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OSHA AND SMALL BUSINESS: IMPROVING THE RELATIONSHIP FOR WORKERS

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

EXAMINING WAYS TO IMPROVE THE RELATIONSHIP BETWEEN OSHA AND SMALL BUSINESS, FOCUSING ON OSHA RULES AND REGULATIONS TO PROTECT THE HEALTH AND SAFETY OF SMALL BUSINESS EMPLOYEES

MAY 10, 2005

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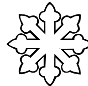

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C O N T E N T S

STATEMENTS

TUESDAY, MAY 10, 2005

	Page
Isakson, Hon. Johnny, Chairman, Subcommittee on Employment and Workplace Safety, opening statement	1
Enzi, Hon. Michael B., Chairman, Committee on Health, Education, Labor, and Pensions, opening statement	3
Murray, Hon. Patty, a U.S. Senator from the State of Washington, opening statement	4
Norwood, Hon. Charles, a U.S. Congressman from the State of Georgia, opening statement	7
Dodd, Jerrold, General Manager, Dayton United Metal Spinners, Dayton, OH; Roy Swindall, Masonry Arts, Bessemer, AL; Arthur Sapper, OSHA Practice Group, McDermott, Will and Emery, Washington, D.C.; and Lynn Rhinehart, Associate General Counsel, AFL-CIO	11
Prepared statement of:	
Jerrold Dodd	14
Roy Swindall	18
Arthur Sapper	22
Lynn Rhinehart	32

ADDITIONAL MATERIAL

Statements, articles, publications, letters, etc.:	
Questions of Senator Enzi to Mr. Sapper	4
Tom Howley, Academy of General Dentistry (AGD)	45

OSHA AND SMALL BUSINESS: IMPROVING THE RELATIONSHIP FOR WORKERS

TUESDAY, MAY 10, 2005

U.S. SENATE,
SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:08 p.m., in room SD–430, Dirksen Senate Office Building, Senator Johnny Isakson (chairman of the subcommittee) presiding.

Present: Senators Isakson, Enzi, and Murray.

Senator ISAKSON. The committee will come to order.

Ranking Member Murray is on the way and, in the interest of your time, we will make our opening statements as chairman, subcommittee chairman and full committee chairman. And as soon as Ms. Murray comes we will recognize her for her opening statement. I will begin.

OPENING STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. I wish everybody a good afternoon. I would like to welcome everyone to the first hearing of the Subcommittee on Employment and Workplace Safety. I look forward to working with Senator Murray, Chairman Enzi, ranking member Kennedy on all the important issues under our jurisdiction.

Today specifically, we are looking at the Occupational Safety and Health Administration and its relationship with small businesses. I want to welcome Representative Congressman Charlie Norwood from the State of Georgia, my home State, and a gentleman with whom I served in the United States House of Representatives on the same committee dealing with this issue. I appreciate his leadership that he has provided and we will hear from him shortly.

Having run a business for 22 years before coming to the Congress of the United States, I am familiar with a myriad of government regulations that small businesses, unquestionably the biggest employer of economic growth in this country, face daily.

Among those regulatory burdens are those imposed by OSHA. Fortunately for small businesses and their employees, Secretary Elaine Chao has consistently adopted an effective proactive approach to workplace safety emphasizing compliance, assistance and cooperative approaches to small employers in addition to strong, fair and effective enforcement. This approach has indisputably produced results as both the rates of workplace fatalities, four deaths

per 100,000 workers, and the injury and illness rate, five per 100,000 workers, are the lowest level in OSHA's 32 year history.

In light of these successes, we in Congress must continue to work with OSHA and small employers to find ways for them to cooperate to keep the workplace safe.

To this effect I anticipate hearing from Mr. Swindal who will discuss his thoughts on how workplace safety can be improved through voluntary cross-training and education, especially if OSHA personnel have a better understanding of the businesses they are regulating and inspecting.

Accordingly, small employers tell me they are often unable to fight a questionable case that is brought before them because of time and cost, and too often are forced to settle questionable cases with OSHA. Mr. Dodd will testify to cases such as that.

The appeals process for questionable citations goes like this: A small business's case will first be heard before an administrative law judge. If unsuccessful, the case can be taken to the Occupational Safety and Health Review Commission, a supposedly independent agency created by Congress. The sole function of the commission is to carry out adjudicative functions under the OSH Act. Unfortunately, frequent absences on the commission make timely adjudication of citations rare.

If still dissatisfied, an employer can appeal an OSHRC decision to an appropriate U.S. Court of Appeals by any person adversely affected or aggrieved. However, once in the Appeals Court, the courts must defer to OSHA's judgment, making OSHA the judge and jury on its own actions. Essentially, the courts must defer to OSHA interpretations of its own regulations, which as Mr. Sapper will describe, is inconsistent with legislative history of the act.

All of this litigation is extremely costly, but let us suppose that a small employer actually fights and is victorious over OSHA in court. Under current law, that company may recoup its attorney's fee if and only if OSHA cannot show that the action was "substantially justified."

This threshold is far too low. If a smaller employer is able to go through a process heavily slanted against him or her and prevail against OSHA he or she could receive full reimbursement of attorney's fees, backed by the Solicitor of Labor's office—a group of lawyers so large that if it were a private law firm it would rank as one of the largest law firms in the country.

On a personal note, I would like to add this. I have toured lots of companies. And to mention a few specifically, in recent years in my own district, the Coca-Cola Company and UPS. The thing that impressed me on the tours of both of those were the first thing I saw after the corporate logo were signs that focused on safety in the workplace.

The investment that I have seen by those companies in their company and in their employees is always safety-oriented, whether it is loading, whether it is ergonomics, whether it is awareness, whether it is hard hat requirements, whatever it might be.

The American workplace that is not safe is the most expensive thing an employer can have. All of us want a safe workplace and all of us want a regulatory environment that induces safety but does not overly burden a company that otherwise would try its

dead level best anyway to be sure it had the safest workplace possible.

With that said, I would like to introduce our distinguished chairman for his opening statement, Chairman Enzi.

OPENING STATEMENT OF SENATOR ENZI

The CHAIRMAN. Thank you, Mr. Chairman. I appreciate your holding this as your first hearing of the subcommittee covering small business and OSHA. I want to express my appreciation for all of the hard work and leadership that you provide on the committee as a whole and your diligence in attending everything.

I know that you have been working in these areas of employment and workplace safety for a long time and have a real grasp of the information, besides the diligence that you have done in doing the tours.

I reflect back on my start on this. I am an accountant. And I had a client that was an oil well servicing company and I did some numbers on it. And I went to the boss and I said you know, you could really save a lot of money if you had a safety program here. And he said okay, do it.

And I looked like the telephone guy. I said no, no, I do not do safety, I just recommend safety. He said well, you already know more about it than anybody in my company, so go ahead and do it.

So I did some safety programs and built quite an interest in it and know that safety programs do make a difference. I also know that businessmen recognize that safety programs make a difference and the only way they can work this thing harder is if they had better information, more understandable information. That is one of the difficulties that we have.

Improving workplace safety and the way the procedures and regulations under the Occupational Safety and Health Act have been administered are issues of longstanding concern. The relationship between OSHA employers and employees should be one of mutual assistance, guidance and support. OSHA, the business community and employees should not be adversaries. All sides want the same thing and that is a safe workplace. That common goal should bring them together, not push them apart.

That is why OSHA must recognize that small businesses have unique safety and health issues and they need to be helped not hindered in an effort to make their workplace safer. OSHA has already begun to address the needs of small businesses.

I look forward to the additional efforts they can make to increase the level of dialogue and ensure the lines of communication and trust and understanding are kept open between them and the employers of this country.

Workplace safety is just as important for the small employer as it is for the large employer. The importance of a worker's health and safety has nothing to do with the size of an employer's workplace or the annual payroll.

Still, as we examine these issues, we must keep in mind the fact that all government regulations, no matter how necessary or useful, do impose a burden on those businesses that are regulated. And the weight of that burden is often directly proportional to the

size of the business. This is a reality we have to consider whenever we assess the fairness and practical effect of any system of regulation and enforcement.

Employers have to read through and implement over 1,000 pages of highly technical safety regulations. Too often employers are left on their own to try and understand and comply with all of these regulations. It is hard enough for large employers who have an in-house staff of safety experts. For the small employer, whose safety expert is also the human resources manager, accountant and systems administrator—and probably waits on customers, too—the task is nearly impossible. We are talking about employers who want to do the right thing, who want to comply with the law and protect their workers. They just need help doing so, more help than OSHA can currently give them.

We need a system that encourages these good faith employers to find out how to achieve safety voluntarily. The fact is that enforcement alone cannot ensure the safety of America's workforce. I want to prevent the accident in the first place. Although inspection and enforcement must be a part of any comprehensive regulatory system, we understand that we will never be able to rely on them alone. Inspections and fines by themselves will never lead the way to a safer workplace. The overwhelming majority of employers who are committed to ensuring the health and safety of their employees need more help not more headaches.

That is why we must continue to encourage cooperation, foster the exchange of ideas and increase the level of trust between the regulators and the regulated community. If we do, we will advance the cause of workplace safety.

Today's hearing continues that discussion about what is involved in achieving greater safety and health for our most important resource, our great American workers.

Thank you Mr. Chairman.

QUESTIONS OF SENATOR ENZI TO ARTHUR SAPPER

Question 1. Currently, under the Equal Access to Justice Act, small businesses can't recover costs of litigation if OSHA can show the action it brought was substantially justified even when the company successfully challenged the citation. In your experience, is it difficult for the agency to be able to show substantial justification? Should this standard be changed? If so, how should it be changed?

If an employer that believes he was incorrectly cited nonetheless does not contest the citation for financial reasons what are the potential future effects of that citation?

Question 2. As you may be aware, there have been legislative proposals to exempt employers that are cited for non-willful violations from any monetary fine if they correct the violation within 72 hours. Do you believe such a proposal, if enacted, would have any positive effects on improving workplace safety?

Senator ISAKSON. Thank you, Mr. Chairman. Senator Murray.

OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Mr. Chairman, let me personally welcome you to the HELP Committee. I am looking forward to working with you on a bipartisan basis to strengthen the safety and health protections that America's workers depend on.

As the Ranking Member of the Subcommittee on Employment and Workplace Safety, I worked closely with our chairman, Senator

Enzi, who is here as well. I look forward to working with you to develop an equally productive partnership.

I want to thank you for calling this hearing today to discuss how OSHA can do a better job of working with small businesses to protect the health and safety of their workers.

Like you, Mr. Chairman, I do recognize that small businesses are engines for our economy. They create jobs and economic development and we want them to be strong, productive and safe. We need to ensure that health and safety standards do not unfairly burden small businesses while at the same time ensure that all workers are safe, no matter how many people their company employs. We all recognize that there are costs to these regulations. But when workers are killed or injured on the job, there is also a high cost to businesses, to communities and families and we need to be mindful of that.

Several Members of Congress have suggested changes to OSHA and before Congress looks at those changes we need to understand the context today. We need to examine how safe America's workers are and how effective OSHA is.

And frankly, the statistics are troubling. Each day more than 12,800 workers are killed or injured on the job. Think about that. More than 12,000 are killed or injured every day. Those are not just numbers. That is someone's mom or dad. It is the family breadwinner. It is someone whose life will never be the same.

To me, that really says we need to do a much better job of protecting workers and enforcing our laws on workplace health and safety.

So how is OSHA doing today? As I look at the staff levels and enforcement history and penalty assessments, frankly the picture is not very encouraging. First, OSHA does not have enough inspectors to protect American workers. At its current staffing and inspection levels it would take OSHA 108 years to inspect each job site in America just once. Think about that. We have got more than 12,000 Americans being killed or injured every day. And at this rate OSHA will not even reach every workplace until the year 2113.

That inadequate level of staffing does not give me a lot of confidence that American workers are adequately protected. I would hope that any OSHA reform proposal would increase the number of inspectors to catch up on this tremendous backlog because it is killing and crippling American workers every day.

Beyond staffing, OSHA has among the weakest enforcement capabilities of any Government Agency. For the past few years, I have worked on legislation relating to asbestos so I have looked closely at how OSHA has enforced asbestos regulations. As you may know, exposure to asbestos in the workplace skills some 10,000 Americans every year. Over the last 30 years OSHA has had a very poor track record of enforcing asbestos regulations in the workplace.

Auto repair workers, particularly our brake mechanics, are extremely vulnerable. The EPA is in the process of reexamining its Gold Book Guidance for brake mechanics. If the EPA decides to change or eliminate that guidance, then OSHA will need to issue and promote new guidelines quickly so that auto mechanics are

alerted to the dangers of asbestos exposure and can take the appropriate precautions.

OSHA's history of enforcement is not encouraging so it would not make sense to further weaken OSHA's ability to protect America's workers.

Beyond staffing and enforcement, OSHA financial penalties are often much smaller than similar penalties at comparable Government Agencies such as the Employment Standards Administration, the Equal Employment Opportunity Commission and the Mine Safety and Health Administration. For example, OSHA's penalty for a serious violation, one that poses a substantial risk of death or serious harm, is less than $900. I would expect that any OSHA reform bill would revise the penalty formula so it truly serves as a deterrent rather than just the cost of doing business.

So when I look at today's context, more than 12,000 workers killed or injured on the job every day, an agency that has too few inspectors, inadequate enforcement and weak penalties, it is not hard for me to suggest new ways to improve the agency so we can better protect America's workers.

I am troubled by some of the proposals I have seen so far because to me they appear to move in the wrong direction. I realize the purpose of today's hearing is not to review any particular piece of legislation, but I do want to take this opportunity to raise some serious concerns about some of the bills I have seen because I think we all agree with their stated goal to alleviate some real-time burdens without sacrificing health and safety.

But when I look at these bills, it is clear to me they would seriously undermine and weaken enforcement of the job safety law and will drain resources away from OSHA, an agency that is chronically underfunded.

For instance, requiring OSHA to pay the legal costs for most small private sector employers, regardless of whether the action was substantially justified, will have a very chilling effect on both OSHA enforcement and OSHA standard setting.

Today small businesses can already recover litigation costs if the Government position was not substantially justified. That protection is already available through the Equal Access to Justice Act. Changing the law only as it applies to OSHA treats the enforcement of work and safety protections differently than the enforcement of all other laws. That sends the wrong message in our country where, as I said, 12,000 workers are killed or injured every day.

It is also worth remembering that smaller businesses have a higher rate of deadly job injuries than businesses with more than 100 workers. In fact, according to the Congressional Budget Office, employers with fewer than 100 employees constitute 70 percent of OSHA's case load. Most of the small employers cited are construction-related terms—half of all occupational deaths in the construction industry occur in small employer companies. Hampering OSHA's enforcement ability in these establishments would be devastating to workers, resulting in even higher rates of worker fatalities and injuries and illness.

In addition, these bills would undermine the power of the Secretary of Labor to interpret and enforce our Nation's job safety law. We should not be expanding the size of the role of an outside com-

mission that hears only a small portion of the enforcement cases brought by the Secretary and really lacks the comparable knowledge, experience and expertise.

So if we are going to reform OSHA, we need to understand the facts today and make sure any legislation moves us in the right direction to a safer and healthier workplace.

Mr. Chairman, you have my commitment to work with you on a bipartisan basis to adopt solutions to worker health and safety that experts around the years have spent years developing. One example is the global system for classifying and labeling chemicals. We have a real opportunity to forge a bipartisan consensus on those kinds of health and safety issues, and I hope this subcommittee will move quickly to adopt a uniform approach on chemical safety and to correct the current failings of the Material Safety Data Sheets.

This approach will be crucial to the ongoing economic success of any business or industry, especially small businesses, that are becoming increasingly frustrated with the confusing and misleading safety information that they receive.

So again, Mr. Chairman, I look forward to working with you as we move forward on the critical issue of workplace health and safety.

Thank you, Mr. Chairman.

Senator ISAKSON. Thank you very much, Senator Murray.

Senator ISAKSON. Before I introduce the witnesses, it is a real personal pleasure for me to introduce Congressman Charlie Norwood, with whom I worked in the United States House for 6 years and for years before that in the State of Georgia. He has been a tireless worker on behalf of workplace safety issues, issues directly engaged in dealing with OSHA, and has been a real leader on the Committee on Education and the Workforce in the House of Representatives.

Congressman Norwood, we are delighted to have you today and we would recognize you for any remarks you would like to make.

STATEMENT OF THE HON. CHARLES NORWOOD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. NORWOOD. Thank you, Mr. Chairman.

Mr. Chairman and Ranking Member Senator Murray, we really appreciate the opportunity to come and spend a few minutes with you on this what I consider a very important issue.

My background in this is pretty simple. I have had to deal with OSHA most of my adult life, as a dentist. And I have had to deal with OSHA the last 11 years as being a member of the Education and Workforce Committee, the last 6 years being the chairman who had authorization over OSHA. So I am pleased to be here to be part of this gathering.

I do thank you, Mr. Chairman, for holding this hearing to explore a relationship between American small businesses and OSHA. As you all know, it is critically important, this relationship, in order to enhance workplace safety and health, and to allow the American small businesses to grow and prosper. That is really what this is all about.

To me, that is what these bills are all about, the relationship between the worker and their safety and health and the relationship between the small business owner and OSHA itself just simply have to be improved in order to solve the problem, for example, of not having enough inspectors. You will never have enough inspectors to inspect every small business. The only hope we have is being a consultant with small businesses, having small businesses come to us and seeking help in how to have a safer and healthier workplace.

This is part of what I see these bills doing. These are twin goals that I have sought to achieve for the past 4 years as Chairman of the Workforce Protection Subcommittee in the other body. And I am pleased to report to you that indeed I believe we are making progress on both fronts.

Mr. Chairman, the GAO reported to Congress last year that the American workforce is safer today than any other period in modern times. Workplace related injuries and fatalities are on the decline and employer cooperation with OSHA is on the rise. That is, in my view, what this is all about. That is what we should shoot for.

As the GAO study suggests, this is in large part due to the expansion of the voluntary compliance strategy that the administration has fought hard to strengthen and expand. And Secretary Chao is to be commended, in my mind, for her hard work in this regard.

While the administration has taken strides to reverse the old gotcha enforcement policies of the past—and I know about those gotcha programs enforcement firsthand—I believe that American small businesses deserve additional protection in order to level the playing field when they are dealing with this Federal Agency. Gotcha enforcement does not increase workplace safety and health and it does not promote economic growth.

However, I believe that the gotcha enforcement strategy is still alive and well in too many OSHA field offices across this country. At no other time is this more evident than when a hard-working small business owner attempts to appeal an OSHA citation.

Mr. Chairman, for too many employers, the systems for appealing an OSHA citation is simply unfair and unjust. Fairness is all the American small businessman is asking for but fairness is not what the Government promotes due to burdensome regulatory policy for the appeal of OSHA citations.

In the 109th Congress I introduced four bills that will level this playing field and restore fairness for small American businesses. And I believe fully in my heart, and our committee in the House believes, that this will in no way hurt the employer in terms of health and safety.

These four bills make commonsense reforms to OSHA and they do not reduce health and safety standards in any way, shape or form. In any forum I would debate that.

My first bill resolves the conflict between OSHA and Federal Rules of Civil Procedure rule 60(b) as it pertains to the unfairly enforced 15-day contest of citation period. It simply provides that a small employer gets his day in court when a response to a citation is delayed for a mistake or good reason.

As Chairman Enzi pointed out, not every small business can have a safety director on their payroll. Sometimes the same guy is at the front desk or on the counter selling a product is the same guy who is the safety inspector. And maybe they get a citation. And maybe it drops in the back seat of their car and they do not find it for 3 weeks later. But they ought to have, if for good reason or for a mistake, they ought to have their day in court.

The second bill increases the Occupational Safety and Health Commission from three to five members. This is not hard. We hope to solve the quorum problem that has left this commission unable to function almost two-thirds of its entire existence. That is not satisfactory if you have a citation laid on you by the Federal Government that it can be very destructive if you cannot come to a end. Sometimes you simply pay the fine rather than having that hang over your head. This problem effectively denies an employer or can deny an employer a day in court.

The third measures ensures that legal deference is given to OSHRC. This simply restores congressional intent. Look at the history. OSHA was signed by Richard Nixon. It almost did not get through until they came up with this independent commission that was truly an arbitrator and independent of OSHA citations. It would never have passed and been signed had that not been put in there. Now what we have done is we have simply taken that way.

Finally, the last bill provides attorneys' fees to small employers who prevail in litigation against OSHA. In testimony before my subcommittee, we repeatedly heard that small businesses settled with OSHA rather than challenging an unjust citation. They do this because it is cheaper to settle than pay an attorney to fight, no matter how strong you may believe that you are innocent.

Mr. Chairman, that is simply an unfair choice for a small businessman or a small businesswoman. The owner should not have to make these kind of choices.

By introducing this legislation, I hope to put an end to the loose conundrum for small employers and force OSHA to think very, very carefully, to think twice before they issue a frivolous citation or an unjust citation or issue a citation by an incompetent inspector. They need to think about that. We are not trying to not get the citations issued. What we are trying to do is make them think twice before they force a small business owner into this kind of situation.

Mr. Chairman, it really comes down to this. These four OSHA bills will prevent small employers from deciding to pay an unfair OSHA fine or making an investment in his company. It comes down to that. They are modest. They are simple. They are straightforward. They will improve the relationship between employers and the Federal Government, which is what we must have if we want a healthier, safer workplace. And very likely, in my belief at least, it will lead to that.

I thank my friend from Georgia, Chairman Isakson, for exploring these policies today and let us start thinking about them. I have thought about them so long I am tired of thinking about them. I would like to get this done.

I especially appreciate this opportunity to testify before this distinguished committee. I actually look forward to the testimony of some of the other witnesses.

Mr. Chairman, with that I yield back the balance of my time.

Senator ISAKSON. Thank you very much, Dr. Norwood. And on a personal note, I personally, and I am sure the members of the committee commend you on your miraculous recovery. You are doing great and we are very proud of you and proud that you are here today.

Mr. NORWOOD. Thank you, sir. So am I.

Senator ISAKSON. If the witnesses will assume their place at the table, I will introduce them all at once and then we will hear the testimony in the order of the introduction.

First with us today is Mr. Jerrold Dodd. Mr. Dodd has been General Manager and Chief Operating Officer of Dayton United Metal Spinners in Dayton, OH for the last 12 years. Mr. Dodd has been in manufacturing for over 35 years. Before that he served his country from 1964 to 1970 in the United States Marine Corps as an E-5 platoon sergeant.

After his service he started out as a welder while attending college at night, eventually earning a bachelors of science degree in manufacturing engineering. Most importantly, he did all this while raising three children with his wife of 39 years.

Mr. Dodd will discuss his experiences with OSHA and any suggestion he has to improve OSHA's inspection and adjudication process.

Second, we have Mr. Roy Swindal. Mr. Swindal is President of Masonry Arts, Inc., a specialty contractor company which installs exterior brick skin components. Mr. Swindal apprenticed as a bricklayer in high school and college and later worked with his father as a journeyman bricklayer and foreman. He opened his own shop, Masonry Arts, in 1979 and has seen it grow into a nationally recognized company.

He will discuss his own experience with OSHA regulations and inspections and suggest methods to encourage trust and cooperation between a small business and OSHA to ultimately make the workforce safer in a joint effort between both parties.

Third, we are pleased to welcome Mr. Arthur Sapper, a graduate of Georgetown University Law Center and the State University of New York at Buffalo. Mr. Sapper is a partner in the law firm McDermott, Will and Emery. Mr. Sapper's practice focuses on all areas of occupational safety and health law, including inspections, litigation, rulemaking, counseling and lobbying.

He litigates regularly before the Occupational Safety and Health Review Commission, the Federal Appellate Courts and various administrative bodies. Prior to joining the firm, Mr. Sapper held the position of Deputy General Counsel of the Occupational Safety and Health Review Commission.

We are also very happy to have Ms. Lynn Rhinehart with us today. Ms. Rhinehart is an Associate General Counsel for the AFL-CIO, a position she has held since 1996. Ms. Rhinehart is a former staff member of this subcommittee, serving as a staffer to former Senator Howard Metzenbaum.

Among her current responsibilities is the coordination of the Federation's legal work on occupational safety and health issues. Ms. Rhinehart graduated magna cum laude from Georgetown University Law Center in 1994, which means she is a whole lot smarter than I am. Following graduation, she clerked for 2 years in the Honorable Joyce Hens Green of the United Sates District Court for the District of Columbia.

She is here today to share her views of the AFL-CIO and proposed OSHA reform legislation.

Finally, I would like to add that we asked Mr. Earl Ohman, former general counsel of the Occupational Safety Health Review Commission to testify today but he was unable to do so due to a family commitment. He has agreed to submit testimony for the record, for which we thank him very much for his cooperation and for his willingness.

[The statement of Mr. Ohman not available at time of print:]

Senator ISAKSON. I would ask each of the members to try and stay as close to 5 minutes as they can so we can get in the testimony and all the questions for the panel.

I recognize Mr. Dodd.

STATEMENTS OF JERROLD DODD, GENERAL MANAGER, DAYTON UNITED METAL SPINNERS, DAYTON, OH; ROY SWINDAL, MASONRY ARTS, BESSEMER, AL; ARTHUR SAPPER, OSHA PRACTICE GROUP, McDERMOTT, WILL AND EMERY, WASHINGTON, DC; AND LYNN RHINEHART, ASSOCIATE GENERAL COUNSEL, AFL-CIO

Mr. DODD. Thank you and good afternoon, Mr. Chairman, members of the subcommittee.

I am Jerrold Dodd, General Manager, Chief Operating Officer, Human Resources Manager. I am all of those above, as you have heard before. I am the safety officer of Dayton United Metal Spinners Company.

I am pleased to have the opportunity to testify on behalf of the National Association of Manufacturers on ways to improve the relationship between OSHA and small businesses that benefit not only employees but their employers and their workers.

As you are aware, the NAM is the Nation's largest industrial trade association, representing large and small manufacturers in every industrial sector and in all 50 States.

NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping legislative and regulatory environment conducive to U.S. economic growth.

In light of our dedication to that mission, the NAM commends the chairman and ranking Democrat for your efforts on this subcommittee to improve this relationship between small business and OSHA.

Thank you for allowing me the time to tell you about what is unfortunately a very troublesome episode from my company's own history with OSHA.

First off, Dayton United Metal Spinners has been in business for 57 years. My brother and his wife bought the company back in 1993, but they left the running of the business in my hands. We are a manufacturer of quality metal spun products in a safe and

family atmosphere. We are small, under 20 workers, but each of the jobs in our plant is a good job which is valuable to the workers and their families.

The reason I am here today is to relate a firsthand experience of what I believe to be an OSHA injustice. I think the small business OSHA due process reforms, when passed, will certainly be a step in the right direction to correct some of the unfavorable OSHA conditions small businesses confront and maybe even prevent what I experienced from happening in the future.

On or about September 10th of 2004, one of my punch press employees severed the tips of two fingers. We packed the fingers on ice, called the emergency squad and had him flown to an amputee specialist at the Jewish Hospital in Louisville, Kentucky. The fingers were saved, reattached. He came back to work for light duty within 3 months.

Approximately 1 week after the accident an investigator for the Cincinnati, OH OSHA office stopped in. She started asking a few questions about what happened, when by sheer coincidence the injured worker stopped with his girlfriend. He came into my office so I told the investigator that she was welcome to ask him what happened.

It was at this moment that the injured worker told the OSHA investigator in front of me, his girlfriend, and my administrative assistant, that the accident was his fault. He told the investigator he was trying to set the punch press up while it was still running and he knew better. He told the investigator—he admitted his mistake, his mistake, and he said he was trained otherwise.

The investigator took him out in the parking lot and spoke with him. A little while later she came back in and said she wanted to take some pictures and talk to some more employees.

The injured worker came back to my office and told me that while outside alone with the investigator she told him never to admit wrongdoing in front of your employer and that he had grounds for a major lawsuit. The investigator also told him that he may not have a worker's compensation claim if he admitted wrongdoing and he would have to pay for all of the medical expenses himself.

I asked the injured worker if he would sign an affidavit to that effect and he later did just that. He also stated again he told the investigator the accident was his own fault. The machine should have been locked out. He failed to do that. He was also upset that an OSHA investigator would even tell him to sue the company and he should never admit to wrongdoing.

My story does not stop there. The OSHA investigator also spoke outside to an employee who was working at a machine behind the injured worker at the time of the accident. The repeated investigation of this employee was just short of harassment. The employee, after being repeatedly asked the same questions with the tape recorder being selectively turned off and on, said the investigator made her feel like she was lying and that the company was being attacked for wrongdoing. The investigator asked the second employee for her home phone number and address so she could contact her away from the plant. I also have a signed affidavit from

this employee stating exactly what happened during the OSHA interview.

Needless to say, the manner and scope of questioning by the OSHA investigator left not only my employees but me very upset. I wrote a letter to the regional director of OSHA in Chicago expressing my displeasure. To my chagrin, this letter seemed to provoke the agency even further and resulted in another visit from the first investigator with her superior, an OSHA Area Director.

In the meantime I had to hire an attorney from Dunlevey, Mahan and Fury to represent me. Remember, this entire chain of events was caused by an employee forgetting to follow safe operational procedures.

When the second visit occurred, it became more an interrogation of me than an investigation of what happened with the worker and the severed finger. The OSHA investigator was vindicated by her superior and all of a sudden then I was the bad guy.

I explained that I wanted no part of an interrogation, called my attorney, put him on the phone with the Area Director and they left.

Some time passed, but when I next heard from OSHA, it was in the form of a notice that I had been fined $17,000. Of course, small companies such as mine have little option but to pay an attorney to try to negotiate a lesser fine, despite having to pay the eventual fine and the attorney's fees. This is less than having an attorney fight the charges which would cost even more. To date I have paid over $8,000 in attorney's fees which got my fine reduced to $3,500.

The incident gets worse. In addition to the above, this injury got me kicked out of my BWC group, which I was in for having a good safety record. My projected BWC premiums are now going to run between $45,000 and $50,000 a year, compared to the $15,000 I pay now.

All of this expense is for something that an employee admitted was his fault. With the shrinking manufacturing work my company sees each year, this is all money that I cannot afford to pay.

Instead of understanding and help from OSHA, I get fined, thrown out of a group, and faced with possibly closing my doors if the money keeps flowing out for the wrong reasons.

We have worked very hard at writing safety and operational procedures that have allowed us to be audited and found compliant to AS9000 standards, necessary in our industry. We train all of our employees in these safety and operational procedures and spend large sums of money to keep our equipment safe.

If I were to make a recommendation or two, I would first suggest that OSHA investigators be retrained to get out of the employer always guilty first, then the employee mindset. They should be more of a help in showing employers what needs fixing and give the employer time to make the repairs. Fines should be a last option. There should be absolutely—they should be absolutely prohibited from giving legal advice or suggesting legal remedies to any employees that they interview.

It is next to impossible for a person running a small business to know everything there is to know in the OSHA standards manual. Investigators need to recognize that, look at what safety devices

the company already has in place, what training exists for employees and take these into consideration.

Manufacturing in the United States is under assault like never before. I believe that providers of jobs in this Nation are taxed, sued and regulated to death by what are largely unintended consequences of government action. I do not think our competitors have these same issues to contend with.

All people like me ask of lawmakers like the ones on this subcommittee is to keep a perspective of what each new law and regulation means to people trying to make a living in the rest of the country. For a long time there has been a Dayton United Metal Spinners Company and we would like to keep it that way for a long time. But when the Government comes knocking on your door, they see retribution and condemnation as its role in what amounted to a worker failing to do his job properly.

The NAM and its members are working to extend this great American economy. We want to lower the costs of production that hamstring us against the world competitors that are taking away so much of our national wealth. This subcommittee can play its part by examining new methods for agencies like OSHA to employ when reaching out to employers and workers.

No one wants an unsafe workplace. I live and work with my employees and see them around town. Do I want to alienate them and drive them away and see harm done to them? No. I am not that kind of a person and my company is not that kind of a company.

This experience with OSHA shows how sometimes its inspectors can stray from their mission of safety and health and get out of control. Legislation that would allow small businesses to have their attorneys' fees reimbursed when they successfully defend a citation would be a step in the right direction to help small manufacturers like myself in dealing with these unruly situations.

I invite you to visit your local manufacturing companies to see firsthand what they are making. The American manufacturer wants to work. Let us keep it that way. Thank you again for this opportunity and I look forward to answering any questions that you may have.

[The prepared statement of Mr. Dodd follows:]

PREPARED STATEMENT OF JERROLD DODD

Good afternoon, Mr. Chairman and members of the subcommittee. I am Jerrold Dodd, General Manager and Chief Operating Officer of Dayton United Metal Spinners, Inc. I am pleased to have the opportunity to testify on behalf of the National Association of Manufacturers (NAM) on ways to improve the relationship between OSHA and small businesses that benefit not only employers, but their workers.

As you are aware, the NAM is the Nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. In light of our dedication to that mission, the NAM commends the Chairman and ranking Democrat for your efforts on this subcommittee to improve this important relationship between small business and OSHA.

Thank you for allowing me the time to tell you about what is unfortunately a very troublesome episode from my company's own history with OSHA.

First off, Dayton United Metal Spinners has been in business for 57 years. My brother and his wife bought the company in 1993, but have left the running of the company in my hands. We have a proud history of producing high-quality metal spinning products in a safe, family atmosphere. We are small, with under 20 work-

ers, but each of the jobs at our plant is a good job; valuable to the workers and their families.

The reason I am here today is to relate a first-hand experience of what I believe to be an OSHA injustice. I think the Small Business OSHA Due Process Reforms, when passed, will certainly be a step in the right direction to correct some of the unfavorable OSHA conditions small businesses confront and maybe even prevent what I experienced from happening in the future.

On or about September 10, 2004, one of my punch-press employees severed the tips of two fingers. We packed the fingers on ice, called the emergency squad and had him flown to an amputee specialist at the Jewish Hospital in Louisville, Kentucky. The fingers were saved, reattached, and he came back to light duty within 3 months. Approximately 1 week after the accident, an investigator from the Cincinnati, Ohio, OSHA office stopped in. She started asking a few questions about what happened, when by sheer coincidence the injured worker stopped in with his girlfriend. He came into my office, so I told the investigator that she was welcome to ask him what happened.

It was at this moment that the injured worker told the OSHA investigator in front of me, his girlfriend, and my administrative assistant, that the accident was his fault. He told the investigator that he was trying to set up the punch press while it was still turned on. He admitted this was a mistake—his mistake—and said he was trained otherwise.

The investigator then took him out in the parking lot and spoke with him. A little while later she came back in and said she wanted to take some pictures and speak with some other employees. The injured worker came back into my office and told me that while outside alone with the investigator she told him to never admit wrongdoing in front of his employer and that he had grounds for a "major" lawsuit. The investigator also told him that he may not have a workers' compensation claim if he admitted wrongdoing and he would have to pay for all the expenses himself.

I asked the injured worker if he would sign an affidavit to that effect and he later did just so. He also stated again that he told the investigator the accident was his own fault. The machine should have been locked out and he failed to do that. He was also upset that an OSHA investigator would even tell him that he could sue the company and should never admit to wrongdoing.

My story does not stop there.

The OSHA investigator also spoke outside to an employee who was working at a machine behind the injured worker at the time of the incident. The repeated investigation of this employee was just short of harassment. The employee, after being repeatedly asked the same questions with a tape recorder being selectively turned on and off, said the investigator made her feel like she was lying and that the company was being attacked for wrongdoing. The investigator also asked this second employee for her home phone and address so she could contact her away from the factory. I also have a signed affidavit from this employee stating exactly what happened during the OSHA interview.

Needless to say, the manner and scope of the questioning by the OSHA investigator left not only my employees, but me very upset. Later, I wrote a letter to the Regional Director of OSHA in Chicago expressing my displeasure.

To my chagrin, this letter seemed to provoke the agency further and resulted in another visit from the first investigator and her superior, an OSHA Area Director. In the meantime, I had to hire Mr. Gary Auman of Dunlevey, Mahan and Fury, to represent me. Remember, this entire chain of events was caused by an employee forgetting to follow safe operational procedures.

When this second visit occurred it became more of an interrogation of me than an investigation of what happened with the worker and his severed fingers. The OSHA investigator was vindicated by her superior, and all of a sudden I was the bad guy.

I explained that I wanted no part of an interrogation, called Mr. Auman, put him on the phone with the Area Director, and they left.

Some time passed, but when I next heard from OSHA it was in the form of a notice that I had been fined $17,000. Of course, small companies, such as mine, have no option but to pay an attorney to try and negotiate a lesser fine, despite then having to pay the eventual fine and attorney's fees.

To date, I have paid over $8,000 in such fees and got my fine reduced to $3,500.

This incident gets worse. In addition to the above, this injury got me kicked out of my BWC group, which I was in for having a good safety record. My projected BWC premiums are now going to run between $45,000 and $50,000 a year versus the $15,000 I used to pay.

All this expense is for something that an employee admitted was his fault. With the shrinking manufacturing work my company sees each year; this is all money that I can't afford to pay.

Instead of understanding and help from OSHA, I got fined, thrown out of a group rating, and possibly faced with closing my doors if the money keeps flowing out the door for the wrong reasons.

We have worked very hard on writing safety and operational procedures that have allowed us to be audited and found compliant to meet the AS9000 standards necessary in our industry. We train all of our employees in these safety and operational procedures and spend large sums to keep our equipment safe.

If I were to make a recommendation or two, I would first suggest that OSHA investigators be re-trained to get out of the "employer always guilty first, then the employee" mindset. They should be more of a help in showing employers what needs fixing, and then give the employer time to make repairs. Fines should be a last option. They should also be absolutely prohibited from giving legal advice or suggesting legal remedies to any employees they interview.

It is next to impossible for a person running a small business to know everything there is to know in the OSHA standards manual. Investigators need to recognize that, look at what safety devices the company already has in place, what training exists for employees, and take these into consideration.

Manufacturing in the United States is under assault like never before. I believe that providers of jobs in this nation are taxed, sued and regulated to death by what are largely unintended consequences of government action. I don't think our competitors have these same issues to contend with.

All people like me ask of lawmakers like the ones on this subcommittee is to keep a perspective on what each new law and regulation means to people trying to make a living in the rest of the country. For a long time there has been a company called Dayton United Metal Spinners, and we'd like to keep it that way for a long time to come. But, when the government comes knocking on the door, like they did in my case, and only sees retribution and condemnation as its role in what amounted to a worker failing to do his job properly, then I just don't know what to think about the future.

The NAM and its members are working to extend this great American economy to a new century of growth and opportunity. We want to lower the costs of production that hamstring us against the world competitors that are taking away so much of our national wealth. This subcommittee can play its part by examining new methods for agencies like OSHA to employ when reaching out to employers and workers. No one wants an unsafe workplace. I live and work with my employees and see them around town. Do I want to alienate them, drive them away and see harm done to them from my own incompetence? No way. I'm not that kind of person and my company is not that kind of business.

This experience with OSHA shows how sometimes its inspectors can stray from their mission of safety and health and get out of control. Legislation that would allow small businesses to have their attorneys' fees reimbursed when they successfully defend a citation would be a step in the right direction to help small manufacturers like myself in dealing with these unruly situations.

I invite all of you to visit your own local manufacturing companies and see first-hand what they're making. The American manufacturer wants to work, let's keep it that way for a long, long time.

Thank you again for this opportunity and I look forward to answering any questions you may have.

Senator ISAKSON. Thank you, Mr. Dodd. Your testimony was very informative, albeit slightly a little long. So I would tell the other members if they will watch the red light and try and sum up when it is on, that would be greatly appreciated. Mr. Swindal.

Mr. SWINDAL. Chairman Isakson, members of the subcommittee, thank you for the opportunity to testify before you today on small employer concerns with rules and regulations promulgated and enforced by the Occupational Safety and Health Administration, OSHA.

I own a masonry construction business in Birmingham, AL. We do a variety of masonry, stone and blast-resistant construction in the United States.

As I am sure most of you are aware, OSHA has a variety of programs in place to exchange ideas with trade associations about best practices which their member companies have a place to protect employees on the job and improve upon the effectiveness of standards impacting their industries.

The Mason Contractors Association of America has an alliance with OSHA which focuses on scaffolding, fall protection, wall bracing and forklift safety issues. Our director of engineering, with the help of several others in the industry, has written a handbook on wall bracing which OSHA actually refers to for guidance.

These alliances are, in our view, invaluable because they allow us to share ideas with OSHA on how we can better protect health and safety of our workers. I commend OSHA for the resources they dedicate to this important effort.

The Mason Contractors Association would like to expand on this concept through our existing alliance. In essence, take it one step further and allow qualified safety personnel from our industry to train OSHA compliance officers and agency personnel responsible for writing, interpreting and enforcing health and safety standards, primarily those impacting construction including masonry and other specialty trades.

We have had some initial conversations with OSHA about this and they seem very willing to work with us to establish what we like to call a "Training Exchange Program." We have also asked the agency to add a masonry specific course to its curriculum at the OSHA Training Institute and again have someone with broad experience from our industry assist in teaching OSHA officials about the practical applications, some of the standards they write and enforce that are specific to our specialty trade.

By way of example, 2 years ago in Florida and Massachusetts two companies were cited for leaving materials on the scaffolding at the end of the work day. The materials are left on scaffolding for a number of reasons. First and foremost, it would be impractical to remove part of a pallet of bricks from the scaffolding without creating some very precarious and potentially life-threatening problems.

Moreover, many of these materials remain so the masons can simply pick up their tools the next morning and go to work. OSHA's strict interpretation of this standard would have forced contractors to bring laborers on the site an hour prior to the start of a work day and pay them overtime to remove the materials at the end of the workday, this requiring materials to be handled two or more times and opening the door for possible injury. This simply made no sense.

A group of contractors met with the Directorate of Construction of OSHA to explain to them that they were actually creating more safety problems. OSHA ultimately issued a different interpretation to allow contractors to leave materials on the scaffolding without being cited.

But it is this type of situation which could easily be avoided if we as contractors were allowed to offer very detailed training guidance to agency officials, most of whom have very little hands-on experience. While it may be the case that only the larger mason contractors would have the resources to make this training exchange

program work, every mason contract construction company small and large would ultimately benefit. Our goal here is information sharing and the resolution of interpretations and/or citations in a nonconfrontational fashion. The number one goal of any contractor is the health and safety of its employees.

If our industry is allowed to work more cooperatively with OSHA to help avoid the issuance of these certain citations due to the lack of understanding about a particular provisions' applications, we will do a great service to the industry, the OSHA officials and the Administrative Law Judges who are already overwhelmed with work. It simply makes sense to have this type of collaborative structure in place. The contractors and their employees will feel less threatened if they know OSHA has more knowledge and insight into the specifics of the trade. And the OSHA officials should be grateful for the knowledge they gain about an industry that contributes a tremendous amount of jobs and economic stability to our country.

Remember, there are literally millions of construction workers in this country today.

Again, thank you for the opportunity to present these ideas to you and I would be glad to answer any questions. Thank you very much.

[The prepared statement of Mr. Swindal follows:]

PREPARED STATEMENT OF ROY SWINDAL

Chairman Isakson, members of the subcommittee, thank you for the opportunity to testify before you today on small employer concerns with rules and regulations promulgated and enforced by the Occupational Safety and Health Administration (OSHA).

I own a mason contracting business in Bessemer, Alabama. I do a variety of masonry work throughout the country.

As I'm sure most of you are aware, OSHA has a variety of programs in place to exchange ideas with trade associations about "best practices" which their member companies have in place to protect employees on the job and improve upon the effectiveness of standards impacting their industries. The Mason Contractors Association of America has an Alliance with OSHA which focuses on scaffolding, fall protection, wall bracing and forklift safety issues. Our Director of Engineering, with the help of several others in industry, has written a handbook on wall bracing which OSHA actually refers to for guidance on wall bracing issues. These Alliances are, in our view, invaluable because they allow us to share ideas with OSHA on how we can better protect the health and safety of our workers. I commend OSHA for the resources they dedicate to this important effort.

The Mason Contractors Association would like to expand on this concept through our existing Alliance—in essence take it one step further—and allow qualified safety personnel from our industry to train OSHA Compliance officers and agency personnel responsible for writing, interpreting and enforcing health and safety standards, primarily those impacting construction and masonry. We have had some initial conversations with OSHA about this and they seem very willing to work with us to establish what we like to call a "Training Exchange Program." We have also asked the Agency to add a masonry specific course to its curriculum at the OSHA Training Institute and, again, have someone with broad experience from our industry assist in teaching OSHA officials about the practical applications of some of the standards they write and enforce such as scaffolding, fall protection, the overhand bricklaying exemption and other issues specific to our specialty trade.

By way of example, 2 years ago contractors in Florida and Massachusetts were cited for leaving materials on the scaffolding at the end of the work shift. The materials are left there for a number of reasons. First and foremost, it would be impossible to remove part of a pallet of bricks from the scaffolding without creating some very precarious and life-threatening problems. Moreover, many of these materials remain so the masons can simply pick up where they left off the previous day. OSHA's strict interpretation of this standard would have forced contractors to bring

laborers on the job site an hour prior to the start of a shift and pay them overtime to remove the materials at the end of the shift. This simply made no sense and we met with the Directorate of Construction at OSHA to explain to them that they were actually creating more safety problems. OSHA ultimately issued a different interpretation to allow contractors to leave materials on the scaffolding without being cited. But it is this type of situation which could easily be avoided if we as contractors were allowed to offer very detailed training and guidance to agency officials, most of whom have very little hands-on construction experience.

While it may be the case that only the larger mason contractors would have the resources to make this Training Exchange Program work, every mason contracting company, small and large, would ultimately benefit. Our goal here is information sharing and the resolution of interpretations and/or citations in a non-confrontational fashion. The number one goal of any contractor is the health and safety of their workforce. If our industry is allowed to work more cooperatively with OSHA to help avoid the issuance of certain citations due to a lack of understanding about a particular provisions application, we will do a great service to the industry, the OSHA officials and the Administrative Law Judges who are already overwhelmed with work. It simply makes sense to have this type of collaborative structure in place. The contractors and their employees will feel less threatened if they know OSHA has more knowledge and insight into the specifics of their trade. And the OSHA officials should be grateful for the knowledge they gain about an industry that contributes a tremendous amount of jobs and economic stability to our country.

Again, thank you for the opportunity to present these ideas to you today. I'd be happy to answer any questions.

Senator ISAKSON. Mr. Swindal, thank you very much. Mr. Sapper.

Mr. SAPPER. Thank you, Mr. Chairman.

My name is Art Sapper. I am a partner in the OSHA practice group of the law firm of McDermott, Will and Emery here in Washington. I represent today the Chamber of Commerce of the United States.

I have been practicing OSHA law for 31 years, both in the government and out. I also taught a course at Georgetown in OSHA law. And I would like to focus my remarks today on the problem that really amounts to an underlying pathology in the current enforcement of the OSHA Act, and that is judicial deference to OSHA instead of the Review Commission.

That deference was required indeed by a U.S. Supreme Court case. The U.S. Supreme Court held, in a case called CF&I Steel, that if OSHA's interpretation is merely reasonable it wins, even if the Review Commission and even if a court thinks OSHA's interpretation is wrong. They do not have to be right. So OSHA is awarded a home run, you might say, even if it, in fact, hit only a foul ball.

The correctness of the Review Commission interpretation is literally irrelevant. Why is it important? Because it was the Review Commission that Congress established in 1970 as the oversight agency over OSHA, to look over OSHA citations carefully. Yet it does not matter if the Review Commission has an opinion on the matter any more. OSHA wins if it is reasonable, even if everybody thinks it is wrong, including the court, including the Review Commission.

Now OSHA is essentially a prosecuting agency. And like all prosecuting agencies, it is supposed to do its job with zeal. It would not be doing its job if it did not do it with zeal. But when you have an agency that is supposed to act like that, you must have an oversight body over it. You must have a body that can say that OSHA is wrong, not merely that its lawyers can cobble together an argument that sounds reasonable, which is the case now. But for all

practical purposes, there is no such oversight today because of that U.S. Supreme Court decision.

What are the bad effects of this? First of all, it undermines rulemaking. You see, deference kicks in only if the standard is ambiguous. So if you are an OSHA rule writer, you are going to write ambiguities into your standards. That way you avoid all of the hard work that goes into making hard policy decisions on the public record and with evidence. You can just write the standards to be ambiguous and settle the policy issue through the back door later through interpretation. And as long as you cobble together a reasonable sounding interpretation, you are going to win.

And that is exactly what happened in the American Cyanamid case. There a major policy decision was never made in rulemaking. After the hazard communication standard was adopted, there was an internal controversy within OSHA over whether or not to impose something called target organ labeling.

It is not important what it is. Let us just say when you read the OSHA standard when it was adopted it was not there. The only thing that was there was a vague allusion to it in an appendix to the standard. The Review Commission said it is not there. So that if the label said do not breath this stuff, that is bad. It must say it causes lung damage. OK, it is a policy decision. But it was never made in rulemaking.

When it was challenged, the Review Commission said it is not there. The Sixth Circuit reversed, saying it does not matter if it is not there. OSHA's interpretation is reasonable so we are going to require millions of product labels to be rewritten based on a policy decision that was never actually made in rulemaking.

Another problem with deference. It makes for some really far out interpretations. Remember, I said the Agency is supposed to enforce the act with zeal? Well, it does. And that is the problem sometimes.

I once had a client, who happened to be a small employer but it could have been a large one, that was not guilty of an OSHA violation. This we knew to a dead certainty. It received a citation. We went to the OSHA supervisor in charge of the case and we said we would like you to withdraw this. Why? Because my client did not know of the violation. He did not know of it and he could not have known of it with the exercise of reasonable diligence.

Now if that sounds familiar to people in this room, that is because that has been the case law under the OSHA Act for over a quarter of a century. The commission and the courts all agree that that is a requirement that OSHA must satisfy before it can issue a citation.

This supervisor, a man I have known personally for many years, and who has had many years of experience in OSHA law, was unaware of the case law. Why? Because the OSHA field manual does not inform him of it because OSHA has never acceded to all of this case law. Why? Because its lawyers believe that they can cobble together a reasonable sounding argument that says that all this case law is wrong. So they do not tell their inspectors about it, they do not tell their supervisors about it. We asked this gentleman to withdraw the citation based on this case law. He did not know

about it. He was not going to take my word for it so he, logically, refused.

Now my client happened to be a small employer. He could not afford to fight this case. So he had to confess to a wrong he did not commit. He paid the citation. Yes, right, we got the penalty reduced. But he had to admit to something that he did not do wrong, all because this supervisor was never informed of this case law. And the reason that he was not informed of it is because of judicial deference to OSHA.

OSHA does not have to accede to any court decision if it thinks it can come back with a merely reasonable counter argument.

Now there is absolutely no doubt that Congress never intended this. It is not even arguable. On the floor the U.S. Senate, Senator Javits assured the Senate that the Review Commission would decide cases "without record regard to the view of OSHA". And in fact, it was that assurance that assured the passage of the Javits compromise. And that compromise permitted the passage of the OSHA Act. Without it, we would have no OSHA today.

Unfortunately, through fate, the lawyers brief to the U.S. Supreme Court in the CF&I Steel case did not bring that up to the U.S. Supreme Court. It was not there. I do not blame the U.S. Supreme Court for coming out nine to zero against the employer. It just was not there. But we know today that it is. We know today that the Senate was assured that the role of the commission would be an important one, that it oversee OSHA, that it could say when OSHA is wrong.

Finally, another problem I would like to bring to your attention about judicial deference is that yes, the U.S. Supreme Court doctrine says that OSHA can be reversed if it is unreasonable. Well, try and prove that OSHA is unreasonable. A small attorney who does not have a lot of experience with OSHA is simply not going to be able to do it. Not that I don't have a lot of respect for my colleagues in smaller towns and cities or in large towns who do not specialize in OSHA, but they do not specialize in OSHA. Even I have had tremendous difficulty trying to prove that OSHA is unreasonable, even when it is.

For example, I have had one case pending before the Review Commission where OSHA's interpretation is just crazy. It has been pending there for 10½ years by the way, at least.

The interpretation, by the way, is that whenever a maintenance mechanic has to work on a piece of equipment he has to have been trained on how to lock out that very piece of equipment before he works on it. It sounds reasonable at first glance. Then you realize that there are tens of thousands of machines in a large manufacturing plant. It would seem crazy, therefore, it would seem enough to have trained him on general lockout skills that he can then apply to each machine as he comes across them. But that issue is now pending before the Review Commission and the Review Commission is not free to decide whether OSHA is right or wrong.

So there is an underlying pathology. It makes for arrogance and not just ignorance on the part of the OSHA inspectors. And the Review Commission was established, Mr. Chairman, to make sure that that is cabined, that zeal is controlled.

I thank the chairman for his time.

[The prepared statement of Mr. Sapper follows:]

PREPARED STATEMENT OF ARTHUR G. SAPPER

Mr. Chairman, and members of the subcommittee, I am pleased to be testifying before you this afternoon. I am a member of the OSHA Practice Group of the law firm of McDermott Will & Emery LLP.

I am testifying today on behalf of the U.S. Chamber of Commerce. I am a member of the Chamber's Labor Relations Committee and its OSHA Policy Subcommittee.

For 31 years, I have been deeply involved in OSHA law. For 12 of those years, I served in the Government. I spent over 10 years at the Occupational Safety and Health Review Commission, where I became Deputy General Counsel. I also spent 2 years at the Federal Mine Safety and Health Review Commission as its Special Counsel. For over 17 years, I have advised employers regarding their obligations under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651–678, and I have litigated some of the groundbreaking cases under the statute. I have written and lectured on OSHA law. I have helped to co-author treatises on the OSH Act, including the well known American Bar Association treatise, OCCUPATIONAL SAFETY AND HEALTH LAW (2d ed. 2002). I was for 9 years an adjunct professor at Georgetown University Law Center, where I taught a graduate course in OSHA law.

Many of the U.S. Chamber's members are small-and medium-size companies. The burden of OSHA enforcement falls with special weight upon them, for they can rarely afford to defend themselves against OSHA charges. Unfair aspects of OSHA enforcement—and there are unfair aspects—make it especially difficult for them to assert their rights and often deprives them of a fair hearing entirely.

We therefore encourage the subcommittee to favorably report several bills amending the Occupational Safety and Health Act that we hope will be introduced shortly. These are moderate and limited bills. They are narrowly targeted at some of the worst problems with OSHA enforcement. They do not affect OSHA's ability to adopt standards. They do not affect OSHA's inspection authority. They do not diminish the obligations of any employer or diminish workplace safety. They do not take away any power that Congress in 1970 intended that OSHA have. Yet, they will make important improvements in the OSH Act. They will restore balance to OSHA's enforcement of the act, and give small businesses a fair chance to plead their case. They will enhance public respect for the fairness of OSHA enforcement, which is essential if the act is to be effective.

A PATHOLOGY IN THE ENFORCEMENT OF THE OCCUPATIONAL SAFETY AND HEALTH ACT

Mr. Chairman, there is a pathology in the enforcement of the OSH Act. It causes courts to issue wrong decisions. It undermines the rulemaking process. It lets OSHA's prosecutorial zeal go unchecked. It encourages arrogance in OSHA's attitude toward employers. It effectively strips from many employers a fair opportunity to assert their rights. And it betrays a promise made to the United States Senate in 1970, when the OSH Act was passed.

That pathology is the emasculation of the agency that Congress established to be a check on OSHA's excesses—the Occupational Safety and Health Review Commission.

That emasculation occurred in *Martin v. OSHRC (CF&I Steel Corp.*), 499 U.S. 144 (1991), where the Supreme Court held that an OSHA interpretation of an ambiguous regulation must be upheld if the interpretation is merely "reasonable"—*even if the court believes that the interpretation is wrong*. The decision awards OSHA a home run even if the Review Commission and a court think that OSHA has hit only a foul ball. Some courts have even extended that decision to require deference to OSHA even when OSHA interprets the OSH Act, as opposed to OSHA's own standards. As I shall show later, this course of decisions is contrary to *known* congressional intent and to a pledge made directly to the United States Senate.

I can hardly exaggerate the adverse effects of this decision on the fairness of enforcement under the OSH Act.

As I have said, the decision emasculates the Review Commission as a check on OSHA. Now, OSHA is supposed to enforce the law with zeal. But zeal comes with a price—it can cause enforcement officials to get carried away. It can cause OSHA enforcement officials to resort to wrong legal interpretations merely because their lawyers can make them sound reasonable. Zeal needs to be held in check and overseen by persons chosen for their impartiality. That is why the commission was created—to serve as an impartial check on prosecutorial over-zealousness. But the Review Commission can no longer do that.

Chief Justice John Marshall once said that the duty of the courts is "to say what the law is." The Review Commission may no longer say what the law is. It may say only whether OSHA's lawyers are reasonable—not right—when they say what the law is. This disability prevents the Review Commission—the body that Congress established to act as a check on OSHA—from doing its job. The Commission cannot restrain over-zealous enforcement officials if it must follow legal interpretations because they are merely defensible, and ignore whether they are wrong. That is the nub of the issue.

SOME EXAMPLES

The following are just a few examples of the unfortunate consequences of judicial deference to OSHA:

- *Depriving small employers of their day in court*. A clear example of the destructiveness of deference to OSHA is the Second Circuit's decision in *Chao* v. *Russell P. Le Frois Builder, Inc*., 291 F.3d 219 (2d Cir. 2002). There, OSHA's lawyers had devised an absurdly hyper-technical argument that the Review Commission could not relieve even *deserving* employers from merely procedural defaults. The court held that it was required by CF&I *Steel* to follow that interpretation. (See the fuller description of the case below.)
- *Telling the public to ignore the commission*. In 1995, OSHA issued an interpretation letter (Letter to L. Kreh from R. Whitmore (April 4, 1995)[1]) that told an employer to ignore a Review Commission decision. OSHA did not appeal the decision. Instead, it just ignored it and, worse, told the public to ignore it too. This is the kind of the arrogance that the *CF&I Steel* decision breeds.
- *Imposing target organ labeling without rulemaking. In Martin* v. *American Cyanamid Co*., 5 F.3d 140, 16 BNA OSHC 1369 (6th Cir. 1993), rev'g 15 BNA OSHC 1497 (Rev. Comm'n 1992), the issue was whether millions of product labels had to be re-written. OSHA decided—*after the rulemaking was over* and after internal disagreement—that labels on chemical containers must state the bodily organs they affect. So, "Do Not Inhale" was no longer good enough; only "Causes Lung Damage" would do. Neither the standard nor its legislative history said that OSHA was right, and OSHA could point to only an ambiguous statement in an appendix to the standard. The Review Commission held that OSHA's interpretation was wrong. A court of appeals upheld OSHA's interpretation, however, not because it was right, but because it was merely "reasonable." OSHA thus used deference to avoid rulemaking requirements, to evade scrutiny by the Office of Management and Budget under the Paperwork Reduction Act, and to force millions of perfectly sensible product labels to be re-written.
- *Machine-specific lockout training*. OSHA has interpreted its lockout standard (29 C.F.R. § 1910.147) to require that maintenance employees be trained on how to lock out every machine they service. Do the words of the standard clearly require such machine-specific training? No. Did OSHA decide in rulemaking that it should be required? No. Would such a requirement be massively expensive? Yes. Would employees remember such training? No. Is such a requirement unreasonable? Yes, but it is very expensive to prove it. We were counsel to a large industrial corporation that received a citation requiring machine-specific training. To our client, the expense of litigating the issue would have been too high and, given CF&I *Steel*, the probability of success too uncertain, to justify litigation. This employer was thus forced to admit violations it did not commit.
- *Chemical-specific hazard training*. OSHA has taken the position that when employees are given chemical safety training, the employees must be told the name of every plant chemical and the hazard it presents. This is an absurd interpretation. For example, if you run a gasoline refinery, which has literally thousands of different flammable liquids, you must have a trainer uselessly recite to employees a mind-numbing list of the name of each flammable liquid. To challenge this view, a coalition of seven major trade associations had to finance and file an *amicus curiae* brief documenting in detail the error in that interpretation. That substantial effort was driven by the effect of the *CF&I Steel* decision. Ordinary employers—even large employers—simply cannot afford to mount such an effort. And so they forgo their rights.

These are just a few examples of the destructiveness of judicial deference to OSHA. What cannot be cited to the Senate are the thousands of cases that are never brought because this destructive doctrine makes it too expensive and, frankly, fruitless for employers to seek justice in the first place.

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[1] The letter can be found at http://www.google.com

EFFECTS ON RULEMAKING

The *CF&I Steel* decision has also had the perverse effect of rewarding OSHA for writing ambiguities into its standards. The reason for this is that, under *CF&I Steel*, ambiguity enhances OSHA's litigating position. If a standard is ambiguous, OSHA need only put forth a "reasonable" interpretation and it will win. This permits OSHA to resolve major policy issues through "interpretation" and without rulemaking. That is why key provisions of the ill-fated ergonomics standard, for example, repeatedly used the ambiguous words "reasonable" or "reasonably" to describe the employer's duty.[2]

The decision also encourages OSHA to evade congressionally imposed requirements for OSHA standards, such as proving "feasibility" and "significant risk." It encourages OSHA to evade congressional oversight, to evade oversight by the Office of Management and Budget under the Paperwork Reduction Act, and to evade the requirements of the Small Business Regulatory Enforcement Fairness Act. This is precisely what happened in American Cyanamid, for example. There, OSHA was able to impose a major policy decision without rulemaking and without scrutiny by the Office of Management and Budget under the Paperwork Reduction Act.

The *CF&I Steel* decision has also caused OSHA to develop at least two non-rulemaking avenues for making new rules—interpretation letters and compliance directives. Especially since the *CF&I Steel* decision, the interpretation letter culture has flourished in the OSHA field. The issuance of such letters is often featured in occupational safety and health journals[3] and newletters.[4] OSHA's abortive "home office" policy was announced in an interpretation letter.[5] OSHA's lawyers cite such letters against employers when they favor their litigating position.[6] Similarly, OSHA has taken to announcing major policies in compliance directives, such as its policy on multi-employer worksites.[7] As the home-office debacle shows, this secret law-making process encourages loose thinking and irresponsible decisions. Instead of OSHA regulating through rulemaking, where public comment must be considered and other protections (such as those in the Regulatory Flexibility Act) must be provided, OSHA issues interpretations based merely on internal discussions. The result is rules made without rulemaking.

EFFECTS ON ENFORCEMENT AND SMALL EMPLOYERS

But worst of all is the disrespect that these decisions breed for the commission and even the courts. I will give you an example of how this attitude deprives employers of their legal rights. For over a quarter century, the commission has held that a violation cannot be found unless OSHA shows that the employer knew or should have known of the violative condition.[8] The courts have accepted this holding.[9] One would think that OSHA would, therefore, educate its employees and compliance officials on this principle and that it would be reflected in OSHA's Field Information Reference Manual but neither is the case.

I have had settlement conferences with both long time and new area directors who give me blank stares when I mention the knowledge principle. Their unawareness means that the company will have to contest the citation and then spend time and money fighting charges that should never have been made. Small and medium size employers can't afford to do that, and even large employers often

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[2] See 29 C.F.R. § 1910.900(j)(iv), (s)(2), and (z), published in 65 Fed. Reg. 68261 (2000).

[3] E.g., BUREAU OF NATIONAL AFFAIRS, OCCUPATIONAL SAFETY AND HEALTH REPORTER: CURRENTS REPORTS, Index to Vol. 33, Nos. 1–38 (Jan. 2—Sept. 25, 2003) (listing 15 stories in 9 months).

[4] E.g., AcuTech, ACUSAFE NEWS "Insider: Update to OSHA Changes on PSM Interpretation" (January 2000) (Attachment T).

[5] See "OSHA's Policy Concerning Employees Working At Home," Hearings before the Committee On Education and the Workforce, Subcommittee on Oversight and Investigations, United States House Of Representatives (Jan. 28, 2000). News reports about the controversy were broadcast on, for example, CNN Headline News on January 5, 2000. The letter was withdrawn. See Letter from Richard E. Fairfax to T. Trahan (November 15, 1999).

[6] *E.g., Beaver Plant* Operations, Inc., 18 BNA OSHC 1972, 1974 n.6 (No.97–152, 1999).

[7] OSHA Directive CPL 2-0.124, Multi-Employer Citation Policy (December 10, 1999) <http://www.osha-slc.gov/OshDoc/Directive_data/CPL_2-0_124.html>.

[8] *E.g., Pride Oil Well Service*, 15 OSHC 1809, 1814 (OSHRC 1992); *Southwestern Acoustics & Specialty, Inc*., 5 OSHC 1091 (OSHRC 1977).

[9] N.Y. *State Elec. & Gas Corp.* v. *Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996); *Carlisle Equip. Co.* v. *Sec'y of Labor*, 24 F.3d 790 (6th Cir. 1994); *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350 (3d Cir. 1984); *Capital Elec. Line Builders* v. *Marshall*, 678 F.2d 128 (10th Cir. 1982); *Ocean Elec. Corp.* v. *Sec'y of Labor*, 594 F.2d 396 (4th Cir. 1979); *Dunlop* v. *Rockwell Int'l*, 540 F.2d 1283, 1289–92 (6th Cir. 1976); *Horne Plumbing & Heating Co.* v. *OSHRC, 528 F.2d 564 (5th Cir. 1976); Brennan* v. *OSHRC (Alsea Lumber), 511 F.2d 1139 (9th Cir. 1975).*

find the prospect too expensive, and so they must accept unjustified citations. The result is occasional justice for large employers and no justice for small ones. I have had to tell small employers and medium-size employers who were innocent of any violation, "Yes, you are right, OSHA is wrong, but you can't afford to prove it."

The decision also encourages in OSHA a palpable arrogance. A safety expert I once knew complained to me shortly after the *CF&I Steel* decision came out that OSHA had suddenly become arrogant in its behavior. As a great legal scholar once said, "There is nothing so calculated to make officials and other men disdainful of the rights of their fellow men, as the absence of accountability." [10]

IT WASN'T SUPPOSED TO BE THIS WAY: THE PROMISE MADE TO THE SENATE

The great irony is that it was not supposed to be this way. This we know *for certain*. The legislative history of the compromise that permitted the passage of the OSH Act indisputably proves this.

In 1970, the act almost did not pass. Many feared that, if all functions under the Act were placed in the U.S. Labor Department, that Agency would become too powerful and the confidence of employers in the fairness of the act would be shattered.[11] Proponents of giving all powers to the Labor Department argued that a departmental appeals board (i.e., a board established by Cabinet agencies to adjudicate cases brought by an enforcement bureau) would afford sufficient oversight and independence.[12] Such boards decided cases *de novo* and their views were given deference by the courts.[13] But distrust of internal appeals boards was widespread, and a veto was threatened by the President.[14] To permit the passage of the act, a compromise was agreed upon: An independent Review Commission would be established as a check on prosecutorial excess. [15]

The legislative history directly addresses whether the Review Commission would defer to OSHA. The author of the compromise, Senator Jacob Javits, whom even the Labor Department's own historian has stated "played a major role in the passage of the act," [16] specifically assured the Senate that the commission would decide cases **"without regard to"** OSHA. He stated that adjudication would be conducted by "an autonomous, independent commission which, *without regard to the Secretary*, can find for or against him on the basis of individual complaints." [17] On the strength of that assurance, Senator Holland immediately declared his support, stating that "that kind of independent enforcement is required." [18] On the heels of that remark, the Senate passed the OSH Act. These remarks appear to be the only legislative history that directly addresses the deference issue. They indisputably show that the U.S. Senate and the Congress intended that the commission not defer to OSHA.

Deference to OSHA is, of course, contrary to congressional intent, for the commission cannot both decide cases "without regard to" OSHA and also defer to its views.

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[10] Leon Green, *Public Destruction of Private Reputation—A Remedy*?, 38 MINN. L. REV. 567, 572-73 (1954), *quoted in* David W. Robertson, *The Legal Philosophy of Leon Green*, 56 TEX. L. REV. 393, 436 (1978).

[11] S. Rep. No. 1282, 91st Cong., 2d Sess. 55 (1970), *reprinted in* SENATE SUBCOMMITTEE ON LABOR, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92d Cong., 1st Sess. at 141, 194 (Comm. Print. 1971) (debate "so bitter as to jeopardize seriously the prospects for enactment . . .). See also the pointed remarks by Senators Dominick and Smith appended to the Senate Report at 61–64, Leg. Hist. at 200-03.

[12] S. Rep. at 15, Leg. Hist. at 155.

[13] For example, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), gave all administrative functions to the Department of the Interior. That department established an enforcement arm, the Mining Enforcement Safety Administration (MESA), and an adjudication arm, the Interior Board of Mine Operation Appeals (IBMA). The IBMA reviewed questions of law *de novo*, without deference to MESA (*see, e.g., Eastern Associated Coal Corp*., 7 IBMA 133, 1976–77 CCH OSHD ¶21,373 (1976) (*en banc*); 1 COAL LAW & REGULATION, ¶ 1.04[9][b][iii], p.1–49 (T. Biddle ed. 1990) ("Of course, the Board could independently decide questions of law.")), and its views were given deference by courts. *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976) (IBMA's view "must be given some significant weight"). (MESA was later transferred to the Labor Department and became MSHA after the Federal Mine Safety and Health Act of 1977 was passed; the IBMA's functions were transferred to the newly-created Federal Mine Safety and Health Review Commission.)

[14] AMERICAN BAR ASSOCIATION, OCCUPATIONAL SAFETY AND HEALTH LAW 32–33 (2d ed. 2002).

[15] *Id*.; Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous*, MONTHLY LAB. REV. 22–23 (MARCH 1981).

[16] Judson MacLaury, "The Occupational Safety and Health Administration: A History of its First 13, 1971–1984," available at http://www.dol.gov/asp/programs/history/mono-osha13introtoc.htm#jud,esp. Chapter 1, "George Guenther Administration, 1971–1973: A Closely Watched Start-Up" (http://www.dol.gov/asp/programs/history/osha13guenther.htm) (Javits "a New York Republican who had played a major role in the passage of the Act").

[17] Leg. Hist. at 463 (remarks of Senator Javits).

[18] *Id.* at 463; *see also id*. at 193–94, 200-03, 380-94, 479.

Moreover, deference makes the commission even more subservient than the department appeals boards that Congress in 1970 specifically rejected as insufficiently independent.

So why did the *CF&I Steel* decision come out the other way? Unfortunately, the employer's brief in that case did not bring Senator Javits's floor statement to the Supreme Court's attention. The employer's brief did not quote or cite the remark and, apparently as a result, the Court did not discuss it. The employer, CF&I Steel, was then in bankruptcy, used a sole practitioner with almost no OSHA experience, and apparently could not afford the cost of thorough legal research.[19] The remark was briefly mentioned in only an *amicus curiae* brief and apparently overlooked. Thus, one cannot blame the Supreme Court for this misstep. The Senate should, however, cure it.

We urge the Senate to redeem the promise made to its members by Senator Javits by restoring the Review Commission's proper place under the OSH Act.

THE VACANCY PROBLEM

Another bill before the committee would expand the Review Commission from three to five members. This is a much-needed reform, and we most respectfully urge that it be passed.

For over two thirds of its existence, the commission has been so paralyzed by frequent vacancies that it has been unable to do its job. At the moment, the commission has only two members, which nearly always results in paralysis. Unfortunately, that is common. For about half its existence, the commission has had two or fewer members and, for over a third of that time, it has had only two members. For 20 percent of that time, it lacked even a quorum of two. Between 1996 and 1999, it had a full complement for only a third of the time. So cases sit, often for many years, and the backlog mounts as new cases come in. One large and important case has been pending before the Commissioners for 11 years.

This endemic problem has greatly damaged public respect for the commission and prevented it from doing what Congress expected—decide cases expeditiously and keep a watch on OSHA's excesses. This would be far less likely to happen if the OSHRC had five members. As I mentioned above, I have served at both the OSHRC and its counterpart under the Mine Safety Act, the Federal Mine Safety and Health Review Commission (FMSHRC), which has five members. The difference between the two agencies is like night and day. A major reason for this is that the FMSHRC has five members while the OSHRC has only three. Because it has five members, the FMSHRC has enjoyed a much more stable membership than the OSHRC. The FMSHRC can usually be assured of having at least a quorum of three to decide cases. The OSHRC cannot.

We respectfully urge the Congress to expand the commission to five members.

ATTORNEYS' FEES—LEVELING THE PLAYING FIELD JUST A BIT

The bill on attorneys' fees is a modest step in the right direction. It would award attorneys' fees and expenses to the very smallest employers if they win. It applies to employers with not more than 100 employees and a net worth of not more than $7 million and applies only to OSHA.

The Equal Access to Justice Act (EAJA) has not succeeded in protecting small employers from erroneous OSHA prosecutions. The principle reason is that, under the EAJA, even if an employer wins, OSHA does not have to pay the employer's attorneys' fees unless OSHA's position was not "substantially justified." That is far too easy a target for OSHA to hit. OSHA's specialized lawyers can almost always come up with a plausible justification for the prosecution, and that is in practice all that they need to show. And it is difficult and expensive to prove that OSHA's position was not "substantially justified" even if it was. Even if a small employer proves that he or she is innocent and OSHA should not have brought the case, that employer must still start another proceeding, incurring even more expenses, to prove that OSHA's position was not "substantially justified." This is a formidable deterrent to seeking fees, particularly since OSHA can meet this test relatively easily.

The bill will help solve this problem, and somewhat re-open the door to the courthouse for small employers. To be sure, the bill's effect will be modest, as it covers only the smallest of the small employers covered under the EAJA, which applies to

[19] That CF&I Steel was then in bankruptcy is shown by *United States* v. *Reorganized CF&I Fabricators of Utah, Inc*., 518 U.S. 213 (1996). That it was represented by a small practitioner is shown by the legal directory at http://pview.findlaw.com/view/2222453_1?noconfirm=0. That this small practitioner had not previously litigated OSHA cases can be shown by a Westlaw or Lexis search of the commission's cases.

employers of 500 employees and not more than $7 million. Few small employers will want to gamble on winning in court. Few will beat OSHA's specialized attorneys. Nearly all will continue to settle at the informal conference stage, to which this provision does not apply. Nevertheless, the prospect of having to pay attorneys' fees and expenses should encourage OSHA and its lawyers to be sure of their legal ground before prosecuting a small employer. It will force them to focus on employers that truly deserve their attention. That will assuredly be a good thing.

Now some will argue that this provision will "chill" legitimate enforcement by OSHA, because the expenses will be paid from OSHA's budget. However, the Congressional Budget Office estimated the cost of a previous version of this legislation to OSHA at about only 3 million dollars per year. This seems to be a small price to pay to make OSHA think twice about the strength of its case before going after the small employer and to inject a little justice into a system that grinds up small employers in litigation costs and effectively denies them the opportunity to vindicate themselves.

GIVING SMALL EMPLOYERS A NEEDED BREAK FROM DEFAULT JUDGMENTS

Right now, the case law under the OSH Act deprives employers—and especially small employers—of the same right to seek relief from a default judgment possessed by nearly every other litigant in the Nation. If a small employer fails to file an answer to a complaint on time in almost any other court, that court has the power to relieve the small employer of the default, and give him a day in court. But that is not true under the OSH Act. According to a recent decision by the U.S. Court of Appeals for the Second Circuit, which I will soon describe, an employer flatly loses its opportunity to defend itself before the Occupational Safety and Health Review Commission, and will be deemed guilty, if it misses a rigid 15 working day deadline to file a notice contesting an OSHA citation, even if the employer had a good excuse for missing that deadline. The employer is out of luck and the Government wins without even proving its case.

Although OSHA recently announced that it would no longer urge this interpretation, administrations change and there is no guarantee that a future OSHA will adhere to this course. Accordingly, a bill to cure this problem permanently is needed.

THE FACTS OF THE LE FROIS CASE—AN UNDISPUTED CASE OF EXCUSABLE NEGLECT

Take the case of Russell P. Le Frois Builder, Inc. OSHA issued citations and $11,265 in proposed penalties to that company by certified mail. A secretary for the company got the envelope from the post office, and put it with the day's other mail on the front seat of her car. The envelope with the OSHA citation apparently slipped behind the seat, where it was found after the 15 working day contest deadline expired. The company had used the same mail pickup system for 18 years and had not previously had a problem with it. Le Frois promptly filed a notice of contest, and asked the independent Occupational Safety and Health Review Commission for "a chance to tell our side and to defend ourselves." The commission excused the lateness of the notice of contest, finding this to be a case of excusable neglect.

OSHA agreed that the *Le Frois* case involved excusable neglect. But OSHA appealed anyway to the U.S. Court of Appeals for the Second Circuit—and won, with one judge dissenting. *Chao* v. *Russell P. Le Frois Builder, Inc*., 291F.3d 219 (2d Cir. 2002). OSHA convinced the court that the Review Commission lacked the power to relieve an employer from a default on the ground of excusable neglect.

THE UPSHOT—EXCUSABLE NEGLECT IS IRRELEVANT

The Review Commission thus stands nearly alone among the courts of the Nation in lacking the power to relieve an employer of a procedural default caused by neglect that is excusable. If this result makes no sense, that is because sense has nothing to do with it. OSHA's litigation position and the decision of the Second Circuit turn instead on a hyper-technical reading of the OSH Act and judicial deference to OSHA. The decision holds that Section 12(g) in which Congress ordered the commission to apply court rules, including a rule permitting relief from default judgments—was overridden by Section 10(c) of the OSH Act, which makes uncontested citations final and not subject to review.

I will spare the subcommittee my technical analysis of the matter. Suffice it to say that the bill would do away with this unequal result and put employers on the same footing as nearly every other litigant in the Nation: They will have the right to ask for relief from a default judgment and, after explaining, have a reasonable opportunity to obtain that relief. This bill would permit the commission to grant relief in rather narrow circumstances—when the default is due to "mistake, inadvertence, surprise, or excusable neglect." That language is taken directly from Federal

Rule of Civil Procedure 60(b), which has long been interpreted by the commission and the courts to permit relief if there is a legitimate reason.

For that reason, the change brought about by this bill will be modest. Under the bill, comparatively few employers will qualify for relief from default. The effect on OSHA's enforcement program will be small. But small employers will notice it. They will know that under the OSH Act they can at least have a shot at justice. Why is a shot at justice important? Because the consequences of being unable to appeal an OSHA citation can be severe and far-reaching. They include:

- Payment of proposed penalties. Penalties can range up to $7000 for "serious" and non-serious violations, from $0 to $70,000 for each "repeated" violation, and $5000 to $70,000 for each "willful" violation.
- Inclusion of the citation on the employer's "history of previous violations," which raises subsequent penalties, and which is available to the public to see on the Web.
- Exposure to subsequent "repeated" or "willful" violations, even if the subsequent violation occurred at a different workplace or years later.[20]
- Disqualification in some jurisdictions from bidding on public construction contracts. E.g., CAL. GOV'T CODE § 14661(d)(2)(B)(vi)(II).
- Use of the citation against the employer in civil litigation.[21]
- A requirement to abate the cited condition. This might require that a factory be rebuilt or a construction method be abandoned. It might require that a machine be modified to meet specifications in an inapplicable standard. *See, e.g., Losli, Inc.*, 1 BNA OSHC 1734 (OSHRC 1974), where a failure to contest a citation meant that a metal shear had to be modified to meet inapplicable specifications for power presses—a nonsensical result.

Moreover, there is more than one way that small employers can innocently fail to timely contest a citation, aside from losing a mail envelope. For example, a notice of contest sent to the wrong agency—to the Review Commission rather than OSHA—is ineffective.[22]

Legislation to permanently fix this problem should be introduced.

Thank you for permitting me to participate in this afternoon's panel. I look forward to answering any questions that you may have.

Senator ISAKSON. Thank you, Mr. Sapper. Ms. Rhinehart.

Ms. RHINEHART. Thank you, Mr. Chairman, Mr. Chairman and Senator Murray.

I appreciate the opportunity to testify this afternoon on measures to improve safety and health protections for America's workers, and particularly workers at small businesses. Clearly, a lot of work remains to be done.

I appreciate the opening comments of the Senators and the panelists. I think it is clear that we all agree and support job creation in America. We all want to see increased employment and see our economy grow. We also all support workplace safety to protect America's workers. The question is how we get there.

The fact is that there is much work that still needs to be done. We have serious safety and health problems in America's workplaces.

Senator Murray recounted these statistics better than I can and so I will be very brief in summarizing just a couple. Each day 15 workers die on the job, over 5,500 a year. That is not counting the tens of thousands of workers who die from occupational diseases like cancer caused by asbestos, benzene and other substances. There are more than 12,000 workers a day who are injured on the job, more than 4 million workers each year. That is the population of many small towns in America who get injured on the job every day of every year in this country.

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[20] *See Potlatch Corp.*, 7 BNA OSHC 1061, 1064 (OSHRC 1979) (no time or location limit on "repeated" violations).

[21] *E.g., Felden* v. *Ashland Chemical Co.*, 631 N.E.2d 689 (Ohio App. 1993) (admitting OSHA citation); *Industrial Tile* v. *Stewart*, 388 So.2d 171 (Al. 1980) (same).

[22] *See Fitchburg Foundry*, 7 BNA OSHC 1516 (OSHRC 1979) (§ 10(a) requires notice of contest to be sent to "the Secretary").

The cost of these injuries, according to data produced by the Liberty Mutual Insurance Company, is more than $1 billion a week. Not $1 billion a year, $1 billion a week. So it is an extremely expensive cost to our Nation, to workers, to their families. The fact is that prevention of these injuries and illnesses is good for workers. It is good for families. And it is good for the bottom line.

Now there are many well-meaning good employers out there doing the right thing, trying to protect their workforce and paying attention to job safety issues. But we would not have 4 million injuries in America today and 50,000 to 60,000 workers being killed and dying from occupational disease in this country if everybody was doing the right thing. So clearly, there are problems that still need to be addressed.

One of the problems is that we have a job safety agency that is chronically underfunded and has just an enormous job to do with very limited resources. OSHA gets about $450 million a year to protect the health and safety of more than 100 million workers at more than 8 million worksites. Federal OSHA has less than 1,000 inspectors. There are about 2,000 inspectors nationwide, if you count Federal, OSHA and State plans. As Senator Murray pointed out, this is enough inspectors to inspect each workplace in America once every 108 years.

In some States, there are even fewer than average inspectors. Like for example, Georgia only has 33 inspectors to cover 220,000 businesses. And so inspectors there can only get to workplaces once every 158 years. Other States like Washington State are actually better than the average. Washington State has 119 inspectors to cover about the same number of workplaces as exist in Georgia. There, inspectors can get to workplaces on average once every 33 years. Better, still not great. It is clearly a very under-resourced Agency.

So given the fact that OSHA cannot get to workplaces all that often, you would expect to find significant penalties when they do get to the workplace and find that an employer has been violating the job safety law. You would expect significant penalties. But that is simply not the case. The average penalty for violating the OSHA law is only $955. It is less, it is $872 on average, for series violations of the law which are violations that pose a substantial risk of death or serious injury to workers.

And criminal enforcement under the OSHA law, in comparison to environmental laws for example, is virtually nonexistent. And that is because the criminal provisions in the OSHA law are such that an employer can only be prosecuted for a willful violation of the law if a worker dies. If a worker is injured or put at great risk, that is not enough. A worker actually has to die. And in that instance, the penalty is a misdemeanor, 6 months in jail. You can go to jail for longer for harassing a wild burro on Federal lands than you can for willfully killing a worker in this country. And that is just not right.

So in our view, the law needs to be strengthened, not weakened, and much more needs to be done to protect workers in this country.

I would like to make a couple of points about safety and health as it pertains to small business in particular. I think we all would agree that small does not necessarily mean safe, that there are se-

rious hazards that exist in small businesses, particularly in certain industries like, for example, construction.

According to the Bureau of Labor Statistics, in the construction sector firms with fewer than 20 employees are 38 percent of the workforce but have 55 percent of the fatalities. There are other studies that have been done around the country. For example, in Texas a study of Hispanic construction workers showing the same sort of disproportionate fatality rate as small construction employers.

There are a number of measures in place in law and by OSHA to assist small employers in complying with the law. There is a $53 million per year compliance assistance program that is directly targeted to small employers. That is four times the annual budget that OSHA has to set job safety standards. Four times that budget goes to assist small employers in complying with the law. Last year about 31,000 employers, all small employers, received assistance through that program.

Small employers get up to 60 percent penalty reduction when they are cited by OSHA. Very small employers, employers with fewer than 10 employees, are exempt through an appropriations rider from regular job safety inspections.

And there are other laws like SBREFA and the Regulatory Flexibility Act and alphabet soup of regulatory oversight laws that direct the Agency to pay particular attention to the concerns of small business.

We agree that consultation and outreach to small business is appropriate but we also think that we need strong enforcement of the law as a deterrent to get employers to focus on protecting the safety and health of their workers. It is not one or the other. We really do need both.

I see I am running short on time but I would like to spend just a minute talking for a few minutes about a small employer by the name of Eric Ho.

Senator ISAKSON. 2 minutes, is that good?

Ms. RHINEHART. I can do that. I can do this in 2 minutes. Thank you, Mr. Chairman.

Senator ISAKSON. Even two-and-a-half, you are so nice.

Ms. RHINEHART. I appreciate it, Mr. Chairman.

I would like to talk for a couple of minutes about Eric Ho, a small employer, and how that sad story relates to the issues that we are talking about today and the legislation introduced in the House of Representatives.

Eric Ho is a small employer in Houston, Texas. He hired 11 undocumented workers from Mexico to do building renovation work at a facility in Texas. They were scraping and removing material that contained asbestos. As you know, asbestos causes cancer, lung disease and a range of other disorders.

Eric Ho knew there was asbestos and he knew his workers were being exposed. He provided them no training. He provided them no respirators, none at all.

The city inspector of Houston inspected the workplace and he saw dust and he saw that workers were not provided respirators. That inspector issued a stop work order and told Eric Ho to stop the job until he got a proper workforce and inspector on site.

Eric Ho did not stop the job. Instead, he had the work done at night, under cover of darkness. He locked the gates and had workers work behind locked gates with no water, one portable toilet, to get the job done. No respirators, no training or other safety equipment.

OSHA inspected and cited Eric Ho for 11 willful violations of its asbestos training standard and its asbestos respirator standard. One violation per employee who was not provided a respirator or training. Eric Ho admitted he did not provide the respirators or training but he took his case to the Occupational Safety and Health Review Commission which threw out 10 out of the 11 citations, saying that OSHA only had authority to cite him once for violating a training standard and once for violating the respirator standard, even though 11 workers needed a respirator to protect them from the asbestos and 11 workers needed training to be protected on the job.

Incidentally, Eric Ho was also criminally convicted for violating the Clean Air Act and letting asbestos into the air but he could not be prosecuted under the OSHA law because the workers did not die, they were just put in harm's way. So he was criminally convicted under the environmental laws but succeeds before the Review Commission in getting 10 out of his 11 citations thrown out.

What does all that have to do with the price of milk and what we are talking about here today? Two things. First, one of the measures introduced in the House of Representatives, HR 742, would give employers like Eric Ho their attorney's fees. Because he was able to get 10 out of 11 of those citations thrown out at the Review Commission, he would have taxpayers pay his attorney's fees for fighting his case. So that bill would reward rogue employers like Eric Ho and give them their attorneys' fees at the end of the day. We think that is just an outrageous use of public funds and taxpayer funds, especially when you are talking about an agency that does not have enough money to the job as it is.

Second, the Eric Ho case relates very much to the deference bill, the bill that Mr. Sapper was talking about, that would shift the deference from the Secretary of Labor to the Occupational Safety and Health Review Commission.

Why is that? Well, because the issue in the Ho case was whether or not the respirator and training standards were standards that imposed obligations to individual employees, whether or not the standards meant that each employee got a respirator or whether just employees as a whole got respirators. The Secretary of Labor interpreted the rules to say each employee, the rule means each employee gets a respirator. The Review Commission engaged in exactly the kind of second-guessing that the U.S. Supreme Court said it should not and it said no, the rule only allows one citation and it threw out all but one of those citations against Eric Ho.

HR 741, the bill in the House of Representatives, would open the door to more decisions like Ho, by giving the Review Commission the authority to make decisions like that. And to give deference to decisions like that, we believe, places deference and authority in the wrong place. The deference should go to the policymaker, the rulemaker, not to the adjudicator.

We think that the legislation moves things in the wrong direction and we would prefer measures that would actually strengthen the job safety law, not divert resources away from OSHA and the important work it needs to do.

Thank you, Mr. Chairman, and thank you for the additional couple of minutes.

[The prepared statement of Ms. Rhinehart follows:]

PREPARED STATEMENT OF LYNN RHINEHART

Mr. Chairman and members of the subcommittee, thank you for the opportunity to testify today about the need to improve safety and health protections for the millions of workers employed by small businesses. My testimony will address several legislative proposals (H.R. 739, 740, 741, and 742) that have been advanced and promoted on grounds that they will assist small businesses in their efforts to comply with the requirements of the Occupational Safety and Health Act. This testimony is submitted on behalf of the 13 million working men and women represented by the 57 national and international unions that comprise the AFL-CIO.

The Occupational Safety and Health Act (OSH Act), as written and as administered by the Occupational Safety and Health Administration (OSHA), already includes numerous measures to assist small businesses in complying with the law. In our view, the pending legislative proposals are either unnecessary or counterproductive. The bills will drain resources away from an agency that is chronically underfunded and struggling to fulfill its statutory mandate. And the bills will do nothing to address the serious job safety hazards faced by American workers.

Two weeks ago, on Workers Memorial Day (April 28), the AFL-CIO released a report, entitled, "**Death on the Job: The Toll of Neglect,**" that details the astounding number of deaths and injuries occurring in workplaces across the United States, and the numerous shortcomings in our Nation's efforts to deal with this serious problem. Each year, millions of workers are injured or made ill by job hazards. According to the Bureau of Labor Statistics, each day, 15 workers die on the job. The number would be far higher if deaths from occupational diseases such as cancer and black lung disease were included.

At its current budget levels, OSHA's enforcement reach is severely limited. There are at most 2,138 Federal and State OSHA inspectors responsible for enforcing the law at approximately 8 million workplaces. In fiscal year 2004, 861 Federal OSHA inspectors conducted 39,246 inspections, and the inspectors in State OSHA agencies conducted 58,675 inspections. At its current staffing and inspection levels, it would take OSHA 108 years to inspect each jobsite in America just once.

The penalties assessed by OSHA for violations of the law are exceedingly modest. In fiscal year 2004, OSHA assessed a total of $82.6 million in penalties against employers for 86,475 violations of the law, for an average penalty of just $955. The average penalty for a serious violation of the Occupational Safety and Health Act—defined as a hazard posing a "substantial probability that death or serious physical harm could result," 29 U.S.C. § 666(k)—is just $872.

Serious safety and health hazards exist at workplaces across the United States, in businesses large and small. Just because a business is small does not mean it is safer. To the contrary, small firms, particularly in high hazard industries like construction, are very dangerous.

The Bureau of Labor Statistics' fatality data—which, unlike injury data, is based upon a government census, and not employer self-reports—shows that in high risk industries such as construction, small firms account for a disproportionately high percentage of fatal injuries. For example, according to BLS, firms with fewer than 20 employees employed 38.2 percent of the construction workforce, but accounted for 55.5 percent of all construction fatalities. (BLS, 2002 Census of Fatal Occupational Injuries).

Similarly, a study of Hispanic construction workers in Texas found that 40 percent of fatalities among these workers occurred in establishments of less than 10 employees. (Fabrega and Starkey, Fatal Occupational Injuries among Hispanic Construction Workers of Texas, 1997 to 1999, Human and Ecological Risk Assessment, 2001; 7:1869–1883). And a study of fatalities among teenage construction workers found a similar result. Sixty three percent of the teenage construction fatalities investigated by OSHA from 1984–1998 occurred at firms with fewer than 11 employees. (Suruda et al., Fatal Injuries to Teenage Construction Workers in the U.S., American Journal of Industrial Medicine, 2003, 44:510–514).

Clearly, small businesses have their share of workplace hazards, particularly in high risk industries. Workers employed at these firms need the full protection of the job safety law.

It is important to point out that OSHA, and the OSH Act, already include special provisions designed to assist small employers and provide them special relief in enforcement proceedings. First, for more than 25 years, through a rider in the annual OSHA appropriations bill, employers with 10 or fewer employees in "safer" industries have been exempt from OSHA general schedule inspections. This exemption covers the majority of small businesses in this country. These firms are only subject to inspections in the event of a fatality or complaint from employees alleging serious hazards.

Second, the OSH Act itself directs that the size of the employer must be taken into account in setting penalties, along with the seriousness of the violation, the employer's compliance history, and the employer's good faith. 29 U.S.C. § 666(j). OSHA has established specific enforcement policies taking these statutory mandates into account. Under OSHA's policy, the smallest employers—those with 25 or fewer employees—are entitled to an automatic 60 percent reduction in the amount of the assessed penalty. The percentage reduction decreases as the size of the employer increases. (Field Inspection Reference Manual, Ch. IV.C.2.c.) Penalties may be further reduced in any post-citation settlement, and they also may be reduced by the Occupational Safety and Health Review Commission (OSHRC), which considers the size of the employer when establishing a final penalty amount.

Third, for decades OSHA has had a small business compliance assistance program. This program, administered through grants to the States, is currently funded at more than $53 million in the fiscal year 2005 budget—more than 10 percent of OSHA's entire budget. This is nearly four times more than the agency spends developing workplace safety standards. According to OSHA, in fiscal year 2004, there were 31,334 consultation assistance visits conducted under this program, all of which, pursuant to OSHA's policies, were conducted at business establishments with fewer than 250 employees.

The AFL-CIO believes that these measures appropriately address the particular issues and needs of small employers, and they should be continued. We do not support the additional measures contained in H.R. 739, 740, 741, and 742. It is important to point out that only one of these bills—H.R. 742—specifically applies only to employers with less than 100 employees. The other bills apply to all employers covered by the OSH Act. These bills would chill enforcement of the law and divert much-needed resources from enforcement and standard-setting, at a time when the injury, fatality, and enforcement statistics all show that more, not less, enforcement of the job safety law is needed to protect American workers.

Our views on each of the bills are set forth below.

H.R. 742, The Occupational Safety and Health Small Employer Access to Justice Act

H.R. 742 would require taxpayers to pay the attorneys' fees and legal costs for "small" employers (defined as employers with 100 or fewer employees and up to $7 million net worth) who prevail in any administrative or judicial proceeding brought by OSHA or any challenge to an OSHA standard, regardless of whether OSHA's action was substantially justified. This bill would drain resources away from OSHA and further weaken OSHA enforcement at a time when it needs to be strengthened, not curtailed.

Under the age-old American Rule, each party to litigation pays its own expenses. This is true not only in private litigation but also in cases in which the Government acts as public prosecutor to enforce consumer protection laws, environmental laws, safety and health laws, and labor laws.

The Equal Access to Justice Act (EAJA) provides a limited exception to the American Rule. Under EAJA, organizations with no more than 500 employees and a net worth of no more than $7 million, can recover their fees and costs if they prevail in administrative or judicial proceedings against the Federal Government, but only if they meet two conditions. First, an award is proper under EAJA only if the agency's position was not substantially justified. Second, an award can only be made if there are no special circumstances that would make the award unjust. 5 U.S.C. § 504.

H.R. 742 would create a special exception from the American Rule, and from EAJA, for legal proceedings under the OSH Act. Employers that prevailed in administrative or judicial proceedings under the OSH Act would be entitled to fees and costs from OSHA without having to show that the Government's position lacked substantial justification and that there are no special circumstances that would make an award unjust.

There is no credible reason for carving out this exception either to the American Rule or to EAJA. By subjecting OSHA to the payment of attorneys' fees and costs every time the agency loses a case to an employer falling within the bill's definition, the bill would seriously weaken OSHA's effectiveness.

When Congress enacted EAJA, it considered and rejected automatic awards to prevailing parties precisely because such an "approach did not account for the reasonable and legitimate exercise of government functions and, therefore, might have a chilling effect on proper government enforcement efforts." GAO, "Equal Access to Justice Act: Its Use in Selected Agencies," Jan. 14, 1998, at 9. Instead, Congress crafted EAJA's limited exceptions "to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 11.

H.R. 742's reach is broad. Notwithstanding the label "small employer" in the title, the bill would apply to all employers with not more than 100 employees and a net worth of not more than $7 million. Data from the Census Bureau show that establishments with fewer than 100 employees make up 98 percent of all private sector establishments. (U.S. Census Bureau, Statistics about Business Size, 2001). Excluding businesses with no employees (i.e., self-employed individuals), establishments with fewer than 100 employees still comprise 86 percent of all private sector business establishments. Id. These firms employ fully 36 percent of all employees, or nearly 41 million workers. Id.

In contrast, Congress traditionally defines "small business" for the purpose of establishing coverage under a range of other employment-related laws by imposing a far smaller ceiling on the size of the workforce. The Age Discrimination in Employment Act, for example, applies to employers who have 20 or more employees. 29 U.S.C. § 630(b). Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(b), covers employers with 15 or more employees. But the vast majority of private sector establishments would fall within the employee threshold for coverage established by H.R. 742.

H.R. 742 would provide a monetary incentive for more employers to challenge OSHA citations, to spare no expense, and to drag out litigation of the case, because at the end of the day they could recover their attorneys' fees and costs if they prevailed.

The bill would allow even the worst employers—ones with repeated and egregious violations—to recover fees if they prevailed on a particular violation. Take for example Eric Ho, who was cited for 11 willful violations of OSHA's respirator and training standards after he exposed his immigrant workforce to asbestos by requiring them to perform building renovation work behind locked gates at night without any respirators or training. Eric Ho was criminally convicted of violating the Clean Air Act. But he succeeded in persuading the Occupational Safety and Health Commission to throw out 10 of the 11 willful OSHA violations, on grounds that OSHA was not allowed to cite Ho for each employee exposed to asbestos hazards, but could only issue one citation. *Secretary of Labor* v. *Ho*, Nos. 98–1645 & 98–1646 (OSHRC, Sept. 29, 2003). H.R. 742 would require taxpayers to pay the attorneys fees and costs of rogue employers like Eric Ho.

EAJA currently provides for fee awards if the Government's position is not "substantially justified." EAJA thus penalizes—and deters—the filing of insubstantial complaints. No rational public policy would be furthered by discouraging OSHA from issuing citations that are substantially justified but as to which the government ultimately is unable to carry its burden of proof. Rather, the inevitable result of such a rule, which would penalize the government every time it loses, would be to chill the issuance of meritorious citations in close cases on behalf of employees exposed to unsafe working conditions.

It is important to point out that H.R. 742 is not limited to enforcement proceedings initiated by OSHA. By its terms, H.R. 742 applies to any administrative or judicial proceeding, meaning that qualifying employers could recover their attorneys' fees and costs for successfully challenging an OSHA standard or regulation in court. While OSHA has been quite successful in defending its rules and standards, this provision will create a huge financial incentive for businesses to fight OSHA's rules even more routinely and aggressively, given the possibility of recovering their attorneys' fees and costs at the end. As a result, OSHA will be even more reluctant to issue much-needed workplace safety rules to protect workers.

H.R. 742 will drain resources away from an agency that has perpetually struggled to do its job with the limited resources available to it. As estimated by the Congressional Budget Office, this bill would cost $7 million in fiscal year 2005 and $44 million total for fiscal year 2005–2009, which must come out of OSHA's budget. This would require Congress to appropriate additional money to OSHA's budget to cover

the cost of the bill or to cut OSHA's enforcement budget or reduce compliance assistance to small business. Passage of this bill would further reduce the resources available for implementing and enforcing the OSH Act, to the detriment of working men and women who depend on OSHA to protect their safety and health on the job.

H.R. 741, The Occupational Safety and Health Independent Review of OSHA Citations Act

H.R. 741 is a misdirected piece of legislation that would undermine the Secretary of Labor's authority to interpret and enforce the job safety law. The bill flies in the face of Supreme Court precedent and longstanding administrative law principles. The bill should be rejected.

H.R. 741 would overturn the Supreme Court's unanimous decision in *Martin* v. *Occupational Safety and Health Review Commission*, 499 U.S. 144 (1991). *Martin* v *OSHRC* dealt with the question of which agency's interpretation of an OSHA rule should be given deference—the Secretary of Labor's, or OSHRC's. After reviewing the language, structure, and legislative history of the OSH Act, the Court unanimously ruled that the Secretary of Labor, and not OSHRC, should be given deference.

The Court's decision in *Martin* v. OSHRC was in keeping with well-established precedent giving deference to administrative agencies that are given authority by Congress to adopt and implement regulations. 499 U.S. at 150–151 (citing precedent). In *Martin* v. *OSHRC*, the Court elaborated on the important reasons for this rule.

First, the Court pointed out that the Secretary of Labor "enjoys readily identifiable **structural advantages** over the commission in rendering authoritative interpretations of OSH Act regulations. Because the Secretary promulgates these standards, the Secretary is in a better position than is the commission to reconstruct the purpose of the regulations in question." 499 U.S. at 152. By contrast, OSHRC does not promulgate occupational safety and health standards and has no such expertise.

Second, the Court pointed out that "by virtue of the Secretary's statutory role as **enforcer**, the Secretary comes into contact with a much greater number of regulatory problems than does the commission, which encounters only those regulatory episodes resulting in contested citations." 499 U.S. at 152. This experience makes it "more likely [that the Secretary will] develop the expertise relevant to assessing the effect of a particular regulatory interpretation." Id. By contrast, OSHRC sees only a small slice of the enforcement cases brought by the Secretary. Employers seek review of less than 10 percent of all cases before the commission, and only a fraction of these cases are heard by the full commission. As a consequence, the commission does not have the same breadth and depth of knowledge and experience as the Secretary of Labor.

It is also important to note that under *Martin* v. *OSHRC* and related cases, the Secretary of Labor still has the burden of showing that her interpretation is reasonable. Where the commission or a reviewing court believes the Secretary's interpretation is not reasonable—for example, where the Secretary has advanced conflicting or inconsistent interpretations—no deference is given to the Secretary's view. Thus, the Secretary does not have unbridled discretion; there is a very real and substantial check on her authority built into the system.

H.R. 741 would turn this well-established system upside down and say that the Review Commission, not the Secretary, should get the final say on the meaning of the Secretary's regulations. This defies longstanding precedent and common sense. As the Court in *Martin* recognized, the Secretary of Labor, as the policymaking entity that promulgates and enforces workplace safety standards, is in a far superior position to interpret the meaning of her own regulations, and to have those interpretations respected so long as reasonable. Policy decisions like the interpretation of workplace safety standards should be left with the policymaking body, not given to an adjudicative body that lacks comparable knowledge, experience, and expertise.

H.R. 739, The Occupational Safety and Health Small Business Day in Court Act

Under the OSH Act, an employer has 15 days in which to challenge an OSHA citation. 29 U.S.C. § 659(a). If the employer does not file a notice of contest with OSHRC by that deadline, the OSHA citation becomes a final order of the commission, enforceable against the employer. Id.

H.R. 739 would excuse employers from the OSH Act's 15 day deadline if the employer can show that its failure to meet the deadline was caused by "mistake, inadvertence, surprise, or excusable neglect."

The intent of the bill, according to its proponents, is to incorporate into the OSH Act provisions for obtaining relief from a final judgment similar to those provided by Rule 60(b) of the Federal Rules of Civil Procedure (FRCP).

The bill is unnecessary. The Commission has always taken the position that Rule 60(b) applies to commission proceedings and that the Commission has the authority to provide relief from a final judgment when the employer has made the requisite showing under Rule 60(b). See, e.g., *Secretary of Labor* v. *Branciforte Builders, Inc.,* 9 OSHC 2113 (1981). The courts of appeals have generally agreed that Rule 60(b) applies to commission proceedings and that OSHRC has authority to provide relief from a final judgment where appropriate under that rule. See, e.g., *Marshall* v. *Monroe & Sons, Inc.,* 615 F.2d 1156 (6th Cir. 1980); *J.I. Hass Company* v. *Marshall*, 9 OSHC 1712 (3d Cir. 1981); *Avon Contractors*, 372 F.3d 171 (3d Cir. 2004).

Proponents of the legislation argue that the bill is needed because of a contrary court ruling in *Chao* v. *Russell P. LeFrois Builder, Inc*., 291 F.3d 219 (2d Cir. 2002). But that decision is both an anomaly and irrelevant, given that the Solicitor of Labor has now issued a memorandum stating that the Department of Labor will no longer seek to prohibit employers from making a claim for relief under Rule 60(b). See Memorandum to Regional Solicitors, et al., from the Solicitor of Labor (Dec. 13, 2004).

The bill is also inappropriately one-sided. It excuses employers from missing their 15 day deadline but does not provide the same relief to employees or their representatives who seek to exercise their statutory rights to challenge the period for abatement in a citation. Fairness and reason dictate that both employers and employees should be afforded the same relief if Congress were to adopt this measure.

Finally, it is important to point out that the legislation, while purporting to incorporate the provisions of FRCP 60(b), does not actually track the language of that rule. Rule 60(b) includes important safeguards and limitations, including that the motion for relief under Rule 60(b) must be made within a reasonable time, and in any event not more than 1 year after the judgment was entered. Rule 60(b) also specifies that a motion made under the section does not affect the finality of a judgment or suspend its operations. Particularly in a circumstance where, as here, the judgment at issue is one that requires employers to address workplace safety hazards, Rule 60(b)'s safeguards and limitations should apply. Parties should be required to make their motion for relief within 1 year, and the motion should not affect the employer's obligation to abate the hazard while the employer is seeking relief from the judgment.

H.R. 740, The Occupational Safety and Health Review Commission Efficiency Act

H.R. 740 expands the number of members on the Occupational Safety and Health Review Commission (OSHRC) from three to five, and mandates that all members have legal training.

In our view, the bill is unnecessary and inappropriate in a time of severe budgetary constraints. The commission's modest caseload does not warrant a 40 percent expansion in the number of Commissioners. Moreover, the fact is that the commission's perpetual case backlog has persisted regardless of whether the commission is fully staffed or lacks a quorum. It would appear that factors other than the size of the commission or the lack of a quorum affect the commission's ability to issue decisions.

And it is no coincidence that Republican Members of Congress are pushing to expand the number of seats on the commission at a time when a Republican president would fill the seats.

Proponents cite to the Federal Mine Safety and Health Review Commission as an analogous agency with five Commissioners, not three. However, it is also the case that the FMSHRC has more responsibilities, and hears more cases, than OSHRC. For example, miners and their representatives are permitted to bring cases before the FMSHRC alleging retaliation for exercising their rights under the mine safety law, and the FMSHRC hears and decides these cases. The OSH Act has no comparable provision, and OSHRC has no comparable role.

Expansion of the Commission, and restricting the eligibility of individuals to serve as Commissioners, are unnecessary and unwarranted proposals that should be rejected.

In sum, the AFL-CIO urges the subcommittee to explore ways of strengthening the OSH Act and its enforcement in order to address the high injury and fatality levels that persist in American workplaces today. Passage of H.R. 739, 740, 741, and 742 will do nothing to advance this goal; to the contrary, they will deprive OSHA of the resources and authority they need to do the job.

Senator ISAKSON. Thank you, Ms. Rhinehart.

We will do our questions 5 minutes each. And then if there is time and there are other questions, we will go to a second round. I will start.

I have to ask Ms. Rhinehart a question. I take every story I hear at every committee hearing at face value. You told a story with regard to Eric Ho and Mr. Dodd told a story with regard to his employee that cut off the ends of I think two fingers. Did you hear that story?

Ms. RHINEHART. I did.

Senator ISAKSON. Based on your testimony, what Mr. Ho did was outrageous. I think most people would react in that way. Do you think the action of OSHA in the case that he talked about, of the fingers, was as outrageous?

Ms. RHINEHART. Mr. Chairman——

Senator ISAKSON. That is not a trick question.

Ms. RHINEHART [CONTINUING]. It is not a trick question but it is a hard question because, just as you do not have the entire record in the Ho case before you, I do not have the entire case.

Senator ISAKSON. I would never hold you to it.

Ms. RHINEHART. I know you would not but I am troubled by some of the things that Mr. Dodd said. I am troubled by some of the things he said but I would really like to see——

Senator ISAKSON. Let me tell you why I asked that, and that is a tough question and you are a sweet lady and I probably should not have done that to you.

But I find oftentimes that we sometimes lose sight in these hearings of—we get an extreme issue. I would hope your situation and the behavior of that OSHA inspector was an isolated instance, just like I would hope and pray that the Eric Ho's of the world are an isolated situation, but recognize we need to be vigilant to see to it that if those people exist they are pointed out.

The ideal in enforcement is for people to respect the law for what it is intended to do. Which brings me to my first question which I will throw out there.

I will ask Mr. Swindal, in your experience with OSHA directly, or what you have heard, do you feel like that cases are made where there is an example that can serve the purpose to send notice? Or do you think they are always made based on the most merit of the circumstances?

And I ask that question because Ms. Murray raised a very good point, and that is the number of inspectors versus the number of workers. The problem is we could not hire enough IRS agents or anything else, versus the number of taxpayers, on compliance. So there is a lot of example setting in terms of—which do you think? Do you think it is based on merit, in all cases, or sometimes to set the example to get the word out?

Mr. SWINDAL. You will hear in town that such and such, that we have got inspectors coming around, they are all over, they are trying to do this and that. But there may have been a death and something very, very serious could have happened in the city.

I have been involved in cases where an OSHA inspector comes to the job and the site was ridiculous. It was in terrible shape. And we had our people on the site having to follow the rules, making

sure everything was right, because we know it was a dangerous site and we had complained to the general contractor.

I think that what I was talking about earlier, to avoid those circumstances where the agents are on this side and the contractors are on this side or the manufacturers are on this side, the coming together in a situation like I was discussing, as a training together to go over situations before we have these occur. And to get the smaller firms that are involved in construction, that do not have, as you said, the safety directors, the people to go out and really help them. They do not know the rules. How could you know all the rules if you were a small, 15 or 20 man company? You will not.

Your MSDS books are going to be out of date. They are not going to be correct. That is part of it. And it is unfortunate, but that is the way it is.

And I think the partnership that we can create as a company here and taking the time with professionals in our business, joining with the OSHA team to look at these regulations: one, before they are presented; two, to go over some of the regulations that are—when there is a series of violations occur, and it seems to me there is nothing you can do about it, and it does not work, come together, sit down and discuss it with the contractor community or the safety director as a team as we were discussing earlier.

That is what we see. It is a problem. As you said, the construction industry is absolutely the most unsafe of all the work environments. We are doing everything we can to improve it. But I go to sleep every night praying that nobody's going to get killed the next day because I know they are on their own.

Senator ISAKSON. Thank you. Ms. Murray.

Senator MURRAY. Thank you, Mr. Chairman, and I would agree. The statistic that Ms. Rhinehart cited—spending $1 billion a week on occupational injuries, is a cost that is hurting all of us. And it seems to me that one of our challenges is we do not have sufficient funds within the budget to make sure we are educating people, that OSHA has what they need, and NIOSH, to be able to educate companies so they can follow the regulations without being surprised by them.

And I think that is something that all of us believe we should be doing a better job of.

I do have a question. Ms. Rhinehart, you talked about Eric Ho. Was part of the problem that there is not criminal liability? And the fact that he could keep doing this for some time without facing some kind of criminal—for something as egregious as you discussed.

Ms. RHINEHART. That is exactly one of the problems in the Eric Ho case, is that the OSHA Act only allows a criminal prosecution in circumstances where a worker died, where an employer willfully violates an OSHA rule—which Eric Ho did and the commission found he did—and a worker dies.

Here workers were not killed directly but they were poisoned by asbestos.

Senator MURRAY. Which we know you may not know about for 30 years.

Ms. RHINEHART. Correct. There is no authority under the OSHA law for prosecution in that instance. Ironically, there is, under the

Clean Air Act, for releasing asbestos into the air but not for poisoning the workers. In our view, it is a serious shortcoming in the law and we would support legislation to correct it.

Senator MURRAY. Mr. Dodd, the chairman asked Ms. Rhinehart one side of it. Let me ask you the other side of it.

You heard her story about someone who very willfully violated the law, really put people at risk knowingly. Do you think that for those egregious—not for your case, which can be understandable, but for egregious cases should we have criminal liabilities within OSHA? It does cost business.

Mr. DODD. That is a question, I think, for the courts to settle. But if somebody does something like that, yes. People like myself, people like Mr. Swindal, I am sure, who have been working for a long time, trying to run an honest business and provide jobs for people. We do not need people like that. The industry does not need people like that. Those are the kind of people that hurt the industry.

So if it was me that was making the decision, if I was in charge of that, if I was Senator Isakson and I had the power to say that, I would say he needs to be prosecuted. He needs to be prosecuted.

That was more than willful. That was deliberate. If OSHA came in and shut the place down and then he climbs over the fence and unlocks it and has his workers back in there, then that is a criminal action.

But again, that is not for me to decide.

Senator MURRAY. Mr. Dodd talked about some of the things that he felt were important for us to look at, training for OSHA inspectors, more help to businesses to be able to comply with the law. Ms. Rhinehart, would you concur that those are some of the things we need to look at? To reduce the number of injuries and deaths?

Ms. RHINEHART. Yes, I would agree that those are good suggestions and areas to look at. The only point I would make is that you are talking about an agency that has $450 million to do its job. Every time you move resources into this area, it takes them away from another area like, for example, enforcement.

So it seems to me that some good suggestions have been made and that perhaps some additional moneys could be found to explore those sort of partnerships.

Senator MURRAY. Which would be my final point, and I have to go to the floor so I am not going to be able to remain, Mr. Chairman. We can all talk about helping our companies understand the rules. But if we do not provide the enforcement officers out there working with them and the direction to do that, then we will be back with egregious cases, injured workers and employers frustrated.

So I think it is an issue that our committee does have to look at.

Thank you, Mr. Chairman.

Mr. SWINDAL. Senator Murray, could I ask you one question in reference to that?

I do not think we will—do you actually think that we are going to ever have the ability to legislate this to every company in the United States? We, as companies, have got to take the responsibility along with OSHA to do this.

Senator MURRAY. I absolutely think that there are really good employers out there who work really hard to comply with this. And there are times when they simply do not have the knowledge of what they need. How do we get them better information? As people who want to make sure everybody has fewer injuries, fewer deaths, we all share that same goal. We need to educate them.

That was my point, we cannot just expect this information to somehow transform into businesses. We need to help provide the resources to make sure it is out there.

Mr. DODD. That law that you are talking about, the Ho thing, that law could also be used against—again, if Senator Isakson had the power to say that he could be criminalized for that or punished for that criminally, that same law—if the OSHA people have the power, I guess, to say we are going to have you arrested for that because you were criminal there, again that same law could be used against Roy. It could be used against myself, too, as good employers.

They came in, you had this employee who just nipped off two fingers on a punch press. That, to me, is criminal in my mind, the inspector's mind. I am going to have to have you two arrested and shut your place down.

Senator MURRAY. Thank you, Mr. Chairman.

Senator ISAKSON. Thank you, Senator Murray. Mr. Chairman.

The CHAIRMAN. Thank you. The accountant in me made me make some calculations here. I noticed that we have 861 inspectors now, at the Federal level. And so I made some calculations to see how many we would have to have in order to get it down to one inspection per 5 years.

It means that we have to add 18,000 inspectors to do the job. I do not think anybody is going to consider that a reasonable number to increase the budget by. So we are going to have to find some other solutions. We are going to have to find some cooperative ways where employers and OSHA and employees are working together.

Incidentally, I also did some calculations based on the numbers provided in Ms. Rhinehart's testimony. And I can figure out a way to get that number down without increasing the workforce quite that substantially. Those numbers indicate that there is less than one inspection a week done by each of the employees. If we increase that to one per day, we bring the number down by 80 percent.

I have got to find out more about what takes so long to do the inspections, because again when I was a safety officer, I never had anybody inspect me longer than half a day and it was at multiple sites. I have got to tell you, I got the violation once where we did not have a no smoking sign the right number of feet from the rig. Now that is very important. It was 3 feet short. And the actual rule of the industry is that it has to be outside of the guy lines. And it was well outside the guy lines. So people that were within a dangerous distance to the rig would know about it. But that took us several weeks to get resolved.

So Mr. Swindal, I really like your program where industries do some cross training with the OSHA inspectors so that they can learn what the best practices are. These guys have a tough job. They go from a dentist's office to a construction site to a shoe store

to an oil field and that is all different practices. So there probably needs to be a little bit of specialization which would speed up that process a little bit.

But you suggested this idea of having safety personnel to cross train. How do you think such a program—how can we implement such a program?

Mr. SWINDAL. The Training Exchange Program which we are discussing is very similar to how the mason contractors, as I said earlier, we have created a number of manuals, one for forklift drivers, one for bracing scaffolding.

We shared all of that information with OSHA. That was the first way that we started to be able to try to work with them. And they were very interested in understanding what we are trying to do.

So now what we do is we take, let us say from one of the best safety directors of one of the major masonry contractors or glazing contractors or concrete forming contractors. And he goes and he actually sits down and discusses any new regulations or regulations that at the time OSHA is having a hard time enforcing or there seems to be a rash of incidents about these.

And they sit down and they discuss what is causing this? Why is this happening? And what can we do? Is something wrong with the regulation? Is this really a safe/unsafe thing going on? Or is it just something that has been on the books and it is not of any use at the present time, the way it is being interpreted in this particular occasion?

So I think that would work very well and work with some of the people that are in charge of the OSHA—we discussed the OSHA training facility they have here. Do some mockups of any of the new rules, whether it be for dentistry or whether it be for whoever or whatever. But construction, in general, there are so many things that can go wrong that are so dangerous. And we spend too much time going through those.

The CHAIRMAN. But you are kind of saying that through this process of doing the cross-training, you also have the people in the industry comparing notes on what the good practices are, too.

Mr. SWINDAL. Yes.

The CHAIRMAN. Which undoubtedly has some good side benefits.

Mr. SWINDAL. With all of the trades involved and—this can go from manufacture all the way across. It does not just have to be for the masonry industry. We looked at it in that manner.

The CHAIRMAN. I noticed in your testimony, too, that you have a drug testing program in place.

Mr. SWINDAL. Yes, sir.

The CHAIRMAN. You may not realize that in some States random drug tests are illegal unless they are based on reasonable suspicions of drug use. They cannot be a preventive tool applied across the board so that it does not discriminate. Clearly that is not the case in Alabama.

Do you believe that your policy keeps your employees safer and has other positive effects?

Mr. SWINDAL. The drug policy?

The CHAIRMAN. Yes.

Mr. SWINDAL. Yes. As a whole, it is preemployment, number one. That stops probably—our HR director said it probably stops 50 per-

cent of the problems that we were having without it. Our insurance rates have gone down dramatically and our injury, lost time injury accidents, have dropped dramatically over the last 10 or 15 years that we have been doing this.

The CHAIRMAN. I would agree. I am probably the only one in the Senate that is trained to collect urine specimens and do saliva tests.

Mr. SWINDAL. We have a number of foremen that can do the same.

The CHAIRMAN. We found that it affected almost four out of five employees that applied for jobs and we were able to cut off a lot of accidents in the past that way.

Ms. Rhinehart, it has been observed in some instances the hazardous communications practices and procedures are pretty complicated. And we have been trying to work on those MSDS sheets for quite a while and get them more reasonable so that they actually provide timely information to people in a crisis situation. It would be nice if they knew all of that stuff beforehand, but they do not even know what all the chemicals are before they get to working on it.

Do you have any suggestions for simplifying that MSDS process and some way that we can get that information to the workers when it is more meaningful and more useful?

Ms. RHINEHART. I am wishing I could snap my fingers and become Peg Seminario, our Health and Safety Director, who would have a very complete answer for you on that.

But perhaps developing some model MSDS's, OSHA developing some models and getting them out to businesses and to small business and providing them to workers would be of assistance across the board. That is one suggestion.

The CHAIRMAN. Good. We would like to work with you on that and other things that you have suggested in the testimony.

I see that my time is expired. I have some other questions but I will submit those in writing.

Senator ISAKSON. Thank you, Mr. Chairman.

Mr. Sapper, you had a comment?

Mr. SAPPER. Mr. Chairman, I just wanted to add something about the Ho case and the effect, or I should say the light it might shed on the attorney's fees bill. It actually proves the opposite of the point that I believe Ms. Rhinehart was trying to make.

Had the attorney's fees bill been law when the Ho case was brought, OSHA would have easily seen that 10 out of the 11 citations were patently weak. They were so weak, in fact, that the Review Commission, even under the crippling disability imposed by the CF&I Steel case, threw them out. Not only that, they were also thrown out by the Fifth Circuit on appeal.

So had you been an OSHA lawyer looking at the Ho case, as egregious as it was, and I agree that it was egregious, you would have said to yourself, this guy should be slammed. But if we try to do it 11 times, it is going to get thrown out. So you would have had your mind concentrated mightily by the thought you will end up paying this guy his attorney's fees. So you will bring just a straight case, no questionable citation items, just a straight case.

He would have been slammed. That would be the end of it. And he would not have gotten a penny of attorney's fees.

So I think it proves the opposite of the point that she was quite eloquently trying to make. But those are the facts.

Senator ISAKSON. Well, it proves by my asking that question about 15 minutes ago I provoked a lot of responses. But two of the responses that I provoked were actually the intent of the question and I would like to just tell you what those were.

If this subcommittee were to try and improve OSHA laws, undertaking one side or the other based on Mr. Dodd's case or Ms. Rhinehart's example in the Ho case, we would do a great disservice. Because both of them are extreme examples. And were we to assume all businesses were like Mr. Ho or all OSHA inspectors were like the one that inspected you, we would have a heap of trouble.

Fortunately for us, I think both of those cases, both very egregious in different ways, should be dealt with as examples for either inspectors or businesses to never do that again.

But in the meantime in the middle, the broad middle, wherein I think most all American business is or strives to be, we need to work for two things. One is good laws that protect the health and welfare and safety of workers. And second is a proactive compliance attitude on behalf of business and the regulator.

To that end, I want to, as chairman of the subcommittee, commend Mr. Swindal and those that he represents for their best practices, recommendations and their offering to OSHA from the standpoint of training in the expertise that they have. And believe me, high rise skin application is an expertise like something you have never seen. I do not know what your rate per 100 on worker's comp is but—what is it, by the way?

Mr. SWINDAL. I do not know right now. We have to be self-insured with—we are self-insured with a very high deductible.

Senator ISAKSON. I would be willing to bet you that after payroll, workers comp might be the number two expense in the company.

Mr. SWINDAL. Besides material, yes.

Senator ISAKSON. Which is another thing that, as a business person, is so important. And that is that safety is rewarded at the bottom line by better premiums, meaning lower premiums. And bad practices are punished at the bottom line very severely.

Did I cut you off, Ms. Rhinehart? I let him say something and you had a—I do not know whether you were pointing your index finger at me or whether you wanted to be recognized.

Ms. RHINEHART. I was pointing it at Mr. Sapper.

Senator ISAKSON. That was the right answer.

Ms. RHINEHART. If I could just have a moment to respond.

Senator ISAKSON. We have 47 seconds left and then we are out of time.

Ms. RHINEHART. I just wanted to point out that, in fact, there was precedent for per employee citations of the sort of training and respirator standards that OSHA cited Eric Ho for. So in fact, they were relying on precedent, not just going off on a lark and citing him for those 11 employees. I would make that point.

I would also say that I just do not think that any of us around this table would criticize OSHA for pursuing an employer like Eric

Ho aggressively. I think we can all agree that employers like Eric Ho need to be dealt with and dealt with severely. Thank you.

Senator ISAKSON. That was my point. Both of those stories indicated violators on all sides of this whole equation that should have been dealt with and the whole situation would be a whole lot better off.

I want to thank all of our witnesses for testifying today.

I want to ask unanimous consent that the record be held open for 10 days for any additional submission or comment.

Hearing no objection, so ordered.

The subcommittee hearing is adjourned.

[Additional material follows.]

ADDITIONAL MATERIAL

STATEMENT OF TOM HOWLEY

Subcommittee Chairman Isakson, my name is Dr. Tom Howley and I currently serve as President of the Academy of General Dentistry (AGD), a national professional association representing over 37,000 general dentists.

Let me begin this testimony by thanking you for your distinguished leadership on this committee; for your continued and well-known support of the small-business community; for your strong record as an advocate for workplace safety; and for your demonstrated support for improving the programs and operations of the Occupational Health and Safety Administration (OSHA) through the enactment of appropriate reform legislation.

As you may know, a major focus of the Academy of General Dentistry's work, is to afford our members the opportunity to hone and refine their skills through high-quality continuing education opportunities; to promote the highest degree of professionalism possible; and to promote excellent standards of patient care. Members of the academy also know, from first hand experience, that appropriate access to oral health care services is essential to maintaining good health—and that a lack of access to adequate oral health care is harmful to individuals and families, and is extremely costly to society as a whole.

As trained health care professionals, members of the academy are justifiably proud of their long years of training, their special expertise, and their commitment to quality health care—but our member dentists also wear another hat. As a practical matter, the vast majority of the Academy's members practice in a small-business environment. Most dentists are small businessmen and women who are the principal owners and operators of their individual dental practices. In this capacity, they face the same day-to-day challenges faced by any small businessman or businesswoman. They must manage their cash flow and control expenses. They must hire and retain a skilled workforce. They must ensure an accessible and well-equipped facility in which to provide their skilled services—and, like other small businessmen and women, they must comply with a myriad of rules and regulations—some of which, do not always efficiently or fairly address the concerns for which they were originally intended.

One Federal Agency, well known to our members, is the Occupational Health and Safety Administration (OSHA). OSHA is primarily concerned with workplace and workforce safety issues. Without question, the overall mission of OSHA is vital—and it is clearly appropriate for this agency and for Members of Congress to be concerned about workplace safety issues. As small businessmen and women—who employ on average six persons in each dental practice—our members are committed to ensuring a safe workplace environment, and invest much of their time and energy doing so on a continuous basis.

In terms of ensuring a safe workplace environment, both for our employees and patients, members of the academy and other practicing dentists have not always found that interacting with OSHA has been an especially constructive or welcome exercise. There have been instances where the Agency has gone about its mission in a ham-handed manner—resulting in unrealistic burdens and unfair enforcement actions being visited on our members and other small businessmen and women. To address these concerns, we are pleased to add the support of the AGD to the large number of business groups, trade and professional associations, that have called for the enactment of reasonable OSHA reform legislation. Specifically, we are pleased to endorse the enactment of four bills (*H.R. 739, H.R. 740, H.R. 741 and H.R. 742*) introduced in the House of Representatives by your colleague from Georgia, Representative Charlie Norwood. We are further pleased that you are taking a leadership role in addressing the small business communities OSHA concerns by holding this hearing today and focusing attention on the need for appropriate OSHA reform legislation.

As you know Mr. Chairman, the reform legislation we seek to advance, has broad support within the business community, and will go a long way towards addressing legitimate concerns small businessmen and women have when it comes to OSHA compliance and enforcement issues. The Norwood legislation being discussed today will: (1) Provide the OSHA Review Commission with added flexibility when it comes to applying the 15-day rule for contesting citations or proposed penalties, so that an employer would not automatically lose their case on technical grounds—if for legitimate reasons, they are unable to comply with the 15-day deadline for an appeal; (2) Expand from three to five the number of members sitting on the OSHA Review Commission in an effort to prevent unnecessary delays in adjudicating cases; (3) Establish that the independent OSHA Review Commission—*rather than OSHA itself*—

is the entity that will be given deference on how to interpret OSHA law by appellate courts reviewing the Commission's decisions; and (4) Amend the Equal Access to Justice Act (*EAJA*) to allow, under some circumstances, an employer to recover attorney's fees incurred if they are successful in defending against OSHA citations. Collectively, these proposed reforms will, if enacted, produce a fairer, more balanced, and more effective OSHA enforcement environment. Such an environment will help assist the small business community in meeting its responsibilities under the law and will help ensure a safer workplace environment overall.

Mr. Chairman, we look forward to working with you and other Members of the HELP Committee to advance these needed reforms. We commend your leadership, the leadership of Representative Norwood in the House—and we also commend the fine efforts of the U.S. Chamber of Commerce and the OSHA Fairness Coalition in helping to focus attention on the need for OSHA reform legislation.

In conclusion, we thank the subcommittee for this opportunity to express the views of the Academy of General Dentistry regarding OSHA.

For additional information regarding the Academy's views on other matters likely to be considered by the 109th Congress, please do not hesitate to contact us at the Academy's national office: 211 East Chicago Avenue, Suite 900, Chicago, Illinois 60611–1999, (Tel. 312–440–4300), (www.agd.org).

[Whereupon, at 3:30 p.m., the subcommittee was adjourned.]

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