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ONE YEAR LATER: INADEQUATE PROGRESS ON AMERICA'S LEADING CAUSE OF WORKPLACE INJURY

HEARING

BEFORE THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

EXAMINING WORKPLACE INJURY ISSUES, FOCUSING ON MUSCULOSKELETAL DISORDERS (MSDs) AND ERGONOMICS

APRIL 18, 2002

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ONE YEAR LATER: INADEQUATE PROGRESS ON AMERICA'S LEADING CAUSE OF WORKPLACE INJURY

THURSDAY, APRIL 18, 2002

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, D.C.

The Committee met, pursuant to notice, at 10:05 a.m., in room SD-430, Dirksen Senate Office Building, Hon. Edward M. Kennedy, [Chairman of the Committee], presiding.

Present: Chairman Kennedy; Senators Dodd, Wellstone, Reed, Edwards, Clinton, Gregg, Enzi, Hutchinson, Bond, Sessions.

The CHAIRMAN. We will come to order.

We are honored to have the Secretary of Labor with us today on a subject of enormous importance to workers and workers' families. I know that all of us appreciate, Madam Secretary, the time, effort, and energy that you have spent on this issue. You have had a lot of contact with all of us on it over a period of time, we have been looking forward to hearing from you, and we will hear from you in just a moment. I know you will introduce John Henshaw, the Assistant Secretary, when you are recognized.

I will make a brief opening statement and then turn to Senator Gregg, the Chairman of the Subcommittee on Children and Families; Senator Wellstone, who has important responsibilities in this area, will say a word, and hopefully, Senator Enzi will be here as well to make a comment, and then we will get on with your testimony.

I understand we will have two votes at 11:30, so we are going to try to make as much progress as we can.

OPENING STATEMENT OF SENATOR KENNEDY

America's workers have waited for more than a year for a plan from the Department of Labor to keep them safe on the job from ergonomic injuries. Two weeks ago, we learned that we will have to wait even longer for serious action on the Nation's leading causes of workplace injuries. During that extended delay by the administration, America's workers have suffered over 1.8 million workplace injuries which could have been prevented. The administration's delay has also cost the economy dearly—nearly $50 billion according to the National Academy of Sciences due to injury costs and lost productivity from injured workers unable to do their jobs.

As we will hear today, these injuries have devastated lives and destroyed careers. Ergonomic injuries account for approximately

one-third of all workplace injuries. Women have suffered the most from the administration's extended delay. Women make up less than half of the work force, yet they suffer about two-thirds of all workplace injuries from carpal tunnel syndrome and tendonitis.

Many of these injuries could have been prevented if this administration had acted as promised. Sadly, the long-awaited plan of action by the administration falls far short of protecting America's workers. It is not the "comprehensive approach to ergonomics" promised by the President and the Secretary over a year ago. In fact, it is really only a plan to come up with a plan.

The administration's plan is a replay of failed strategies from the past. They rely on toothless voluntary guidelines that most corporations will simply ignore. In fact, after over a year of delay, the administration still has not identified what industries will be covered and has not produced a single one of these voluntary guidelines.

Under the administration's voluntary plan, great emphasis is placed on the importance of training; yet the President's budget cuts workplace safety training by $7 million. With these cuts, the administration is eliminating a long-time successful program for improving workplace safety for immigrant workers.

This issue has been studied and studied and studied again and again and again over 10 years. There were three congressionally-funded studies over 4 years. There is absolutely no doubt that millions of workers suffer from repetitive motion injuries due to their jobs. Yet the administration's plan means more study, additional delay, unenforceable guidelines, and another decade in which little is done to protect these workers.

We all know that if a million CEOs were injured on the job instead of a million secretaries and cashiers, we would see a very different plan presented to the Committee today.

As the American Public Health Association stated: "It is very clear that American workers need a real ergonomic standard, that there is scientific data supporting a standard, and that Secretary Chao has chosen to ignore the information favor of big business interests."

The administration mistakenly claims that a purely voluntary approach is best to protect workers. We have already been down that road. In the first Bush Administration, they recognized the failure of voluntary guidelines, compliance assistance and enforcement under the general duty clause, and began to develop a nationwide standard 10 years ago. Instead of taking seriously the lessons of history, the administration is protecting the employers who ignore the safety of their workers, and America's workers are left to suffer the consequences. Millions of injured workers have their lives disrupted and their careers destroyed just for doing their job well. We owe it to them to do all we can to protect them.

I welcome our witnesses today and look forward to hearing from them how we can best protect America's workers on the job.

Senator Gregg.

OPENING STATEMENT OF SENATOR GREGG

Senator GREGG. Thank you, Mr. Chairman.

Traditionally, hearings in this Committee are held for the purpose of receiving facts, developing policy, or learning something

about an issue which we may not be fully informed on. But when I look at the title of this hearing, which is "Over One Year Later: Inadequate Progress on America's Leading Cause of Workplace Injuries," I have to conclude that maybe this hearing comes with a conclusion versus a purpose. And it is ironic that it does in those contexts over one year later, because if you look at what has occurred on the issue of ergonomics, you have to appreciate the fact that this a question of incredible complexity which we have not as a Government wrestled with very effectively. And I would state that the prior administration is the best example of that.

They spent over 8 years and $10 million to produce regulations which amounted to 600 pages. I have copies of it right here. This is the Clinton proposal which they issued in the final hours of the Clinton Administration—600 pages, 8 years, $10 million. It was such a flawed product—such a flawed product—that a bipartisan vote of the Congress rejected it out of hand as something that has failed.

They rejected it because as a study, it basically did not use strong science. They rejected it because it created a one-size-fits-all approach which fundamentally impacted the capacity of small business people especially to create and maintain jobs. They rejected it because the terms were vague and the definitions were vague, and the policies would have been virtually unenforceable on many accounts and would have created a plethora of lawsuits and might have benefitted the trial lawyers but would have benefitted few employees. And they rejected it because it simply did not work, and it was going to end up costing America jobs without any significant improvement in the health of our citizenry.

We all recognize that musculoskeletal injuries are serious, that they are real, and that they need to be addressed. I think, however, that to point the finger of blame at this administration, at the Bush Administration, which has made a legitimate effort over its year in office to try to put back together the pieces of a strategy which was so fundamentally flawed under the Clinton Administration, is an inappropriate and probably nonproductive approach to the issue.

The Labor Department under the leadership of Secretary Chao has come forward with a set of principles, and they are reasonable principles as to how we should proceed. Had these principles been put in force 8 years ago, maybe we would not be at this point; maybe we would have a policy that would work. Unfortunately, that was not the case.

The first principle is that they will develop industry- and task-specific guidelines to assist businesses in achieving a safer workplace. Such an approach would encourage creativity and flexibility, allowing customized solutions to meet specific demands of different workplaces—a fundamentally different thrust than what the Clinton Administration proposed, which was a one-size-fits-all approach which simply was not functional in the multiple marketplaces and workplace which we have in our country.

Second, the Department of Labor will focus heavily on enforcement activities, cracking down on bad actors that refuse to abate recognized hazards that can cause harm to workers—and, in fact, has done that, and as a result of doing that, we have seen an ac-

tual reduction in these types of injuries since this administration took office.

Third, the Department of Labor will conduct outreach and assistance activities, providing expertise to employers and especially small business people who need that type of assistance, through training programs, compliance assistance tools, and determining the best practices available. This is the type of assistance we need in the marketplace to accomplish real results.

Finally, the Department will help to fill the research gaps that exist in the area of ergonomics so that we can develop a policy that is based on sound science and that will be constructive and that will actually work to abate these injuries rather than a policy which will simply create paperwork and lawsuits.

I applaud the administration for their initiatives. I think that in the context of what they were given, the problems which they confronted when they came into office, the fact that they had 8 years of failed policies, 600 pages of administrative initiatives which clearly did not work and which, in fact, the Congress rejected, that they have done an excellent job in trying to right the ship and get us back on a course toward addressing this issue and protecting the American worker.

The CHAIRMAN. Senator Wellstone.

OPENING STATEMENT OF SENATOR WELLSTONE

Senator WELLSTONE. Thank you, Mr. Chairman.

Let me first of all thank you for convening the hearing today, although I think it is disappointing that we have to address this topic of inadequate progress in America's leading cause of workplace injury. But sadly, that is the situation that we face.

Madam Secretary, let me welcome you to the Committee. I appreciate your joining us today, but quite frankly—and I do not think it will surprise you when you hear me say this—I think this is a case of too little too late.

We have had a year of inaction and delay, and I think that is a very fair conclusion to reach. After having pressed the administration to deliver on its promise of a "comprehensive plan" to address the serious problem of repetitive stress injuries in the workplace, what we have today, what has been delivered, is a hollow shell.

It is a plan that actually turns the clock back, Mr. Chairman, before the first Bush Administration. I am very anxious to hear from the Secretary why it took so long to produce so very little.

Mr. Chairman, we have heard all the statistics, and we are going to have people testify today whose lives reflect those statistics. Each year, 1.8 million workers experience repetitive stress injuries on the job; 5,000 injured workers a day; one worker injured every 18 seconds. Women suffer disproportionately from these injuries, painful and debilitating injuries. And we will hear from witnesses today about what this has meant to their lives and what it is doing to people around our country, men and women, but especially women.

We know that we can prevent literally hundreds of thousands of needless workplace injuries each year. We have the know-how and

we have the experience, and a strong, balanced repetitive stress injury standard would have advanced that goal.

Instead, the administration has opted for measures that have been repeatedly tried—and I say this as Chair of the Subcommittee on Employment and Safety and Training—that have been repeatedly tried over the past 10 years and have consistently failed to decrease the level of injuries—voluntary guidelines, general duty clause enforcement, outreach and compliance, and further research.

Voluntary approaches alone have not protected workers from repetitive stress injuries. OSHA itself reports that only 16 percent of employers in the general industry have put in place ergonomic programs to reduce hazards. Relying on employers to take the necessary steps simply has not stemmed the tide of 1.8 million repetitive stress injuries suffered each year by workers.

Moreover, the Bureau of Labor Statistics reports show that injury numbers and rates are increasing, particularly in high-risk industries and occupations. And what do we have here? Voluntary guidelines.

Nor can general duty clause enforcement deliver the same results as a comprehensive standard. General duty clause enforcement is lengthy, burdensome, expensive, resource-intensive, and most importantly, it is not a preventive tool, and most importantly, you do not even have a definition of repetitive stress injury, so I do not even know how we use this.

OSHA has been providing valuable compliance assistance on repetitive stress hazards for nearly two decades. It is not a new initiative. What is difficult to understand, however, is how OSHA can advance this part of its plan in the face of the President's proposed cuts to the overall compliance assistance and training budgets by nearly $11 million.

Indeed, with the demands that will be placed on OSHA to implement this repetitive stress injury plan, it is difficult to understand why the Department did not seek additional resources for its implementation.

And finally—and I will spend some time in questions on this—I am really troubled by this research agenda. To begin with, given the comprehensive National Academy of Sciences report—as long as we are holding up documents; right here—just finished last year, it is difficult to understand what additional research could possibly be needed in order for OSHA to frame a repetitive stress injury agenda.

In any event, the Occupational Safety and Health Act clearly specifies that NIOSH is the entity for conducting and engaging in the research, and this is a complete end run around NIOSH with yet another advisory committee, and quite frankly, I am trying to figure out what the meaning of this is. Is the real goal here to create a forum for those who continue to claim that there is no science behind ergonomics and that repetitive stress injury simply results from the worker's inability to cope? Why yet another advisory committee outside the jurisdiction of NIOSH?

Gunnar Murdahl, the Swedish sociologist, once said "Ignorance is never random." Sometimes we do not know what we do not know want to know.

Finally, I am concerned that despite the Department's year-long inquiry into precisely the question of definition, there is no definition of ergonomic injury other than to leave open the possibility that the definition might be narrowed.

OSHA has stayed until next year its definition of MSDs for the purpose of recordkeeping. Without answering this question, without having a definition of repetitive stress injury, which you do not have, how does OSHA encourage compliance? Compliance of what? How does OSHA undertake research and training, invoke the general duty clause, identify research gaps and quantify the magnitude of the problem when you do not even have a definition of the injury?

How can anything meaningful be done for workers who suffer from repetitive stress injury every day, when you do not even come up here with a definition of repetitive stress injury?

I do not think time is neutral for a lot of workers, and I think it is fair to conclude that very little has been done in this past year, and a lot of people pay a very dear price. And I think that that is what this hearing is about.

The CHAIRMAN. Senator Hutchinson.

OPENING STATEMENT OF SENATOR HUTCHINSON

Senator HUTCHINSON. Thank you, Mr. Chairman.

I want to thank you, Madam Secretary, for being here today. Under your leadership ergonomic protections have been put in place a little over a year after taking office, and we need to remember the significant work force that the Department of Labor has had to dedicate to the aftermath of September 11, the anthrax attacks, and the Enron collapse.

Rather than the attitude implied by the title of this hearing, which indeed presupposes its own conclusion, I would like to congratulate you for your actions on this very difficult subject, one which the previous administration spent 10 years and $10 million developing a rule to address a rule, which I might add was so clearly misguided, so flawed, and so unworkable that in an unprecedented bipartisan action, Congress overturned it.

So I congratulate you, and I thank you for what you are doing, Madam Secretary. We thank you for your leadership and your testimony today and the plan to reduce ergonomic injuries. The actions that you have outlined in your testimony and the plan that the administration has come forward with will make a real difference in the lives of American workers by improving the safety of their workplace.

The plan you announced on April 4 has already gone into effect. In fact, the general duty clause, which requires employers to provide a workplace free of recognized hazards that are likely to cause serious physical harm is already being applied to ergonomic hazards by your administration. This approach is already working.

You settled an OSH Review Commission case brought against Beverly Nursing Home, and now, that nursing home is switching to a mechanical lifting device for lifting patients.

Much has been said about the fact that the guidelines for reducing ergonomic hazards will be voluntary. Well, I would like to point out that while complying with the specific guideline may be vol-

untary, the obligation to keep a workplace free of recognized ergonomic hazards—and I am quoting—"recognized ergonomic hazards likely to cause serious harm" is not voluntary.

So essentially, you are giving employers a goal line that they must reach and one possible path to get there. But if an employer knows of another way to get there, a way that might be better or less expensive or less onerous for the employer or the employee, that can be used too. What counts here is the result—reducing ergonomic injuries. And while the number of reported cases of repeated trauma injuries more than tripled to 332,000 in the decade ending in 1994, they then began to back down to 235,000 by 1998. Additionally, injuries and illnesses related to MSDs have declined over the last 10 years even though there has not been a specific standard addressing them.

So I believe your approach is working, and it is results that count, and you have moved forward with a very good plan and good guidelines in a very difficult time for the Department and for the Nation. I commend you, and I thank you for your willingness to come and explain that approach to the Committee today.

The CHAIRMAN. Thank you very much, Senator Hutchinson.

Madam Secretary, we will be glad to hear from you.

STATEMENT OF HON. ELAINE CHAO, SECRETARY, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C., ACCOMPANIED BY JOHN HENSHAW, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH

Secretary CHAO. Chairman Kennedy, Senator Gregg, and Members of the Committee, thank you for inviting me to appear before your Committee this morning on the subject of ergonomics.

Mr. Chairman, I do have a more detailed written statement that I would like to request be submitted for the record.

The CHAIRMAN. It will be included in its entirety in the record.

Secretary CHAO. As I listened to stakeholders and reactions and responses on this issue, I was reminded of Lord Tennyson's immortal lines: "Cannon to the right of them, cannon to the left of them, cannon in front of them, volleyed and thundered."

Ergonomics has indeed been a highly charged and controversial subject on which people have very strongly held views, and in many cases I have found, diametrically opposed points of view.

But it does not have to be that way if we agree that our ultimate goal is to protect workers as quickly and effectively as possible. I am confident that our comprehensive plan on ergonomics will achieve the goal of protecting workers from musculoskeletal injuries with quick and lasting results.

In fact, our plan goes much further than the old and rejected ergonomics rule by seeking to prevent injuries before they occur and by having the capacity to protect a much broader range of workers who are at risk.

Our plan integrates four essential components that complement and reinforce each other—industry- and task-specific guidelines; vigorous enforcement; a range of dedicated compliance assistance efforts; and expanded research to help us continuously upgrade the ergonomic protections available to workers.

Most importantly, our plan accomplishes what the old regulations could not, even after 10 years and $10 million—it protects real workers in real workplaces, starting now.

Before I go any further, I would like to introduce a person on my right, that is, Mr. John Henshaw, the Administrator for OSHA at the Department of Labor, and I will speak a little bit more about his background at the end.

I am here with Mr. Henshaw today to announce our first industry-specific guidelines and initiatives to protect workers in nursing homes. These workers play a vital role in caring for the needs of the elderly and the infirm, but in the course of caring for others, they are frequently exposed to significant risks to their own health and safety, especially from ergonomic hazards.

As you may know, the majority of nursing home workers are low wage earners, many are low-skilled, and many are women. In the last decade or so, recent immigrants have become a major source of nursing home labor. Many of them have only limited English proficiency, let alone an understanding of U.S. labor laws. A substantial percentage of nursing home workers do not have legal immigration status, and that is a reality that we have to work with as well.

All of this makes it very difficult for these employees to take steps on their own to better protect themselves on their jobs. And that is why my announcement today that we are embarking upon our first industry-specific guidelines to protect workers in nursing homes demonstrates once again that now is the time—today—to start taking care of these caregivers—not 2 years from now, not 3 years from now, not 10 years from now, but today.

Our new initiative will establish effective, workable guidelines to quickly reduce ergonomic injuries among these vulnerable workers. These guidelines will build on our groundbreaking pro-worker settlement in the Beverly Enterprise case, where we require for the very first time ergonomically safe lifting programs in well over 200 nursing home facilities.

As a senior labor leader said of our work on that case, "Nursing home workers suffer crippling back injuries, and now, help is on the way."

That is the message that I want to bring to all of you today, and that is that help is finally on the way. Our success in the Beverly Enterprises case proves that we can protect workers from ergonomic injuries with the tools that we have right now.

But this is only the beginning. We are in the process of reaching out to representatives of nursing home workers as well as nursing home operators to try to find common ground on reducing ergonomic hazards in these workplaces. We all agree that workers have an interest in achieving this goal, but so do employers. The truth is as many employers already know and practice, protecting your workers is just good business sense.

Our plan is to bring these interests together to develop creative, effective solutions that will prevent injuries and get them implemented as quickly as possible. We will use outreach and training efforts to reinforce these solutions and maximize their use. This is the approach we will adopt not only in nursing homes but also in

other industries where workers face high risks of ergonomic injuries.

In most cases, bringing employers and workers together will be the most effective way to get injury rates down in the short run and also in the long run. In that vein, I do want to commend the nursing home operators who have agreed to work with us and with their workers and employees to make their facilities ergonomically safer. That is the kind of cooperation we seek and expect, but we also intend to exert leadership and pressure to get the results we need to adequately protect workers.

That is why our comprehensive ergonomics plan includes not only collaborative guidelines but also committed enforcement. I truly believe that most employers want to do the right thing by their employees. Some companies already invest large amounts of money in tools and technologies that help prevent ergonomic injuries. But to those employers who stubbornly refuse to safeguard their workers from identifiable, work-related ergonomic hazards, I have a word of warning: Our law defends the safety and health of every worker, and we will enforce that law.

Our enforcement strategy will build on the approach that delivered real victories for the workers in the Beverly Enterprise case by combining enforcement with compliance assistance techniques, new research and development, and industry-specific guidelines, we can move quickly to get workers the help that they need.

Now, of course, I realize that the approach we are pursuing, which sets the highest priority on protecting workers immediately, still will not satisfy everybody, including Members of this Committee. A number of you strongly based the last administration's ergonomics rule and would basically like it to be reinstated even though it was extremely controversial and ultimately rejected by a majority of your colleagues, both Democrat and Republican.

There are also interest groups out there that would prefer us not to do anything, who argue that ergonomic injuries simply do not exist, or at least they do not deserve the level of intervention that our plan provides.

So I will be the first to admit that there are some things that our plan will not do that tend to make Washington comfortable. It will not generate thousands of pages of entries in The Federal Register. It will not keep armies of lawyers and lobbyists busy as they figure out ways to attack the plan or expand parts of it or shrink parts of it. It will not make for good mail copy for groups to send out to their members to inflame them. And it will not take years to promulgate, litigate, or legislate to get results.

Instead, our ergonomics plan is designed to do just one thing—protect workers as quickly and as effectively as possible.

I mentioned John Henshaw, the Assistant Secretary of OSHA at the Department of Labor, is next to me. John has years of real life experience in occupational safety and health. Unlike most people in Washington, he has personally designed and implemented health and safety plans that achieve measurable benefits for workers, and throughout this process I have valued John's integrity and his experience as we have crafted a comprehensive ergonomics plan that will succeed in protecting America's workers.

Now, John and I look forward to responding to the Committee's question.

[The prepared statement of Hon. Elaine Chao follows:]

PREPARED STATEMENT OF HON. ELAINE L. CHAO

Chairman Kennedy, Senator Gregg, and Members of the Committee, thank you for inviting me to appear before you to discuss ergonomic injuries in the workplace. I am pleased to be here to talk about the Department of Labor's new, comprehensive approach to ergonomics. I am confident that we have developed an approach that will effectively reduce ergonomics injuries in the workplace.

Over the past several years, few workplace issues have proved more contentious than what has become known as "ergonomics." Although injuries often related to ergonomic issues, referred to as Musculoskeletal Disorders (MSDs), have declined by 26 percent since 1992, calls for Federal action have been widespread. Since becoming Secretary of Labor, I have spent more time on this issue than any other issue, meeting with dozens of leaders from organized labor and industry, as well as medical experts, to discuss this problem. More importantly, I have spent time with injured workers who shared their stories with me, and I am determined to make their workplaces safe.

I feel strongly about the need to reduce ergonomic injuries in the workplace. The Department has backed up that belief with action. We are implementing a practical, four- pronged approach with concrete steps that we can take now, to address the issue of MSDs—steps that will produce real results for American workers.

First, the approach calls for the development of industry-specific MSD prevention guidelines, with the first set to be completed this year. Second, it creates a new enforcement strategy to pursue bad actors who refuse to take the necessary steps to protect their employees. Third, we are establishing an outreach and assistance program, to make sure that employers, workers, labor unions, and health and safety professionals are aware of ergonomics issues and measures to resolve them. Finally, while there is a large body of research available on ergonomics, there are many areas where additional research is necessary, including those identified by the National Academy of Science (NAS). The Occupational Safety and Health Administration (OSHA) will serve as a catalyst to encourage researchers to design studies in areas where additional information would be helpful, by chartering an advisory committee on ergonomics to identify research gaps and by working closely with the National Institute for Occupational Safety and Health (NIOSH) and through the National Occupational Research Agenda process to encourage research in needed areas.

Sound principles underlie this approach. First and foremost, it will get workplace protections into place as quickly as possible. Even assuming that a scientifically valid rule could be prepared based on our current understanding of the nature of the relationship between work activities and certain injuries, following that route could take years. Our approach consists of steps we can take now, without waiting for the science to answer the many questions that exist about these injuries and their relationship to workplace ergonomic factors. Carefully developed guidelines, together with a workable, targeted enforcement strategy, can begin to be rolled out this year. We should not delay further while we attempt to resolve scientific uncertainties. Guidelines suggest specific actions employers can take to address ergonomic hazards in the workplace while recognizing that different workplaces have different needs. Of course, guidelines capture existing best practices and provide voluntary solutions for the overwhelming majority of employers who want to find better ways to protect their workers. To target bad actors, this approach also includes the development of a serious enforcement strategy, under Section 5(a)(1) (the General Duty Clause) of the Occupational Safety and Health Act (OSH Act).

The Department of Labor's multi-pronged approach builds upon existing guidelines that have already proved effective in bringing down injury rates. MSDs in the meat products industry, for example, have fallen by 62 percent since 1992—more than twice the decline for all of private industry. We firmly believe this approach benefits both workers and employers. In particular, it avoids a one-size-fits-all mandate that would discourage employers from developing innovative, customized approaches to preventing MSDs. Given the evolving nature of the science, Government simply does not have all the answers.

It is important to understand the context in which we have settled on this strategy. In the closing days of the Clinton Administration, OSHA issued a controversial and broadly questioned ergonomics rule. Many interested persons have contended that the rule was rushed through without sufficient consideration of the voluminous public record. They thought that it failed to distinguish between job-related and non

job-related injuries, and required employers to pay for work days that employees missed due to injuries that may not have been caused by work at all. They also argued that the rule did not adequately inform employers of what steps they must take to achieve compliance with the rule and that it would not have been effective in preventing injuries to workers. OSHA's final ergonomics rule was thought to be so flawed that bipartisan majorities in both houses of Congress voted to eliminate it early last year.

At that time, I promised to establish a comprehensive policy to address MSDs. It was critical that any Departmental approach to ergonomics be clear, effective, and capable of surviving legal challenges and Congressional review under the Congressional Review Act. After more than a year of work, including three public forums held around the country, the Department of Labor has unveiled an approach that will provide real protections for America's workforce. Inevitably, some will criticize the new approach, arguing that relying on enforcement and industry-specific guidelines instead of a formal rule does not go far enough. Such criticism ignores several realities.

For example, when promulgating a rule, OSHA should follow certain principles, such as making a scientifically valid determination regarding the degree of risk from various levels of activity. The lack of precise information about degree of risk, "dose-response" relationships, or feasible and effective controls, for example, would be a major hurdle to Agency efforts to promulgate a standard that meets legal requirements and protects workers. The risk assessment does not have to be based on 100 percent perfect information, but we need to know more about many types of MSDs than we do at this point in time.

Because of the practical realities involved in doing a rulemaking on ergonomics, I believe our new four-pronged approach is simply a more effective and realistic way of addressing the needs of workers and employers. Industry-specific guidelines and compliance assistance are, in fact, among the best ways to protect workers from MSDs. A simple look at OSHA's inspection numbers, which I will describe shortly, will explain why. OSHA cannot be in every workplace all the time. The bottom line is that workplace protections are only effective if employers have usable information and incentives to implement them on their own.

Of course, OSHA can, and will, crack down on those who ignore identified threats to worker safety. Enforcement is, accordingly, the second prong of our approach. In addition to responding to complaints, OSHA will address recognized hazards where they are identified in the course of planned inspections. In FY 2002, OSHA plans to conduct some 36,400 inspections overall, and in FY 2003 we plan to do 37,700 inspections, including investigation of ergonomic hazards and including about 3,600 Site Specific Targeting (SST) inspections. SST inspections, which target the Nation's most hazardous workplaces as determined by employer-reported injury and illness data, are thorough inspections that address both safety and health hazards in the workplace. The next round of SST inspections is scheduled to begin this month.

Along with that program, OSHA will be implementing a separate National Emphasis Program that will address hazards in the nursing home industry, including ergonomics hazards.

OSHA will not focus its enforcement efforts on employers who have implemented an effective ergonomics program or who are engaged in good faith efforts to correct the hazards. Inspections that identify ergonomic hazards will not necessarily result in citations. In some cases, OSHA will issue a Hazard Alert Letter that makes the employer aware of the hazard and provides information on feasible means of abatement and possible sources of assistance. Within twelve months, OSHA will conduct follow-up inspections or investigations of certain employers who receive a Hazard Alert Letter. To assist this effort, OSHA is also providing its inspectors with additional training on ergonomic hazards and abatement.

As you know, employers have two principal obligations under the OSH Act: to comply with standards and to provide a workplace free of "recognized hazards" under the General Duty Clause in Section 5(a)(1) of the OSH Act. Historically, OSHA has issued over 500 General Duty Clause citations related to ergonomic-type problems and issues. To be sure, the number of those citations dropped off considerably over the past few years because OSHA did not pursue General Duty Clause citations during the pendency of the rulemaking.

OSHA's new comprehensive approach to address ergonomic hazards, however, incorporates an enforcement strategy that will result not only in General Duty Clause citations, but also successful prosecutions. Let me just mention in this regard the successful settlement recently of a 5(a)(1) citation against Beverly Enterprises, Inc. nursing homes, under which the employer agreed not only to institute a lifting program in the 5 facilities that were the subject of citations, but to do so at each of their 240 nursing home facilities under Federal jurisdiction.

Building upon the Department's litigation successes in the Beverly Enterprises and Pepperidge Farm cases, OSHA will use the General Duty Clause to cite employers who fail to engage in good faith efforts to abate ergonomic hazards. OSHA will, in appropriate cases, issue 5(a)(1) citations involving ergonomic hazards, and I have instructed OSHA and the Solicitor of Labor to act accordingly. The Solicitor's office is preparing a new enforcement strategy that will help ensure that employers meet their safety obligations to their employees. As SEIU President Andrew L. Stern said in reaction to our victory in the Beverly case, "Nursing home workers suffer crippling back injuries, and now help is finally on the way."

Along with guidelines and enforcement, our comprehensive approach includes outreach and assistance, as well as research. OSHA will provide specialized training and information on guidelines and the implementation of successful ergonomics programs, administer targeted training grants, develop compliance assistance tools to help employers prevent and reduce ergonomic injuries, forge partnerships, and create a recognition program to highlight successful ergonomics injury reduction efforts. This effort will also include, as part of the Department's commitment to protecting immigrant workers, a specialized focus to help Hispanic and other immigrant workers, many of whom work in industries with high ergonomic hazard rates. Finally, in concert with NIOSH, OSHA will stimulate and encourage needed research by forming a national committee, which will advise OSHA about research gaps and other issues related to our approach to ergonomics. This measured, step-by-step, four-pronged approach assures that OSHA will fulfill its statutory obligation to protect American workers, while at the same time protecting against overreach and one-size-fits-all determinations.

While we implement our approach to reduce workplace MSDs, it is important to recognize that many American workplaces are addressing this problem on their own. MSDs have declined by 26 percent over the last decade, in part due to increased awareness regarding the problem. Many employers know that it is simply good business to prevent workplace injuries, and they are taking steps to do so. We need to avoid taking any action that would stifle the creativity and initiative that workplaces have demonstrated over the last several years to respond to this issue.

I want to thank the Members of this Committee for allowing the process to run its course. We are now taking real steps to address the problem. Reducing MSD hazards will make all workplaces safer and improve the lives of thousands of American workers. The Department of Labor's comprehensive, multi-pronged strategy is the best way to reach these goals. I urge employers, workers, organized labor, and ergonomics experts to come together and help this strategy succeed.

RESPONSE TO QUESTIONS OF SENATOR ENZI FROM ELAINE L. CHAO

Question 1. Have you seen that employers are already voluntarily developing ergonomics programs? As a follow-up question, would the promulgation of a broad new ergonomics standard assist or hinder these efforts?

Answer. Many employers, in a wide variety of industries, have already implemented successful ergonomics programs. Participants in OSHA's Voluntary Protection Programs (VPP) are documented proof of the success of a voluntary approach. We have also seen successful voluntary programs implemented in industries where OSHA does not typically have a significant presence, such as Honeywell Technology Solutions at the White Sands testing facility in Las Cruces, NM. In addition, during the forums on ergonomics that the Department conducted last summer, OSHA heard from many other participants who had implemented successful programs.

Part of the reason for the success of the voluntary approach is that each employer is free to develop a program that is flexible enough to adapt to the unique conditions within its own environment. The promulgation of a mandatory one-size-fits-all approach would eliminate such flexibility, and could actually hinder implementation of more appropriate tailor-made solutions. Guidelines can be more effective because they create a co-operative relationship with employers, who will actually implement ergonomic safeguards. Also guidelines are cost effective, making it far more likely that businesses can actually implement needed protections.

Question 2. How do you think the Department's strategy will reduce workplace ergonomic injuries and illnesses more quickly and effectively than a broad new rule?

Answer. First, our plan can be implemented faster. There are a number of time-consuming procedural requirements that must be met when undertaking a new rulemaking. It would tie up critical OSHA personnel and other resources which would then not be available to help promote immediate hazard reduction. We estimate that it could take more than 4 years to promulgate a new rule. The last ergonomics rulemaking took 10 years and $10 million to accomplish, and still there

were so many flaws and controversies regarding it that a bipartisan majority of both houses of Congress voted to nullify it. Any new ergonomics rule, particularly one that is as broad and complex as some have suggested, would be vulnerable to court challenges.

Second, our approach is workable. The Department of Labor considered whether a new ergonomics standard could be crafted that did not have the myriad of negatives that were cited during congressional debate on S. J. Res. 6. We concluded that a one-size-fits-all standard that would apply to every workplace and every occupation was virtually impossible to conceive. Flexibility was needed to tailor abatement of hazards to individual worker and employer situations.

Third, the Department strongly believes that abatement of hazards that lead to ergonomic injuries, not just after-the-fact fines and penalties, should be the ultimate goal of our ergonomics plan. Guidelines, the first prong of our comprehensive approach, have proven to be effective. For instance, in the meat packing industry, industry-specific guidelines have led to a 62 percent reduction in Musculoskeletal Disorders (MSDs), as well as a 73 percent decline in the rate of carpal tunnel injuries, a 76 percent decline in the rate of sprains and strains, and a 78 percent decline in the rate of back injuries. If employers fail to take seriously the need to address ergonomic hazards, they will face the prospect of enforcement action under Section 5(a)(1).

Question 3. One of my concerns with the repealed ergonomics rule was that it took a "one size-fits-all" approach. How does the Department's new strategy differ in this respect?

Answer. Industry-specific guidelines give the Department the flexibility to work with industries to find the best means of reducing ergonomic hazards. Unlike rulemaking, guidelines can be formulated and implemented more quickly. Also, as proven by the record of the past 10 years on this issue, it is very difficult to produce a one-size-fits-all standard to address ergonomic hazards, which vary widely in complexity across industries and occupations.

A rule is also no guarantee of success in reducing hazards. Workplace practices and processes may change during a lengthy rulemaking, thus producing the possibility of little or no reduction in injuries to workers while producing a definite regulatory burden on businesses and high costs in time and dollars.

Further, a more flexible approach will permit OSHA to keep the guidelines up to date with advances in the science. A one-size-fits-all standard could only be amended after a long regulatory process.

Question 4. One of my biggest concerns with the repealed ergonomics rule was its impact on small businesses. How will the Department's new strategy take into account the unique needs and capabilities of small businesses?

Answer. We understand that small businesses often do not have an employee solely dedicated to job safety and health. OSHA will offer specific assistance to small businesses by providing direct outreach to them and their trade associations to reach as many small businesses as possible. For example, OSHA will tailor its consultation program to help businesses with 250 or fewer employees by providing best practices designed for small businesses, and also by conducting workshops focused on small business needs. Small businesses will also be able to work with OSHA's 10 regional ergonomic coordinators, who will be involved in enforcement, outreach, and compliance assistance.

We are also in discussions with the Small Business Administration's Office of Advocacy to determine additional ways to disseminate information to small businesses on how to effectively reduce ergonomic hazards.

Question 5. The Department's strategy calls for industry and task-specific guidelines. Does the Department's plan have sufficient "teeth" to motivate employers to provide their employees with a safe workplace?

Answer. A large majority of businesses already have sufficient motivation they want to protect their most important asset: their employees. We will provide those businesses with the best tools for continuing to protect the health and safety of their workers.

For those employers who fail to engage in good-faith efforts to abate recognized ergonomic hazards, we will consider our enforcement options. We will target these employers through an enforcement plan that includes a legal strategy designed for successful prosecution under the General Duty Clause.

Question 6. Since the General Duty clause of the OSH Act, Section 5(a)(1), already exists and requires employers to provide employees with a workplace that is free from recognized serious hazards, what new activities will OSHA's ergonomic enforcement program entail?

Answer. OSHA will have an enforcement plan designed from the start to target prosecutable violations. For the first time in the Agency's history, inspections will

be based on a legal strategy successfully used in past ergonomics cases. Under the ergonomics plan we will be implementing, we intend to build on the success of the Beverly Enterprises and Pepperidge Farm decisions, and on the favorable settlement we achieved to resolve the final issues in the Beverly case, which produced positive results for workers throughout the corporation.

Also, OSHA will utilize special ergonomics inspection teams that will, from the earliest stages, work closely with Department of Labor attorneys, and experts to successfully bring prosecutions under the General Duty Clause.

OSHA has already announced a National Emphasis Program in the nursing home industry to guide inspections of nursing homes. The program will focus special attention on ergonomic hazards related to patient lifting. OSHA will also issue ergonomic hazard alert letters when appropriate and will conduct follow-up inspections or investigations within 12 months of certain employers who receive these letters.

RESPONSE TO QUESTIONS OF SENATOR BINGAMAN FROM ELAINE L. CHAO

From what I can tell, the recommendations that you have put forward by and large ignore the recommendations published by the National Academy of Sciences on MSD and the workplace. Given the quality of the scholarship and the length of time involved in the research, I am confused why this might be. I would like you to walk through each of the recommendations published by the National Academy of Sciences and explain either: (1) how exactly your current proposal is compatible with that recommendation, and; (2) why you believe that recommendation is inappropriate and you have chosen not to implement that recommendation.

Your statement at the HELP ergonomics hearing suggests that employers and employees share a common goal of reducing workplace injuries. In theory, I would agree with you. In practice, this is still not the case. Unfortunately, there are still many cases where employers find it more cost-effective to ignore the changes that would help their employees and simply hire new employees when current employees are injured. These employers may (or may not, depending on your perspective) be anomalies, but they are still a problem that needs to be addressed. In concrete terms, how would your current proposal respond to or prevent such cases?

I think Senator Enzi made a good comment today, that being that some businesses do not know the best practices that can be used in their workplace to solve ergonomic problems. Your current proposal mentions outreach, assistance, training, and other such efforts, but neglects to give concrete plans. Given the voluntary nature of your current proposal and its reliance on business to comply of their own volition, I would like some elaboration on your plans in this area. In concrete terms, please tell me if the administration is planning to request equal or additional funds for current programs designed for employer and/or employee education? Does it have new programs in mind? If outreach and training is so important, why has funding been cut to successful and important programs like the Susan Harwood program?

The testimony of Ms. Purvis suggests that one of the primary problems we face at this time in this country on MSD's is that there are differences across States, but within industries and companies in terms of how they implement and enforce ergonomic standards. It would seem that common guidelines across industries and companies would assist in solving this long-standing, but you have chosen not to create them at this time. Given this fact, in concrete terms how would your current proposal eliminate some of these differences that I have mentioned? Using Brylane as an example, how should the administration respond to, how will the administration respond to, the problems that exist at that company?

You stated at the HELP ergonomics hearing that you would provide guidelines for specific industries "soon." Please provide me with a concrete timetable for when you expect that these guidelines will be created and implemented.

The CHAIRMAN. Thank you very much. We welcome you.

We will have 6-minute rounds, and I will ask staff to keep track of the time.

Just to understand, what are you announcing today in terms of the nursing homes?

Secretary CHAO. We have a comprehensive ergonomics plan, and it is a four-pronged strategy to ensure that workers are protected. The first is industry-driven and task-specific guidelines to be followed by strong enforcement and aggressive outreach, compliance

assistance, and lastly, research and development to add to the gaps in the science.

So today, we are announcing, in fact, the first industry-specific guidelines, and based on our experience with——

The CHAIRMAN. This is in the nursing homes.

Secretary CHAO. Yes.

The CHAIRMAN. Do you have the guidelines here?

Secretary CHAO. I do not have it with me. We will submit that.

The CHAIRMAN. Okay. But they are prepared, and they are going to go out now—it is current. I think your earlier testimony had indicated that that was the plan for the end of the year——

Secretary CHAO. Right.

The CHAIRMAN [continuing]. And I understand you to say now that it is going to be issued today.

Secretary CHAO. It will not be issued today. Our comprehensive plan of guidelines will take—we will exert all efforts to make sure that guidelines are coming out as quickly as possible, and we think that by the end of the year, we will have guidelines. But these will be——

The CHAIRMAN. By the end of the year?

Secretary CHAO [continuing]. But they will be industry-specific and task-specific, and our first industry-specific guidelines we are announcing today, that we are working on with industry workers and employers, will be the nursing home industry.

The CHAIRMAN. Are you setting any goals or timetables for industry-wide where you even expect your guidelines to go into effect? Are we going to have an evaluation—could you answer that?

Secretary CHAO. I can assure you, Mr. Chairman, that it is my intent to proceed as quickly as possible to working out the guidelines in as short a time as possible, because my concern is speed and protecting workers.

The CHAIRMAN. But today we have no plan establishing any goals or any timetables for the industries, other than the announcement of what you are doing in the nursing homes?

Secretary CHAO. The nursing homes will not be the only industry. We will proceed with other industries as well. But we will——

The CHAIRMAN. But you are not prepared to tell us what those industries are?

Secretary CHAO. Primarily because when we take a look at the industries, there are a number of factors that we want to take a look at, and also, our guidelines, as I mentioned, are a four-pronged strategy, and we want to make sure that as we proceed with guidelines, we will also have the other three prongs in place as well.

But as I mentioned, I will assure you that we want to do this as quickly as possible.

The CHAIRMAN. We have to look at this, Madam Secretary, obviously, against a whole history of activity in this area, as you are very familiar with, starting even under President Reagan, where OSHA used voluntary guidelines for, at that time, just manual lifting; and then, under President Bush, OSHA issued voluntary guidelines for the red meat industry. Then, they had pursuit of the general duty clause which you have referenced in your own plan, and they also had a nationwide education and outreach program. President Clinton for the first 8 years highlighted voluntary guide-

lines. He also indicated that he was going to have enforcement of the general duty clause. They also had a nationwide education program and three congressionally-funded comprehensive studies over 4 years. They had regional ergonomic coordinators around the country.

And what we have seen in all the statistics that ergonomic injuries are still one-third of workplace injuries. After 10 years, they are still about one-third of all the injuries. These past approaches have failed; they have failed. And the question is why do you believe that yours are going to be any more successful than the previous Presidents' when they have followed similar guidelines? Why are yours going to be so effective? What kind of assurance can you give to all those who are out there working today, right now, to those workers outside of the nursing home industry, who are going to be endangered this year and very likely next year as well?

Why do you believe that you are going to be successful when the record for all the other efforts using the same approach has been a complete and unadulterated failure?

Secretary CHAO. I do not think the efforts in the past have been comprehensive, nor have they been coordinated. I think there has been a great deal of controversy in the past which has shown that these efforts have been in fits and starts and were not a seamless procession of efforts as your remarks would indicate.

We have shown results. We have shown in the Beverly Enterprise case that we can use the general duty clause to bring about much-needed relief for workers. And despite the temporary increase in ergonomic injuries as reported by the BLS, which I am very concerned about, the overall trend for ergonomic injuries in the last decade has been declining; and in fact, with specific types of ergonomic injuries with relation to back strains, back pain and carpal tunnel, there have been substantial decreases in injuries.

I am not satisfied with that—but also, I think the important thing to note is that a rule in itself will not stop these injuries, either. What we need is a comprehensive approach, and I believe that our plan will be able to accomplish that.

The CHAIRMAN. Well, the statistics indicate that at least one-third of serious workplace injuries are still ergonomic injuries. The statistics indicate that very, very completely.

Now, we have the situation where former Secretary Dole, when she reviewed this and looked at it over 10 years ago, said, "The Department is committed to taking the most effective steps necessary to address the problem of ergonomic hazards on an industry-wide basis. Thus, I intend to begin the rulemaking process by asking the public for information about ergonomic hazards across all industry." And even in your March 6 letter, you indicate that, "I intend to pursue a comprehensive approach to ergonomics which may include new rulemaking."

Why did you discount the possibility of rulemaking? Let us put aside the rule from the last administration. Why haven't you issued a rule that would cover all industries and available to cover all the workers who are being adversely affected?

Secretary CHAO. We actually did consider a whole array of options, and it was our belief that our number one priority was to protect the workers in as quick a matter as possible. It is by no

means certain that the previous rule, had it been in place, would not have been challenged and would not have been stayed and bogged down in tremendous litigation.

To promulgate a successful rule, we expect would take about 4½ years, assuming that that rule were not subject to legal challenges. So our concern is that we want to prevent injuries from occurring, we want to help the workers as quickly as we can, we want to have a strong enforcement program that will be a disincentive for employers to be bad actors, and we want to have an aggressive outreach and compliance assistance program so that we can help the workers. And from a speed point of view, we thought that this comprehensive point of view, comprehensive plan, would be best able to achieve that.

The CHAIRMAN. Well, your own Solicitor has talked about using the general duty clause in enforcement—and I did not think I would be quoting Mr. Scalia these days—but his conclusion was: "Not Ready for Prime Time—from its embarrassing losses in the three ergonomic cases it litigated to judgment, OSHA has concluded that it should cease enforcing ergonomics under the general duty clause and issue an ergonomic rule instead."

Here is your Solicitor General talking about the complexities and difficulties in pursuing cases under the general duty clause, effectively saying, if you read through the article, that it just does not work. So we are getting voluntary guidelines similar to the guidelines in the past that have not worked and following an enforcement mechanism which I think has been lacking.

Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman.

First, I would like to ask unanimous consent that my full statement appear in the record, and I will not go through that again. I had to be in the Finance Committee talking about stock options.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Enzi follows:]

PREPARED STATEMENT OF SENATOR ENZI

Thank you Mr. Chairman. When a majority of both Houses of this Congress voted to rescind the Clinton Administration ergonomics rule an opportunity was created—an opportunity to protect workers from ergonomic injuries in an effective and feasible way. As Ranking Member of the Subcommittee on Employment, Safety and Training, I feel a special responsibility to help protect America's workers. I believe that ergonomic injuries and illnesses are a very real and very significant concern for America's workers and the companies that employ them.

What is the best way for the Occupational Safety and Health Administration to respond? The measure of success for a plan to address ergonomic hazards in the workplace is its ability to prevent their occurrence. Last March, Congress exercised its authority under the Congressional Review Act to overturn the product of a rushed and flawed rulemaking process. The result of that process was a rule that would have impeded efforts to reduce musculoskeletal disorders (MSDs) in the workplace. Many companies have already taken significant steps to address musculoskeletal injuries at their worksites. Many other companies are looking for the tools

to do so. Many small businesses don't know what to do. OSHA should build upon and foster successful efforts to reduce ergonomic injuries. The Agency should also provide tools for companies to implement programs that can work—and will work—to reduce ergonomic injuries in their particular industries and worksites. This is the best way to protect America's workers.

Recently released data shows that overall MSD injuries and illness have continued to decline. Today, I am pleased to hear about OSHA's strategy for accelerating—rather than inhibiting the decline of these injuries and illnesses.

OSHA's plan calls for industry- or task-specific guidelines, enforcement, compliance assistance and research. This approach recognizes that many questions remain, but much can still be done now to address ergonomic hazards in the workplace. This approach will build upon "best practices" that have proven successful in reducing injuries and illnesses. This approach will build partnerships between the Agency and businesses to reduce ergonomic injuries, rather than merely creating adversaries. Most importantly, this approach will focus on realities and results.

Companies must be given the flexibility to implement ergonomics programs tailored to their particular needs and capabilities—not the complex formulas that are difficult to find, let alone follow, that were referenced but not provided in the repealed rule. Ergonomic hazards, and therefor appropriate interventions, vary from industry to industry, from location to location, and from individual to individual. A "one-size-fits-all" mandate that fails to recognize the varying capabilities and characteristics of different businesses will simply not work. Furthermore, such a mandate will divert resources away from innovative programs that actually do work to reduce ergonomic injuries.

OSHA's strategy will provide companies with the flexibility to address ergonomic hazards in their workplaces. The Agency also plans to provide employers and employees with tools to do so quickly and effectively. OSHA has announced that it will immediately begin work on developing industry and task-specific guidelines. OSHA has also announced a number of outreach and compliance assistance activities that will proactively deal with ergonomic issues in the workplace.

I am particularly pleased to see that OSHA's proposal includes compliance assistance to small businesses. One of my biggest problems with the Clinton Administration's ergonomics rule was its impact on small businesses. Small businesses have unique needs and capabilities which must be taken into account by the Agency in order to develop an effective and appropriate ergonomics plan that prevents injuries. Small business doesn't have the range of experts to know what to do. Searching is often more costly than the cure.

This concern about small businesses is highlighted by a recent study conducted by the Mercatus Center at George Mason University in conjunction with the National Association of Manufacturers. The "Workplace Regulation Compliance Study" found that the regulatory burden of compliance with Federal workplace regulations falls disproportionately on small manufacturing firms with less than 100 workers. The total compliance cost per employee is 68 percent higher at small firms than at large firms with more than

500 employees—and that's the cost of discovery of what can be done.

I will be very interested in hearing from Secretary Chao about specific plans to address the needs of small businesses in addressing ergonomic hazards. OSHA has announced the formation of an advisory committee to identify gaps in research related to the application of ergonomics to the workplace. I request Secretary Chao and Assistant Secretary Henshaw to ensure that small business is represented on the advisory committee.

While OSHA's ergonomics strategy will give employers the tools to reduce ergonomic injuries, it also contains the "teeth" to punish employers who expose workers to ergonomic hazards. Some of my colleagues argue that an ergonomics rule is necessary in order to punish employers for ergonomic hazards and to motivate companies to reduce ergonomic injuries. However, my colleagues fail to acknowledge two fundamental facts—(1) ergonomics is good business and (2) ergonomics hazards are enforceable under the General Duty Clause of the OSH Act. We've had examples from past General Duty clause actions, including the Beverly Enterprises case, that ergonomic hazards are within the scope of the General Duty clause.

First of all, good ergonomics is good business. Ergonomics injuries raise costs to a company, decrease productivity and impact the bottom line (not only because worker injuries are an expense under workers' compensation). In the absence of an ergonomics standard, businesses are implementing ergonomics programs because they recognize the benefits of a safer workplace. We will hear today from Paul Fontana, an occupational therapists who works with companies to address ergonomic hazards. Mr. Fontana can speak first-hand about businesses efforts to reduce ergonomic injuries because they recognize it makes good business sense to do so.

Secondly, Under the General Duty Clause of the OSH Act, Section 5(a)(1), employers must keep their workplaces free from recognized serious hazards. This includes ergonomic hazards. OSHA has announced an ergonomics enforcement plan that will crack down on "bad actors" by coordinating inspections with a legal strategy designed for successful prosecution of General Duty Clause violations.

As indicated by the title of this hearing, some of my colleagues argue that nothing short of an OSHA ergonomics standard will be sufficient to protect workers from ergonomic injuries. I must point out that significant legal, scientific and technical impediments to such action remain. Available science cannot accurately attribute ergonomic injuries to work-related versus non-work-related factors. Furthermore, the economic and technical feasibility of an ergonomics rule has not been supported. Perhaps we should be asking what can be done to reduce ergonomic injuries at home and with hobbies and recreation. Since home and hobbies affect work, I'm sure businesses would be willing to help—but not to shoulder all the responsibility of an inspect and fine mentality.

I applaud the administration for developing an ergonomics strategy that contains the flexibility, the tools and the "teeth" to significantly reduce ergonomic injuries and illnesses. The National Safety Council, a non-partisan public service organization, responded to

OSHA's ergonomics plan with the statement that: "We are optimistic that this approach, rigorously pursued, will produce effective, targeted results." I share in the National Safety Council's optimism that OSHA's ergonomics strategy will produce results—a safer workplace that benefits both workers and employers alike.

Thank you Mr. Chairman.

Senator ENZI. I do appreciate the issue that we have here. I do not think anybody disagrees that we need to take care of ergonomics injuries, and we need to prevent them.

I want to thank you for all of the work and effort that you have gone into since you became Secretary of Labor. I also think that the approach that you are taking will be a quick way to get some great reductions in ergonomic injuries.

One of the problems that we noticed when we went through the kind of pseudo-rulemaking process the last time—and I still object to the way that that was handled and know that that is the reason why Congress threw that out—one of the problems that businesses have—and the smaller the business, the bigger the problem—is that they do not know what to do. They do not know how it can be done. They do not know the best practice. And your guidelines will provide that kind of information for each industry in a very specific way.

I remember in the ergonomics rule that we looked at, one of the difficulties was that one of the formulas that people had to use was in a separate publication from the ergonomics rule itself, and that publication was out-of-date and not available. Fortunately, I was able to find one, and I did a chart on it, and I defied any engineer who was watching to be able to interpret in detail so that a small businessman could understand the formula that was necessary for truck vibration or any other industry that had vibration. What they need to know is how to solve the problem, not how to calculate whether there is a problem.

I definitely noted during the process that we went through that there just was not enough information for a small businessman to understand what was going on.

Now, as to the general duty clause, the reason that the general duty clause is hard to enforce is because we do not have any specific duty, and the guidelines provide some things that a business can look at, can determine whether it is actually applicable to their business, meaning that they have that kind of situation, and if they have that kind of situation, they can put the solution in place. If they are not putting the solution in place, they are violating the general duty clause. So I think you have actually increased some of the capability there, and I want to congratulate you for what you have done. I think that it will be a speedy resolution.

Insofar as ergonomics still encompass one-third of the injuries, I think one thing that our committee has noted through the years is that injuries have been going down, injuries of all kinds. Injuries for ergonomics have been going down. The fact that they are still one-third of the injuries shows where some of the concentration needs to be done, and I appreciate the specific way that you are saying that it will be done.

Now, I do assume that you carefully considered doing another ergonomics rule before you ultimately decided on the approach you did. Why did you feel that a rule was not feasible?

Secretary CHAO. Well, as has been discussed, the Congress, by a bipartisan majority, overturned the previous administration's ergonomics rule which became final on January 16, 4 days before they left office.

I am interested in protecting workers, and I wanted to find a comprehensive way, as I mentioned to the Congress, of protecting workers. In going through the rules, there was a great deal of question as to whether a new rule can indeed be promulgated given the Congressional Review Act, which overturned the previous rule; and secondly, the length of time it would take to promulgate a new rule. To do a credible job in coming up with a new rule would probably require about 4½ years.

Again, because my concern is with the speed with which we can protect workers, I believe the Department's comprehensive approach will best help workers now and not just years from now. Guidelines, as you have noted, are indeed helpful because they do lay out a path; they help people know what they can do to prevent injuries before they occur. The previously-rejected rule, in fact, had a trigger which would not go into place unless an injury occurred. That is unacceptable to me as well.

I also wanted something that was flexible, because I wanted employers and employees to work together and have the ability to custom design whatever made sense for them at their particular worksite. A one-size-fits-all, as you have heard, just will not be responsive in truly helping workers.

Senator ENZI. I particularly appreciate the emphasis on prevention. I am sure you are aware that Senator Breaux introduced a bill yesterday requiring the Department to issue an ergonomics rule within 2 years. I know that we repealed the ergonomics rule because it was flawed both in process and in substance, and I was particularly troubled by the fact that OSHA paid contractors to testify and they paid them to tear apart the testimony of other people, and that all played a role in it.

I am now very troubled that the bill introduced by Senator Breaux requires the Department of Labor to develop an ergonomic standard based on the complete record of evidence for the repealed rule, a record that I think we pretty well showed was tainted at best, and the only redeeming factor would be that maybe this time the information that was presented would be read.

Do you share this concern?

Secretary CHAO. I have not had a chance to read the bill myself because, as we all know, it was introduced very late last night. I am concerned about the amendment, because I think it will set up a deterrent effect to people following our comprehensive ergonomics rule.

If there is uncertainty, and if there is a lack of clarity as to where this Department is going and what other factors are impinging upon this comprehensive ergonomics plan, I think a lot of people would not follow the ergonomics plan and therefore contribute to its possible failure.

Senator ENZI. Vagueness was our problem before. I think you are on the right track.

I see that my time has expired.

The CHAIRMAN. Senator Wellstone.

Senator WELLSTONE. Madam Secretary, first of all, let me just repeat what I said earlier. The truth of the matter is there is a reason why we have a focus on this, and it is because we have all of these disabling injuries, and I think we have measures here that have not worked for 10 years, and that is what we have again—voluntary guideline—not guidelines, but guideline—general duty clause enforcement, and further research.

Let me ask you this. Last March when the original standard was repealed, you stated that you would develop a comprehensive approach to ergonomics that might include—well, a comprehensive approach.

Then, in your press release of April 5 announcing your program, you said that OSHA—this is a year later, this is April 5, would "develop industry- and task-specific guidelines"—guidelines.

Today you announce a plan to develop a guideline.

This is an incredibly shrinking plan that we have before us here.

I want to ask you two questions, and you can answer them together. First of all, I am interested in—when it comes to this guideline—as I look at what has happened, Mr. Chairman, between 1999 and 2000 in a whole bunch of different areas of work—painting and paper-hanging, 172 percent increase in occupational injuries involving MSDs; nursing and personal care facilities, 237 percent increase; beer, wine, and distilled beverages, 240 percent increase; leather tanning and finishing, 188 percent increase; local and suburban transportation, 173 percent increase; tires and inner tubes, 157 percent increase; fabricated rubber products, 153 percent increase—no, scratch that; I was looking at the wrong column—very quickly, again, beer wine and distilled beverages, 27 percent; leather tanning and finishing, 107 percent; tires and inner tubes, 43 percent; fabricated rubber products, 35 percent.

The point is that nursing and personal care facilities—the point is there is a huge percentage increase in all kinds of areas of work, and I am interested in why we do not have a plan to deal with these workers. That is my first question.

The part B is now to go to what we have heard today, which is a plan to develop a guideline—so we have a nursing home guideline, but it is voluntary, right—I think you said it is voluntary—so if the nursing home chooses not to be interested in the guideline, does this then mean you automatically invoke the general duty clause?

So my question is how are workers in companies that do not go along with the guideline protected?

So I have two questions. One guideline is all we have, far from comprehensive. We have all kinds of people working in all kinds of parts of the economy, with huge numbers of people injured, and we do not do anything for them; why not?

And then, third, I am not even sure how this works in the nursing home industry.

Secretary CHAO. I am very confident that our plan is going to help reduce ergonomic injuries, and I hope that the Committee

Members will give the Department and my team an opportunity to make that happen.

Instead of viewing and characterizing our progress in the last year as "shrinking," I would respectfully say that we are really showing progress. I have said that I was going to enact a comprehensive approach, and I have done so. And in the year since, obviously, September 11 has slowed our progress because OSHA was involved at Ground Zero and in a lot of security aspects with the anthrax scare of our country. Nevertheless, this has been a front burner issue. No other Secretary has worked more on this issue than I have. This is the second time that I have testified on the Hill. No other Secretary has ever testified on the Hill on this.

What I am concerned about in terms of the guidelines is that our announcement today is one additional step in what we have done to protect workers. We have now designated an industry, the nursing home care industry, which has a high number of low skill workers with high risk of ergonomic injuries. We are making progress in designating this industry. This will not be the only industry. We will work with other industries to come out with guidelines.

Senator WELLSTONE. But Madam——

Secretary CHAO. In the year since, may I also add, we do not operate in a vacuum. We are actively engaged in soliciting and interacting with other stakeholders. We came in on January 20, and we have met with scores of stakeholders from across the spectrum; I myself have met personally with a tremendous number of labor leaders, with health care organizations, with academicians, with doctors, with physical therapists, on this particular issue.

So during this time, we are making progress. We are consulting with the groups who have a stake in this issue. We cannot do this in a vacuum, and we are enlisting their assistance as well.

Senator WELLSTONE. But didn't the workers—I think of a union like SEIU—first of all, again, you have one voluntary guideline. That is what you presented here, with no enforcement. That is your plan. What you have announced today is a plan to develop a guideline, with no enforcement.

Let me ask you this. I have spent a lot of time with nursing home workers, and I certainly know SEIU, to use but one union. So now you have a situation where the nursing home industry chooses not to—they are not interested in your voluntary guideline.

Secretary CHAO. That is not true. They are.

Senator WELLSTONE. Wait a minute, wait a minute. I am asking you if, in fact, you have a situation where one of these companies is not interested, because it is voluntary, is there enforcement? Do you then invoke the general duty clause?

Secretary CHAO. We have a whole enforcement strategy.

Senator WELLSTONE. What is it?

Secretary CHAO. For the very first time, we are going to have an enforcement strategy that links the investigators and the lawyers at the Department of Labor.

Senator WELLSTONE. But you have not answered my question. Will you invoke the general duty clause? That is what you list here today as one of your——

Secretary CHAO. If there is a bad player who is blatantly and deliberately ignoring the well-being of their workers, they will be targeted.

Senator WELLSTONE. What is a "bad player"? In other words—I want it to be clear on the record, because it is different from what I think you were saying earlier—let us assume you have good people——

Secretary CHAO. The guidelines——

Senator WELLSTONE [continuing]. Let me finish with the question—you have good people who want to go along. I say that is great; all of us do. Then, you have some actors in the industry who do not want to go along with the standard. It is voluntary. If they do not go along with the standard, and you say they are bad actors—and I would like to ask your definition—then, you will invoke the general duty clause; is that correct?

Secretary CHAO. It will not be linked, but yes, we have——

Senator WELLSTONE. It will what—not be linked?

Secretary CHAO. It will not be linked to guidelines. But we have a responsibility to ensure that these bad actors who are blatantly ignoring the well-being of their workers will be taken to task. So we have that tool, and it is an effective tool, as we have shown in Beverly Enterprises. And, in fact, the union that you mention, SEIU, and we have worked together on the Beverly Enterprises case, and they are quite pleased with the results that we have gotten in that case.

Senator WELLSTONE. I am, too. It took 10 years. But you have answered my question and you have told me it will not be linked.

Secretary CHAO. It cannot be linked.

Senator WELLSTONE. First you said it would be, but now you say it won't be; correct?

Secretary CHAO. It cannot be linked—but the general duty——

Senator WELLSTONE. Okay. Well, then, you have no enforcement.

Secretary CHAO [continuing]. That is not true, with all due respect, Senator.

The CHAIRMAN. Senator Bond.

OPENING STATEMENT OF SENATOR BOND

Senator BOND. Thank you very much, Mr. Chairman, and welcome, Madam Secretary. I can say finally, after more than 10 years of studies, hearings, false starts, rumors, suspicions, and one hugely miscalculated, politically motivated regulation, we have an approach that is grounded in what we know and will reduce work-related ergonomic injuries, rather than hold employers accountable for non-work-related pains and discomforts.

Secretary Chao, Assistant Secretary Henshaw, and your entire team should be commended for tackling this problem aggressively, forthrightly, and honestly and for developing an approach that promises to produce results, but above all, it makes common sense and not just more work for trial lawyers.

To those who would favor a more restrictive, burdensome regulatory approach, I ask why. The Secretary has outlined a comprehensive program with all the elements inherent in a regulation, but with more flexibility and responsiveness than any regulation could ever provide.

The approach is designed to reduce exposure in the workplace before an employee develops symptoms or reports an injury, compared to the previous regulation, which merely triggers actions after an injury occurs.

I know there are those who would like to see the regulation reinstated, and we know that legislation has been introduced that would allow that to happen, but it is beyond me to understand why they believe it would be beneficial to the workers. Not only would it shift the focus to post-injury administrative penalties and lawsuits—as I said, a bonanza for those who file lawsuits—it would cost a very significant number of jobs in the small businesses, which would either be put out of business or forced to replace workers with equipment.

The impact on small business is why Senator Enzi and others on the Small Business Committee, which I chair, were called to use the Small Business Red Tape Reduction Act to overturn this misguided regulation.

While workplace exposures can contribute to a worker getting an ergonomic injury, there are many other factors that are not controlled by the employer. As the National Academy of Sciences study concluded, none of the common musculoskeletal disorders is uniquely caused by work exposures. That means there was a problem in the causal relationship.

We found out with the invalidated regulation the structure and burdens of the regulation made it so expensive that it was economically infeasible, particularly for small businesses.

The Secretary's plan is not just the most reasonable and pragmatic decision she can make within the limits of science and available options; it is actually superior to a full regulatory approach relying on *post facto* fines and lawsuits.

To make sure, however, that the plan is taken seriously, this plan includes a very strategic and focused commitment to enforcement designed to find those employers who are ignoring all the advice and assistance instead of putting all employers under hollow threats. The plan also includes a dedicated commitment to research to develop new information and data which would help support more and better guidelines.

By contrast, were a regulation to be issued, it would freeze research where it was because the rulemaking process is cumbersome.

Finally, the plan also includes a more specific vision about outreach and compliance assistance, especially for small businesses, than we saw before. I think the Secretary's plan is well-conceived. We look forward to seeing it put in place.

And I would say that the new bill introduced last night, from our initial review, is a colossal step backward. It would literally mandate that the invalidated Clinton ergonomic standard be resurrected as if it were being brought back from the dust bin of bad Government policy. It is a brazen attempt to turn back the clock and pretend that the bipartisan majorities of both Houses did not say this regulation was flawed.

The new bill is the legislative equivalent of trying to establish by law that the world is flat. We know better. The science will not

support that conclusion just as it will not support the ergonomics regulation.

Madam Secretary, you have indicated that you will use your enforcement powers; you will use the general duty clause. It is not tied to voluntary guidelines because the guidelines are voluntary.

Would you or Mr. Henshaw like to give us some insights into your enforcement philosophy, because you have indicated that you do intend to go after those who are not maintaining safe workplaces. Could you explain your enforcement philosophy and your commitment to us, please?

Secretary CHAO. Yes. I appreciate the opportunity very much.

I did not get a chance to finish. If the nursing home does nothing, if there are no guidelines or any other alternative efforts, they will be a target for the general duty clause 5(a)(1). And there are four required elements that go into pursuing a 5(a)(1) case, and I want to also let John Henshaw speak to this.

We are increasing, in fact, our FTEs in enforcement by about 17 people, so we are increasing our enforcement efforts. We are also going to be giving out additional grants to help educate and do more aggressive training and outreach on what ergonomic injuries mean and how to prevent them.

The four requirement elements are: Is there an exposure to the hazard? Is there a recognized workplace hazard by the employer or the industry or employee? Is it likely to cause serious injury? There is a whole set of rules.

John, maybe you would like to take it up, because you are going to be in charge of the enforcement effort.

Mr. HENSHAW. Yes, thank you, Madam Secretary.

Yes, obviously, the enforcement strategy is a key component of this four-prong approach. And it is the first time ever that we have established a strategy around successful prosecution using 5(a)(1).

The tenets of 5(a)(1) still remain the tenets of 5(a)(1), as the Senator realizes. It is existing in our Act, and we continue to enforce it according to the tenets established in that. But this will be the first time that we will develop a team that will be specialized in identifying those organizations who choose to ignore ergonomic hazards and do not take the appropriate steps to address them. They still have to meet the qualifications under 5(a)(1).

Senator BOND. Thank you, Mr. Chairman.

[The prepared statement of Senator Bond follows:]

PREPARED STATEMENT OF SENATOR BOND

Mr. Chairman, all I can say is: Finally! Finally, after more than 10 years of studies, hearings, false starts, rumors, suspicions, and one hugely miscalculated, politically motivated regulation, we have an approach that is grounded in what we know, and will reduce work-related ergonomic injuries rather than hold employers accountable for non-work related pains and discomforts. Secretary Chao, Assistant Secretary Henshaw and their team are to be commended for tackling this problem aggressively, forthrightly, and honestly and for developing an approach that promises to produce results, but above all, just makes common sense.

To those who favor a more restrictive, burdensome, regulatory approach I would ask: Why? The Secretary has outlined a com-

prehensive program with all the elements inherent in a regulation but with more flexibility and responsiveness than any regulation could ever provide. Furthermore, this approach is designed to reduce exposures in the workplace before any employee develops symptoms or reports an injury, compared to the previous, invalidated regulation that required a reported injury to trigger an employer's response. I know that there are those who would like to see that regulation reinstated, legislation has been introduced that would allow that to happen, but it is beyond me to understand why they believe that would be beneficial.

The Secretary and her team have carefully reviewed the data and testimony that was submitted during last summer's fora and have determined that, as a matter of law, there is insufficient certainty and clarity surrounding the requirements for a regulation to support pursuing a new regulation. For OSHA to pursue a regulation, they must demonstrate: (1) that there are actual injuries; (2) that these injuries are caused by the workplace; and 3) that these injuries are preventable through economically and technologically feasible means. Whether there are actual injuries is no longer at issue, the problems arise with the other requirements.

While workplace exposures can contribute to a worker getting an ergonomic injury, so can a wide range of other factors that are not controlled by the employer. As the NAS study concluded, "None of the common [musculoskeletal disorders] is uniquely caused by work exposures." Absent that causal relationship, OSHA cannot promulgate a regulation to reduce these injuries.

As we found out with the invalidated regulation, the structure and burdens of a regulation make one so expensive that it becomes economically infeasible. This is particularly true for small businesses who do not often have workplace safety specialists on their payroll. Depending on the workplace, the remedies may also be technologically infeasible if entire workplaces must be redesigned, or better equipment does not exist to reduce or eliminate exposures.

The Secretary's plan is not just the most reasonable and pragmatic decision she could make within the limits of the science and available options, it is actually superior to a full regulatory approach. This comprehensive approach will achieve better results because it preserves employers' flexibility to try different things instead of forcing them to worry about whether they had met the burden of a regulation just so they could avoid a legal penalty. To make sure, however, that her plan is taken seriously, it includes a very strategic and focused commitment to enforcement designed to find those employers who are ignoring all the advice and assistance, instead of putting all employers under hollow threats. The plan also includes a dedicated commitment to research to develop new information and data to help support more and better guidelines. By contrast, once a regulation is issued, it freezes research where it is because the rulemaking process is so cumbersome and lengthy there is no way to react to new findings. Finally, the plan also includes a more specific vision about outreach and compliance assistance, especially for small businesses, than we saw before.

Secretary Chao's plan is well conceived, and will result in better protection of workers than they currently have. I commend the Sec-

retary for being willing to start from the beginning on this issue and forging a new course, and I look forward to seeing it put into place.

COMMENT ON S. 2184—BREAUX ERGO BILL II

The new bill, S. 2184, just introduced by Senator Breaux, is a colossal step backwards. This bill would literally mandate that the invalidated Clinton ergonomics standard be resurrected as if it were being brought back from the dustbin of bad Government policy. It is a brazen attempt to turn back the clock and pretend that bipartisan majorities of both Houses did not say this regulation was so flawed it could not be salvaged.

By mandating that the docket for the previous regulation be used for the new rule required by the bill, this bill is quite literally mandating that the same mistakes will be made again. Have not the sponsors of this legislation learned anything from the previous experience?

This bill also expands the definition of work-related injuries that would be covered so that now, even injuries that occur outside the workplace can be covered by this standard. It is simply outrageous to imagine that an employer would be responsible for injuries that are caused by anything other than exposures that occur in the workplace.

This new bill is the legislative equivalent of trying to establish by law that the world is flat. We know better. The science will not support that conclusion just as it will not support an ergonomics regulation. We now have a viable, sensible approach on how to deal with workplace ergonomic issues before us that the Secretary has unveiled and we need to do everything possible to make this work instead of spending energy trying to revive failed, rigid regulatory regimes.

The CHAIRMAN. Senator Clinton.

Senator CLINTON. Thank you very much, Mr. Chairman, and thank you, Secretary Chao, for being here and answering our questions.

As you can tell, this is a case of the glass being either half-empty or half-full, depending upon one's perspective. I have six areas of concern, some of which have already been addressed. The definition and timing issues are ones that I am hoping to get more clarification on based on the questioning of previous Senators. And the enforcement system with respect to the use of the general duty clause is also something that I am concerned about.

But let me jump to a few other issues. What is the Department's attitude with respect to national coverage, because of course, this plan only applies to States covered by Federal OSHA and not to the 23 States and Territories that operate their own State OSHA plans.

So what is it that you will do with respect to the 23 States, one of which is New York?

Secretary CHAO. Well, generally speaking—and I want to have John also answer more fully, because I am very interested in Members understanding what our comprehensive plan is all about——

Senator CLINTON. I understand that. But the law——

Secretary CHAO [continuing]. Yes. We work very well together with State OSHA departments. In fact, the Federal standards are what is the minimum, and then——

Senator CLINTON. That is not the case, Secretary, and I think——

Secretary CHAO. Let me have John answer it, then.

Senator CLINTON. That would be good.

Secretary CHAO. Thank you.

Mr. HENSHAW. Thank you, Madam Secretary.

The Secretary is correct. We have 23 States that have State plans, and we have three others that have just public sector employees covered, like New York. We had discussed this plan with the board that monitors all the State plan organizations. Counting the total, all employees, as well as State and municipal employees, we deal with 26 plans. So there are 26 different States including New York.

Senator CLINTON. But of course, if there were a rule, that rule would apply to all States. One of the problems after 10 years of effort to try to determine how to deal with this issue is that the existing patchwork of enforcement and coverage challenges led previous administrations, including the first Bush Administration and the Clinton Administration, to basically throw up their hands and say, "We need a rule." One of the reasons they did that is that in the absence of a rule, States are not required to adopt this plan and these guidelines that you are promulgating. I think that is a significant deficit. If half of our States are not covered, then the voluntary approach that you are proposing leaves out millions and millions of workers and employers.

So I would ask you to look at that. I do not think that that is an adequate response.

Secondly, with respect to the voluntary guidelines, one of the reasons that the Clinton Administration finally promulgated a rule is stated in the preamble to that rule, which is that the promulgation of a rule was literally the only tool that the agency had not used. With all due respect, I believe that Secretary Dole and previous Secretaries of Labor and Presidents were concerned about this issue, and they tried everything. They tried voluntary efforts, they tried training, they tried general duty enforcement, and finally, the consensus was that we needed a rule.

Now, one can quibble about the rule, and one can say that maybe the rule was not the right rule, but the reason the rule was adopted was because everything else had been tried.

Now, here we are, 10 years later, about to go down that road again of trying all sorts of things that will only apply to half the States. I think that that raises some serious questions.

Thirdly, with respect to the use of the general duty clause, I think that what Senator Wellstone was attempting to get at was that the general duty clause was used in earlier years in an attempt to try to create pressure on these so-called bad actors to act voluntarily, and in the absence of voluntary action, the general duty clause was invoked.

Now, of course, as you know, were subsequent employer challenges to enforcement and legal decisions that essentially rendered

the enforcement through the general duty clause time-consuming, expensive, and ultimately unsuccessful.

I applaud you for the Beverly Nursing Home resolution, but it did take 10 years, and it is the exception, not the rule. I think the facts are clear on that.

I am also concerned about the role of compliance assistance and what I see as a contradiction between your proposal and the budget that the administration has proposed. As I look at the budget, the President's budget cuts OSHA's overall compliance assistance budget by over $4 million in fiscal year 2003. It also calls for a huge, $7 million cut, 64 percent cut, in the fiscal year 2003 OSHA training budget. That would come on line at exactly the time that these guidelines are going to be promulgated, assuming there is a guideline by the end of the year, maybe more than one guideline, and the enforcement of those guidelines rests on compliance assistance; yet the budget is being cut.

I find that contradictory. Can you explain to me how you will fund the compliance assistance that you are resting this voluntary effort on in the absence of adequate funding?

Secretary CHAO. Senator Clinton, thank you very much for your questions and obviously for your concern. You have worked on this, and I want to say that we are committed to working with you. In fact, for all the Senators on the Committee, I am more than willing to have my staff come over and meet with your staff so that we can present—and we have done so already, but maybe we need to continue to do that. We are more than glad to send our staff over, because we do need a greater understanding of this comprehensive approach, and we are again more than willing to work with you.

Specifically on the rules issue, people kind of talk about this——

Senator CLINTON. What about the budget issue, Madam Secretary?

Secretary CHAO. On the budget issue, we in fact, as I mentioned, have increased our FTEs in our inspection ranks by 17, and the cut in FTEs that you are talking about primarily applies to management. So we, in fact, are increasing our enforcement resources, and the enforcement resources to ergonomics obviously will reflect that intensity as well.

Senator CLINTON. What about the Susan Harwood program which, as I understand——

Secretary CHAO. We are reconstructing the Susan Harwood grants to be more web-based and to be more conducive to what we are doing today to reach a larger number of people.

Senator CLINTON. Without any money?

Secretary CHAO. No—we have about $4 million for that. But the Susan Harwood grants are not the only grants that we use to reach out for training. There are many other grants which we use for training purposes as well.

Senator CLINTON. Well, I think the problem is that the web-based programs do not directly address the issues of many low-income and non-English-speaking immigrant workers which is what the Susan Harwood program was specifically directed to address, and in fact, the Congress provided money specifically for that program, because again, after many years of experience, we learned that we could not get information to many of these populations

who, as you pointed out, are working in our nursing homes, working in our poultry plants, et cetera.

My final issue, Madam Secretary, is with respect to this new national advisory committee—if I could, Mr. Chairman, just one last, quick question on this. As I understand it, you are chartering a new national advisory committee. Does that mean that you are basically ignoring or undermining NIOSH?

Secretary CHAO. Absolutely not. We are, in fact, working as a catalyst and facilitator, because the National Academy of Sciences study, in fact, points out gaps in science which we hope, through a grassroots approach with members who actually work on these issues, being a part of the national advisory commission, will be able to fill in some of these gaps and work with NIOSH on that.

Senator CLINTON. I would appreciate additional information on all of these six issues that I raised.

Secretary CHAO. We would be more than glad to provide that.

Senator CLINTON. Thank you.

The CHAIRMAN. Senator Sessions.

OPENING STATEMENT OF SENATOR SESSIONS

Senator SESSIONS. Thank you, Mr. Chairman.

Madam Secretary, thank you for your leadership. I do not believe there is anyone in Government more committed to doing the right thing than you or working harder. You have assembled a first-rate staff, and I know you want to do this thing right, and I believe you have proposed these procedures as a result of your honest and fair study of it. So we thank you for that.

With regard to the 600 pages of guidelines that the previous regulations were proposed to be part of, you really almost have to have 600 pages if you are going to do a comprehensive management of all industry in America through a written guideline. It is so large and so complex, as Senator Enzi noted, that it is just difficult if not impossible, particularly for small businesses, to comply with them.

So I believe there are some good indications that we are moving in the right direction. You noted in your written remarks that musculoskeletal disorders have declined by 46 percent since 1992. We do not have any mandatory regulations to cause that; it is because businesses know that if they have safe workplaces, they will have better workers, happier workers, workers who will be off from work a lot less, and they have a real self-interest in making that happen.

I know that Treasury Secretary O'Neill is almost obsessive about his efforts on behalf of his business previously, in Alcoa, to reduce injuries. But injuries are difficult to ascertain, particularly ergonomic injuries. I have concluded that I have carpal tunnel syndrome. I did not know it until I worked at home in the woods one day with a machete, and my hand became numb, and I notice now that if I work out in the gym in certain ways, my hand gets numb. If I write for a long time, my hand will get numb. Now, I do not know what caused it—working out at the gym or writing. So some of these things are just difficult to ascertain what is causing the injury.

I believe that your approach has much merit. Let me ask you this. You indicated several times that it would literally take over

4 years if you were to promulgate another complex set of guidelines to actually have them become law. How does that happen?

Secretary CHAO. To do a credible and responsible job, it would take about 4- to 4½ years.

Senator SESSIONS. And those have to be published, and you have to have input and all of the formalities that go along with that, and Congress would have to vote again on whether or not to approve them. Your proposals take place right now.

I note, Madam Secretary, some of the successes in the meat-packing industry as a result of voluntary guidelines. I am told that with industry-specific guidelines in the meat-packing industry, where OSHA focused on enforcement, and the guidelines were specific to the kind of work they do in that industry that days away from work have gone down 47 percent from 1992 through 1999, and that for injuries from strains and sprains, days away from work have gone down 61 percent; that rates for back injuries and days away from work have gone down 64 percent. Now, that was a voluntary procedure in which OSHA worked with that industry to develop realistic goals and guidelines for their specific kind of work.

Is that what you have in mind throughout all industries in general?

Secretary CHAO. Very much so. There is an assumption that rules work. There is an assumption that had the previous rule been upheld that it would have worked, and that is not at all certain.

The previous rule most likely would have been, again, bogged down in litigation, and there was a great deal of uncertainty as to whether that rule would have indeed saved very many people from very many injuries. I am concerned about prevention. I am concerned about a speedy resolution, a speedy and responsible solution to help workers with their injuries.

Well, we know that the estimates were as high as $60 billion annually under the previous set of regulations, and we have to ask ourselves if we are getting the maximum benefit from that kind of expenditure, and I do not think we are.

Senator Enzi and I had the privilege to know and have testify here Mr. Ron Hayes, whose son was killed in a workplace accident. He is just passionate about the view that I share, and I know Senator Enzi shares, that we need to do more in advance of accidents; that just coming in after accidents and fining and so on is not a good way to do business.

I notice in your testimony that you do expect increased inspections, and you project increased inspections in the years to come; is that correct?

Secretary CHAO. We expect to increase inspections to about 38,000 this year.

Senator SESSIONS. And that will represent a commitment on your part to inspect the workplace prior to an injury?

Secretary CHAO. That is always our goal. We want to be helping people prevent injuries, not after they have occurred and punishing people afterward.

Senator SESSIONS. Some have complained about your insistence that we go out and get the best science on health and injury mat-

ters. Explain to us why it is important when we pass a rule or guideline or regulation that we have good science to back it up.

Secretary CHAO. Having a sound foundation and understanding what we are regulating I think is very important. The National Academy of Sciences study does point out that there are gaps in the science. That is why we have set up this national advisory commission. The charter of this commission will be coming out in 30 days, and we want to be able to also print out and release guidelines for nominations as to how people can apply.

What we basically want to do is to make sure that we are preventing injuries before they occur. We have a speed program which we want to enact. We have a strong enforcement program and team in place, and we want to add to the sound science.

Senator SESSION. Thank you. I share that view.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Dodd.

OPENING STATEMENT OF SENATOR DODD

Senator DODD. Thank you very much, Mr. Chairman.

Let me begin by thanking you, by the way, for convening this hearing, and thank you, Madam Secretary and Mr. Henshaw, for being here today to participate in this discussion.

Madam Secretary, you do not have an easy job. All of us know that, and we appreciate your willingness to take these issues on.

I must say, though, that in reading over your statement of more than a year ago now, in March 2001—and others may have read it, but I read it again this morning, and I am quoting here—this was just prior to the abandonment of the regulations involving ergonomics—you said that you made a commitment "to pursue a comprehensive approach to ergonomics which may include new rulemaking. This approach will provide employers with achievable measures that protect their employees before injuries occur."

As I review the bidding in going over this, what we have is a plan for a plan. Is that about right?

Secretary CHAO. I think you have to announce what you are going to do before you do it.

Senator DODD. So it is a plan for a plan.

Secretary CHAO. We have announced what direction our Department will take to reduce workplace——

Senator DODD. It is a year later. There have been 1.8 million people who have suffered. I think those numbers are pretty accepted.

Secretary CHAO. No, they are not, but——

Senator DODD. Well, do you think this is a serious issue? A lot of people do not.

Secretary CHAO. Even one injury——

Senator DODD. Our colleague from Alabama is candid about it. He says, "I do not think this is really a serious problem."

Secretary CHAO. No, no. I think——

Senator SESSIONS. No, I did not say that, Mr. Chairman——

Senator DODD. Well, I think some people think this is sort of made up, excuses why people do not show up at work.

Senator SESSIONS. I would just like to have a personal——

Senator DODD. Let me ask the Secretary—let me use my time to ask the Secretary——

The CHAIRMAN. Wait a minute.

Senator SESSIONS. You raised my name——

The CHAIRMAN. On my time, on my time——

Senator SESSIONS [continuing]. And suggested I did not think this was serious, and that is absolutely incorrect.

Senator DODD. The Senator has responded.

Let me ask the Secretary—how serious do you think it is?

Secretary CHAO. I think that ergonomic injuries are serious, and I think everyone is concerned about it.

Senator DODD. Why does it take over a year to come back with a plan for a plan?

Secretary CHAO. Because we live in a democracy and we have people who want to make known their concerns, and we have gone through our due diligence in talking with the various stakeholders. I have talked with numerous labor leaders; I have talked with primarily labor leaders, and my staff has talked to others that I am not personally able to talk to myself. But we have to take the input of various groups who are involved in this issue and incorporate them in what we are going to do.

Senator DODD. I understand that, but there are no standards here, no guidelines, no targeted industries, a general duty clause that could take 9 years in some cases, we know, before employees get any kind of answer at all.

Secretary CHAO. Not under my tenure. We were able to effect action on this nursing home care after 11 years, and that is because it took leadership and it took determination.

Senator DODD. Well, I appreciate that, but the point is your response to Senator Wellstone says we are not going to enforce based on the guidelines——

Secretary CHAO. We are going to enforce.

Senator DODD. But not based on the guidelines.

Secretary CHAO. If there is a bad actor and there is flagrant disregard——

Senator DODD. But did I hear wrong—not based on the guidelines.

Secretary CHAO. No, it cannot—it cannot be linked.

Senator DODD. All right. Let me go back. Senator Clinton raised a very important series of questions here about money. I mean, here we are increasing budgets for homeland security, we are increasing budgets obviously to try to make us more secure, we are looking into bioterrorism issues. The one agency that comes up with answers and research in this area, in NIOSH, in OSHA, we are cutting the budgets by $28 million and $9 million, respectively, and cutting, 64 percent of individuals in the enforcement area. How do we explain to our constituencies that at a time when we are facing greater threats from bioterrorism, in the very agencies of the Federal Government that we are going to be asking to step in here, we are looking at cuts of $9 and $28 million respectively and 64 percent cuts in enforcement—or 83 positions.

Secretary CHAO. I cannot speak to the supposed cuts in NIOSH. In terms of OSHA, we have actually been very much involved with

homeland security and with the anthrax scare. We have signed a partnership agreement with the international laborers——

Senator DODD. But do you agree with these cuts? Do they make sense to you?

Secretary CHAO. We are not cutting back enforcement. We are increasing——

Senator DODD. Well, how about the positions? There are 83 positions. OSHA is being cut by $9 million and 83 positions, and 64 of the cuts are in enforcement.

In response to my friend from Alabama, your answer was 38,000 inspections. I think you raised the question about how many inspections.

How do you increase the number of inspections when you are cutting back on the number of people who are charged with doing the job?

Secretary CHAO. Let me say that our enforcement action, as I mentioned—we are increasing our resources in enforcement. But let me go into more detail with John Henshaw, if I may.

Mr. HENSHAW. Thank you, Madam Secretary.

The Secretary IS RIGHT. We have not decreased our enforcement staff. In fact, we have increased it.

Senator DODD. Well, what is this number? Am I wrong about that number?

Mr. HENSHAW. Yes, you are. The inspection force has increased, sir. We are at 1,123 individuals. It is up from last year and will remain that in year 2003.

What you are speaking to is the overall enforcement staff which are primarily managerial and support staff. They are not our inspectors. Our inspectors are increasing.

Secretary CHAO. And they are all out in the field.

Mr. HENSHAW. There are the ones who are actually doing the inspections in the field.

Senator DODD. But we are going to cut back on that budget, anyway?

Mr. HENSHAW. To effective management, we are looking to cutting managerial staff, and that is successful; we can do that.

Senator DODD. All right. Let me jump to the Susan Harwood issue that Senator Clinton raised with you as well.

If we are talking about the minority community, the Latino community, how does a web-based program help? How many people in the Latino and minority community are on the web? Do we know?

Secretary CHAO. Let me answer one part of it, and then, John, if you can answer that, because you are going to be in charge. We, in fact, have a particular outreach program to Hispanic workers and other immigrants with limited English proficiency as part of our comprehensive plan. We understand that a lot of new immigrants are in these high-risk, low-paying industries, so we do have a special—we have a particular emphasis/outreach program for Hispanic workers. And John, if you can just describe that.

Senator DODD. Is this the web-based program that we are talking about?

Secretary CHAO. This is overall. The web-based is only a very small part of it, and that is not the only part of it.

Senator DODD. Go ahead, Mr. Henshaw.

Mr. HENSHAW. Senator, I appreciate the opportunity to comment on this. Let me just emphasize the fact that I have been in the safety and health business for 26 years, and my only job is to reduce injuries and illnesses. That is my only purpose in life. In fact, my kids say that I have been in this business all my life, and I say I have not yet, but I am working on it, and I will. This will be my entire life. This is the most serious thing that we are doing, at least I am doing as Assistant Secretary of Labor.

So the ergonomic issues are very serious to me, and this plan will work. It will produce quick results. It will produce lasting results.

Senator DODD. This plan for a plan. You are not calling this a plan, then.

Mr. HENSHAW. No, sir. This is a plan, and the plan has four elements. One element, one piece of that plan, deals with developing guidelines, industry-specific and task-specific guidelines. These are guidelines that will cover specific industries to help determine what are the real solutions to real problems.

Senator DODD. When will we get those, by the way, John? Do you have any idea when we might get these guidelines?

Mr. HENSHAW. I do not think you had stepped in the room—we had announced that nursing homes are the first set that we will be working on, and we have an agreement with all parties involved to help us develop these guidelines.

Senator DODD. When? Give me some ball-park.

Mr. HENSHAW. We are starting now, and we will have them out very quickly.

Secretary CHAO. As soon as we can.

The CHAIRMAN. The Senator's time has expired.

Senator DODD. Thank you.

The CHAIRMAN. Senator Edwards.

OPENING STATEMENT OF SENATOR EDWARDS

Senator EDWARDS. Thank you.

Secretary CHAO. And this requires input from groups—sorry, Mr. Chairman.

Senator EDWARDS. Thank you, Mr. Chairman.

Madam Secretary, I wanted to give you a chance to respond if you needed to.

Secretary CHAO. No. I am fine. Thank you very much.

Senator EDWARDS. Good morning. How are you?

Well, this has been an interesting hearing. I had been watching some of it before I came here. Let me tell you what my concern is and see if you can address some of these concerns. It appears to me that what is being proposed is that the only enforcement mechanism is enforcement under the general duty clause. Am I right about that?

Secretary CHAO. If it is—yes. That is an important component. It is a very valuable tool, yes.

Senator EDWARDS. But that is the enforcement mechanism that you are proposing, is use of the general duty clause; right?

Secretary CHAO. Yes.

Senator EDWARDS. Okay. Now, if I understand it correctly, what OSHA must show in order to—was that right—okay—what OSHA

must show in order to prevail under the general duty clause is first that a hazard exists, number one; second, that the hazard caused or is capable of causing serious injury; third, that the employer recognize the hazard; and fourth, that there is a means of abatement that the employers failed to employee—all of those things have to be shown. Would you consider that a fairly heavy burden for OSHA?

Secretary CHAO. I am not an expert. I believe that the legal advice that we have received is sound. There was talk about Mr. Scalia, and I am not interested in revisiting the confirmation battle over Gene Scalia; he is now our Solicitor, and he is doing a great job. Before he was appointed, he had no role in this. Since his recess confirmation, he has helped us refine our 5(a)(1) strategy. There has been some comment that he was very much aggressively against it. Well, I can think of no better advocate to help me draft this strategy than to have someone who understands every nuance. So he is now my advocate; he has a new client, and I am very confident that he will be a very forceful advocate.

Senator EDWARDS. Well, let me ask you about him, since you brought it up. I think Senator Kennedy raised this issue briefly earlier. I think in May of 2000, Mr. Scalia wrote an article about the very enforcement mechanism that you are completely depending upon now in this proposal, and it was called "OSHA's Ergonomics Litigation Record: Three Strikes, and It is Out." And I think he talked about three different cases. One was the Beverly Enterprises case which in fairness was reversed subsequent to the time that he wrote the article. But when he goes through the three cases and talks about use of the general duty clause as an enforcement mechanism, he uses words like "OSHA's record is embarrassing"—I am quoting him now—"embarrassing, devastating, dreadful." This is your Solicitor, as I understand it, talking about the very enforcement mechanism that you are now proposing be used. And again, in fairness, one of the cases was reversed after that time, but the other two I think were not.

Secretary CHAO. Well, he has a different client now.

Senator EDWARDS. So his view on that has changed?

Secretary CHAO. He has said that he will enforce the law. And I think it is noteworthy that Beverly Enterprises was settled when he came on board. This is a very effective tool, and it will be used.

Senator EDWARDS. Sure. Well, that is what I want to talk about, the effectiveness of the tool, because what Mr. Scalia was talking about was—regardless of who his client is or which side he is on——

Secretary CHAO. It makes a big difference.

Senator EDWARDS [continuing]. But what he was talking about at the time was how effective—he was not speaking for a client—he was talking about how effective he believed these OSHA general duty clause enforcement proceedings were, and he described them as "embarrassing, devastating and dreadful." And this is now the guy who is your Solicitor.

Let me just ask you about Beverly Enterprises, the case that you mentioned was just settled. If I understand it correctly, this case—and again, we are now talking about the only way that you will be able to enforce—this case, which was settled in 2002, took about

10 years, is that correct, from the time the first citation was filed in 1992?

Secretary CHAO. I believe so, yes.

Senator EDWARDS. And if I understand—tell me if I have these facts right—some of the remediation, in other words, what needs to be done to fix it, is going to take another 5 years. So for the employees who are involved, it is a period of 15 years. And again, correct me if I have these facts wrong—this was after a 31-day trial, four Labor Department lawyers involved, five expert witnesses, a 5,500-page trial record, a long decision by an administrative law judge who ruled against you and, 5 years later, an even longer decision by the OSHA Review Commission.

Did all of those things happen in that 10 years that this case was going on—if you know.

Secretary CHAO. I am not a trial attorney, as experienced as you are. All I know is that the last administration was more intent on getting out a rule than showing real enforcement teeth on this general duty clause——

Senator EDWARDS. But can I tell you—excuse me—I will not interrupt you; you finish.

Secretary CHAO [continuing]. And let me also add that the labor union that is involved with workers who work in this industry was very satisfied with the outcome.

Senator EDWARDS. Well, here is my concern. If the only way you have of enforcing these voluntary standards that you are creating is this mechanism, and the two cases you cite as successes, one took 10 years and will take another 5, at least for some provisions, for remediation; so that is 15 years. The other case, which is the Pepperidge Farm case, took a period of almost 10 years, and the factory that is involved is actually not even open any more; it is closed, as I understand it. And those are the cases that you cite as examples of how successful it is.

Here is what I am concerned about. Let me just give you a hypothetical case. Let us assume that you have a company that has bad working conditions, and they do not want to fix them, and you give them a citation under this general duty clause provision. The company goes to its lawyer—we know this happens in the real world—and the company says, "Listen, it is going to cost us all this money to fix this thing. I do not agree with them. I do not want to do it. Can we fight it?"

And their lawyer, who is an experienced lawyer representing them in these kinds of cases, says, "Well, you know, the truth of the matter is the Labor Department has limited resources." My experience with these things has been that they take years; they can take as long as 8, 10, 15 years. And every day that that case is going on, you can keep operating exactly the way you are operating now.

Would you be surprised—if the only enforcement mechanism is what you are proposing—would you be surprised if lawyers who are out there representing companies who are violating the standards that you are proposing would give that kind of advice?

Secretary CHAO. I think it is noteworthy in Beverly that we fought it out with five homes, five facilities, within this company. We were able to leverage that to 275 facilities. So I think that this

tool, if used properly and used intensely, could be of very much value.

I don't think there was the comprehensive approach nor was there a linking up of a legal strategy with the enforcement strategy to make this work.

Senator EDWARDS. But would you—just one last question, Mr. Chairman—would you be surprised if this is all you have got, if it is the only tool you have got—and that is what you are proposing—would you be surprised if the lawyers out there representing these companies may not give advice that these things drag on, you can fight them, you can keep doing exactly what you are doing—and by the way, in the meantime, the workers who are employed are continuing to be hurt every, single day.

Secretary CHAO. Certainly.

Senator EDWARDS. That is something you would be concerned about?

Secretary CHAO. Absolutely. I may also say that Beverly and Pepperidge Farm were just the first two decisions. We have to establish some new principles, and I think the next cases will be faster.

Let me also say that if we had a rule, and if that rule had been—I talked a lot about litigation already under the previous law; the lawyers can object under the previous repealed rule as well.

Senator EDWARDS. Thank you very much, Madam Secretary.

Secretary CHAO. Thank you.

The CHAIRMAN. Just very briefly, Madam Secretary—and I thank you so much—we are winding up this part of the hearing, and we still do not have the goals or the timetables set by the administration.

This is what the OSH Act of 1970 says: "To assure safe and healthful working conditions for working men and women by authorizing enforcement of the standards developed under the Act." There it is, the first sentence—standards.

Over the period since this Act has been in force, we have had standards on benzene, we have had standards on lead, we have had standards on asbestos, on coal dust, on bloodborne pathogens, on formaldehyde, on confined spaces. We have had scores of standards, and none of those—none of those—has even come close to causing the number of injuries that we have with ergonomics.

I do not see how you can possibly justify the fact that the administration refuses to do what it has the power and the authority to do, and that is to really protect workers by issuing new standards. You do not have the timetables, you do not have the guidelines. You cannot measure your own results, and there is no way in the world that we are going to be able to do that, either. That is my real disappointment as a result of the administration's position on this.

If you want to make a brief comment, I would invite you to make any comments that you would want to on that.

Secretary CHAO. Mr. Chairman, I appreciate the opportunity to appear before the Committee. Ergonomics injuries is an issue which I am very concerned about. I am concerned about enacting a speedy program that will get results, and a rule would have

taken too long; it would have been subject to litigation and further possible stays.

I am concerned about prevention as well. The previous rule had a trigger in there; I did not like that.

I hope that the Committee will work with me, because this Department wants to prevent ergonomic injuries before they occur. We have a strong enforcement program. We want to add to the research. We have a national advisory committee which we are going to call upon, people who are well-versed in this area, to seek their help as well.

So I hope the Committee will work with us, and as we go forward, we do hope—it is certainly my intent to show results.

The CHAIRMAN. Senator Gregg.

Senator GREGG. Thank you, and I apologize, Madam Secretary, for having had to leave briefly, but I was able at my other event to watch a little bit of the testimony. One of the issue which was raised, which I thought was interesting, was this question of the relationship of the Department on its rules relative to the States. As was mentioned, there are 26 States that have legislation in this area and have operating agencies in this area. The argument was made, I think by the Senator from New York, that the only way the Federal Government could assert its jurisdiction was through a rule, that if we did not have a rule, if we used the guideline approach that the Department is suggesting, then you would have to work with the States in order to accomplish the regulatory oversight and to get the type of workplace atmosphere that you deem appropriate.

This raises two issues. First, is it the assumption of the Department as it appeared to be the assumption of the question that these States, especially, for example, New York, are not capable of coming up with their own workplace rules which effectively address the issue of ergonomics?

And second, is it reasonable to presume that you must use the hammer of the Federal Government coming in and using a one-size-fits-all rule to address issues which are uniquely divided amongst the States, or is it reasonable to assume that the Department can work with the States to develop guidelines which are jointly pursued and which effect the result of being concerned about workers.

I would be interested in Mr. Henshaw's response to that, because he responded to the original question, and the Secretary's also on this.

Mr. HENSHAW. Thank you, Senator.

Yes, you are correct. The State programs have the responsibility to enforce the requirements under OSHA. We are granting them that right through our funding, and they are executing it. They can promulgate more stringent standards, but they must be at least as stringent as the Federal system.

Two States, as you know, have ergonomic rules. One is a trigger, which is California, which the Secretary already indicated that that was not acceptable to her. The other one is Washington State, which as you know, the Governor has also put a stay on the Washington State rule. So those two States have done something in addition to what we are doing.

The comprehensive plan covers the entire Nation. Our efforts around the four prongs cover the entire Nation. Certainly the States have the ability to enforce under 5(a)(1), and we will work with them to make sure their enforcement strategies were up to par to be successful when we choose to take 5(a)(1), the general duty clause.

The guidelines we are working on are nationwide guidelines, and implementable, and will be implemented across all States regardless of whether it is a State plan or a Federal system. So our approach covers nationwide.

I have talked in several States to the people who run these State programs, and they are very supportive of this plan. They believe it will work just as we believe it will work, and they are going to work with us to execute plans successfully to reduce musculoskeletal disorders.

Secretary CHAO. I might also add that the Federal OSHA really does apply to private employees in New York State—and I am talking specifically about New York State. The State plan in New York actually only applies to the public sector.

Senator GREGG. Thank you. I appreciate your time.

The CHAIRMAN. Senator Wellstone.

Senator WELLSTONE. Well, Mr. Chairman, the Secretary has been here for a long time, with much questioning, and I know we have other witnesses. There are two things I want to mention just for the record.

Senator Harkin wanted to be here today, but he is in a conference committee on the agriculture bill, and he wanted me to convey that to you, Madam Secretary.

And I would like to put some questions to you on the research agenda. I raised that at the beginning, and I will just put those written questions to the two of you, and we will do it that way because we have other witnesses as well.

There is a strong difference of opinion, obviously, but I do thank you for being here.

Secretary CHAO. Thank you.

[The prepared statement of Senator Harkin follows:]

PREPARED STATEMENT OF SENATOR TOM HARKIN

Thank you, Mr. Chairman, for holding this important hearing and thank you, Secretary Chao, the UFCW and other witnesses who have joined us today to talk about this proposal.

Before I begin with my questions, Ms. Chao, I'd like to take a moment to express my extreme disappointment in the proposal that the administration released earlier this month.

I've taken a good look at your plan—and from what I can see, your four-pronged approach does very little to prevent these debilitating injuries.

In your April 5 announcement packet, you're quoted as saying "This plan is a major improvement over the rejected rule because it will prevent ergonomics injuries before they occur and reach a much larger number of at-risk workers."

Your plan does nothing of the sort. What you're proposing are unenforceable guidelines and a commitment to continue efforts—such as OSHA compliance assistance—that already exist. Of

course, that commitment doesn't seem too strong since the President's 2003 budget cuts compliance assistance.

I just can't understand how your voluntary plan will prevent more injuries than an ergonomics rule—that is enforceable and based on more than 10 years of scientific study.

Well, I'm pleased that here in Congress we're still pursuing an enforceable rule to protect America's workers—many of whom who suffer from these injuries are women. I am a proud cosponsor of the bill Sen. Breaux introduced yesterday that puts a 2-year deadline for a final rule.

The CHAIRMAN. Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman.

I just want to thank the Secretary for being the first Secretary of Labor to appear before the Committee and for now having done that twice.

On the general duty clause, I feel compelled to point out that when we had testimony before, one of Senator Wellstone's people showed that the general duty clause does work, that there had been huge improvements in their company as a result of that. And that had not been one of those that went through the 10-year process. So the threat of the general duty clause is a provision that can make a difference.

Senator WELLSTONE. I want to remind my good friend that the Secretary is on record saying that the general duty clause will not be invoked in relation to the voluntary standards; so that is the problem once you de-link it.

Senator GREGG. Does the Secretary wish to respond to that?

Secretary CHAO. We will target. We have a strong enforcement program. We will target bad actors.

Senator WELLSTONE. I understand that, and you keep saying that, but I asked you whether in relation to your voluntary standards whether it was directly linked or not if people did not comply, and you said no.

Secretary CHAO. We will be very targeted in our approach, because you cannot inspect every single workplace even if we had a rule. So we are going to be able to target specific offenders, and that will be a strong deterrent effect. We will make sure it is successful.

The CHAIRMAN. Madam Secretary, this is obviously a matter of enormous importance and consequence—I know you feel that way—and we have important areas of difference, but I want to thank you very much for appearing before our Committee today and for your responses to the questions. We are very, very grateful to you for doing so.

Secretary CHAO. Thank you, Mr. Chairman.

The CHAIRMAN. We now welcome our panel.

Jackie Nowell is Director of Occupational Safety and Health for the United Food and Commercial Workers. She is a certified industrial hygienist and earned her Master's in Public Health at the University of California. She served as Assistant Professor in the Environmental and Occupational Health Sciences Division of Hunter College in New York City. In her work with the United Food and Commercial Workers, she has been deeply involved in the

development of major ergonomic programs, particularly in the red meat and poultry industries.

Melody Purvis started working in the returns department at Brylane in Indianapolis, IN in November 1993. Brylane is a major catalog clothing company. We welcome her.

Paul Fontana is an Occupational Therapist and owner of Fontana Center for Work Rehabilitation in Lafayette, LA. The Fontana Center has 40 employees who administer programs to businesses and individuals such as industrial injury prevention, rehabilitation, and return to work. We are delighted to have him here.

Jackie, do you want to start?

STATEMENT OF MS. JACKIE NOWELL, DIRECTOR, OCCUPATIONAL SAFETY AND HEALTH OFFICE, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

Ms. NOWELL. Thank you, Chairman Kennedy and Members of the Committee.

I am Jackie Nowell. I am ddirector of the Occupational Safety and Health Office at the United Food and Commercial Workers Union. We represent packinghouse workers, poultry workers, retail store workers, and myriad other industries.

Thank you for the opportunity to testify today about ergonomics and the Department of Labor's proposal for addressing the nearly 2 million MSDs suffered each year by American workers.

My testimony provides historical background and evidence for why the Bush Administration's proposal to confront this epidemic with a voluntary program will fail to bring about a significant reduction in musculoskeletal disorders.

My full statement is in the record, so I am going to summarize, and I also want to raise a few points that were raised both by the Secretary and by the Committee.

The Department of Labor's announced plan released on April 5 merely mirrors OSHA's experience in the red meat industry more than 10 years ago. Everything else has been used except a standard, and I think that was well-put this morning.

Let me give you that scenario in the red meat industry. We have very high rates of injuries in the industry. The union filed, in the late 1980s and 1990s, OSHA complaints. These resulted in inspections and citations under the general duty clause and high fines including, actually, those for recordkeeping.

The companies settled. The settlement agreements mandated highly successful ergonomics programs. In the midst of that enforcement in 1990, OSHA utilized the expertise of ourselves, the union, the meat industry and the Government in development of these now-famous red meat guidelines. I actually brought a copy with me; they used to be red, and they are now green.

In 1990, Secretary of Labor Elizabeth Dole announced her commitment to go forward with an ergonomic standard. Then again in 1992, Secretary of Labor Lynn Martin again committed to a standard. During the mid-1990s, there was research going on, and there were also tripartite stakeholder meetings.

The missing piece, of course, was a standard. So when we talk about comprehensive plans, all has been done before. The missing

piece was a standard. And the administration in 2002 actually published a standard.

This bit of history shows that rather than moving forward, the Department of Labor is actually moving backward.

Let me say a little bit about the incidence of MSDs which was raised here this morning in the meat-packing industry. While much has been done, let me give you the most recent statistics and then an example from one of our plants.

The meat-packing industry still leads all industries in numbers of injuries and illnesses. Fully one-quarter of meat-packing workers are injured every year.

Number two, the weight of lost work-day injury/illnesses cases leads all other industries.

And number three, the meat-packing industry still leads the pack with MSDs.

One of my plants, which is the starship plant for having an ergonomics program, the union tells me today in this year has an MSD rate of 10 percent. Is that okay? Is that acceptable? We say no.

As for the Bush Administration's plan, where is the beef? Workers have waited over 1 year, and the announced plan is less than three pages long, and it contains no specifics.

As to the issues of State plans and employer guidelines—again, these were raised earlier—there has never been anything to stop the States from going forward with ergonomic rules or with guidelines. As a matter of fact, several have done that. There has never been anything that would stop the industry from going forward with ergonomic guidelines.

This plan announced today does not give anybody permission to do any of that. That all has been there.

In terms of the guidelines, I again want to put in context the red meat guidelines. They came on the heels of high, high numbers of injuries in this industry. Union complaints that brought OSHA into those plants, inspections, high fines—John Morrell was fined $4.1 million, the highest fine in OSHA's then history—were followed by settlement agreements, and part of the reason they settled was because it was also a recordkeeping issue. These companies were bad actors at the time. So we got settlement agreements.

On the heels of that, people sat down from all of the parties and said let us come up with guidelines on this, and at the same time, the agency said they were moving forward with a standard. So whenever someone tries to take the red meat guidelines out of context, you must remember that they were in a context, and that it was 10 and 12 years ago. Companies get it now. They know about enforcement, they know about general duty clause. I do not think it would work today the way it worked back then.

The CHAIRMAN. Take another minute if you could wrap up.

Ms. NOWELL. Okay. The general duty clause was talked about a lot. In terms of outreach and assistance, we represent low-wage workers, immigrant workers, and we believe that cutting back the very grant program that is reaching those workers is a real mistake. We were very glad to see that Senators Breaux and Specter introduced legislation yesterday that would force the Department

to issue a standard. Workers now look to you, their elected officials, to swiftly pass legislation.

Thank you.

The CHAIRMAN. Thank you very much.

[The prepared statement of Ms. Jackie Nowell follows:]

Committee on Health, Education, Labor and Pensions
United States Senate Hearing

Over one year later, inadequate progress on America's leading cause of workplace injury

April 18, 2002

Testimony of
Jacqueline Nowell, Director
Occupational Safety and Health Office
United Food and Commercial Workers International Union

Chairman Kennedy and members of the Committee, my name is Jackie Nowell and I am the Director of the Occupational Safety and Health Office at the United Food and Commercial Workers International Union. Thank you for the opportunity to testify today about ergonomics and the Department of Labor's proposal for addressing the 1.8 million musculoskeletal disorders suffered each year by American workers.

I want to tell you about a young packinghouse worker who came to Washington to meet with Secretary Chao last March, one week after President Bush signed the resolution repealing the OSHA ergonomics standard. Julio Gonzalez came here from Omaha, Nebraska, to tell Secretary Chao about how he had to quit his job after 8 years in a packinghouse because he was afraid that if he continued to work there, he would become disabled. Julio's job was as an aitch boner, a very difficult boning job, a job that had not ergonomic design changes. His shoulder became injured and by the time the company moved him to another job, he had damage that required surgery. He went back to the job after recovering and four months later, his other shoulder began to bother him. He was in and out of the nurses office and doctors and finally they told him he needed another surgery. That was when he quit. He can use both his arms but he has no strength.

It is well known and documented that ergonomics programs over the last 15 years have worked to reduce costs, increase productivity and improve the general well being of workers. There is ample evidence as well that there aren't enough companies implementing them. Fully 41 percent of all direct workers compensation costs, or $15.7 billion, is attributable to overexertion, bodily reaction and repetitive motion. (Liberty Mutual reports, 1998) My testimony will provide historical background and evidence for why the DOL's proposal of a voluntary program and enforcement under the General Duty Clause,

at this point in the epidemic, is doomed to failure and will not bring about a significant reduction in musculoskeletal disorders.

The UFCW's experience

I'm going to give you some UFCW history with the issue of musculoskeletal disorders (MSDs) and ergonomics. Without a doubt, ergonomic hazards and MSDs are the number one safety and health problem facing UFCW members. While we represent poultry and retail workers, as well as healthcare, boot and shoe, garment and textile manufacturing and myriad other industries where workers are suffering from this crippling disorders, my written testimony and remarks will concentrate on the red meat industry as OSHA's experience in this industry regarding ergonomics very closely tracks the current Department of Labor's announced plan released on April 5, 2002.

We believe that nothing would have been done about MSDs without unions raising the concern in the early 1980s. Meatpacking workers were experiencing wrist disorders at 21 times the number experienced by other manufacturing workers *(Monthly Labor Review,* 1983). The Bureau of Labor Statistics (BLS) reported disorders related to cumulative trauma in the meatpacking industry peaking in 1991 (1493.7 per 10,000 workers), and dropping 11% in 1993 (1298.8 per 10,000) and steadily declining since. This coincides with OSHA enforcement activities, corporate-wide settlement agreements in the industry, publication of the Ergonomics Program Management Guidelines for Meatpacking Plants (Red Meat Guidelines), the resultant implementation of ergonomics programs and a strong union presence. I'll return to statistics later in my testimony.

Early on our union conducted education and training with our meatpacking locals, and requested research by academics into the ergonomics problems in several industries. By the late 1980s, we were filing OSHA complaints in the meatpacking, catfish and poultry industries in response to the lack of medical management for the growing epidemic of MSDs, the lack of attention to engineering changes that were needed to address the problem and the lack of an OSHA standard or activity. These complaints resulted in huge citations. IBP was cited and fined $3.1 million for exposing workers to repetitive-motion illnesses at its plant in Dakota City, NE and John Morrell & Co. in Sioux Falls, SD was cited and fined $4.33 million for willfully ignoring cumulative trauma disorders. This penalty was the largest ever proposed against a single employer in OSHA's then 17-year history. One year before, they were cited for 69 alleged instances of willfully violating requirements for accurate recordkeeping of injuries and illnesses, a penalty of $690,000. (OSHA press releases, October 23, 1988 and March 21, 1990; UFCW Chronology of Events, Sioux Falls, SD plant). (In all, more than 550 citations, under the General Duty Clause were issued, many precipitated by union complaints.) Thirteen of these resulted in Corporate-wide Settlement Agreements (CWSAs) covering multiple sites. The settlement agreements required the companies to implement ergonomics programs, which were highly successful (more on this later in my testimony). OSHA utilized the expertise of the union, the industry and the government in development of the Red Meat Guidelines, which described the program elements developed under the CWSAs in detail, in the midst of the enforcement activity.

Importantly, in 1990, then Secretary of Labor Elizabeth Dole announced her commitment to go forward with an ergonomics standard.

In 1991, we were the lead union filing a Petition for an Emergency Temporary Standard on Ergonomic Hazards, which then Secretary of Labor Lynn Martin denied, instead committing to begin the standard setting process. We submitted in-depth comments and documentation to the 1992 Advanced Notice of Proposed Rulemaking issued by acting Assistant-Secretary for OSHA Dorothy Strunk.

During the mid-1990's, OSHA held tripartite stakeholder meetings on a draft ergonomics standard and "Best Practices" conferences around the country.

And NIOSH, with monies set aside in settlement of one of the agreements in red meat, conducted intervention research projects to reduce ergonomic hazards at three meatpacking plants. (NIOSH, published 1994)

The provisions in the Bush Administration's ergonomics plan have all been done before, they are the activities the DOL did ten years ago and again 7 years ago (OSHA's 4-pronged Program,Federal Register, Vol. 65, No. 220, Pgs. 68266-68268) ! The missing piece is, of course, a standard. So rather than moving forward with rulemaking, this Department of Labor is **moving backwards**.

MSD STATISTICS

While, as I describe in my testimony, much as been done to reduce the risks and numbers of MSDs in the meat industry, the statistics for the year 2000 show several disturbing trends that I think are worth noting. The meatpacking industry continues to lead all industries in rate of injuries and illnesses — fully one quarter of all packinghouse workers suffers a recordable occupational injury or illness. As well, workers in the meatpacking industry suffer the highest rates for lost workday cases, those injuries and

illnesses that are serious enough to warrant a day away from the job. And the industry still leads in the rate of disorders associated with repeated trauma. One statistic that is coming down significantly is "days away from work" cases that are associated with repeated trauma and other MSDs. But this is a misleading statistic because, while workers are not missing work as a result of an MSD, they are on "restructed duty." These cases are classified as restricted duty, not "days away from work," which can consist of sitting in the break room, or in the safety office, or being assigned to a different job. Workers who are diagnosed with work-related carpal tunnel syndrome and undergo carpal tunnel release surgery are scheduled for surgery on Friday and are expected to report for work on Monday. This is a restricted duty case, not a days away case, but the BLS doesn't keep statistis on restricted days, and so it looks like things are getting better. **Therefore the drop in the lost workday injury and illness rate statistic merely reflects the current medical management of MSDs, a shifting of cases from time off the job to restricted duty.**

Another issue that the MSD statistics don't reflect is the issue of underreporting. The meatpacking industry, while it was under intense scrutiny in the late 1980s and early 1990s when OSHA enforcement included recordkeeping citations, and because it is a heavily unionized industry, probably more fully reported their true injury and illness cases. Many plants also incorporated early detection into their medical management programs that reduced the severity of these injuries. But, today's changing immigrant workforce is not reporting consistently when hurt. They leave the employer, or they are told they should use their health insurance or the free clinic.

Finally, is the Department of Labor willing to settle for the current MSD experience in this industry? One of our plants, with probably the most effective ergonomics

program, has a ten percent MSD rate for the year 2000. Is that good enough? The answer is clearly NO.

A more detailed analysis of MSD statistics is attached as Appendix A.

The Bush Administration's plan for addressing ergonomic hazards

As Secretary of Labor Elaine Chao laid out this morning, the Department is planning to develop a program that includes voluntary industry and task-specific guidelines, enforcement under the general duty clause, outreach and compliance assistance and research. I'm going to comment on each of the elements of this program.

First, *Where's the beef?* Workers have waited over one year and the announced plan is less than 3 pages long and contains no specifics!

Guidelines

The Bush Administration has proposed developing voluntary guidelines in selected industries and tasks but after thirteen months of delay, they have given us neither the industries they are targeting nor have they outlined the process by which they will be developing the guidelines or a timetable for issuance. But most importantly, guidelines won't work, not today. It is my belief that all the companies that were going to voluntarily implement ergonomics programs and address MSD injuries have done so already. With the lack of commitment by this DOL, and this weak, non-protective approach, there will be little incentive for companies to do the right thing.

This union and the meatpacking industry have a great deal of experience with guidelines. For one thing, they were jointly developed with OSHA over a year-long

process. They describe the elements that were incorporated into the CWSAs. These were worksite analysis, hazard prevention and control, medical management, training and education and employee involvement and management commitment. And most meatpacking plants that the UFCW represents, to some degree, have these programs.

The DOL has been quick to point to the Red Meat Guidelines as successful and therefore worth duplicating for other industries, better actually than a standard. In the words of Secretary Chao, more protective in that it "will prevent ergonomics injuries before they occur." We disagree.

But a little context and history is instructive! The Red Meat Guidelines came in the midst of strong, union-complaint driven enforcement activity by the OSHA agency in the red meat industry. To illustrate the impact that strong enforcement was having in the industry, in 1989, one of the large meatpackers, whose parent company had already incurred citations in their poultry division, came to the UFCW and suggested that we negotiate an ergonomics program as part of the collective bargaining agreements. They knew we would file a complaint in one of their plants eventually if they didn't do something. Lawyers for the industry itself were advising meat companies to ignore the guidelines at their peril (*Meat Processing* editorial, May 1990).

Based on the success of the Red Meat Guidelines, OSHA soon developed draft ergonomic program management recommendations for General Industry but held them back after industry told them it was "back door standard setting."

The Red Meat Guidelines were issued in the context of strong enforcement and a commitment by the Department of Labor to proceed with rulemaking. (See Timeline attached to this testimony) So the enforcement led some companies to the door, the

guidelines were an interim step for moving others through the door and the impending rulemaking was the hammer for many of the rest. The industry knew that a standard would require them to address ergonomic problems.

General Duty Clause enforcement

History shows a need for strong OSHA enforcement and standards where a significant hazard exists, and when there is no standard, that enforcement is carried out under the General Duty Clause (Section 5(a)(1) of the Occupational Safety and Health Act). Namely, employers are required to provide a safe and healthy place of employment.

In the 1980's and 1990's the Reagan and Bush Administrations successfully used the General Duty Clause to enforce against ergonomic hazards in meatpacking, poultry and other high risk industries. The inspections revealed large numbers of injured workers who were seriously injured. In the case of John Morrell & Co., 880 of Morrell's 2,000 employees sustained "serious and sometimes disabling cumulative trauma injuries" in just one year! 63 of the workers had surgery that same year!

But the number of workplaces covered by these actions was limited and was a huge endeavor on the part of OSHA, including astronomical costs. And subsequent employer challenges to enforcement actions and legal decisions made the use of the General Duty Clause much more difficult.

An illustrative example is the last major ergonomics case OSHA brought against an employer, Hudson Foods (Tyson Foods, Inc.) in Noel, Missouri. A 5 (a)(1) letter (a warning) to the company was the result of an inspection in 1997. The union filed a subsequent complaint when the company failed to correct the conditions. OSHA utilized

experts and conducted a lengthy investigation which led to citations under the General Duty Clause and fines of $840,000. The case ultimately resolved two years later and resulted in a very weak settlement agreement. Tyson agreed to implement the existing program at another of its facilities with no specifics of how that would apply to the Noel location. This program is a mere shadow of the prior settlement agreements OSHA previously negotiated.

We believe this case shows that strong and meaningful OSHA enforcement under the General Duty Clause is extremely difficult and that companies know this. The *Beverly Enterprises* and *Pepperidge Farm* cases also illustrate that long, expensive litigation is not effective in protecting workers, at least on any wide spread basis. The broad use of the General Duty Clause had its time in the history of the evolution of ergonomics and, as such, was a piece of the process that preceded standard development (enforcement, citations, programs under settlement agreements, guidelines, gather information for a standard). Again, the DOL with its plan announced two weeks ago, is going backwards.

Today, we continue to file OSHA complaints under the General Duty Clause on behalf of our members on a selected basis in plants with major MSDs problems and employers have done little or nothing. The UFCW recently filed such a complaint at a poultry plant in Lufkin, Texas. Workers were suffering from MSDs at a rate far above what we've come to see in plants that have implemented ergonomics programs. We approached the company with our concerns and offered to assist them in implementing a meaningful program but they refused our offer. We felt we had no choice, given the lack of any commitment by the Department of Labor to address this issue more than a year after President Bush signed the resolution repealing the OSHA ergonomics standard and

promised to pursue a "comprehensive approach" to ergonomics. But we also know the process. We know the inspection will take a full six months and if the company is cited, the settlement or litigation will take years to change anything for the workers in that plant. And we know that OSHA's utilization of this limited tool has had its day except for the most egregious cases.

Other questions are raised by the DOL's plan to use the General Duty Clause to enforce against ergonomic hazards. What will be their basis for citations -- what will OSHA cite? Some things have been done as a result of the massive effort by OSHA to educate and inform employers of ergonomic hazards and solutions as well as industry and task specific guidelines that already exist and have existed for years. And who will OSHA target for this enforcement — beyond a previously announced but as yet uninitiated program targeting nursing homes? And how many — what is their target number of inspections for sending the message? The DOL has informed us that they will also use 5 (a)(1) letters when there isn't enough evidence to cite under the General Duty Clause but they want to pressure a company to fix their ergonomic problems. What will be the criteria for the use of these warning letters? What criteria will they use for measuring an employers" good faith" effort to address MSDs in their plant? Again, the Bush plan offers no information on any of these issues.

Corporate-wide Settlement Agreements (CWSAs)

The citations and unprecedented fines on ergonomic hazards levied by OSHA in the 1980s and early 1990s led to settlement agreements which often reduced the fines and importantly, committed the companies to long-term programs aimed at solving their

ergonomic problems. The programs required employee involvement and management commitment. The elements were worksite analysis to identify existing hazards; hazard prevention and control to eliminate job hazards through redesign, work practices and administrative controls; medical management to eliminate or reduce MSDs and their severity; training and education. Where the agreements were complied with, they resulted in improved conditions and greatly reduced the numbers and incidence of musculoskeletal disorders. One plant reported to us a one-third reduction in surgeries in just the first year. We worked closely with several of the companies in getting the programs off the ground. We signed side agreements with the companies that established committees and workers specifically designated a critical role in the programs. In one of the agreements, rank and file members were designated as "ergonomic monitors" to identify ergonomic problems and potential solutions and to be the unions primary involvement in the program. They received one week of training by an ergonomics consultant and received periodic training as well. These programs continue today in many but not all the plants. Were they waiting to see what a standard would require?

The CWSAs and other ergonomic settlement agreements that have covered UFCW-represented plants are listed below.

IBP, 1988
Empire Kosher Poultry, Inc., 1989
Hillshire Farm Co./Sara Lee Corporation, 1989
John Morrell & Co., 1990
Cargill, Incorporated, 1991
Delta Catfish Processors, Inc., 1991
National Beef Packing Company, 1992
ConAgra Poultry Company, 1992
Simmons Industries, Inc., 1994
Monfort, Inc., 1995
Marshall Durbin Companies, 1995

Oscar Mayer Food Corporation, 1985

State-plan OSHA settlement agreements:

Farbest Foods, Inc., Indiana, 1991
Worthington Packing Company, Indiana, 1992
Worthington Pork, Minnesota, 1995

Outreach/Compliance Assistance

The DOL plan includes a component on outreach and compliance assistance and we support efforts to continue this effort. In fact, we and many of our employers have actively participated in the numerous conferences and stakeholder meetings that OSHA has sponsored over the past 10 years, and we and some of our employers have also used many of the publications, videos, and web pages that OSHA and NIOSH have produced over the last ten years. But we need more than just compliance assistance!

But let me make a couple of things perfectly clear. First, as I said, while we find compliance assistance very useful, it's nothing new. OSHA and NIOSH have been funding compliance assistance efforts on ergonomics for over a decade. And I think I can say without much doubt that there is no company out there that can honestly say that they aren't doing anything on ergonomics because they can't find enough information. Between the efforts of OSHA and NIOSH over the past decade, and the efforts of industry associations, universities, unions and ergonomics consultants, this nation's cup overfloweth with ergonomics information. While there is always the need for more and better information, the real problem for workers is that there is no effective way to force employers to control ergonomics hazards in their workplaces.

Second, far from increasing those efforts, OSHA is actually proposing to cut back on its total compliance assistance by $4 million in FY 2003. Not only are they ending the highly successful worker training program that I have discussed, but they are ending the whole Susan Harwood grant program and replacing it with another program that is 64% smaller and based not on the actual face to face training that has proven so effective, even by OSHA's account, but rather on a web and computer based training program.

Now web- and computer-based training may be effective in certain situations, but speaking for our members, the ones that need this training most go home every night to the barrios and trailer parks. They don't have the high speed web access and powerful computers that one needs to take advantage of this technology. Nor do they usually have time to get trained at home on their own time when the law says that they must be trained at work on paid work time.

Since 1994, the UFCW has received OSHA Susan Harwood Training Grants to conduct training and education programs, particilarly on ergonomics, in our high risk industries, especially meatpacking, poultry and food processing. Our grant targets the most vulnerable workers of all - workers in meatpacking, poultry and food processing plants who are non-English speaking, who by OSHA's own statistics are shown to be at increased risk for fatal on-the-job injuries. The current grant (FY 2000), OSHA Institutional Competency Building grant, came with the promise that it would be long term, and we are in the process of building infrastructure and institutional competency. In just one year under this grant, we trained over 800 workers in these high-risk industries, nearly 100% on work time. OSHA's budget, however, FY 2002, has been reduced by 25% and has

prematurely terminated the program despite the fact that Congress provided the money specifically for this program.

Along with the training, we have conducted conferences, hired a bi-lingual occupational safety and health trainer and placed her in a UFCW regional office. We have partnered with the meat industry to address outreach to Spanish-speaking workers, looking to research the links between new immigrants and the high fatality incidence in meatpacking and to increase participation in safety and health.

It would be a shame to halt this progress in occupational safety and health training for high-risk workers and lay off highly skilled and productive health and safety professionals given OSHA's inclusion of training as part of its comprehensive approach to ergonomics. But OSHA has reduced our funding and terminated these programs, despite this record!

Research/Science Advisory Committee

We are also quite disturbed that OSHA has chosen to spend any money or time on identifying research gaps or developing a research agenda. First, the Occupational Safety and Health Act is very specific on the fact that NIOSH and not OSHA, has research responsibilities, including intervention research. Second, the National Academy of Sciences, using $1.4 million of government funds, conducted two extensive literature reviews of all the existing science on ergonomics, and identified research gaps.

Finally, NIOSH's National Occupational Research Agenda, commonly known as NORA, issued a report in January 2001 entitled Research Topics for the Next Decade: A Report by the NORA Musculoskeletal Disorder Team. The review focused on very

practical research needs and the report produced sets forth a comprehensive research agenda. The team that produced the report is a group of experts from industry, labor, and government. The inquiry/review was a broad based process involving 3 focus groups of 150 practitioners and another researchers workgroup meeting involving 50 researchers. Meanwhile the Bush Administration has proposed to cut $28 million from the NIOSH budget and NORA.

While these studies and reports identify research gaps, a large community of medical and health experts is on record that the scientific evidence on MSDs is sound and that an OSHA ergonomics standard is needed to protect workers. Yet, the Bush Administration continues to insist that we can't move forward more aggressively until there is even more research on what causes MSDs, how to measure exposure exactly and how to choose effective controls. Our fear is that this research committee is just another way for the Administration to provide a forum for those who say there's no science behind ergonomics and that ergonomic injuries are simply a matter of workers not being able to cope with the exertion required in difficult jobs.

In other words, the research section of this "plan" brings the phrase "been there, done that" readily to mind. The bottom line is that in this time of alleged budgetary austerity where we're trying to make every dollar count, when the Administration is proposing to cut back on needed and effective programs, spending even one OSHA cent on research seems to me to be the epitome of government waste.

Coverage for workers in OSHA state-plan states

The issue of coverage of workers in the 23 states and territories states that have their own OSHA plans has not been addressed by the DOL. The Bush Plan only applies to states covered by federal OSHA. States will not be mandated and workplaces won't be covered by a voluntary program while an OSHA standard by statute must be adopted by states with approved state plans.

Summary

OSHA had sufficient information and experience from its major enforcement cases, from the development of meatpacking industry ergonomic guidelines, from stakeholder meetings and best practices conferences, from the compliance assistance and outreach, research literature and the experience of the OSHA Susan Harwood grantees upon which to base a permanent standard. This hasn't changed with changing administrations. There is nothing here that will help the million workers who have suffered an MSD since the Administration repealed the ergonomics standard.

Workers now look to you, their elected representatives to take action to pass legislation that will force the Bush Administration to issue a new ergonomics standard that will protect them.

Appendix A

The Epidemic Continues: MSDs Still the Leading Job Safety Problem for Workers in America

Musculoskeletal disorders (MSDs) caused by ergonomic hazards are the biggest job safety problem workers face today, which OSHA has estimated account for more than 1.8 million injuries every year (65FR68762). According to a recent report from the Bureau of Labor Statistics for the year 2000, more than 572,000 musculoskeletal disorders which resulted in one or more days off the job were reported by private sector employers, accounting for 34.7 percent of all days away from injury and illness cases.

The industries that reported the highest number of MDSs involving days away from work MSDs were hospitals, nursing homes, air transportation, grocery stores, and trucking and courier services. Occupations with the highest reported numbers of MSDs were truck drivers, nurses aides, laborers, assemblers, janitors and registered nurses.

For certain types of MSDs, including those caused by repetitive motion, and MSDs involving the upper extremities women workers are at particular risk. According to BLS, in 2000 women workers experienced 63.9 percent of all repetitive motion injuries and illnesses, 67.7 percent of carpal tunnel syndrome cases and 62 percent of tendonitis cases.

It is important to recognize that the numbers and rates of MSDs reported by BLS represent but a part of the total MSD problem. These figures do not include injuries suffered by public sector workers or postal workers, nor do they reflect the underreporting of MSDs by employers. Based on studies and experience OSHA has estimated that MSDs are underreported by a factor of two - that is for every MSD reported there is another workrelated MSD that is not recorded or reported.

Moreover, the BLS MSD figures are for cases involving one or more days away from work, the cases for which BLS collects detailed reports. Similar detailed reports are not collected for injuries and illness that do not involve lost work time or those which result in restricted activity, but not in days lost from work. But using the percentage of days away from work cases involving MSDs (34.7 percent), in 2000 there were an estimated 377,165 MSDs that resulted in restricted work, 1,005,606 MSDs that did not result in lost time, and a total of 1,960,585 MSDs reported by private sector employers.

From 1999 to 2000, BLS reported a small reduction in the number of MSD cases that resulted in days away from work, from 582,340 to 577,814 cases. However, the percentage of days away from work cases that were MSDs increased from 34.2 percent to 34.7 percent, demonstrating that MSDs remain the biggest source of injury and illness.

The decline in reported lost workday MSDs in 2000 followed similar declines reported in recent years. However, these declines most likely do not not reflect a reduction in the numbers of MSDs that are occurring, but a change in the way MSD

cases are managed, with workers put on restricted work, instead of being sent home to recover. Indeed, in meatpacking, poultry and other industries where we represent workers, we have seen a major change in the way MSD cases are managed with injured workers being kept on the job and assigned to light duty.

During the 1990's, at the same time days away from work cases and rates have been declining, the numbers and rates of restricted work day injury cases reported by employers have been on the rise. From 1992 to 2000, the number of injury and illness cases involving restricted activity reported by employers increased by 75 percent, from 622,300 to 1,088,100 cases. If MSDs account for a similar proportion of restricted work day cases as lost work day cases, then the number of restricted work MSDs cases increased from 209,093 to 377,165 during the years 1992 to 2000. There has been little change in the number of total lost workday MSDs. Any overall progress that has been made by past OSHA, employer and union efforts has now leveled off.

Even more troubling, in certain industries and certain occupations, reported MSDs, even those resulting in days away from work, on are the rise. These include trucking, nursing homes and air transportation which are among the highest risk industries, and high risk occupations like truck drivers, nursing home workers and cashiers.

While the exact number of work-related MSDs is not known with precision, we know that the problem is massive and costly. The National Academy of Sciences in its 2001 study Musculoskeletal Disorders and the Workplace found that in 1999 more than 1 million workers took time away from work due to work-related MSDs, costing employers, workers and the nation $45 - $54 billion.

In 2001, Liberty Mutual Insurance, the nation's largest workers' compensation insurance company, released a report on the leading causes of compensable work injuries and illnesses. The report found that injuries due to overexertion, bodily reaction and repetitive motion, all sources of MSDs, combined accounted for 41.7 percent of direct workers compensation costs - $15.7 billion - in 1998. Liberty Mutual also estimated that for every dollar of direct compensation costs, there are $3 to $5 dollars of indirect costs due to lost productivity, training costs, overtime and other similar factors, putting the total cost of compensated MSDs at between $62.8 and $94.2 billion annually. It should be noted that these figures are for compensated cases only, and do not include cases which are not eligible for workers compensation or are not handled through the workers' compensation system, which according to published research studies are significant in number.

The Bush Administration has cited declines in the reported numbers of MSDs involving lost work days as evidence that voluntary approaches are working. As outlined above, a more complete examination of the data shows that the numbers of MSDs have hit a plateau and are on the rise in certain sectors and occupations. The bottom line is that MSDs are a major national safety and health problem that need a meaningful national solution. Protecting workers from the biggest job safety problem in the country should not be a voluntary matter.

Industries with the 20 Highest Numbers of Nonfatal Occupational Injuries and Illness with Days Away from Work[1] Involving Musculoskeletal Disorders[2], 2000

	SIC Code	Industry	Number of MSDs		Change
			2000	1999	
1	806	Hospitals	38,186	41,152	-2,966
2	805	Nursing and personal care facilities	34,522	33,877	651
3	451	Air transportation, scheduled	30,038	27,247	2,791
4	541	Grocery stores	20,778	22,047	-1,269
5	421	Trucking and courier services, except air	20,481	17,104	3,377
6	531	Department stores	15,818	16,353	-535
7	371	Motor vehicles and equipment	13,292	14,871	-1,579
8	514	Groceries and related products	12,867	15,481	-2,614
9	701	Hotels and motels	9,136	9,656	-520
10	171	Plumbing, heating, air-conditioning	8,467	9,119	-652
11	173	Electrical work	7,152	5,294	1,858
12	308	Miscellaneous plastic products, n.e.c.	6,955	8,581	-1,626
13	521	Lumber and other building materials	6,235	5,453	782
14	174	Masonry, stonework, and plastering	6,041	5,831	210
15	152	Residential building construction	5,883	4,907	976
16	836	Residential care	5,825	n/a	n/a
17	179	Miscellaneous special trade contractors	5,246	4,346	900
18	154	Nonresidential building construction	5,213	4,653	560
19	808	Home health care services	5,199	5,222	-23
20	344	Fabricated structural metal products	5,110	6,397	-1,286

Source: U.S. Department of Labor, Bureau of Labor Statistics, April 2002.

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[1] Days away from work include those which result in days away from work with or without restricted work activity. They do not include cases involving only restricted work activity.

[2] Includes cases where the nature of injury is: sprains, strains, tears; back pain, hurt back; soreness, pain, hurt except back; carpal tunnel syndrome; hernia; or musculoskeletal system and connective tissue diseases and disorders and when the event or exposure leading to the injury or illness is: bodily reaction/bending, climbing, crawling, reaching, twisting; overexertion; or repetition. Cases of Raynaud's phenomenon, tarsal tunnel syndrome, and herniated spinal discs are not included. Although these cases may be considered MSDs, the survey classifies these cases in categories that also include non-MSD cases.

Occupations with the 20 Highest Numbers of Nonfatal Occupational Injuries and Illness with Days Away from Work[1] Involving Musculoskeletal Disorders[2], 2000

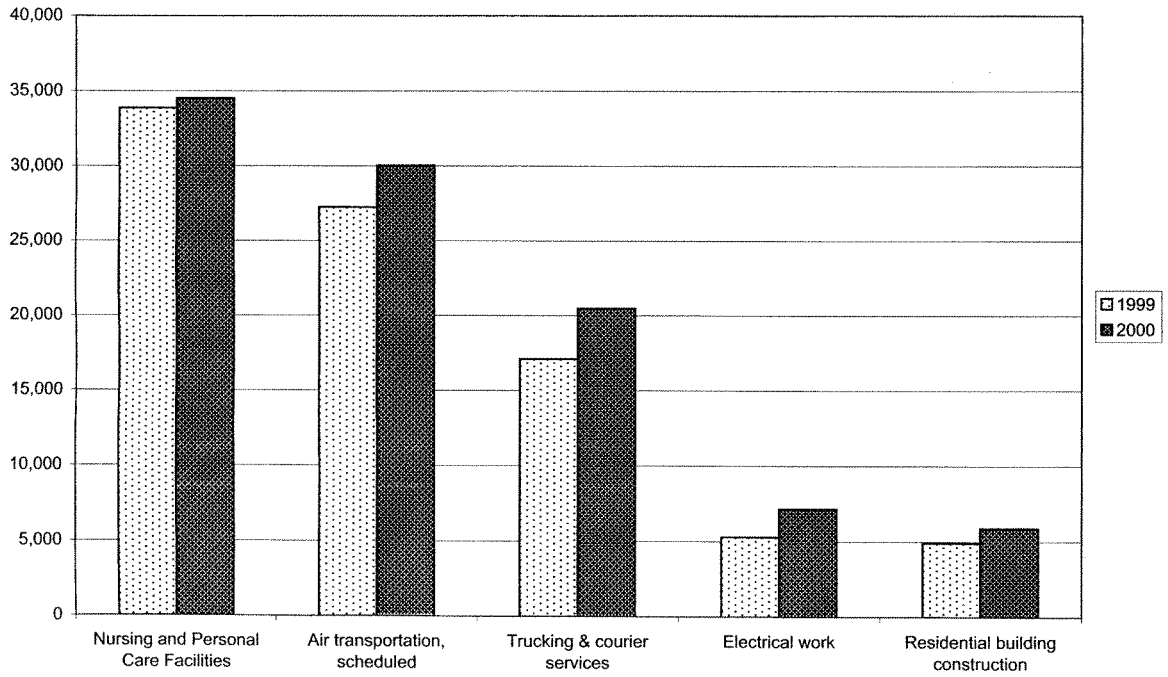
Occupation	Number of MSDs	
	2000	1999
Truck Drivers	45,327	41,698
Nursing Aides, orderlies and attendants	44,660	44,277
Laborers, non-construction	30,998	32,788
Assemblers	17,157	17,896
Janitors and cleaners	13,001	14,147
Registered Nurses	12,074	13,073
Construction laborers	11,689	11,006
Cashiers	10,526	9,693
Carpenters	9,960	9,132
Stock handlers and baggers	9,886	12,368
Supervisors and proprietors, sales occupations	8,836	9,323
Maids and housemen	8,497	8,975
Traffic, shipping and receiving clerks	8,130	7,532
Sales workers, other commodities	7,431	7,483
Welders and cutters	7,207	7,528
Cooks	5,958	5,644
Driver-sales workers	5,692	5,969
Licensed practical nurses	5,598	6,103
Electricians	5,222	4,478

Source: U.S. Department of Labor, Bureau of Labor Statistics, April 2002

[1] Days away from work cases include those which result in days away from work with or without restricted work activity. They do not include cases involving only restricted work activity.

[2] Includes cases where the nature of injury is: sprains, strains, tears; back pain, hurt back; soreness, pain, hurt except back; carpal tunnel syndrome; hernia; or musculoskeletal system and connective tissue diseases and disorders and when the event or exposure leading to the injury or illness is: bodily reaction/bending, climbing, crawling, reaching, twisting; overexertion; or repetition. Cases of Raynaud's phenomenon, tarsal tunnel syndrome, and herniated spinal discs are not included. Although these cases may be considered MSDs, the survey classifies these cases in categories that also include non-MSD cases.

Selected Industries in Which the Number of MSDs Involving Days Away from Work Increased Between 1999 and 2000



Source: U.S. Department of Labor, Bureau of Labor Statistics, 2002.

Estimated[1] and Reported Cases of Musculoskeletal Disorders, 1996 - 2000

Year	Total MSD Cases[1]	Total MSD Lost Workday Cases[1,2]	MSD Cases with Days of Restricted Activity	MSDs Involving Days Away from Work[3]	Percent of Cases Involving MSDs
2000	1,960,585	954,979	377,165	577,814	34.7%
1999	1,951,862	938,038	355,698	582,340	34.2%
1998	2,025,598	950,999	358,455	592,544	34.2%
1997	2,101,795	980,240	353,888	626,352	34.2%
1996	2,146,182	974,380	327,025	647,355	34.4%

Source: Department of Labor, Bureau of Labor Statistics.

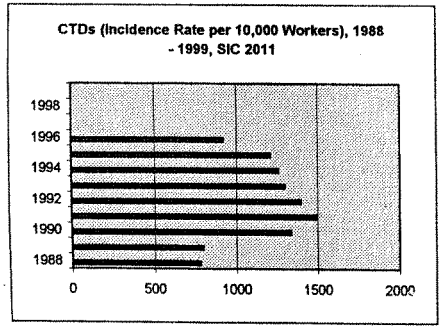
[1] The percentage of MSD cases reported by BLS for the total days away from work cases involving MSDs, is assumed to be the same for total MSDs and lost workday MSD cases.
[2] Total lost workday cases involve days away from work, days of restricted work activity, or both.
[3] Days-away-from-work cases include those which result in days away from work with or without restricted work activity.

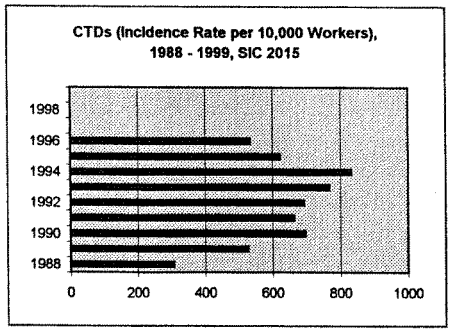
U.S. Meatpacking Plants (SIC 2011)
Disorders Associated With Repeated Trauma

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Incidence Rate per 10,000 workers	782.7	799.1	1336.2	1493.7	1395.6	1298.8	1257.4	1206.2	921.6	1,191.6	993.5	
Number of Repetitive Trauma Illness Cases	11,000	11,400	18,500	20,700	19,300	18,800	17,900	18,000	14,000	17,874	15,900	

U.S. Poultry Processing (SIC 2015)
Disorders Associated With Repeated Trauma

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Incidence Rate per 10,000 workers	307	527.7	696.2	665.1	693.4	767.6	832.2	623.5	535	522.8	494.6	
Number of Repetitive Trauma Illness Cases	5,300	9,400	13,600	12,900	14,100	16,300	18,700	14,400	12,840	12,799	12,700	





Sioux Falls, S.D., Plant
Chronology of Events, Summary of Citations, and Recommended Solutions

CHRONOLOGY OF EVENTS:

April 23, 1987---Morrell cited for 69 alleged instances of willfully violating requirements for accurate recordkeeping on injuries and illnesses of Sioux Falls workers. Total proposed penalties, $690,000.

January, 1988---OSHA receives formal complaints from workers alleging severe cumulative trauma disorder (CTD) problems at the plant.

March 3, 1988---OSHA requests assistance from the National Institute for Occupational Safety and Health (NIOSH) in making the inspection involving cumulative trauma disorders.

March 29, 1988---OSHA-NIOSH inspection team denied entry to plant, although company later permitted OSHA inspectors to enter to inspect safety complaints only.

April 29, 1988---A warrant permitting the OSHA-NIOSH team to enter for 30 days of inspection served on the company.

May, 1988----OSHA-NIOSH team conducts inspection of Sioux Falls plant, focusing on CTD problems.

September, 1988---Morrell cited by OSHA for one willful, seven serious, and 12 repeat safety violations at Sioux Falls, with total proposed penalties of $28,900.

Oct. 18, 1988---An administrative law judge for the independent Occupational Safety and Health Review Commission vacates the recordkeeping citations issued April 23, 1987 on grounds that OSHA did not issue them within the six-month period specified by law. The judge also disapproves OSHA's instance-by-instance citation of alleged recordkeeping violations, affirming instead a single willful violation with a $10,000 penalty. This action is in direct contrast to an earlier judge's decision affirming the policy in a case involving Caterpillar. OSHA also has settled a number of cases involving instance-by-instance citation of violations. The agency can ask the full review commission to review the judge's decision in the Morrell recordkeeping case.

Oct. 28, 1988---OSHA proposes record $4.33 million in penalties against Morrell for alleged willful safety and health violations in the plant involving cumulative trauma disorders.

KEY POINTS FROM INSPECTION:

A total of 880 cumulative trauma disorders (CTD's) recorded from May 1, 1987 to April 30, 1988. Plant-wide CTD incidence rate per 100 full-time workers is 41.7. Some departments had incidence rates in excess of 75.

Morrell's rate is nine times that of the Bureau of Labor Statistics industry-wide rate of 4.8 for CTDs in meatpacking and 652 times the BLS rate of .064 per 100 full-time workers for all industries.

Ninety-three percent (817) of the 880 CTD recorded cases had no time off. Thirty-nine percent (345) had no work restrictions.

Sixty-three employees had surgery for CTDs between May 1, 1987 and April 30, 1988. The mean number of days off for these was 1.1. Twenty-seven had no days off. NIOSH recommends 30 to 60 days off depending on the type of surgery.

Fifty percent (100 of 200) of employees taken off the lines and interviewed and examined by a physician suffered a CTD in the past year and still had the illness.

SUMMARY OF CITATIONS AND PROPOSED PENALTIES:

Alleged willful violation of Section 5(a)1 of the Occupational Safety and Health Act requiring the employer to maintain a workplace free of serious hazards by exposing 722 workers to dangers of cumulative trauma disorders without trying to prevent the risk through available engineering or administrative controls. (Characterized as egregious willful). A total of 722 instances at $5,000 per instance. $3.61 Million

Alleged willful violation of Section 5(a)1 of the Occupational Safety and Health Act by increasing the risk of aggravating CTD problems through not allowing 63 workers suffering from the disorder sufficient time off or restricted work activity following surgery and by ignoring physicians' recommendations for restricted work activity for eight workers. (Characterized as egregious willful). A total of 71 instances at $10,000 per instance. $710,000

Alleged willful violation of Section 5(a)1 by exposing 817 workers who suffered CTDs to increased risk of aggravation of their problems by not giving them any time off from work. $10,000

Grand Total $4.33 Million

RECOMMENDED SOLUTIONS:

Prevention of cumulative trauma disorders can be accomplished by engineering, administrative, and medical methods, according to ergonomics experts.

Some of the engineering or ergonomics approaches include redesigning cutting knives or work stations to make work easier; reducing the speed of production lines to slow down repetitive motions; restructuring jobs to make workers' tasks more varied; and making sure that knives are sharp and in working order.

Administrative techniques include training workers in proper cutting methods and knife care and to recognize early symptoms of CTD; rotating workers among jobs that require use of different muscle, tendon, or nerve groups; and use of rest pauses.

Medical approaches include, once a CTD is diagnosed and/or surgery is performed, allowing enough time off for all muscle/tendon/nerve groups to heal, and assigning workers to slower-paced, lower-force tasks after a CTD injury to allow proper reconditioning.

# # #

NEWS

Department of Labor 202- 622-2769

Office of Information Washington, D.C. 20210 Dan Zwerling NPR

Frank Berkowitz

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

USDL 88-545

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OFFICE: (202) 523-6027

FOR RELEASE: 10:00 A.M.
Friday, October 23, 1988

OSHA PROPOSES RECORD $4.33 MILLION IN FINES AGAINST MORRELL

The Occupational Safety and Health Administration (OSHA) has proposed $4.33 million in penalties against John Morrell & Co. for hundreds of instances of alleged willful safety and health violations at its Sioux Falls, S. D., packing plant, the U.S. Labor Department announced today.

The penalty is the largest ever proposed against a single employer in OSHA's 17-year history. Morrell is a wholly-owned subsidiary of United Brands, Inc.

The agency cited the meatpacker for willfully ignoring a crippling illness, called cumulative trauma disorder, that affected more than 40 percent of its Sioux Falls workforce in a single year.

Company injury and illness records show that 880 of Morrell's 2,000 employees sustained serious and sometimes disabling cumulative trauma injuries between May 1987 and April 1988.

OSHA's investigation, which began nearly six months ago in response to a worker complaint, was conductd with technical assistance from a team of ergonomics specialists from the National Institute for Occupational Safety and Health (NIOSH).

NIOSH found that in 173 jobs examined at the Morrell plant, 722 employees were daily exposed to the significant risk of contracting cumulative trauma disorder.

The plant's management knew about the causes and remedies for the disorder, perhaps as early as 1984, but failed to correct the problems, according to John A. Pendergrass, assistant secretary of labor who heads OSHA.

Instead, the company allegedly forced its afflicted employees to continue working on the production line, even in cases involving surgery.

- more -

75 Years of Working for America's Future

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"This case involves an employer who knew about a serious health hazard, saw the tragic toll on its workers, and chose to ignore it," Pendergrass said. "Meatpackers in general and Morrell in particular must do a far better job of protecting their workers."

Cumulative trauma disorder, including carpal tunnel syndrome, is caused by repeated hand, wrist and arm motion involved in an occupational task. This and other OSHA investigations indicate that the disorder is a widespread problem in the meatpacking industry.

The cumulative trauma incidence rate at the Sioux Falls plant, however, is nine times greater than the industry average rate of 4.8 per 100 full-time workers per year and more than 600 times the rate for all U.S. industries.

In detail, the Morrell citations include:

o 722 workers willfully exposed to dangers of cumulative trauma disorders without trying to prevent the risk through available engineering or administrative controls; penalties of $5,000 per instance were proposed.

o 71 cases of willfully aggravating cumulative trauma problems by not allowing workers sufficient time off or properly restricting work activity following surgery; penalties of $10,000 per instance were proposed.

An additional $10,000 fine was proposed for willfully exposing workers who suffered cumulative trauma problems to the risk of aggravating their illnesses or injuries by not giving them any time off from work.

A willful violation is defined by OSHA as one in which an employer either knew that a condition consituted a violation or was aware that a hazardous condition existed and made no reasonable effort to correct it.

The company has 15 working days to contest the citations and proposed penalties before the independent Occupational Safety and Health Review Commission.

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EDITORS NOTE: See attached Fact Sheet for more details.

News United States Department of Labor

Office of Information Washington, D.C. 20210

Occupational Safety and Health Administration

USDL: 90-151

CONTACT: Frank Kane
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FOR RELEASE: Immediate
WED., MARCH 21, 1990

SECRETARY DOLE ANNOUNCES MAJOR OSHA SETTLEMENT WITH MORRELL TO PROTECT WORKERS AT SIOUX FALLS, S.D., PLANT

Secretary of Labor Elizabeth Dole today announced a major settlement agreement with John Morrell & Co., one of the nation's leading meatpackers, calling for a program to abate occupational ergonomic hazards at its Sioux Falls, S.D., plant.

Secretary Dole said, "The red meat industry has traditionally been plagued by high incidences of repetitive strain injuries. It is my hope that employees within meatpacking and all American industry will take note of this case and better protect the safety and health of workers on the job."

The agreement between OSHA, Morrell, and the AFL-CIO United Food & Commercial Workers Local 304A, representing employees at Sioux Falls, also calls for the company to pay a penalty of $990,000 and to give a grant of $260,000 to the National Institute for Occupational Safety and Health (NIOSH) for the continuing study of musculoskeletal injuries, which include cumulative trauma disorders (CTDs) or repetitive motion illnesses. It also stipulates that Morrell will institute a program to assure proper recordkeeping corporatewide.

Assistant Secretary of Labor Gerard F. Scannell, who heads OSHA, said, "This is an excellent solution to one of the most significant enforcement cases in the history of the agency. Morrell has agreed to institute a program which will provide the more than 2,000 workers at the Sioux Falls plant with the best of protection against these potentially crippling illnesses."

Morrell has agreed to apply the program to reduce or 88eliminate ergonomic hazards both to 171 production jobs that were the subject of OSHA citations in October, 1988 and to the remaining 700 production jobs that were not the subject of citations.

The company will retain an ergonomic consultant for at least four years to assist it in carrying out the program.

That program will include analyzing jobs for CTD hazards, evaluating and testing recommended procedures for abating the hazards, implementing abatement, educating employees and supervisors on CTDs and the ergonomic program, and training new and reassigned workers on the proper use of knives, safety procedures, and proper techniques in meatpacking operations.

In addition, the company will retain a medical consultant knowledgeable about CTDs to develop a medical management program for work-related CTDs at the Sioux Falls plant.

Under an agreement with the State of Iowa, which operates its own occupational safety and health program, Morrell has been implementing an ergonomic program for its Sioux City, Iowa plant. The company intends to use the ergonomic program outlined in the agreement covering Sioux Falls as part of its Sioux City ergonomic program, as necessary.

The company also will undertake an audit of occupational injury and illness recordkeeping at both the Sioux Falls and Sioux City plants to ensure that records going back to Jan. 1, 1988, are in compliance with OSHA requirements. Training programs in OSHA recordkeeping requirements will be instituted at both plants for employees responsible for keeping the records.

OSHA had proposed penalties of $4.33 million against Morrell in October, 1988 for exposing employees to hazards that produced CTDs at Sioux Falls. It was the largest penalty ever proposed against a single employer up to that time.

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(Editor's Note---See attached fact sheet for additional details on the agreement.)

HIGHLIGHTS OF AGREEMENT
WITH JOHN MORRELL & CO.
Sioux Falls, S.D., Plant

Recognition of Problem:

Morrell and OSHA recognize that cumulative trauma disorders (CTDs) are occupational illnesses in the meatpacking industry, as well as in other industries with similar types of jobs. Methods of materially reducing or eliminating the ergonomic stressors related to CTDs can be complex and can require a number of different control technologies including engineering controls; employee and supervisory training and education; early recognition of the problem; early and proper medical diagnosis, treatment and care follow-up; and administrative controls, job rotation and rest pauses.

Ergonomic Consultant:

Morrell agrees to retain an ergonomic consultant for at least four years to assist the company in performing an ergonomic analysis of certain jobs and in developing and implementing an ergonomic program.

Determining Ergonomic Stressors, Evaluating and Testing Abatement, and Implementing Abatement:

Morrell, with the advice and guidance of the ergonomic consultant, will analyze both the 171 production jobs that were the subject of OSHA citations at Sioux Falls and the 700 production jobs that were not the subject of citations to determine which ones might expose employees to ergonomic stressors related to CTDs.

For most of the cited jobs, Morrell will then test and evaluate recommended OSHA abatements in the citations. Those OSHA-recommended abatements that are feasible in materially reducing or eliminating ergonomic stressors related to CTD then will be implemented by Morrell. Nothing in the agreement prevents Morrell or the ergonomic consultant from testing or evaluating other potential methods of materially reducing or eliminating ergonomic stress.

A procedure for resolving any disputes between OSHA and Morrell over abatement is also included.

A similar program will be used for analyzing non-cited jobs at Sioux Falls and evaluating and testing abatement methods for any ergonomic stressors related to CTDs which are found.

Education Program:

Morrell, with the advice of the ergonomic consultant, will develop and implement an education program at Sioux Falls which will be designed to educate employees, supervisors, engineers and other plant management personnel on medical aspects of CTDs such as the early signs of CTD, the range of disorders, causes of these disorders, means of prevention, and the importance of early reporting of symptoms.

The program will include a description of the ergonomic program at the Sioux Falls plant and a portion designed to educate employees about knife maintenance, tool preparation, and the postures or other activities that may create an ergonomic stressor related to CTD in their jobs.

There will be quarterly refresher training as part of regularly scheduled departmental safety meetings.

Training Program:

Morrell, with the advice of the ergonomic consultant, will establish a training program for new and reassigned workers at Sioux Falls who are to begin working in production jobs involving the use of knives. This program will include knife care and maintenance; hazards of improper knife handling; types of knives associated with individual work duties; and tools and devices associated with individual work duties, as well as applicable safety procedures for new employees.

Following classroom training, each new or reassigned employee will be assigned to work with a qualified co-employee who will provide on-the-job training.

Medical Management Program:

Morrell will institute a medical management program at the Sioux Falls plant and will retain a medical consultant knowledgeable about work-related CTDs to further develop the program as necessary. The specifics of the program are spelled out in the agreement.

Recordkeeping Program:

Morrell will correct entries in its OSHA 200 log which had been listed in April, 1987 OSHA citations for alleged recordkeeping violations. The company also will undertake an audit of the occupational injury and illness recordkeeping practices at both its Sioux Falls, S.D. plant ant its Sioux City,

Iowa plant and ensure that OSHA-required records going back to Jan. 1, 1988 are in compliance with OSHA requirements. In addition, training programs in OSHA recordkeeping requirements will be instituted for employees in both plants responsible for keeping the records.

Penalty:

Morrell withdraws its notice of contest and agrees to pay an amended proposed penalty of $990,000, although specifically denying any and all allegations that it violated the Occupational Safety and Health Act.

Grant to NIOSH:

Morrell will give a grant of $260,000 to the National Institute for Occupational Safety and Health (NIOSH) for the continuing study of musculoskeletal injuries.

Sioux City, Iowa Plant:

Pursuant to an agreement with the State of Iowa, Morrell has developed and is implementing an ergonomic program for its Sioux City, Iowa plant. Morrell intends to use the ergonomic program outlined in this agreement, as necessary, as part of the Sioux City ergonomic program. Morrell intends to meet with the State of Iowa to execute an agreement similar to this agreement.

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TABLE S01. **Highest incidence rates[1] of total nonfatal occupational injury and illness cases, private industry, 2000**

Industry[2]	SIC code[3]	2000 Annual average employment[4] (000)	Incidence rate	
			1999	2000
Meat packing plants	2011	148.1	[5]26.7	[5]24.7
Motor vehicles and car bodies	3711	353.5	22.7	22.7
Ship building and repairing	3731	97.1	20.2	22.0
Gray and ductile iron foundries	3321	77.6	21.9	21.7
Truck trailers	3715	42.3	[5]16.6	[5]21.1
Mobile homes	2451	65.4	17.3	19.7
Truck and bus bodies	3713	49.0	18.0	19.4
Transportation equipment, n.e.c.	3799	32.8	[5]14.1	[5]18.9
Aluminum foundries	3365	26.2	18.3	18.3
Industrial furnaces and ovens	3567	18.4	11.8	18.1
Travel trailers and campers	3792	25.2	17.1	18.1
Structural wood members, n.e.c.	2439	47.4	15.7	17.5
Metal sanitary ware	3431	16.3	22.6	17.5
Plastics pipe	3084	21.7	12.9	17.2
Boat building and repairing	3732	71.5	[5]14.5	[5]17.0
Fabricated structural metal	3441	90.7	15.2	16.7
Leather tanning and finishing	311	10.9	15.7	16.5
Public building and related furniture	253	53.7	14.9	15.8
Prefabricated wood buildings	2452	24.9	19.0	15.3
Automotive stampings	3465	122.6	20.1	15.3
Flat glass	321	15.9	12.2	15.2
Aluminum die-castings	3363	40.6	16.2	15.2
Primary aluminum	3334	20.5	14.0	15.0
Sausages and other prepared meats	2013	103.8	[5]13.5	[5]14.7
Air transportation, scheduled	451	1,101.3	14.4	14.7
Iron and steel forgings	3462	30.1	17.8	14.6
Bottled and canned soft drinks	2086	97.9	13.9	14.4
Poultry slaughtering and processing	2015	253.2	14.3	14.2
Brick and structural clay tile	3251	14.5	16.1	14.2
Office furniture, except wood	2522	43.2	[5]12.5	[5]14.0
Nursing and personal care facilities	805	1,799.9	13.5	13.9
Private industry[6]		110,064.9	[5]6.3	[5]6.1

[1] The incidence rates represent the number of injuries and illnesses per 100 full-time workers and were calculated as: (N/EH) x 200,000, where

N = number of injuries and illnesses
EH = total hours worked by all employees during the calendar year
200,000 = base for 100 equivalent full-time workers (working 40 hours per week, 50 weeks per year)

[2] High rate industries were those having the 25 highest total cases incidence rates for injuries and illnesses at the most detailed or lowest SIC level at which rates are calculated and published. Generally, manufacturing industries were calculated at the 4-digit code level and the remaining industries at the 3-digit level based on the *Standard Industrial Classification Manual*, 1987 Edition.

[3] *Standard Industrial Classification Manual*, 1987 Edition.

[4] Employment is expressed as an annual average and is derived primarily from the BLS-State Covered Employment and Wages program.

[5] A statistical significance test indicates that the difference between the 2000 incidence rate and the 1999 rate is statistically significant at the 95 percent confidence level.

[6] Excludes farms with fewer than 11 employees.

NOTE: The n.e.c. abbreviation means that the category includes those components not elsewhere classified.

SOURCE: Bureau of Labor Statistics, U.S. Department of Labor December 2001

OS TB 12/18/2001 Table: S2. Highest rates for lost workday cases - injuries and ill:

TABLE S02. Highest incidence rates(1) of nonfatal occupational injury and illness cases with lost workdays,(2) private industry, 2000

Industry(3)	SIC code(4)	2000 Annual average employment(5) (000)	Incidence rate	
			1999	2000
Meat packing plants	2011	148.1	15.6	14.3
Ship building and repairing	3731	97.1	10.7	11.7
Motor vehicles and car bodies	3711	353.5	(6)10.1	(6)10.5
Truck trailers	3715	42.3	(6)7.9	(6)10.4
Air transportation, scheduled	451	1,101.3	10.4	10.4
Transportation equipment, n.e.c.	3799	32.8	(6)7.0	(6)10.2
Travel trailers and campers	3792	25.2	(6)7.0	(6)10.0
Aluminum foundries	3365	26.2	10.2	9.9
Plastics pipe	3084	21.7	6.6	9.6
Public building and related furniture	253	53.7	8.2	9.5
Bottled and canned soft drinks	2086	97.9	9.1	9.3
Mobile homes	2451	65.4	8.0	9.3
Gray and ductile iron foundries	3321	77.6	8.6	9.3
Sausages and other prepared meats	2013	103.8	(6)7.8	(6)9.1
Leather tanning and finishing	311	10.9	10.4	9.0
Storage batteries	3691	24.3	5.8	8.8
Poultry slaughtering and processing	2015	253.2	8.6	8.6
Fluid milk	2026	61.2	(6)7.3	(6)8.6
Concrete products, n.e.c.	3272	85.2	7.5	8.1
Canned and cured fish and seafoods	2091	6.5	9.5	8.0
Nursing and personal care facilities	805	1,799.9	7.6	7.9
Structural wood members, n.e.c.	2439	47.4	8.8	7.8
Tires and inner tubes	301	79.4	(6)6.2	(6)7.8
Mechanical rubber goods	3061	57.7	6.4	7.8
Vitreous plumbing fixtures	3261	9.9	9.4	7.8
Fabricated structural metal	3441	90.7	7.0	7.8
Prefabricated wood buildings	2452	24.9	9.7	7.7
Mattresses and bedsprings	2515	36.7	8.4	7.7
Steel wire and related products	3315	17.7	4.3	7.7
Aluminum extruded products	3354	35.9	(6)5.7	(6)7.7
Truck and bus bodies	3713	49.0	7.9	7.6
Private industry(7)		110064.9	3.0	3.0

OS TB 12/18/2001 Table: S10. Highest rates of repeated trauma disorders(w/number of

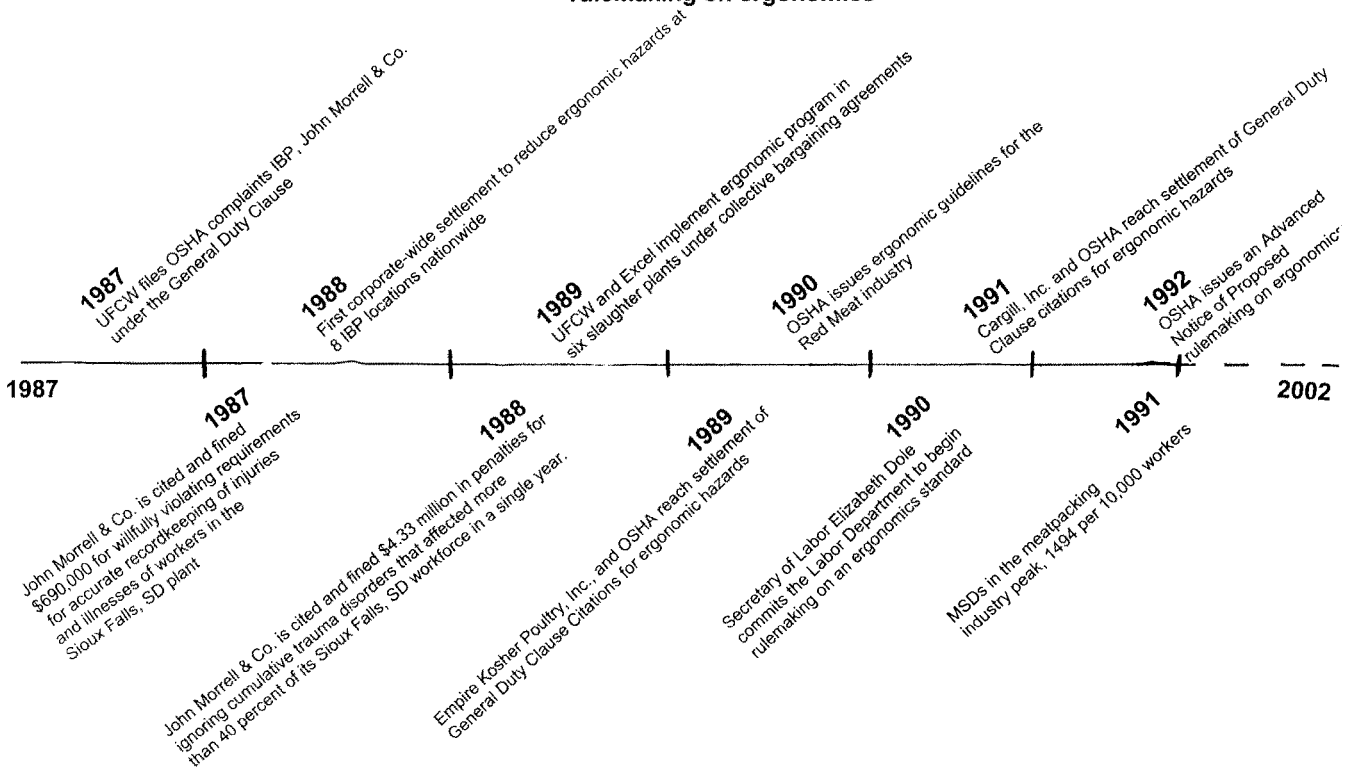
TABLE S10. Highest incidence rates(1) and number of disorders associated with repeated trauma, private industry, 2000

Industry(2)	SIC code(3)	2000 Annual average employment(4) (000)	Incidence rate	Number (000)
Meat packing plants.....	2011	148.1	812.0	12.6
Motor vehicles and car bodies.	3711	353.5	726.9	25.7
Poultry slaughtering and processing.....	2015	253.2	374.0	9.5
Automotive and apparel trimmings.....	2396	62.8	328.7	2.0
Fabricated textile products, n.e.c.....	2399	30.0	286.0	.8
Sausages and other prepared meats.....	2013	103.8	274.2	3.0
Public building and related furniture.....	253	53.7	273.7	1.5
Engine electrical equipment...	3694	67.4	258.2	1.8
Men's footwear, except athletic.....	3143	16.0	256.7	.4
Automotive stampings.....	3465	122.6	240.9	3.1
Dental equipment and supplies.	3843	15.7	232.1	.4
Men's and boys' trousers and slacks.....	2325	39.7	224.8	.8
Motor vehicle parts and accessories.....	3714	549.7	221.1	12.5
Leather tanning and finishing.	311	10.9	199.2	.2
Aircraft.....	3721	233.8	187.8	4.4
Pens and mechanical pencils...	3951	8.3	179.4	.1
Motor homes.....	3716	21.9	179.0	.4
Dolls and stuffed toys.....	3942	4.7	178.8	.1
Household appliances, n.e.c...	3639	12.9	170.8	.2
Commercial lighting fixtures..	3646	28.6	169.8	.5
Household vacuum cleaners.....	3635	11.9	169.4	.2
Men's and boys' work clothing.	2326	25.5	169.3	.4
Household refrigerators and freezers.....	3632	28.6	160.8	.5
Ship building and repairing...	3731	97.1	154.7	1.5
Hosiery, n.e.c.....	2252	34.3	149.0	.5
Private industry(5).....		110064.9	26.3	241.8

1 The incidence rates represent the number of illnesses per 10,000 full-time workers and were calculated as: (N/EH) x 20,000,000, where

N = number of illnesses
EH = total hours worked by all employees during the calendar year

Some important early milestones in OSHA's rulemaking on ergonomics



RESPONSE TO QUESTIONS OF SENATOR ENZI FROM JACQUELINE NOWELL

Answer 1. Please see my testimony, pages 8 and 9. As I have stated often in the public record regarding our role in and support of the Red Meat Guidelines, their development and use must be taken in the context of the time. They were developed in the middle of heavy union complaint-generated enforcement activity by OSHA in the meatpacking industry. Under the settlement agreements, companies were developing comprehensive and effective ergonomic programs, the elements of which were incorporated into the Guidelines. And, concurrently, Secretary of Labor Elizabeth Dole announced the Department's decision to promulgate a standard. Therefore, OSHA was quite confident that companies who had not yet been inspected for ergonomic hazards would follow these guidelines.

We are in a very different time today. Initially, companies who were cited under the General Duty Clause, negotiated and settled the citations with ergonomic programs. However, strong and meaningful OSHA enforcement under the General Duty Clause is extremely difficult, as illustrated by the Pepperidge Farms and Beverly Enterprises cases which took years to litigate and settle. And companies know this. As well, the last major ergonomics case OSHA brought, against Hudson Foods (Tyson Foods, Inc.), resulted in a settlement with no specifics, a mere shadow of the prior settlement agreements OSHA negotiated in the early 1990s.

Answer 2. The Department of Labor's plan has been done before, you're correct. But, this is the year 2002, not the year 1990. We've been there and done that! As for the components of the plan, they are NEARLY the same as those in 1990 (and 1996). However, OSHA was committed to promulgate a standard, that's the missing piece that both opponents to a standard and this DOL forget! Where is the hammer to convince "bad" companies that they should address ergonomic hazards? General Duty Clause enforcement? I don't think so, in the post-Pepperidge Farm, Beverly Enterprises era.

I have a question you might consider asking the DOL. There is no doubt that the number of cumulative trauma cases in the meatpacking industry have dropped since 1991 and significant progress has been made in the area of ergonomics. However, the industry still experiences the highest rate of reported MSDs. My best plant has a 10 percent MSD rate for the year 2002. Is that good enough? The answer is clearly NO!

Answer 3. Yes. History shows that the decade-old General Duty Clause enforcement strategy utilized by OSHA in the meatpacking industry, the result of union complaints, was successful. Again, please look at the cases, the large number of injured workers, the limited number of cases, the speed with which they settled (two years compared to ten for later cases, Beverly Enterprises and Pepperidge Farms), the unprecedented fines ($4 million) and the huge endeavor required by OSHA, including astronomical costs. Subsequent employer challenges to enforcement actions and legal decisions have made its use today much more difficult.

Answer 4. Voluntary efforts have so far failed to protect workers from work related MSDs. Overall the number of MSDs has remained the same for the past several years. But in a number of high risk sectors, including nursing homes, air transportation and trucking and courier services, MSDs have increased. Cashiers and construction laborers MSDs have also increased.

OSHA successfully utilized the expertise of Government, industry and the union in both development of the Red Meat Guidelines and subsequent stakeholder meetings during the course of standard development. However, with additional guidelines, OSHA is developing little more than educational pamphlets if they are unwilling to link these guidelines to enforcement, actually utilize the guidelines in coordination with an effort to enforce compliance with them.

What will motivate industries to address ergonomic hazards who have not already under a set of guidelines not linked to enforcement? The threat of a random OSHA inspection? It would take OSHA 84 years to inspect all the workplaces under its jurisdiction just once. I don't think so!

Thank you for this opportunity to once again share with the Committee our experience regarding this hazard which significant affects the UFCW membership.

The CHAIRMAN. Ms. Purvis.

STATEMENT OF MELODY PURVIS, FORMER EMPLOYEE, BRYLANE, INDIANAPOLIS, IN

Ms. PURVIS. Mr. Chairman and Members of the Committee, my name is Melody Purvis, and I am from Indianapolis, IN. On behalf of all the workers at the Brylane Company in Indiana, all the

workers injured on the job, thank you for giving me this chance to speak here today.

In my plant, 1,600 workers select, pack, and ship out garments and other products to customers ordering from catalogs and websites and handle customer service calls. The company's own records show that there were 163 cases of repetitive trauma illnesses in 2000, including dozens of people who had to stop working for an average of about 7 weeks each. So many people have had surgery and, like me, have suffered tremendously.

I am here today to tell you my story and hope that it will help you put a face on the issue of why American workers need a real ergonomics standard—not voluntary.

I am married, and my husband and I support our three children and one grandchild, with another one on the way in June.

On November 16, 1993, I went to work in the returns department as a folder. I was first injured on a job where I stood 8 hours a day, taking garments out of a tote, putting them up over my head on a hanger—and I am showing you with my left arm because it hurts to use my right arm, but I am right-handed.

In December of 1993, my arm swelled up, got inflamed, and was hot to the touch. When I told a company official, he told me to go home and put some ice on it. Later, he sent me to the doctor, who sent me to physical therapy and put me on light duty. But I was still performing the same motion between 400 and 600 times every night. My pain continued. I had surgery on my right shoulder in 1995, and the doctor put me on work restrictions. My restrictions limited the weight of the materials I was throwing, but it did not change the lifting and throwing that I had to do.

Many packages still weighed as much as 10 pounds and sometimes more. I was re-injured in December of 1997. I had surgery on both hands and my right wrist for carpal tunnel syndrome, but I still have numbness in my right hand. I was put on permanent restrictions for lifting, throwing, and bending. In order to make production, I would take painkillers, and even with the pain, I was a hard worker.

In June of 1999, my supervisors gave me a certificate of appreciation for top production.

By June of 2000, my hands and arms would hurt so bad that I could not hold a potato or a knife to peel it.

By June of 2001, I hurt so badly that I could not go to sleep or brush my own hair. I was scared to pick up my grand-daughter. I went back to a company doctor who told me, "Melody, Brylane is killing you." He recommended another surgery that had no guarantees. I had to take a medical leave of absence.

In October of 2001, the company told me that I would, quote, "remain off work due to permanent partial impairment for a work-related injury that Brylane could not comply with in your department."

I truly believe that if Brylane had spent their time fixing the job instead of trying to fix me, I could still be working today. Instead, I have had four surgeries, and they have not made one real change to my work station. Does Brylane know about this problem and how to stop it? Yes.

In Massachusetts, the same company has another plant doing the same kind of work. They have almost no repetitive motion injuries there. Why? Because the company has an ergonomics program that the union developed with management. That program says that "the Brylane management team is committed to enforcement of this policy—encouraging prompt reports of symptoms and actions to decrease ergonomic hazards."

I am glad the company's program works for the union members and the company in Massachusetts, but in Indianapolis, even after we win our union drive, we will still need strong OSHA standards that will force companies like Brylane to fix our jobs and to educate us about the dangers of these injuries.

I could tell you many changes that Brylane could do to help stop the pain at work. Unfortunately, Brylane's past shows that on its own, Brylane will not make even these simple changes. This is outrageous. We work hard in our plant to feed our families and pay our taxes, and this is what we get in return—a plant with an injury rate that is nearly 18 times higher than the average for the same industry.

Unless OSHA issues real ergonomic standards that will force companies like Brylane to make jobs safer, we will continue to suffer. This is just wrong. We should be able to go to work and do our jobs without fear of injury.

Now OSHA has started talking about doing some things about ergonomics, but OSHA is still not talking about new standards to force Brylane to fix the jobs.

In February, with help from United, my co-workers filed an OSHA complaint about a lot of safety problems, but we were told that there were no laws to protect workers against ergonomically dangerous jobs. It is too late to save my hands and arms, but it is not too late to save the hundreds of other workers in my plant who suffer from these problems every year.

Please tell OSHA they have to issue new standards. We are counting on you to get us the protection we need.

Thank you again for the opportunity to testify.

The CHAIRMAN. Thank you. That was very moving. [Applause.] You obviously speak for a number of people.

Thank you.

[The prepared statement of Ms. Melody Purvis follows:]

Testimony of
Ms. Melody Purvis
Former Employee, Brylane LP
Indianapolis, IN
Testimony Before the
Health, Education, Labor And Pensions Committee
United States Senate
Hearing on
Over One year Later: Inadequate Progress on
America's Leading Cause of Workplace Injury
April 18, 2002
Washington, DC

Testimony Of Ms. Melody Purvis

Former Employee
Brylane LP, Indianapolis, IN
(Subs. Pinault-Printemps-Redoute [PPR], Paris, France)

Before the Committee On
Health, Education, Labor And Pensions
United States Senate

Over One year Later: Inadequate Progress on
America's Leading Cause of Workplace Injury

April 18, 2002
Washington, DC

Mr. Chairman and members of the Committee, on behalf of all the workers at Brylane in Indiana, and all the workers injured on the job, I want to thank you for giving me the chance to speak to you today.

I want to tell you about my story, so you can truly understand how terrible it is when companies don't fix the problems that cause job injuries. But I just want you to understand that when I speak, I am not alone.

In my plant, 1600 workers select, pack and ship out garments and other products to customers ordering from catalogues and websites, and handle customer service calls. The company's own records show that there were 163 cases of "repeated trauma" illnesses in 2000. Out of these, 127 workers had to take time off of work or transfer to another job. Of the dozens of people who had to stop working, the average injured worker was out of work for about seven weeks! So many people have had surgeries, and like me have suffered tremendously in their daily lives at home and on the job.

Does the Brylane company know about this problem? Do they know how to stop this daily horror for myself and so many of my co-workers?

Sure they do. In Massachusetts, the same company has another plant, doing the same kind of work. They have almost no injuries there.

Why? Because the company has an "Ergonomics Program" that, in the company's own policy, says it utilizes "ergonomic principles in the design, redesign or modification of work methods".

Also, in the Massachusetts plant:

> "Brylane's Management Team is committed to ... enforcement/implementation of this policy, encouraging prompt reporting of symptoms and actions to decrease ergonomic hazards."
>
> "Ergonomics Task Force will screen suggestions for alleviating hazards, perform facility walk-throughs and perform basic job analysis with recommendations."

I'm glad the company's program works for the UNITE members and the company in Massachusetts. But I know we need a lot more than that in Indianapolis. We need really strong OSHA standards that force companies like Brylane to fix our jobs, and to educate us about the dangers of these injuries.

So I appreciate the chance to come here today to tell you about my injuries. But I and the other 1600 Brylane workers in Indianapolis also need your help, as soon as possible, to stop these brutal conditions.

I am married, and my husband and I support ourselves, our three children and one grandchild. On November 16, 1993, I went to work at Brylane, in the Returns Department on first shift. Night after night, I sat at my desk with shelves of materials in front of me, boxes, bags and packaging. I was a folder, which meant that I took garments out of a tote, put them on a hanger, and hung them on a rack over my head.

In December, I started to have pain in my arm between my elbow and shoulder. My arm would swell up, get inflamed, have a burning sensation, and was hot to the touch. It became harder and harder to make my production quota. When I told my unit leader, he told me to home and put some ice on it and if it wasn't better tomorrow that he would send me to the doctor. Later, he sent me to the doctor, who sent me to physical therapy and put me on light duty.

In 1994, I moved to second shift as a trainer. I trained workers to hang and fold clothes. When I wasn't training, I folded and packaged merchandise and threw it overhead and onto a belt:

- Returned items from customers came to me in totes on the lower conveyor belt. I would pull the tote off the belt and begin sorting through the packages.
- The next step was to enter returned materials into the computer system. I typed in the style number for every single item I processed. This meant that I would have to reach my left arm to the end of my desk to reach my keyboard.
- My computer monitor was set up under my desk at knee level. I would have to look under my desk to check the screen to make sure that the correct number was entered.
- Then, I would take the item, re-fold it, package it, and throw it over my head onto the higher conveyor belt with my right arm.

I would perform this same motion of opening, folding and throwing packages 400-600 times every night: **pulling** weight off one conveyor belt, **stretching** my arm to type, **bending** into carts to pick up packages, **straining** my neck to look at the computer screen, and **throwing** the weight above my head. It is because I did this same routine night after night for almost 9 years that I sit here before you today without a job.

I had surgery on my right shoulder in 1995, and the doctor put me on work restriction.

While my work restriction limited the weight of the materials I was throwing, it did not change the motion that I had to do in order to perform my job. I continued to throw bags of clothes over my right shoulder to a conveyor belt above my head. The difference that Brylane made was instead of having me throw coats and boots and dresses, they switched me to "staples", which means I was throwing underclothes, pajamas and pantyhose. But many packages still weighed as much as 10 pounds, and sometimes more.

I was re-injured in December of 1997. I had carpal tunnel surgery and DeQuervains surgery on both hands in 1997, but I still had numbness in my right hand through 1998. I was put on permanent restriction for lifting, throwing, and bending at this time. In order to make production and reduce the pain, I would take Darvocet pain killers that the doctor had prescribed.

In June of 1999, I received a certificate of appreciation for top production signed by supervisors Barbara Byers, Doris Newsome, and Wayne Collins. By June of 2000, I would come home from work and my hands and arms would hurt so bad that I couldn't hold a potato or a knife to peel it. I couldn't wring out a mop to clean my floors, and pushing a broom or sweeper was like tearing my arms out of their sockets. More and more these became chores my husband had to assume.

By June of 2001, I was working so hard to make production that by the time I got home at night I hurt so badly that couldn't go to sleep; or else I would wake up and lay awake for hours with my shoulder burning and my hands numb. It got to the point where I couldn't brush my own hair or pull it back to fix it. I have a granddaughter who I am afraid to pick up for fear of dropping her.

I went back to a company doctor and he told me, "Melody, Brylane is killing you." He recommended another surgery that had no guarantees. I had to take a medical leave of absence from June to October. In October 2001, Jennifer Irwin, Brylane's Corporate Occupational Health Administrator, wrote me a letter telling me that the status of my employment was not protected by a medical leave of absence. The letter went on to say, "You will remain off work due to your permanent partial impairment for a work related injury that Brylane cannot comply with in your department."

I truly believe that if Brylane had spent their time fixing the job instead of trying to fix me, I could still be working today. Many times, I told my supervisor, Barbara Byers, that Brylane had to change our jobs so my co-workers and I would not get hurt at work. She always responded the same way: "I know, we are planning on redesigning this department." During the last three years that I worked there, 1998-2001, Ms. Byers would tell me, "I know the way the job is set up back here is not good, but there is nothing we can do to change it until we get the okay from the boss." Even though the supervisor was saying things like this to give me hope that the job could change to be less painful, in the 9 years I worked there, the company never did one thing to make our jobs safer.

There are many changes Brylane could do immediately to help stop the pain at work.

Even though I am no longer able to work in the warehouse, here are my suggestions for the simple things that Brylane could do right away to make my old job in the Returns Department more ergonomically safe:

1. Lower conveyor belts so employees can place items on belts without having to throw weight over their heads, and avoid overhead throwing.

2. Put computer monitors on the desks at our work stations instead of below the desks. This would avoid the neck strain from having to look down to check that we entered he numbers correctly into the computer system.

3. Put carts next to desks, to avoid excessive bending

4. Reduce the weight of packages workers have to throw, and avoid heavy loads.

Unfortunately, Byrlane's past shows that on its own, Brylane will not make even these simple changes. My co-workers will continue to suffer from carpal tunnel, tendonitis, back strain, and other repetitive stress injuries,

This is outrageous. We work hard in our plant. We try to feed our families, pay our taxes, and be good citizens. And this is what Brylane workers get in return -- a plant with an injury rate that is nearly 18 times higher than the average for the same industry.

Unless OSHA issues real Ergonomic Standards that will force companies like Brylane to make jobs safer, we will continue to suffer. I'm sure the same is true for lots of workers in Indiana, and all around the country.

This is just wrong. We should be able to go to work, and do our jobs without fear of injury.

Brylane is owned by a rich international company -- PPR. They have fixed jobs to make them safer, both in Massachusetts, and in France. If PPR can sell Gucci bags, then they can certainly make Brylane give all their American workers decent working conditions. All it takes is someone in the government to tell Brylane that they have to do it.

Now OSHA has started talking about doing some things about ergonomics, but OSHA is not talking about new standards to force Brylane to fix the jobs.

In February, with the help our supporters at the labor union UNITE, my co-workers filed a formal OSHA complaint. We pointed out safety hazards that included: blocked aisles, no fire protection plan, unsafe forklift equipment and exposure to human blood and waste.

But the biggest problem in the plant is people suffering pain because of the design of work they are doing. We were told that there were no laws to protect workers against ergonomically dangerous jobs.

This is just wrong. We needed strict standards last year, and we still need them now.

It's too late to save my hands and arms. But it's not too late to save the hundreds of other workers in my plant who suffer these problems every year! It's no too late at all the other companies. They can still be saved from this terrible suffering.

Please tell OSHA they have to issue new standards. We don't have any other protection. We are counting on you to get us the protection we need.

Thank you again for the opportunity to testify. I'll be pleased to answer any questions you have.

Respectfully submitted,

Melody Purvis

Lost-time and "Light-Duty" Ergonomically-Related injuries
Brylane Co., Indianapolis, IN, YEAR 2000

TYPE OF CASE	Total Number	Total %Rate	National 1999 %Rate (1)	Repetitive Motion Number	Repetitive Motion %Rate	National 2000 %Rate (1)	Back/shoulder Number	Back/shoulder %Rate
Total cases				163	10.2	0.57		
"Lost Workday" cases				127	7.8			
Lost-time cases	49	3.1	0.6	35	2.2		14	0.9
# Days lost-time	1798	37.0/case		1215	34.7/case		583	41.6/case
"Light-duty" cases				92	5.6			
# Days "light-duty"				2444	26.6/case			

Sources: Brylane LP, *Log of Occupational Injuries and Illnesses,* 1998 - 2000; US Bureau of Labor Statistics, *Annual Survey of Occupational Injuries and Illnesses*, 1998-2000; the "National Rate" for "Total" cases (i.e. lost-time cases for "repetitive motion" and "back/shoulder" combined) is the BLS' compilation from this Survey, entitled "MSD cases". BLS provided these data to the AFL-CIO in June, 2001.

Note: all Brylane rates include many supervisory or office clerical employees, whose jobs are less dnagerous than the jobs of Brylane's production and telemarketing workers, and based on the assumption that Brylane has a total of 1600 employees. Therefore, the true rates among production and telemarketing workers are significantly higher than the rates shown here. However, the BLS "national" rates also include supervisory and clerical employees as well

1) All national rates are the latest ones available from the US Bureau of Labor Statistics, and based on the more general BLS category of "Non-Store retailers", SIC 596, instead of "Non-store retailers - catalogue sales", SIC 5961, for which these data are not available.

Lost-time and "Light-Duty" Repetitive Motion injuries
Brylane Co., Indianapolis, IN

TYPE OF CASE	1999 Brylane Number	1999 Brylane %Rate	1999 National %Rate (1)	1999 Brylane vs. National	1998 Brylane Number	1998 Brylane %Rate	1998 National % Rate (1)	1998 Brylane vs. National
Total cases	195	16.3	0.68	24x higher	185	15.4	0.84	18.3x higher
"Lost Workday" cases	191	15.9			174	14.5		
Lost-time cases	42	3.5			38	3.2		
# Days lost-time	1945	46.3/case			761	20/case		
"Light-duty" cases	89				136			
# Days "light-duty"	2229				2347			

BRYLANE

INJURY PREVENTION THROUGH ERGONOMICS AWARENESS

I MISSION STATEMENT

Brylane is committed to providing a lifestyle free of musculoskeletal disorders by using a team work approach to maintain a safe and healthy workplace. This goal will be accomplished through awareness of ergonomic principles, education of our associates and good communication throughout our organization.

II SCOPE

This process applies to all Brylane associates and will address methods of MSD prevention utilizing ergonomic principles in the design, redesign or modification of work methods.

Responsibility

- Brylane's Management team is committed to providing a work place that emphasizes quality of life through enforcement/ implementation of this policy, encouraging prompt reporting of symptoms and actions to decrease ergonomic hazards.
- Health and safety will encourage early reporting of symptoms, provide appropriate medical care, maintain data and monitor employee health.
- Brylane's employees will practice proper lifting, comply with any ergonomics changes to job, observe for hazards, and report symptoms of MSD promptly.
- Brylane's Ergonomic Task Force will screen suggestions for alleviating hazards, perform facility walk-through and perform basic job analysis with recommendations.

MANAGEMENT COMMITMENT + ASSOCIATE INVOLVEMENT= TEAMWORK! SUCCESS!

The CHAIRMAN. Mr. Fontana.

STATEMENT OF PAUL FONTANA, OCCUPATIONAL THERAPIST AND OWNER, FONTANA CENTER FOR WORK REHABILITATION, LAFAYETTE, LA

Mr. FONTANA. Chairman Kennedy and Members of the Committee, my name is Paul Fontana, and I am appearing before you as both a small business owner and an occupational therapist who works in the area of ergonomics on a regular basis. I am honored to be invited to present my thoughts regarding this important issue and thank you for allowing me the opportunity to speak with you all.

I am the owner and president of the Fontana Center for Work Rehabilitation in Lafayette, LA. This is a small business with 40 full-time employees, providing injury prevention, rehabilitation, and return-to-work programs to industry, outpatient, occupational, and physical therapy, and fitness and health programs to business and individuals.

Working in south Louisiana means that much of my industrial work comes from work dealing with companies directly involved with the oil and gas business, both on the drilling and production side. However, I regularly work with customers from all industries—the beverage industry, the transportation and warehouse industry, the mining industry, municipalities, power and electric. I have even developed programs on ergonomics for an invasive cardiologist, attorneys, nurses, nurses' aides, bank tellers, secretaries, data input aides.

I have reviewed the information on the administration's proposal for establishing the voluntary industry- and task-specific guidelines to control ergonomic-related problems. On balance, I am pleased with what I see.

As a small business owner, I believe the new proposal offers a flexible, cost-effective plan that I will be able to implement. As an occupational therapist who is intimately involved with returning employees to work and with developing and implementing injury prevention and ergonomic programs to companies, I believe this offers us a solid framework to take care of the problems found in the job.

Incorporating proper ergonomic principles into the workplace makes good business sense, because it keeps our employees healthy, improves their productivity, and reduces injuries. Along with the reduction in injuries will come a reduction in the cost to the employer, which makes the employer a more competitive company. A competitive company is a stable employer. Employers large and small understand this and are responding positively to this.

A flexible approach to workplace safety is needed to allow business and industry to tailor solutions to these specific problems, and I would like to share just one example of one of my customers.

It is a small salt processing mine with under 100 employees. These guys were experiencing high numbers of relatively minor but costly injuries, and over a period of years, this resulted in a decrease in the profitability from the salt processing operations and an inability for this company to compete with the largest salt pro-

ducers in the area. The bottom line was that their cost for salt per ton was substantially higher than the larger producers.

The plant's management team made a concerted commitment to total safety, and zero injuries became the company's safety goal. Briefly, what the company implemented is as follows.

I evaluated each job from a biomechanical standpoint, both to quantify the physical demands of the job as well as to identify the physiological hazards present in the job. All employees underwent intensive training in biomechanical ergonomic principles. Then, the ergonomic team which consisted of hourly employees, management, and maintenance personnel as well as myself, trained in ergonomic principles, set up an abatement program to resolve these issues.

Many of these abatements involved minimal to no cost, like job rotation every 2 hours instead of every 2 weeks, or the implementation of a regular stretching program. These resulted in comments from the employees of well-being very quickly after being implemented.

Other items, such as a series of custombuilt scaffolds and stairways eliminated high risk in the plant yet were relatively expensive—about $10,000. This, along with the new processing technique, actually increased production by almost 5 percent a year.

With the success of these programs came an increase in employee morale. As injuries went down and production increased, the company's cost per ton of salt also went down so the company was more competitive with these larger producers. In the year 2000, the company invested $700,000 in an automated packaging and pelletizing unit. This eliminated all the repetitive motion hazards that we were unable to eliminate in any other manner. This has resulted in an increase in production by 40 percent.

The CHAIRMAN. Mr. Fontana, I am very reluctant to interrupt you. As you probably see with our colleagues going out and the lights in the back, it means that the clock is ticking for Senator Enzi and myself, and we are going to have another vote after that.

So if you would not mind, we will put your full statement in the record as read and completed, and if you would like to take another 30 seconds to conclude, that would be fine.

Mr. FONTANA. That is about what I had left, and it is right under the time frame that you all had asked me to stay within.

The CHAIRMAN. Well, we apologize to you and to our other witnesses because of the arrangements over there; we would have had more than enough time.

Mr. FONTANA. The bottom line is this company was able to decrease its cost per ton. The two employees who would not be needed in the job any longer that the company I guess could have eliminated, they did not eliminate, but rather moved them to a quality control position. And over the last 5 years, this salt mine has successfully completed one million man-hours without a lost time incident or modified return-to-work incident.

I have many success stories like this. The voluntary flexible approach to ergonomic hazards is successful. The repealed ergonomic rule did not allow for the creativity and flexibility depending on the size of the business. Moreover, the burden to implement the old rule would have been tremendous, especially to small businesses such as mine.

Industry is working toward eliminating these ergonomic hazards inherent on the job. Employers are stepping up and making the changes in their worksites because it is good business, and I believe they will embrace the voluntary guidelines to make the workplace safer. And for those employers who just do not get it, OSHA's new proposed enhancement penalties under the general duty clause I believe will have enforcement.

As an occupational therapist who does this on a regular basis, I can see a willingness of companies to do this.

[The prepared statement of Mr. Paul Fontana follows:]

Statement of

Paul A. Fontana, OTR
Occupational Therapist
President/Owner
Fontana Center for Work Rehabilitation, Inc

before the

Committee on Health, Education, Labor and Pensions

United States Senate

Washington, D.C.

Ergonomic Issues

Thursday, April 18, 2002

Paul Fontana's Testimony on Ergonomic Plan
Senate Committee on H, E, L, & P
April 18, 2002

Chairman Kennedy, Senator Gregg and members of the Committee on Health, Education, Labor and Pensions, my name is Paul Fontana and I am appearing before you as both a small business owner and an Occupational Therapist who works in the area of ergonomics on a regular basis. I am honored to be invited to present my thoughts regarding this important issue affecting the business community, and thank you for allowing me the opportunity to speak with you.

I am the owner and President of the Fontana Center for Work Rehabilitation in Lafayette, Louisiana. This is a small business with 40 full time employees working in providing industrial Injury Prevention, Rehabilitation and Return to Work Programs, outpatient Occupational and Physical Therapy, Massage Therapy and Fitness and Health programs to business and individuals. Working in south Louisiana means that much of my industrial work deals with companies involved either directly or indirectly with the oil and gas industry - both drilling and production companies as well as the wide range of supporting industries from service companies to water transportation and shipping. However, I service a full range of industrial customers from the beverage industry, transportation and warehouse industry, mining industry (salt mines), municipalities, power and electric companies and manufacturing facilities.

As part of the injury prevention program, I perform onsite analysis of the various jobs and quantify the essential physical requirements of each job and develop the company's written physical job descriptions. Based on these essential functioned physical job descriptions, I develop and implement 4 - 5 hour tests to screen the new hire employees and ensure that each employee is able to safely and efficiently perform the essential job functions before they go to work. Each test is job specific involving participation in actual job simulated tasks in a non climate controlled environment closely simulating the job - although in a safe environment. In doing so, we have seen companies injury rates drop substantially. For example, one of the major drilling companies in the Gulf of Mexico with over a thousand workers in the Gulf has recently become one of my customers after they identified that they were spending 75 % of their injury management dollars ($ 7 million) on workers who had worked less than 2 hitches (2 weeks). Another major drilling contractor in the Gulf of Mexico who has been testing all new hire employees with me for over 7 years reported no lost time accidents or modified return to work instances for any employee during his/her first 4 months of employment. Another customer of mine, a small tugboat company with less than 100 employees was in jeopardy of going out of business in 1990 because they could not afford their insurance premiums after many years of high injury rates. After implementing the new hire testing program along with back education and safe lifting training and some simple ergonomic changes, the company reported only one on the job musculoskeletal injury over a 6 year period. Their annual insurance premiums have dropped $ 800,000 over the past 5 years.

Companies understand that they do not have control over many of their expenses. They pay relatively the same for salaries, benefits, supplies, equipment, etc as their competitors. What they do have direct control over is the cost of their productivity and workers compensation insurance through injury prevention programs. As they have seen the positive results in reduced incidences in injuries, I am being called upon to assist them with other injury prevention solutions. With my Occupational Therapy training and my knowledge of anatomy and physiology, kinesiology, medical conditions and pathology as well as biomechanics, I am able to assist them with ergonomic programs - either on a case by case injured worker basis or to help set up or implement the entire program from management and employee education, to job site analysis, physiologic hazard identification and abatement issues. Furthermore, as an Occupational Therapist with 26 years of experience in this aspect of my profession, I am regularly retained to teach ergonomic principles to other professionals and business leaders and employees throughout Louisiana and the United States.

As a member of the Independent Association of Drilling Contractor's subcommittee looking at the

ergonomics issue, I assisted the committee in developing the testimony for the initial hearings on the Clinton ergonomic rule. At the conclusion of the 2 days of meetings I told the subcommittee, "Ergonomics is good for business. It will reduce injuries, save money and is good for our employees." I am pleased to see the movement towards industry specific guidelines as this is the direction that many of my customers, including the drilling contractors through the IADC, were moving.

Over the past 4 - 5 years I have seen a continual increase in the call from businesses to assist them with the implementation of an ergonomic program - either for the company or plant or for a specific individual who needs some help. Some of the individual cases that I have personally worked on include an executive secretary to a high school principal, a bank teller, an invasive cardiologist, many secretarial and other office type personnel (accountants and data entry personnel), welders, truck drivers and forklift operators, packers, medics and ambulance personnel, nurses and nurse aides, various plant workers, field and plant operators or mechanics, helicopter pilots and oil field drilling and production workers.

In all these types of businesses I see that the number of musculoskeletal injuries that are not from a slip, trip or fall continues to decrease. When I work with a business I evaluate the company's OSHA logs to determine incident patterns and high risk areas. I have the opportunity to speak with a number of the employees who are performing the job to understand their physical complaints, what they feel are the most difficult areas of their job as well as what they feel would resolve their physical complaints. When I go out into the field and observe them work I will often see ergonomic solutions the employees have implemented on their own in an attempt to resolve problems they find in their jobs. I tell the employees that I am not there to tell them how to do their job. They are the experts in how to do their jobs. I am the expert in the anatomy and physiology and the biomechanics of the body. Once I see what they do, I can determine what the physiological hazard is in the way they do what they do. Between the two of us, we will find a better way to resolve their complaints and not cause additional complaints. This approach establishes a true partnership between myself and the employee. The abatement solution becomes "their" solution.

Proposed Comprehensive Plan to Reduce Ergonomic Injuries - Voluntary Guidelines

I have reviewed much of the information on the Administration's proposal for establishing voluntary - industry and task specific - guidelines to control ergonomic related problems. I am pleased by what I see. As a small business owner, I believe the new proposal offers a flexible, cost effective plan that I will be able to implement. The proposal will allow me to develop a format that works for me to ensure that I am meeting the needs of my employees while at the same time that I am able to continue to function and operate in the small business world. Even if my area of expertise was not in the ergonomic arena, the proposal allows for compliance assistance, training grants and work place outreach areas where I will be able to get needed assistance. The bottom line for me as a small business owner with 40 full time employees (39 of which the Fontana Center is the primary source of income) is that I have to ensure that my employee's are able to work continually at the job in a safe and efficient manner while at the same time that I am not overburdened with the process of complying with a regulation. I believe the new voluntary guidelines allow me to do this.

As an Occupational Therapist who works with business every day on injury prevention and return to work programs, I have seen a continual willingness from the business community to take positive steps to ensure things on the job (job modifications, technique changes, administrative controls, etc.) do not adversely affect their employees' health. Business, whether it be private enterprise or government, must run in a cost effective manner. Business leaders clearly see the cost of treating injured workers continually climbing. One of the areas a company has significant control over is the costs associated with a worker's injury. (This cost is not only in dollars spent by the employer but also includes the pain and

suffering of the injured employee and the change of his/her role in the family structure.)

Over the past 16 years that I have been a small business owner, I have seen a continual increase in companies inquiring about injury prevention and ergonomic programs. This indicates to me that company managers do see that the incorporation of a comprehensive injury prevention and ergonomic program is really good business and not just "feel good P.R."; it really pays off.

The table below indicates what this pay off can be in terms of real dollars. For example, if a company is operating at a 4% profit margin and incurs one injury at a total cost of $10,000, the sales force would have to generate an **additional** $250,000 in sales to offset the cost of the injury ($250,000 x 0.04 = $10,000). The additional cost associated with lost production due to employee absence, recruitment and training of replacement personnel, etc. only adds to the true cost of an injury.

Injury Costs (dollars)	Company Profit Margin				
	2%	4%	6%	8%	10%
$ 10,000	500,000	250,000	167,000	125,000	100,000
$ 20,000	1,000,000	500,000	333,000	250,000	200,000
$ 50,000	2,500,000	1,250,000	833,000	625,000	500,000
$ 75,000	3,750,000	1,875,000	1,250,000	938,000	750,000
$ 100,000	5,000,000	2,500,00	1,667,000	1,250,000	1,000,000
$ 500,000	25,000,000	12,500,000	8,333,000	6,250,000	5,000,000

Sales necessary to offset the cost of accidents and injuries at different profit margins.

Donald Bloswick, Ph.D., P.E., C.P.E.
University of Utah

When one combines all the costs of an on the job injury and accompanying medical management and rehabilitation and compares that to the amount of sales the company will have to generate to pay for the injury, the benefit of preventing injuries really becomes apparent.

When a company takes care of its injury prevention, management and return to work issues, it will see a decrease in the cost of doing business. It will see a positive reflection in their bottom line. As its insurance modifier decreases so does its insurance premiums. Now the company's cost of doing business is better than its competitor who is not taking the same preventative action. It will be a stronger company, better able to compete in any market because its costs are less than its competitors. Like the example of the small tugboat company that I service, their insurance premiums have dropped over $ 800,000 over a 5 year period. Although they continue to pay the same for rope, salaries, fuel, etc. as their competitors, they save so much on their insurance costs that they are able to fund the company's retirement plan, increase salaries and upgrade their boats. This resulted in increased employee retention and decreased turnover. Many of their competitors are now turning to similar types of programs so as to compete in the same market. All of this was accomplished without government mandated regulations.

In 1989 - 90 I saw an increase in interest in companies for the post hiring assessment programs that I was providing for business and industry customers. I have seen a continued interest from businesses, both

large and small, regarding assistance with setting up ergonomic programs for either a specific individual who is having some problems to setting up a comprehensive ergonomic program company or plant wide even after the Clinton rule was repealed. Furthermore, the Bush proposed plan to reduce ergonomic injuries allows for OSHA to investigate those businesses who do not respond to the call to make the work place free of all recognizable hazards and force compliance through regulatory means under the general duty clause of the OSH Act. I believe that this is one of the roles of our federal government - to bring important issues to light, encourage the business community to follow through, and provide the support and direction necessary to allow business to make good business decisions. This system is already working.

When we look to voluntary guidelines, the auto industry and meat packing industries have provided the rest of the business community with some valuable "guidelines" to follow in regards to establishing programs that work well. I utilize a similar format approach with the business customers who come to me for help with program assistance and implementation. The program involves both the management and employee team in the identification of high risk areas, use of internal or outside professionals with specialized training in anatomy and physiology, medical conditions and bio-mechanical principles to identify the physiological hazards in the job, and both of these groups to identify potential abatement remedies to ameliorate the physiological concerns. This approach has resulted in wonderful success stories of reduced injuries, increased production and happier and safer employees who are able to work many years to come.

One of my customers, a salt processing mine, was experiencing high numbers of relatively minor but costly injuries. Over a period of years this resulted in a decrease in profitability from the salt processing operations and an inability to compete with the larger salt producers in the area because their cost per ton of salt was substantially higher than the larger producers. The plant's management team made a concerted commitment to total safety. Zero injuries became the company's safety goal. A two year plan was formulated. The company hired the Fontana Center to perform on site job analysis of every job in the plant and quantify the physical requirements of each position. Next, all management and hourly employees underwent extensive training in the anatomy and physiology of the spine, instruction in proper body mechanics and lifting postures and techniques and a comprehensive stretching and warm up program. Each team underwent "on-site" training in any problem material handling situations they might face. I reviewed the OSHA logs to determine the immediate and obvious problem areas as well as interviewed the employees to ascertain their impression of the problem areas they face every day. From this, I performed an on-site ergonomic analysis of each work area and, with the hourly employee, identified the physiological hazards that were present in each job along with recommended abatement recommendations for each hazard. Often times the employee knew exactly what needed to be done to resolve the issue. Having the company's ergonomic specialist confirm their recommendation was a validation of the recommendation. Where possible, estimated back compression forces and shoulder moments were calculated to give management personnel some comparison as to why a specific area needed to be resolved and which one was a higher priority.

Many of the abatements involved minimal to no additional cost other than an hour or two of a maintenance personnel's time. Abatements like job rotation every 2 hours instead of every 2 weeks and the implementation of a regular stretching program resulted in reports of immediate "well-being" from the hourly workers. These measures cost nothing in terms of real dollars to the company. Other items, such as a series of custom built scaffolds and stairways were relatively expensive (under $10,000). However, when the shoulder moment and back compression forces were calculated and compared to figures supported by NIOSH, the company quickly made the investment. This, along with a new processing technique, actually resulted in an increase of production by almost 5 % a year.

With the success of the ergonomic program and the post hire assessment of all new hire employees and the return to work program of injured workers, came an increase in morale by the hourly employees. As production increased and injuries went down the company's cost per ton of salt also went down so the company was somewhat more competitive with the larger producer competitors. In 2001, the company invested $ 700,000 in an automated packaging and pelletizing unit. This eliminated all of the repetitive motion hazards that we were unable to eliminate in any other manner. This has resulted in allowing the plant to operate 24 hours a day instead of 16 hours and increased production by 40 %. The employees who were working these two areas now rotate through a 24 hour per day (8 hours a day) schedule. The company has decreased their cost per ton to such a degree that the company is not going to reduce the workforce by the two employees who are no longer needed on that job. These employees have been reassigned to a quality control position.

Over the past 5 years, the salt mine has successfully completed 1,000,000,000 man-hours without a loss time accident or modified return to work program.

Another customer of mine is an oilfield service company who was employing me for several years to teach regular back education and safe lifting techniques to all their employees. I was asked to work with the accounting department to see if we could resolve some musculoskeletal complaints some of the employees were reporting. There are approximately 15 data input and accounting employees in their financial section. In working with these individuals it was apparent that the company needed to purchase some ergonomic chairs specifically evaluated to meet the individual needs of almost half of the department. The Manager of this department was relatively new on the job - working there only 2 - 3 weeks. She was not at all interested in us requesting specialized chairs for these 7 - 8 workers. Her exact words were, "We have a special arrangement to buy ergonomic chairs from a supplier. All the chairs are the same so we get a great deal." She did not see that by the very fact that all the chairs were identical, they would, in all likelihood, not "fit" some of the workers. (Proper ergonomic chairs requires more than simply a chair with moving parts. It requires chairs that fit the worker and his/her needs.)

The Manager was experiencing serious back, neck, shoulder and upper extremity pain and discomfort after only 2 - 3 weeks on the job. She did not report any of the discomfort she felt in the job to her supervisor because, as she later told me, she attributed this to working 13 - 15 hour days. She reports now thinking at the time that she would not be able to stay in this job long term if she continued to feel this way. When one of my therapists was attempting to convince her of the need for specialized chairs for these employees, he noticed that the Manager's workstation did not fit her needs. The Manager told us that she inherited the office that she reports was ergonomically set up for her predecessor. Her predecessor was 6 foot 3 inches tall and she is 5 foot 3 inches tall. My associate replaced her chair with a loaner specifically chosen to fit her needs. In addition, she was provided with some education on bio-mechanical ergonomic techniques (stretching and posture exercises). In addition, he corrected some simple ergonomic physiological hazards that involved rearrangement of the office according to her size and needs. With the implementation of the stretching and posture exercises and the re-engineering of her worksite, after two days the Manager reported that she was "cured"! From this one experience we were

given approval to individualize the ergonomic abatement plan for each of her employees. The results have been similar across the board.

Neither of these examples would have been successful had the employees not taken personal responsibility in following through with the bio-mechanical Tools to Fight Back (TTFB) that were specifically designed by a trained professional to give each person control over their individual symptoms. The use of voluntary guidelines as proposed by OSHA allows for this type of response to ergonomic problems. Engineering changes alone will not resolve every situation. It is equally imperative that the employee be held accountable and responsible for taking an active role in his/her care. The employer's role is to hire the appropriately trained health care provider or ergonomic specialist who is proficient with these techniques, provide the correct equipment modifications and changes recommended by the professional, ensure that the employee has sufficient education and training so as to understand the "why" behind the tool(s) that has been chosen by the professional as the best response for this employees unique and specific problem, along with providing the encouragement and time to perform the TTFB on the job site. The employee's role is to fully participate in and follow through with these abatement plans.

The Overturned OSHA Ergonomic Rules

I am knowledgeable of the requirements of the OSHA rule that were initially proposed under the Clinton Administration. In addition to working with my business customers in ensuring their implementation, I taught other therapists throughout the country the requirements of the rule. As a small business owner, I also had the task of implementing these rules in my own business. I would like to briefly share my experiences from both standpoints.

As a provider and a professional whose work is to establish and implement ergonomic programs for business and industry customers I believe that the proposed rules would have been a tremendous boost to my business. It was my belief that I would be able to work full time in this area, even to the point of having to hire and train additional occupational therapists to meet the growing ergonomic needs of my customers. Just from the standpoint of servicing the 40 or so businesses that I currently provide injury prevention, rehabilitation and return to work programs to, I believe that it would have required 2 - 3 additional therapists working almost exclusively in ergonomics to meet their needs.

Although this would have been a boom to my own business, I was not in favor of the rule as proposed because in my opinion they would not have been good for my customers' businesses. As an occupational therapist who has served on several committees for the American Occupational Therapy Association I know that AOTA was in support of the Clinton Administration rule. However, I felt that the rule needed some major changes. I work with business and industry representatives every day on issues that will affect their business and I know that if it is not good for their business, in the long run, it will not be good for my business.

I would like to briefly explain some of my beliefs and concerns with the previous OSHA rule:

1. The previous rule would indicate that essentially any musculoskeletal injury other than a slip, trip and fall could be considered an ergonomic injury. This is just not the case. As an occupational therapist, I am called upon to assist with keeping a person with musculoskeletal complaints on the job or to assisting in returning the worker to work in an expedient manner. Part of my involvement with this process is to assess the situation from an ergonomic standpoint. More often than not, it seems, the job does not have sufficient risk factors to have been the **cause** of the musculoskeletal injury but elements of the job may be present in sufficient quantity to prevent the healing process from occurring in a timely manner. By making every musculoskeletal problem an

ergonomic situation, it seemed the company would have to spend more time trying to prove the ergonomic hazards in the job were not strong enough to cause the problem, instead of addressing the aspects of the job that may hinder healing.

We do not work in a vacuum. What the individual does during the non-work hours can be equally (or more) important to either causing musculoskeletal injuries or preventing them from recovering. The activities they participate in for play, leisure and physical daily living play critical roles in whether the individual has sufficient down time and rest to promote healing. A transportation specialist with a salt mine was reporting signs and symptoms of upper extremity musculoskeletal problems. His job requires 3 - 4 hours a day at a computer. However, seldom is it continual data input for extended periods of time where he does not perform other tasks. I determined that his work station had a few ergonomic problems that could be easily abated. In addition there were some bio-mechanical ergonomic exercises that I recommended him to perform. As I explored what he did on his off time, he disclosed that he played the organ for 5 - 6 hours every evening. In my opinion, his leisure time activities had more to do with causing his musculoskeletal problems than the worksite.

Another injured worker I worked with was a draftsman for a manufacturing plant in Houston. He had been treated by an occupational therapist from a local outpatient facility but was reporting no success in reducing his symptoms. He had been evaluated by the facility's ergonomic team and had tried every mouse and joystick on the market as well as several different chairs, arm supports and station reorganization. He continued to complain of serious debilitating pain. I was asked to come in as an outside expert to assess whether there was anything they might have missed. In my opinion, he was being properly treated. He was on anti inflammatory medication, was properly splinted and all appropriate adaptive equipment was tried. His comment to me was that "nothing helped". However, he admitted that he was feeling better over the past 4 months. When asked what had changed over this period he insisted that nothing was different. In exploring his job and off work activities he admitted that he had previously been working on his home computer for 6 - 8 hours a night but that over the past 4 months he was no longer doing this. I told him that it was my belief that this is the reason for his recovery over this time period. Before he quit "working" the extra 6 - 8 hours a day at home, his body did not have sufficient time to promote the healing that the splinting and anti inflammatory medication was trying to do . The individual would not admit that this was the case. His case was resolved when he quit his job and moved back to his home in the northeast.

2. Musculoskeletal injuries are generally the result of either repetitive or sustained micro trauma or repetitive macro trauma over time causing a degenerative process to the structure (tendons, discs, joints, muscles, etc). Over time this can result in an inability of the tissue to recover on its own. When the symptoms are first noticed, this is not a medical problem but rather a technique problem. If nothing is done to correct the technique a medical problem may develop (over time). Engineering changes alone will seldom resolve all the issues. For bio-mechanical ergonomic tools to be effective, a trained professional needs to evaluate the employee with the physical complaints and prescribe the right tool to resolve the unique problem of the individual. The employee's active participation in the bio-mechanical ergonomic solutions (what I am referring to as Tools to Fight Back or TTFB) is often equally as important as the administrative and engineering changes. The previous OSHA rule did not address the necessity of the individual to take responsibility for and to be an active participant in preventing the "technique problem" from becoming a medical problem. (Example, a person who is just starting to play tennis begins to experience tenderness along the posterior lateral aspect of their elbow. This is the beginning of a problem commonly called tennis elbow. This is signs of a technique problem. This individual

does not need to seek medical attention for the relief of the symptoms but rather should seek out a good tennis coach. The individual is rotating the forearm in such a manner as to be irritating to the extensor muscles of the forearm. If they continue doing whatever they are doing to irritate these structures the symptom will become a medical problem in time. Anything they do that likewise pronates and supinates their forearm will likewise irritate these structures - wringing out a dish rag, carrying luggage, shaking hands, using a computer mouse or playing tennis with poor technique.)

I had a secretary who was reporting serious upper back, scapular and neck problems. As part of the training I offer to my professional staff, I hired the founder of the McKenzie Institute of North America, Mr. Wayne Rath, PT to teach my staff the McKenzie / Duffy Rath treatment approach to bio-mechanical spine problems. Mr. Rath is one of the top 3 - 4 therapist in North America trained in the bio-mechanical treatment approach to spine injuries. While he was in Lafayette for these 4 days of training, I had my secretary assessed by Mr. Rath. He confirmed that the ergonomic re-engineering we had performed at the worksite addressed all the appropriate concerns. He furthermore concurred that the bio-mechanical ergonomic program we had established for the employee was both the cure and the prevention for her complaints. When the secretary addressed her needs by following the exercises and posture changes we instructed her to do she stated her symptoms would go away. She resigned from my employment approximately 3 - 4 months later to return to her home town to work. During her exit interview, she complained that she still had the symptoms in her shoulder and scapular area and that we did not do enough to resolve her complaints. She admitted that she did not continue to do the bio-mechanical ergonomic exercises that she had been taught. Had she continued to work for me she would have eventually gone out on workers compensation because of the continued progression of her complaints. Yet, there is little else that we could have done for her to keep her in her job. I would have been faced with a long term workers compensation claim and eventually an increase to my premiums because she did not live up to her responsibility in addressing her problems.

When I travel to offshore drilling and or production facilities, I often have 4 - 5 hours of continual computer work to do on my lap top computer. As a contractor offshore, I do not have access to an office but rather have to work in the sleeping quarters which are not set up with ergonomic friendly spaces. I have found that if I put my lap top on the bed and lean forward with my forearms resting on my knees I do not get any symptoms of repetitive motion problems or fatigue in my arms and hands. I perform my bio-mechanical ergonomic stretches (my TTFB) every 20 minutes and I do not get fatigue in my upper back, neck and shoulders. Without these measures I would be in serious discomfort by the end of a day or two. Knowing what to do and following through with the corrective measures makes all the difference.

If we always do what we always did we will always get what we always got. If we expect to get different results, if we expect not to hurt at the conclusion of a specific task, we have to be willing to do something different.

3. The previously proposed rule would have created a "new workers compensation system". As a provider of return to work programs I often times have difficulty returning an injured worker to work when he/she is satisfied to receive 66 % of their hourly wage. Giving them 90 % of their after tax earnings would make this nearly impossible. As a small business owner, my current workers compensation insurance policy would not have covered this additional financial payout, thus making me pay for it directly. If I have to spend additional money on insurance issues, I do not have money to give raises, bonuses, buy equipment or provide additional training to my staff, etc.

4. The previously proposed rule did not allow for creative flexibility depending on the situation, size of the business, needs of the situation, etc. This one size fits all approach would put a tremendous burden on smaller businesses who simply do not have the manpower and or resources to implement the full scope of the program as previously required.

5. The cost to implement the education aspect of the previous OSHA rule would have been tremendous. One of my smaller drilling contractors asked me what it would cost for me to travel to all 20 rigs they had in the Gulf and educate all their employees on the risks of musculoskeletal injuries. I would have to spend a minimum of 2 days out on each rig to ensure I reached both crews (45 - 75 people) and each hitch. Travel to a drilling rig can be a time consuming and expensive operation. At a cost of my daily consultation rate of $ 1,000/day, that would have cost a minimum of $ 40,000 to train the men and women who worked on the 20 rigs. Plus there would be additional cost to set up and implement the training of any individual who was not present on the rig on the day that I taught the course.

Summary

1. Incorporating proper ergonomic principles into the work place makes good business sense because it keeps our employees healthy, improves their productivity and reduces injuries. Along with a reduction in injuries will come a reduction in cost to the employer which makes the employer a more competitive company. The bottom line is that incorporating a good ergonomic program into the process will save the company money and help it continue to compete in the marketplace. A competitive company is a stable employer.

2. The new strategy is flexible, calling for industry or task specific guidelines which will allow all businesses to reduce ergonomic injuries without being overburdened.

3. Business and industry managers understand the benefits of the safer workplace. This is why I see zero incidents as realistic safety goals by businesses from all walks and manner of work. Industry is working towards eliminating the ergonomic hazards inherent in the jobs or on individual's work sites even without a mandated government requirement. Employers are stepping up and making the changes to their work areas because it is good business.

4. Government's role is to bring these important concerns to the forefront and ensure they are not forgotten. The current and previous administrations have done that. Furthermore, under the new OSHA strategy, OSHA can enforce serious recognized ergonomic hazards under the general duty clause.

Respectfully submitted by Paul Fontana, President/Owner of the Fontana Center for Work Rehabilitation, Inc, 709 Kaliste Saloom Road, Lafayette, LA 70508. Phone 337 - 234 - 7018, FAX 337 - 232 - 3891. Email address pfontana@fontanacenter.com

Response to Questions
Regarding Ergonomic Issues
Submitted by

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Committee on Health, Education, Labor and Pensions
United States Senate
Washington, D.C.

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Question # 1: In your written testimony, you describe how you work with both employers and their employees to help identify ergonomic hazards and craft solutions tailored to their specific workplaces and jobs. Do you feel the repealed ergonomics rule would have allowed for developing solutions in this way, particularly with respect to the basic screening tools and the job hazard analysis tools?

Response: While voluntary, flexible approaches to ergonomic hazard identification and abatements are successful, the repealed ergonomics rule did not allow for creative flexibility depending on the diversities of each situation, size of the business, needs of the specific situation, etc. Moreover, the burden to implement the old rule would have been tremendous, especially to small businesses like mine. Under the old rule a business would have assigned someone the job of implementing the ergonomic rule throughout the company. As part of this person's training they would have been taught to utilize the basic screening tool whenever an employee reports a possible MSD. The use of this generic tool would have, more often than not, given the user multiple "risk factors" that in and of themselves would have had nothing to do with causing the MSD complaint. The employer, based on faulty information, will make job changes based on a symptom and not resolve the problem. For example, an employee reports he/she has back, trunk or neck pain. In performing the job analysis utilizing the basic screening tool, the evaluator notes that the individual is required to lift 76 lbs one time in the 12 hour day. According to this tool, this is the "cause" of the back complaints. Therefore the solution to this problem would be to eliminate the one time 76 lbs lift. If this individual stands for extended periods of time, or quickly twisted while getting up from a kneeling position, or played softball over the weekend or worked in his/her garden for several hours the day before, etc. these things, both on the job and off the job, in all likelihood had more to do with the person's complaints of low back pain than the 76 lb lifting on the job.

The basic screening tool states that *"lifting more than 75 lbs at any one time, more than 55 lbs more than 10 times per day or more than 25 lbs below the knees, above the shoulders or at arms' length"* are associated risk factors and or causes of neck/shoulder, hand/wrist/arm, back/trunk/hip and leg/knee and ankle musculoskeletal disorders. These rules are too absolute. If one uses the research provided by the National Institute of Occupational Safety and Health (NIOSH), we learn that back compression **forces in excess of 770 lbs. will put some portion of the work force at risk and back compressive forces in excess of 1430 lbs. will put most members of the work force at risk (But not all members of the work force will be put at risk of injury even with high back compression forces unless the repetitions are high).** A 200 lbs individual, utilizing correct body mechanics, is able to lift a 75 lbs object **from the floor** and keep his/her back compression forces below the 770 lbs range. (723 lbs of compression forces). This same individual will generate similar back compression forces when he/she bends at the waist to pick up a 5 lbs bag of charcoal (734 lbs of compression forces). Using the basic screening tool to assume the cause of back, neck, shoulder or wrist and hand complaints is not going to result in a reduction of MSD complaints.

The example that I have used here indicates how this one size fits all tool will not resolve the industrial MSD complaints, partly because we do not know how many repetitions of a certain task are going to cause problems for an individual. The American workforce, and I would include the full House and Senate in this category, bends at the waist to tie their shoes, pick up clothes, pet the cat, etc. literally hundreds of times a day. Each of these activities (assuming the person weighs 200 lbs) will cause the back compression forces to exceed the amount of back compression forces seen when a similar size individual utilizes correct body mechanics to lift the 75 lb load. If the individual weighs in excess of 200 lbs, then their back compression forces will be even higher than the 734 lbs example provided above. Indicating that an individual who handles 75 lbs one time or 55 lbs 10 times in an 8 or 12 hour time period is at risk for back, neck, shoulder, hand, etc musculoskeletal disorders is, on it's own, simply not true. To even **suggest** that an adult male or female warehouse worker, who has been properly trained in the use of good body mechanics and who has the physical strength to handle 75 lbs, is always going to be put at risk of a musculoskeletal injury because he/she lifts 75 lbs (and that the employer is somehow at fault), is, in my opinion, reckless and wrong. The key word is being properly trained in correct body mechanics.

Based on this simplistic example of using the basic screening tool, the entire American business community would have to change just about everything we do. Lawyers would not be able to lift their brief cases (25 lbs below the knee), parents would not be able to lift their 3 year olds, individuals would not be able to feed the office cat or dog ("gripping an unsupported object weighing 10 lbs"), individuals would have to eliminate any strength training, office workers would not be able to move their office plants or computers or furniture, etc. if the company had even one MSD complaint. I hope this indicates how the use of these overly generalize screening tools simply does not resolve the problem which is causing the MSD complaint but rather, in semi trained hands, will only distract the company from the true cause of the problem.

Furthermore, the Clinton rule would have required a company with one reported MSD to initiate at least the quick fix portion of the requirement and if another MSD was reported, the company would have been required to implement the entire ergonomic plan throughout the company. This would have been a tremendous cost to the company that would not have necessarily addressed the two MSD complaints, or if they did, at a much greater cost than would have been necessary. A company with 500 employees who has 2 complaints of MSD type problems should not be required to implement a full ergonomic plan but rather would be better off focusing their resources and attention on resolving the issues associated with the 2 MSD complaints and the directly related job functions. Likewise, a small company like mine (40 full time employees) who has 2 MSD type complaints in it's 14 year existence would have to hire a consultant and implement the entire Clinton plan. This one size fits all type of solution would require the company to spend a tremendous amount of money well beyond what it would take to analyze and resolve the problems apparent in the facility.

Question # 2: Do you think that OSHA's new ergonomic strategy will allow for this type of flexible practice?

Response: Absolutely. The Bush Administration's plan to reduce ergonomic problems in the work place has all the tools necessary to promote change. The Administration's focus on ergonomic related problems has

pushed the problem to the forefront of the business community. Business leaders, from both small and large organizations, are aware of ergonomics and the problems poor work design can cause. Furthermore, busines: and industry leaders are understanding the cost factor involved in preventing injuries and how this plays on the company's bottom line and profitability. I know this to be true because I have seen a continual increase in requests from companies asking me to provide ergonomic programs (consultation, education, training, on site analysis and abatement programs, etc) over the past 4 - 5 years of my practice. When I first started in practice as an Occupational Therapist I was very seldom asked to perform an ergonomic analysis on an injured worker in an attempt to determine what was causing the client's problems. Today, Occupational Therapists are being asked every day to perform an analysis of the work site to determine what, if any, work related tasks are contributing to the musculoskeletal problems in the clients we rehabilitate. In addition, the employers are seeking out advice from Occupational Therapists like myself and other trained professionals on ways to reduce and prevent injuries in the work site.

In addition to focusing the business community's attention on the ergonomic issues, the Bush Administration has training solutions available to help both employers and employees understand the relationship between repetitive activities and the degenerative. The call for industry specific voluntary guidelines will allow the groups who are involved with similar businesses and processes to develop strategies to resolve the problems associated with their industry. As each industry gets involved in the creation of the voluntary guidelines, the newsletters, journals and books related to those industries will regularly report the committee's actions and progress. This will further keep the idea of ergonomic solutions in the forefront of the employers. Having these guidelines will allow employers to tailor the solutions to meet their needs quickly and without the overly burdensome management and administrative expenses that the Clinton rule would have required. The idea is toquickly and efficiently resolve the ergonomic issues not create another layer of management bureaucracy.

The Bush Administration proposal calls for the use of the OSHA General Duty clause as a means to encourage employers who disregard dangerous ergonomic problems to get on board. I believe this will be a deterrent to those companies who simply "don't get it". During the hearing, much was made that the previous successes in utilizing the General Duty clause took 8 - 10 years to bring to closure. As the lawyer Senator from North Carolina clearly should know, once there is legal precedence, the next similar case will not take nearly as long because you don't have to re-fight all the same battles. I believe that aggressive, yet even handed enforcement under the General Duty clause, along with enhanced training and public awareness, will result in quick action and resolution of problems.

An example of how the Bush Administration proposal could work took place just this past week. A rehabilitation counselor who works for the state of Louisiana suffered neck and back injuries as a result of a fall several years ago. She has had disc surgery with fusion in her neck and suffers from daily pain and discomfort. Because her job involves a fair amount of office work (sedentary and stationary postures) and because she is still having difficulty with working the full day without continually changing her position from seated to standing, her supervisor has asked me to assist with an ergonomic assessment and abatement programs. After spending approximately 1 ½ hours with the employee, I have developed an abatement plan hat will involve, among other things:

- Elimination of the use of a heating massage pad the client had in her chair because it cause her to continually slide out of her chair.
- An office chair that is tailored to meet her needs and requirements.
- Re-arranging her office completely, including re-adjusting keyboard tray height, monitor location, etc so as to allow access to needed work areas and documents.
- Instruction in and implementation of a bio-mechanical ergonomic stretching and posture program the client must participate in as a part of her regular work day activity.
- Encouraging the client to join a local fitness center with indoor, heated pool for a regular aerobic exercises classes, stretching and swimming exercise fitness program to improve her overall fitness level and improve her quality of life.

The cost of implementing this program will be under $ 1,000 and will resolve all the issues that can be resolve in her case. Under the positive potential for ergonomic solutions made this possible.

Question # 3: You are not only an expert in ergonomics, you are also a small business owner. As a small business owner, how would the repealed ergonomics rule have impacted you?

Response: Small business owners do not have the luxury of having additional personnel who are not directly involved in providing the services or product of the business to delegate additional administrative duties to. These duties then fall on the shoulders of the owner of the small business, who already is overburdened with providing the services of the business as well as managing the business. In addition, most employers do not have personnel trained in ergonomic principles to delegate the tasks to so they will have to be hired from outside the organization.

In addition, the Clinton rule would have created another workers compensation program, one that is not covered under the current policies available in the state of Louisiana. Therefore, the additional payments for those individuals who would not be covered under the state mandated workers compensation program would have had to come out of my pocket. As an Occupational Therapist who works every day in return to work programs, I am continually faced with the difficult task of returning a person to work when they are satisfied with receiving 66 % of their hourly rate to a maximum as prescribed by current workers comp law. If these same individuals were to receive 90 % of net pay and benefits, I would never be able to return them to work and get them off workers compensation.

The Clinton rule's definition of an ergonomic MSD essentially stated that all musculoskeletal complaints other than those that can be attributed to a slip, trip or fall would be covered by the rule. **This would indicate that essentially any musculoskeletal injury other than a slip, trip and fall could be considered an ergonomic injury. This is just not the case. As an occupational therapist, I am called upon to assist with keeping a person with musculoskeletal complaints on the job or to assist in returning the worker to work in an expedient**

manner. Part of my involvement with this process is to assess the situation from ar ergonomic standpoint. More often than not, it seems, the job does not have sufficient risk factors to have been the cause of the musculoskeletal injury but elements of the job may be present in sufficient quantity to prevent the healing process from occurring in a timely manner. A recent study published in *Neurology* magazine stated that persons using the computer 4 - 6 hours a day were no more likely to develop carpal tunnel than the general population. Why does one employe develop the symptoms when the other 10 in the same office do the exact same work with no problem? We don't know the answer to this question although we do understand some of the risk factors associated with the degenerative process. By making every musculoskeletal problem an ergonomic situation, the Clinton rule would have required the company to spend more time trying to prove the ergonomic hazards in the job were not strong enough to cause the problem, instead of addressing the aspects of the job that may hinder healing.

We do not work in a vacuum. What the individual does during the non-work hours can be equally (or more) important to either causing musculoskeletal injuries or preventing recovery. The activities of play, leisure and physical daily living play critical roles in whether the individual has sufficient down time and rest to promote healing. A transportation specialist with a salt mine was reporting signs and symptoms of upper extremity musculoskeletal problems. His job requires 3 - 4 hours a day at a computer. However, seldom is it continual data input for extended periods of time where he does not perform other tasks. I determined that his work station had a few ergonomic problems that could be easily abated. In addition there were some bio-mechanical ergonomic exercises that I recommended him to perform As I explored what he did on his off time, he disclosed that he played the organ for 5 - 6 hours every evening. In my opinion, his leisure time activities had more to do with causing his musculoskeletal problems than his work day activities.

Small business owners are the "doers" in the company. Mandating the rules and regulations from the 600 + page Clinton rule would have made the process of eliminating ergonomic problems from the workplace of small businesses an impossible all consuming task.

Question # 4: As a small business owner, how do you think that OSHA's new ergonomics strategy will impact you?

Response: As a small business owner, I believe the new proposal offers a flexible, cost effective plan that I will be able to implement. The proposal will allow me to develop a format that works for me to ensure that I am meeting the needs of my

employees while at the same time that I am able to continue to function and operate in the small business world. Even if my area of expertise was not in the ergonomic arena, the proposal allows for compliance assistance, training grants and work place outreach areas where I will be able to get needed assistance. The bottom line for me as a small business owner with 40 full time employees (39 of which the Fontana Center is the primary source of income) is that I have to ensure that my employees are able to work continually at the job in a safe and efficient manner while at the same time that I am not overburdened with the process of complying with a regulation. I believe the new voluntary guidelines allow me to do this.

Question # 5: You have worked with a variety of businesses and industries. In your experience, do businesses recognize that good ergonomics is good business?

Response: Absolutely. Over the past 16 years that I have been in business, I have seen a continual increase in attention from businesses, in all industries, to work to improve the safety of their employees. **As an Occupational Therapist who works with employers every day on injury prevention and return to work programs, I have seen a continual willingness from the business community to take positive proactive steps to ensure things on the job (job modifications, technique changes, administrative controls, etc.) do not adversely affect their employees' health. Business, whether it be private enterprise or government, must run in a cost effective manner. Business leaders clearly see the cost of treating injured workers continually climbing. One of the areas a company has significant control over is the costs associated with a workers injury. (This cost is not only in dollars spent by the employer but also includes the pain and suffering of the injured employee and the change of his/her role in the family structure.)**

Over the past 16 years that I have been a small business owner, I have seen a continual increase in companies inquiring about injury prevention and ergonomic programs. This indicates to me that company managers do see that the incorporation of a comprehensive injury prevention and ergonomic program is really good business and not just "feels good P.R."; it really pays off.

Question # 6: In your experience, has the recognition that good ergonomics is good business motivated businesses to reduce ergonomic hazards, even in the absence of an ergonomics rule?

Response: Yes. The bottom line is regardless of whether the employer is making changes because it is concerned about the health and well being of the employees or he/she is doing it because it saves the company money is irrelevant. The results are the same. We have a healthier employee who is less likely to miss work and who will be more productive.

The success stories in the industry-specific journals and publications will keep the interest up among employers. As they hear how their competitors are keeping the edge on the competition through ergonomic

changes alone will seldom resolve all the issues. For bio-mechanical ergonomic tools to be effective, a trained professional needs to evaluate the employee with the physical complaints and prescribe the right tool to resolve the unique problem of the individual. The employee's active participation in the bio-mechanical ergonomic solutions (what I am referring to as Tools to Fight Back or TTFB) is often equally as important as the administrative and engineering changes. The previous OSHA rule did not address the necessity of the individual to take responsibility for and to be an active participant in preventing the "technique problem" from becoming a medical problem. (Example, a person who is just starting to play tennis begins to experience tenderness along the posterior lateral aspect of their elbow. This is the beginning of a problem commonly called tennis elbow. This is signs of a technique problem. This individual does not need to seek medical attention for the relief of the symptoms but rather should seek out a good tennis coach. The individual is rotating the forearm in such a manner as to be irritating to the extensor muscles of the forearm. If they continue doing whatever they are doing to irritate these structures the symptom will become a medical problem in time. Anything they do that likewise pronates and supinates their forearm will likewise irritate these structures - wringing out a dish rag, carrying luggage, shaking hands, using a computer mouse or playing tennis with poor technique.)

I had a secretary who was reporting serious upper back, scapular and neck problems. As part of the training I offer to my professional staff, I hired the founder of the McKenzie Institute of North America, Mr Wayne Rath, PT to teach my staff the McKenzie / Duffy Rath treatment approach to bio-mechanical spine problems. Mr. Rath is one of the top therapists in North America trained in the bio-mechanical treatment approach to spine injuries. While he was in Lafayette for these 4 days of training, I had my secretary assessed by Mr. Rath. He confirmed that the ergonomic re-engineering we had performed at the work site addressed all the appropriate concerns. He furthermore concurred that the bio-mechanical ergonomic program we had established for the employee was both the cure and the prevention for her complaints. When the secretary addressed her needs by following the exercises and posture changes we instructed her to do, she stated her symptoms would "go away". She resigned from my employment approximately 3 - 4 months later to return to her home town to work. During her exit interview, she complained that she still had the symptoms in her shoulder and scapular area and that we did not do enough to resolve her complaints. She admitted that she did not continue to do the bio-mechanical ergonomic exercises that she had been taught. Had she continued to work for me she would have eventually gone out on workers compensation because of the continued progression of her complaints. Yet, there is little else that we could have done for her to keep her in her job. I would have been faced with a long term workers compensation claim and eventually an increase to my premiums because

she did not live up to her responsibility in addressing her problems.

Similar to my story regarding the Rehabilitation Counselor who had a cervical fusion and now must sit and stand throughout the day. As she incorporates the few engineering tools into her daily work process and integrates the bio-mechanical ergonomic abatements into her daily lifestyle, she is empowered and the fatigue, stresses and strains on the job will never become medical problems.

The CHAIRMAN. Thank you. I think that will have to be the last word for now. We will put the remainder of your statement in the record, and I hope you will accept our apologies.

The hearing will stand in recess. We will keep the record open for questions for the witnesses.

Thank you very much.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF GARY SMITH

Mr. Chairman, and Members of the Committee:

I am pleased to be here today to present some insight regarding efforts to reduce musculoskeletal disorder (MSD) injuries in the workplace. This is truly an important subject and I applaud the Committee for holding this hearing to discuss it.

My name is Gary Smith and I am the Executive Director of the Independent Business Association in Washington State. The Independent Business Association represents over 4800 small business owners all across Washington State in almost every conceivable industry.

Members of the Committee may already know that Washington State has one of the most comprehensive regulations in the world intended to reduce MSD injuries. The Washington State regulation was adopted in May 2000.

My comments today are to inform the Committee on the implementation of these Washington State MSD injury reducing regulations in order to help the Committee to understand the complexity and the large number of significant challenges involved in establishing Government regulations to attempt to reduce MSD injuries.

First, I want to address a common misconception. For some unknown reason, many think that without some form of Government regulation, employers have no desire to control or minimize MSD injuries. This truly is a gross misconception for four key reasons:

1. With each MSD injury, the costs for an employers workers' compensation insurance increases. One of the major activities in managing any business is to minimize costs and avoid cost increases. Since MSD injuries increase costs, employers already do whatever they can to eliminate them.

2. If an employee suffers an MSD injury, the production capability of that business is reduced. Lost production means late deliveries or lost sales. Business owners clearly manage their enterprises to avoid late deliveries or lost sales. Otherwise their business would cease to exist.

3. If an employee suffers an MSD injury, it is likely that employee will no longer be able to work for that employer temporarily or permanently. Replacing that employee is extremely costly to the employer. Just the hiring and training alone will cost the employer thousands of dollars.

4. Finally, employers, especially small employers, are real people with feelings and compassion for their employees. They have no reason or desire to see their employees hurt by MSDs or any other type of injury or illness. Yes, there may be a very few anecdotal examples of some employers not having the best interest of their employees at heart, but clearly ninety-nine plus percent of all employers have the best interest of their employees at heart. Their employees are their most valuable resource.

I know for a fact that almost every employer has already taken action to reduce MSD injuries in the place of business. Clearly, from the four points just outlined, reducing MSD injuries is simply good business besides being the right thing to do.

Therefore, we believe it is extremely important for the Committee to clearly understand that employers do want to reduce MSD injuries now, even without any Government regulation, and have been and continue to take action to do so.

Yet, the Committee and employers are still concerned about the number and severity of workplace MSD injuries. What can be done to reduce those injuries?

The experience in Washington State with its comprehensive MSD injury reduction regulation gives our small employer members a great deal of insight to help answer this question.

Will a comprehensive Government regulation reduce these workplace MSD injuries?

The Washington State experience to date shows a comprehensive regulatory approach likely does more harm than good in reducing workplace MSD injuries. Please let me explain.

First, the Washington State regulation is a one-size-fits-all approach. It sets out a series of benchmarks for various body motions and activities that employers are not to exceed unless the employer has reduce the activities to the extent "technologically and economically feasible." This one-size-fits-all approach makes no sense. If applied literally, the Washington State regulation calls for the following:

A 20-year old male worker in top physical condition cannot lift a 71-pound box from the floor and put it on a shelf at a height above his waist, anytime during any workday. Yet, this same regulation provides no protections for a 60 year old male or female worker to pick up a box weighing 63 pounds from the floor and putting on a shelf at a height above their waist, 3 times a minute as long as this worker

is not required to do this for more than 59 minutes continuously. The difference is, the 20-year-old worker cannot lift 71 pounds at anytime during his workday. Yet the 60-year-old worker can be expected to lift 11,151 pounds over the course of 59 minutes with no protections.

Ah, you say, the Washington State regulation is obviously flawed. But for this aberration, the regulation is probably very good policy.

Unfortunately that initial reaction is not justified. The Washington State regulation was developed over a 2-year period with input from experts from across the nation. The lifting guideline described above is based on NIOSH lifting standards. NIOSH is the National Institute for Occupational Safety and Health and is the research arm of the Federal Government's Center for Disease Control and Prevention with the responsibility to reduce workplace injuries and illnesses.

The problem with a comprehensive type of regulation like that already adopted in Washington State 2 years ago is that it attempts to apply a very unclear set of research to an infinitely variable set of conditions. In the world of engineering and science, trying to apply unclear inputs to an infinitely variable set of outputs produces no predictable or reliable set of results.

Please allow me to now move from theory to real practice with the Washington State workplace MSD injury reducing regulations. I personally have worked extremely closely with the roofing industry in Washington State in an effort to assist them in understanding what they must do to comply with the Washington MSD regulation. All of us have roofs over our heads at home and at work. Someone has to put that roof on. A roof is of one of the most fundamental elements of our civilized society. The strict application of this regulation in the roofing industry as been carefully estimated to increase the cost of roofing a normal residence by 33 percent to 40 percent depending on the unique features of that residence. What are the MSD injury risks identified in the Washington State regulation for the roofing industry?

- They must lift materials that exceed the lifting limits allowed
- They must work with their backs bent more than the 2 hours a day allowed by the regulation
- They often must work on their knees for more than the 4 hours a day allowed by the regulation
- They must repetitively grasp and move materials (roofing) and put it in place for more hours than is allowed by the rule
- Many must use vibration producing tools for more hours in a day than is allowed by the regulation
- Some use tools requiring hand forces which exceed that allowed by the regulation
- Many must work with the necks bent for more hours a day than is allowed by the regulation.

Now picture one of the Nation's 35 million senior citizens who are living on Social Security and struggling to make ends meet and remain in his/her home. Their roof springs a leak. The contractor comes out and the roof is shot. The Washington State ergonomics regulation will add an additional $1,000 to $1,500 in cost for that senior citizen to re-roof his/her home. Most simply can't afford that.

We are confident you do not find this scenario acceptable and either do we. That is why we have been working with our Washington State Department of Labor and Industries to find ways for the roofing industry to comply with this regulation. This is critical because if citizens cannot afford to roof or re-roof their homes, hundreds of roofing workers are out of work. A vicious cycle none of us can accept. We have been working this the Department now for over 2 years to find solutions. This is the same Department that developed and adopted this Washington State regulation. While no final solution has been reached to date, the reality is, the regulation as written will not work for the roofing industry. But that is not all. This same Department is working with many other industries for which the regulation will not work. In each case, the Department and the industry are developing special plans in lieu of complying with the regulation as written.

Bottom line, a one-size-fits-all regulation or approach simply will not work. This has been proven in Washington State already.

One final and unfortunate effect of the Washington regulation. The regulation is actually diverting the limited funds employers have available to reduce MSD injury risks, away from injury reduction and instead to try to figure out what must be done to comply with the regulation. This is a poor use of those limited resources but when you will face citations and fines for non-compliance of the regulation, that diversion of those limited funds is required.

Let me present with my observations of what will work to help reduce workplace MSD injuries:

1. The single most important action any Government authority can undertake is to provide information employers on ways to reduce workplace MSD injury risks in their specific industry or business. Reducing workplace MSD injuries is far from a science currently. Reducing these injuries involves so many factors that simply do not enable the development of a regulation. Factors include the physical condition of those doing the work, the type of work, recovery times, where the work is being done, etc. A solution to reducing workplace MSD injuries for one roofing project simply cannot be applied to another roofing project because of the infinite variability in this as well as other industries.

Please allow me a moment to talk about information. In years past, those workers who did warehouse work were told to wear "back belts" to reduce their risk of MSD injury. Employers provided back belts. A few years later a study showed that the use of back belts may actually increase the risk of MSD injury not reduce it because when the worker went home and did not use the back belt while lifting, the likelihood of injury was greater.

Employers need clear information of what has proven to work. Not what will theoretically work, but what has proven to work. Here is the correct role for Government to play. Gather this data or do the research necessary to develop this data instead of having each employer expend funds trying to find solutions using a hit-and-miss approach to see what really works to reduce workplace MSD injuries. This is the biggest single action any Government agency can provide that will deliver the most results in reducing workplace MSD injuries. Figure out what works and then tell employers. Employers already have four significant incentives to reduce workplace MSD injuries as discussed previously. They just need information about how to do it.

2. Provide this information along with assistance to employers—especially small employers. More than 85 percent of the nation's employers are small employers with fewer than 50 employees. They employ about 45 percent of the nation's private sector workforce. Almost none of these employers have any expertise in ergonomics. Government authorities need to provide assistance in how to apply the information on what works. As I stated earlier in my comments, employers small and large, already have four reasons they want to reduce workplace MSD injuries. They want the information and assistance to do so. This must be the focus of any Government initiative to help reduce workplace MSD injuries.

We applaud President Bush and his administration for their recently announced plan to reduce workplace MSD injuries. Their approach is very similar that what I have just presented to you. We know from the Washington State experience that a new, comprehensive set of regulations setting theoretical limits on various work activities simply are unworkable and threaten the jobs of many workers. Developing information about what works and providing assistance in applying it industry-by-industry and business-by-business in a mode of assistance rather than through the use of citations and penalties is the best approach. Employers already want to reduce workplace MSD injuries. What they lack is information and assistance on how to do it.

Thank you and I will be pleased to respond to any questions you may have.

PREPARED STATEMENT OF NATIONAL COALITION ON ERGONOMICS

The National Coalition on Ergonomics ("Coalition"), which represents well over 100 associations and companies with a vital interest in governmental ergonomics policy, appreciates the opportunity to submit this post-hearing statement to the record. At the conclusion of the Committee's hearing, the record was held open for submissions relating to specific questions and issues that were raised at the hearing. This statement focuses on two of the issues that were raised most prominently.

First, during introductory remarks preceding the questioning of Secretary of Labor Elaine Chao, Senator Wellstone termed OSHA's research agenda "troubling." In Senator Wellstone's opinion, "given the comprehensive National Academy of Sciences report finished just last year, it is difficult to understand what additional research could possibly be necessary in order for OSHA to frame its repetitive stress injury agenda." As explained below, however, neither the National Academy of Sciences ("NAS") report nor other any other scientific source resolves the serious scientific questions in this area or brings an end to the need for further research. Until these questions are answered, it is inappropriate to reach beyond a voluntary guidelines approach to impose a standard.

Second, during the questioning of Secretary Chao, it was suggested that a Government standard is necessary to overcome specific shortcomings in OSHA's guidelines approach. Senator Edwards expressed concern about OSHA's intent to rely upon

general duty clause enforcement, despite the delays and mixed results it has experienced in prior general duty clause litigation. Senator Clinton also raised the issue of applicability to Government employees in state-plan jurisdictions. As OSHA's past experience shows, however, there are inherent problems with governmental enforcement when the science is so uncertain. These problems are intensified, and not solved, by a rulemaking effort.

THE NATIONAL ACADEMY OF SCIENCES REPORT UNDERSCORES THE NEED FOR ERGONOMICS RESEARCH

Far from calling for an end to scientific inquiry, NAS calls for a renewal of these efforts. Those who would suggest otherwise focus solely on a couple of oft-quoted passages from the NAS report, which speak in isolation about "clear" relationships between "back disorders and physical load" and "important work-related factors" that contribute to "disorders of the upper extremities." [1] These statements have been taken out of context as expressions of enthusiastic support for Government regulation. They are not.

A DEFINITIONAL NIGHTMARE

When the NAS refers to a "disorder," it is not referring to an injury in any sense that OSHA can—or should—regulate. Rather, the "disorder" that NAS describes is "an alteration in an individual's usual sense of wellness or ability to function," which "may or may not be associated with well-recognized anatomic, physiologic, or psychiatric pathology." [2] NAS readily acknowledges that musculoskeletal "disorders," in its lexicon, are not necessarily injuries or illnesses, and in many cases share common characteristics with pain syndromes such as migraine headaches and premenstrual syndromes.[3] OSHA's mandate simply does not extend beyond clinical injury to these vague concepts of "wellness."

Recognizing the seriousness of the definitional problem, the NAS emphasizes the imperative of "developing uniform definitions of musculoskeletal disorders for use in clinical diagnosis, epidemiologic research, and data collection for surveillance systems. These definitions should (1) include clear and consistent endpoint measures, (2) agree with consensus codification of clinically relevant classification systems, and (3) have a biological and clinical basis." [4] The National Institute for Occupational Safety and Health ("NIOSH") has also recognized the "scarcity of objective measures (including physical examination techniques) to define work-related MSDs, and lack of standardized criteria for defining MSD cases." [5] OSHA properly posed this issue as the lead question in its forums, ultimately concluding that it needed to consider the question further in light of the continuing controversy and uncertainty. Until this important issue can be resolved, OSHA will continue to lack the essential definitional building block for governmental regulation.

A COMPLEX WEB OF SUSPECTED CAUSES

Even the "disorders" broadly referenced by NAS cannot be linked solely, or even primarily, to the physical factors that a standard would exclusively address. According to the NAS, "the association between physical exposure and the development of a musculoskeletal disorder occurs in a broad context of economic and cultural factors and reflects the interaction of elements intrinsic to, as well as extrinsic to, the individual." [6] The NAS identified a complex web of suspected influences, including not only "mechanical exposure" (both in and out of the workplace) but also individual "physiological characteristics" and "psychological characteristics," all considered against the "broader social, economic, and cultural context." [7] The following illustrations, reproduced from the NAS document, reflect these contributing factors and their inextricable interrelationship:

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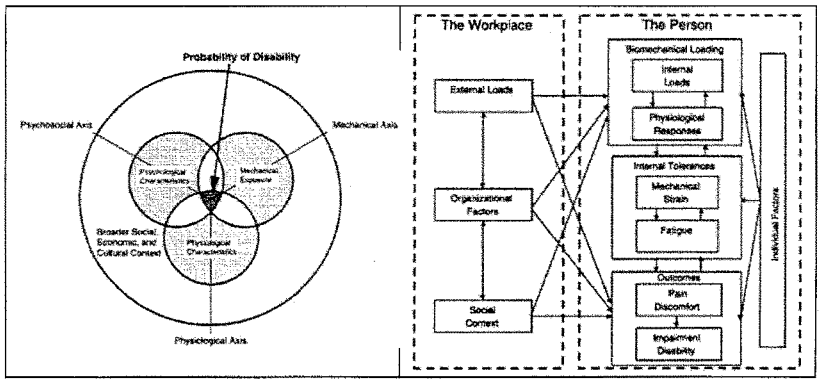
[1] National Research Council, National Academy of Sciences, *Musculoskeletal Disorders and the Workplace: Low Back and Upper Extremities* ("NAS Report") at ES-5 (2001).
[2] *Id*. at 1-15.
[3] *Id*. at 1-6.
[4] *Id*. at ES-7.
[5] NIOSH, *Musculoskeletal Disorders and Workplace Factors*, at 1-7 (1997).
[6] NAS Report at 1-8 to 1-9.
[7] *Id*. at 1-16; see also *id*. at 1-10 ("Every clinical disorder represents a complex interaction between the affected individiual and a variety of determinants of the response of the particular individual to injury.")



These figures[8] show not only the myriad of suspected causal factors, but also the difficulty in extracting and isolating any one factor, including work. According to the NAS, these illustrations and what they suggest about the interrelationship of contributing factors is central to the panel's conclusions and to an understanding of its report[9] and it should likewise be central to any decision on ergonomics regulation.

It is a well-established principle, stated succinctly in the NAS report, that "injury is a psychosocial event as well as a biological or physical one."[10] According to the NAS, "there is convincing evidence to support the hypothesis that compensation wage replacement rates, local unemployment rates, and cultural differences can influence the reporting of musculoskeletal pain or disability."[11] The NAS focused, in particular, on the impact of three separate socioeconomic factors (or, properly, categories of factors), and found that all three showed a strong correlation to injuries reported in the workplace: disability benefits, employer organizational policies and practices, and what can broadly be called cultural factors.[12] The panel noted a strong correlation between return to work after injury and the level of benefits; studies show that as disability benefit levels rise, the probability that an injured employee will return to work decreases, and the duration of absence from work increases.[13] Employers with policies that show a commitment to worker health and safety report lower rates of lost-time injuries.[14] Cultural factors also appear to impact the level at which "work-related" MSDs are reported. For example, "Westernization, industrialization, and social security systems may be associated with a greater willingness of workers to report low back pain."[15]

Even the NAS' review of physical factors, moreover, acknowledges important limitations in the relationship. In responding to a dissent with respect to its findings on carpal tunnel syndrome, for example, the panel emphasized: "The report does not state that [physical workplace] interventions prevent carpal tunnel syndrome or, indeed, any other upper-extremity disorder. The emphasis, rather, is on amelioration of symptoms, which is the end point in the relevant literature.... [I]nterventions influence symptoms, not the incidence of specific disorders."[16]

In light of all of these interwoven factors, the NAS found that "musculoskeletal disorders should be approached in the context of the whole person."[17] Voluntary employer programs are well suited to such a task. Government mandates are not—especially regulations, like the former standard, that rely on formulaic judgments as to "unsafe" physical exposure levels.

A STATISTICAL WASTELAND

Quite possibly, no other area of current labor policy debate is more prone to the misuse of statistics than ergonomics. While the Bureau of Labor Statistics reported

[8] *Id.*, Figures 1.1, 1.2.
[9] *Id.* at 1-11.
[10] *Id.* at 1-5.
[11] *Id.* at 1-9.
[12] *Id.*
[13] *Id.* (citations omitted).
[14] *Id.* at 1-10 (citations omitted).
[15] *Id.* (citations omitted).
[16] *Id.* at APP.C-1.
[17] *Id.* at ES-15.

approximately 577,000 lost workday MSDs in its most recent annual statistics,[18] for example, the Senate bill that would mandate a standard includes an express finding that "[a]n estimated 1,000,000 workers each year lose time from work as a result of work-related musculoskeletal disorders,"[19] citing NAS as the source. NAS, however, reports that "there are no comprehensive national data sources capturing medically determined musculoskeletal disorders."[20]

Why is there such a disconnect between these numbers and others that are frequently bandied about, both higher and lower? The answer is explained above: no one really knows how to define a musculoskeletal disorder or to reliably determine its relationship to work.

BLS and OSHA reporting mechanisms do not even recognize a category for "MSDs," forcing statisticians to speculate as to the portions of existing recordkeeping categories to include.[21] In doing so, they inevitably include large portions of data for incidents that the recordkeeper believed to be the result of a single traumatic event rather than any sort of repetitive stress.[22] Not that the recordkeeper has any real idea, because—as the NAS itself observed—BLS recording criteria rely upon "very crude collapsing of unlike conditions and is determined by a person with no specific training for the task."[23]

The BLS statistics are, by far, the most widely quoted and heavily used source of MSD data. Indeed, as the NAS noted, they are the only recognized source of nationwide data.[24] They formed the bedrock of OSHA's case justifying regulation of ergonomics as a "significant risk,"[25] and they continue to be cited as a measure of progress, even for OSHA's guidelines approach. Blind reliance on these inherently unreliable numbers, however, would be a serious mistake. Until BLS can resolve the problems that plague every aspect of these statistics, they should not form the basis of critical policy decisions.

A CALL FOR MORE RESEARCH

In light of all of these problems, all fully acknowledged by the NAS, the panel could not have possibly found that research issues have been fully resolved. To the contrary, the NAS expressly called for more research—a recommendation that OSHA's comprehensive plan now implements. Indeed, the NAS report devotes an entire chapter to a proposed "research agenda" designed to fill "several important gaps in the science base."[26] NAS calls upon researchers, among other things, to (1) develop improved tools for exposure (dose) assessment; (2) develop improved measures of outcomes and case definitions for use in epidemiologic and intervention studies; (3) in studies of humans, further quantify the relationships between exposures and outcomes; (4) conduct tissue mechanobiology studies related to the impact of physical loading; (5) conduct biomechanical studies to investigate the role of various factors on changes in loading patterns and tolerance limits, quantify the relationship between loading and pain, and explore the influence of psychological stress on musculoskeletal response and loading of joints; (6) conduct studies into the impact of psychosocial stressors; (7) conduct epidemiologic studies into the exposure-response relationship; and (8) conduct workplace intervention studies.[27]

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[19] S.2184, 107th Cong., 2d Sess., § 1(a)(2).

[20] NAS Report at 2-1.

[21] *See* 65 Fed. Reg. 68541 (Nov. 14, 2000); *see also* Government Accounting Office, *Worker Protection; Private Ergonomics Programs Yield Positive Results* (1997) ("BLS does not currently have a simple way to classify an injury or illness as an MSD . . . As a result, there is no single estimate of the total number of MSDs reported.").

[22] *See* OSHA Hearing Transcript, July 7, 2000, at 18212-13 (*http://www.osha-slc.gov/ergonomics-standard/PROPOSED/transcripts/ergo07072000.pdf*). Many individual examples of alleged "musculoskeletal disorders" also arise from specific, one-time incidents that have nothing to do with the conditions that an ergonomics standard is supposed to address. *See, e.g.*, (lead example on AFL-CIO website of an injury that could allegedly be prevented by an ergonomics standard, which, in fact, was an accident caused by faulty bed brakes: "In November 1999, while [nursing assistant Cindy Wright] was helping to transfer a patient three times her size, the bed's brakes failed and the patient rolled over on top of Wright, seriously inuring her shoulder and neck.")

[23] NAS Report at 2-14. The NAS also criticized the BLS statistics because, among other things, they are based on a sample size too small to permit reliable estimates at all but the largest macro-level, they fail to provide essential data concerning occupation, task, or demographics, and more detailed information is restricted to lost-time cases based on another inadequate coding system. NAS Report at 2-14 to 2-15.

[24] *Id*. at 2-14.

[25] *See* 65 Fed. Reg. 68541 (Nov. 14, 2000).

[26] NAS Report at 12-1.

[27] *Id*. at 12-1 to 12-4.

Clearly, then, the NAS does not believe that the need for research has come to an end or that the case for Government regulation has been fully established. Indeed, in the entire 492-page NAS report, any recommendation to regulate ergonomics with mandatory governmental obligations is conspicuously absent. It would be a serious mistake to disregard these important recommendations for additional research, or to proceed with a regulation before knowing the answers that this research can provide.

INTRACTABLE HURDLES TO THE PROMULGATION OF A STANDARD PREVENT OSHA FROM GOING BEYOND VOLUNTARY GUIDELINES

The second key question posed by the Committee—why is the Secretary of Labor pursuing guidelines rather than a standard—is answered directly by the "frequently asked questions" document issued on the day of the Secretary's announcement. The document explains that a host of factors "make it very difficult to develop simple criteria for compliance that can apply to a broad range of industries," including: (1) "There are a variety of different hazards and combinations of different hazards to be addressed"; (2) "Exposure to the hazards is not readily measured in some cases"; (3) "The exposure-response relationship is not well understood"; (4) "Cost and feasibility of abatement measures may be uncertain and may be very high in some cases"; and (5) "It is very difficult, except in the most general terms, to prescribe remedies for abating such hazards in a single rule."[28]

OSHA's findings are right on the mark. While it is tempting to think of ergonomics standard-setting as something that can be done instantly to make the problem go away, the answer is not that simple.

A HISTORY OF FAILED ATTEMPTS

The 10 years of rulemaking activity preceding OSHA's rejected rule is sometimes invoked as providing all the necessary groundwork for a quick and easy solution that OSHA could provide right now. What is lost in such statements, however, is one of the major reasons why this process took so long. Throughout the past decade, OSHA repeatedly tried to solve two regulatory conundrums: (1) How can a standard be designed that is specific enough to provide adequate notice of abatement actions that will be enforced, yet is not so specific as to outstrip the limitations of scientific research; and (2) if a more specific approach is chosen, how can it account for basic differences in all the various industries, suspected risk factors, and reported syndromes while at the same time avoiding undue complexity? OSHA moved back and forth between both sides of each dilemma, but it was never able to find a satisfactorily solution.

After an initial round of comments in 1992 and a series of face-to-face stakeholder meetings that followed, OSHA circulated a "pre-proposal draft" in March 1995.[29] That draft, which required the use of a specific "workplace risk factor checklist" whenever there was exposure to any of five quantitatively-defined "signal risk factors," was widely criticized for codifying rigid, quantitative exposure measures that lack scientific verification or uniform applicability. OSHA followed up with a 1998 "working draft" requiring interventions for "problem jobs," which were vaguely defined as jobs with "known hazards" including those identified in insurance reports, consultant reports, prior OSHA inspections, or even self audits.[30] In its 1999 proposed standard, OSHA added terminology that purported to clarify the definition of "hazard" and the descriptions of required abatements, but it continued to rely on vague concepts such as reduction "in a way that is reasonably anticipated to significantly reduce the likelihood that covered MSDs will occur."[31] Finally, after a flood of comments justifiably criticizing the uncertainty of these benchmarks, OSHA incorporated a series of quantified "action levels" and "tools" to its final standard,[32] even though these measurements had not been scientifically validated and none of them had been subjected to notice and comment.[33] Members of Congress expressed concern with not only the lack of scientific support for these measures, but also their "complexity."[34]

OSHA's inability to develop an acceptable standard, therefore, is not due to a lack of effort. The science is simply not in place to support a regulation that would pro-

[28] *http://www.osha-slc.gov/ergonomics/FAQs-external.html.*
[29] *See* 65 Fed. Reg. 68265 (Nov. 14, 2000).
[30] *See http://www.osha-slc.gov/SLTC/ergonomics/ergoreg.html.*
[31] 65 Fed. Reg. 66071 (Nov.14, 2000) (proposed § 1910.921).
[32] *See* 65 Fed. Reg. 68848-49 (Table W-1), 68859-64 (App. D-1).
[33] *See* Congressional Record, Mar. 6, 2001, at S1858 (statement of Sen. Specter).
[34] *Id.* (statement of Sen. Specter).

vide workable, understandable, and enforceable regulatory endpoints. OSHA's decision to pursue voluntary guidelines, on an industry-specific basis, recognizes these hurdles. By keeping guidelines voluntary and disclaiming their use as an enforcement barometer, OSHA avoids the problems inherent in mandating adherence to rigid goals that the science does not support. By further breaking down its guidance effort to specific industries, moreover, OSHA avoids the complexity that is inevitable when the agency tries to bring too many diverse situations under one umbrella. Congress cannot make these problems disappear by simply decreeing that OSHA must quickly do what it has not yet found an acceptable means to accomplish.

A HOST OF LEGAL BARRIERS

Noting that OSHA's guidelines policy would rely to some extent on general duty clause enforcement, several Members of the Committee also brought up the rather checkered history of past ergonomics litigation. The vast majority of the more than 550 general duty clause citations issued by OSHA were resolved relatively quickly and favorably from the agency's perspective. Yet, as Senator Edwards also observed, the three cases that proceeded to litigation took years to resolve and did not culminate in findings of enforceable abatement requirements.

No one should conclude from this experience, however, that the solution is to pursue a standard. OSHA encountered difficulty in its general duty clause cases because it was unable to establish all of the essential elements of a general duty clause violation: an activity or condition in the workplace that presents a hazard, recognition of the hazard by the employer or industry, a likelihood of death or serious physical harm, and a feasible and effective means of abatement to eliminate or materially reduce the hazard.[35] To promulgate a standard, however, OSHA must make similar findings—not just for a single employer or industry but for the entire regulated community—and it must successfully defend these findings against any judicial challenge.[36]

This litigation would be enormously complex and lengthy. The general duty clause litigation, moreover, provides just a small glimpse of the legal issues that OSHA would face. Even among its own hired experts, OSHA was unable to achieve a consensus in those cases as to even a single workplace, much less all of general industry. In its citation of Dayton Tire, for example, OSHA's in-house ergonomist used a "lifting equation" to determine that one job was safe, while the agency's hired outside expert concluded the same job was *not* safe and would not become safe unless the lifted weight was reduced to zero.[37] The agency further charged in its citation that one job's hazard was "elevated and extended reaches" and "long periods of standing," but at trial the outside expert "admitted . . . that neither activity is likely to result in injury."[38] Similarly, in the Pepperidge Farm litigation, OSHA paraded a virtual who's who of expert ergonomists to the witness stand, each of whom advocated a variety of different ergonomic interventions. The Review Commission decided that none of these experts had identified effective, feasible steps that the employer should have taken but did not.[39]

If OSHA seeks to define exposure levels that are "hazardous" or "safe" in a final rule, it will encounter the same problems in justifying those determinations and defending them during appellate review. Even if it does not—and it somehow gets beyond the problem of promulgating a standard that provides no concrete guidance on compliance—it will ultimately be faced with the burden of making similar showings during enforcement, in order to prove that an employer's existing practices were inadequate. So long as the science remains in its present state, OSHA will not be able to overcome the lack of evidence supporting measurements of compliance that could be applied in a workable, enforceable standard.

A VARIETY OF STATE APPROACHES

Senator Clinton also raised the issue of public employee coverage in the 26 jurisdictions with State plans, which would be mandatory in the wake of a Federal standard. Yet, in a voluntary guidelines regime, all 50 State governments—like all other employers—will be encouraged to voluntarily apply "best practices" that fit their particular situations. State employees thus will not be treated any differently

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[35] *See, e.g., Secretary of Labor* v. *Beverly Enterprises, Inc.*, 2000 OSAHRC LEXIS 121, at *18 (OSHRC Oct. 27, 2000).

[36] *See* 29 U.S.C. § 655.

[37] *Secretary of Labor* v. *Dayton Tire, Bridgestone/Firestone*, OSHRC Docket No. 93-3327, 1998 OSAHRC LEXIS 23, at *120 (Jan.26, 1998).

[38] *Id.* at *88 n.40.

[39] *Secretary of Labor* v. *Pepperidge Farm, Inc.,* 17 O.S.H. Cas. (BNA) 1993, at 2036 (Apr. 26, 1997).

than their private sector counterparts. If there are concerns that render a mandatory standard problematic when applied to the private sector, those same concerns will be at least as problematic in the public sector. An unfunded mandate requiring comprehensive ergonomics programs for State employees, moreover, would be particularly troublesome during this time of shrinking State revenues and rising deficits. It would be perverse—and contrary to any reasonable notion of federalism—to call for mandatory ergonomics regulation simply to exercise more direct control over the working conditions of State employees in the 26 states that have reached State plan agreements with OSHA. Ergonomics rulemaking, for all employees, should rise or fall on its own merits.

A ROLE FOR GUIDELINES

In the end, guidelines allow OSHA to accomplish what it cannot accomplish through a standard. Guidelines leave room for the uncertainty of medical knowledge, the lack of clarity as to what should be done in any particular situation, and the vast distinctions between industries, jobs, regulated employee activities, and reported medical conditions. They also provide an opportunity for employers and employees to try out new and innovative approaches. Many medical professionals, for example, emphasize accommodations for individual workers that allow them to return to full activity levels. These approaches find support in some of the most respected collaborations of medical expertise, such as the Agency for Health Care Policy Research guideline on low back pain prepared under the auspices of the U.S. Department of Health and Human Services.[40] A standard requiring employers to permanently eliminate or restrict specific work activity levels would at the very least complicate—and very possibly contravene—a program based on this emerging medical consensus that rapid return to normal activity is in the back pain patient's best interest.

The success of guidelines, of course, will depend upon details not yet known: most importantly, how will they be formulated and applied? With this in mind, the Coalition is looking forward to the release of OSHA's first set of guidelines for nursing homes, described during Secretary Chao's testimony. OSHA quite properly promised that these guidelines would be posted for notice and comment, giving all interested parties an opportunity to air their concerns. In light of the advantages of OSHA's guidelines approach and the barriers that continue to impede a workable standard, the Coalition urges this Committee to grant Secretary Chao the leeway necessary to make her guidelines policy work.

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PREPARED STATEMENT OF GARY SMITH

Mr. Chairman, and Members of the Committee:

I am pleased to be here today to present some insight regarding efforts to reduce musculoskeletal disorder (MSD) injuries in the workplace. This is truly an important subject and I applaud the Committee for holding this hearing to discuss it.

My name is Gary Smith and I am the Executive Director of the Independent Business Association in Washington State. The Independent Business Association represents over 4800 small business owners all across Washington State in almost every conceivable industry.

Members of the Committee may already know that Washington State has one of the most comprehensive regulations in the world intended to reduce MSD injuries. The Washington State regulation was adopted in May 2000.

My comments today are to inform the Committee on the implementation of these Washington State MSD injury reducing regulations in order to help the Committee to understand the complexity and the large number of significant challenges involved in establishing Government regulations to attempt to reduce MSD injuries.

First, I want to address a common misconception. For some unknown reason, many think that without some form of Government regulation, employers have no desire to control or minimize MSD injuries. This truly is a gross misconception for four key reasons:

1. With each MSD injury, the costs for an employers workers' compensation insurance increases. One of the major activities in managing any business is to minimize

[40] *See* Bigos S., et al., *Clinical Practice Guideline: Acute Low Back Problems in Adults*, U.S. Department of Health and Human Services, Public Health Services, Agency for Health Care Policy and Research, AHCPR Pub. No. 95-0642 (Dec. 1994).

costs and avoid cost increases. Since MSD injuries increase costs, employers already do whatever they can to eliminate them.

2. If an employee suffers an MSD injury, the production capability of that business is reduced. Lost production means late deliveries or lost sales. Business owners clearly manage their enterprises to avoid late deliveries or lost sales. Otherwise their business would cease to exist.

3. If an employee suffers an MSD injury, it is likely that employee will no longer be able to work for that employer temporarily or permanently. Replacing that employee is extremely costly to the employer. Just the hiring and training alone will cost the employer thousands of dollars.

4. Finally, employers, especially small employers, are real people with feelings and compassion for their employees. They have no reason or desire to see their employees hurt by MSDs or any other type of injury or illness. Yes, there may be a very few anecdotal examples of some employers not having the best interest of their employees at heart, but clearly ninety-nine plus percent of all employers have the best interest of their employees at heart. Their employees are their most valuable resource.

I know for a fact that almost every employer has already taken action to reduce MSD injuries in the place of business. Clearly, from the four points just outlined, reducing MSD injuries is simply good business besides being the right thing to do.

Therefore, we believe it is extremely important for the Committee to clearly understand that employers do want to reduce MSD injuries now, even without any Government regulation, and have been and continue to take action to do so.

Yet, the Committee and employers are still concerned about the number and severity of workplace MSD injuries. What can be done to reduce those injuries?

The experience in Washington State with its comprehensive MSD injury reduction regulation gives our small employer members a great deal of insight to help answer this question.

Will a comprehensive Government regulation reduce these workplace MSD injuries?

The Washington State experience to date shows a comprehensive regulatory approach likely does more harm than good in reducing workplace MSD injuries. Please let me explain.

First, the Washington State regulation is a one-size-fits-all approach. It sets out a series of benchmarks for various body motions and activities that employers are not to exceed unless the employer has reduce the activities to the extent "technologically and economically feasible." This one-size-fits-all approach makes no sense. If applied literally, the Washington State regulation calls for the following:

A 20-year old male worker in top physical condition cannot lift a 71-pound box from the floor and put it on a shelf at a height above his waist, anytime during any workday. Yet, this same regulation provides no protections for a 60 year old male or female worker to pick up a box weighing 63 pounds from the floor and putting on a shelf at a height above their waist, 3 times a minute as long as this worker is not required to do this for more than 59 minutes continuously. The difference is, the 20-year-old worker cannot lift 71 pounds at anytime during his workday. Yet the 60-year-old worker can be expected to lift 11,151 pounds over the course of 59 minutes with no protections.

Ah, you say, the Washington State regulation is obviously flawed. But for this aberration, the regulation is probably very good policy.

Unfortunately that initial reaction is not justified. The Washington State regulation was developed over a 2-year period with input from experts from across the nation. The lifting guideline described above is based on NIOSH lifting standards. NIOSH is the National Institute for Occupational Safety and Health and is the research arm of the Federal Government's Center for Disease Control and Prevention with the responsibility to reduce workplace injuries and illnesses.

The problem with a comprehensive type of regulation like that already adopted in Washington State 2 years ago is that it attempts to apply a very unclear set of research to an infinitely variable set of conditions. In the world of engineering and science, trying to apply unclear inputs to an infinitely variable set of outputs produces no predictable or reliable set of results.

Please allow me to now move from theory to real practice with the Washington State workplace MSD injury reducing regulations. I personally have worked extremely closely with the roofing industry in Washington State in an effort to assist them in understanding what they must do to comply with the Washington MSD regulation. All of us have roofs over our heads at home and at work. Someone has to put that roof on. A roof is of one of the most fundamental elements of our civilized society. The strict application of this regulation in the roofing industry as been carefully estimated to increase the cost of roofing a normal residence by 33 percent to

40 percent depending on the unique features of that residence. What are the MSD injury risks identified in the Washington State regulation for the roofing industry?

- They must lift materials that exceed the lifting limits allowed
- They must work with their backs bent more than the 2 hours a day allowed by the regulation
- They often must work on their knees for more than the 4 hours a day allowed by the regulation
- They must repetitively grasp and move materials (roofing) and put it in place for more hours than is allowed by the rule
- Many must use vibration producing tools for more hours in a day than is allowed by the regulation
- Some use tools requiring hand forces which exceed that allowed by the regulation
- Many must work with the necks bent for more hours a day than is allowed by the regulation.

Now picture one of the Nation's 35 million senior citizens who are living on Social Security and struggling to make ends meet and remain in his/her home. Their roof springs a leak. The contractor comes out and the roof is shot. The Washington State ergonomics regulation will add an additional $1,000 to $1,500 in cost for that senior citizen to re-roof his/her home. Most simply can't afford that.

We are confident you do not find this scenario acceptable and either do we. That is why we have been working with our Washington State Department of Labor and Industries to find ways for the roofing industry to comply with this regulation. This is critical because if citizens cannot afford to roof or re-roof their homes, hundreds of roofing workers are out of work. A vicious cycle none of us can accept. We have been working this the Department now for over 2 years to find solutions. This is the same Department that developed and adopted this Washington State regulation. While no final solution has been reached to date, the reality is, the regulation as written will not work for the roofing industry. But that is not all. This same Department is working with many other industries for which the regulation will not work. In each case, the Department and the industry are developing special plans in lieu of complying with the regulation as written.

Bottom line, a one-size-fits-all regulation or approach simply will not work. This has been proven in Washington State already.

One final and unfortunate effect of the Washington regulation. The regulation is actually diverting the limited funds employers have available to reduce MSD injury risks, away from injury reduction and instead to try to figure out what must be done to comply with the regulation. This is a poor use of those limited resources but when you will face citations and fines for non-compliance of the regulation, that diversion of those limited funds is required.

Let me present with my observations of what will work to help reduce workplace MSD injuries:

1. The single most important action any Government authority can undertake is to provide information employers on ways to reduce workplace MSD injury risks in their specific industry or business. Reducing workplace MSD injuries is far from a science currently. Reducing these injuries involves so many factors that simply do not enable the development of a regulation. Factors include the physical condition of those doing the work, the type of work, recovery times, where the work is being done, etc. A solution to reducing workplace MSD injuries for one roofing project simply cannot be applied to another roofing project because of the infinite variability in this as well as other industries.

Please allow me a moment to talk about information. In years past, those workers who did warehouse work were told to wear "back belts" to reduce their risk of MSD injury. Employers provided back belts. A few years later a study showed that the use of back belts may actually increase the risk of MSD injury not reduce it because when the worker went home and did not use the back belt while lifting, the likelihood of injury was greater.

Employers need clear information of what has proven to work. Not what will theoretically work, but what has proven to work. Here is the correct role for Government to play. Gather this data or do the research necessary to develop this data instead of having each employer expend funds trying to find solutions using a hit-and-miss approach to see what really works to reduce workplace MSD injuries. This is the biggest single action any Government agency can provide that will deliver the most results in reducing workplace MSD injuries. Figure out what works and then tell employers. Employers already have four significant incentives to reduce workplace MSD injuries as discussed previously. They just need information about how to do it.

2. Provide this information along with assistance to employers—especially small employers. More than 85 percent of the nation's employers are small employers with fewer than 50 employees. They employ about 45 percent of the nation's private sector workforce. Almost none of these employers have any expertise in ergonomics. Government authorities need to provide assistance in how to apply the information on what works. As I stated earlier in my comments, employers small and large, already have four reasons they want to reduce workplace MSD injuries. They want the information and assistance to do so. This must be the focus of any Government initiative to help reduce workplace MSD injuries.

We applaud President Bush and his administration for their recently announced plan to reduce workplace MSD injuries. Their approach is very similar that what I have just presented to you. We know from the Washington State experience that a new, comprehensive set of regulations setting theoretical limits on various work activities simply are unworkable and threaten the jobs of many workers. Developing information about what works and providing assistance in applying it industry-by-industry and business-by-business in a mode of assistance rather than through the use of citations and penalties is the best approach. Employers already want to reduce workplace MSD injuries. What they lack is information and assistance on how to do it.

Thank you and I will be pleased to respond to any questions you may have.

[Whereupon, at 12:10 p.m., the hearing was adjourned.]

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