

August 9, 2004

Tom McCabe, Executive Vice President
Building Industry Association of Washington
Post Office Box 1909
Olympia, Washington 98507

Dear Mr. McCabe:

I am writing in response to your letter of July 22, 2004, which promises legal action and a new initiative drive for any attempt by L&I to “enforce the repealed ergonomics standards by means of a newly adopted ergonomics policy.” You refer to a new document on ergonomics being developed by L&I and have apparently presumed it must be a “substitute for the ergonomics standards repealed by the voters” and therefore “a blatant violation of the law.”

Your conclusions about L&I’s plans are wrong. We will abide by the decision of the voters. Initiative 841 repealed the ergonomics rule, and L&I will not adopt any new or amended rules dealing with musculoskeletal disorders until and to the extent required by Congress or federal OSHA or otherwise authorized by the Washington State Legislature or the people of the state of Washington.

As we announced in March at a WISHA Advisory Committee meeting attended by a representative of your organization, L&I has begun work on a revised WISHA Regional Directive to instruct our safety and health inspectors how to respond to ergonomics complaints in the absence of a specific ergonomics standard. This directive cannot and will not create any new obligations or requirements for employers. It will not be a new or amended rule, and it is not prohibited by Initiative 841.

Long before L&I adopted its ergonomics rule in May 2000, there were several general WISHA rules requiring employers to address recognized hazards not covered by other specific rules. These general rules have always applied to all recognized hazards not covered by specific standards, including those associated with work-related musculoskeletal disorders. These general rules were not repealed or otherwise affected by Initiative 841 and they remain fully in effect.

Prior to May 2000, L&I enforced these general rules by conducting inspections and issuing citations and fines to those found violating them. We set aside enforcement of

these rules after adoption of the specific ergonomics standard. Following the repeal of the ergonomics standard, these rules remain valid tools for preventing work-related musculoskeletal disorders.

L&I's plan to return to the use of our general rules is the same as that taken by federal OSHA following the congressional repeal of OSHA's own ergonomics standard in early 2002. OSHA's website (www.osha.gov/sltc/ergonomics/four-pronged_factsheet/) states that "employers must keep their workplaces free from recognized serious hazards under the OSH Act's General Duty clause. This includes ergonomic hazards...OSHA will conduct inspections for ergonomic hazards and issue citations under the General Duty Clause..." OSHA's ergonomic enforcement plan (www.osha.gov/sltc/ergonomics/enforcement_plan/) explains that "the ergonomics enforcement program builds on the two OSH Review Commission decisions (Pepperidge Farm and Beverly Enterprises) recognizing that the OSH Act general duty clause may be used to require employers to address ergonomic hazards." In testimony before the U.S. House Subcommittee on Labor, Health and Human Services and Education, Assistant Secretary of Labor for OSHA John Henshaw reported that "since January 2002, OSHA has conducted almost 1,500 inspections focusing on ergonomics issues and has followed up with citations and hazard-alert letters informing employers of ergonomic hazards in their workplaces."

As your organization has previously recognized, it has been proper and legitimate for many years to apply general rules to the hazards associated with musculoskeletal disorders. In fact, one of the arguments made by your representatives and publications in support of Initiative 841 was that because existing WISHA rules gave L&I all the authority it needed to address hazards, the ergonomics standard was unnecessary. For example, on page 6 of the October 2003 edition of your *Building Insight* publication you summarize a study done by the Washington Policy Center and note that:

"...current safety codes cover ergonomics injuries in the same manner as other workplace risks. Currently employers are required to keep safety records and to share them with L&I. State inspectors are authorized to conduct workplace inspections at any time with no advance warning. Employers with unsafe workplaces – including ergonomically hazardous – may be fined."

In summary, L&I intends to use all the tools legally available to the agency in the absence of a specific ergonomics standard to prevent the more than 50,000 work-related musculoskeletal disorders that still occur every year. These tools include voluntary consultations, technical assistance and education as well as enforcement of the general requirements to have effective programs that keep workplaces free from recognized hazards.

We plan to exercise our regulatory authority selectively and prudently, focusing on those employers with the worst problems who are most resistant to preventing injuries

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voluntarily. We look forward to working together on this strategy with responsible members of the business and labor communities. This will be a major subject for discussion at the September 15, 2004, meeting of the WISHA Advisory Committee.

We hope that the BIAW will work constructively with us in this important effort. As you know, employers in the residential construction industry, including members of your organization, have among the highest rates of work-related musculoskeletal disorders in the state. We have a great deal to gain by working together.

Sincerely,

Paul Trause
Director

cc: Members, Commerce and Labor Committee
Members, Commerce and Trade Committee
WISHA Advisory Committee
Construction Advisory Committee