

STATEMENT

OF

LPA

HEARING ON ERGONOMICS: ONE YEAR LATER

SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR AND
PENSIONS

WASHINGTON, DC

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Mr. Chairman and Members of the Committee:

LPA is pleased to submit testimony commenting on the Occupational Safety and Health Administration's (OSHA's) new approach to ergonomics, entitled "Effective Ergonomics: Strategy for Success." We applaud OSHA's use of industry- and task-based voluntary guidelines to reduce injuries. This approach encourages experimentation and development of new means of addressing musculoskeletal disorders (MSDs) while recognizing that much is still unknown about which work tasks and work motions will cause an employee to develop an ergonomics injury.

At the same time, LPA is concerned about OSHA's decision to use the General Duty Clause of the Occupational Safety and Health Act to cite employers for ergonomics violations. In particular, LPA is concerned that OSHA will enforce it indiscriminately, saddling employers and the agency with significant legal costs while it perfects its litigation strategy.

Despite its concerns on the enforcement component of OSHA's approach, LPA firmly believes that this committee, the Senate, and Congress as a whole should give OSHA an opportunity to demonstrate the effectiveness of its new program.

LPA, Inc., is an association of the senior human resource executives of more than 200 leading corporations in the United States. LPA's purpose is to ensure that U.S. employment policy supports the competitive goals of its member companies and their employees. Collectively, LPA members employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce. Our members take workplace safety, and ergonomics in particular very seriously, and they look forward to contributing their best practices to OSHA's guideline effort.

Recorded Musculoskeletal Disorders Continue to Decrease

Mr. Chairman, at the outset, it is important to reiterate that recorded musculoskeletal disorders, an extremely broad term, continue to decrease. Last week the U.S. Bureau of Labor Statistics released the statistics on lost-worktime injuries for 2000. The numbers indicated that musculoskeletal disorders decreased from 582,300 to 577,800, marking the eighth consecutive annual decrease. Since 1992, the number of ergonomics injuries has decreased by 206,300, or roughly 26 percent. This continued decline indicates that employers are already making adjustments to working conditions to limit work-related ergonomics injuries.

Cause of Many Ergonomics Injuries Unclear

Mr. Chairman, although employer and industry knowledge about ergonomics injuries in the workplace has improved greatly in recent years, the science is still unclear. As you know, certain employees performing a task may develop a problem, while others performing the same task will not. The National Academy of Sciences (NAS) study completed in January 2001 was intended to solve this debate. The study reviewed existing scientific literature in order to determine whether science has affirmatively linked injuries to workplace exposures. However, it only demonstrated that more research was required in this complex area.

The NAS panel concluded that “[n]one of the common musculoskeletal disorders is uniquely caused by work exposures,” that there are no comprehensive national data on medically defined MSDs, and that the available data is mostly based on employee reporting, not a diagnosis from a health care provider. It cautioned that often it is difficult to scientifically distinguish work exposures that may cause MSDs from other life exposures that cause them because 80 percent of the population works, further complicating research on the issue. The panel concluded that significant additional research is needed in this area.

Other research has cast doubt on the link between work and the existence of MSDs. A June 2001 Mayo Clinic study¹ explored the connection between heavy computer use at work and carpal tunnel syndrome, the first time such a connection had been scientifically studied. The study stated plainly that “[c]omparison of the characteristics of the employees with and without CTS revealed no differences that might implicate computer keyboard use as the causative factor in the CTS cases.”² The study compared employees in similar occupations and evaluated the number of years they had used a computer and the number of hours they used a computer daily. None of these factors increased an employee’s risk of developing carpal tunnel syndrome.

The study found that although nearly 30 percent of all employees in the workplace studied who were heavy computer users complained of hand and/or wrist pain, only 10.5 percent of the heavy computer users were diagnosed as meeting the clinical criteria for carpal tunnel syndrome.³ This is comparable to the estimates of carpal tunnel syndrome in the general population. In addition, the existence of carpal tunnel syndrome was confirmed by nerve conduction studies – the “gold standard” of measurements of the condition – in only 3.5 percent of the total employees.⁴

Mr. Chairman, these results demonstrate that the research is not yet at the point where consistent and effective regulation of work-related ergonomics injuries is possible. As noted below, much additional information is necessary. Without a sound basis from which to act, OSHA has chosen a prudent approach of developing guidelines to help disseminate best practices that employers can adopt to their own situations.

LPA Position on Ergonomics

Mr. Chairman, after Congress invalidated the Clinton Administration’s ergonomics standard, LPA developed a position on the regulation of ergonomics. The position recognized the extreme controversy created by the repealed standard, the lack of sound science on the issue, and yet the need for OSHA to be proactive. In pertinent part, it stated as follows:

LPA believes that OSHA can best carry out its mission with respect to ergonomics injuries caused by work by concentrating its resources on providing examples of best practices and developing guidelines to assist employers in adopting or enhancing their ergonomics programs.

LPA is pleased that the first prong of OSHA’s new approach recognizes the useful role served by disseminating information to employers.

OSHA's Guidelines Focus on Reducing Ergonomics Injuries

Mr. Chairman, LPA believes that OSHA has taken the correct approach by focusing on reduction of injuries through the development of industry- and task-based guidelines. History has shown that the best way to reduce workplace injuries is by providing employers with good information that is effective in reducing injuries. In the ergonomics context, OSHA will develop the guidelines with industry input, making the guidelines practical and relevant. Just as important, employers will be given the flexibility to apply the guidelines in a manner that best suits an employer's workplace, ensuring that employers are allowed to fashion solutions that have the greatest chance of improving workplace conditions.

Many of those opposed to OSHA's new ergonomics approach have criticized it on the basis that regulation is the only way to reduce ergonomics injuries. However, in other, similar contexts, voluntary compliance efforts among the federal government, employers and employees have produced successful results. For example, under OSHA the Voluntary Protection Program, an enforcement program, has reduced recorded injuries by as much as 50 percent below industry averages. Outside of OSHA, the American Chemical Council's Responsible Care Program provides an example of industry self-regulation to achieve greater safety and compliance in the management of chemicals and the chemical handling process. The program consists of a 10-step process for developing, implementing, and evaluating safe procedures.⁵ Participating members of the Council report recordable incident rates that are roughly four times less than general industry.

OSHA's proposed process of developing, disseminating and revising voluntary guidelines would serve a similar purpose, and it has a great chance of further reducing recordable ergonomics injuries. OSHA has said that it will start by reviewing the injury and illness rates and then analyze what workplace solutions have reduced musculoskeletal injuries. In this way, it appears that OSHA seeks to have a significant impact as quickly as possible.

Another advantage to OSHA's guideline approach is that it is flexible. As noted above, there is much that is yet unknown about the cause of workplace ergonomic injuries. By adopting a guideline approach, OSHA can change and disseminate guidelines far more quickly than it could if it promulgated a formal standard.

In sum, Mr. Chairman, OSHA's proposed approach of using guidelines allows the agency to develop flexible, practical solutions that are easily changed as new information becomes available. LPA believes this aspect of OSHA's new ergonomics system will have substantial impact on reducing workplace ergonomics injuries.

General Duty Clause Enforcement Must Be Approached Carefully

LPA is troubled by OSHA's proposed vigorous use of the General Duty Clause to cite employers for ergonomics hazards. Although OSHA has cited employers under the general duty clause for ergonomics for over 10 years, history has shown that it is an imprecise tool for ergonomics enforcement. The worst of all worlds would be for OSHA to use General Duty Clause enforcement liberally, even against employers that have undertaken good faith efforts to reduce MSDs. If that were to happen, employers and the

agency would be forced to spend excessive resources on litigation, without any certainty that the litigation would help reduce injuries. Accordingly, Mr. Chairman, LPA encourages OSHA to use the General Duty Clause against employers who are true bad actors, as opposed to those who are struggling with reducing workplace MSD problems.

LPA's concern regarding the new emphasis on General Duty Clause enforcement stems from the agency's dismal litigation record in the 1990s. Out of three cases the agency litigated, it lost two of them, *Pepperidge Farms* and *Dayton Tire*, and procured a settlement in the third, *Beverly Enterprises*, but 11 years after the initial complaint was filed. A brief review of the problems OSHA had during this litigation illustrates why it is important that the agency approach the general duty clause carefully.

As you know, Mr. Chairman, to show a general duty clause violation, OSHA must prove that:

- a workplace hazard existed;
- the hazard is recognized in the industry;
- the hazard is likely to cause death or serious physical harm; and
- a feasible and effective means exists to materially reduce the hazard.

In *Secretary of Labor v. Dayton Tire, Bridgestone/Firestone*,⁶ a case that was generated out of a union corporate campaign against the company, OSHA claimed that the company had recognized ergonomic hazards in over 20 jobs at one factory. OSHA called over three-dozen witnesses in the six-month trial, including facility doctors and two experts. However, the testimony could not establish that the purported injuries were caused by work, or at what level of repetitiveness injury may occur, thus failing the first prong of the test.

In *Secretary of Labor v. Pepperidge Farm, Inc.*,⁷ an Occupational Safety and Health Review Commission decision, OSHA had cited Pepperidge Farm for allowing employees who helped package cookies on a cookie manufacturing line to develop repetitive motion injuries. In the decision, the Commission agreed that the repetitive motion was causing injuries such as carpal tunnel syndrome. To remedy the problem, OSHA's experts had proposed reducing the speed of the production line, increasing the number of employees on the line, imposing short rest breaks, and introducing job rotation. However, OSHA could show neither that these steps would reduce the incidence of injury nor that they could be implemented in the workplace.⁸ Ironically, the Commission found that steps the company had taken on its own prior to the initial OSHA inspection had effectively reduced injuries. Thus, OSHA could not prove the last prong of the test, and the company prevailed.

In *Secretary of Labor v. Beverly Enterprises, Inc.*,⁹ OSHA cited five nursing homes for hazards associated with patient lifting. An administrative law judge heard the evidence of several ergonomists and medical experts and determined that the conflicting evidence presented precluded a finding that OSHA could show that a hazard existed. On appeal, a divided Occupational Safety and Health Review Commission reversed the judge's conclusions, and found sufficient evidence that a recognized hazard existed that could cause serious harm to employees. Yet, the Commission asked the administrative

law judge to determine whether an appropriate means of remedying the lifting hazards existed.

However, the case was never litigated to judgment. On January 11, 2002, roughly 11 years after OSHA issued the original citations, Beverly entered into a nationwide settlement with OSHA, agreeing to implement mechanical lifts and train employees how to use them.¹⁰ Thus, whether requiring mechanical lifts in nursing homes meets the final prong under the General Duty Clause has still not been decided.

Mr. Chairman, all of these decisions illustrate that OSHA must make careful decisions when bringing general duty clause cases. LPA is concerned that the agency will issue citations indiscriminately, and employers will be forced to wade through excessive litigation, just as the employers in the three examples above did. LPA believes that if OSHA chooses to pursue litigation, it should only do so where the cases involve clear injuries, clear causes and clear remedies. To do otherwise wastes valuable resources that could be used toward employer education and compliance and undercuts the agency's goal of reducing recordable injuries.

OSHA Deserves an Opportunity to Demonstrate Effectiveness of New Approach

Since Congress nullified the prior ergonomics standard, there has been much debate, particularly in the Senate, over the need to pass legislation such as S. 598, which was introduced by Sen. Breaux (D-LA), to require OSHA to promulgate a new standard. LPA strongly opposes this approach because its first attempt to implement a standard illustrated that the time, resources and energy required will not justify the results. (In the case of the repealed standard, the result was complete failure.)

LPA believes that OSHA ought to have an opportunity to fully implement its new ergonomics approach and demonstrate that it will work. The advantage of the approach is that it can be implemented relatively quickly. OSHA has estimated that it will release the first guidelines before the end of the year. The approach also allows OSHA to reach out to industries that would not have been covered by the first standard and to encourage them to take steps to reduce injuries.

Moreover, as was demonstrated time and again last year, the science is not yet at a point where OSHA can point to a wide variety of motions and work practices and craft a standard that will prevent injuries. LPA applauds OSHA's goal of identifying the research that needs to be done in this area and the agency's initiative to promote additional research. The science is essential to a better understanding of applied ergonomics. As science clarifies the relationship between work-based motion and individual employee physiology, employers understanding of how to address ergonomics in the workplace will likewise become clearer. For now, therefore, OSHA's new approach makes the most sense.

Conclusion

OSHA's new approach to ergonomics, while far from perfect, provides employers and the agency with the best opportunity to reduce the incidence of workplace ergonomics injuries. The agency's focus on guidelines is practical and flexible. It will allow employers to collect the best ideas and tailor them to their particular situations.

OSHA's use of the General Duty Clause is less helpful. The agency must select its cases carefully so that enforcement is viewed as targeting the worst actors, yet is effective in producing compliance. Finally, Congress should give the agency time to implement its approach before forcing it to write another ergonomics standard. Requiring the agency to develop a new standard at this point would only divert resources away from the significant education and compliance effort it is just now beginning. We urge you to give OSHA a chance to succeed.

Thank you for the opportunity to present our views.

Endnotes

¹ J. Clarke Stevens *et al.*, *The Frequency of Carpal Tunnel Syndrome in Computer Users at a Medical Facility*, 56 *Neurology* 1568-70 (2001).

² *Id.*

³ *Id.* at 1569.

⁴ *Id.*

⁵ See generally the American Chemistry Council Website,

<http://www.americanchemistry.com/rc.nsf/0/a5df77344a25fa8c852567f9004989c5?opendocument>.

⁶ OSHRC No. 93-3327, 1998 OSHA HRC LEXIS 23 (Jan. 26, 1998).

⁷ 17 O.S.H. Cas. (BNA) 1993, 2028.

⁸ *Id.* at 2039.

⁹ OSHRC Docket Nos. 91-3344, (Oct. 27, 2000).

¹⁰ *Beverly Nursing Home Chain to Install Lifting Devices to Settle OSHA Citations*, Daily Lab. Rept. (BNA), Jan. 16, 2002, at A-6.