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**Testimony of Eric Frumin
Health and Safety Coordinator**

Change to Win

Before the

**Subcommittee on Workforce Protections
Committee on Education and Labor
United States House of Representatives**

on

Improving OSHA's Enhanced Enforced Program

Washington, DC

April 30, 2009

Chairman Woolsey, Ranking Member Price, and members of the Subcommittee, thank you for the opportunity to testify today.

I am Eric Frumin. I serve as the Health and Safety Coordinator for Change to Win, and have worked in this field for 35 years. Change to Win is a partnership of seven unions and six million workers, in a wide variety of industries, building a new movement of working people equipped to meet the challenges of the global economy in the 21st century and restore the American Dream: a paycheck that can support a family, affordable health care, a secure retirement and dignity on the job. The seven partner unions are: International Brotherhood of Teamsters, Laborers' International Union of North America, Service Employees International Union, UNITE HERE, United Brotherhood of Carpenters and Joiners of America, United Farm Workers of America, and United Food and Commercial Workers International Union.

On behalf of Change to Win, we greatly appreciate the leadership of this Subcommittee in holding this hearing, and for your determined interest in the serious problems confronting workers, ethical employers, OSHA and others concerned with the severe gaps in OSHA's enforcement program. These shortcomings endanger workers' lives, and with Congress has the power to help.

Worse, Not Better

Today we hear the testimony of Jesus Rojas, the son of Raul Figueroa, a mechanic at Waste Management, Inc. (WMI) who was killed by the hydraulic arm of the garbage truck he was repairing. A year ago, this subcommittee heard the testimony of Emmanuel Torres Gomez, the son of Eleazar Torres Gomez, a Cintas Corp. employee who died after becoming trapped in an industrial-sized clothes dryer. Their statements describe the anguish that their families have suffered at the hands of companies with extensive records of citations for life-threatening violations of well-established OSHA standards – companies that have been criticized by this Committee and the public for putting production (and profits) before safety.¹

The conditions Mr. Rojas has described are truly intolerable. If indeed WMI managers misled OSHA inspectors about the working conditions at the time of his father's death, OSHA should have investigated to determine whether their stories were true. If they lied, they may well have committed the same felony interference in a federal investigation that just sent several McWane managers to federal prison for 3-5 years, particularly if they colluded in that deception.

¹ J. Bandler, "House Panel to Examine Cintas Safety Record," *Wall Street Journal*, April 23, 2008 ["Workers told OSHA investigators they were 'under a lot of pressure to keep everything going.'"]; OSHA Press release, Aug. 16, 2007 ["Plant management at the Cintas Tulsa laundry facility ignored safety and health rules that could have prevented the death of this employee," said Assistant Secretary of Labor for OSHA Edwin G. Foulke Jr.]; OSHA Press Release, Oct. 31, 2007 ["As a large, national employer with a history of OSHA inspections and citations for hazards at other facilities, we are disappointed to find so many of the same or similar hazards at this facility," said Ken Atha, OSHA's area director in Mobile.]; National Commission of Inquiry into the Worker Health and Safety Crisis in the Solid Waste Industry: *In Harm's Way: How Waste Management, Inc. Endangers the Sanitation Workers who Protect the Public's Health*. April, 2008.

Last April, Change to Win testified before your counterpart committee in the U.S. Senate about patterns of violations at WMI, Cintas Corp., the Agriprocessors meatpacking plant in Iowa, the scandal at the House of Raeford poultry plants in the Carolinas, and the construction sites in New England operated by Avalon Bay/ShawnLee/National Carpentry. (That testimony is appended here.²) Today, I regret to report that there appears to be a growing pattern of large corporations ignoring or avoiding their obligations to assure a safe workplace.

Sadly, since last spring:

- Cintas has now finally acknowledged that 65 of its automated laundries in federal jurisdiction lack the basic guarding essential to protecting their employees from tragedies such as the one that happened to Eleazar Torres Gomez.³ It has agreed to pay a nearly \$3 million fine. But despite these acknowledgements, Cintas has still not recanted its callous position that Mr. Torres Gomez was responsible for his own death.
- ShawnLee has accumulated additional “willful” and “repeated” violations for fall-protection hazards as recently as February 24, 2009.⁴
- Not long after this Committee reviewed the atrocious conditions at the Agriprocessors’ infamous meatpacking plant in Postville, IA, the managers and owners of that plant were charged with major immigration and child-labor crimes, and more recently for financial crimes and violating U.S. Agriculture Department financial orders.⁵
- Despite its repeated denials of any wrong-doing, the top manager of the notorious House of Raeford chicken processing plant in Greenville, SC has been indicted for violations of immigration-related labor regulations, as have the Human Resource Manager and dozens of supervisors. As at Agriprocessors, Department of Homeland Security investigators also found repeated cases of children working in the House of Raeford’s hazardous poultry environment—sparking demands for improved safety and child labor enforcement in North Carolina.⁶
- Finally, Waste Management has incurred more serious lockout violations since Mr. Figueroa’s death.⁷

The Enhanced Enforcement Program (EEP) was specifically established to deal with flagrant and repeated offenders such as these. However, as will be discussed below, the EEP is far too limited to accomplish its objectives.

The Problems Beyond EEP

Before discussing the EEP itself in detail, we should look at two examples of the serious limitations in OSHA’s enforcement regime apart from the limitations within the EEP.

Indeed, some employers – and even some industries as a whole -- have such disregard for their obligations that the EEP alone is not enough.

² It is available also at: http://help.senate.gov/Hearings/Hearings/2008_04_01/2008_04_01.html

³ Addendum A, Stipulation and Agreement, Secretary of Labor vs. Cintas, Dec. 18, 2008.

⁴ OSHA inspections 312589302 and 309560183.

⁵ Grant Schulte, *Rubashkin Hit With 99-Count Indictment*, Des Moines Register, Jan. 17, 2009.

⁶ Charlotte Observer, March 8, 2008, Feb. 17, 2009 and April 17, 2009.

⁷ OSHA inspections 311089510.

BP Products North America: a corporate-level study in enforcement failure

In February, 2005, OSHA properly designated the Texas City as an EEP site following its investigation of the multiple deaths there in late 2004. As the IG report notes, OSHA failed to pursue investigations at additional sites based on this incident. The huge explosion occurred a month after OSHA issued its citations in 2005 – and though the incidents were not closely related, they reflected the abysmal state of the company’s safety program in Texas City. OSHA then designated BP as an EEP and issued a National Alert. However, one supervisor and two contract workers have died at the Texas City facility in the three years since 2005. Two other contract workers died in 2005 and 2007 at the company’s Cherry Hill, WA plant.⁸ Clearly, BP indicates that for some companies, the EEP alone is simply not enough to deter highly hazardous operations. Much more aggressive measures are required.

The Oil/Gas Drilling Industry: an industry-wide study in enforcement failure

The continuing high death toll in the oil and gas well drilling industry -- which has one of the highest fatality rates of any industry sector-- demonstrates that flagrant and repeated violators persist at the level of entire industries as a whole. In fact, in the most recent 2-year period for which data is available (2006-07), this industry still accounts for two-thirds of ALL deaths in the “mining” industry (see attached BLS data). The number has increased by 30% compared to the prior three-year period. Compare that to the 43% decrease in coal mining in 2007 alone.

Not surprisingly, several drilling companies appear repeatedly in the IG’s report, including companies like Patterson-UTI, Nabors Industries and Premium Well Drilling which even had subsequent fatalities after the initial EEP inspection.

And the major oil/gas drilling states —TX, LA, OK and WY—all suffered increases in their death tolls in 2007. Wyoming indeed has the highest fatality rate of any state in the Union. But notwithstanding these severe problems, OSHA Region VI reported a 24% reduction in the number of inspections in this industry.⁹

The oil/gas drilling industry requires more than just EEP designation, such as a National or Regional Emphasis Program.

Finally, when OSHA adopted the Process Safety Management Standard in 1992 to reduce refinery hazards, it created an exemption for this industry. In 1999, OSHA stated at the time that it was “... currently determining whether to place this standard back on its rulemaking agenda.”¹⁰ It is evident that this industry badly needs that additional regulation. More enforcement efforts alone are simply not enough.

⁸ Lise Olson and Tom Fowler, *Costly Cleanup, Fines Have Failed To Halt BP Deaths*, Houston Chronicle, Feb. 24, 2008. Olson and Fowler also noted that a total of 41 workers have died in the Texas City refinery “since the mid-1970’s.”

⁹ Alisa Stingley, *Critic: Not Enough Government Oversight*, Shreveport Times, Feb. 23, 2009.

¹⁰ Richard Fairfax, *Memorandum for Regional Administrators: PSM Applicability to Oil/Gas Production Facilities*, Nov. 4, 1999.

The Problem With EEP: An Inadequate Enforcement Regime

At the outset, the EEP was at best a weak response to the the notorious McWane cases that prompted the creation of the EEP program in the first place. Initially, it relied heavily on fatalities to trigger enforcement, rather than relying as much on severe violations as well. Even after the changes in 2008, by limiting itself to both willful/repeat violations AND a recent history, it still lacks the proper focus on multiple, severe workplace hazards and violations.

The EEP has also suffered from inadequate procedures for follow-up. It only *requires* one additional inspection at “related” sites within the same company within the same Region. Finally, OSHA made only meager efforts under the EEP to launch wide-scale investigations when confronted by serious problems in large companies. In six years, it has issued only nine National Alerts to focus the necessary attention on larger companies with flagrant violations.

OSHA’s inspectors have already noted the many problems with the design of the program. Enforcement Director Rich Fairfax recently stated: “[W]e are still not targeting the ‘bad actors’ the program is intended for.”¹¹

The IG’s investigation into the EEP Program, therefore, was a welcome review that highlighted many problems and demonstrated the need to focus on the goals of the program.¹² However, because the IG’s investigation was limited to the scope of the existing program, that report cannot provide comprehensive guidance on what is necessary to establish a program that will fully identify and effectively deter flagrant and repeated violators.

What is needed is a more systemic, holistic examination of the current OSHA enforcement regime. In an era of giant corporate entities, OSHA is currently designed primarily to find violations at individual “establishments.” OSHA usually takes such action *only after* fatalities occur, at which point willful, repeated, and egregious violations often prompt broad “corporate-wide” settlement agreements. While some of these settlement agreements have worked well, others have not. In any case, they were reactive responses to problems, not proactive approaches in keeping with the overall preventive purposes the Congress originally intended.

The Solution: 21st Century Enforcement Powers

OSHA needs a new enforcement regime that includes stronger criminal sanctions, cutting-edge investigation capability and corporate reporting requirements to facilitate detection and follow-up, and sufficient additional resources to do the job. We need legislative reforms such as those in Protecting America’s Workers Act and other legislation to close loopholes and give OSHA the new tools and resources it needs.

¹¹ Memorandum for Donald G. Shaloub from Richard Fairfax, EEP End of Year Report, (FY2008), March 19, 2009. Found at: <http://thepumphandle.wordpress.com/2009/04/02/ig-slams-bushs-osha-twice-in-one-day/#more-4664>.

¹² US Department of Labor, Office of the Inspector General. *Employers With Reported Fatalities Were Not Always Properly Identified And Inspected Under OSHA’s Enhanced Enforcement Program*, Report # 02-09-203-10-105, Washington, DC., March 31, 2009. The IG limited its review to only three of OSHA’s 11 regions. It was also limited to the time period after OSHA’s mishandling of the notorious McWane cases that prompted the creation of the EEP in the first place.

Expanded Investigatory Capacity – It is vital that OSHA have the authority and the organizational tools to establish a national investigation program so it can identify dangerous conditions at an early stage when it can still intervene to prevent future deaths and serious injuries. In order to accomplish this goal, we urge Congress to make sure that OSHA has a 21st Century information system with the ability to track companies that operate under multiple names or in states with a separate state enforcement programs. OSHA also must make sure that corporate officers—and those who work for them—are as much the subjects of investigations as the front-line supervisors and workers who OSHA first interviews. This is especially important when investigations involve either severe violations, potential employer deception, or both.

More National Alerts - The use of Regional or National investigations is necessary to create an effective deterrent to continued misconduct. As the IG has noted, in most cases the use of National Alerts were effective in greatly reducing and stopping deaths at the targeted companies. And if Regional or National Alerts are useful in the case of flagrant violators, then broader investigations of some kind should also be useful at companies with “high-severity” hazards—even if the cases do not involve the “flagrant” (i.e., repeat or willful) violations that trigger EEP cases.

Corporate-wide Reporting - If OSHA inspectors are to undertake the aggressive follow-up envisioned by the EEP program, they must know the full scope of the companies with which they are dealing. Compliance officers cannot be limited to sending letters to the corporate headquarters merely requesting such information. Companies must be required to report their unified compliance information directly to OSHA on a regular basis, allowing OSHA to plan its enforcement investigations and actions with full knowledge of a company’s operations. Corporate-wide information is also important for calculating penalties. The newly-issued Field Operations Manual specifically requires that an employer’s past violations must be considered in any penalty calculations, even if those violations were issued by a state-administered program or against the same employer operating under a different name.

Sufficient Resources – The failures identified in the IG report certainly do not diminish the dedication of career OSHA staff who are often fighting an uphill battle against these systematic abuses. OSHA staff simply cannot adequately perform with the current level of resources. In relation to the size of the workforce, the number of inspectors has dropped by more than 50% since its high-water mark at the end of the Carter Administration in 1980.¹³

Stronger Criminal Sanctions - Higher monetary penalties are not enough. Even the landmark nearly \$3 million civil penalty that Cintas has agreed to pay OSHA is less than one percent of its annual profits. The OSHAct currently authorizes criminal sanctions only in the case of fatalities resulting from a willful violation of a specific standard, and even that egregious misconduct is only a mere misdemeanor, punishable with a maximum six-month sentence. A violator faces more time in prison for killing a burro on federal land than a worker on the job. There must be stronger criminal sanctions in place.

Enhancing Responsible Corporate Performance - In 1970, Congress established a basic principle: employers—not the government and not individual workers—have the primary responsibility to protect workers’ lives on the job. Employers are obligated under law to provide workers with safe

¹³ Center for American Progress Action Fund, *Enforcing Change*, January, 2009

equipment and a healthy work environment. Employers have the additional obligation to maintain effective management systems to deliver that safety, and to hold managers accountable when they fail. Corporations have the infrastructure to know what equipment they operate, where it is, how it runs and whether or not they are committing the same or similar violations in multiple locations. Responsible employers already conduct their own “follow-up” inspections after OSHA finds a severe hazard. This should be an enforceable obligation for all companies.

A comprehensive internal investigation and safety management system at Cintas might have saved the life of Eleazar Torres Gomez. WMI’s OSHA violations increased by 28% over the period 2003-2007. If WMI had implemented a comprehensive safety program, and held it managers accountable, rather than allowing an increasing number of violations, Raul Figueroa might well be alive today.

Enforcement after workers die is not really enforcement at all. We need real change.

That is the change that America voted for last year, and we are more than willing to work with Congress, with responsible employers and with others to see that American workers receive that change. Fortunately, the Secretary of Labor has made it clear that she, too, wants real change, and we are delighted to support her efforts. We believe real change begins with the Protecting America’s Workers Act, and it ends with workers having safe, healthy places to work.

We appreciate the opportunity to testify, and will be happy to answer any questions.

Thank you.
Respectfully submitted,

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For further information, see:

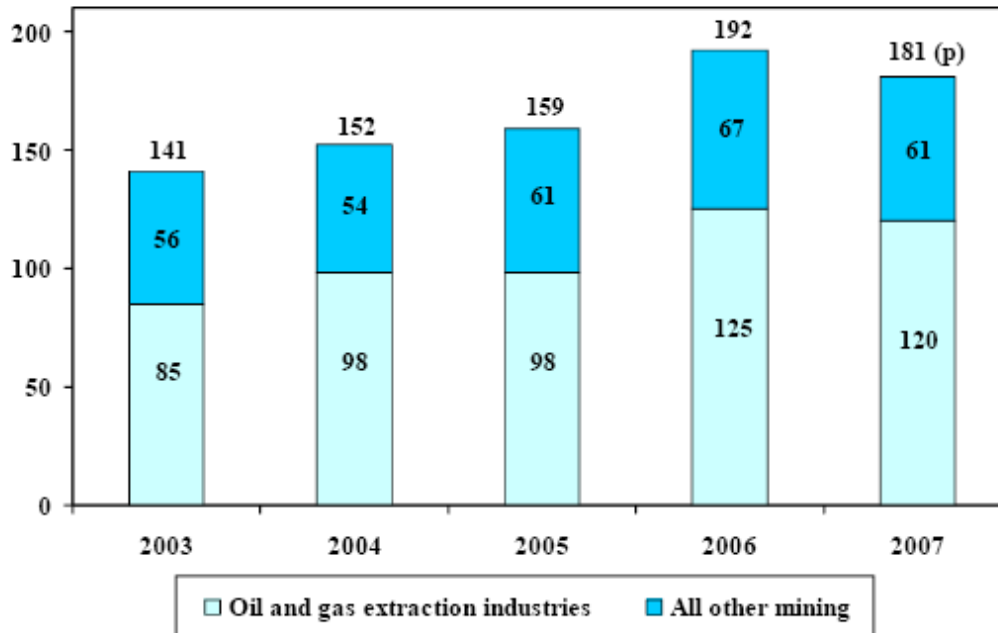
1. Testimony of Change to Win, Senate Subcomm. Employment and Workplace Safety, 4/1/08
2. Report by the National Commission of Inquiry into the Worker Health and Safety Crisis in the Solid Waste Industry—*In Harm’s Way: How Waste Management, Inc. Endangers the Sanitation Workers who Protect the Public’s Health*. Published April, 2008.

http://www.teamster.org/08news/nr_080325_1.asp.

Excerpt from BLS Census of Fatal Occupational Injuries 2007

Fatal occupational injuries in the private mining industry, 2003–07

Number of fatalities



Fatal work injuries in the private mining industry declined in 2007, led by a 43 percent decrease in coal mining fatalities (from 47 in 2006 to 27 in 2007). Oil and gas industry fatalities accounted for nearly two-thirds of the fatal work injuries in mining in 2007.

p = Preliminary

NOTE: Oil and gas extraction industries includes NAICS 211 (oil and gas extraction), NAICS 213111 (drilling oil and gas wells), and NAICS 213112 (support activities for oil and gas operations).

SOURCE: U.S. Bureau of Labor Statistics, U.S. Department of Labor, 2008