

**STATEMENT OF LAWRENCE P. HALPRIN  
BEFORE THE U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON EDUCATION AND LABOR  
HEARING ON**

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

**APRIL 28, 2009**

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

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

At Keller and Heckman, my practice largely focuses on environmental, health, safety and security issues. I have spent a substantial portion of the last 30 years assisting clients in the area of workplace safety and health – providing counseling, performing audits, providing training, developing and reviewing programs, and representing clients in a wide range of enforcement proceedings brought by OSHA and its state counterparts. In addition, I am a member of several ANSI and ASTM committees that develop safety and health standards, have represented one or

more clients in almost every major OSHA rulemaking since the mid 1980s, and have extensive experience working with OSHA staff both informally and through alliances and other cooperative activities, SBREFA panels and joint speaking engagements.

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

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

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

Given that reality, OSHA, with substantial Congressional input, has, over the years, experimented with various combinations of regulatory interventions -- rulemaking, outreach and education, compliance assistance and enforcement -- and continues to refine the mix of interventions to make the most effective use of its limited resources. The focus of this hearing has been described as an inquiry into whether "employers who fail to protect their workers are

adequately penalized and deterred from committing future violations,” and the recently introduced Protecting Americas Workers Act indicates a belief by some Members that there should be an increase in the civil and criminal sanctions that may be imposed for violations of the OSH Act.

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

### **FACTORS SUPPORTING THE CURRENT PENALTY STRUCTURE OF THE OSH ACT**

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

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

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<sup>1</sup> Most OSHA standards were adopted verbatim from outdated, national consensus standards developed by ANSI and NFPA prior to 1970. The often-ambiguous consensus standards were developed with the idea that the users would voluntarily conform to the spirit of those rules; they were not developed for use as enforceable government standards. Furthermore, presumably because of copyright

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

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

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

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issues rather than a concern about saving printing costs, many of those standards were simply incorporated by reference rather than being printed in the Federal Register and the Code of Federal Regulations.

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

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

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

full compliance with the requirements of the OSH Act.

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

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

### **A REVIEW OF THE EXISTING OSHA PENALTY STRUCTURE**

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

assessment approach (which does not assume an accident will occur) and may force employers, working with limited resources, especially under current economic conditions, to choose between prudent risk management of workplace safety, and regulatory compliance.

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

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

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

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

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

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

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

### **THE ISSUE OF ENHANCED CRIMINAL SANCTIONS**

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

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

## **POSSIBLE CHANGES TO THE PENALTY PROVISIONS OF THE OSH ACT**

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

## **CONCLUSION**

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

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

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<sup>3</sup> See the *National Census of Fatal Occupational Injuries in 2007 (revised)*, available at [http://www.bls.gov/iif/oshwc/cfoi/cfoi\\_revised07.pdf](http://www.bls.gov/iif/oshwc/cfoi/cfoi_revised07.pdf)

<sup>4</sup> See: <http://www-fars.nhtsa.dot.gov/Main/index.aspx>



also continued to decline each year. According to BLS<sup>5</sup>, there were 4.2 cases per 100 full-time workers.

Civil monetary penalties and citations, coupled with the criminal penalties that are given to the most egregious violations, have been sufficient to assure compliance with the regulations. I believe workplace safety and health could be far more effectively advanced through greater emphasis on clarifying OSHA standards and implementing effective training, outreach and cooperative programs.

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

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

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