** §35-1-12 --E violation, add 15%, except death cases

25% Reduction

*Florida, Fla.Stat.Ann. §440.09(4)
Nevada, Nev.Rev.Stat. §616.665--if employee "removes" safeguard or protection
Wisconsin, Wis.Stat.Ann. §102.58--up to $7500
** §102.57--E violation, add 25%

50% Reduction

Colorado, Colo.Rev.Stat. §8-52-104

Group V: REDUCE COMPENSATION BY SPECIFIED PERCENTAGE for injuries caused by serious employee misconduct--no specific reference to safety rules or devices. (** refers to parallel provision regarding additional liability of employer for his failure to follow safety procedure or to provide required safety device.)

California, Cal.Lab.Code §4551--50% reduction for "serious and willful misconduct" unless employee: (a)dies; (b)suffers at least 70% permanent disability; (c)injured through employer violation; or (d) is under age of 16.
** §4553--E violation, add 50% up to $10,000 plus $250 costs.

Group VI: NO PROVISION. The remaining states have no such provision. However, many of these states do restrict liability in cases of employee intoxication or where the employee was injured in the course of attempting to injure himself or another; statutory references are provided to these sections, where applicable.

Alaska
Arkansas, Ark.Stat.Ann. §81-1305
Hawaii, Haw.Rev.Stat. §386-3
Idaho, Idaho Code §72-208
Illinois
Iowa, Iowa Code §85.16
Maine, Me.Rev.Stat.Ann. tit.39,§61
Maryland, Md.Ann.Code art.101,§13
Minnesota, Minn.Stat.Ann. §176.021(10
Mississippi, Miss.Code Ann. §71-3-7
Montana
New York, N.Y.Work.Comp.Law §10 (McKinney)
North Dakota, N.D.Cent.Code §65-01-02(8)
Ohio, Ohio Rev,Code Ann. §4123.54
Oregon, Or.Rev.Stat. §656.156
Rhode Island, R.I.Gen.Laws §28-32-2
Texas, Tex.Stat.Ann. art.8306,§1(3)
Washington, Wash.Rev.Code §51.32.020

APPENDIX B

"AN ACT to Create a Defense of Employee Noncompliance With Safety Procedures Under the Workers' Compensation Act."

Be it enacted by the People of the State of Maine, as follows:

39 MRSA §61 is repealed and the following enacted in its place:

§61. Injury, illness or death due to employee misconduct

1. Defense. No compensation or other benefits may be allowed for the injury, death or occupational disease of an employee where it was proximately caused by the following:

A. Intention to injure. The injured employee caused the injury by his willful intention to bring about the injury, death or disease of himself or of another;

B. Intoxication. The injured employee was intoxicated while on duty, except that this provision shall not apply if the employer knew that the employee was intoxicated or that he was in the habit of becoming intoxicated while on duty;

C. Safety apparatus. The injured employee willfully failed or refused to use a safety device provided by the employer; or

D. Safety rule. The injured employee willfully failed or refused to follow a reasonable safety rule promulgated by the employer, including safety rules established by law which the employer is liable to enforce.

2. Burden of proof. The burden of proving the defense provided by this section is on the party asserting it.

3. Employer safety rules. In order for a person to assert a defense based on violation of a safety rule, that party must show that there was actual notification of the rule to the employee, and good faith enforcement of the rule by the employer.

4. Excuse. The defense shall not prevent the payment of compensation if the commissioner finds that:

A. Under the circumstances of the employment, compliance with the rule or use of the device would have created a risk of injury or disease outweighing the anticipated benefits to safety; or

B. Under the circumstances, the use of the device would itself create an injury or disease.

STATEMENT OF FACT

This bill expands the current employee misconduct provision to cover the willful failure or refusal of workers to use employer-provided safety devices or to follow reasonable safety rules.

A similar defense exists in the workers' compensation laws of 11 states. Three other states provide for a complete defense of failure to use a safety device, and 8 states provide a complete defense for serious employee misconduct. Eleven more states provide for a partial defense of some kind, while the remaining jurisdictions, including Maine, presently have either no comparable provision or one limited to the employee's intentional injuries or intoxication.

In about half the states with similar laws, the only safety

rules included are those which are either statutory or approved by the appropriate commission. In virtually all cases, either by statute or judicial interpretation, there must be effective notification to the employee and good faith enforcement by the employer. These requirements avoid the situation of employers shifting costs through the promulgation of rules whose only purpose or use is to limit liability, rather than to enhance workplace safety.

The provision for excuse allows for occasions where the employee's conduct is justified by attendant circumstances, e.g., in case of emergency.

Subsection 4 on excuse allows an employee to interpose as a bar to the defense of noncompliance with safety rules the answer of excuse. This would apply only in cases where the compliance would either create some other hazard (e.g., where a hearing protector would affect the worker's balance while working on a high scaffold), or where a device is itself injurious to the worker (e.g., where an improper harness would cause strangulation).

"AN ACT to Clarify the Provision of the Maine Human Rights Act Relating to Employment Discrimination Which is Not Prohibited."

Be it enacted by the People of the State of Maine, as follows:

5 MRSA §4573, sub-§4, as amended by P.L. 1975, c. 770, §34, is further amended by adding at the end a new paragraph to read:

It is sufficient evidence of the employee's inability under this section that:

A. The employee or applicant for employment suffers from a physical or mental handicap; and

B. According to competent medical evidence, and given the nature of the employment, either:

(1) The individual, due to his particular handicap, is unable to safely perform the duties of the employment; or

(2) The existence of that handicap in any person and to any degree gives rise to a reasonable probability that the person will be unable to safely perform the duties of the employment.

STATEMENT OF FACT

Presently, the Human Rights Act (5 M.R.S.A. §4551, et seq.) provides that the refusal to hire or the discharge of a physically or mentally handicapped person is justifiable only if either:

(a) the absence of the handicap is a "bona fide occupational qualification" (5 M.R.S.A. §4572 (1)); or

(b) the handicap renders the person "unable to perform his duties or perform those duties in a manner which

would not endanger the health or safety of the employer or...of others..." (5 M.R.S.A. §4573(4)).

In recent decisions, the Maine Human Rights Commission has decided that, in the absence of persuasive evidence that the particular individual is unable to safely perform the duties, general medical judgments about the appropriateness of certain handicaps to given jobs may be insufficient. Thus, the Commission held that workers suffering from spondylolisthesis, a forward displacement of one vertebra over another, could not be excluded as a class from employment in a position demanding strenuous back exertion, even though the employee's physician noted that such workers would "'potentially and probably' experience excruciating pain and extreme motor damage" as a result of the work.

While employment of the handicapped is an important goal to pursue, the present law may prevent an employer from screening out classes of individuals whose handicaps render them particularly unsuitable for certain jobs. The result may be that workers suffering from some inchoate or latent disability are seriously and irrevocably injured. This loss to the worker, as well as to the employer who may be liable for Workers' Compensation, ought to be avoided.

SECOND REGULAR SESSION

ONE HUNDRED AND TENTH LEGISLATURE

Legislative Document No. 1829

H.P. House of Representatives,

H. P. 1848 House of Representatives, January 13, 1982
Filed under Joint Rule 18 pursuant to Joint Order H. P. 1629 and 2,000 ordered printed.

EDWIN H. PERT, Clerk

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-TWO

AN ACT to Change the Time Limitations for Filing a Claim for Compensation of Occupational Disease.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 39 MRSA §186, as last amended by PL 1977, c. 696, §411, is repealed and the following enacted in its place:

§186. Date from which compensation is computed; employer liable

1. Date of injury. For purposes of this law, the date of injury for occupational disease, equivalent to the date of injury under the Workers' Compensation Act, is the later of the following:

A. The date when an employee becomes incapacitated by an occupational disease from performing his work in the last occupation in which he was injuriously exposed to the hazards of the disease; or

B. The date when the claimant knew, or through the exercise of reasonable diligence should have known, that the incapacity was related to the employment.

2. Employer liable. Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of the disease, and the insurance carrier, if any, on the risk when the employee was last so exposed under that employer, shall be liable therefor. The amount of the compensation shall be based upon the average wages of the employee when last so exposed under the employer, and notice of injury and claim for compensation shall be given and made to that employer. The only employer and insurance carrier liable shall be the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease during a period of 60 days or more, and the insurance carrier, if any, on the risk when the employee was last so exposed, under that employer.

Sec. 2. 39 MRSA §187, as last amended by PL 1977, c. 696, §412, is repealed and the following enacted in its place:

§187. Notice of incapacity; filing of claim

1. Procedure; exceptions. Sections 63 and 95 of the Workers' Compensation Act with reference to giving notice, making claims and filing petitions shall apply to cases under this law, except that:

A. In cases under this law the date of injury as defined in section 186 shall be taken as the equivalent to the date of injury in sections 63 and 95; and

B. The notice under section 63 shall include the following:

(1) The employee's name and address;

(2) The nature of the occupational disease;

(3) The date of incapacity; and

(4) The name of the employer in whose employment the employee was last injuriously exposed for a period of 60 days to the hazards of the disease and the date when employment with that employer ceased.

2. Resumption of payments. After compensation payments for an occupational disease have been legally discontinued, claim for further compensation for that occupational disease not due to further exposure to an occupational hazard tending to cause that disease, shall be barred if not made within one year after the last previous payment.

Sec. 3. 39 MRSA §189, last sentence, as amended by PL 1971, c. 376, is repealed.

Sec. 4. 39 MRSA §194, as last amended by PL 1975, c. 480, §12, is repealed and the following enacted in its place.

§194. Silicosis and asbestos diseases

1. Definitions. For the purposes of this section, unless the context indicates otherwise, the following terms have the following meanings.

A. "Asbestos disease" means asbestosis or mesothelioma.

B. "Silicosis" means silicosis which results in impaired lung function so as to conclude that the subject is precluded from following his usual occupation. Impairment under this section is to be corrected to account for differences of age, sex, race and body size.

2. Limitation; exposure requirement. In order for a claimant to recover benefits for silicosis or asbestos disease under this section, the employee must have been exposed to the hazards of the disease in the course of his employment in this State within 20 years before the date of injury.

Sec. 5. 39 MRSA §194-A, as enacted by PL 1967, c. 374, §8, is repealed.

STATEMENT OF FACT

The purpose of this bill is to remove onerous time limitations and exposure requirements and to provide claimants under the Occupational Disease Law with greater opportunities to have their cases decided upon the merits.

Section 1 of the bill institutes a new definition of "date of injury," based upon the "discovery rule" effective in several other states. Time periods, for purposes of notice and filing under this rule, would not begin to run until the employee is both incapacitated by the disease and either knows, or by the exercise of reasonable diligence should know, that the incapacity is related to the employment.

Section 2 of the bill substantially reenacts present law, reorganizing it and accounting for the change made in section 1 of the bill.

Section 3 of the bill repeals the requirement that, in order to be compensable, incapacity must result "within 3 years after the last injurious exposure to such disease in the employment." That language requires exposure to a disease, not just to the causative factors of a disease and requires the worker to remain in contact with the hazard until no more than 3 years prior to becoming incapacitated.

Sections 4 and 5 revise the special provisions of the law relating to silicosis and asbestos diseases. The requirement of a minimum of 2 years exposure is dropped, but some limit on claims is retained by requiring that the employee must have been exposed to the hazards of the disease within the preceding 20 years.

SECOND REGULAR SESSION

ONE HUNDRED AND TENTH LEGISLATURE

Legislative Document **No. 1828**

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EDWIN H. PERT, Clerk

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-TWO

AN ACT to Regulate the Sound Level of Entertainment on Premises Licensed to Sell Liquor.

Be it enacted by the People of the State of Maine as follows:

28 MRSA §855 is enacted to read:

§855. Sound level of entertainment

1. Definition. For purposes of this section "sound level" means the weighted sound pressure level obtained by the use of a sound level meter with A-weighting, as specified in American National Standards Institute specifications for sound level meters, American National Standards Institute S1.4 - 1971, or the latest approved revision.

2. Restriction; notice. No licensee for the sale of liquor to be consumed on licensed premises may operate or play or permit the operation or playing of any radio, television, phonograph, jukebox, drum, musical instrument, sound amplifier or similar device which produces, reproduces or amplifies sound at a sound level greater than 95 dB(A) as read by the slow response on a sound level meter at any point that is normally occupied by a customer. If sound levels do not exceed 95 dB(A) but are greater than 85 dB(A), when so measured, the licensee shall post a conspicuous and legible sign outside the premises, near each public entrance, stating: "WARNING: SOUND LEVELS WITHIN MAY CAUSE PERMANENT HEARING IMPAIRMENT."

STATEMENT OF FACT

The purpose of this bill, based in part upon an Environmental Protection Agency model community noise control ordinance, is to limit the levels of sound in licensed establishments.

Excessive noise levels can lead to permanent hearing impairment, quickened pulse rate, increased blood pressure and narrowing of blood vessels, according to federal government publications.

Occupational noise exposure is largely governed by the Federal Occupational Safety and Health Administration, OSHA, and compensated under the State Occupational Disease Law. Current Occupational Safety and Health Administration regulations call for mandatory hearing conservation programs where covered workers are subjected to noise levels in excess of 90 dB(A). By comparison, normal conversation registers about 65 dB(A) and a power saw registers about 110 dB(A).

This bill addresses part of the gap in present law, that of nonoccupational noise exposure. Music in a licensed establishment may exceed 110 dB(A) levels, with people working or relaxing in the area for periods of several hours.

4575010582

AN ACT to Revise the Workers' Compensation Laws Relating to Occupational Hearing Loss

Be it enacted by the People of the State of Maine, as follows:

39 MRSA § 193 is repealed and the following enacted in its place:

§ 193 Occupational Loss of Hearing

1. Occupational Hearing Loss. Compensation for noise induced occupational loss of hearing which constitutes an occupational disease shall be paid only as provided in this chapter.

2. Definitions. Whenever used in this chapter:

A. "Noise induced occupational hearing loss" means a permanent bilateral loss of hearing acuity of the sensorineural type due to prolonged exposure to potentially hazardous noise in employment. For purposes of this chapter, sudden hearing loss resulting from a single, short noise exposure, such as an explosion, shall not be considered an occupational disease but shall be considered as an injury. Also for purposes of this chapter, tinnitus shall not be considered a compensable condition.

B. "Sensorineural hearing loss" means a loss of hearing acuity due to damage to the inner ear which can result from numerous causes, as distinguished from conductive hearing loss which results from disease or injury involving the middle ear or outer ear or both and which is not caused by prolonged exposure to noise.

C. "Prolonged exposure" means exposure to potentially hazardous noise in employment for a period of at least 1 year.

D. Potentially "hazardous noise" means noise which exceeds the permissible daily exposure to the corresponding noise level as shown in the following table:

Noise Level (dBA)	Permissible Daily Exposure
90	8 hours
95	4 hours
100	2 hours
105	1 hour
110	30 minutes
115	15 minutes

3. Degree of hearing loss; determination of degree.

A. For purposes of determining the degree of hearing loss for awarding compensation for noise induced occupational hearing loss, the average threshold for each ear

shall be determined by adding the hearing thresholds (ANSI) for the four frequencies 500, 1,000, 2,000, and 3,000 Hertz and dividing that sum by four. To determine the binaural disability, subtract the 30dB (low fence) from the obtained average in each ear. This decibel amount is then multiplied by 1.5% for each ear. Then multiply the smaller percentage (the better ear) by 5 and add the larger number (the poorer ear) and divide the resulting number by 6. This resulting number is the percentage of binaural hearing disability to be used under subsection 9.

B. If the better ear has a hearing loss of 30 dB or less as measured from 0 dB on an audiometer calibrated to ANSI S3.6 - 1969 American National Standard "Specifications for Audiometers," or 20 dB or less as measured on an audiometer calibrated to ASA-Z 24.5 - 1951 "American Standard Specifications for Pure-Tone Audiometers for Screening Purposes," the hearing loss shall not be compensable. If the audiogram is performed on an ASA calibrated audiometer, the hearing threshold level must be converted to ANSI calibration levels.

4. Liability for hearing loss; previous hearing loss; pre-placement audiometric testing

A. An employer shall be liable for the hearing loss of an employee to which his employment has contributed. If previous occupational hearing loss or hearing loss from non-occupational causes is established by competent evidence, including the results of a pre-placement audiogram, the employer shall not be liable for the hearing loss so established whether or not compensation has previously been paid or awarded, and shall be liable only for the difference between the percentage of disability determined as of the date of disability and the percentage of disability established by the pre-placement audiogram.

B. An employer may require an employee to undergo audiometric testing at the expense of the employer at the time of termination of employment. The employer shall be required to notify the employee, in writing, of this requirement and the penalty, as provided herein, for noncompliance with the requirement at or before the employee's termination date. In the event of refusal or failure by the employee to undergo audiometric testing within 60 days after receipt of written notice of the scheduling of the test by the employer, the employee shall be penalized by losing any right to compensation, unless the failure is due to a legitimate reason as determined by a commissioner.

C. Any employee who undergoes audiometric testing at the direction of an employer may request a copy of the results which shall be provided to him within 2 weeks of the request.

D. For purposes of verifying the degree of hearing loss for awarding compensation, an employee may introduce audiometric test results obtained, at his own expense within 30 days after employer testing, from any qualified individual as set forth in subsection 8.

5. Administration of testing. A commissioner shall have the discretion to order further audiometric testing if there is any question of reliability in the administration of the testing under this section.

6. Frequencies; evaluation of hearing loss. In any evaluation of occupational hearing loss, only hearing levels at frequencies of 500, 1,000, 2,000, and 3,000 Hertz shall be considered.

7. Hearing tests; instruments; test conditions. Hearing levels shall be determined at all times by using puretone air-conduction audiometric instruments calibrated in accordance with American National Standard ANSI S3.6 - 1969 - R 1973 and ANSI S 3.13 - 1972 and performed in an environment as prescribed by American National Standard S.31 - 1960 R 1971 (American Standard Criteria for Background Noise in Audiometer Rooms). To measure permanent hearing loss, hearing tests shall be performed after at least 14 hours absence from exposure to hazardous noise. Adequate hearing protection is acceptable for 14 quiet hours. The electroacoustic calibration of an audiometric instrument used to measure permanent hearing loss shall have been performed within 1 year of the time of the hearing examination, to assure that the audiometer is within the tolerances permitted by the ANSI standards. On the day of the examination, the audiometer also shall have been given a functional test by a person with known, stable hearing thresholds and a listening test to ensure that the audiometer's output is free from distorted or unwanted sounds.

8. Audiometric technician to perform hearing test. All hearing tests shall be performed by a person at the level of a certified audiometric technician or above or by an individual who meets the training requirements specified by the Intersociety Committee on Audiometric Technician Training (American Industrial Hygiene Association Journal 27:303-304, May-June 1966).

9. Compensation for noise induced occupational hearing loss. There shall be payable for total (100%) hearing loss 200 weeks of compensation. For partial hearing loss, compensation shall be payable for the number of weeks which bears the same percentage relationship to 200 weeks as the calculated percentage loss bears to total hearing loss. Notwithstanding any other provision of this Title, the maximum weekly benefit shall, for the purpose of this section, be considered to be 100% of the average weekly wage in the State of Maine as computed by the Bureau of Employment Security.

10. Filing of claims. No claim for compensation for occupational hearing loss may be filed until after the employee has been separated from the occupational noise for a period of at least 30 days. The last day of this period shall be the date of disability. "Separation from the occupational noise" may be achieved by the use of effective hearing protective devices or equipment.

11. Award; use of hearing aids. No reduction in award for hearing loss shall be made if the ability of the employee to understand speech is improved by the use of a hearing aid and the employer shall not be required to furnish hearing aids, including accessories and replacement, in case of occupational hearing loss.

12. Effective Date. This act shall apply only to actions instituted after its effective date. The requirements concerning the calibration and testing of audiometric instruments set forth in subsection 7 shall apply only to hearing examinations which are conducted after that date.

STATEMENT OF FACT

This bill increases the frequency levels at which occupational hearing loss is compensable under the Workers' Compensation Law. Under present law, if an individual sustains a hearing loss due to occupational noise exposure in frequencies above 2,000 cycles per second, he or she is not entitled to compensation. This bill adds a 3,000 cycle level to the existing levels of compensable frequencies.

Standing alone, this change would not only increase the number of hearing loss claims but also the amount of compensation awarded per claim. In order to partially offset the anticipated additional costs as well as to minimize the impact on workers' compensation insurance rates, the bill makes a number of other changes. The most important of these are as follows: an increase in the threshold sound pressure level used in calculating hearing loss and an adjustment of the maximum benefit levels for hearing loss.