

Testimony of

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**On The Breakdown of OSHA Standard
Setting**

Before the

**Subcommittee on Workforce Protections
Committee on Education and Labor
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OSHA STANDARDS: A BROKEN PROCESS AND PROMISE

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My name is Scott Schneider. I am the Director of Occupational Safety and Health for the Laborers' Health and Safety Fund of North America, a joint labor-management fund of the Laborers' International Union of North America (LIUNA) and its signatory contractors. The Laborers' Union represents about 800,000 mostly construction workers in the United States and Canada. I am a Certified Industrial Hygienist and a Fellow member of the American Industrial Hygiene Association. I have been working on occupational safety and health issues for the Labor movement for over 26 years. I am also a former member of the OSHA Advisory Committee for Construction Safety and Health (ACCSH).

The OSHA Act was passed with the promise to protect workers in America from death and serious injury and illness on the job. That promise has been broken.

My first introduction to OSHA rulemaking came in 1984 when I testified at an OSHA hearing on a proposed asbestos standard. My daughter was born during those hearings. It took OSHA 10 years to finalize that rule. Each year I would remind the folks at OSHA what grade my daughter was in at school until the final rule was issued when she was almost entering middle school. The delays in this instance were not in the process itself so much, the rule was published two years after the hearing, but from the litigation after because the published rule was not protective enough. Now, however, the delays occur much earlier, before the proposals are even published. It was an early lesson for me about the difficulty we face in gaining protection for workers.

When OSHA was created in 1970, OSHA standards were conceived as one leg of a three legged stool – standards, enforcement and outreach. While regulations cannot solve all problems, they are necessary to address market failures in order to keep the playing field level and set a minimum standard for all employers to meet. Many OSHA standards are outdated and the process for updating them or setting new ones is broken. There are three main reasons for this:

- 1) Lack of budget- only three percent of OSHA's budget- currently about \$16 million- goes for standard setting. Currently the standards office is also responsible for developing guidance so the amount for new standards is even less.
- 2) Regulatory review- Over the years layers of review have been heaped on OSHA causing lengthy delays in the rulemaking process. New rules have to go through advisory committee review, paperwork review, small business review, OMB review, potential Congressional review and, new this past year, external scientific review.
- 3) Lack of political will- Many needed standards just never get put on the regulatory agenda or sit there for years because the administration is not interested in their promulgation.

About thirteen years ago OSHA began to use “negotiated rulemaking” to speed up the process and, hopefully, avoid litigation. They convened a panel of industry experts, both labor and management, to develop a draft consensus rule. Once published, because of the consensus, there should be less chance of litigation. But even when OSHA has used negotiated rulemaking, the publication of the proposed rule can often take years. The new Cranes and Derricks standard for construction was developed by a negotiated rulemaking team through monthly meetings over the course of one year. Consensus was difficult but was finally achieved. Yet, almost three years later the proposed rule has not been published. It is currently scheduled for publication in October, although these deadlines have a way of slipping.

Construction standards

OSHA has a bad habit of setting standards for general industry and exempting the construction industry from coverage, promising future rulemaking that may never come. Meanwhile construction is one of the most dangerous industries in the country with 100 construction workers dying on the job each month. In 1993, OSHA issued a standard to protect workers in confined spaces from the danger of asphyxiation. This standard was supposed to be adapted for construction. The calendar claims that a proposed rule would be issued by February 2007, but again that hasn’t happened. After 14 years, we still don’t have a proposed rule and workers keep dying in confined space fatalities.

In 1998, OSHA issued a general industry “lockout/tagout” standard to prevent injuries among workers doing maintenance on machinery. The development of a proposed standard for construction was dropped in September 2001 when OSHA summarily dropped over dozen proposed rules (including a proposal for comprehensive safety and health programs in construction and improving sanitation in construction) from its agenda, claiming it did not have the resources to pursue them all.

While standards need to be modified to meet the unique characteristics of the construction industry, that should not require a 10, 15 or 20 year delay. Such standards can and should be developed simultaneously with those for general industry. The nation’s seven million construction workers do not deserve second class protection.

Silica and Hearing Loss in Construction

Silica is a common dust hazard in construction. Its dangers have been known for about three hundred years. Its cancer-causing properties have been well documented for over ten years. The risk estimates show very high risk of silicosis and cancer from exposures. Between 3,600 and 7,300 people are estimated to get silicosis each year. At the same time, numerous studies document successful and inexpensive control methods to reduce dust levels. The measurement methods required by OSHA for measuring silica levels are, by their own admission, “obsolete” and have not been used in voluntary standards since 1983. I’m not even sure how OSHA can enforce the current standard given the problems with measurement methods. The voluntary standard (TLV) for silica exposures

was cut in half again last year for the second time in the past nine years. Yet OSHA's standard is mired in the past.

OSHA identified silica as a priority for its rulemaking efforts in 1994. Ten years ago OSHA and NIOSH held a National Conference to Eliminate Silicosis. Silica has been on the OSHA regulatory calendar for almost ten years. A draft standard has been developed and was reviewed by SBA in 2003. A peer review of the health effects data was to be completed this month. Yet there is still no date certain for a proposed rule to be published. While we wait for OSHA to move forward, construction workers and others continue to suffer and die from debilitating lung diseases and cancer as a result of this delay.

Hearing loss is an enormous problem in construction. In 1983, OSHA published a hearing conservation standard for general industry that triggers a comprehensive hearing protection program at less than half the allowable exposure limit for construction workers. Construction workers were excluded from that standard but OSHA promised to extend coverage in the future. Twenty-four years later OSHA's regulatory calendar now lists this as a "long-term action" and does not commit the agency to issuing a standard. Seven years ago last month at a national conference hosted by the Laborers' Health and Safety Fund on preventing hearing loss in construction, a previous OSHA assistant secretary claimed it would be a priority for his agency. That commitment has been lost. In the meantime thousands of construction workers have lost their hearing and their quality of life. Workers who have lost hearing may also be in danger of their lives on the job if they cannot hear warnings.

Some states have moved forward while OSHA delays. Washington State extended the hearing conservation standard to construction several years ago. New Jersey has instituted a ban on the dry cutting of masonry and California is expected soon to follow suit. Washington State has just published a tough new standard for crane safety, well before an OSHA rule is even proposed.

We urge the committee to press for a report on the status of these rulemakings, why OSHA has not moved more quickly to address these serious hazards and what their plan is to move forward on both these critical issues.

How can we fix this problem?

Congress should seriously consider a legislative fix to this problem. Here are several options to be considered:

- 1) Standards Board- California has had success with a Standards Board in promulgating many regulations, e.g. heat stress, safety and health programs, which OSHA has not even begun to consider. The Board has labor, management and academic members. One of LIUNA's Vice Presidents serves as a member of that Board.

- 2) Time Limits- Congress can set time limits for OSHA to consider and then issue proposals and final rules. In the past Congress has mandated that OSHA issue rules within a six-month period and the agency has done so (e.g. lead, hazardous waste). Congress should give OSHA a limited time, say four months, to consider any petition for new standards and require the agency to publish a response in the Federal Register as to its reasons for accepting or denying the petition. The burden should be on the agency to show why a standard should not be issued. Once committed to a rule making, the agency would be given additional deadlines to meet to ensure that rules are issued in a timely manner, say no more than three years. Congress would have to provide additional funding for OSHA dedicated to standard setting in order for it to meet these deadlines.
- 3) Expedited Rulemaking- Congress should streamline the rulemaking process. Once OSHA commits to developing a standard, a Notice of Proposed Rulemaking is published. These Notices of Proposed Rulemaking (NPR) undergo extensive review before they are published. Then they are reviewed by the public through a series of public hearings. The final rule is issued after a review of the record created through these public hearings. The NPR is not the final rule and should not be viewed as an end product. The vetting of NPRs is excessive and onerous. Congress should reduce the burden of proof needed for issuance of an NPR.
- 4) Emergency Temporary Standards (ETS)- Congress should review and expand the ability of OSHA to issue “emergency temporary standards.” This section of the Act has been undermined by court decisions and is not used any more because of that. Congress could define risk criteria that once met would allow issuance of an ETS to speed up rulemaking for high risk hazards.

The current system is broken and blocked. We need a serious effort to solve this problem. Workers should not have to wait decades for needed protections. I hope Congress will take up this issue and craft a workable solution. This hearing is an important first step.