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ARE OSHA'S PENALTIES ADEQUATE TO DETER HEALTH AND SAFETY VIOLATIONS?

HEARING

BEFORE THE

COMMITTEE ON
EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, APRIL 28, 2009

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ARE OSHA'S PENALTIES ADEQUATE TO DETER HEALTH AND SAFETY VIOLATIONS?

Tuesday, April 28, 2009
U.S. House of Representatives
Committee on Education and Labor
Washington, DC

The committee met, pursuant to call, at 10:02 a.m., in room 2175, Rayburn House Office Building, Hon. George Miller [chairman of the committee] presiding.

Present: Representatives Miller, Kildee, Payne, Andrews, Scott, Woolsey, McCarthy, Tierney, Kucinich, Holt, Davis, Bishop of New York, Loebsack, Hirono, Altmire, Hare, Courtney, Shea-Porter, Fudge, Polis, Tonko, Sablan, Titus, McKeon, Petri, Ehlers, Platts, Price, and Cassidy.

Staff present: Aaron Albright, Press Secretary; Jody Calemine, General Counsel; Lynn Dondis, Labor Counsel, Subcommittee on Workforce Protections; Carlos Fenwick, Policy Advisor, Subcommittee on Health, Employment, Labor and Pensions; Alex Nock, Deputy Staff Director; Joe Novotny, Chief Clerk; and Meredith Regine, Junior Legislative Associate, Labor; Andrew Blasko, Minority Speech Writer and Communications Advisor; Robert Borden, Minority General Counsel; Cameron Coursen, Minority Assistant Communications Director; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Senior Legislative Assistant; Richard Hoar, Minority Professional Staff Member; Jim Paretti, Minority Workforce Policy Counsel; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel; and Loren Sweatt, Minority Professional Staff Member.

Chairman MILLER [presiding]. The Committee on Education and Labor will come to order this morning for their purposes of conducting a hearing on the question of whether OSHA's penalties are adequate to deter health and safety violations.

This is an effort to explore whether current penalties are adequate to protect the health and safety of American workers. It is fitting that we recognize Workers' Memorial Day today. This day honors the thousands of workers who fall sick or are injured or killed each year due to hazardous conditions on the job.

The landmark Occupational Safety and Health Act became the law in 1970, opening the door to safer and healthier workplaces for millions of workers. In nearly 40 years in its existence, the Act pro-

tections has saved hundreds of thousands of lives and millions more of avoided exposure to preventable illnesses and injuries.

I applaud the hard work of those Occupational Safety and Health Administration employees who ensure that workers can return home to their families safe and healthy after their shift.

However, over the last decades evidence suggests that we have seen an erosion of workplace protections guaranteed by the Occupational Safety and Health Act. The erosion of OSHA's effectiveness was particularly acute during the last several years.

Beginning in the last Congress, the committee and Ms. Woolsey's subcommittee conducted a systematic examination of OSHA and the agency's ability to adequately protect workers.

Since assuming the majority, we have held at least 15 hearings into workplace health and safety issues, most often issues regarding the failure of the last administration to properly protect American workers.

We found well-documented hazards, like the exposures to chemicals that cause popcorn lung disease, the combustible dust dangers, as well as basic regulatory work like updating construction standards, were not being addressed.

In fact, OSHA's regulatory function shut down. The Bush administration promulgated only one significant health and safety standard during its tenure, and that was under court order. Additionally, we found that the enforcement tools were left on the shelf at times.

These facts uncovered by the committee show that the last 8 years have left OSHA significantly weakened. OSHA has the ability to reverse some of the problems with new leadership, and that is why I am confident that Labor Secretary Hilda Solis will be able to get the agency back on firm footing.

But good leadership alone may not be enough to sufficiently protect workers' health and safety. Long overdue reforms to the OSHA Act are needed.

Last week Representative Woolsey introduced Protecting America's Workers Act. This bill will update OSHA penalties, strengthen whistleblower protections, and ensure that bad employers are held accountable. This legislation is vital to improving the worker health and safety.

Today's hearings will examine adequate OSHA penalties, and we will look at whether Congress should modernize and strengthen penalties against those who put Americans at unnecessary risk while at work.

Penalties under the OSHA were last updated in 1990 and were not indexed for inflation. And these penalties for failing to protect workers pale in comparison to penalties for failing to protect animals or environment generally.

While both civil and criminal penalties are available under OSHA, criminal prosecutions for egregious violations of the law are only possible when willful violations lead to the death of a worker.

Even then, no matter how bad an employer acted, killing a worker is only a Class B misdemeanor. Under federal law harassing certain animals can bring twice as much prison time as killing a worker with willful health and safety violations.

While the law currently provides low penalties for health and safety violations at the outset, those penalties often get lower. Unscrupulous employers often avoid being held accountable by their actions by negotiating finds down or away altogether.

This is exactly what happened in a Las Vegas strip during a particularly dangerous year and a half when 12 workers died on a construction site. George Cole testified before our committee last June on how Project City Center in Las Vegas negotiated away all of the penalties for violating safety rules in private that directly related to the death of his brother-in-law. This is an outrageous example that negotiating away egregious violations is not uncommon, as we will hear today.

Penalties are often key enforcement mechanisms under OSHA, but they must be real. They must be meaningful, and they must function to deter violations. They must get people's attention. And these enforcement mechanisms must not be mere cost of doing business.

Today we will hear testimony on the need to update and modernize the key enforcement mechanisms under OSHA.

Before introducing the witnesses, I want to recognize the committee's ranking Republican, Mr. McKeon, for the purposes of an opening statement.

[The statement of Mr. Miller follows:]

Prepared Statement of Hon. George Miller, Chairman, Committee on Education and Labor

The Committee on Education and Labor meets this morning to explore whether current penalties are adequate to protect the health and safety of American workers.

This hearing is fitting as we recognize Workers' Memorial Day today. This day honors of the thousands of workers who fall sick, are injured or killed each year due to hazardous conditions on the job.

The landmark Occupational Safety and Health Act became law in 1970, opening the door to safer and healthier workplaces for millions of workers.

In the nearly forty years of its existence, the Act's protections have saved hundreds of thousands of lives and millions more have avoided exposure to preventable illnesses and injuries.

I applaud the hard work of those Occupational Safety and Health Administration employees who ensure that workers can return home to their families safe and healthy after their shift.

However, over the last few decades, evidence suggests that we have seen an erosion of the workplace protections guaranteed by the OSH Act.

The erosion of OSHA's effectiveness was particularly acute during the last several years.

Beginning in the last Congress, this committee and Ms. Woolsey's subcommittee conducted a systematic examination of OSHA and the agency's ability to adequately protect workers.

Since assuming the majority, we have held at least 15 hearings into workplace health and safety issues; most often issues regarding the failure of the last administration to properly protect American workers.

We found that well documented hazards, like exposure to a chemical that causes popcorn lung disease and combustible dust dangers, as well as basic regulatory work like updating construction standards, were not being addressed.

In fact, OSHA's regulatory function shut down. The Bush administration promulgated only one significant health and safety standard during its tenure. And that was under court order.

Additionally, we found that enforcement tools were left on the shelf at times.

These facts uncovered by this committee show that the last eight years have left OSHA significantly weakened.

OSHA has the ability to reverse some of these problems with new leadership. That's why I am confident that Labor Sec. Hilda Solis will be able to get the agency back on a firm footing.

But good leadership alone may not be enough to sufficiently protect workers' health and safety. Long overdue reforms to the OSH Act are needed.

Last week, Representative Woolsey introduced the Protecting America's Workers Act. The bill will update OSHA penalties, strengthen whistleblower protections, and ensure that bad employers are held accountable.

This legislation is vital to improving worker health and safety.

Today's hearing will examine the adequacy of OSHA penalties. We will look at whether Congress should modernize and strengthen penalties against those that put Americans at unnecessary risk while at work.

Penalties under the OSH Act were last updated in 1990 and were not indexed for inflation.

And, these penalties for failing to protect workers pale in comparison to the penalties for failing to protect animals or the environment generally.

While both civil and criminal penalties are available under the OSH Act, criminal prosecutions of egregious violations of the law are only possible when a willful violation leads to the death of a worker.

Even then, no matter how bad an employer acted, killing a worker is only a class B misdemeanor.

While the law currently provides comparatively low penalties for health and safety violations, those penalties often get lower. Unscrupulous employers often avoid being held accountable for their actions by negotiating the fines down or away altogether.

This is exactly what happened on the Las Vegas strip during a particularly dangerous year and a half where 12 workers died on construction sites.

George Cole testified before our committee last June on how Project City Center in Las Vegas negotiated away all the penalties for violating safety rules in private that directly resulted in the death of his brother-in-law.

This is an outrageous example, but negotiating away egregious violations is not uncommon we will hear today.

Penalties are the key enforcement mechanism under the OSH Act. They must be real. They must be meaningful. They must function to deter violations. They must get people's attention.

And, these enforcement mechanisms must not be a mere cost of doing business.

Today we will hear testimony on the need to update and modernize that key enforcement mechanism under the OSH Act.

Before introducing the witnesses, I first want to recognize the Committee's ranking Republican, Mr. McKeon, for purposes of his opening statement.

Mr. MCKEON. Thank you, Chairman Miller, and good morning.

One injury, one illness or one death on the job is one too many. We Republicans do not defend and do not support bad employers who put their employees at risk, and I offer my sincere condolences to those families who lost a loved one this way.

But instead of focusing on punishment, as we do with today's hearing, we should also look at strategies that prevent accidents in the first place. Current health and safety regulations are complex and confusing. Simply increasing penalties and creating even more rules will not work.

If anything, this "Gotcha" approach will lead to more employer challenges and lawsuits, and in the end it won't be as effective in keeping workers safe. Instead, Republicans believe that cooperation with employers to fix potential problems, along with strict enforcement, works best.

Indeed, there is evidence that when OSHA works with businesses, particularly small ones, there has been great progress. The Bureau of Labor Statistics backs that up. It notes that in 2007 the number of deaths on the job fell to less than four for every 100,000 workers. The Bureau also says that in 2007 nonfatal injuries and

illnesses also were down by 4 percent, or 122 cases for every 10,000 workers.

OSHA's figures tell the same story. They say that since 2001 workplace deaths have declined 14 percent. Meanwhile, injuries and illness rates have dropped 21 percent. This is good news, although I repeat: one injury, one illness or one death on the job is one too many.

That is why I suggest to you, Mr. Chairman and my fellow committee members, that we approach this problem with a measured and balanced response. This response should look at prevention and cooperation with employers, not just punishment.

After all, the evidence shows that prevention and cooperation are making American workplaces safer, which in the end is something that we all want.

Thank you, Chairman Miller, and I yield back.

[The statement of Mr. McKeon follows:]

Prepared Statement of Hon. Howard P. "Buck" McKeon, Senior Republican Member, Committee on Education and Labor

Thank you, Chairman Miller and good morning.

One injury, one illness or one death on the job is one too many.

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This response should look at prevention and cooperation with employers, not just punishment.

After all, the evidence shows that prevention and cooperation are making American workplaces safer, which, in the end, is something that we all want.

Thank you, Chairman Miller. I yield back.

Chairman MILLER. Thank you.

Pursuant to committee rule 7c, all members may submit an opening statement in writing, which will be made part of the permanent record.

By prior agreement, Representative Lynn Woolsey, the chair of the Subcommittee on Workforce Protections, will give an opening statement this morning. The gentlewoman is recognized for 5 minutes.

Ms. WOOLSEY. Thank you very much, Mr. Chairman, and thank you for holding this important hearing on OSHA penalties.

In the more than 2 years that I have chaired the Subcommittee on Workforce Protections, I, like you and like the rest of the members of this committee, have heard story after story of worker tragedies that could have been prevented. That is the biggest tragedy. It is when there could have been a prevention, if only the employer had safety and health protections in place and followed them.

My heart goes out particularly to Becky Foster, who is here today, and all of the other family members who have senselessly lost their loved ones to workplace incidents.

I can think of no more fitting tribute to workers on Workers' Memorial Day—that is what today is, by the way—than to dedicate ourselves to putting policies in place that would protect workers and will deter employers. That is why this hearing is so very important.

OSHA penalties against employers are shockingly low. It is rare that an employer gets more than a slap on the wrist, even when a worker dies or is seriously injured, even in the most egregious cases.

It is rarer still that they are referred for prosecution. H.R. 2067, the Protecting America's Worker Act—PAWA we will call it from now on—which was introduced last week, provides needed reforms to the Occupational Safety and Health Act, including increasing penalties.

And I thank you, Mr. Chairman, for your strong support of PAWA. Under this legislation civil penalties are raised to the level to account for inflation since 1990, and then they will be indexed to inflation in the future.

Criminal penalties are extended to not only cover willful violations resulting in death, but those willful violations that result in serious injury as well. Also, these criminal penalties would be subject to felony prosecution and provide for up to 10 years in jail.

Possibly even more importantly, workers and their families will have a right to participate in OSHA's enforcement process against the employer. They can appeal, and they can modify a decision. In fact, they can weigh in ahead of time, giving advice as we go along.

Mr. Chairman, thank you for being a fierce advocate for American workers. As the head of this committee, you make all the difference. I look forward to this hearing, and I look forward to passing strong safety and health legislation. I will yield that.

Chairman MILLER. Thank you.

I want to welcome all of the witnesses to the committee this morning. Thank you for your time and for your expertise that you are sharing with us.

We will begin with Ms. Becky Foster, who is before the committee today to testify about how her stepson, Jeremy Foster, was fatally injured on the job at a timber company 6 months after his 19th birthday. Ms. Foster is a lifelong resident of Danville, Arkansas, and she has worked for a poultry company for the past 23 years, currently serving as a clerk.

Ms. Margaret Seminario has worked for the AFL-CIO for more than 25 years and has served as director of safety and health for the AFL-CIO since 1990. She has served on a number of federal

government advisory committees, including the National Advisory Committee on Occupational Safety and Health, and she received a BA in biological science from Wellesley College and a Masters of Science degree in industrial hygiene from Harvard School of Public Health.

Mr. Lawrence Halprin is a partner at Keller Heckman, where he works on a broad range of workplace health and safety, environmental product safety and business transaction issues. Mr. Halprin works with clients in the developing, implementing and auditing environmental, health and safety management programs. He has a BS from the University of Pennsylvania, a JD from Duquesne School of Law, and an MBA from George Washington University.

Mr. David Uhlmann is the Jeffrey F. Liss professor and inaugural director of the Environmental Law and Policy Program at the University of Michigan Law School. Prior to joining the faculty, Professor Uhlmann served for 7 years as the chief of the United States Department of Justice Environmental Crime Section, where he was the top environmental crimes prosecutor in the United States. Professor Uhlmann received his BA from Swarthmore College and his JD from Yale Law School.

Welcome to the committee. Just a quick note. When you begin testifying, in those little boxes in front of you, a green light will go on. You will have 5 minutes for your testimony. When you have 1 minute remaining, an orange light will go on, and we would like you to try to start to wrap up your testimony, but we also want you to be able to complete your thoughts and complete it in a manner of which you desire to convey the information to the committee, all within 5 minutes. Imagine that. Thank you.

So also we will begin with you.

Ms. FOSTER. Thank you, Mr. Chairman.

Chairman MILLER. We are going to ask you to pull that microphone a little bit closer to you.

Ms. FOSTER. Is this better?

Chairman MILLER. That is better. Thank you.

STATEMENT OF BECKY FOSTER

Ms. FOSTER. Good morning, Mr. Chairman and Ranking Member. Thank you for giving me the opportunity to testify today on behalf of families of fatally injured workers.

My name is Becky Foster. My testimony today is honor of my stepson, Jeremy Foster. Jeremy was the best son a family could hope for. He was a respectable young man, who loved his family and enjoyed spending much of his time outdoors. Our Jeremy would have celebrated his 24th birthday last Saturday.

Our time with Jeremy was cut short—tragically short—in the early hours of Friday, October 1st, 2004. His mother called me at 2 a.m., very upset and saying that a friend of Jeremy's that was working with him at the Deltic Timber Sawmill in Ola, Arkansas, had called his aunt. This was the only phone number that the friend could think of. And he said that Jeremy had been badly hurt while working near the chipper.

We naturally assumed that he would be taken immediately to the local hospital only 15 miles away, so we chose to meet there.

I called his dad at work, and we all went to the hospital and waited for the ambulance to arrive. It never did.

After waiting approximately 45 excruciating minutes, a nurse walked into the room to repeat what she had been told from a phone call. At the same time Jeremy's aunt, who had also met us at the hospital along with his uncle, received another call on her cell phone. She looked at us and said, "Jeremy is gone."

I will not describe what we went through in those moments. The pain cannot be described. We all left from the hospital, called family members, and then we met at his oldest sister's house.

Later that morning two men from Deltic Timber came to the door to express their condolences. They wouldn't tell us what happened, but they assured us that they would find out, and they would keep us updated. Those two men left that morning, and we have never seen or heard from them again.

It was our friend, who worked with the coroner at the funeral home, that told us what happened, that he had been strangled. She said that his shirt had caught on something and was wound continuously until the shirt became so tight around his neck that he could no longer breathe.

It was later that we learned that this equipment caught his shirt because it had been modified by maintenance workers at Deltic Timber. They had welded a piece of cheesepot to an auger shaft, and by not placing a guard over this modified area, they created a catch point.

It is stated in the OSHA report that this modification was the direct result of our son's death.

When we received our copy of the OSHA report, we were not surprised at all to see the notation of the company's actions being at fault for the fatality. But we were appalled to see the amount they were fined at $4,500. Surely, this was an error.

Shortly afterwards, we read in our state newspaper that this fine had been reduced to only $2,250. Did they place the value of our only son's life at this amount? It was as if OSHA had Pat said Deltic Timber on the back and said, "Good job, guys. You only killed one person."

This company walked away from us and was only at a loss of $2,250. They sent flowers to the funeral, and they walked away. Jeremy was employed with Deltic Timber through a temp agency. The temp agency paid for the funeral under workers' compensation regulations.

We were left with nothing but pain and loss—still are. We did consult lawyers—several of them—but our state of Arkansas does an excellent job of protecting employers. Because of workers' compensation statutes and the dual employment law, we were denied our day in court with Deltic Timber.

At the very least Deltic Timber should have been penalized with a substantial fine. Yes, we understand that companies are in business to make a profit, and a very large fine could result in loss of profits. But of course, they would have a chance to make up for this loss in the next fiscal quarter.

What about the worker that is killed? There is no second chance. All of this could have been avoided simply by reviewing OSHA

equipment regulations before modifying this equipment. Just one moment to consider the options would have saved Jeremy's life.

Why even have regulations, if they are not being enforced? Why have penalties, if they are not substantial enough to get the company's attention and to prevent more accidents?

Obviously, this meager fine had no lasting impression on this company. Since Jeremy's accident, there have been at least two other accidents. One was a fire at another location that resulted in one death and two serious burn injuries.

The posters that you see behind me represent the thousands of other people that are killed on the job every year.

Mr. Chairman and Ranking Member, I plead for your support in any efforts that are presented to ensure a safer workplace. Thank you.

[The statement of Ms. Foster follows:]

Prepared Statement of Becky Foster

Good morning Mr. Chairman and Ranking Members. Thank you for giving me the opportunity to testify today on behalf of families of fatally injured workers. My name is Becky Foster. My testimony today is in honor of my step-son, Jeremy Foster.

Jeremy was the best son a family could hope for. He was a respectable young man who loved his family and enjoyed spending much of his time outdoors. Our Jeremy would have celebrated his 24th birthday last Saturday. (Apr25th)

Our time with Jeremy was cut tragically short in the early hours of Friday October 1st, 2004. His mother called me at 2am—very upset and saying that a friend of Jeremy's that was working with him at the Deltic Timber sawmill in Ola Arkansas had called his Aunt—this was the only phone number the friend could think of—and said that Jeremy had been badly hurt while working near the chipper. We naturally assumed that he would be taken immediately to the local hospital only 15 miles away. So we chose to meet there. I called his Dad at work and we all went to the hospital and waited for the ambulance to arrive—It never did.

After waiting approximately 45 excruciating minutes, a nurse walked into the room to repeat what she had been told from a phone call. At the same time Jeremy's Aunt—who had also met us at the hospital along with his Uncle—received another call on her cell phone. She looked at us and said "Jeremy is gone".

I will not describe what we went through in those moments. The pain cannot be described. We all left from the hospital, called family members and then met at his oldest sister's house. Later that morning two men from Deltic Timber came to the door to express their condolences. They wouldn't tell us what happened but assured us that they would find out and keep us updated. Those two men left and we have never heard from them again.

It was our friend who works as the coroner at the funeral home that told us that he had been strangled. She said that his shirt had caught on something and was wound continuously until the shirt became so tight around his neck that he could no longer breathe.

It was later that we learned that this equipment caught his shirt because it had been modified by maintenance workers at Deltic Timber. They had welded a piece of keystock to an auger shaft. By not placing a guard over this modified area, they created a 'catch point'. It is stated in the OSHA report that this modification was the direct result of our son's death.

When we received our copy of the OSHA report we were not surprised to see the notation of the company's actions being at fault for the fatality. But we were appalled to see the amount of the fine: $4,500. Surely this was an error. Shortly afterwards we read in our state newspaper that the fine had been reduced to only $2,250. Did they place a value of our only son's life at this amount? It was as if OSHA had patted Deltic Timber on the back and said "Good job guys. You only killed one person".

This company walked away from us and was only at a loss of $2,250. They sent flowers to the funeral and they walked away.

Jeremy was employed with Deltic Timber thru a temp agency. The temp agency paid for the funeral under workers compensation regulations.

We were left with nothing but pain and loss. We did consult lawyers; several of them. But our state of Arkansas does an excellent job of protecting employers. Because of workers compensations statutes and a dual employment law we were denied our day in court with Deltic Timber.

At the very least Deltic Timber should have been penalized with a substantial fine. Yes, we understand that companies are in business to make a profit and a very large fine could result in loss of profit. But of course they would have a chance to make up for the loss in the next fiscal quarter. What about the worker that is killed? There is no second chance.

All of this could have been avoided simply by reviewing OSHA equipment regulations before modifying the equipment. Just one moment to consider the options would have saved Jeremy's life. Why even have regulations if they are not enforced? Why have penalties if they are not substantial enough to get the companies attention and prevent more accidents?

Obviously, this meager fine had no lasting impression on this company. Since Jeremy's accident there have been at least two other accidents. One was a fire at another location that resulted in one death and two serious burn injuries.

Mr. Chairman and Ranking Members; I plead for your support in any efforts that are presented to ensure a safer workplace.

I ask that each of you please visit the website *http://www.usmwf.org/*. for additional stories from families of fatally injured workers. The United Support & Memorial for Workplace Fatalities (USMWF) was created by Tammy Miser. Tammy also has personal experience with these issues, as she lost her brother in unsafe working conditions.

Her story is included in the attached "FAMILY BILL OF RIGHTS".

I also ask for your support of the "PROTECTING AMERICA'S WORKERS ACT".

Thank you for your service to workers and their families.

[Additional submissions of Ms. Foster follow:]

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Deltic Timber Fined In Deadly Fire

Deltic Timber Corp. has been fined $13,500 for safety violations at its sawmill near Waldo after a fire caused the death of one worker and injured two others.

The Occupational Safety and Health Administration inspected the mill following the Aug. 9 fire. OSHA said an enclosure for the planer room, where the fire broke out, and the dust-collection system were not built to national standards, and exposed employees to intense flames, heat and sparks.

Diana Petterson, a spokeswoman for OSHA, said Deltic Timber has addressed the problems, although the company is contesting the citation and fine.

Craig Douglass, a spokesman for the El Dorado-based company, said Deltic completed the corrective actions recommended by OSHA before starting the mill back up October 30th.

In the fire, Darrell Richards of Junction City suffered burns on most of his body and died September First at a hospital in Memphis.

Andy Emerson of Taylor and Billy Pope of Springhill, Louisiana, were injured and hospitalized. The two men have not returned to work but are back at home and receiving physical therapy.

KELLER AND HECKMAN LLP,
1001 G ST., NW, SUITE 500 WEST,
Washington, DC, May 12 2009.

Hon. GEORGE MILLER, *Chairman,*
House Education and Labor Committee, Rayburn House Office Building, Washington, DC.

Re: Adequacy of OSHA Penalties and the PAW Act

DEAR CHAIRMAN MILLER: I sincerely appreciated the opportunity to testify before the House Education and Labor Committee on the critically important issues of OSHA penalties addressed at the April 28 hearing, and appreciate the opportunity to file this supplemental statement and information on the adequacy of OSHA penalties and the interrelated OSH Act enforcement issues raised by the proposed PAW Act.

As was the case with my testimony on April 28, I am expressing my personal views as a safety and health professional committed to the goals of the Occupational

Safety and Health Act. My statement and comments are not intended to represent the views of Keller and Heckman LLP, or any of our clients. My objective is to provide the Committee with practical and helpful insights that address the issues before the Committee and hopefully will assist the Committee in advancing workplace safety and health.

It seems appropriate to begin any discussion of proposed legislative initiatives by (1) identifying the overall goal; (2) examining the system and measures currently in place and their effectiveness in achieving that goal; (3) determining (through a thorough and unbiased analysis) the underlying causes of the failure to achieve that goal; (4) re-assessing whether the goal is appropriate; and (5) identifying (through a thorough and unbiased analysis) appropriate additional measures—both legislative and non-legislative—that would be expected to significantly increase the effectiveness of the existing system in achieving the stated goal.

The expressly stated "purpose and policy" of the OSH Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." In short, that goal was to be achieved "by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; [and by other appropriate measures]. Through the flexibility provided by the OSH Act, OSHA—with the participation of Congress, the employer community, the employee community, the Review Commission, the courts and the media—have fashioned a system that has made tremendous progress in addressing workplace safety and health issues in the United States.

The data published by the Bureau of Labor Statistics (BLS) demonstrate that work-related fatalities have been reduced by nearly two-thirds since the adoption of the OSH Act, and that workplace fatality and injury rates are currently the lowest they have ever been since BLS began recording statistics in 1992. In other words, much of what we are doing is working, and we should be careful about making dramatic changes without the careful deliberation necessary to avoid counterproductive measures and the significant problems created by uncertainty and instability.

The current level of workplace fatalities and injuries suggests that our country is still some distance away from its stated goal, which is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." From a moral standpoint, our stated goal can be nothing less, but at the same time we must recognize that it is an idealistic goal that seems impossible to achieve given: (1) the ongoing interaction between workers and their work environment; and (2) the reality that human beings have human qualities that lead to shortcomings in communication, understanding, perception, performance, assessment and judgment. As of 1993, the risk of dying from an accident in the home was greater than the risk of dying on the job. In the most recent year for which BLS statistics are available, American workers were over three times more likely to be killed in their motor vehicle than at their place of employment. I believe those statistics provide a useful point of reference and avoid creating unrealistic expectations.

My experience is that the overwhelming majority of employers sincerely care about the safety of their employees, both because it is morally correct and because it is in the best interests of their business, and do their best within the limits of their resources to provide a safe workplace for their employees, protect the environment and comply with the multitude of other federal, state and local laws governing the operation of a business in this country. According to the attached OSHA statistics, the agency conducts approximately 40,000 inspections per year at workplaces where it believes it is more likely to find violations, and issues approximately 85,000 citations per year, a significant portion of which are eventually withdrawn. That comes out to a fairly low number of two citations (alleged violations) per site. In contrast, the PAW Act appears to reflect a view that workplace deaths and injuries are due almost entirely to some callous misconduct on the part of employers, and that increased OSHA penalties and increased enforcement driven by granting employees full party status in every enforcement proceeding will eliminate these events. I respectfully disagree with that view.

One point of view expressed at the April 28 hearing was that enhanced criminal penalties will deter criminal behavior and the enhance civil penalties will deter civil violations. In fact, the attached history of criminal referrals by OSHA shows that the maximum number in recent years was 12 referrals whereas the number of workplace fatalities was approximately 5600. In other words, OSHA determined that approximately 0.2% of the fatality cases involved conduct meriting a criminal referral. That strongly suggests that the focus on increased criminal sanctions would do little to address the current level of workplace injuries, illnesses and deaths in this coun-

try. Furthermore, as has been demonstrated by the criminal enforcement activities of the Department of Justice, the threat of far more severe criminal sanctions under, for example, the environmental and securities laws, does not completely deter crime. If, on the other hand, the primary objective of the greatly increased criminal penalties is to exact retribution from the few employers guilty of truly egregious conduct, then we should acknowledge that objective and assess whether the ability to exact that retribution outweighs the greatly magnified potential for harm from prosecutorial abuse that would accompany the change in criminal penalties.

As demonstrated by the attached BLS statistics, approximately 57% of the workplace fatality cases involve workplace violence and transportation incidents that are traditionally handled by the local police department and outside the reach of OSHA enforcement. Therefore, for purposes of the OSH Act, it appears that the situation has been overstated, and Congress should recognize that fact.

The case for a change in criminal and civil sanctions of the magnitude proposed by the PAW Act should be based on statistical evidence of a major shortcoming in the OSH Act. To the best of my knowledge, no such evidence has been presented to the Committee. The details of only one case were brought before the Committee at the April 28 hearing. The discussion of the 1996 Evergreen Resources case by a former DOJ prosecutor demonstrated that one can find a person willing to engage in outrageous conduct that is particularly deserving of criminal prosecution, but that was only one case and there is no evidence to suggest that any Federal or state criminal laws would have had a deterrent effect on the individual involved in that case.

The other case presented to the Committee on April 28 was a tragic 2004 case ("the 2004 Case"). The 2004 Case was described in a very summary fashion that did not provide the details necessary to understand the facts of the case or indicate why the OSHA enforcement action proceeded as it did. Unfortunately, I did not have adequate time to pursue an FOIA request that would have yielded a fairly complete copy of the enforcement file. But what I did obtain in a limited response to my FOIA request suggests the discussion at the April 28 hearing was substantially incomplete and that the Committee should not rely on that limited information in deciding how to proceed on the PAW Act.

According to the OSHA enforcement file, the 2004 Case involved a facility with a low total OSHA Recordable Case Rate of 1.8 and 3.4 for 2003 and 2002, respectively, and a very low OSHA Days Away Restricted Transferred (DART) Rate of 0 and 1.1 in 2003 and 2002, respectively. Turning to the facts of the case, OSHA found that a metal bar had been welded to the end of an elevated turning shaft and, with the benefit of 20/20 hindsight, that it created a potential catch point. However, OSHA's machine guarding rule does not prohibit creating a catch point; it generally prohibits creating a catch point where there is anticipated employee exposure to that catch point in performing assigned tasks. There was no possibility of employee exposure to the elevated catch point unless the employee was elevated. In this case, the OSHA enforcement file indicated that the employee was standing on a stepladder and reaching across the shaft to clear a jam. See attached excerpt. The enforcement file also appears to indicate that task was supposed to be performed from the floor using a pole, which would have avoided the tragic outcome in that case.

During my testimony, I made the point that a responsible employer might perform an audit, use a risk assessment to determine what recommendations to address first and, then be exposed to a citation alleging a willful violation if OSHA determined the employer had taken too long to address a particular issue. Representative Andrews asked for a citation to support that concern. Attached is an excerpt from the OSHA Field Operations Manual that acknowledges that such a situation may arise. See Note on page 4-29.

The PAW Act raises many issues beyond the adequacy of OSHA penalties. On the positive side, one of the most effective ways of advancing workplace safety and health in the United States would be to extend the coverage of the OSH Act to all government employees. In addition to the enormous benefit of bringing those employees under the protections of the OSH Act, I believe it would have a useful effect in tempering OSHA's tendency, described in my April 28 statement, to adopt overreaching and ambiguous rules, and to improperly reinterpret existing rules to require substantially more than was ever contemplated.

The proposed change to Section 4 of the OSH Act appears to eliminate the presumption that OSHA's rules are preempted by the rules of another Federal agency. It appears that, unless and until OSHA makes the "equally protective" certification that would be authorized by the PAW Act, there would be great uncertainty, if not chaos, as to which agency's rules applied. In the interim period, parties would have to resort to the responsible administrative tribunals and the courts to resettle what would previously been reasonably well settled law. Furthermore, it seems likely that

OSHA would find it difficult to make the "equally protective" determinations because: (1) it would find some agency's rules more protective and some less protective than OSHA's with respect to different aspects of the same hazard; (2) there would be inevitable interagency disputes over the interpretation of those rules; and (3) neither OSHA nor the Solicitor's Office has the resources to engage in this massive undertaking. OSHA has been unable to establish uniform interpretations of its own rules just within OSHA, much less within the 24 state plan states which, with a few exceptions, have largely adopted OSHA's rules. This proposed change in the law should be carefully reconsidered. If there is a particular industry that Congress believes should be subject to certain OSHA's rules, it would be better to address that objective in a more focused manner.

While no regulatory enforcement system is perfect, the current OSHA enforcement system provides a reasonable balance that, in my experience, protects an employer's due process rights while encouraging and generally achieving prompt abatement of conditions that clearly require abatement. The PAW Act would violate basic due process requirements in requiring an employer to "abate" an alleged violation before OSHA ever established that the cited condition or practice was a violation of the OSH Act.

My experience is that the current enforcement system achieves substantial compliance with the OSH Act by the great majority of employers for the great majority of the time. When citations are issued, the current enforcement process generally results in a settlement that avoids the costs of litigation and advances workplace safety. Only about 7% of OSHA citations are contested and the great majority of the contested cases are settled prior to trial. If the maximum OSHA fines are increased, and OSHA makes aggressive use of that additional authority, the number of contested cases is likely to rise dramatically, and there is a real potential that employers will reconsider their current practice of allowing warrantless OSHA inspections or allow OSHA to expand the scope of a limited inspection without a warrant.

When OSHA issues citations, my experience is that disputed facts and legal issues are addressed between the parties in an objective and professional manner, and that personal agendas rarely enter the picture. OSHA and the employer understand the process and generally are able to successfully negotiate a mutually acceptable informal settlement agreement. They proceed with the knowledge that, assuming the cited condition has been abated or must be abated within a reasonable time, the matter is resolved and their agreement will not be subject to being second-guessed or overturned by a third party, particularly a third party which is often likely to have a counterproductive personal agenda or bias.

An amendment to the OSH Act that would subject OSHA's prosecutorial discretion in settling a case under particular terms to a legal challenge through a formal administrative process and litigation would have a tremendous chilling effect on the entire system. Much of the incentive for the employer, OSHA and the Solicitor's Office would be eliminated if those entities believed an employee was likely to pursue a legal challenge to the settlement. In many cases, it may be simpler for OSHA or the Solicitor's Office to try the case than to write the contemplated legal justification explaining why the settlement would effectuate the objectives of the OSH Act. In many cases, the Solicitor's Office would not be willing to write the referenced legal justification because it would disclose legal strategy or weaknesses in OSHA's case. In many cases an employer would not be willing to disclose what it was willing to commit to in a settlement to avoid litigation if it would eventually end up litigating the case.

The risk of this type of post-settlement litigation will reduce cooperative efforts between employers and employees, and between employers and OSHA. In short, it may be appropriate to increase the DOL resources available to enforce the OSH Act, but it would turn a generally effective process on its head to allow affected employees or their representatives to control OSHA prosecutorial discretion, or to place the responsibility for reviewing challenges to that prosecutorial discretion on the Review Commission and the courts.

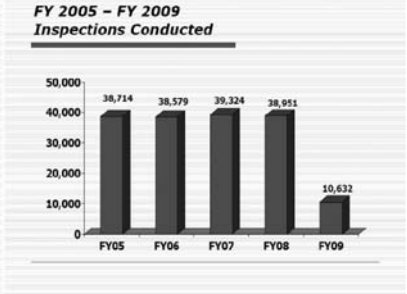
Again, I appreciate the opportunity to file this supplemental statement and information on the adequacy of OSHA penalties and the interrelated OSH Act enforcement issues raised by the proposed PAW Act. Please let me know if there are any questions or I may be of further assistance regarding these issues.

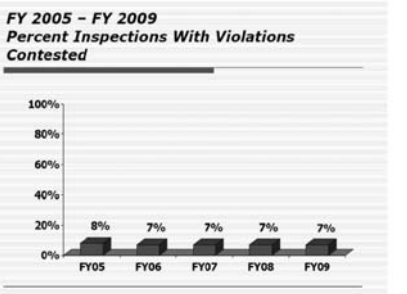
Thank you for your consideration.

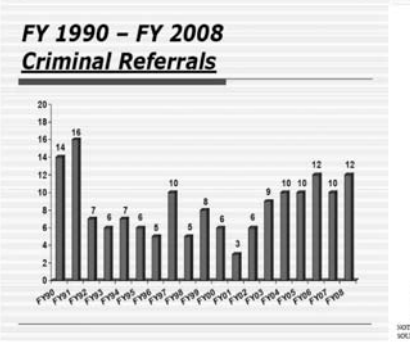
LAWRENCE P. HALPRIN.

ABA 2009 – Enforcement Programs Update

Richard E. Fairfax, CIH
Director
OSHA – Enforcement programs







U.S. Department of Labor

Occupational Safety and Health Administration
425 W. Capitol Avenue, Suite 450
Little Rock, AR 72201
(501) 324-6291
Fax (501) 324-5243
Reply to the Attention:
Paul J. Hansen

February 9, 2005

Mr. James Phillips
DELTIC TIMBER CORPORATION
P.O. Box 7200
210 East Elm Street
El Dorado, Arkansas 71731

Dear Mr. Phillips:

An inspection of your workplace at Hwy 10 East, Ola, Arkansas beginning on October 1, 2004 disclosed the following potential hazard:

Chipper tenders and other employees were not protected from being caught in or by the Webster 110 box chain in the edger sawdust chain conveyor when clearing jams in the edger saw box. The top side of the elevated saw dust chain conveyor was not covered or enclosed.

It is not considered appropriate for citations to be issued for these hazards at this time. In the interest of work place safety and health, however, I recommend that you take one or more of the following actions, or other equally protective actions, voluntarily to eliminate or reduce employees' exposure to the hazards described above.

1. Equip the edger sawdust chain conveyor with additional guarding across the top to prevent employees from having any part of their hands, fingers or clothing caught in or by the chain when clearing jams in the edger saw box.

2. Require Chipper Tenders and other employees to shut down the edger sawdust chain conveyor and lockout its energy sources prior to cleaning jams in the edger saw box.

3. Prevent employees from working from a height that exposes them to the open top of the saw dust chain conveyor. Develop and enforce a work rule prohibiting employees from working from ladders or other elevated work surfaces to clear jams in the edger saw box. Prohibit employees from reaching into the saw box with their

A letter of corrective action explaining any measures taken by Deltic Timber to address this condition is required.

Sincerely,

Paul J. Hansen
Area Director

OSHA 1A Narrative Continued

Name of Company: Deltic Timber

Inspection #: 307893347

I. Nature and Scope of the Inspection:

A: **Nature:** Fatality investigation – ON or about 10/1/04, the Chipper Tender, attempted to clear a jam in the saw box that was located below the edger and above the sawdust chain conveyor. The sawdust chain conveyor was in operation at the time and the employee's shirt became caught on a metal bar that had been welded to the chain conveyor's tail spool shaft. The saw box and the chain conveyor were elevated above the floor and the employee was working from a ladder to access the area. When the employee's shirt became twisted around the shaft, the employee fell, or was pulled from the ladder and was strangled by his shift as it was pulled tightly around his neck.

B: **Scope:** Partial- Limited to the fatality event and the work processes being performed when the fatality occurred.

C: **Background Information and Inspection History:**

D: **Additional Comments, Unusual Circumstances, etc:**

E: **Interstate Commerce Information:** Product manufactured at the facility was sold and shipped by truck and rail to various locations in Texas, Oklahoma, and Kansas. One such location was Southern Timber Sales in Fort Worth, TX.

F: **Company History**: Murphy Oil, the parent company, started Deltic Farm and Timber as the Murphy Family Timber Holdings. Deltic was incorporated in the early 1950's and was comprised mostly of woodlands and farm land in Northwest Louisiana. Two sawmills were built and added to Deltic, one in 1971 and one in 1973. In December of 1996, Murphy Oil decided to spin Deltic off as it's own entity. The name was changed to from Deltic Farm and Timber to Deltic Timber. In 2004, Deltic Timber was still primarily comprised of land holdings. For example, the company owned approximately 7,000 acres of real estate development in Chenal Valley in West Little Rock, AR.

b. If a standard does not apply and all criteria for issuing a Section 5(a)(1) citation are not met, yet the Area Director determines that the hazard warrants some type of notification, a Hazard Alert Letter shall be sent to the employer and employee representative describing the hazard and suggesting corrective action.

IV. Other-than-Serious Violations.

This type of violation shall be cited in situations where the accident/incident or illness that would be most likely result from a hazardous condition would probably not cause death or serious physical harm, but would have a direct and immediate relationship to the safety and health of employees.

V. Willful Violations.

A willful violation exists under the Act where an employer has demonstrated either an intentional disregard for the requirements of the Act or a plain indifference to employee safety and health. Area Directors are encouraged to consult with RSOL

when developing willful citations. The following guidance and procedures apply whenever there is evidence that a willful violation may exist:

A. Intentional Disregard Violations.

An employer commits an intentional and knowing violation if:

1. An employer was aware of the requirements of the Act or of an applicable standard or regulation and was also aware of a condition or practice in violation of those requirements, but did not abate the hazard; or

2. An employer was not aware of the requirements of the Act or standards, but had knowledge of a comparable legal requirement (e.g., state or local law) and was also aware of a condition or practice in violation of that requirement.

NOTE: Good faith efforts made by the employer to minimize or abate a hazard may sometimes preclude the issuance of a willful violation. In such cases, CSHOs should consult the Area Director or designee if a willful classification is under consideration.

3. A willful citation also may be issued where an employer knows that specific steps must be taken to address a hazard, but substitutes its judgment for the requirements of the standard. See the internal memorandum on Procedures for Significant Cases, and CPL 02-00-080, Handling of Cases to be Proposed for Violation-by-Violation, dated October 21, 1990.

EXAMPLE 4-26: The employer was issued repeated citations addressing the same or similar conditions, but did not take corrective action.

B. Plain Indifference Violations.

1. An employer commits a violation with plain indifference to employee safety and health where:

a. Management officials were aware of an OSHA requirement applicable to the employer's business but made little or no effort to communicate the requirement to lower level supervisors and employees.

b. Company officials were aware of a plainly obvious hazardous condition but made little or no effort to prevent violations from occurring.

EXAMPLE 4-27: The employer is aware of the existence of unguarded power presses that have caused near misses, lacerations and amputations in the past and does nothing to abate the hazard.

c. An employer was not aware of any legal requirement, but knows that a condition or practice in the workplace is a serious hazard to the safety or health of employees and makes little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, or complaints of employees or their representatives.

NOTE: Voluntary employer self-audits that assess workplace safety and health conditions shall not normally be used as a basis of a willful violation. However, once an employer's self-audit identifies a hazardous condition, the employer must promptly take appropriate measures to correct a violative condition and provide interim employee protection. See OSHA's Policy on Voluntary Employer Safety and Health Self-Audits (Federal Register, July 28, 2000 (65 FR 46498)).

d. Willfulness may also be established despite lack of knowledge of a legal requirement if circumstances show that the employer would have placed no importance on such knowledge.

EXAMPLE 4-28: An employer sends employees into a deep unprotected excavation containing a hazardous atmosphere without ever inspecting for potential hazards.

2. It is not necessary that the violation be committed with a bad purpose or malicious intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.

3. CSHOs shall develop and record on the OSHA-1B all evidence that indicates employer knowledge of the requirements of a standard, and any reasons for why it disregarded statutory or other legal obligations to protect employees against a hazardous condition. Willfulness may exist if an employer is informed by employees or employee representatives regarding an alleged hazardous condition and does not make a reasonable effort to verify or correct the hazard. Additional factors to consider in determining whether to characterize a violation as willful include:

a. The nature of the employer's business and the knowledge regarding safety and health matters that could reasonably be expected in the industry;

b. Any precautions taken by the employer to limit the hazardous conditions;

c. The employer's awareness of the Act and of its responsibility to provide safe and healthful working conditions; and

d. Whether similar violations and/or hazardous conditions have been brought to the attention of the employer through prior citations, accidents, warnings from OSHA or officials from other government agencies or an employee safety committee regarding the requirements of a standard.

NOTE: This includes prior citations or warnings from OSHA State Plan officials.

4. Also, include facts showing that even if the employer was not consciously violating the Act, it was aware that the violative condition existed and made no reasonable effort to eliminate it.

VI. Criminal/Willful Violations.

Section 17(e) of the Act, as amended, provides that: "Any employer who willfully violates any standard, rule or order promulgated pursuant to Section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine" of not more than $250,000 for an individual and $500,000 for an organization or by imprisonment for not more than six months nor less than 30 days, or by both. Note that this provision of the Act does not apply to Section 5(a)(1) violations classified as willful. See Chapter 6, Section XIII, Penalties and Debt Collection, regarding criminal penalties.

A. Area Director Coordination.

The Area Director, in coordination with the RSOL, shall carefully evaluate all willful cases involving employee deaths to determine whether they may involve criminal violations of Section 17(e) of the Act. Because the quality of the evidence available is of paramount importance in these investigations, there shall be early and close discussions between the CSHO, the Area Director, the Regional Administrator, and the RSOL in developing all evidence when there is a potential Section 17(e) violation.

B. Criteria for Investigating Possible Criminal/Willful Violations

The following criteria shall be considered in investigating possible criminal/willful violations:

1. In order to establish a criminal/willful violation OSHA must prove that:

a. The employer violated an OSHA standard. A criminal/willful violation cannot be based on violation of Section 5(a)(1).

b. The violation was willful in nature.

c. The violation of the standard caused the death of an employee. In order to prove that the violation caused the death of an employee, there must be evidence which clearly demonstrates that the violation of the standard was the direct cause of, or a contributing factor to, an employee's death.

1. If asked during an investigation, CSHOs should inform employers that any violation found to be willful that has caused or contributed to the death of an employee is evaluated for potential criminal referral to the U.S. Department of Justice.

2. Following the investigation, if the Area Director decides to recommend criminal prosecution, a memorandum shall be forwarded promptly to the Regional Administrator. It shall include an evaluation of the possible criminal charges, taking into consideration the burden of proof requiring that the Government's case be proven beyond a reasonable doubt. In addition, if correction of the hazardous condition is at issue, this shall be noted in the transmittal memorandum, because in most cases prosecution of a criminal/willful case stays the resolution of the civil case and its abatement requirements.

3. The Area Director shall normally issue a civil citation in accordance with current procedures even if the citation involves charges under consideration for criminal prosecution. The Regional Administrator shall be notified of such cases. In addition, the case shall be promptly forwarded to the RSOL for possible referral to the U.S. Department of Justice.

C. Willful Violations Related to a Fatality

Where a willful violation is related to a fatality and a decision is made not to recommend a criminal referral, the Area Director shall ensure the case file contains documentation justifying that conclusion. The file documentation should indicate which elements of a potential criminal violation make the case unsuitable for referral.

VII. Repeated Violations.

A. Federal and State Plan Violations.

1. An employer may be cited for a repeated violation if that employer has been cited previously for the same or substantially similar condition or hazard and the citation has become a final order of the Review Commission. A citation may become

a final order by operation of law when an employer does not contest the citation, or pursuant to court decision or settlement.

2. Prior citations by State Plan States cannot be used as a basis for Federal OSHA repeated violations. Only violations that have become final orders of the Review Commission may be considered.

Workplace Tragedy Family Bill of Rights

By
USMWF.ORG, Members of LaborSafe,
COSH and Caring Families

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To find detailed information pertaining to the Workplace Tragedy Family Bill of Rights, visit www.usmwf.org

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The Sobering Facts: Workplace Injury, Illness & Death

Each day millions of fathers, mothers, husbands, wives, sons, and daughters leave their homes for another day of work. They work in retail stores, restaurants, mines, hospitals, and countless other industries. They work to provide for their families, save for the future, and better Society. Tragically, many of these workers and their loved ones have no idea that simply going to work may jeopardize their limbs and life.

According to the US Department of Labor, in 2005, 4.2 million non-fatal injuries and illnesses were reported in private industry workplaces. In 2006, 5,703 US workers were fatally injured on the job Behind each one of these injured, sickened or killed workers is a family in mourning – a family in need of answers, resources, and support.

Occupational Tragedies and their Impact on Families

Workplace fatalities and serious injuries have a tremendous impact on the community. While coworkers and friends must also cope with the unexpected tragedy, no one is more affected than the families. These families have a special need to understand the death of their spouse, parent, son, daughter, or fiancé. For many family members, grief persists and is unresolved unless all available information about the circumstances of the work-related fatality or injury is shared in a timely manner.

Unfortunately, when a loved one is injured or dies on the job families do not know where to turn for answers. Current legislation ignores the rights of family members to be involved in the investigative process, and investigative government agencies, such as the Occupational Health and Safety Administration (OSHA) and the Mine Safety and Health Administration (MSHA), are complex and highly bureaucratic. Workers' compensation systems are equally complicated. Not surprisingly, families too often find little support from government officials when they inquire into how the workplace incident occurred.

In spite of their loss and overwhelming frustration with the investigative system, family members are banding together to advocate for safer and healthier work environments. These family members are committed to calling attention to occupational dangers not only to honor their loved ones, but also to prevent other families from experiencing the pain and confusion associated with workplace injury, illness, and death.

United Support & Memorial for Workplace Fatalities (USMWF): Our Mission

In 2004, USMWF was formed to support individuals, companies and other organizations dealing with the repercussions of a worker's death and/or injury. USMWF also aims to prevent future workplace tragedies. Additional goals include:

- Provide individuals who have lost a loved one with information pertaining to workplace laws, rights, mental health resources, memorials, tributes, and local relevant events.
- Connect new workplace tragedy family member victims to others who have experienced a similar loss.
- Equip students and/or adults with prevention strategies that will protect them from injuries or illnesses in a variety of workplace settings.
- Provide companies with information to help their employees deal with the loss of a coworker.
- Assemble dedicated organizations and individuals for advocacy initiatives and events.

- Create awareness in the field of workplace deaths and injuries and the needs of families, coworkers and employers.

Families of workplace tragedies need and deserve hope, answers, direction, support, and acknowledgment. Together USMWF, advocacy organizations such as LaborStart, and national Coalitions for Occupational Health and Safety, caring families, and government agencies can change the way family member victims are treated, and ensure their needs are met by giving them the right to a fair and transparent investigative process.

Workplace Tragedy Family Bill of Rights

The following Bill of Rights for family member victims of workplace fatalities and serious injuries would provide fundamental privileges to the loved ones left behind by workplace incidents.

1. A federal liaison office must be established to provide family members with information about the accident investigation(s) process, role of other state or federal agencies, workers' compensation and other matters related to their loved one's death.

2. Family members must have full "party status" in legal proceedings involving OSHA, MSHA, or whatever state or federal agency is conducting the workplace-fatality investigation.

3. Family members must have the right to designate a representative to act on their behalf in all matters related to the investigation and any follow-up legal actions related to the investigation.

4. Family members must be notified of all meetings, phone calls, hearings or other communications involving the accident investigation team and the employer, and be given the opportunity to participate in these events.

5. Family members must have the opportunity to recommend names of individuals to be interviewed by the accident investigation team and to submit questions to the investigators for response by the interviewees. Family members should be given access to all transcripts of interviews, affidavits, or written statements made by witnesses and others interviewed for the investigation.

6. Family members must have the right to be kept routinely [no less than once every 14 days] informed by federal and state officials (e.g., OSHA, OSHA State-Plans, MSHA) on the progress of the incident investigation, including an estimate of when the investigation will be completed.

7. Family members must have the right to conduct an independent investigation of the work-related fatality or serious injury, including the right to visit the scene of the accident before it is released by the investigation team back to the employer's control.

8. OSHA and MSHA must assure that all physical evidence related to the accident investigation is preserved and secured in a tamper-resistant environment. Family members should have the right to view all physical evidence.

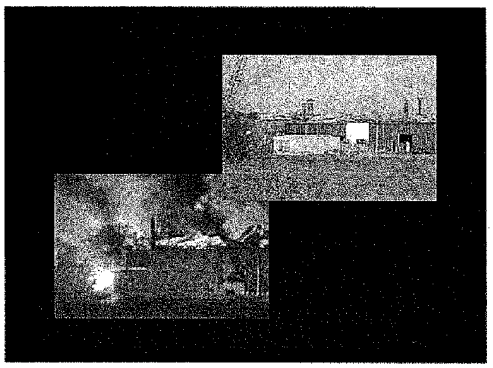
9. Family members should have access to all documents gathered and produced as part of the accident investigation, including records prepared by first responders, and state and federal officials. Information mentioning the deceased family-member's name and condition should not be redacted from documents provided to family members. All fees related to the production of documents should be waived for family members.

10. Family members must be compensated for the time and expenses incurred because of a work--related fatality or serious injury. In cases where the deceased or seriously injured worker has no spouse or dependent children, a parent of the worker should be compensated for funeral cost, travel and medical expenses, and lost wages.

True Stories of Workplace Tragedies and the Families Left Behind

Shawn Boone

Shawn Boone, 33, was killed from injuries resulting from an explosion at the Hayes Lemmerz Plant in Huntington, Indiana. The lack of information surrounding his death, and assistance from government agencies inspired his sister to start an organization dedicated to reaching out to family members of workplace fatality victims.



On October 29, 2003, Shawn and his coworkers performed a routine procedure to relight a furnace at Hayes Lemmerz, an international producer of automotive and commercial highway steel and aluminum wheels. (It was common practice for workers to be asked to put fires to avoid calling the fire department.) After the furnace was lit, Shawn remained in the vicinity to ensure the flames remained extinguished. After few minutes, Shawn and his coworkers began to collect their tools. He was standing directly behind the furnace with his back toward it, when suddenly an explosion occurred. Coworkers who witnessed the explosion stated that despite being knocked down Shawn got up and started walking toward the doors. It was then that a second and more intense blast occurred. The heat from the blast was hot enough to melt copper piping. Unfortunately, Shawn did not die instantly; instead, he remained on the building floor smoldering while the aluminum dust continued to burn through his flesh and muscle tissue. The breaths he took burned his internal organs, while the blasts took his eyesight.

By the time the ambulance arrived, Shawn had no nerve endings and was burnt from head to toe. Yet, he was conscious and asking for help. Later that morning, Shawn's family let him go. It was the hardest thing they've ever done, and to this day they live with a feeling of guilt.

In the middle of the family's tragedy there was another taking place. Hayes Lemmerz was allowed to start the clean-up process simply because Shawn was not dead yet. The immediate clean-up not only contaminated the investigation site, but also deprived Shawn's family and coworkers the opportunity to begin their healing by visiting the site of the incident.

Today, Shawn's sister, Tammy Miser, is the founder of the United Support and Memorial for Workplace Fatalities. She works tirelessly to ensure that family members of workplace tragedies have the support needed to cope with their loss. In addition, she advocates for the rights of these family members, including the right to visit incident sites. Shawn's loss has forever impacted the life of his family. His family's efforts to provide resources and support to those affected by workplace tragedies has forever impacted the lives of countless others.

Christopher Doughty

In February 2007, Christopher Doughty, 18, went to work with his uncle. The two were taking soil samples for a new house. Later in the afternoon, Christopher was killed when a jacket he was wearing was pulled into an auger – an auger without an automatic emergency shutoff. He was killed instantly. Christopher's entire family, including his parents, brothers, sister, and aunts and uncles, is devastated. In addition to the emotional and psychological effects of their son's death, Christopher's parents have also incurred a large financial burden related to funeral costs. Current workers' compensation laws deny parents financial assistance for the loss of a child.

Christopher's dad, Kenneth, vividly remembers receiving the call at work that Christopher had been killed on the job. He nearly fainted. Some eight months have passed since Christopher's death, but the pain is still as sharp as ever. "I lost my son, my fishing buddy," Kenneth explains. "I miss him everyday." Kenneth and his son, Kyle, have begun grief counseling, but still find themselves wondering how and why this incident happened.

Lorraine, Christopher's mom, is also having a very difficult time coping with her son's death. "The toll it has taken on me is awful," she explained. "I am doing all the right things: counseling, church, compassionate friends and reading, but I will never get over it."

In addition to coping with their grief, Christopher's parents have also had to deal with new financial realities. Funeral costs, which Kenneth paid, amounted to more than $20,000. He received only $6,000 from workers' compensation. Kenneth was able to pay the expenses from his savings, but worries that some parents may be forced into dire financial straits without proper compensation for their loss.

Lorraine, too, has experienced a financial burden since Christopher's death. Hospitalizations and medications prescribed to cope with the loss of her son have left Lorraine with medical bills in the thousands.

Christopher's death shattered both Kenneth and Lorraine's worlds. They are now haunted by unanswered questions regarding the incident. For example, why didn't Christopher receive safety trainings on the job? Why didn't the auger automatically shut-off? The OSHA report, which Kenneth can not read without breaking into tears, offers little support and few answers.

"It is sickening; we were robbed of our son and our futures…He did not have time to be a dad or husband," Lorraine explained. Kenneth echoes similar sentiments. His thoughts also turn to those families who may not have the financial means to pay for their son or daughter's funeral. "While no amount of money can ever bring back a child, families deserve to be compensated for their loss in order to properly say goodbye to their loved one. Indeed, it should be a right!"

Donald W. Smith

A college senior, Donald Smith, 22 of Texas, was tragically killed on the job while working as a mechanic's helper at a local chicken processing plant. Ordered by his supervisor to disconnect and remove a large electric motor without assistance, Donald was electrocuted while performing the task. Faced with the overwhelming loss of his son, Donald's father, Donald Coit, has become an outspoken advocate for the rights of families of workplace fatality victims.

"In viewing what is "right" and what is "wrong" with how families are treated in job related deaths, I believe one must look at our current laws," Donald Coit explained. "To the naked eye, it is obvious that current

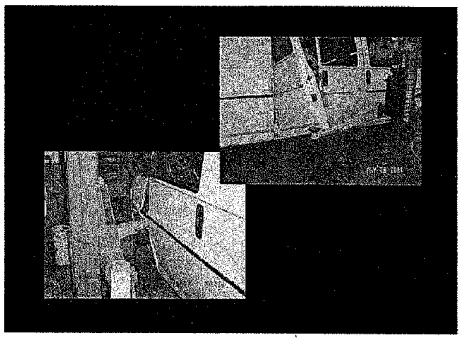
laws favor corporate America." The family has been denied access to documents concerning negotiations between OSHA and his son's company, despite formal and properly filed requests. When government agencies and companies refuse to provide information that could reveal criminal actions, the entire legal system works against the families of workplace fatality victims. The current system undoubtedly needs serious revisions. "In my opinion, one of those revisions must allow families of workers killed on the job access to ALL information, including negotiations, meetings and correspondence," Donald Coit said. "An equally important revision must allow for the successful prosecution of negligent employers. With workers continually being injured and killed on the job, gross negligence is simply not enough; employers must be held accountable for the working environments they create."

Donald Coit also wishes that OSHA's final investigative reports contained more information – information that would answer the questions of grieving families and, perhaps, save the life of another worker. For example, although OSHA publishes their final citations on the Web, they do not include any of the information gleaned from interviews that could directly pinpoint an individual or company policy responsible for the workplace fatality.

"Unless laws are changed to allow prosecution and legal actions to be filed by parents outside of workers compensation protection, we will continue to see job deaths on a regular basis," Donald Coit explained. "Equally important is giving families the knowledge they need to fully grieve for their loved one – knowledge about the fatality incident, and knowledge about the investigative process.

William H. Nichols

William H. Nichols, 41 of South Carolina, was killed after he was crushed under an automotive lift on May 28, 2004. Because William's only child was under age at the time of his death, she has been afforded few rights as a surviving family member. His daughter's mother, Sharon, has continually tried, often without success, to obtain information surrounding the incident so that her daughter may someday know the truth about her father's death.



Sharon's frustration with the lack of information surrounding William's death is great. Despite the Freedom of Information Act (FOIA), which mandates government agencies disclose records when requested in writing by any person (exemptions apply), information surrounding William's death has been difficult to obtain. "My family is frustrated and angry," she explains. "We think of his death daily with confusion and misunderstanding and ask questions about how such a tragedy could have happened. Maybe this tragedy could have been prevented. Maybe we could save the lives of other sons, fathers, or brothers by sharing information about William's death."

Unable to find the information on her own, Sharon turned to the media to draw attention to William's story. Unfortunately, the media showed little interest. Next, Sharon wrote to several state representatives with the following results:

1) She received statements such as "sorry about your loss but there is nothing we can do to help you."

2) Sharon's letter was "passed on" to someone else in the government who in the end could do little to help her.

3) She received a printed document from an internet search explaining the laws of the state.

4) She received a letter from a United States Senator that read:
"I understand that you have requested incident investigative records from the SC Department of Labor, Licensing and Regulation under the state Freedom of Information Act. If you feel this agency has violated state laws, please contact the State Attorney General's office. However, please note that the state FOIA, nor the federal FOIA, allows the release of all records. Some information is still considered confidential under the FOIA laws and cannot be released. I have enclosed information pertaining to the state FOIA statute and what information OSHA must protect under law. I have also enclosed a citizen's guide detailing the federal Freedom of Information Act for your review. It lists nine exemptions which guards the release of information."

While Sharon recognizes that some types of information must remain protected, she wonders why a family should be denied information pertaining to a loved one's death. For, it is the family in need of protection from fear, confusion, and endless questions, not the information itself, and most definitely not the employer of the victim.

William's young daughter doesn't understand her dad's death. But, she does understand that he is gone, and she misses him daily. "The loss of her father is more than she should have to deal with, much less all the laws and regulations that keep her from knowing the truth." Sharon said. "As the mother of our child – William's only child - I will continue to fight for justice, for the truth, and for the release of information under the Freedom of Information Act. After all, what good comes from such a statue, if it continues allowing for the concealment of information?"

References:

US Department of Labor, Bureau of Labor Statistics (2007). *Latest numbers.* Retrieved October 1, 2007 from http://www.bls.gov/iif/home.htm.

We are also in the process of put ting together a resource guide for families who have lost someone. It contains information for legal assistance, support, fact sorting, follow-up, grief resources becoming an advocate and more. This will be a great asset to after the initial shock of suddenly losing a family member or friend.

Inspection: 311127906 - Deltic Timber Corporation

Inspection Information - Office: Little Rock		
Nr: 311127906	Report ID:0627100	Open Date: 08/10/2007
Deltic Timber Corporation 1720 Highway 82 West Waldo, AR 71770 SIC: 2421/Sawmills and Planing Mills, General NAICS: 321912/ Cut Stock, Resawing Lumber, and Planing		Union Status: NonUnion
Inspection Type: Accident Scope: Partial Ownership: Private Safety/Health: Safety		Advanced Notice: N Close Conference: 10/11/2007 Close Case: 07/21/2008
Optional Information: Type ID Value N 10 IMMLANG-N		
Related Activity: Type ID Safety Health Accident 100264399		

	Violation Summary					
	Serious	Willful	Repeat	Other	Unclass	Total
Initial Violations	4					4
Current Violations	2					2
Initial Penalty	18000					18000
Current Penalty	11500					11500
FTA Amount						

Violation Items

#	ID	Type	Standard	Issuance	Abate	Curr$	Init$	Fta$	Contest	LastEvent
Deleted 1.	**01001**	Serious	5A0001	01/18/2008	02/07/2008	$4500	$4500	$0	02/01/2008	F - Formal Settlement
Deleted 2.	**01002**	Serious	5A0001	01/18/2008	02/07/2008	$4500	$4500	$0	02/01/2008	F - Formal Settlement
3.	**01003**	Serious	19100022 A01	01/18/2008	01/31/2008	$4500	$4500	$0	02/01/2008	F - Formal Settlement
4.	**01004A**	Serious	5A0001	01/18/2008	02/07/2008	$7000	$4500	$0	02/01/2008	F - Formal Settlement
5.	**01004B**	Serious	5A0001	01/18/2008	02/07/2008	$0	$4500	$0	02/01/2008	F - Formal Settlement

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Inspection: 309893931 - Deltic Timber Corporation

Inspection Information - Office: Little Rock		
Nr: 309893931	Report ID:0627100	Open Date: 03/01/2006
Deltic Timber Corporation Highway 10 East Ola, AR 72853 SIC: 2421/Sawmills and Planing Mills, General NAICS: 321113/Sawmills Mailing: P.O Box 129, Ola, AR 72853		Union Status: NonUnion
Inspection Type: Planned Scope: Partial Ownership: Private Safety/Health: Safety Emphasis: N:Amputate,S:Amputations		Advanced Notice: N Close Conference: 03/01/2006 Close Case: 03/01/2006

Inspection: 307893347 - Deltic Timber Corporation

Inspection Information - Office: Little Rock		
Nr: 307893347	Report ID:0627100	Open Date: 10/01/2004
Deltic Timber Corporation Highway 10 East Ola, AR 72853 SIC: 2421/Sawmills and Planing Mills, General NAICS: 321113/Sawmills Mailing: P.O Box 129, Ola, AR 72853		Union Status: NonUnion
Inspection Type: Accident Scope: Partial Ownership: Private Safety/Health: Safety	Advanced Notice: N Close Conference: 11/30/2004 Close Case: 02/16/2005	
Optional Information: Type ID Value N 10 IMMLANG-N		
Related Activity: Type ID Safety Health Accident 100262922		

	Violation Summary					
	Serious	Willful	Repeat	Other	Unclass	Total
Initial Violations	1					1
Current Violations	1					1
Initial Penalty	4500					4500
Current Penalty	2250					2250
FTA Amount						

Violation Items

#	ID	Type	Standard	Issuance	Abate	Curr$	Init$	Fta$	Contest	LastEvent
1.	01001	Serious	19100219 C04 I	01/19/2005	01/24/2005	$2250	$4500	$0		I - Informal Settlement

Accident Investigation Summary

Summary Nr: 200262434 Event: 10/01/2004 Employee Strangled By Shirt Caught In Machinery

Employee #1, a chipper tender, attempted to clear a jam in the sawdust hopper located above the saw dust chain conveyor. The conveyor and hopper were elevated and the employee was working from a ladder. The sawdust chain conveyor was operating at the time and Employee #1's shirt became caught on a metal bar welded to a rotating shaft, which was part of the conveyor's power transmission apparatus. As his shirt was twisted around the metal bar on the rotating shaft, the employee was pulled from the ladder. The shirt twisted tightly around the employee's neck, killing him.

Keywords: jammed, clothing, strangulated, unguarded, ladder, rotating shaft, conveyor, tree pruner

	Inspection	Degree	Nature	Occupation
1	307893347	Fatality	Other	Occupation not reported

Chairman MILLER. Ms. Seminario?

STATEMENT OF MARGARET SEMINARIO, DIRECTOR OF HEALTH AND SAFETY, AFL–CIO

Ms. SEMINARIO. Chairman Miller, Ranking Member McKeon and other members of the committee, I appreciate the opportunity to testify today on the issue of the adequacy of penalties for violations of the Occupational Safety and Health Act.

Today is Workers' Memorial Day, a day the unions and others here and around the globe remember those who have been killed, injured and diseased on the job. It also marks the 39th anniversary of when the OSHA Act went into effect.

While progress has been made since the Act was passed, the total of workplace injuries, illnesses and fatalities is still enormous. In 2007 5,657 workers died on the job. That is an average of 15 workers every day.

Nearly 4 decades after the OSHA law was passed, the job safety law remains essentially the same today as when it was enacted in 1970. Enforcement is weak, and OSHA penalties remain low, particularly when compared with other safety and environmental laws, all of which have been updated by the Congress since they were first enacted.

Yesterday the AFL-CIO released its annual report on job safety in conjunction with Workers' Memorial Day. Our analysis found that the average penalty for serious violation of the OSHA Act nationwide is about $900.

In some states, particularly the state plan states, the penalties are much lower. For example, in South Carolina the average penalty for serious violation was just $331.

Even in cases involving workers' deaths, OSHA enforcement is weak and penalties are low. On average nationally last year, the penalty for worker fatalities was just—the average penalty was just about $11,000.

But this average includes high penalty cases and doesn't represent the penalties in typical cases. And moreover, it doesn't reflect the final penalties after cases are settled.

Last year the Senate Labor Committee conducted an in-depth investigation of enforcement and penalties in fatality cases. And what they found in the typical case, the median penalty that was issued and then was settled out was $3,700.

And so what we heard from Becky Foster about the OSHA citations and penalty in her case are typical of what happened in thousands of fatality investigations for job fatalities in this country.

Clearly, this type of penalty provides no deterrent to employers to prevent future violations of the law and to prevent deaths and injuries. So why are the penalties so low?

The problems are largely systemic, and they start with the OSHA law itself. Under the OSHA Act the maximum penalty for serious violation—and that is the most common violation associated with fatality cases—the maximum penalty is $7,000.

But the maximums are rarely assessed. And throughout its history OSHA's procedures for considering the factors of employer size and gravity and history end up and result in penalties that are well below these maximums.

As I said, for serious violations the Act says you start at $7,000. But the OSHA formula says, "No, you start at $5,000 and you go down from there." And so as I said, at the end of the day what we have, even in fatality cases, are penalties that are in the range of $3,000 to $4,000 for cases of worker deaths.

And the end result of this process and the Act and penalty procedures is that we end up with serious violations that put workers

in danger, that can cost workers their lives, that are pitifully low and provide no deterrence.

The OSHA Act provisions for criminal penalties are just as weak. Under the law criminal prosecutions are limited to those cases where a worker death is the result of a willful violation.

In the case of Jeremy Foster's death, it was a serious violation, not even willful, even though the employer had taken action to modify the equipment intentionally. And so it wasn't even a willful violation, and so there was no possibility of criminal prosecution.

But again, it is only a misdemeanor, and so there are very few criminal prosecutions under the OSHA law. Since 1970 only 71 cases have been prosecuted for criminal provisions under the OSHA law, with a total time in jail of 42 months. During that time there were 350,000 worker fatalities, but there were only 71 prosecutions.

By comparison under the environmental laws, there is much tougher criminal prosecution. Last year alone, there were 319 criminal enforcement cases initiated by EPA, charging 176 defendants, that resulted in 57 years of jail time. That is 1 year, compared to 71 cases in 40 years under the OSHA Act.

And as I said, all of the environmental laws have been updated by the Congress. And so we would urge that both OSHA and the Congress should act to strengthen enforcement and penalties for job safety law.

The legislation that was introduced last week, the Protecting America's Workers Act, would move and enhance OSHA penalties particularly in cases of fatalities and would enhance criminal penalties under the OSHA Act. We would encourage the committee to move quickly to enact that legislation. Thank you.

[The statement of Ms. Seminario follows:]

Prepared Statement of Peg Seminario, Director, Safety and Health, AFL–CIO

Chairman Miller, Ranking Member McKeon, and other members of the committee, I appreciate the opportunity to testify today on the issue of the adequacy of penalties for violations of the Occupational Safety and Health Act.

Today is Workers Memorial Day—a day unions and others here and around the globe remember those who have been killed, injured and diseased on the job. Here in the United States, it also marks the 39th anniversary of when the Occupational Safety and Health Act went into effect.

While progress has been made since the OSH Act was passed, the toll of workplace injuries, illnesses and fatalities is still enormous. In 2007, 5,657 workers died on the job, an average of 15 workers every day, and an estimated 50,000 more lost their lives due to occupational diseases. In 2007, the Bureau of Labor Statistics reported more than 4 million work-related injuries. But this number does not reflect the full extent of job injuries, and the real number is estimated to be 2 to 3 times greater.

Nearly four decades after the Act was passed, enforcement of the job safety law remains weak and OSHA penalties remain low, particularly when compared with other safety and environmental laws. Yesterday the AFL-CIO released its annual report on job safety—Death on the Job: The Toll of Neglect—in conjunction with Worker's Memorial Day. Our analysis found that the average penalty for a serious violation of the OSH Act is less than $1,000, and the average penalty involving worker deaths is $11,300, but there is great variability in enforcement and penalties, particularly in the states that operate their own state plans. Only a handful of fatality cases are prosecuted for criminal violations. OSHA's capacity to inspect workplaces and oversee job safety has greatly diminished, as the number of job safety inspectors has been reduced while the size of the workforce and number of workplaces has grown.

Improvements in OSHA's enforcement and penalty policies could help strengthen enforcement. But many of the deficiencies in enforcement rest with the OSH Act itself and must be addressed through Congressional action.

OSHA Enforcement and Penalties are Too Weak to Create an Incentive to Improve Conditions and Deter Violations

The Occupational Safety and Health Act places the responsibility on employers to protect workers from hazards and to comply with the law. The law relies largely on the good faith of employers to address hazards and improve conditions. For this system to work, it must be backed up with strong and meaningful enforcement. But at present, the Occupational Safety and Health Act and the OSHA enforcement program provide little deterrence to employers who put workers in danger. OSHA inspections and oversight of workplaces are exceedingly rare. There are no mandatory inspections even for the most dangerous industries or workplaces. Between federal OSHA and the states there are approximately 2,050 inspectors. OSHA has the capacity and resources to inspect workplaces on average once every 94 years—once every 137 years in the federal OSHA states. Over the years OSHA's oversight capacity has been diminished, as the number of inspectors has declined at the same time the workforce has increased. Today federal OSHA's capacity to inspect workplaces is the lowest level in the agency's history.

Since there is no regular oversight, strong enforcement when workplaces are inspected and violations are found is even more important. But the penalties provided in the OSH Act are weak. Serious violations of the law (those that pose a substantial probability of death or serious physical harm to workers) are subject to a maximum penalty of $7,000. Willful and repeated violations carry a maximum penalty of $70,000 and willful violations a minimum of $5,000. These penalties were last adjusted by the Congress in 1990 (the only time they have been raised). Unlike all other federal enforcement agencies (except the IRS), the OSH Act is exempt from the Federal Civil Penalties Inflation Adjustment Act, so there have not even been increases in OSHA penalties for inflation, which has reduced the real dollar value of OSHA penalties by about 39%. For OSHA penalties to have the same value as they did in 1990, they would have to be increased to $11,500 for a serious violation and to $115,000 for a willful violation of the law.

By comparison, the Mine Safety and Health Act requires mandatory inspections—four per year at underground mines and two per year at surface mines. As a result of Congressional action following the Sago mine disaster and other disasters in 2006, the Mine Act now provides for much tougher penalties. The MINER Act increased maximum civil penalties for violations to $60,000 (from $10,000), which may be assessed on an instance-by-instance basis. The 2006 mine safety legislation also added a new provision for "flagrant" violations, with a maximum civil penalty of $220,000. Since the MINER Act was passed, there has been a significant increase in MSHA penalties. In December 2008, MSHA assessed $23 million in penalties for violations, compared to $3 million assessed in December 2006.

The maximum civil penalties provided for under the OSH Act are rarely assessed. Indeed, just the opposite is the case. In FY 2008, the average penalty for a serious violation of the law was $960 for federal OSHA and $872 for the state OSHA plans combined. Again this is the average penalty for violations that pose a substantial probability of death or serious physical harm. California had the highest average penalty for serious violations ($4,890) and South Carolina had the lowest ($331). Both of these are state plan states. For violations that are "other" than serious, which also carry a statutory maximum of $7,000, the average federal OSHA penalty was just $215. Clearly, for most employers these levels of penalties are not sufficient to change employer behavior, improve workplace conditions or deter future violations.

OSHA penalties for violations that are willful or repeated also fall well below the maximum statutory penalties. For both willful and repeat violations, the OSH Act provides a maximum penalty of $70,000 per violation. For violations that are willful, a $5,000 mandatory minimum penalty is also prescribed. In FY 2008, the average federal OSHA penalty for a willful violation was $41,658, and the average willful penalty for state plans was $28,943. For repeat violations, the average federal OSHA penalty was only $4,077 and for state plans the average was $2,021, a fraction of the statutory maximum penalty for such violations.

Even in cases where workers are killed, penalties are abysmally low. According to OSHA inspection data, the average serious penalty in fatality cases for FY 2008 was just $2,476 for federal OSHA and $3,978 for the state plans combined. The average total penalty assessed in fatality cases was just $11,311 nationally ($13,462 for federal OSHA and $8,615 for the OSHA state plans). (Attachment 2). These averages include open cases, which when finally resolved, will result in a reduction

in these average penalty levels. Average penalties in fatality cases for FY 2003—2007, where most cases have been resolved, show a national average of $6672 ($6646 for federal OSHA and $5363 for the state plan states). All of these average penalties include several high penalty cases. The median penalty, which is more representative of the typical penalty in a fatality case, is much lower.

A state-by-state review shows that there is wide variability in penalties assessed in cases involving worker deaths, with the penalties in some states exceedingly low. For example, in FY 2008, in the state of Iowa, the average penalty in worker fatality cases was $45,499, but in the state of Utah the average penalty in worker fatality cases was just $1,106, and in South Carolina the average penalty was $1,383. (Attachment 3).

Last year the Senate Committee on Health, Education, Labor and Pensions Majority staff conducted an in-depth investigation of OSHA enforcement in fatality cases. Their study—Discounting Death: OSHA's Failure to Punish Safety Violations That Kill Workers—analyzed detailed enforcement data for thousands of fatality investigations and individual case files for hundreds of enforcement cases. It found that OSHA penalties in cases involving worker deaths were consistently low and routinely reduced in settlement negotiations. For all federal OSHA fatality investigations conducted in FY 2007, the median initial penalty was just $5,900. But after negotiation and settlement, the median final penalty for workplace fatalities was reduced to only $3,675. For willful violations in fatality cases, the final median penalty was $29,400, less than half the statutory maximum of $70,000 for such violations.

The following examples are typical of OSHA enforcement and penalties in many fatality cases:

In 2004, two Pennsylvania sewer workers, Robert Hampton, 43 and Larry Dunning, 61, were asphyxiated and died while working in a 10-foot deep manhole. No confined space entry procedures were followed or protection provided. The contractor, Rittenbaugh, Inc., was cited for one serious violation of the general duty clause (since there still is no confined space entry standard for construction) and one serious violation of safety training requirements, with an initial penalty of $1,500. The case was settled for $1,000.

In New Jersey, Jose Duran Painting was cited for one serious violation and penalized $2,000 in the death of an immigrant worker, for failing to provide fall protection. The penalty was reduced to $1,400.

In Michigan, in 2006, Midwest Energy Cooperative was fined $4,200 for 2 serious violations for excavation and safety program requirements in the death of Danny Young, 27, who was killed when a backhoe hit a gas line that exploded. The case was settled for $2,940.

In Austin, Texas, in September 2004, a worker was killed in a trench cave in. The sewer contractor, ID Guerra, was cited for one serious and one repeat violation of OSHA's trenching standards, and penalized $8,400, including a $5,600 penalty for the repeat violation. Despite being cited by OSHA for a similar trenching violation in 2003, OSHA reduced the repeat penalty in the fatality case to just $2,800. (Under the Act, the maximum penalty for a repeat violation is $70,000).

What kind of message does it send to employers, workers and family members, that the death of a worker caused by a serious or even repeated violation of the law warrants only a penalty of a few thousands dollars? It tells them that there is little value placed on the lives of workers in this country and that there are no serious consequences for violating the law.

The OSH Act and OSHA Enforcement Policies Discount Penalties for Violations Even in Cases of Worker Death

So why are OSHA penalties for workplace fatalities and job safety violations so low? The problems are largely systemic and start with the OSH Act itself. The Act sets low maximum penalty levels, particularly for serious violations, which carry a maximum of $7,000. For a willful or repeat violation the maximum penalty is $70,000. In assessing penalties, under the Act, employer size, good faith, history, and gravity of the violation are to be taken into consideration.

Throughout its history, OSHA procedures for considering these four factors have resulted in proposed penalties that are substantially below the maximum penalties. The agency starts with a gravity based penalty, which is then reduced by specified percentages for each of the other 3 factors (except in certain circumstances). Under OSHA's current penalty policy, for high gravity serious violations, except in rare cases, OSHA starts with a base of $5,000, not $7,000 to determine the penalty. This is true even for fatality cases, which under OSHA policy are supposed to be classified as high-gravity. In fatality cases, no reductions are allowed for good faith, but penalty reductions are still allowed for employer size and history.

Under the penalty policy, reductions for employer size range from 20 percent (for employers with 101-250 employees) to 60 percent (for employers with 1-25 employees), but a larger reduction of 80 percent reduction is provided for serious violations that are willful for employers with 10 or fewer employees. The reduction for no history of serious, willful or repeat violations in the past 3 years is an additional 10 percent. So in many cases there is an automatic 30 to 90 percent discount in penalties, regardless of the gravity of the violations that are found.

OSHA's general policy is to group multiple instances of the same violation into one citation, with one penalty. So, for example, if five workers are injured due to an employer's failure to provide guarding for machines, the employer will only be cited once for the violation, even though five workers were hurt. This policy further minimizes the level of overall penalties in enforcement cases, including fatalities.

In 1986, OSHA instituted a policy to provide for instance-by-instance penalties in those cases where there was a flagrant and willful violation of the law. This "egregious" policy as it came to be known, was designed to penalize employers who put workers at risk and to send a message to other employers about the potential consequences of not complying with the law. Over the years, the egregious policy has had some positive impact, particularly when used as part of an industry-wide enforcement initiative, as was the case in the 1980's and early 1990's, when it was used for widespread injury reporting and ergonomic hazard violations. But in recent years, the impact of the policy was reduced, as the Bush appointees to the Occupational Safety and Health Review Commission (OSHRC) took an exceedingly restrictive view of the types of violations that may be cited on an instance-by-instance basis.

The initial citations and penalties in OSHA enforcement cases, weak to begin with, are reduced even further in the resolution of cases. Due to limited staff and resources, OSHA area directors and Department of Labor solicitors are under tremendous pressure to settle cases and avoid time consuming and costly litigation. In both informal settlements by the agency, and formal settlements after employer challenges to OSHA citations, penalties are routinely cut by another 30—50 percent. Indeed, it is OSHA practice to offer employers an automatic additional 30 percent penalty reduction at the time the citations are issued, no questions asked, if the employer agrees to correct all violations. (Attachment 4). The effect of these policies and practices in most cases is to reduce penalties to a level too minimal to have any effect.

Last year the Las Vegas Sun conducted an in-depth investigation of construction worker fatalities on the Las Vegas Strip that highlighted the weakness of OSHA enforcement in responding to and preventing workplace fatalities. In an 18-month period from December 2006 to June 2008, 12 workers died on a massive construction project overseen by some of the nation's largest contractors.

The Sun reported that Nevada OSHA inspections of many of the fatalities initially resulted in findings of serious violations of safety standards and penalties, albeit fairly low. However, in case after case during informal conferences with the contractors, the agency withdrew many citations and reduced the penalties, in some cases removing all the citations and penalties in their entirety. For example, in a case involving the death of Harvey Englander, a veteran operating engineer, who was killed when struck by a man-lift in August 2007, Nevada OSHA issued 3 serious violations with $21,000 in penalties against the Pernini Building Company for lockout and training violations. The citations and penalties were later withdrawn. Just a few months later, in October 2007, Harold Billingsly, a 46 year-old iron worker fell to his death, falling 59 feet through an unguarded opening. SME Steel Contractors was issued three serious citations and penalized $13,500 for failing to provide fall protection and other violations. But, as in the Perini case, following an informal conference with the company, Nevada OSHA withdrew all the citations and penalties.

The Sun expose, which recently was awarded the Pulitzer prize, brought intensive scrutiny to the safety practices at the Las Vegas construction projects on the Las Vegas strip, and led to improvements in training and safety measures. It also led to examination of Nevada OSHA enforcement practices by federal OSHA and the Nevada legislature, and some changes in those practices. There have been no deaths on the Strip since June 2008. But, if it hadn't been for the enterprising work of the Sun reporters, it's unlikely likely that these dangerous practices and conditions would have changed.

Another way the impact of OSHA enforcement is minimized is through downgrading the classification of citations from willful to serious, which greatly reduces civil penalties and undermines any possibility of criminal prosecution under the OSH Act. In some cases OSHA has utilized a practice of changing the characterization of willful or repeat violations to "unclassified," even though the OSH Act makes

no provision for the issuance of such citations. Employers will seek "unclassified" violations, particularly in fatality cases, not only to undermine the potential for criminal prosecution, but to lessen the impact of the violations in any civil litigation and to keep willful or repeat violations off their safety and health record.

In FY 2003 there were 50 unclassified violations in federal OSHA fatality cases and in FY 2004 there were 49 such violations. In recent years that number has dropped, and for FY 2008, OSHA inspection data shows 13 unclassified violations, but no unclassified violations associated with fatality cases.

The use of these "unclassified" violations may allow for settlements with higher monetary penalties or additional safety and health requirements. But these "unclassified" violations greatly weaken the deterrent effect of OSHA enforcement to prevent future occurrence of similar violations.

For example, in a fatality investigation of a worker death at McWane Inc. Atlantic States Cast Iron Pipe Company in March 2000, OSHA downgraded four repeat violations to "unclassified" violations, even though the company had been cited previously for serious violations in a fatality that occurred at the same facility the year before. Within 6 months of these citations, 2 more workers were killed at other McWane facilities. The company was subsequently prosecuted for a series of violations at multiple facilities, with most of the criminal charges being brought under environmental laws due to weaknesses in the OSH Act.

In another case that involved a planned inspection at the Bayer Cropscience chemical plant in Institute, West Virginia, in 2005 OSHA originally cited the company for 2 willful violations and 8 serious violations of the process safety management (PSM) standard and related requirements and proposed $135,000 in penalties. In a formal settlement the serious violations were deleted, and the 2 willful violations were changed to "unclassified" with a $110,000 final penalty assessed.

In August 2008, there was a powerful explosion and fire at the Bayer facility that killed two plant operators and threatened the community. The explosion occurred when there was a runaway reaction during the restart of a methomyl unit. Methomyl is a highly toxic substance that is sold as a pesticide. In the preliminary report on its investigation of the explosion, the Chemical Safety Board found significant deficiencies in process safety management that according to the Board likely contributed to the accident. The CSB also found that the explosion could have been catastrophic. Within 80 feet of the site of the explosion, there is a 37,000 pound capacity tank of methyl isocyanate (MIC), the same chemical that caused the deaths of thousands in the toxic gas release in Bhopal, India in 1994. The CSB found explosion debris near the MIC unit, which if compromised could have led to a catastrophic outcome.

The OSHA investigation of the 2008 Bayer explosion found extensive violations of the process safety management standard. OSHA issued 11 serious and 2 repeat violations, but no willful violations, and proposed $143,000 in penalties. The company has contested all the citations.

OSHA's Enhanced Enforcement Program Needs Enhancement

In 2003, in response to a New York Times expose on McWane, Inc's history and pattern of worker deaths and OSHA's weak enforcement actions, OSHA adopted a new Enhanced Enforcement Program (EEP). The purpose of the program as described by then-OSHA Assistant Secretary John Henshaw was to target "employers who are indifferent to their obligations under the OSH Act. Under the program, employers with worker fatalities with willful or repeat violations, or who have a history of previous violations or fatalities, are subject to enhanced oversight. This enhanced scrutiny is supposed to include follow-up inspections and/or inspections at other facilities of the employer and may result in stricter settlement practices and enforcement actions in future cases.

In FY 2008, after OSHA modified the EEP program criteria to focus on more significant violations, there were 475 inspections involving EEP cases. This compares to 719 inspections involving EEP cases in FY 2007, 467 EEP cases in FY 2006, 593 EEP cases in FY 2005 and 313 EEP cases in FY 2004. Many of the cases in the earlier years were among small employers (25 or fewer) who had workplace fatalities with a serious violation, but no prior OSHA history. The 2008 changes in the program eliminated these types of cases.

The concept behind the EEP program—enhanced enforcement for persistent violators—is a good one. But unfortunately, in practice the program has been highly deficient. A recent investigation of the EEP program conducted by the U.S. Department of Labor Office of Inspector General (OIG) found that in 97 percent of the EEP cases OIG evaluated, OSHA's follow-up was deficient or lacking. At 45 of the worksites where OSHA oversight and follow-up was deficient, 58 workers were subsequently

killed by job hazards, deaths that may have well been prevented if proper procedures were followed.

There are also significant problems in the design of the EEP program itself. The program includes no provisions for actually enhancing penalties against serial violators or even changing practices for informal settlements or penalty reductions in future cases. For example, in one EEP case at ADM Milling in Nebraska, in 2003, the employer was cited for serious and repeat violations of lock-out/tag-out, machine guarding and electrical safety requirements. Initial penalties of $124,000 were proposed, reduced to $62,000 in an informal settlement. Two years later a follow-up inspection at the same plant found 2 repeat violations for machine guarding standards. Penalties of $50,000 were proposed, but were later reduced by OSHA to $32,500 in an informal settlement—clearly not a deterrent for a company the size of ADM, which had $44 billion in sales in 2007.

Under the EEP, expansion of investigations to other facilities of the same employer is not automatic, and only occurs in limited cases. Thus, the program provides little leverage to force employers who have similar violations and unsafe practices at multiple facilities to change the behavior and address hazards on a corporate-wide basis.

OSHA keeps an internal list of employers who are targeted for this enhanced enforcement and notifies employers that they have been targeted for enhanced scrutiny. But there is no public disclosure of the list of companies that are being targeted under the EEP due to their history of fatalities and serious, willful or repeat job safety violations. Publicizing this list could increase public awareness and scrutiny of these companies and create an added incentive for these companies to change their safety and health practices.

OSHA Criminal Penalties Are Weak and Provide Almost No Deterrence

If the civil penalties under the Occupational Safety and Health Act provide little deterrence or incentive for employers, the criminal penalties are even weaker. Under the Occupational Safety and Health Act, criminal penalties are limited to those cases where a willful violation of an OSHA standard results in the death of a worker, and to cases of false statements or misrepresentations. The maximum period of incarceration upon conviction is six months in jail, making these crimes a misdemeanor.

The criminal penalty provisions of the OSH Act have never been updated since the law was enacted in 1970 and are weaker than virtually every other safety and environmental law. For example, since 1977 the Mine Safety and Health Act has provided for criminal penalties for willful violations of safety and health standards and knowing violations for failure to comply with orders or final decisions issued under the law, and the Mine Act makes these violations a felony. Unlike the OSH Act, these criminal penalties are not limited to cases involving a worker's death.

Federal environmental laws have also been strengthened over the years to provide for much tougher criminal penalties. The Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act all provide for criminal prosecution for knowing violations of the law, and for knowing endangerment that places a person in imminent danger of death or serious bodily harm, with penalties of up to 15 years in jail. Again, there is no prerequisite for a death or serious injury to occur.

The weak criminal penalties under the OSH Act result in relatively few prosecutions. With limited resources, federal prosecutors are not willing or able to devote significant time or energy to these cases. According to information provided by the Department of Labor, since the passage of the Act in 1970, only 71 cases have been prosecuted under the Act, with defendants serving a total of 42 months in jail. During this time, there were 350,000 workplace fatalities according to National Safety Council and BLS data, about 20 percent of which were investigated by federal OSHA. In FY 2008, there were 14 cases referred by DOL for possible criminal prosecution. To date, 2 of these cases have resulted in guilty pleas, with monetary penalties and probation. Prosecutions have been initiated in 2 additional cases, and the other 10 cases are still under review by the Justice Department.

By comparison, according to EPA in FY 2008 there were 319 criminal enforcement cases initiated under federal environmental laws and 176 defendants charged resulting in 57 years of jail time and $64 million in penalties—more cases, fines and jail time in one year than during OSHA's entire history. The aggressive use of criminal penalties for enforcement of environmental laws and the real potential for jail time for corporate officials, serve as a powerful deterrent to environmental violators.

In recent years the Justice Department launched a new Worker Endangerment Initiative that focuses on companies that put workers in danger while violating environmental laws. The Justice Department prosecutes these employers using the much tougher criminal provisions of environmental statutes. Under the initiative,

the Justice Department has prosecuted employers such as McWane, Inc. a major manufacturer of cast iron pipe, responsible for the deaths of several workers; Motiva Enterprises, which negligently endangered workers in an explosion that killed one worker, injured eight others and caused major environmental releases of sulfuric acid; and British Petroleum for a 2005 explosion at a Texas refinery that killed 15 workers.

These prosecutions have led to major criminal penalties for violations of environmental laws, but at the same time underscore the weaknesses in the enforcement provisions of the Occupational Safety and Health Act.

In the Motiva case, the company pleaded guilty to endangering its workers under the Clean Water Act and was ordered to pay a $10 million fine. The company also paid more than $12 million in civil penalties for environmental violations. In contrast, in 2002 following the explosion, OSHA initially cited the company for 3 serious and 2 willful violations with proposed penalties of $161,000. As a result of a formal settlement, the original serious and willful citations were dropped and replaced with "unclassified" citations carrying $175,000 in penalties, greatly undermining any possibility of criminal enforcement under the OSH Act.

In the BP Texas City refinery disaster, where 15 workers were killed and another 170 injured, under a plea agreement, the company pleaded guilty to a felony violation of the Clean Air Act and agreed to pay $50 million in penalties and serve a 3-year probation. BP also agreed to pay $100 million in criminal penalties for manipulating the propane market. But BP paid no criminal penalties under the OSH Act, even though 15 workers died and OSHA issued hundreds of civil citations for willful, egregious violations of the law. And under the OSH Act, even if BP had paid criminal penalties, it would have been a misdemeanor, not a felony. Cases like this send a terrible message to workers about the value our laws place on their health and safety on the job.

OSHA and the Congress Should Act to Strengthen Enforcement and Penalties for Job Safety Violations

Current OSHA enforcement and penalties are far too weak to provide any meaningful incentive for employers to address job hazards or to deter violations. As a result, workers are exposed to serious hazards that put them in danger, and cause injury and death.

Action is needed to put teeth into enforcement of the job safety law, and to bring OSHA enforcement into line with the enforcement practices and authorities under other safety and environmental laws.

OSHA can and should take action under the existing law to make enforcement more effective and to enhance penalties for violations that put workers in serious danger and cause death and injury.

The entire OSHA penalty policy and formulas should be reviewed and revamped. The agency should use its the full statutory authority to impose meaningful penalties for serious, willful and repeat violations of the law, particularly in cases involving worker deaths.

OSHA should cease the practice of issuing "unclassified" violations in all enforcement cases.

The Enhanced Enforcement Program (EEP) should be overhauled to actually provide for enhanced enforcement, stiffer penalties and follow-up for employers who persistently violate the law.

Federal OSHA should conduct an in-depth review of the enforcement and penalty policies and practices in the state plan states to determine whether they are "as effective as" the federal OSHA enforcement program, as required by law, and take action where plans are found to be deficient.

OSHA should greatly expand the access to and disclosure of information on employer's enforcement records. The list of employers on OSHA's EEP list should be posted on the web, along with reports about the employers' violations and progress towards addressing hazards. The OSHA inspection data base should be not only searchable by establishment, but also by industry, geographic area, standards violated and types of violations and linked to the data bases on exposure measurements and injury rates reported under the OSHA data initiative.

The Congress must also act to address the serious deficiencies in the OSH Act itself.

The OSHA civil penalties should be increased—significantly. The enhanced penalties for mine safety adopted by Congress in the MINER Act in 2006—$60,000 for serious violations and $220,000 for flagrant violations—provide a good guide. There should also be a floor for penalties in fatality cases, to take into account the harm that has been done. These increased penalties should be automatically adjusted for

inflation, as is the case with other federal laws, so their impact is not diluted with the passage of time.

OSHA's authority to issue violations and assess penalties for each instance of a violation should be made clear and unambiguous. The greater the number of workers put at risk or in danger or who have been injured or killed due to workplace violations, the greater the penalty should be. The use of "unclassified" citations should be prohibited.

Consideration should be given to adopting special provisions to address safety and health practices at the corporate level. Presently, the enforcement structure of the OSH Act is focused primarily at the establishment level, which is inadequate to change the practice and culture at the corporate level. Requirements for corporate officials to address identified violations and hazards on a corporate-wide basis would greatly enhance the Act's effectiveness, and result in improved workplace conditions and greater protection for workers.

The criminal enforcement provisions of the Act must also be strengthened and expanded. At a minimum, criminal violations should be made a felony carrying a significant prison term and monetary fines, and expanded to cover cases where violations cause serious injury to workers. The law should make clear that responsible corporate officials are subject to prosecution in appropriate cases. As a matter of fundamental fairness and sound public policy, the criminal provisions of the Occupational Safety and Health Act should be strengthened so that violations of workplace safety laws carry at least the same potential consequences under our criminal justice system as violations of federal environmental statutes.

For these legislative improvements to be effectively implemented, OSHA and the Department of Labor must be given additional resources to enforce the law.

The Protecting America's Workers Act (H.R. 2067), introduced last week by Rep. Miller and Rep.Woolsey with the support of others incorporates many of these needed measures. The bill would strengthen OSHA enforcement by increasing civil and criminal penalties and expanding their scope. It would also put in place a mandatory minimum penalty in cases involving worker deaths, so that we would no longer see the current meager fines of a few thousand dollars in fatality cases. Worker rights in enforcement cases would be expanded and family members of victims would also be given rights in OSHA investigations.

In addition to strengthening enforcement, the Protecting America's Workers Act (PAWA) would extend the Act's coverage to state and local public employees, flight attendants and other workers who currently lack OSHA protection. It would enhance the anti-discrimination provisions of the OSH Act to better protect workers from retaliation, by bringing the law into line with other federal whistleblower statutes.

The Protecting America's Workers Act is a good, sound bill that should be enacted into law.

Four decades after the passage of the Occupational Safety and Health Act, its time for the country and the Congress to keep the promise to workers to protect them death, injury and disease on the job.

Attachment 1

Federal OSHA Safety and Health Compliance Staffing 1973 - 2007

Year	Total Number Federal OSHA Compliance Officers [1]	Employment (000) [2]	OSHA Compliance Officers per Million Workers
1973	567	84,300	6.7
1974	754	86,200	8.7
1975	1,102	85,200	12.9
1976	1,281	88,100	14.5
1977	1,353	91,500	14.8
1978	1,422	95,500	14.9
1979	1,441	98,300	14.7
1980	1,469	98,800	14.9
1981	1,287	99,800	12.9
1982	1,003	98,800	10.2
1983	1,160	100,100	11.6
1984	1,040	104,300	10.0
1985	1,027	106,400	9.7
1986	975	108,900	9.0
1987	999	111,700	8.9
1988	1,153	114,300	10.1
1989	1,038	116,700	8.9
1990	1,203	117,400	10.2
1991	1,137	116,400	9.8
1992	1,106	117,000	9.5
1993	1,055	118,700	8.9
1994	1,006	122,400	8.2
1995	986	126,200	7.8
1996	932	127,997	7.3
1997	1,049	130,810	8.0
1998	1,029	132,684	7.8
1999	1,013	134,666	7.5
2000	972	136,377	7.1
2001	1,001	136,252	7.3
2002	1,017	137,700	7.4
2003	1,038	138,928	7.5
2004	1,006	140,411	7.2
2005	956	142,894	6.7
2006	948	145,501	6.5
2007	948	147,215	6.4

[1] Compliance officers for 1973 to 1989 from Twentieth Century OSHA Enforcement Data. A Review and Explanation of the Major Trends. U.S. Department of Labor 2002. Compliance Officers for 1990 to 2007 from OSHA Directorate of Enforcement Programs. Compliance officer totals include safety and industrial hygiene CSHO's and supervisory safety and industrial hygiene CSHO's.

[2] Employment is an annual average of employed civilians 16 years of age and older from the Current Population Survey (CPS).

Attachment 2

Average Total Penalty ($) per OSHA Fatality Inspection, FY 2003 – 2008*

Fiscal Year	Number of Fatality Inspections Conducted	Total Penalties ($)	Average Total Penalty Per Inspection ($)
FY 2003			
Federal States	1,504	7,120,953	6,756
State Plan States	816	3,448,520	4,214
Nation Wide	1,870	10,559,473	5,647
FY 2004			
Federal States	1,115	7,502,645	6,729
State Plan States	890	4,557,757	5,121
Nation Wide	2,005	12,060,402	6,015
FY 2005			
Federal States	1,131	7,522,700	6,651
State Plan States	887	5,714,741	6,443
Nation Wide	2,018	13,237,441	6,560
FY 2006			
Federal States	1,106	7,133,639	6,450
State Plan States	950	5,391,602	5,675
Nation Wide	2,056	12,525,241	6,092
FY 2007			
Federal States	1,051	11,943,175	11,364
State Plan States	845	5,206,768	6,162
Nation Wide	1,896	17,149,943	9,045
FY 2008			
Federal States	981	13,206,691	13,462
State Plan States	783	6,745,272	8,615
Nation Wide	1,764	19,951,963	11,311

* All data from OSHA IMIS Fatality Inspection Reports, FY 2003-2008

Attachment 3

State By State OSHA Fatality Investigations, FY 2008

State	Number of OSHA Fatality Investigations Conducted, FY 2008 [1]	Total Penalties [1] ($)	Average Total Penalty Per Investigation ($)	Rank of Average Penalty [2]	State or Federal Program [3]
Alabama	36	192,185	5,338	28	FEDERAL
Alaska	3	6,370	2,123	46	STATE
Arizona	28	385,647	13,773	10	STATE
Arkansas	26	82,565	3,176	39	FEDERAL
California	196	2,473,735	12,621	13	STATE
Colorado	33	1,006,149	30,489	6	FEDERAL
Connecticut	8	63,700	7,963	21	FEDERAL
Delaware	3	7,875	2,625	41	FEDERAL
Florida	113	912,729	8,077	20	FEDERAL
Georgia	56	5,485,909	97,963	1	FEDERAL
Hawaii	6	15,100	2,517	42	STATE
Idaho	13	47,900	3,685	35	FEDERAL
Illinois	49	520,800	10,629	18	FEDERAL
Indiana	43	181,567	4,222	31	STATE
Iowa	26	1,182,975	45,499	4	STATE
Kansas	12	68,975	5,748	26	FEDERAL
Kentucky	29	225,325	7,770	23	STATE
Louisiana	32	46,500	1,453	48	FEDERAL
Maine	1	50,780	50,780	3	FEDERAL
Maryland	27	79,005	2,926	40	STATE
Massachusetts	23	237,110	10,309	19	FEDERAL
Michigan	33	174,606	5,291	29	STATE
Minnesota	19	551,475	29,025	7	STATE
Mississippi	20	417,230	20,862	8	FEDERAL
Missouri	25	321,625	12,865	12	FEDERAL
Montana	6	82,200	13,700	11	FEDERAL
Nebraska	9	291,250	32,361	5	FEDERAL

Nevada	26	86,340	3,321	37	STATE
New Hampshire	4	217,325	54,331	2	FEDERAL
New Jersey	42	135,933	3,237	38	FEDERAL
New Mexico	14	239,150	17,082	9	STATE
New York	90	705,219	7,836	22	FEDERAL
North Carolina	49	163,623	3,339	36	STATE
North Dakota	8	35,312	4,414	30	FEDERAL
Ohio	43	486,249	11,308	15	FEDERAL
Oklahoma	31	73,100	2,358	45	FEDERAL
Oregon	28	68,925	2,462	43	STATE
Pennsylvania	75	457,418	6,099	25	FEDERAL
Rhode Island	1	10,800	10,800	16	FEDERAL
South Carolina	27	37,350	1,383	49	STATE
South Dakota	8	15,975	1,997	47	FEDERAL
Tennessee	45	173,095	3,847	33	STATE
Texas	149	841,598	5,648	27	FEDERAL
Utah	18	19,910	1,106	50	STATE
Vermont	1	3,750	3,750	34	STATE
Virginia	54	374,118	6,928	24	STATE
Washington	45	106,750	2,372	44	STATE
West Virginia	18	222,865	12,381	14	FEDERAL
Wisconsin	16	66,125	4,133	32	FEDERAL
Wyoming	9	96,994	10,777	17	STATE
Total or National Average	**1,764**	**19,951,963**	**11,311** [4]		

[1] OSHA IMIS Fatality Inspection Reports, FY 2008.
[2] Rankings are based on highest to lowest average total penalty ($) per fatality inspection (1-highest, 50-lowest).
[3] Under the OSHAct, states may operate their own OSHA programs. Connecticut, New Jersey and New York have state programs covering state and local employees only. Twenty -one states and one territory have state OSHA programs covering both public and private sector workers.
[4] National average is per fatality investigation for all federal OSHA and state OSHA plan states combined. Federal OSHA average is $13,462 per fatality investigatioin; state plan OSHA states average is $8,615 per fatality investigation.

Attachment 4

Example of OSHA Informal Settlement Offer

IMPORTANT NOTICE

(READ THIS CAREFULLY)

The proposed penalties assessed for this inspection's citation(s) reflect reductions that have been granted for the size, good faith, and history of the employer.

ORIGINAL PENALTY	**$12,500.00**
PROPOSED PENALTY	**$7,125.00**

INFORMAL SETTLEMENT OFFER

An additional 30% reduction in penalties (rounded to the nearest dollar) will be granted if all citation items are abated and the **INFORMAL SETTLEMENT AGREEMENT** is signed.

However, full payment for the settlement amount must be paid to **OSHA** within 15 Federal working days (excluding weekends and Federal holidays) from the receipt of the citation. **In addition,** a detailed abatement plan **must** be submitted with the **INFORMAL SETTLEMENT AGREEMENT** for those items which have not been abated and for those requiring a longer abatement period.

REDUCED PENALTY AMOUNT FOR INFORMAL SETTLEMENT:	**$4,988.00**

Corrective Action, taken by you for each alleged violation should be submitted to this office on or about the abatement date(s) indicated on the Citation and Notification of Penalty and included with the submitted **INFORMAL SETTLEMENT AGREEMENT.** A work sheet has been provided to assist in submitting the required abatement information.

This is the only offer for penalty reductions that will be made.

Meetings may be held to discuss questions concerning citation/violation issues (other than the penalties) or dates and methods of abatement prior to the final contest date of the citation. Please contact the U.S. Department of Labor - OSHA at (419)259-7542 for an appointment.

Citation and Notification of Penalty Page 3 of 9 OSHA-2(Rev. 6/93)

Chairman MILLER. Thank you.

Mr. Halprin?

Mr. HALPRIN. Thank you, Chairman Miller. Is my microphone on?

Chairman MILLER. Yes.

STATEMENT OF LAWRENCE P. HALPRIN, PARTNER, KELLER AND HECKMAN, LLP

Mr. HALPRIN. Thank you.

Ranking Member McKeon, members of the committee, my name is Lawrence Halprin. I am an attorney with the law——

Chairman MILLER. You may want to drag it a little closer to you or speak a little bit more into it. Thank you.

Mr. HALPRIN [continuing]. Attorney with the law firm of——

Chairman MILLER. There you go.

Mr. HALPRIN [continuing]. Keller and Heckman. I appreciate the opportunity to present my views on these issues today.

As you can see from my background, I have had extensive experience in workplace safety and health issues for most of my life, always advancing the goal of workplace safety in what I consider to be a balanced and cost effective manner

Appearing before you today, I am presenting solely my views, not the views of my firm, Keller and Heckman, or any of our clients.

I do my best to practice what I preach in the area of workplace safety and health. In our law office people know not to block fire extinguishers, not to block aisles. File drawers don't get left open unattended. When we had a water leak, we brought in an outside expert to make sure there weren't any mold issues.

My family uses protective gear when it plays, and except for the dog Muffin—we have a family dog who leaves things on the steps—that is a prohibited activity for anybody else in the house.

For the reasons stated in my written statement, I believe the current penalty scheme is generally fairly effective in bringing about the objectives of the Occupational Safety and Health Act, and it provides a fair balance between enforcement and the other tools available to the agency, and I would like to briefly emphasize my reasons for this thinking.

First, as has been already mentioned, based on my personal experience for over 30 years, BLS data indicate that adoption of the OSHA Act and the work from various stakeholders, including the ones that Ms. Seminario represents, have brought about a thinking change in this country.

And through the adoptions at work of the Occupational Safety and Health Act, workplace fatalities have been reduced by two-thirds since the Act was adopted. Workplace fatality and injury rates are the lowest they have ever been since BLS started collecting data in 1992.

There for, the Act in many ways is working. Could it be improved? Yes. There is always room for improvement in any activity we are engaged in.

I think it is important to remember that the data suggests you have twice as great a chance of dying in your home and six to eight times the chance of dying on the highway as in the workplace.

So we have to keep things in perspective. We are dealing with human beings. They are far from perfect. They make mistakes. Management makes mistakes. Employees make mistakes. It is impossible to totally eliminate them. The cost and resources that would be required to make a workplace foolproof or failsafe simply are not available to our society.

We have to do the best we can in balancing things, that means an appropriate balance between enforcement and writing rules that people can understand. Right now they are generally incomprehensible to most, except for some attorneys and highly educated regulatory people.

Now, with the economic benefits or the impact of fines that were adopted in 1990 may be slightly reduced. The point is they are still substantial. The maximum fine is $7,000 for serious violation.

OSHA has great flexibility in how to assess those violations—$70,000 for repeat, $70,000 for willful.

If you go into a confined space without following the program and OSHA determines it is a willful violation, there are probably 15 steps that have to be followed to go into a confined space, and OSHA has the ability to cite an employer for every single one of them. You end up with a $1 million fine fairly quickly.

Whether the agency chooses to take that approach, that is a matter of its discretion. Part of the problem, the funding for the agency has basically at best kept up with cost of living, which means basically you have enough time to—or have enough more resources that almost fund salary increases.

That means an overworked inspector doesn't have time to get the training needed to understand their jobs properly. They don't have time to carry out an appropriate investigation. I talked to one local state inspector recently, who said he handles 100 cases a year. I think it is extremely difficult to handle 100 cases a year and do an effective job.

When a solicitor's office has cases that are brought to them with inspectors were not necessarily prepared or have the time to carry out an investigation properly, they don't have the time to go reinvestigate the case to see whether it should have been handled differently, and they have so many cases on their docket that they don't have time to try them all. They have to pick and choose which ones are important.

Third, my experience has been, despite all these other issues, the fact that the current fines are low reflects the fact that most employers are in substantial compliance with the Act.

I don't know how many of you have taken the time to read the thousands of pages in the Code of Federal Regulations that employers have to comply with. They are ambiguous. They are confusing. They are developed by a dysfunctional rulemaking process.

And then when it is time for compliance directives and guidance to help people better understand them, they are written in the same ambiguous language as the original rules.

Now, I detailed in my statement many reasons why the rulemaking process in my mind is dysfunctional. Under basic principles of due process, for an agency rule to be enforced, it must be reasonably capable of being understood by those subject to its requirements.

In my view many OSHA requirements at best barely pass that test. Many are ambiguous. A significant number require impractical, unfeasible, and later are interpreted by the agency in ways that were never contemplated to understand it was written.

When you take all factors into account, there are serious problems with enhancing penalties against employers, who really don't understand what is required.

Again, employers shouldn't be totally excused for noncompliance with rules, but they need to be given credit for substantial compliance, not penalized for lack of ability to understand things.

Finally, I want to make the point that in the last years, the last 20 years almost, at least 15 since BLS has been collecting data, the Department of Justice has only referred 12 cases at maximum for criminal prosecution, which means 0.2 percent of the fatality cases

in this country that were work related were referred to criminal prosecution.

If all of them were tried, that would not make a significant difference in reducing the current fatality rate in this country.

I realize I am a little over my time, so I think I would just say that overall I think the current theme is balanced, and I appreciate the opportunity to make this presentation.

[The statement of Mr. Halprin follows:]

Prepared Statement of Lawrence P. Halprin, Partner, Keller and Heckman, LLP

Good morning Chairman Miller, Ranking Member McKeon and Members of the Committee. My name is Lawrence Halprin. I am an attorney with the law firm of Keller and Heckman, LLP, and appreciate the opportunity to provide you with my views on the important issues raised by this hearing.

Before addressing the substantive issues raised by this hearing, I would like to provide you with a brief background on my experience so that you can better appreciate my perspective on the issues before the Committee. While growing up, I spent many hours working on major home projects with my dad who taught me the importance of working safely. I have a Bachelor of Science in Chemical Engineering. During summer vacations, while an undergraduate, I worked hourly jobs on rotating shifts in a unionized ceramic tile factory. In those jobs, I was regularly exposed to many of the more common health and safety hazards potentially found in American workplaces. At the beginning of each new job assignment, I spent at least a full shift and sometimes longer getting on-the-job training from the regular operator.

At Keller and Heckman, my practice largely focuses on environmental, health, safety and security issues. I have spent a substantial portion of the last 30 years assisting clients in the area of workplace safety and health—providing counseling, performing audits, providing training, developing and reviewing programs, and representing clients in a wide range of enforcement proceedings brought by OSHA and its state counterparts. In addition, I am a member of several ANSI and ASTM committees that develop safety and health standards, have represented one or more clients in almost every major OSHA rulemaking since the mid 1980s, and have extensive experience working with OSHA staff both informally and through alliances and other cooperative activities, SBREFA panels and joint speaking engagements.

In appearing before you today, I am expressing my personal views as a safety and health professional committed to the goals of the Occupational Safety and Health Act. My statement and comments are not intended to represent the views of Keller and Heckman LLP, or any of our clients. My objective is to provide the Committee with practical and helpful insights that address the issues raised by today's hearing and hopefully will assist the Committee in advancing workplace safety and health.

I do my best to practice what I preach. I wear goggles and ear plugs when working with a power saw. My daughter and I wear a full set of pads and a helmet when skateboarding or roller blading. My daughter wears sports goggles when she plays soccer, and our whole family wears ear plugs at loud concerts. Nobody in our house is ever allowed to leave anything on a stairway. Unfortunately, I am still having a problem getting that message across to Muffin, our family dog, who leaves her toys everywhere.

As has been made clear, the success of the OSH Act depends on voluntary compliance because OSHA will never have the resources to inspect every worksite. In rough terms, my understanding is that OSHA conducts approximately 40,000 inspections per year and has jurisdiction over 6 million workplaces. That means it would take the agency over 100 years to inspect every worksite, if the sites remained in operation for that long. Most construction worksites are temporary and would completely change their character to fixed worksites and be dropped from OSHA's inspection rolls before OSHA would ever visit them.

Given that reality, OSHA, with substantial Congressional input, has, over the years, experimented with various combinations of regulatory interventions—rulemaking, outreach and education, compliance assistance and enforcement—and continues to refine the mix of interventions to make the most effective use of its limited resources. The focus of this hearing has been described as an inquiry into whether "employers who fail to protect their workers are adequately penalized and deterred from committing future violations," and the recently introduced Protecting Americas Workers Act indicates a belief by some Members that there should be an increase

in the civil and criminal sanctions that may be imposed for violations of the OSH Act.

For the reasons stated below, with two possible exceptions, I believe the current penalty scheme provided by the OSH Act is adequate to achieve the goals of the OSH Act. However, while there has been a significant improvement in OSHA's enforcement efforts, I do believe OSHA needs to significantly enhance its ability to quickly, but responsibly, identify and take action against those few employers who demonstrate a callous disregard for their responsibilities to provide a safe workplace for their employees. Finally, I believe OSHA could most effectively advance workplace safety by improving the clarity of its standards and implementing more effective education and outreach and cooperative programs. Employers and employees need more information that provides meaningful guidance on what is required and why it is required. Too often, current guidance materials repeat the ambiguous language currently contained in the OSHA standards and compliance directives.

Factors supporting the current penalty structure of the OSH Act

First, the existing penalty scheme under the OSH Act provides significant penalties for each serious, repeat, willful and failure-to-abate violation. It is important to keep in mind that OSHA has the authority to impose these sanctions regardless of whether there has been an injury, illness or death.

Second, the many flaws inherent in OSHA's dysfunctional rulemaking process, for which the business community must accept some responsibility, result in rules with broad and ambiguous requirements that are widely misunderstood, often impractical, frequently infeasible, and later interpreted in ways not contemplated by either OSHA or the regulated community.[1]

This situation leads to great uncertainty and frustration, and widely varying interpretations of OSHA requirements within OSHA, within the 20 plus states with state plan programs, and within the regulated community. This situation also suggests that both Congress and OSHA proceed with due caution in penalizing violations of OSHA standards so as to avoid the fundamental unfairness of penalizing employers for the shortcomings of OSHA's rulemaking processes.

Third, it is a daunting task for most small employers to familiarize themselves with, much less comprehend, just the thousand pages of OSHA requirements in the Code of Federal Regulations, which incorporate by reference hundreds of additional pages of national consensus standards. When one adds to that burden, the thousands if not tens of thousands of pages of OSHA directives, letters of interpretation and other guidance materials needed to more fully understand the applicable OSHA requirements, the task becomes insurmountable.

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[1] Most OSHA standards were adopted verbatim from outdated, national consensus standards developed by ANSI and NFPA prior to 1970. The often-ambiguous consensus standards were developed with the idea that the users would voluntarily conform to the spirit of those rules; they were not developed for use as enforceable government standards. Furthermore, presumably because of copyright issues rather than a concern about saving printing costs, many of those standards were simply incorporated by reference rather than being printed in the Federal Register and the Code of Federal Regulations.

While industry has to share much of the blame for its inadequate participation in OSHA rulemakings, most OSHA standards are developed as generic standards by well-intentioned professionals who unfortunately do not have enough information to adequately understand the spectrum of real world operations to which the rules will be applied and how those operations will be affected by the proposed rule. Furthermore, instead of writing a practical and relatively straightforward standard designed to address 85 to 90% of the problem, I believe OSHA drafts a complex standard designed to address 99.9% of the problem. Finally, taking advantage of Supreme Court case law that requires the courts to defer to an agency's interpretation of its ambiguous rules, OSHA adopts rules with ambiguous language that the agency later interprets and reinterprets to give it the broadest and most protective application possible, regardless of whether that interpretation is consistent with the agency's original intent or the additional burden it imposes on employers.

In reinterpreting its standards, OSHA often turns to later-developed national consensus standards, which it then applies retroactively to equipment and processes that pre-dated the new consensus standards. The apparent theory of this approach is that, over time, the requirements of performance-based OSHA standards should evolve to reflect advancing technology and current thinking on the proper balance between engineering controls and safe work practices. While I can understand the application of this approach to new equipment and processes, I believe it unfairly ignores the huge difference in the burden on employers between designing new protective measures into new equipment and processes, and retrofitting old equipment and processes with the latest technology.

I have been referring to OSHA as though it is a single agency with a uniform approach to the interpretation of its standards. Let me assure you, that is not the case. Interpretations of OSHA standards vary both between regions and within regions. They also vary between OSHA and the twenty plus states with their own state plans.

Fourth, even if it were possible to fully understand what is required by the OSH Act, it would be infeasible for any significant, active industrial operation in the United States to be in full compliance with the requirements of the OSH Act.

Fifth, faced with these practical challenges and limitations, a diligent employer will often turn to sound risk management principles to guide its workplace safety and health process. Applying those principles, an employer would perform risk assessments and manage its operations to minimize the risk of serious physical harm to employees. There are two problems with that approach. First, there is some divergence between what is called for through the application of risk management principles and what is required by OSHA requirements. Second, risk assessment requires an effective identification and evaluation of the relevant factors, includes a subjective component, and is always subject to criticism based on 20/20 hindsight.

Sixth, my experience is that the overwhelming majority of employers sincerely care about the safety of their employees, both because it is morally correct and because it is in the best interests of their business, and do their best within the limits of their resources to provide a safe workplace for their employees, protect the environment and comply with the multitude of other federal, state and local laws governing the operation of a business in this country.

A review of the exisiting OSHA penalty structure

The OSH Act subjects an employer to a civil fine of up to $7,000 for each serious violation. In general, OSHA establishes a serious violation of a standard by proving that (1) the standard applied to the condition, (2) the condition was prohibited by the standard, (3) the employer had either actual or constructive knowledge of the non-compliant condition, (4) there was employee access or exposure to the condition, and (5) the condition was likely to result in serious physical harm if an accident were to occur. OSHA is not required to show that the employer was aware of the OSHA requirement or that an accident was likely to occur. Furthermore, OSHA frequently asserts there was constructive knowledge based on a shortcoming in a particular program or the lack of adequate supervision, determinations often made by OSHA inspectors with the benefit of 20/20 hindsight. As I hope the Members recognize, these cases are heavily fact dependent and the outcome is often subject to an honest difference of opinion. As noted previously, this penalty scheme diverges from a traditional risk assessment approach (which does not assume an accident will occur) and may force employers, working with limited resources, especially under current economic conditions, to choose between prudent risk management of workplace safety, and regulatory compliance.

The OSH Act subjects an employer to a civil fine of up to $70,000 for each repeat violation. A repeat violation is generally a violation of the same or a substantially similar requirement by the same employer at the same or a different facility. As a practical matter, this provision provides a strong incentive for multi-site employers to comply with known OSHA requirements and to promptly implement corporate-wide remedial measures when an OSHA inspection identifies a previously unknown requirement governing a hazard common to multiple facilities.

The OSH Act subjects an employer to a civil fine of up to $70,000 for each willful violation of an OSHA standard or the General Duty Clause. A willful violation is generally one in which the employer is shown to have been aware of and intentionally violated the applicable OSHA requirements, or acted with such reckless disregard or plain indifference to workplace safety that one can reasonably presume the employer would have intentionally violated the applicable requirements if it had been aware of them. The foundation for a willful violation may be based on a pattern of conduct at the cited facility or a pattern of conduct at multiple facilities within the same company.

In what it deems to be cases of particularly egregious willful violations, OSHA has, as a matter of prosecutorial discretion, alleged a separate violation and proposed a separate penalty for each instance of non-compliance with an OSHA standard.[2]

[2] When the OSHA standard is written so that the duty runs from the employer to each employee, the case law supports the position that OSHA has the prosecutorial discretion to separately charge and prosecute a separate violation with respect to each employee that was not protected by the required safety measure. OSHA recently amended its training and personal protective equipment standards so that the legal duty would run from the employer to each employee. Similarly, it appears that OSHA has the discretion to group violations of a single standard into one item or to allege a separate violation and penalty for non-compliance with each element of a required procedure. For example, a complete failure to apply lockout/tagout or to implement a confined space entry procedure provides OSHA with the prosecutorial discretion

Continued

The OSH Act subjects an employer to a civil fine, for each failure-to-abate violation, of up to $7,000 per day for each day beyond the required abatement date that a condition remains unabated.

Finally, the OSH Act subjects an employer or responsible corporate officer to a criminal fine of up to $250,000 and 6 months incarceration for the first willful violation resulting in the death of an employee, and a criminal fine of up to $500,000 and 12 months incarceration for the second willful violation resulting in the death of an employee.

Clearly, these are substantial sanctions that should and do provide employers with the incentive to comply with the requirements of the OSH Act and to cause those who have violated the OSH Act in the past to change their ways.

The issue of enhanced criminal sanctions

It has been suggested by some that the criminal provisions of the OSH Act are inadequate to deter criminal conduct. I do not believe that is correct. For the typical corporate executive, incarceration for a period of six months would be viewed as a terrible and inconceivable outcome. Furthermore, as has been demonstrated by the criminal enforcement activities of the Department of Justice, the threat of far more severe criminal sanctions under, for example, the environmental and securities laws, does not completely deter crime. In addition, the history of criminal referrals by OSHA shows that the maximum number in recent years was 12 referrals whereas the number of workplace fatalities was approximately 5600. In other words, OSHA determined that approximately 0.2% of the fatality cases involved conduct meriting a criminal referral. That suggests that the focus on increased criminal sanctions would do little to address the current level of workplace injuries, illnesses and deaths in this country. BLS statistics indicate that approximately 60% of those cases involve workplace violence and transportation incidents beyond the reach of traditional workplace safety and health programs.

Possible changes to the penalty provisions of the OSH Act

I mentioned two areas where some adjustment in the penalties authorized by the OSH Act may be appropriate. I believe the current criminal provision of the OSH Act is too broadly written to justify an increase in criminal penalties. From a moral standpoint, if the criminal provisions of the OSH Act were revised to distinguish between what are currently described as willful violations, and the much smaller group of cases equivalent to an employer taking out a gun, aiming it at an employee and pulling the trigger, then it would be morally appropriate to increase the criminal penalties for that small category of crimes. Second, given the passage of time, it does seem appropriate to add an escalation clause to the OSHA penalty structure.

Conclusion

Based on my personal observations of hundreds, if not thousands, of workers and their working conditions at the numerous workplaces I have visited over the last 30 years, it is clear that there have been vast improvements in workplace safety and I believe the injury and illness statistics published by the Bureau of Labor Statistics (BLS) reflect that trend.

When OSHA was established in 1970, almost 15,000 employees died each year due to work related injuries. In the time since then, that number has been cut down by nearly two-thirds. According to a census conducted by BLS, workplace fatality and injury rates are currently the lowest they have ever been since BLS began recording statistics in 1992. There were 3.8 fatalities per 100,000 workers in 2007, which was down from 4 per 100,000 in 2006.[3] In comparison, the Department of Transportation found that in the same year automobile accidents accounted for 13.61 fatalities per 100,000 people.[4] American workers were over four times more likely to be killed in their car than at their job. Non-fatal injuries and illnesses have also continued to decline each year. According to BLS,[5] there were 4.2 cases per 100 full-time workers.

Civil monetary penalties and citations, coupled with the criminal penalties that are given to the most egregious violations, have been sufficient to assure compliance with the regulations. I believe workplace safety and health could be far more effec-

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to issue a separate citation and proposed penalty for the failure to comply with each required element of the procedure.

[3] See the National Census of Fatal Occupational Injuries in 2007 (revised), available at *http://www.bls.gov/iif/oshwc/cfoi/cfoi—revised07.pdf*

[4] See: *http://www-fars.nhtsa.dot.gov/Main/index.aspx*

[5] See Workplace Injuries and Illnesses in 2007, available at *http://www.bls.gov/news.release/pdf/osh.pdf*

tively advanced through greater emphasis on clarifying OSHA standards and implementing effective training, outreach and cooperative programs.

Regrettably, there are still employers in this country who do not value the lives and safety of their workers, despite the repercussions that could occur from their continued violations of regulations. These employers are a very small minority. Far more companies are OSHA compliant, adhering to the rules and taking steps to resolve situations in which they are found lacking.

The current system is balanced, adaptable, and effective. Any legislation that aims to change this system should be carefully considered, especially during the incredibly difficult economic situation facing our country. Thank you for the opportunity to make this presentation. I welcome any questions you may have.

Chairman MILLER. Thank you.

Mr. Uhlmann?

STATEMENT OF DAVID M. UHLMANN, JEFFERY F. LISS PROFESSOR AND DIRECTOR OF THE ENVIRONMENTAL LAW AND POLICY PROGRAM, UNIVERSITY OF MICHIGAN LAW SCHOOL

Mr. UHLMANN. Good morning, Chairman Miller, Ranking Member McKeon and members of the committee.

My name is David Uhlmann, and I am a professor at the University of Michigan Law School. I previously served for 17 years as a federal prosecutor, the last seven as the chief of the Environmental Crimes Section of the Justice Department.

Every day in our great country, 15 people go to work and never come home again. Hundreds more go to work healthy and come home severely injured. While some deaths and injuries cannot be avoided, far too many occur because of worker safety violations.

We can do better in the United States of America. We can spend hours debating about whether the costs of regulatory compliance are too high or about whether our worker safety laws are too complex.

But that debate will not bring comfort to Becky Foster and her family or to the thousands of families who have lost loved ones because of worker safety violations.

More debate also will not change one simple fact. The problem with our worker safety laws is not the rules. The problem is that there are no consequences for breaking the rules.

Today and the United States of America it is only a 6-month misdemeanor if you commit a willful violation of worker safety laws and a worker dies. Now, if the same employer who commits that violation goes out over the weekend and shoots a deer without a state permit, transports that deer across state lines, it is a 5-year felony.

Surely, surely, the sanction for committing a willful violation of the law that results in a worker death should be at least as great as the sanction for killing a deer.

The weak penalties for violations that result in worker death are not the only problem with the current version of the Occupational Safety and Health Act. I would like to talk just briefly about one of the cases that I prosecuted at the Justice Department, which I think highlights the problems with the worker safety laws.

It involved an employer named Allan Elias, a company called Evergreen Resources in Soda Springs, Idaho. And Allan Elias was one of the most notorious violators of environmental health and safety

laws in the state of Idaho. His facilities had been inspected for years. He would receive penalties for years.

But none of that stopped him from sending his workers on a hot summer day in August of 1996 into a tank of cyanide waste, a confined space just like the type that Mr. Halprin testified about just a few moments ago.

He provided no safety equipment for those workers. He did no testing of the air inside the tank, and a 20-year-old young man named Scott Dominguez in his first job out of high school collapsed inside the tank, suffered severe and permanent brain damage.

And to tell you everything you need to know about that defendant, that employer, when firefighters were they are responding to this worker injury, trying to save Mr. Dominguez's life, they asked Mr. Elias what was inside the tank. And he told them, even though he put cyanide in that tank, he told them there was nothing in the tank that could hurt anyone.

When the emergency room doctors called him, desperately trying to save Scott Dominguez's life, and asked Mr. Elias was there any possibility that there was cyanide in the tank, Mr. Elias lied and said no.

Now, and we were able to prosecute Mr. Elias under the environmental laws, and after a 3½ week trial, he was convicted and sentenced to 17 years in prison, which until recently was the longest sentence ever imposed for environmental crime.

But Mr. Elias did not commit a criminal violation of the Occupational Safety and Health Act. He didn't commit a criminal violation, even though he may have committed 15 violations of the confined space entry program, even though OSHA did cite him for willful violations of the OSHA Act.

He didn't commit a criminal violation even though a jury unanimously found beyond a reasonable doubt that he had knowingly exposed his workers to imminent danger of death or serious bodily injury. He didn't commit a violation of the Occupational Safety and Health Act because the doctors were able to save Scott Dominguez's life.

There is something wrong with the law, when an employer, who knowingly endangers his workers, commits a 17-year felony under the environmental laws, but doesn't even commit a crime under the law designed to protect the health and safety of America's workers.

We began a Worker Endangerment Initiative at the Justice Department based on the Elias case and others like it to target companies that were serial violators of the environmental laws and the health and safety laws.

That initiative has continued in the last 2 years since I left the department and has enjoyed many successes, including sentencings last week in the prosecution of the McWane Division Atlantic States in New Jersey. Four corporate officials were sentenced to jail terms in that case. The company was sentenced to pay an $8 million fine.

But the success of the Worker Endangerment Initiative owes more to the strength of the environmental laws and the creativity of prosecutors than it does to the OSHA Act.

Like prosecuting Al Capone for taxes, prosecutors charge worker endangerment in cases like Atlantic States under Title 18 of the United States Code under the environmental laws.

Moreover, the success of the Worker Endangerment Initiative only addresses a fraction of the worker safety problem, because according to the most recent Department of Labor data, only 9 percent of worker fatalities occur because of environmental hazards.

It is time to bring the OSHA Act into the 21st century by enacting meaningful penalties for criminal violations of the Act. I have detailed in my written testimony the ways the Act can be strengthened.

Many of those changes are included in the Protecting America's Workers Act introduced last week by Congresswoman Woolsey, and I would urge the enactment of that law. And I would be pleased to work with Congresswoman Woolsey and other members of the committee about ways to strengthen the law.

On this Workers' Memorial Day, we cannot provide justice for those whose lives have been lost because of worker safety violations, but we can honor their memories. Everyone deserves a safe place to work and the ability to come home to their families in good health at night.

By passing the Protecting America's Workers Act, you can make good on the promise of a safe workplace made nearly 40 years ago when Congress enacted the Occupational Safety and Health Act.

Thank you for the opportunity to testify today.

[The statement of Mr. Uhlmann follows:]

TESTIMONY OF

DAVID M. UHLMANN

JEFFERY F. LISS PROFESSOR FROM PRACTICE
DIRECTOR, ENVIRONMENTAL LAW AND POLICY PROGRAM
UNIVERSITY OF MICHIGAN LAW SCHOOL

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR

"KEEPING AMERICA'S PROMISE OF A SAFE WORK PLACE:
THE NEED FOR STRONGER CRIMINAL PENALTIES TO DETER
VIOLATIONS OF THE OCCUPATIONAL SAFETY AND HEALTH ACT"

Thank you Chairman Miller, Congressman McKeon, and Members of the Committee for holding today's hearing and for giving me the opportunity to testify before you.

My name is David Uhlmann. I am the Jeffrey F. Liss Professor from Practice and the Director of the Environmental Law and Policy Program at the University of Michigan Law School. Prior to joining the Michigan faculty in July 2007, I served for 17 years at the United States Department of Justice, the last seven as Chief of the Environmental Crimes Section.

One year ago, I testified before the United States Senate Committee on Health, Education, Labor and Pensions about the need for stronger criminal penalties for violations of the Occupational Safety and Health Act (the "OSH Act"). If history is a guide, nearly 6000 workers died on the job in the United States since that time.[1] Another 6000 workers will die in the year ahead, and 6000 more workers will perish every future year if we keep the status quo.

On average, every day in our country, more than 16 people go to work in the morning and never come home again. Hundreds more go to work healthy and come home injured.

We can do better in the United States of America. Nearly 40 years after Congress enacted the OSH Act to provide "every working man and woman in the Nation safe and healthful working conditions,"[2] it is time that we delivered on our promise to America's workers.

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[1] From 1992 to 2007, approximately 6000 workers were killed on the job each year in the United States. Workplace deaths ranged from a high of 6,632 in 1994 to a low of 5,534 in 2002. During 2007, the last year for which data currently is available, 5,657 work-related fatalities were reported to the U.S. Department of Labor. U.S. Department of Labor, Bureau of Labor Statistics, *Census of Fatal Occupational Injuries Charts, 1992-2006,* (revised 2009).

[2] 29 U.S.C § 651(b).

The United States has comprehensive worker safety regulations. We impose more rigorous requirements on American businesses than many (if not most) other countries. As a result, while our worker safety regulations could be stronger, the primary flaw in our worker safety laws is not the rules we impose but the lack of consequences for breaking those rules.

In recent years, most of the criminal prosecutions for worker safety violations have been brought by the Justice Department's Environmental Crimes Section, which began a worker endangerment initiative in 2005 to highlight the fact that environmental crimes frequently place America's workers at risk of death or serious bodily injury – and to prosecute companies that systematically violate both the environmental laws and the worker safety laws.[3]

The Justice Department's worker endangerment initiative has produced a number of high-profile prosecutions involving companies such as BP Products North America, McWane, Inc., Motiva Enterprises, LLC, and W.R. Grace. Just last week, in one of the most significant cases brought under the initiative, four managers from Atlantic States Cast Iron Pipe Company, a division of McWane, were sentenced to jail terms for their part in a conspiracy to violate environmental and worker safety laws, and the company was sentenced to a $8 million fine.

The success of the Justice Department's worker endangerment initiative, however, has highlighted the inadequacy of the criminal provisions of our worker safety laws. Most of the cases brought by the Environmental Crimes Section charged violations of the endangerment provisions of the environmental protection statutes[4] and the general criminal provisions of Title 18 of the United States Code, which makes it a crime to make false statements, obstruct justice, and commit conspiracy to defraud the United States by impeding the effective implementation of government regulatory programs.[5] Typically, the crimes charged were felonies, punishable by up to 15 years in jail for knowing endangerment and 20 years in jail for obstruction of justice.

Only two cases brought under the worker endangerment initiative, the prosecution of McWane for a worker death at its Union Foundry plant in Alabama and the prosecution of Tyson Foods for a worker death at its River Valley Animal Foods plant in Arkansas, have charged

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[3] David Barstow and Lowell Bergman, *With Little Fanfare, a New Effort to Prosecute Employers That Flout Safety Laws*, N.Y. TIMES, May 2, 2005.

[4] *See, e.g.*, 33 U.S.C. § 1319(c)(3) (knowing endangerment under the Clean Water Act); 42 U.S.C. § 6928(e) (knowing endangerment under the Resource Conservation and Recovery Act); 42 U.S.C. § 7413(c)(4) (negligent endangerment under the Clean Air Act); and 42 U.S.C. 7413(c)(5) (knowing endangerment under the Clean Air Act).

[5] 18 U.S.C. § 1001 (false statements); 18 U.S.C. §§ 1503, 1505, 1512, and 1519 (obstruction of justice); and 18 U.S.C. § 371 (conspiracy to defraud the United States).

violations of the OSH Act.[6] Prosecution under the OSH Act is rare, because the only substantive criminal provision of the OSH Act covers (1) willful violations of worker safety regulations that (2) result in worker death. Even if a willful violation causes death, the crime is only a Class B misdemeanor, with a maximum sentence of six months in jail.[7]

The criminal provisions of the OSH Act are so weak that they do little to protect America's workers. Misdemeanor violations provide little deterrence and minimal incentive for prosecutors and law enforcement personnel, who reserve their limited resources for the crimes that Congress has deemed most egregious by making them felonies. Focusing exclusively on violations involving worker deaths ignores the pain and anguish that results from serious injuries, which also warrant criminal remedies if they occur because of egregious violations.

In addition, limiting prosecution to willful violations may make ignorance of the law a defense, contrary to the time-honored maximum of American jurisprudence that ignorance of the law is not a defense. Only "employers" can be prosecuted for criminal violations of the OSH Act, which means that the mid-level managers who have the greatest day-to-day responsibility for unsafe working conditions often are immune from criminal prosecution under the Act.

In each of the last three Congresses, the Protecting America's Workers Act has been introduced, which would expand the coverage of the OSH Act and strengthen the penalties for violators. The legislation has never made it out of committee. Last week, the legislation was introduced in the House for a fourth time; this year the Protecting America's Worker Act should be enacted by Congress.

In my testimony today, I will focus on the need for stronger criminal penalties for violations of the OSH Act and how more vigorous enforcement will protect America's workers.

First, I will describe one of the cases that I prosecuted at the Justice Department that exposed the inadequacy of the criminal provisions of the OSH Act and helped lead to our worker endangerment initiative. Second, I will explain why a stronger criminal program under the OSH Act would deter violations of the Act and promote greater compliance with our worker safety laws. Third, I will identify the shortcomings of the OSH Act and the ways that Congress can address those problems when it considers enactment of the Protecting America's Workers Act.

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[6] 29 U.S.C. § 666(e). McWane pleaded guilty in September 2005 and agreed to pay a $4.25 million fine; Tyson pleaded guilty in January 2009 and agreed to pay a $500,000 fine.

[7] The OSH Act also makes it a crime to give advanced notice of an inspection and to make false statement in records or documents required under the Act. *See* 29 U.S.C. § 666(f) (advanced notice of inspections); 29 U.S.C. § 666(g) (false statements). Both are Class B misdemeanors.

The Cyanide Canary[8]

In August 1996, Scott Dominguez collapsed and nearly died inside a 25,000 gallon steel storage tank while working at Evergreen Resources, a fertilizer manufacturing facility in Soda Springs, Idaho. The owner of Evergreen Resources was Allan Elias, who was a Wharton graduate, a lawyer, and one of most notorious violators of environmental and worker safety laws in the state. Elias had used the 25,000 gallon tank for a cyanide leaching operation and to store phosphoric acid. Cyanide and phosphoric acid react to form hydrogen cyanide gas; expert trial testimony established that there was enough cyanide in the tank to kill thousands of people.[9]

Elias nonetheless ordered Dominguez and his co-workers to clean out the cyanide-laced sludge from the bottom of the tank. Elias ignored the pleas of his workers to test the waste. Elias refused to prepare a "confined space entry permit" that was required under OSH Act regulations,[10] even though he had been warned for years by the Occupational Safety and Health Administration ("OSHA") about the dangers of confined space entries. When the workers said that they had sore throats and difficulty breathing, Elias told them they needed to finish the job.

Dominguez, a recent high school graduate without significant work experience, feared that he would lose his job if he did not clean out the tank. Wearing just jeans and a t-shirt, he descended into the tank on a ladder, a 20-year-old with his whole life ahead of him. Less than two hours later, covered in sludge and barely breathing, Dominguez was removed from the tank on a stretcher, his life destroyed by a ruthless employer who later would blame his "stupid and lazy" employees for the tragedy. Today, Dominguez has severe and permanent brain damage.

In the frantic minutes before Dominguez was rescued, firefighters repeatedly asked Elias what was in the tank. Elias lied and said there was nothing but mud inside the tank. After the ambulance rushed Dominguez to the hospital, the emergency room doctor, John Wayne Obray, called Elias twice to ask what was inside the tank. On the second call, Dr. Obray asked Elias whether there was any possibility that cyanide was in the tank. Elias lied again and said no.

The next day OSHA inspectors interviewed Elias, who falsely claimed that he had prepared a confined space entry permit prior to the tank cleaning operation. Later that morning, Elias went to a neighboring facility operated by Kerr McGee Chemical Corporation and

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[8] Joseph Hilldorfer and Robert Dugoni, THE CYANIDE CANARY: A STORY OF INJUSTICE (2004). Former EPA Special Agent Hilldorfer and co-author Dugoni provide a first-hand account of the prosecution of *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), for environmental crimes that left the victim permanently brain-damaged. Multiple worker safety violations occurred, but no worker safety crime, because of the deficiencies of the OSH Act.

[9] *United States v. Allan Elias* (D. Idaho, CR No. 98-00070-E-BLW), Trial Transcript at 3320 (Testimony of Dr. Joe Lowry, May 3, 1999).

[10] 29 C.F.R. § 1910.146. A confined space entry permit would have detailed the steps that were being taken to protect the workers and enable them to be rescued if someone were injured.

borrowed a safety manual, which included a sample confined space entry permit. He then prepared and backdated a confined space entry permit and submitted the false permit to OSHA.

The Justice Department began a criminal investigation soon after Dominguez was injured. I was one of the lead prosecutors. We quickly discovered that Elias did not commit a violation of the OSH Act when he sent Dominguez into the tank, even though OSHA eventually cited Elias for willful violations, and Dominguez suffered severe and permanent brain damage.

Elias did not commit a violation of the OSH Act, because Dominguez did not die.

We were shocked to learn that an employer who willfully violates the OSH Act commits a crime only if a worker dies (and even then only a six-month misdemeanor). We ended up prosecuting Elias for environmental crimes, including knowing endangerment under the Resource Conservation and Recovery Act ("RCRA"), which carries a maximum penalty of 15 years in prison. In addition, we charged Elias with one felony count under Title 18 of the United States Code for submitting the fabricated confined space entry permit to OSHA.[11]

During the 3½-week trial, expert witnesses testified that Elias committed egregious violations of the OSH Act and that his actions placed Dominguez and others in imminent danger of death or serious bodily injury.[12] OSHA inspectors testified about earlier inspections and how they had warned Elias about the dangers associated with confined space entries.[13]

On May 7, 1999, after less than six hours of deliberations, the jury convicted Elias on all counts. United States District Court Judge B. Lynn Winmill sentenced Elias to 17 years in prison, which until recently was the longest sentence ever imposed for environmental crime.

The Justice Department hailed the Elias conviction and the resulting sentence, because it demonstrated that "environmental crimes are real crimes, and those who flout our environmental laws will go to prison for a long time."[14] The proof of knowing endangerment in the Elias case,

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[11] The United States charged the falsified permit as a violation of 18 U.S.C. § 1001, instead of the OSH Act's false statement provision, 29 U.S.C. § 666(g), because a false statement under Title 18 is a felony, punishable by up to five years in jail. Elias was convicted and sentenced to the statutory maximum penalty of five years in jail on the Title 18 false statement charge.

[12] *United States v. Allan Elias* (D. Idaho, CR No. 98-00070-E-BLW), Trial Transcript at 2353-2354, 2360 (Testimony of Gregory Boothe, April 27, 1999) and 3522-3523 (Testimony of Dr. Daniel Teitelbaum, May 4, 1999).

[13] *United States v. Allan Elias* (D. Idaho, CR No. 98-00070-E-BLW), Trial Transcript at 2012-2034 (Testimony of David Mahlum, April. 26, 1999).

[14] United States Department of Justice, Office of Pubic Affairs, *Idaho Man Given Longest-Ever Sentence for Environmental Crime*, PRESS RELEASE, Apr. 29, 2000 (Statement of Assistant Attorney General for the Environment and Natural Resources Division Lois J. Schiffer).

however, was based as much upon evidence that Elias violated OSHA regulations governing confined space entries as it was on the unpermitted disposal of hazardous waste in violation of RCRA. Indeed, the case was a worker safety case as much as it was an environmental case.

The Elias prosecution provides a stark contrast between the strength of the criminal provisions of the environmental laws and the weakness of the worker safety laws. It is appropriate that endangering workers during a hazardous waste violation carries a 15 year maximum sentence per count; it makes no sense that the same conduct during a worker safety violation is not a crime unless a worker dies – with a maximum penalty of six months in prison.

Nor are the criminal provisions of the environmental laws an antidote for the weakness of the worker safety laws. Only nine percent of workplace fatalities during 2007 involved exposure to harmful substances or environments.[15] As a result, most worker safety cases cannot be prosecuted criminally under the environmental laws, because they do not involve mishandling of hazardous wastes, or unlawful releases of hazardous air pollutants into the ambient air, or illegal discharges of pollutants into waters of the United States. Relying on the environmental laws to protect America's workers means that, in most cases, America's workers will be unprotected.

Moreover, even when environmental laws apply, their enforcement can raise complicated regulatory issues. Elias challenged his convictions on the grounds that the applicable definition of hazardous waste was too vague to be criminally enforced. He also raised jurisdictional issues post-trial that nearly resulted in the dismissal of several of the charges. While the Ninth Circuit did not agree with Elias, his ability to make such arguments shows the limits of environmental criminal enforcement as the primary method of addressing worker endangerment cases, and why meaningful criminal enforcement of worker safety violations requires changes to the OSH Act.

The Need for a Strong Criminal Program

Most companies in the United States comply with the law and care about protecting their workers. For those companies, worker safety is more than a legal requirement; it is a moral obligation. Law-abiding companies also devote significant resources to their compliance programs. They should not be at a competitive disadvantage against companies who flout the rules and have lower costs because they do not make any financial commitment to compliance.

But experience teaches us that there always will be companies that do not care about their workers, companies with owners like Allan Elias who think that the law does not apply to them or that, if they get caught, they can either avoid penalties or simply pay a modest fine.

Sadly, under the existing OSH Act, the companies that think there are not significant penalties for violating OSHA regulations probably are correct. Willful or repeated violations

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[15] U.S. Department of Labor, Bureau of Labor Statistics (2009).

carry a statutory maximum of $70,000 per violation, a number which has not been increased in nearly two decades[16] and pales in comparison to the cost of an effective compliance program.

Criminal penalties can be much higher than administrative penalties under the OSH Act, because Title 18 sets a maximum penalty of $500,000 for misdemeanors that are committed by organizational defendants and result in death or twice the gain or loss associated with the offense[17] (whichever is greater). As discussed above, however, the substantive criminal provisions of the OSH Act only apply when a willful violation results in a worker death.

Moreover, even if the criminal provisions apply, most United States Attorney's Offices – faced with the challenge of prosecuting cases across a wide range of federal regulatory programs, in addition to drug and gun crimes – focus on felony cases and do not devote limited prosecutorial resources to misdemeanor cases involving regulatory crime. In the 39 years since Congress enacted the Occupational Safety and Health Act, only 71 criminal cases have been prosecuted, or less than two per year, with defendants serving a total of just 42 months in jail. During that same time period, approximately 350,000 people died at work.[18]

The net result is a worker safety program where most violators – even willful violators – will face only administrative violations and relatively modest penalties if they are cited. While OSHA has sought large penalties in high-profile cases like BP Texas City and Imperial Sugar, a Senate report last year found that the median penalty imposed by OSHA for fatality cases was $3,675 during fiscal year 2007.[19] Such small penalties makes it easy for companies to put profits before compliance and to view any penalties that may result as a "cost of doing business."

One of the best examples of how strong criminal penalties are an essential component of an effective enforcement scheme is the prosecution of McWane, a privately-owned corporation that is one of the largest pipe manufacturing companies in the world. Although pipe manufacturing is inherently dangerous, McWane facilities were particularly hazardous places to

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[16] 29 U.S.C. § 666(a). The penalty for willful violations was increased from $10,000 to $70,000 in 1990. Pub. L. 101-508, 104 Stat.1388.

[17] 18 U.S.C. § 3571(c)(4), 18 U.S.C. § 3571(d).

[18] *See* David M. Uhlmann, *The Working Wounded*, N.Y. TIMES, May 27, 2008; *see also* Testimony of Peg Seminario, Director of Safety and Health, AFL-CIO, before the Senate Committee on Health, Education, Labor and Pensions, Apr. 29, 2008 at 8 (reporting 68 cases and 341,000 deaths; numbers cited above are revised to reflect data from calendar year 2008).

[19] Majority Staff of the United States Senate Committee on Health, Education, Labor and Pensions, *Discounting Death: OSHA's Failure to Punish Safety Violations That Kill Workers* at 5, Apr. 29, 2008.

work. From 1995 to 2003, at least 4,600 workers were injured at McWane plants across the United States, giving McWane one of the worst safety records in the country.[20]

Yet, despite McWane's alarming record of worker injuries and deaths, the company's only criminal conviction prior to 2005 was a single misdemeanor count in July 2002 under the OSH Act for willful violations of the worker safety laws that resulted in a worker being crushed to death at McWane's Tyler Pipe facility in Tyler, Texas. McWane paid a fine of $250,000.

In January 2003, as a pilot project for the worker endangerment initiative, the Justice Department and the United States Environmental Protection Agency ("EPA") began a criminal investigation of environmental and worker safety violations at five McWane plants: Atlantic States Cast Iron Pipe Company in New Jersey; McWane Cast Iron Pipe Company in Alabama; Pacific States Cast Iron Pipe Company in Utah; Tyler Pipe in Texas; and Union Foundry in Alabama. The investigations revealed that McWane and its senior managers were persistent violators of worker safety and environmental laws and made it a practice to lie to OSHA inspectors and federal and state environmental officials to conceal their illegal activity.

From a worker safety perspective, the worst of the McWane facilities may have been Atlantic States. The United States charged the company and top management at Atlantic States in a 35-count indictment that alleged a wide-ranging conspiracy within the company to violate worker safety and environmental laws. One worker death and multiple worker injuries were concealed as part of the conspiracy. After a seven month trial – the longest trial ever for environmental crime in the United States – McWane and four individual defendants were convicted of felony charges under Title 18 of the United States Code and the environmental laws. But there were no criminal charges brought under the OSH Act, because there were no felony charges available, and the one possible misdemeanor count (for the worker death) would have lengthened the trial and distracted from the more serious felony charges.

As noted above, McWane was sentenced to a fine of $8 million for its crimes at the Atlantic States facility, and all four individual defendants received jail sentences ranging from more than 5 years to six months. Previously, McWane pleaded guilty to criminal charges under the OSH Act at its Union Foundry facility, and received a criminal sentence of $4.25 million.[21] McWane also pleaded guilty to Clean Air Act crimes at Pacific States in Utah, with a criminal sentence of $3 million, and at Tyler Pipe in Texas, with a criminal sentence of $4.5 million. McWane challenged the charges for violations committed at its flagship McWane Cast Iron Pipe

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[20] David Barstow and Lowell Bergman, *A Dangerous Business: At a Texas Foundry, an Indifference to Life*, N.Y. TIMES, Jan. 8, 2003.

[21] The federal district court imposed a substantial fine in the Union Foundry case, because McWane agreed to be sentenced under the loss-doubling provisions of the Alternative Fines Act, 18 U.S.C. § 3571(d), with the fine calculated based on what a wrongful death award might have been in a civil case. In a contested sentencing proceeding, however, that approach might not be successful, which underscores the need for the OSH Act to provide larger criminal penalties.

facility in Alabama, and again the company and its senior management were found guilty, although that case will be retried later this year because of jurisdictional issues.[22]

Only time will tell whether there is a new corporate attitude at McWane, but it appears that years of adverse publicity resulting from the criminal prosecutions and multi-million fines have changed McWane's approach to worker safety. In a follow-up piece to the exposé that launched the McWane investigations,[23] *Frontline* interviewed dozens of McWane employees who described a "new McWane" where worker safety and environmental compliance are now a priority. The company has made a significant financial commitment to regulatory compliance, and former OSHA Administrators and senior Justice Department officials now advise McWane.

It is revealing, however, that McWane ignored worker safety in the face of years of worker injuries and deaths, and accompanying administrative penalty actions (and a single criminal conviction with a modest fine). McWane only began to make changes when the United States launched a concerted, national investigation and prosecution effort, with multiple indictments for felony violations and multi-million dollar criminal penalties for those crimes.

The McWane prosecutions speak volumes about the role of a strong criminal program in promoting worker safety. A strong criminal program, particularly one where corporate officials may go to jail if they commit criminal violations, sends a message to the regulatory community about the need to make compliance with worker safety laws a priority. Companies that do not care about worker safety for its own sake will pay far more attention to worker protection if they fear criminal sanctions and possible jail time for corporate officials who put workers at risk.

Criminal enforcement also provides benefits beyond deterrence and punishment. In regulatory programs where there is a credible criminal enforcement threat, companies are quicker to resolve administrative penalty actions and respond more productively to regulatory inspections. The OSHA inspectors trained as part of the Justice Department's worker endangerment initiative describe many companies that are indifferent or hostile to OSHA compliance officers.[24] That would not be the case if the OSHA enforcement scheme included a more significant criminal enforcement threat than the current OSH Act provides.

At a time when our economy is in turmoil, and many businesses are under siege, there may be opponents of enhanced penalties for OSH Act violations. However, companies that make worker safety a priority should not feel threatened by a stronger criminal enforcement program. Criminal enforcement only would occur in situations where there was a knowing

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[22] The United States Court of Appeals for the Eleventh Circuit reversed the convictions on Clean Water Act jurisdictional grounds, *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

[23] *A Dangerous Business Revisited,* FRONTLINE, Feb. 5, 2008.

[24] *See generally* Barstow and Bergman, *supra* note 3 (describing OSHA training sessions and "enthusiasm . . . in the trenches of OSHA . . . [as] agency compliance officers grasp the chance at last to seek significant criminal penalties against defiant employers").

violation of a worker safety requirement. Only companies that routinely violate our worker safety laws would be at risk. Those companies should not have a competitive advantage over companies that devote the necessary resources to worker safety, and we want companies that are chronic violators to be worried about criminal prosecution, so that they comply with the law.

Strengthening the Criminal Provisions of the OSH Act

The criminal provisions of the OSH Act should be strengthened to reflect the Act's emphasis on public health and safety, to provide the credible criminal deterrent that is needed to ensure greater compliance with worker safety laws, and to provide consistency with other federal regulatory crimes. New legislation should (1) make criminal violations of the Act felonies and provide enhanced penalties for violators; (2) expand the criminal provisions to include cases involving serious bodily injury and knowing endangerment; (3) modify the mental state requirements so that ignorance of the law is not a defense; (4) expand the scope of individual liability to include supervisors who knowingly expose their workers to unsafe conditions; and (5) provide resources to investigate and prosecute criminal violations of the OSH Act effectively.

The Protecting America's Workers Act would address many of the shortcomings of the OSH Act. Under the bill introduced last week by Congresswoman Woolsey, criminal violations of the OSH Act would become felonies, and the maximum penalty for a willful violation that results in a worker death would increase from six months to 10 years (and would increase from one year to 20 years in the event of a second conviction for the same offense). The criminal provisions would reach violations that cause serious bodily injury but not death. Responsible corporate officers would be included in the definition of "employer" covered by the Act.

The Protecting America's Workers Act would be a substantial improvement over existing law, and I fully support its enactment. In some respects, however, the legislation does not go far enough. The Protecting America's Workers Act would be even stronger if it addressed knowing endangerment, mental state, supervisor liability, and law enforcement resources. Those issues are discussed below (along with the other shortcomings of the current OSH Act).

Felonies and Enhanced Penalties: Criminal violations of the OSH Act should be felonies. It is a felony to commit most criminal violations of the environmental laws, hazardous materials transportation laws, and many wildlife protection laws. Insider trading, customs violations, tax crimes, antitrust violations, food and drug violations, and transportation of stolen vehicles are felonies. False statements, mail and wire fraud, obstruction of justice, perjury, false declarations, and conspiracy in violation of Title 18 all are felonies. The list goes on and on, but the point is simple: when criminal worker safety violations occur, which may cause even greater harm to crime victims, they too should be eligible for felony prosecution.

Upgrading OSH Act violations to felony status also is essential for meaningful criminal enforcement to occur. From 2003 to 2008, only ten criminal cases were brought for violations of the OSH Act, despite the fact that OSHA conducted 9,838 fatality investigations during that time

period,[25] and thousands of workers died on the job each year. Absent action by Congress, criminal cases will remain infrequent, because federal prosecutors will not devote significant resources to cases that Congress relegates to misdemeanor status. Prosecutors occasionally will accept plea agreements to lesser included misdemeanor charges, but they rarely will initiate complex prosecutions if the most serious, readily provable offense is a misdemeanor.

Enhanced penalties also are necessary to ensure adequate punishment for criminal violations of the OSH Act and to provide meaningful deterrence against future violations. When a worker dies because of a knowing violation of the worker safety laws, the maximum sentence should be measured in years, not months. Anything less sends the wrong message about the value of a worker's life. The environmental laws carry maximum penalties of three to five years per substantive count – and 15 years for crimes involving knowing endangerment (regardless of whether any injury occurs). The OSH Act should be amended to provide similar penalties.

Serious Bodily Injury and Knowing Endangerment: The criminal provisions of the OSH Act should be expanded to reach violations that cause serious bodily injury but not death. Serious bodily injury includes injuries that involve "a substantial risk of death, or protracted unconsciousness, protracted and obvious physical disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."[26] Given the devastation and suffering that can result from serious injuries, criminal prosecution under the OSH Act should be possible even in cases where death does not occur.

The Elias case is an example of a situation where death did not occur but a criminal prosecution under the OSH Act should have been possible. The fact that the emergency room doctors saved Dominguez's life had no bearing on the extent to which Elias violated the worker safety laws or his mental state when he committed those violations. While a worker dying may be relevant to the maximum sentence, it should not determine whether the violation is criminal.

The OSH Act also would promote worker safety more effectively, if it were expanded to cover violations that endanger workers. As noted above, there is no difference in the nature of the violation committed by a defendant or his or her mental state if a particular outcome occurs, whether that outcome is death, serious bodily injury, or the intervention of some good fortune that prevents any harm. Criminal culpability should be determined based on the risk associated with a defendant's misconduct and the degree to which the defendant is aware of that risk.

The environmental laws again are instructive, since they make knowing endangerment a crime whenever a defendant commits a Clean Water Act, RCRA, or Clean Air Act violation and "knows at the time that he [or she] thereby places another person in imminent danger of death or

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[25] Majority Staff Report of the United States Senate Committee on Health, Education, Labor and Pensions, *supra* note 19 at 10.

[26] *See, e.g.*, 33 U.S.C. § (c)(3)(B)(iv) (Clean Water Act definition of "serious bodily injury"); 42 U.S.C. § 6928(f)(6) (RCRA definition); 42 U.S.C. § 7413(c)(5(F) (Clean Air Act definition).

serious bodily injury."[27] If a similar provision were added to the OSH Act, the law would do more to prevent violations that put American workers at risk of death or serious bodily injury.

Mental State Requirements: The OSH Act also would provide greater protection for workers if the Act criminalized "knowing" violations of the worker safety laws that caused death or serious bodily injury or endangered workers. Most federal environmental crimes and other regulatory crimes address knowing violations of the law, which require that the defendants knowingly engage in the conduct that is proscribed. In other words, knowledge of the facts is required (e.g., that a confined space entry is occurring without a confined space entry permit, appropriate testing, and/or safety equipment), but knowledge of the law is not (e.g., that OSHA rules require a confined space entry permit, appropriate testing, and safety equipment).

The current version of the OSH Act is limited to "willful" violations. In criminal cases, willfulness requires proof "that the defendant acted with knowledge that his conduct was unlawful."[28] Because the government must show that the defendant knew his or her conduct was unlawful, ignorance of the law could be a defense to a willful violation charge. Yet, it is a long-standing principle of American jurisprudence that ignorance of the law is not a defense,[29] and ignorance of the law should not be a defense where the health and safety of America's workers are involved. Employers who are covered by the OSH Act have a duty to know the law. Employers should not be able to escape criminal liability for knowing violations that harm workers or place workers at risk by claiming that they did not know what the law required.

There may be concern about changing the mental state requirements for criminal cases to "knowing" violations, because the OSH Act reserves its most severe administrative sanctions for "willful" violations. Arguably, the use of a "knowing" standard for criminal cases would impose a less stringent mental state requirement in criminal cases. It merits emphasis, however, that guilt in a criminal case must be proven beyond a reasonable doubt, not simply by the preponderance of the evidence standard required in administrative cases, so it would be wrong to say that it would be easier to prove a knowing criminal violation than a willful civil violation.

Moreover, a willful violation under the OSH Act is committed if the evidence shows either an intentional violation of the Act or plain indifference to its requirements.[30] Plain indifference includes situations where "[a]n employer representative was not aware of any legal

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[27] 33 U.S.C. § 1319(c)(3)(A) (the Clean Water Act); 42 U.S.C. § 6928(e) (RCRA); and 42 U.S.C. § 7413(c)(5)(A) (the Clean Air Act). The Clean Air Act also contains a negligent endangerment provision. 42 U.S.C. § 7413(c)(4).

[28] *Bryan v. United States*, 524 U.S. 184, 192 (1998) (quotation omitted).

[29] *United States v. International Minerals and Chem. Corp.*, 402 U.S. 558, 563 (1971).

[30] *United States v. Dye Construction,* 510 F.2d 78 (10th Cir. 1975) (criminal violation); *see also Valdak Corp. v. OSHRC,* 73 F.3d 1466 (8th Cir. 1996); *Ensign Beckford Co., v. OSHRC,* 717 F.2d 1419, 1422 (D.C Cir. 1983), *cert. denied*, 104 S. Ct 1909 (1984) (administrative violations).

requirement, but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or take corrective action."[31] In other words, the administrative definition of willfulness is more like the criminal law's definition of "knowing" (knowledge of the facts) than the criminal law's definition of "willful" (knowledge that the conduct was unlawful). At a minimum, therefore, Congress should define willful for OSH Act prosecutions to make clear that the OSHA administrative definition of willful applies in criminal cases and ignorance of the law is not a defense.

Individual Liability: The scope of individual liability for criminal violations of the OSH Act should be clarified to promote greater compliance and provide better deterrence. As noted above, individual liability plays a central role in any criminal enforcement scheme, since the threat of jail time is arguably the single greatest deterrent provided by the criminal law. Unfortunately, the current version of the OSH Act applies only to"employers," which are defined under the Act as "a person engaged in a business affecting commerce who has employees. . . ."[32] The OSH Act's definition of employers may absolve most mid-level managers of criminal responsibility, even though they have the greatest knowledge of worker safety violations.[33]

A better approach to individual liability would be to impose criminal responsibility on all supervisors who are responsible for the violations, which can occur in two ways. First, supervisors who are directly involved or order that misconduct occur should be criminally liable, which is standard in federal criminal cases. Second, supervisors who (1) know that the conduct is occurring; (2) have the authority to prevent the conduct from occurring; and (3) fail to prevent the conduct should be held responsible under the "responsible corporate officer" doctrine (although its scope extends beyond individuals with corporate titles to include all persons who meet the three elements of the doctrine). The responsible corporate officer doctrine also is widely used in federal criminal prosecutions, including cases under the environmental laws.[34]

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[31] OSHA Field Inspection Reference Manual, Chapter III, Section C.2.d.(1)(b)3, available on-line at http://www.osha.gov/Firm_osha_data/100007.html. (last visited April 24, 2009). The OSHA website indicates that the field inspection manual is an archived document and no longer represents OSHA policy, but the definition of willfulness in the manual is consistent with the few judicial interpretations in OSHA administrative actions. *See, e.g., Georgia Electric Co. v. Marshall*, 595 F.2d 309, 319-320 (5th Cir. 1979) (indifference to employee safety generally); *United States v. Dye Construction Co.,* 510 F.2d at 82 (gross indifference to safety hazard).

[32] 29 U.S.C. § 652(5).

[33] *See* Lynn K. Rhinehart, *Would Workers Be Better Protected If They Were Declared An Endangered Species? A Comparison of Criminal Enforcement Under the Federal Workplace Safety and Environmental Protection Laws*, 31 AMER. CRIM. L. REV. 351, 358 n.38 (citing cases) (1994); *see also* Kathleen F. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide,* 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 781-82 (1987).

[34] The "responsible corporate office" doctrine originated in a Supreme Court case interpreting the Federal Food, Drug, and Cosmetic Act. *United States v. Dotterweich*, 320 U.S.

Individual liability can be extended to responsible supervisory personnel by changing the scope of the OSH Act's criminal provision to reach "any person" rather than limiting its scope to employers and by including "responsible corporate officers" in the definition of persons. While there may be concern about the possibility that low-level supervisory personnel could be charged under an "any person" approach, we should rely on prosecutors, judges, and juries to make appropriate distinctions about which individuals are most culpable, as they do in criminal cases under the environmental laws and other federal regulatory programs.

Law Enforcement Resources: A final issue with the criminal provisions of the OSH Act is the need for law enforcement resources to investigate and prosecute worker safety crimes. Most OSHA compliance officers do an excellent job investigating worker safety violations. They are not criminal investigators, however, and Fourth Amendment concerns would be raised if they obtained evidence for purposes of a criminal investigation. Moreover, once a criminal investigation begins, witnesses must be interviewed, evidence reviewed, subpoenas issued, and, in some cases, search warrants executed, all of which must be done by law enforcement officials.

During the Justice Department's worker endangerment initiative, criminal investigators from the EPA and prosecutors from the Department's Environmental Crimes Section handled the cases. As noted above, however, only nine percent of worker deaths in 2007 resulted from exposure to environmental hazards. Therefore, in the majority of worker safety cases, other investigators and prosecutors would be necessary. Prosecutorial resources could be provided by United States Attorney's Offices, although they have significant demands on their budgets and may not have the expertise to handle worker safety prosecutions. Investigative resources could be provided by the Federal Bureau of Investigation ("FBI") or a criminal investigation division could be established within OSHA. While the FBI has few resources for crimes other than counter terrorism – and hiring criminal investigators at OSHA would take time and political will that may be lacking – law enforcement resources for OSH Act prosecutions must be provided for meaningful criminal enforcement under the OSH Act to occur.

Conclusion

The criminal provisions of the environmental laws and the OSH Act were enacted during the 1970's when much of the modern regulatory state was created. Within a decade, Congress had changed the environmental laws – which also began as misdemeanor violations – because federal prosecution resources are generally reserved for felony cases and Congress recognized that the benefits of a strong environmental crimes program would be lost without felonies.

It has been 20 years since Congress amended the environmental laws, and it is long past the time for Congress to take the same approach to our worker safety laws. Some workers do not have a choice about where they work, either because jobs are scarce or they have not had the educational opportunities that would enable them to seek higher-paying and safer jobs. But everyone deserves a safe place to work and the ability to come home in good health each night.

277 (1943). Its use in the environmental crimes context has been considered by a number of courts, most notably in *United States v. Iverson*, 162 F.3d 1015, 1022-25 (9th Cir. 1998).

We can do more to protect our workers and ensure that all companies in the United States honor our best traditions of caring for America's workers. By strengthening the criminal provisions of the worker safety laws, we can make good on the promise of a safe workplace made nearly 40 years ago when Congress enacted the Occupational Safety and Health Act.

Chairman MILLER. Thank you.

Ms. Foster, thank you very much for your testimony. At any time were you consulted are involved in the discussion of the sanctions against the company where Jeremy worked, in terms of the penalties that were to be imposed?

Ms. FOSTER. No, sir, we were not.

Chairman MILLER. I am sorry. Can you just pull the microphone closer?

Ms. FOSTER. No, we were not. No one contacted us and asked for our opinion on the penalty or anything.

Chairman MILLER. How did you find out about the penalties?

Ms. FOSTER. OSHA sent us a letter with the citation being serious and a fine of $4,500. That was the only letter that we have received from them. And then it was later that we actually read in the newspaper that the fine had been reduced, so we——

Chairman MILLER. Ms. Seminario, we heard in the discussions of the accidents and the fatalities in Las Vegas at City Center, again, of people learning about this sort of after-the-fact with respect to settlements and reductions of the settlement. Is that common practice?

Ms. SEMINARIO. Yes, it is very common. Under the OSHA Act itself, family members have no rights.

Chairman MILLER. Mr. Halprin, is that your understanding? I mean that is a correct reading of the Act? I mean that is what we have been told several times in these hearings.

Mr. HALPRIN. The Field operations manual requires that OSHA enforcement officials advise family members of the status of the investigation and provide copies of citations immediately when they are issued, and further involvement, but they are not——

Chairman MILLER. But no involvement in the——

Mr. HALPRIN. They are not involved in the substance——

Chairman MILLER. Of the settlement.

Mr. HALPRIN [continuing]. Of investigation on the theory that it is considered confidential investigatory information. There many times when an investigation goes forward, and OSHA actually changes its mind about what it thinks happened or what level of fault might have been involved in the——

Chairman MILLER. So Ms. Seminario, there is no notice of what the pending penalty will be before it is imposed?

Ms. SEMINARIO. For family members, no. For workers or for represented workers, they are supposed to be advised and have a right to participate in settlements, if they have been involved in the investigation or if indeed they have elected to——

Chairman MILLER. And that is true after—when there are further negotiations for the reduction after the penalty has been imposed?

Ms. SEMINARIO. That is true. The practice, however, is such that the union often finds out after the fact that there are separate negotiations going on with the employer, and the settlement is presented to them as a fait accompli.

Chairman MILLER. As does the family.

Ms. SEMINARIO. The family generally isn't even advised as to what happens. Workers and unions have stronger rights in the law. Family members under the law have no rights currently.

Chairman MILLER. Let me ask you a further question, Ms. Seminario. In your testimony you discuss the various discounts that can be provided once a penalties established. And I am paraphrasing, but I think there is a discount for workplace history, which I guess if you don't have a bad history, you can receive a discount.

And then there is another discount with respect to size. And they understand why that conceivably would be in the law, but let me ask you this. Does that discount continue so if you have a bad history, and this is a repeated offense, you could still get a discount because of size?

You may not get the workplace history discount, but you get a discount because of the size of the employer?

Ms. SEMINARIO. Yes, under OSHA's penalty procedures, the Act itself lays out certain factors that are supposed to be taken into consideration. What OSHA has done over the years is basically made those a matter of fact, and there is a formula that reduces.

You start at a penalty, and it gets reduced by these factors. And except in very, very, very rare cases, the field operations manual does provide in, you know, the rarest of cases that the penalty might not be reduced by size.

But the practice, as we see in case after case after case, is that the penalties are reduced, and it is exceptional cases——

Chairman MILLER. So conceivably, there is for a very small employer—I think it is under 10, and then there is something between one and 100 and over 100; again, unfortunately I am paraphrasing because I—100 to 250, and one to 25, and 10 or under, I think is how you stated it in your testimony.

So a small employer could have a bad history and a repeat violator, and they still get a discount on penalties?

Ms. SEMINARIO. Yes. For very small employer, the size of reduction actually for willful violation is 80 percent for size one to 10. If it is a serious, it is only 60 percent. So if you are willful, you get a bigger discount than you do if it is only a serious violation, it seems a little strange.

Chairman MILLER. Okay. It does seem—okay.

Mr. Halprin stated in his testimony that if you look over the history, only .2 percent of the fatality cases involve meriting criminal referral.

Mr. Uhlmann, you are telling us that is because it is not worth the Justice Department's time to prosecute or even OSHA's to refer to them, because at the end of the day for killing this person, if that what happens under whatever circumstances, it is—what is it—it is a misdemeanor, right?

Mr. UHLMANN. That is correct, Mr. Chairman.

You know, the reality of life in the Justice Department is that prosecutors focus on the crimes that Congress has told them are the ones that Congress wants them to focus on by making them felonies.

And there are felony violations for every single violation of the environmental laws that involves knowing conduct as a felony. The same is true under the food and drug law. The same is true under the security laws.

The OSHA Act is——

Chairman MILLER. So in Ms. Foster's case, the Justice Department would have had to decide to prosecute a case if it was referred to them for a misdemeanor, where they put a value on the crime of $2,500?

Mr. UHLMANN. Well, I mean that is correct. I mean the maximum penalty for criminal prosecution in that case would have been higher. But of course, OSHA didn't even find that to be a willful violation, so it would have been difficult to prosecute that case criminally, even if the department made it a practice of prosecuting misdemeanor cases.

But the reality is in prosecutors' offices across America, misdemeanors aren't the focus of prosecution efforts. They are rarely prosecuted.

Chairman MILLER. We have got prosecution offices all across the country. Because of budget problems, they are suggesting they are going to let like really criminal guys go, you know, that are—they are bopping people on the head in the streets.

But anyway, Mr. McKeon? My time is over.

Mr. MCKEON. Thank you, Mr. Chairman.

Mr. Halprin, in the last several years OSHA has cooperatively worked with employers to provide assistance to employers and employees, particularly small businesses. During that same period there has also been remarkable progress in declines in the workplace fatality rates, as well as the injury and illness rates.

What is the level of concern that a return to the adversarial "Gotcha" mentality on the part of OSHA may reverse these positive trends?

Mr. HALPRIN. I personally believe the overwhelming improvement has been through outreach, communication and education, and there needs to be certainly a reasonable level of enforcement.

But the experience I have had was in one case there was an outstanding facility. The agency came in to do a wall-to-wall inspection, looking at chemical safety issues, couldn't find anything after doing all the monitoring you would have expected, that through the hazard communication program, and finally got into the point of digging through the company's confined space entry records and citing them because in one case a person had been listed as an entrant into a confined space, but not an attendant.

Now, so my point is there is a concern about that. The current program is based on the idea that targeting of employers is supposed to address those with more significant problems or those in an activity that is generally thought to be more significant, and therefore inspectors are expected to come up with citations.

And I think there is more of a need for inspectors to go into a site and say, "You know, this one is really doing a darn good job. We should go elsewhere." Leave. Say, "You are doing a good job," and say to the supervisor, "Send us someplace else."

Mr. MCKEON. You know, I think we hear this—the stories like what happened to Mr. Foster and most of us in here could—common sense—figure that that was a real tragedy, and something should be done about that—more than was done about it.

On the other hand, trying to write a law that covers all kinds of intentions and actions, and then having it interpreted by different prosecutors across the country, and then the investigators being limited with maybe inadequate budgets, enough to supervise all locations, it kind of boggles your mind how much we try to solve all the world's problems here and don't seem to be able to.

And I think we need here a case like, Mr. Uhlmann, that you talked about in Idaho. Seventeen years probably wasn't enough for that person. On the other hand, when you hear other cases where truly there are accidents that happen—I heard a story just last week that a husband and wife were out playing golf, and while the wife was teeing off, the husband tried to run over to the refresh-

ment cart in his cart and bounced across the hill and flipped over and killed himself.

And we had a former congressman die last week out on four wheelers with his children. Came over off of a steep decline, or whatever happened, and flipped and broke his neck and killed himself. You know, you hear just tremendously sad things that happen.

Now, when you hear the Foster case, where they have changed the equipment and made it more dangerous, you know we should do something about that.

But to be spending time hitting a lot of things that are less of a problem and then skipping over some of the things that are real problems, that is where I think there should be an adjustment. But the mentality, I think, should be trying to fix things, trying to make things better, rather than trying to punish.

And that is I think the dilemma that we are kind of faced with. Some people, only punishment gets a response. Some people, if you go in and show them that there is a problem in your business, you know, appreciate that and fix it, and they can move on.

So I think this is going to be a very interesting work as we go through this progress and see how we can make things better and not inadvertently make things worse. Thank you.

Ms. WOOLSEY [presiding]. Thank you, Ranking Member McKeon.

I want to respond to that. It is my law that we are rewriting. We have written a law to strengthen a piece of legislation that is 30 years old. Over those 30 years, we have learned. Over those 30 years, we have moved into the 21st century. It is time for OSHA to join the 21st century.

And as we go through the process with PAWA, we will make sure that that is exactly what it does—gets us to where we need to be in the 21st century and strengthen what needs to be strengthened. And we are not going to be picayune on the wrong things, because we don't have time for that.

Now, Mr. Kildee?

Mr. KILDEE. Thank you, Madam Chair.

Madam Chair, when my daughter was in high school, and injury on the job took place in my district. And that injury helped my daughter for her moral and legal sense of responsibility for employees.

A young lady working in my district on a press was grievously injured. She worked on a press, and she was required to put the raw material in the press. And under the rules and under the mechanics of the kept in condition machine, she had to remove both hands from the material, simultaneously press two buttons, and then the press would come down.

That day she put her hands into the press with the material, and the press came down, and it utterly, utterly destroyed both her hands. I remember I brought the Flint Journal home that Sunday after my visit back to my district, laid it down, and my daughter picked it up, and she started to cry.

She said, "Dad, how could that happen?" They had a minimal fine, by the way, and minimal settlement for her—very minimal. How could that happen? And she just cried some more, and I read the article again, and the thing that really tripped her, and we

need to make is a human issue. It is a moral issue. It is not just a legal issue. It is a moral issue.

She said, "Dad." She said, "Look, it says here, 'I can't even pet my kitten anymore every again.'" now, my daughter was a tenth grader, and she saw the immorality of that and this insignificant settlement she got. The rest of her life—she was about 22 years old or so—the rest of her life she must go through life without hands.

Now, that should move us. First of all, that should enrage us. Anger is good. Even great religious leaders have been angry. Christ knotted ropes and drove the moneychangers out of the temple. Sometimes we have moneychangers who are more concerned about profit and making sure that the equipment that can be dangerous—can be productive, can be dangerous—is taken care of.

We have a moral obligation.

Ms. Woolsey, God bless you. She is one of my favorites, and she really believes in human dignity.

She has a bill. Dr. Uhlmann, is that bill—would that be helpful, or should we go even further than that bill? I am co-sponsor of that bill, following her great leadership.

Mr. UHLMANN. Sir, the bill would be tremendously helpful. I think it would make a huge difference in the ability to deter violations, you know, recognizing as the ranking member says, that obviously the first thing you want to do is try and help companies do the right thing before violation even occurs. I mean I fully support OSHA emphasizing compliance counseling.

But the reality is there are a lot of companies who, with all the counseling in the world—they are not Mr. Halprin's clients, and they are not spending the money on compliance that it costs to engage Mr. Halprin. And for those companies you need more than just counseling. You need the threat, the credible threat of enforcement.

I think the Protecting America's Workers Act would do that. It could go further, and I think there are ways that that could be improved, and you know I am happy to talk about that and work with the committee on ways to make the law even better, but no question it would be a significant improvement over existing law.

Mr. KILDEE. Well, I appreciate that. You know, my daughter now is an employer. She is a very, very good businesswoman. And one of her highest priorities—she still remembers it; she still remembers that Sunday when I brought that newspaper back from Flint, Michigan—one of her highest priorities, and she is roaming her buildings.

She is in charge of two buildings, all the time looking for safety positively, not just you know have something happen—positively trying to anticipate something that could go wrong. It is really high priority with her.

And when we don't have employers that have this high priority, then we need law, right, to make sure.

Thank you very much. And God bless you, Madam Chair.

Ms. WOOLSEY. Thank you very much, Mr. Chairman.

Mr. Cassidy?

Dr. CASSIDY. I think we all agree that we need to decrease these terrible things that just happen to your stepson. I guess my question is what is the best way to do it.

First, Mr. Halprin, you talked about the thousand pages and the ambiguity. And I think of the small businessperson trying to get their equipment lined up. And I kind of took from what you said that the current arrangement, we would go into that small business person and say, "Listen, ma'am, this is the way you need to set it up so as to be in compliance."

Can you give us an example of the ambiguity and where that sort of partnership would be effective? Is there a clear-cut example of, "My gosh, how would you ever understand this unless we employed you, and we can't afford you, because I think your rates are probably too hard for us?"

Mr. HALPRIN. The best example, at least one of them with the problems, is with those whose machine guarding locked-out, tag-out standards.

Dr. CASSIDY. I am sorry. Say it louder, please? I can't hear you.

Mr. HALPRIN. OSHA's machine guarding locked-out, tag-out standards. There is exception for full lock-out when you engage in minor servicing activities. The idea is to lock out a machine, take away its energy sources said that it is basically in a neutral state, and it won't accidentally start up.

And the standard was adopted with the best of intentions. There was, unfortunately, in adequate industry support, so certain practices that had gone on for years that were expected to be permitted to continue suddenly became question or prohibited under OSHA's interpretations.

Those interpretations are so impractical in some cases. There is divergent enforcement with any regions, across regions, between federal, OSHA and the states. And in some cases the best consultant can do is come in and say, "This is what I think you should do, but I really can't tell you what the law requires."

That is not unusual. That is a reality of a generic rulemaking process that doesn't get enough input, that doesn't take into account what is going to happen. And that is a pervasive problem throughout the United States.

Dr. CASSIDY. Mr. Uhlmann, I gather that you have had some regulatory background, and I saw you nodding your head as Mr. Halprin spoke to that.

I guess in my mind is it possible to have this tension between on the one hand, we are going to bust you and throw you in jail, and on the other hand, we are going to come to give you good advice to help you discern what these regulations mean in terms of how to make worker safety, because it is our—safer—because it is our goal.

So I am just asking you, is it possible to kind of have that sort of tension exists and still have a working relationship that would allow that small businesswoman to modify her equipment appropriately? Do you follow what I am saying?

Mr. UHLMANN. I do. I mean first of all, the situation that you asked Mr. Halprin about is not a situation where I think criminal enforcement would be appropriate. And you don't prosecute people for criminal violations of the law, and the law is clear.

Dr. CASSIDY. Now, I am a doctor, so I understand—I mean this—so if I seem a little confused, I am.

But when you speak about willful, when I was reading the definition of "willful," if somebody had a piece of equipment which by law was supposed to go into neutral, die, stop, if not being used, but doesn't do it because it is impractical, that actually seems like that would make the definition of "willful" as I read "willful." Is that correct?

Mr. UHLMANN. Well, I mean "willful" generally means that you know you are doing something that the law forbids. So, you know, as a doctor I mean, you know, if you had medical wastes, which you know has the potential to harm other people, I mean you have got an obligation to handle that waste properly, right?

Dr. CASSIDY. I understand that, but going back to Mr. Halprin's example where the machine is not put in neutral or not shut off automatically, that would be a willful disregard of the law, even though it is impractical to do so. I don't know the particular situation, so I am just assuming—and you are nodding your head—so how would you, knowing that the machine didn't shut off, but the law says it should shut off, and something bad happened, would that constitute a willful infraction is a question.

Mr. UHLMANN. Yes, and what I am trying to say is I mean accidents happen. I mean you are describing an accident, and an accident is not a willful violation.

Accidents happen, and the ranking member talked about those accidents happen throughout American life. And they are unfortunate, and we obviously want to do everything we can to prevent them. That is not what this is about.

I mean, the issue here is what do we do about those companies, even if they are the minority of companies? What do we do about the companies who don't care about the law, don't care about doing the kinds of things that Mr. Halprin pounces his clients to do?

How do we deter them? How do we make sure that they meet their obligations to America's workers?

Dr. CASSIDY. So I guess my question, though—I am not sure I have got it. And agree with what you are saying, obviously, but my first question was, is it possible to have simultaneously two different relationships, one in which you are threatening criminal penalties and the other where you are seeking a cooperative relationship? Show us where you are wrong, and we won't bust you, but rather we are going to help you fix what is wrong. Does that make sense?

Mr. UHLMANN. No, it does. And you know, I think it is a fair question. It is not a question, of course, in the OSHA context, right?

Dr. CASSIDY. Yes.

Mr. UHLMANN. It is a question across the whole area that we regulate. And I think we see this across the federal regulatory programs. You know, every regulatory program that I know about, there is always that—the effort to reach out and to educate and to try and get people to follow the law.

That is what we want, right? I mean, you know, I used to say as a prosecutor that my office existed to put itself out of business. If we prosecuted enough cases and if EPA did its job well enough, we wouldn't have any more pollution, no more crime. We could all go off and do something else with our lives, you know.

But unfortunately, it is not a perfect world, so I think you do that education, but you also need to have the ability to deter violations with strong enforcement in the circumstances when that is necessary.

Dr. CASSIDY. Mr. Halprin, what do your comments to my——

Mr. HALPRIN. Well, EPA, for example, has a self-audit policy, where you can in good faith go out, find problems, disclose them to the agency, reduce the fine substantially, if not zero, and then go on through a program of fixing them.

OSHA doesn't have a program like that. If you go out and do an audit, I would venture to say most facilities in the United States, if you actually did a fine toothcomb audit of every facility, you would find problems, and you would make a grocery list.

And then you have no choice but to do a risk assessment and say which ones need priority to do first, because you can't possibly fix them all. The resources simply aren't there.

Now you have got this list. If you made a misjudgment, or despite the fact that you are diligently proceeding through this list, something goes wrong and somebody gets hurt and in the worst-case scenario dies, then the agency come back and say you have a willful violation.

Now, if you have got, let's say, a dust scenario, and you have been identified having problems, there are some things that can be done right away. You can make sure that you don't have accumulations of dust.

On the other hand, retrofitting a whole factory to put monitoring devices in to see whether a motor is overheating, putting explosion panels in, designing all those things, putting suppression systems in—they take time.

Ms. WOOLSEY. The gentleman's time is complete.

Mr. Andrews?

Mr. ANDREWS. Thank you, Madam Chairwoman.

Ms. Foster, thank you for your testimony here today. It was a very difficult thing to do, and you did it eloquently and very, very well. Thank you.

And to the other families that are representing their loved ones today, welcome. We are sorry that you are here, but we are fortunate that you are here to remind us of our responsibilities. I think Ms. Woolsey has proposed legislation that would honor the memory of those that you are depicting here today.

And I wanted, Mr. Halprin, to ask you a couple of specifics about Ms. Woolsey's legislation.

The first has to do with extending criminal liability when there has been proof of a willful violation and there has been serious injury as opposed to just staff, which is the Dominguez case that we heard about. What is wrong with that? Why shouldn't we do that?

Mr. HALPRIN. As I think I explained in my statement, giving the example if somebody pulls out a gun, aims it at somebody and shoots him intentionally, clearly that is a horrible crime, whether they killed him or whether they wounded them.

Mr. ANDREWS. Yes.

Mr. HALPRIN. Now, using that as an example and looking for equivalents, when you can find a crime along those lines, I have no problem increasing penalties.

Mr. ANDREWS. Well but if somebody pulls out a gun and aims it at someone and shoots them and they just maim them and don't kill them, it is a criminal offense.

Mr. HALPRIN. Correct.

Mr. ANDREWS. But what happened to Mr. Dominguez was not a criminal offense, because he didn't die. Shouldn't we fix that to make it fit your analogy?

Mr. HALPRIN. I am suggesting that there is an area there that needs to be looked at. My concern——

Mr. ANDREWS. Well, we are looking at it. Do you favor or oppose that provision?

Mr. HALPRIN. The broad definition of willful violations right now is too broad to penalize——

Mr. ANDREWS. Not the issue.

Mr. HALPRIN [continuing]. At the level——

Mr. ANDREWS. That is not the issue. The issue is if you have a finding of a willful violation by jury, which we had here——

Mr. HALPRIN. My point is the definition of——

Mr. ANDREWS. But should someone get off the hook because the person survived and they didn't die? That is the issue.

Mr. HALPRIN. But that is not my point. My point is the definition of "willful" is quite now too broad to penalize people at that level you are talking about.

Mr. ANDREWS. How is it too broad, by the way? Tell me how the definition of "willful" is too broad.

Mr. HALPRIN. I gave you an example. If you have somebody that conducts an audit in good faith and doesn't fix a particular problem in time and something goes amiss, I don't see that person as in a sense in the moral situation that they would be subjected to——

Mr. ANDREWS. With all due respect, the definition of "willful" is a little more specific than that. They would have to have done the audit, known that there was a violation, and intentionally choose to ignore the violation, which would then have to result in the death of a person.

Mr. HALPRIN. No, no. It doesn't mean intentionally ignore. It means they didn't fix it in time.

Mr. ANDREWS. I disagree with that interpretation. Can you give me a case where someone has been found a willful violator under those facts, where they didn't intentionally choose to ignore it; they just didn't fix it in time?

Give us some cases that say that.

Mr. HALPRIN. I would have to go do the research and find it.

Mr. ANDREWS. I wish you would. And we will hold the record open for the committee to take a look at that. But I think that mistakes what "willful" means.

I mean, do you agree in the Dominguez case that the facts establish a willful violation?

Mr. HALPRIN. Is Dominguez the case where people were sent into the confined space?

Mr. ANDREWS. Yes.

Mr. HALPRIN. From everything I have heard, and I would like to look at the file, it certainly sounds like it.

Mr. ANDREWS. Oh, yes. Here are the facts there, that the gentleman was told to go into the steel tank and clean cyanide waste

material. He gets very sick, not surprising. The firefighters arrive. They ask the employer's representative what was in the tank. They say it is just mud.

The doctor then examines Mr. Dominguez at the hospital, calls the proprietor of the business and says, "Is there any possibility of any cyanide in the tank?" He knows there is and says, "No," willfully. And then he gets a permit and backdates it to show that he had the permit to get this thing done. That sounds pretty willful to me.

Mr. HALPRIN. Right.

Mr. ANDREWS. Now, that wasn't a crime, because Mr. Dominguez didn't die. Do you think it should be criminal? Do you think it should be criminal, as Ms. Woolsey's bill says, because he was just seriously injured and did not die?

Mr. HALPRIN. I think that is close enough to taking a gun out and shooting somebody. That should be a crime.

Mr. ANDREWS. Is that a yes?

Mr. HALPRIN. Yes.

Mr. ANDREWS. Good.

So he agrees with part of your bill, Ms. Woolsey. We appreciate that.

How about the provision that says that we should update the fines? You know, presently for a violation of the South Pacific Tuna Act, it is a $325,000 fine. But a willful violation that kills a human being in the workplace is $70,000. Do you think we should update that fine?

Mr. HALPRIN. A willful violation that results in criminal conviction is subject to $250,000 for the first violation and $500,000 for the second under current law.

Mr. ANDREWS. Do you think we should update those? Do you think we should equate it with the Tuna Act?

Mr. HALPRIN. I don't have opinion on that one right now.

Mr. ANDREWS. Could you keep the record open and give us your opinion whether we should equate tunas and humans on that scale?

Mr. HALPRIN. I would also like to say that the fact that some environmental crimes or other crimes are sanctioned at the levels they are doesn't mean those numbers are correct. Morally, they may be too high, but that is the issue you are raising.

Mr. ANDREWS. Okay. We would welcome—if that is your conclusion, we would welcome those.

I think my time has expired, Ms. Woolsey, but it looks like Mr. Uhlmann wanted to jump into the fray here.

Ms. WOOLSEY. Thank you, Mr. Andrews.

Mr. Price?

Dr. PRICE. Thank you, Madam Chair, very much.

Ms. Foster, our heart and our prayers go out to you and the tragedy that you suffered in your family. And I want to, on behalf of those of us on the panel, thank you so very much for coming today and sharing that with us. And there is an emotional issue. And it is because lives and livelihood are at stake.

And for all of the folks who attended today because of a tragedy in the workplace, we extend our thoughts and prayers to you and your family.

Because it is emotional, sometimes Congress, when it acts in emotional ways, draws the wrong conclusions and makes the wrong laws. So I think it is important that we all talk about facts in the workplace.

My understanding, not to minimize anybody's tragedy in their own lives and in their own family, but my understanding is that from 1994 that in fact workplace fatalities, the rate of workplace fatalities, has decreased from 5.3 per 100,000 FTEs to 3.9 per hundred thousand FTEs.

Now, something caused that. I don't know what it was, but I think it is important that as we look at the rules that we currently have in place and the outliers that exists, that maybe it is the outliers we ought to be looking at, as opposed to a broad brush for everybody. But I will get to that in just a moment.

The workplace injury and illness rate from 1990 to 2006 also shows similar trends, so something is happening in our society that is making it so there are fewer deaths on the job, and there are fewer injuries and illnesses on the job.

And that is a good thing. And we ought to congratulate those who have been working in that area and hold them up as champions for our nation and for workers.

We have talked a lot about the willful violations, and it is my understanding, Mr. Halprin—correct me if I am wrong—that it is my understanding there is no statutory definition of "willful." Is that correct?

Mr. HALPRIN. It generally developed through case law rather than statutory language, yes.

Dr. PRICE. And you would agree with that, Mr. Uhlmann? There is no statutory definition of "willful?"

Mr. UHLMANN. That is correct.

Dr. PRICE. My sense is that given this debate here this morning about what is willful and don't you believe this is willful and shouldn't this have been willful, that a definition of "willful" would be helpful, would it not, Mr. Halprin?

Mr. HALPRIN. Yes.

Dr. PRICE. Mr. Uhlmann, do you agree?

Mr. UHLMANN. I agree Congress on the definition of "willful" would be helpful——

Dr. PRICE. Would be helpful.

Mr. UHLMANN [continuing]. Although, you know, the committee should be aware that the willful standard is a much higher standard, contrary to what Mr. Halprin is saying. It is a much higher standard than under almost every other federal criminal law.

Dr. PRICE. But a definition would be helpful.

Ms. Seminario, do you believe that a definition would be helpful?

Ms. SEMINARIO. A definition may be helpful. You have under the OSHA Act willful violations for civil purposes.

Ms. WOOLSEY. You need to turn on your microphone.

Ms. SEMINARIO. You also have actions under criminal codes for criminal willful. I am not a lawyer, but I think looking at those, and I am not sure that they——

Dr. PRICE. No, but you are playing one right now, and so are we, so——

Mr. HALPRIN. My understanding is they are the same. The only difference is proof beyond a reasonable doubt.

Dr. PRICE. All right. My sense is that a definition would be helpful, and we are interested in working with the majority on trying to come up with a definition, because I think that would be very, very wise for us as move forward.

Mr. Halprin, I would like to address these charts, if you will, that there has been a decrease in the incidents of mortality, a decrease in the incidents of injury and illness on the job.

Is that the best way to determine whether or not our current rules are working, or are there other measures? Is the number of penalties appropriate to look at or fine? What is the best monitor of whether or not we are making progress?

Mr. HALPRIN. A proactive safety person will tell you that they would rather look at some leading indicators instead of what you are looking at, which is lagging indicators.

However, I do think when you are trying to look for something objective, how many times you have a safety meeting and how many times you have a training program are not really objective enough to be helpful, and therefore lagging indicators are still the best indication. There is dispute about whether they are fully accurate.

However, despite those arguments, I have seen no evidence whatsoever there is any difference in the level of accuracy between what they were in 1992 and 2007. There is no evidence that employers are any less responsible or any less truthful now than they were 10 or 20 years ago. So where there may be some inaccuracies, overall I think this trend best demonstrates the fact that overall the program is successful.

Dr. PRICE. Thank you.

Thank you, Madame Chair. My time has expired.

Ms. SEMINARIO. May I just have a comment on that? I would say per fatality data is pretty good, because in 1992 we went to a census of fatal injuries which go beyond employer reports, and so it is actually a pretty accurate number.

When it comes to workplace injuries, that is all based on employer reports. And they are I would disagree, because there has been a lot of activity in the workplace, which puts a lot of pressure on the reporting of injuries by workers.

There is a lot more focus using that number, the lost work to injury rate, as an indicator of performance, which ends up actually injuries not being reported. So I would say on the injury side that the numbers are not so good.

When you look at workplace that is and you look at what is killing workers, one of the areas, or two of the areas where there had been significant decreases since 1992 are in the area of the rates of fatal injuries for over the road transportation incidents.

When you look at some of the other factors, the other causes, such as people being caught in machinery, explosions, you don't see the same kind of decrease. So you have to look beyond the overall number and look at what is killing workers and looking to measures that can address those particular causes.

So yes, we have made progress, but we have a lot of work to do. And the OSHA Act isn't quite up to the task.

Dr. PRICE. If I may, Madame Chair, in response to that, do you see anything in the current law that is looking at those specific pieces of information?

Ms. SEMINARIO. In the current law I would say——

Dr. PRICE. In the proposed——

Ms. SEMINARIO. In the current proposal, what the proposal attempts to do is to bring the level of enforcement to a level where it would——

Dr. PRICE. But not looking at the specific injuries that you just talked about.

Ms. SEMINARIO. Well, it is looking at outcomes.

Dr. PRICE. Right, but not the specific——

Ms. SEMINARIO. And so yes, it is focusing on those things that are killing workers, those things that are seriously injuring them, and so it is focusing very much on the issues that you said we should be focusing on, which are the serious incidents, yes.

Dr. PRICE. Thank you.

Ms. WOOLSEY. Thank you.

Ms. McCarthy?

Mrs. MCCARTHY. Thank you. And thank you for your work on your legislation.

I have been sitting on this committee for 13 years, and so that means we have had probably 13 to 15 hearings on OSHA. And I am hearing the same arguments that I heard 13 years ago.

Now, certainly I believe that OSHA has a part on trying to educate the employers to keep their workers phase, but the most recent that we have on death is from 2007, and we have 5,657 workers that have died.

Then if you bring up the injuries and illness, it is estimated to cost $145 billion to $290 billion a year to treat those workers. And as far as the work injuries that are reported, most—all agree that they are underreported, so you are still looking at between 8 million and 12 million injuries and illnesses a year.

I think it is time for an improvement.

Mr. Uhlmann, in your testimony I think that one of the best ways that we can explain why we are trying to do what we are trying to do and what Ms. Woolsey is trying to do, on page 7 you talk about the McWane case and how many violations that company had over the years and how many people actually still continued to die.

On that particular case, you actually prosecuted. And with that you were able to get jail time for those, because it was a criminal offense. But in your testimony you also say that you, when you were working for the Justice Department, could not do it every case, only if it is—I am not a lawyer—only if the prosecutors speak volumes about the role of strong criminal programs promoting work safety.

I think that is why we are here and trying to make a difference. So if, Mr. Uhlmann, if you could expand on what you have done over the years and why we need to do something, I would appreciate it.

Mr. UHLMANN. Thank you, Congresswoman.

Well, the McWane case is a classic example of the problem that we are talking about today. McWane is one of the largest pipe

manufacturing companies in the world. It is a very dangerous business. It is a business where a strong safety program, I think everyone would agree, is particularly important.

And McWane was a company that a facility, across facility to facilities, was violating worker safety laws, was lying to OSHA inspectors, was hiding information, was concealing injuries.

And you know, they would get an occasional citation from OSHA, and they would pay fees, you know, $1,000, $2,000 fines. And it did nothing to deter the corporate officials and McWane, did nothing to change their behavior.

What change behavior at McWane was the New York Times and Frontline ran an expose about how many people were injured and killed at McWane facilities. We use that information at the Justice Department to develop criminal cases against McWane at five facilities across the United States.

Those criminal cases were brought under the environmental laws. Those criminal cases were brought under Title 18, which is the general criminal code. And those cases resulted in millions of dollars in fines and years of jail time, and the plane is now a poster child for change.

You know, Frontline has done a follow-up piece talking about where they interviewed people at McWane, who talked about the new McWane and talked about all the money they are now spending on compliance. They have got former OSHA administrators advising them about how to do things the right way.

And you know, I don't know whether McWane has changed in every way that it said that they have changed, but what I said in the testimony is I think it is an example of how, you know, if you have got a strong criminal program, if you have got strong deterrents in place, you can push companies to change.

But you know, frankly, if McWane hadn't been violating the environmental laws at the same time they were violating the worker safety laws, my old office couldn't have done anything about it.

And I don't think a misdemeanor—a bunch of misdemeanor prosecutions with, you know, even with the $250,000 fine that Mr. Halprin described, I don't think that would have changed the McWane.

Mrs. MCCARTHY. And McWane is still in business.

Mr. UHLMANN. They are still in business, and they are still one of the largest pipe manufacturing companies in the world.

Mrs. MCCARTHY. So it didn't seem to hurt them that much.

Mr. UHLMANN. No, not from a profitability standpoint or from being able to, you know, be an employer. I think they are a better employer today. You know, I think we want companies in America to be employing our citizens in jobs that are safe.

Mrs. MCCARTHY. But I mean that is a whole part of OSHA, to make the—where our workers were to be safe, and in the end hopefully not costing all of us, because to be very honest with you, if we are spending billions of dollars on health care for those that have been injured, and sickness, we—every one of us, the taxpayers—are paying for that.

Mr. UHLMANN. You are correct.

Mrs. MCCARTHY. Thank you.

Ms. WOOLSEY. Mr. Hare?

Mr. HARE. Thank you, Madam Chairman.

I hardly know where to begin here today.

Mr. Halprin, you mentioned in your testimony—I might have been taken the notes too fast—that you believe that there are very effective penalties. I am wondering in the case of Ms. Foster's son if you think that penalty was effective.

Mr. HALPRIN. Do I think that penalty was——

Mr. HARE. Effective. You said we have effective penalties on companies. Do you think—would you say that the penalty, if I am correct was down to $2,250, would you classify that as an effective penalty on that company?

Mr. HALPRIN. I am very sympathetic to that case and all the others we have talked about. I would like to think that most of them are outliers. I don't think it is fair without a full record to actually comment on what happened. What happened to sounds terrible, maybe outrageous, but I don't know the facts.

Mr. HARE. Well, I think——

Mr. HALPRIN. One thing I think——

Mr. HARE. Let me be very candid, Mr. Halprin. I think what you are doing, from my perspective, is I think you are—you know, you say that penalties are effective, and then we ask you is the $2,250 for this young man's life and you need the facts.

The fact is, from what I am hearing, they altered the machinery. And let me tell you what my position is on this. Whoever altered that machinery is responsible for this young man dying. And not only should they pay a fine, because I don't know what type of a price you could put on taking somebody's life, which is what they did, but they ought to go to jail, and they ought to go to jail for a long time.

So I would thoroughly disagree with the effectiveness of this.

The other thing, too, is you have other companies, and they seem—Eleazar Torres-Gomez worked for Cintas. He was dragged into a dryer. This is a company that is probably one of the most lawbreaking companies we have in this nation.

They sent a letter to the widow—I met his son—that they thought Mr. Gomez—first of all, they tried to imply that he threw himself into the dryer to commit suicide. And second of all, after that when that didn't work, that he was basically too dumb to operate the equipment. And finally, after that didn't work, they said, "Well, maybe we should do it."

Now, here is a company who has been fined several million dollars, and they are loaded, and they just pay the fine and keep on going down the road, and they don't improve the companies.

Now, I have tremendous respect for the ranking member, but when he says we are playing "Gotcha" here, maybe that is what we ought to do. If these companies are going to willfully continue to do this, then I think what we have to do is we have to have an agency that has teeth. And it ought to really clamp down.

I don't have graphs, as my friend Mr. Price had, but I have seen the pictures of these people. And 15 people a day every day in this nation are dying. And as Mr. Uhlmann says, when the penalty is stiffer for shooting a deer and taking it across the state line than it is for taking the life of somebody, there is something fundamentally wrong here—fundamentally wrong.

And Ms. Woolsey's bill and a bill that I put in yesterday, part of this thing—we get the numbers—they don't even have to report them. And I don't care how big the Corporation is, and I don't care how small they are. Yes, accidents will happen, but I think fundamentally people have a right to be able to go to their jobs every day and expect to come home to their families.

When you alter the equipment, as Cintas did, and in Ms. Foster's case with their son—you know, I don't understand this.

And I guess what I want to know, Mr. Uhlmann, from you is what are we really going to do here? I mean, I honestly think that when companies like Cintas are more—they will pay the fine, and they will allow people—and they still by the way have belts out there that don't have these devices on them in five states.

So we are just waiting for another person to be harmed, either killed or maimed. And what do we do with companies that basically thumb their nose at the law and say, "Well, I will pay the fine and I will just keep making the profits?"

Mr. UHLMANN. Well, congressman, accidents waiting for a place to happen are not accidents, and companies who continuously violate the law and continuously placed their workers at risk, if we want to stop them from doing that, the people who run those companies have to fear that they may go to jail.

It may be exactly the situation you described. What the thought process has to be in that corporate official has to be not, "Well, if we continue to do things this way, we might have to pay a penalty of a few thousand dollars, but we can afford that."

The thought process has to be, "If we keep doing this, and I keep letting this happen at my company, I could go to jail." And that changes behavior more than anything else we could do. So make that a credible threat.

Make it a credible threat that the corporate officials, who are responsible for these kind of violations occurring, could go to jail, the same way we do under all the rest of our regulatory laws. That will start to make some change.

But of course, you can't—that isn't going to happen, if the penalties are just misdemeanors, if they only apply to willful violations involving death, and if we only clear that individuals can be prosecuted under the OSHA Act for these kind of violations.

Mr. HARE. Well, I just—I know my time is up.

Ms. Foster, I would just tell you this. For two people to come to the door and express their condolences and they never see them again, the next time you see people like that, you ought to see them in the jail. And that is how they ought to get visited.

Ms. FOSTER. Thank you. I agree.

Mr. HARE. You are welcome.

Ms. WOOLSEY. Mr. Kucinich?

Mr. KUCINICH. Thank you, Madam Chair.

First of all, I want to thank Mr. Miller for calling this hearing.

And you know, I think we have to be aware of the capabilities of existing law here, and I would like a response from the AFL-CIO on this. Currently, OSHA under the statute can refer a case to the Department of Justice, isn't that right?

Ms. SEMINARIO. It can refer a case if there is a willful violation that results in the death of a worker.

Mr. KUCINICH. Do you know how many cases have been referred to the Department of Justice?

Ms. SEMINARIO. I believe that there the number is 170.

Mr. KUCINICH. Could you speak to the mic?

Ms. SEMINARIO. I think it is 171 over the——

Mr. UHLMANN. Twelve last year, 10 the year, 12 the year before that, 10, 10—you can go down——

Ms. SEMINARIO. Right.

Mr. KUCINICH. And do you know the disposition of those cases? Has anyone whose corporation was responsible for the death of a worker ever served jail time? How much time?

Ms. SEMINARIO. In the entire history of OSHA, there have only been 71 cases that have been prosecuted, resulting in 42 months of jail time over 39 years.

Mr. KUCINICH. And how many workers are—isn't it true that there are about 5,680 workplace deaths each year?

Ms. SEMINARIO. There were last year. Since the OSHA Act was passed, about 350,000 workers have lost their lives due to traumatic injuries.

Mr. KUCINICH. Okay, 350,000 you are saying?

Ms. SEMINARIO. 1970.

Mr. KUCINICH. And how many people were prosecuted?

Ms. SEMINARIO. There were only 71 cases that were prosecuted.

Mr. KUCINICH. And how many people were convicted or sent to jail?

Ms. SEMINARIO. Last year there were 71 cases where they were prosecuted and 42 months of total jail time.

Mr. KUCINICH. How many?

Ms. SEMINARIO. There were 42 months of total jail time. I can get you the number——

Mr. KUCINICH. Right.

Ms. SEMINARIO [continuing]. Number of people, but only 42 months of jail time.

Mr. KUCINICH. You know, when you look at state statutes for manslaughter, let us say you had 100,000 cases of manslaughter nationally, and there were only a few dozen prosecuted, people would start to ask questions about what is wrong with the law.

Now, for some reason workplace safety has not achieved a level of consistent morality in our society alongside of the rights of people who are just going along and minding their own business who suddenly find themselves in a adverse position across their life.

Why do you suppose that the safety of workers and the responsibility of employers has taken such a low level of concern in our society, both legally and morally? Why do you suppose that is?

Ms. SEMINARIO. I think that is an excellent question, and it really is one that is hard to answer.

It is an anathema to me as to why, 40 years after the OSHA law was passed, that we are sitting here today having a discussion as to whether or not to have the penalties for violations of the OSHA law that resulted in death or serious injury to be equivalent to the way they are treated as environmental laws and other laws that protect wildlife.

You know, I don't know. I mean, once——

Mr. KUCINICH. Is it because they are considered accidents?

Ms. SEMINARIO. It may be that they are considered accidents, but there would be——

Mr. KUCINICH. But let me ask you this. Is it an accident if an employer fails to provide safety equipment?

Ms. SEMINARIO. No.

Mr. KUCINICH. And is it an accident if there are not sufficient workers to safely perform a task?

Ms. SEMINARIO. No. No, it is——

Mr. KUCINICH. Without objection, I would like to include into the record an article that was written by Leo Gerard, the president of the Steelworkers, who has adequately described this dilemma over the lack of adequate dedication to workplace safety in our country.

Now, I think that I am hopeful that either in this committee or another committee, we will have OSHA in front of us, because what I would like to hear OSHA saying is that they are going to refer more cases to the Department of Justice.

And we also need to have the attorney general in here to indicate how seriously he will take referrals to the Department of Justice, because it is not as if you don't have a legal structure available to be able to pursue prosecution. It is that we have an attitude about workers that they are somehow less than, let us say, a corporate executive.

There is really a two-class society here when it comes to the concerns of workers and the concerns of corporate executives. And it is becoming more and more apparent here.

You know, you can look—Madam Chair and members of the committee, think about this. All this money that is going to bail out Wall Street, and unemployment keeps increasing, I mean these kind of disparities reflect a greater problem in our culture, and the point that the AFL-CIO makes here, is that, you know, workplace safety, which should be a basic right, is not.

And the people who are responsible for creating that dilemma are making a profit on the adverse conditions that workers have to function under.

Ms. WOOLSEY. If the gentleman hadn't taken a breath, I would have said without objection to your entering into the record. So thank you, Mr. Kucinich.

Mr. KUCINICH. Thank you. I just know that, you know, our committee——

Ms. WOOLSEY. Your time, sir, has——

Mr. KUCINICH. In other words, they are going to have to do more on this, and——

Ms. WOOLSEY [continuing]. Has expired. Thank you.

Mr. KUCINICH. Thank you.

Mr. UHLMANN. Congresswoman, I don't want to extend this unnecessarily, but one point should be clear here. I mean, the congressman may be right about the disparity in terms of how we treat our workers, but the laws aren't on the books right now, and the Justice Department can be as committed as you want them to be and as I want them to be too worker safety cases, but if they are just misdemeanors, you are not going to see the prosecutions. I can guarantee that.

Ms. WOOLSEY. Okay. Thank you, Mr. Uhlmann.

I will yield myself 5 minutes.

Ms. Foster, your loss is so sad and the way your family, and the way Jeremy's death was treated by his employer was appalling. Have you seen any change in the safety and health conditions for Ola Sawmills since Jeremy's death and since that ridiculously low fine?

Ms. FOSTER. No, ma'am. I am not aware of any changes that have been made. I am aware that there was another accident there just last September that resulted in the amputation of a young man's leg. Although this injury was not accounted for, because it was just one injury, you won't see it on record anywhere or in anyone's statistics.

Ms. WOOLSEY. Was that from the same piece of equipment?

Ms. FOSTER. Not the same piece of equipment, as I am saying——

Ms. WOOLSEY. But the same employer.

Ms. FOSTER [continuing]. But it is the same location, the same place. And I feel like it is still an unsafe environment.

Ms. WOOLSEY. Well you have a family bill of rights idea that you have suggested that employers be required to take into consideration. Would you like to tell us what you would want to do to keep families involved?

Ms. FOSTER. In a case like ours, if the company had only treated us like human beings, you know, if they had had a little bit of consideration for us, you know, keep us involved.

The company did not tell us how my stepson was killed. It was a coroner that told us. The company—you know, they had no involvement with us. They walked away from us. They ran away from us. They wanted nothing to do with us.

So I think they just have to be accountable, held accountable for what they have done. They have got to stand up and say, you know, we did this. We need to do something to help.

Ms. WOOLSEY. Okay. Thank you very much.

Ms. Seminario, do you trust OSHA reporting the system that we have in place now with, I mean, lack of emphasis, 30-year-old procedures, shortage of employees. Oh, listen to me. I am leading you, aren't I?

But I mean at that end, aren't near misses recorded and reported now?

Ms. SEMINARIO. No. What ends up coming on the OSHA log, which ends up in the injury statistics, are those cases which results in medical treatment. Those are the cases that end up on the OSHA log and get into the statistics. Near misses don't end up in the log.

What gets reported to OSHA, however, in terms of particular incidents are only those cases that result in three or more hospitalizations or worker death. And so if you have a case where you have a worker that is hospitalized, a single worker, that is not required to be reported to OSHA, so there is no immediate action that is taken, you know, by the agency.

And as far as the injury statistics themselves that were talked about, there have been reason studies that compare workers' compensation records was what is on the OSHA log and other sources of information, and what they have found in at least seven states

where those detailed comparisons have been made, that the OSHA log is underreporting injuries by one-third or two-thirds.

And so there are two to three times as many workplace injuries occurring as there were being reported on the log and recorded in the overall statistics.

Ms. WOOLSEY. Okay. Thank you very much.

Mr. Halprin, you mentioned that we couldn't have a foolproof, failsafe system. So how would you look at Ms. Foster's situation with her stepson? How does that stack up, as far as you are concerned?

I mean, the equipment was modified. They didn't have the safety guard. Was that a misunderstanding? Was that a mistake? What common sense—you know, everybody who knows anything knows that that shouldn't have happened; therefore——

I mean, how would you handle that and prosecute it?

Mr. HALPRIN. I would have done a full investigation. Now, the gentleman unfortunately is part of the temporary workforce. One of the problems in this country, especially the economic times, is that temporaries frequently are brought into a site, don't have the background that a regular worker would have. There are obligations that temporary employers are supposed to provide——

Ms. WOOLSEY. Well, yes. Whose responsibility is it—the temporary worker or the employer on this one?

Mr. HALPRIN. Definitely both.

Ms. WOOLSEY. No way. It is the employer.

Mr. HALPRIN. The temporary worker—the employer is supposed to provide information if the employee is subject to the day-to-day supervision of the host employer. The host employer is also responsible.

The question is clearly the equipment is modified. Somebody needs to take into account whether there is going to be exposure to it. I don't know whether that person was injured, killed unfortunately, and I feel for that person, was supposed to be in that area, what instructions they had, whether they had the right equipment on. Something obviously went wrong, and there should be some clear lines.

Probably what OSHA needs, for example, is a machine guarding standard that clearly says if you have anything but a smooth bore, it needs to be guarded. By the time you go through thousands of pages of regulations, things get lost.

I think that particular case, it is obvious. It should have been done, but——

Ms. WOOLSEY. All right. It should have been done, and yes indeed, we do have machine guarding regulations. That is one of the things we have.

Mr. HALPRIN. The question is why the person was there, and everything else that goes along with it. And I just think we are taking particular cases that were tragic, and we don't know enough about them to say for sure in those cases what went wrong and what happened.

Ms. WOOLSEY. Okay. Thank you so much.

And my time is up, but I am going to ask Mr. Uhlmann if—the record is going to remain open, and I would really appreciate it if you would comment on where PAWA can be strengthened. If you

would, I would so appreciate your insight. And yes, of course, we would like to talk to in person about it, too.

Ms. Titus?

Ms. TITUS. Thank you very much.

I appreciate the panel's testimony. You certainly made a compelling case for the need to strengthen the OSHA requirements, both in terms of the plan and to the enforcement.

But I would like to ask an additional question about the problems created in those 20, 21 states that run their own OSHA program, because with the exception of maybe Washington and California, states may not be enforcing the plan that is supposed to be as effective as the federal level.

And I know that is certainly the case in Nevada. You heard the chairman mention, and I believe you reference this, Ms. Seminario, in your written testimony about the Las Vegas Pulitzer Prize winning story about nine deaths that occurred at construction sites run by one big construction company along the Las Vegas strip, where work occurs 24 hours a day, and the economy and time become more important than safety.

Let me just give you a few facts about Nevada OSHA, and then I want you to tell me what we can do to be sure that the states are doing a good job when they run their own program.

In Nevada, OSHA is under the Department of Business and Industry. It is headed by a person appointed by the governor. That person has intervened in at least one case to reduce penalties for a company that is known as a big donor of the governor. The budget in the state is always too low, and the office is understaffed, so the enforcement is dreadful.

If we fix the law at the federal level, how are we going to be sure that at the state level it gets enforced as well?

Ms. SEMINARIO. That is a very good question. As you point out, under the OSHA law, states have the ability to run their own state OSHA plans. Under the law they are supposed to be as effective as the federal government, and federal OSHA has got the responsibility to monitor those plans to see that they are.

One of the things that has happened over time is that the agency has not really kept up with the monitoring of plans. They did a better job of it when the plans were being developed in the earlier years, but since the plans have been certified as being final, essentially that oversight does not take place.

And so again, you point out the problems in Nevada. There are problems in Indiana. There are problems in South Carolina. There are problems in a lot of states.

And one of the things that I think that the committee needs to do is to look at the whole issue of state plans—some are very, very good and have done exceptional work—and to take a look at what is going on and the fact that we do have this real differential in protection.

But federal OSHA is supposed to be monitoring. It is supposed to be looking at what is going on. But under the law if there are problems, essentially there aren't many options.

And what the federal government can do is to move to withdraw the plan. They have only done that in very, very rare cir-

cumstances. But clearly they need to be doing the oversight in trying to move the plans to be as effective as the federal government.

With the Protecting America's Workers Act, the state plans will be required to adopt provisions and there are laws that are at least as effective, and if they don't, the jurisdiction would revert back to the federal government. So there is a requirement that they come up to the same standards that is in the legislation that is being proposed.

Ms. TITUS. I just worry about the politics at the different state levels and the funding at the different state levels so that we are ensuring that the plan that may look great is really enforced.

Mr. UHLMANN. You know, this is an issue not just for worker safety law. I mean many of our federal regulatory programs are implemented by the state, and the lead role in inspections and enforcement is done by the states.

What we can do under the OSHA Act—and you know, if the current version of the Act doesn't provide this authority, it is authority that can be provided; it wasn't one of the suggestions that I had in mind when I said I thought there were ways the Act could be strengthened, but this could be another way—is we could make clear that the federal government has the ability to bring enforcement actions when the states don't.

And that is what happens under the—environmental laws are what I know best because of my background, but when a state doesn't bring an action under state environmental laws, the federal government, the Justice Department, can bring either a civil penalty action, or they can bring a criminal case, if criminal prosecution is warranted, even though it is a program that is run by the state.

Now, I don't know that we can do—whether the current version of the OSHA Act allows that, but that is something that amendments to the Act could consider. You know, something else that amendments to the act could consider, that we do under other laws, is that we let citizens bring suit.

You know, if the government falls down on its job, and you know I was a public servant for 17 years, so I hate to say that the federal government and state governments sometimes fall down on the job, but it is probably no shock to anyone in this room that that sometimes happens—you know, it is not a bad idea to let citizens bring suit in appropriate circumstances when the government doesn't do its job.

So I mean there are ways we can get at this problem of weak state enforcement. It is not unique to this scenario you describe in Nevada, and it is not unique to the worker safety laws.

Ms. TITUS. Thank you.

Ms. WOOLSEY. Thank you.

Mr. Holt?

Mr. HOLT. Thank you, Madam Chair.

OSHA, of course, is landmark legislation. I mean it was for decades after legislation about hiring and firing workers that we got around to protecting the workplace safety.

And I am always pleased to extol the work of New Jersey's own Senator Williams in passing the OSHA legislation. And I often point out that there are hundreds of thousands of people alive

today, who don't know who they are, thanks to the work of Senator Williams and the others for the OSHA legislation, and millions more who have their limbs and lungs and health because of OSHA.

But OSHA has been a learning process. You know, we went from a time of worker beware and no standards to voluntary compliance and rather weak sanctions so that OSHA compliance becomes a cost of doing business.

Now we are looking at Ms. Woolsey's legislation that would raise the value of life and limb, and it is appropriate we look at that. But if we want to make sure that were not demeaning the value of workers and their lives, criminal prosecution is something that we really should consider to make sure that workers are—you get the protection they deserve.

We need to a lot of other things though, too, as we evolve towards better protection in the workplace. We need more research in setting the standards, and of course, funding for inspectors and better reporting.

I would like to turn to—and I guess it would be to Ms. Seminario—to one particular matter of workplace protection, where we have not kept up with the times.

Nearly 4 years ago in November 2005, the Department of Health and Human Services issued its pandemic influenza plan. Now, you may have heard on the news there is some concern right now about influenza pandemics. This report said, well, this plan's infection control provisions were really pretty weak.

And despite that, when petitioned by the AFL-CIO and other representatives of workers to issue standards to protect health care workers and responders in the event of a pandemic, OSHA denied the petition, claiming that, well, an emergency standard wasn't necessary, because there wasn't an emergency. No influenza virus epidemic or pandemic existed at that time.

So instead of issuing a standard, the Department of Labor decides it to rely on guidelines, recommendations. The guidelines are only advisory. And yet a survey by the AFL-CIO, I understand, has found that a third of facilities are not adequately prepared to protect health care workers in the event of an influenza pandemic.

Forty-three percent of the survey respondents believe that most or some of their fellow workers would stay at home, presumably with some harm to the general public.

How do we bring the standard up to date? What should we be doing for the sake of the general public, but for the sake of the health care workers?

Ms. SEMINARIO. Well, this is an area which obviously there is much focus on because of reports out of Mexico with a large number of fatalities that we are seeing.

We think OSHA needs to act. The state of California is actually moving in this area, once again leading the way. It is not just this particular strain of swine flu or concerns about avian flu. We have regular influenza that puts workers at risk.

The state of California has been moving to develop a standard on airborne transmissible diseases and is actually close to completing that rule. Hopefully, within the next few weeks it will actually be adopted as a legally enforceable rule in the state of California.

And we think it is actually a pretty good rule, and it is something that federal OSHA could look to immediately as a model and take action on.

You are right. They did put out guidelines, but from the survey that was done by the unions through their local union to steps being taken in health care facilities, in a large number of health care facilities nothing has been done.

And so I think it is something that we need to focus on, and we need to focus on now, because we indeed are facing the potential of some very significant potential exposures, and the workers on the frontline——

Mr. HOLT. If I might politely correct you, I think not now, but last year.

Ms. SEMINARIO. Last year. Exactly. Exactly. And just to be clear, the point of our petition wasn't—was basically said that we would be prepared, because when you are in that situation facing a pandemic, it is too late, right?

Mr. HOLT. Thank you.

Ms. WOOLSEY. Thank you very much.

Mrs. Davis?

Mrs. DAVIS. Thank you, Madam Chair.

Thank you to all of you. I am sorry I missed a part of the discussion, but I am not sure that you have had a chance to take a look at this particular issue.

And, Mr. Uhlmann, I understand since you were at the Department of Justice, it appears that there aren't a lot of cases that go from OSHA to the Department of Justice. Is that true? And why is that? I mean, what do you think is going on in that there aren't many referred?

Mr. UHLMANN. Yes, very few referrals. I think Ms. Seminario testified earlier this morning that in the nearly 40 years that the OSHA Act has been law, there has been only 71 criminal cases prosecuted. And the numbers sent each year is very small.

You know, certainly part of the issue is that OSHA needs to serve up more cases. I mean OSHA needs to view the criminal sanction as one that is appropriate more often—certainly more often than twice a year for 40 years.

So you know, I think there is some responsibility within OSHA, but to be fair to OSHA, you know, they could send 100 cases a year to the Justice Department, seeking misdemeanor prosecution for worker violations that resulted in death, and they are not going to see many prosecutions.

And the Justice Department is, you know, like—like everyone else in the country, they have got—they have got a lot on their plate, and they focus on felony cases.

And I know I may be sounding a bit like a broken record, but this is true in—across prosecuting offices. I was a prosecutor for 17 years. Prosecutors—it is their mantra. They prosecute felonies.

And, you know, really we tell them to prosecute felonies. Those other crimes that we are telling them are the ones we think are the most serious. Congress is telling them that. That is where they focus their limited resources.

So even if we saw a lot more referrals to the department, I don't think we will see a lot more in the way of prosecution until we do something about the fact that these crimes are just misdemeanors.

Mrs. DAVIS. If they are good communication between the DOJ and OSHA? And I think the training that is done for some inspectors that OSHA is done by the Department of Justice. Is that correct?

Mr. UHLMANN. Yes, well, what I think you may be referring to is, you know, we started—when I was the chief in the environmental crimes section, we started a worker endangerment initiative, and we reached out to OSHA.

In a Republican administration—I mean I view this—you can't really tell it sitting in this room, but I view this as a nonpartisan issue. You know, this is about worker safety for all Americans.

This is about fairness to all employers. You know, an employer who hires Mr. Halprin spends a lot of money on worker safety. They shouldn't be at a competitive disadvantage with a company that doesn't make any commitment to worker safety.

So we, you know, for 5 years ago started training OSHA, started working with them about ways cases could be brought into the criminal justice system and hopefully get better compliance with the law as a result.

And I mean OSHA was very responsive to the—the training—certainly out in the field. I mean certainly and the various OSHA offices around the country, the inspectors really see the value of this kind of working relationship.

So you know, I think the communication is decent.

Mrs. DAVIS. Appreciate that.

Mr. UHLMANN. We do need——

Mrs. DAVIS. But you said the overall problem remains in terms of the priority for those cases.

Mr. UHLMANN. Absolutely. And I think there needs to be a little more courage at the political level at OSHA, where was a little wobbly when we—you know, when we started this work——

Mrs. DAVIS. Thank you.

Mr. UHLMANN [continuing]. A little more courage to say to the business community, "You know what? This is in all of our interest." Because it really is in all of our interest.

Mrs. DAVIS. Absolutely. Thank you.

I wonder, Mr. Halprin. I don't know whether you have had a chance to review the legislation that has been referenced here in the hearing, Ms. Woolsey's Protecting America's Workers Act.

And I just wondered if, you know, just quickly, I mean, are there some red flags that you see with that? Or do you think that it represents an improvement in the situation that we have today? Where would you want to weigh in and say, "This needs to have a second look?"

Mr. HALPRIN. I have only skimmed the bill. When you find—I have talked about what I mean by "willful." For cases that are at a high level of willful, not all the ones that are currently fined in that way, some sort of criminal prosecution is clearly appropriate.

I would like to think if there is a reason for increasing the level of sanction, it is because there is a moral issue, and there is a sense that the worker's value needs to be reflected.

I am not a sympathetic with the idea that a Justice Department person feels they need to get a felony conviction on the record, and therefore they would rather spend that time on that.

My experience, at least with the people I know, is it will be incredible trauma to think about any executive I know thinking they would be in jail for 6 months. Maybe I am sounding prejudiced, but I think the drug dealers go out there with the recognition there is a good chance they are going to end up in jail, and they take that risk.

They would be tremendous trauma for a person and the family, and so I think in the right circumstance it needs to be done. It is probably underutilized, but I think the other point that I would like to make is OSHA has enforcement tools it hasn't effectively used.

If there was a problem with McWane, and it is not just OSHA, Mr. Uhlmann has pointed out the fact that it take EPA with all its enforcement powers years to achieve what it did, and the fact that it could get some OSHA violations mostly from criminal misrepresentation helped.

But EPA has the same problems. It is not just OSHA. And as high as the EPA fines are, it doesn't totally deter crime. So I am saying that there needs to be a balance.

For example, the current bill would take away the ability to do away with unclassified violations.

Mrs. DAVIS. Thank you. I see my time is up.

Ms. WOOLSEY. Your time is up.

Thank you, Mr. Halprin.

Thank you, Mrs. Davis.

Mr. Cassidy?

Dr. CASSIDY. Just to wrap up on our side, so to speak, I think we all agree that the moral imperative is how do we decrease likelihood that someone like Mr. Foster dies. And I think that what is at issue here is what is the best way to accomplish that.

And as I look at this, and Mr. Uhlmann, in your testimony you speak about how ignorance of the law under our statute is not an excuse. And I do have this kind of sense of thousands of pages of things that it would take—a scholar to try and decipher.

And so you end up with an adversarial relationship, not one where, "Hey, come help me figure this out," but rather "Oh, my gosh. Here comes the inspector. Let us hide it."

I do think apparently, as I have gathered, that there has been a different approach into perhaps helping people interpret this. And clearly we can see on workplace fatality, there has been a continued downward slope. In my mind to imply that the current method of doing it is inferior or immoral kind of rejects the fact that we have had a continued downward slope.

And I say that because intuitively I know that the first preventions of death are the low hanging fruit. And then it gets tougher and tougher, because it becomes more and more kind of out there as to where we are going to save lives.

Ms. Seminario, you mentioned, well, no, this doesn't necessarily reflect workplace injury and illness rates, because look at workers comp. But we heard testimony last year in the 110th Congress in this committee from a Mr. Fellner, who said that really you can't

compare workers comp's records with the OSHA's records because you got 50 different jurisdictions out there, and they have got different standards, and they are privately employed, and groups less than 10 are not applied to, et cetera.

So I am asking to keep the record open and at a later date if you can reply in writing to that sort of statement by Mr. Fellner from last year, I would appreciate that, because I truly want to learn this.

So I guess I would end up by saying if were going to say that the low hanging fruit for fatalities has been—I will make the assumption—has been gathered here, and yet the continued downward slope has occurred, and that most likely that there is a statistical relationship between decreased workplace fatalities and decreased workplace injuries, that perhaps this cooperative relationship has benefited us all.

That said, if you can get comments to my original question, how can you ensure the legislation continues to bring cooperation between the bureaucracy, if you will, the Justice Department and the employer group without creating an adversarial relationship that would make people want to hide their potential errors, as opposed to, "Well, come look at our errors and help us correct them." Because again, our highest moral ground is to decrease the frequency and likelihood of things such as your stepson dying.

Thank you, Madam Chairwoman.

Ms. WOOLSEY. Thank you, Mr. Cassidy.

I yield to the chairman of the committee, Mr. Miller.

Chairman MILLER [presiding]. Thank you very much, Madam Chair. And thank you for assuming the chair. I had to go to a panel on the California drought in the Resources Committee.

I want to thank our witnesses.

You know, we argue back and forth about what makes the reports and what doesn't make the report and whether there is underreporting and over reporting. And you know there is some concern that as many as 69 percent of injuries and illnesses may never make it into the survey of occupational injuries and illnesses report.

So I guess, you know, we hoped you would continue to have a downward incidence in the workplace and the rest of that. But I still think you need the due diligence. Because you know you have the case of Ms. Foster's son—small workplace, temporary worker, and put in a place of danger and ends up losing his life.

And you have the City Center project in Las Vegas that apparently, while under, you know, under the supervision of three of the largest engineering companies in the country and with all of the people managing that job, but for the Las Vegas Sun, they would have continued to kill people. Because it wasn't—the safety on the job was outrageous, given the size, the value and under the working conditions that were being assumed there. That they are working around the clock because of time and money.

So we can report this back and forth, and I guess that gives you some incidence of effectiveness, but I don't think that we are prepared to accept that as to whether or not the law is in fact protecting individual workers when they show up at individual worksites across the country.

So we are going to continue this effort. If the intent of—my intent is chair to report this bill from this—from this committee, and I appreciate the suggestions that have been made about the—about improvements that—that might be made in this legislation, but this is absolutely critical.

Again, there is a lot of discussion about thousands of pages of regulations. I don't know—we just went through 8 years of supposedly, you know, with a pro-business administration with the same secretary of labor. I don't know—didn't they ever review any of this? I don't know.

I mean, you know, it can't be that complicated. And the fact is what you have to review are those things that pertain to your worksite, your business, and the danger to your employees.

So I want to again thank you. We are going to continue to consult with you, if we might. And this hearing is going to be adjourned. And I want to say that—what are we going to do? We have got to do something here. There is always procedure. We are like OSHA.

Without objection, members will have 14 days to submit additional material or questions into the hearing record. And if there is no objection, the committee will stand as adjourned.

And thank you again.

[Additional submissions of Mr. McKeon follow:]

Prepared Statement of the Cintas Corporation

Cintas Corporation submits this statement for the record to the House Education and Labor Committee for the hearing titled "Are OSHA's penalties adequate to deter health and safety violations?" held April 28, 2009 and to the House Education and Labor Subcommittee on Workforce Protections for the hearing titled "Improving OSHA's Enhanced Enforcement Program" held on April 30, 2009.

Throughout the Committee and Subcommittee hearings on April 28 and 30, 2009, various allegations were made against Cintas that are flatly untrue and deeply concerning. Allegations that Cintas does not care about the safety of our employee-partners, does nothing to protect its workers' safety, and did nothing in response to the 2007 accident in Tulsa, Oklahoma are completely false and misleading. The accident in March of 2007 was a tragic event, and we have re-committed our energy and resources to prevent such an accident again. This submission seeks to set the record straight.

In March of 2007, one of our employee-partners in Oklahoma lost his life when he climbed atop a moving conveyor and fell into an industrial dryer. This tragic accident shook our entire organization deeply. With our longstanding emphasis on safety, it seemed unimaginable to lose a friend and employee-partner. Before the tragic accident, the company's safety record was 11 percent better than comparable-sized facilities in our industry and had been showing constant improvement. The company is re-examining all of the facets of the company's safety program and working with outside experts to enhance the program further.

Below you will find a brief history of Cintas Safety efforts and more importantly, some of the efforts taken since the tragic accident.

Brief Safety History:

- For the past 40 years, each Cintas uniform rental facility has maintained an employee-driven Safety and Improvement Committee. Each committee is comprised of frontline partners from production areas as well as plant management who meet monthly to review workplace safety procedures and guidelines.
- In 2003, the company hired Rick Gerlach, Ph.D. as Corporate Director of Safety and Health. Dr. Gerlach has more than 28 years of experience in the safety and health industry.
- Prior to the 2007 accident, the company had designated Regional Safety and Health Coordinators and partners responsible for safety at the locations.
- In the three years prior to the Tulsa accident, company employees attended more than 115,000 hours of classroom and safety training.

• 1,350 managers and supervisors completed the two-day OSHA "ten-hour course."

• We introduced a revised safety compliance auditing program in 2004. As a result of these efforts, the number of citations we received per OSHA inspection in 2004 was reduced by more than 75 percent in 2006.

Enhancements to our program since the accident:

• In 2007, we created the Executive Safety Council chaired by the CEO. This Council constantly monitors the compliance and ethics of our business practices. It helps us develop and implement processes to lead Cintas to world-class safety performance, and it includes Cintas executives and three nationally-recognized safety experts serving as advisors. These experts include former OSHA Administrator John Henshaw, former Proctor & Gamble worldwide health and safety director Dr. Richard Fulwiler, and former DuPont corporate safety and health director Michael Deak.

• Expanded wash alley training programs that include weekly re-training of all wash alley employee-partners.

• Limited wash alley access. Only partners trained in wash alley safety procedures are allowed in the alley.

• Implemented full time wash alley safety monitors whose role is to monitor activities and safe work practices any time a wash alley partner is working in the wash alley. This control is in place in all locations unless the location has a permanent engineered solution installed.

• Hired an additional 17 Regional Safety and Health Coordinators and Safety and Health Specialists around the country to help in monitoring safety initiatives in all Cintas facilities.

• Increased internal safety audits to three times annually.

• Several Cintas locations have enrolled in OSHA's Voluntary Protection Program (VPP) to achieve "Star" certification.

• Established safety scorecard to ensure compliance with all required safety initiatives and accountability by management.

• Working with manufacturers of wash alley equipment to create an engineered solution that will shut off all hazardous motion in the wash alley when someone enters it. This technology will be available to all companies within our industry.

Cintas is committed to continual improvement in our safety program and are working to become world class. We welcome the industry to utilize the best practices we are gathering and implementing to ensure accidents of this nature do not occur in the future for anyone in the industrial laundry industry. The results of our commitments are clearly demonstrated. Our total incident rate for 2008 is more than 20 percent better than the last reported government data for the same size facilities in our industry.

Founded on a family business created during The Great Depression, Cintas has become the leading business-services company in the United States, providing more than 800,000 business-customers with uniforms, entrance mats, restroom supplies, promotional products first aid and safety products, fire protection services and document management services. It's a unique value-based organization in which all employee-partners are made shareholders on their first anniversaries, sharing in combined growth and success of their company. For more than 75 years, together we have built a successful business based on "honesty and integrity in everything we do" and were recently named by FORTUNE magazine as one of "America's Most Admired Companies for the ninth consecutive year." More information can be found at www.cintas.com.

GOVERNMENT FINANCE OFFICERS ASSOCIATION (GFOA);
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION (IMLA);
INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES (IPMA–HR);
NATIONAL ASSOCIATION OF COUNTIES (NACO);
NATIONAL LEAGUE OF CITIES (NLC);
NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION (NPELRA);

May 12, 2009.

Hon. GEORGE MILLER, *Chairman;* Hon. HOWARD "BUCK" MCKEON, *Ranking Member, House Education and Labor Committee, U.S. House of Representatives, Washington, DC.*

DEAR CHAIRMAN MILLER AND RANKING MEMBER MCKEON: On April 28, 2009 the House Committee on Education and Labor held a hearing on the bill, H.R. 2067, the "Protecting America's Workers Act." Our associations would like to express our strong opposition to this legislation.

H.R. 2067 would mandate OSHA coverage for all public employees, including those currently working in non-covered states. As you know, OSHA currently excludes state and local governments from the definition of employers. Twenty- four states and two territories have voluntarily adopted the federal OSHA standards. (Three of those states and one territory cover public sector employees only.) The remaining states have set their own occupational health and safety standards tailored to the needs of their jurisdiction.

A bill that mandates federal OSHA standards on state and local governments would violate the spirit of the 10th amendment and constitute an unfunded mandate on states and localities, in direct conflict with the Unfunded Mandates Reform Act of 1995. Moreover, state OSHA protections render the bill largely unnecessary. Finally, the increasing strain on the budgets and resources of state and local governments as a result of the economic downturn makes this a particularly inopportune time to impose unnecessary federal standards.

We would be happy to meet with either of you or a member of your staff to further discuss our significant concerns with this legislation. Please feel free to contact any of our groups below.

BARRIE TABIN BERGER, *Assistant Director, Federal Liaison Center, GFOA (202) 393-8020.*

CHUCK THOMPSON, *General Counsel and Executive Director, IMLA (202) 466-5424.*

NEIL REICHENBERG, *Executive Director, IPMA–HR (703) 549-7100.*

DESEREE GARDNER, *Associate Legislative Director, NACo (202) 942-4204.*

NEIL BOMBERG, *Principal Legislative Counsel, NLC (202) 626-3042.*

MICHAEL KOLB, *Executive Director, NPELRA (760) 433-1686.*

[Whereupon, at 12:07 p.m., the committee was adjourned.]