

**TESTIMONY OF DAVID MICHAELS
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BEFORE
THE COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS
U.S. SENATE
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Chairman Harkin, Ranking Member Enzi, Members of the Subcommittee, I want to thank the Committee for inviting us here today. It is a sad, but true commentary on human nature and the political system that great advances are all too often made only in the shadow of great tragedy.

Today, we are meeting under the shadow of two recent tragedies that have captured the headlines and the hearts of the American people – the almost unimaginable deaths of 29 miners in West Virginia, and the loss of seven refinery workers in Washington State. But we are also here today in the knowledge that 14 Americans fail to come home from work to their families every single day of the year. In addition, tens of thousands die every year from workplace disease and over 4.6 million workers are seriously injured on the job. Most of these workers die one at a time, far from the headlines and nightly news, remembered only by their family, friends and co-workers. I have here before me a pile of news clips collected over the last couple of weeks describing workers, men and women, young and old who have been crushed, electrocuted, burned, or who have died in falls, trench collapses and forklift accidents.

These are the invisible relentless daily tragedies of the American workplace. Thank you for inviting us here today to work with you to find ways to stop this senseless sacrifice in American workplaces.

Until 1970, although certain industry-specific protections such as the Coal Mine Health and Safety Act of 1969 existed, there was no national guarantee that workers throughout America would be protected from workplace hazards. In that year the Congress enacted a powerful and far-reaching law—the Occupational Safety and Health Act of 1970 (OSH Act).

The results of this law speak for themselves. The annual injury/illness rate among American workers has decreased by 65 percent since 1973. Employers, unions, academia, and private safety and health organizations pay a great deal more attention to worker protection today than they did prior to enactment of this landmark legislation.

The promise of the Act, “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions” is needed today as much as it was 40 years ago. Yet the means provided by the Act to achieve that worthy goal are tragically outdated and inadequate. It has now been almost 40 years since the Occupational Safety and Health (OSH) Act was passed, and aside from an overdue increase in penalties almost 20 years ago, no significant change has been made to this law. There are far too many obstacles that prevent effective enforcement of the law, far too many loopholes that allow unscrupulous employers to continue to get away with endangering workers. This must stop.

Now is the time to think seriously and act courageously to ensure that OSHA and MSHA have the tools they need to enforce safe working conditions, and that this government develops effective incentives that will ensure all employers do the right thing. If we are to fulfill Secretary Solis’ vision of *Good Jobs for Everyone*, we must address these urgent problems. Good jobs are safe jobs, and American workers still face unacceptable hazards.

We all know that most businesses want to do the right thing and will expend the necessary resources to

ensure that their workplaces are safe. We need to make sure that they have the information and assistance they need to protect their employees. But there are still far too many businesses in this country who continue to cut corners on safety, endangering the health and safety of their workers. As Secretary Solis pointed out to President Obama in her report last week on the Upper Big Branch mine disaster, she is committed to taking action now to stop reckless mine operators and other business owners who risk the lives and health of their workers. Too often, we see employers who assess the benefits of refusing to comply with the law and compare them to the costs of complying with the law. If they find that the costs of compliance outweigh the penalties they will face if caught, they opt to gamble with their workers' lives. This is a "catch me if you can" approach to safety and health. It is what we saw in action at Upper Big Branch and what we at OSHA see far too often in the workplaces we visit.

We know that we do not have, nor will we ever have enough inspectors to be in every workplace often enough to make sure that all workplace safety laws, rules and best practices are followed. Therefore, we need to find ways to leverage our resources to ensure the goals of the OSH Act are met. Our mission must not be to punish or react, but to require employers to plan, prevent and protect.

To do this effectively, major changes need to be made in the Act. The Occupational Safety and Health Act is almost 40 years old. Since enactment, the Act has not been significantly modified in all of those years and has not kept up with many of the significant advances made in other laws, including consumer and worker protections.

OSHA has already taken broad steps toward this goal. Just yesterday, the Labor Department released its Spring regulatory agenda which includes a new enforcement strategy – Plan/Prevent/Protect – an effort designed to expand and strengthen worker protections through a new OSHA standard that would

require each employer to implement an Injury and Illness Prevention Program tailored to the actual hazards in that employer's workplace.

Instead of waiting for an OSHA inspection or a workplace accident to address workplace hazards, employers would be required to create a plan for identifying and remediating hazards, and then implement this plan. Essentially, through this common sense rule, we will be asking employers to find the safety and health hazards present in their facilities that might injure or kill workers and then fix those hazards, also known as "Find and Fix." Workers would participate in developing and implementing such a plan and evaluating its effectiveness in achieving compliance. OSHA will soon initiate rulemaking on this standard with stakeholder meetings, the first to take place in June in New Jersey.

Additionally, we are doing everything we can within the limits of our law to expand and strengthen workplace protections. Last week, we announced a new initiative to implement long-overdue administrative modifications to our penalty formulas, which will have the effect of raising OSHA penalties while maintaining our policy of reducing penalties for small employers and those acting in good faith. These changes will be well-advertised so that all employers are aware of the new policies. However, OSHA believes any administrative changes we are able to make would still be inadequate to compel bad employers to abate serious hazards. These steps are an effort to do the best with the outdated, antiquated tools we have. But we can only do so much within the constraints of the current OSH Act.

We also announced that OSHA will implement a new Severe Violators Enforcement Program, increasing our focus on repeatedly recalcitrant employers, which will be discussed in more detail later in my testimony.

While important, both of these administrative measures are severely limited by constraints of current law. To adequately plan, prevent and protect, the law governing OSHA must be updated to reflect the 21st Century.

The Administration supports the Protecting America's Workers Act (PAWA), which makes meaningful and substantial statutory changes to OSHA's penalty structure and enforcement program. PAWA, coupled with our vigorous "plan/prevent/protect" regulatory agenda, will begin to make the "catch me if you can" approach to workplace safety a thing of the past.

PENALTIES

The most serious obstacle to effective OSHA enforcement of the law is the very low level of civil penalties allowed under our law, as well as our weak criminal sanctions.

While most employers understand the business case and the moral case for providing a safe workplace, many do not and the threat of penalties plays a major incentive in forcing them to comply with the law. The deterrent effects of these penalties are determined by both the magnitude and the likelihood of penalties. Swift, certain and meaningful penalties provide an important inducement to "do the right thing." However, OSHA's current penalties are not large enough to provide adequate incentives. Although OSHA can, in rare circumstances involving large numbers of egregious violations, generate large penalties, most OSHA fines are far too small to serve as anything more than an inconvenient cost of doing business.

I also want to stress here that OSHA enforcement and penalties are not just a reaction to workplace tragedies; they serve an important preventive function. Just as the fear of a ticket and large fine keeps

the average driver from running red lights to make it to the meeting for which he or she is late, OSHA inspections and penalties must be large enough to discourage employers from cutting corners or underfunding safety programs to save a few dollars. And even the largest fines when levied on a giant corporation have little effect on the company's bottom line.

Congress has increased monetary penalties for violations of the OSH Act only once in 40 years despite inflation during that period. As a result, unscrupulous employers often consider it more cost effective to pay the minimal OSHA penalty and continue to operate an unsafe workplace than to correct the underlying health and safety problem.

Currently, serious violations – those that pose a substantial probability of death or serious physical harm to workers – are subject to a maximum civil penalty of only \$7,000. Let me say that again – a violation that causes a “substantial probability of death – or serious physical harm” brings a maximum penalty of only \$7,000. Willful and repeated violations carry a maximum penalty of only \$70,000.

After factoring in reductions for size, good faith and history, as well as other factors, the current average OSHA penalty for a serious violation is only around \$1,000. The median initial penalty proposed for all investigations conducted in FY 2007 in cases where a worker was killed was just \$5,900. Clearly, OSHA can never put a price on a worker’s life and that is not the purpose of penalties – even in fatality cases. OSHA must, however, be empowered to send a stronger message in cases where a life is needlessly lost than the message that a \$5,900 penalty sends.

The current penalties do not provide an adequate deterrent. This is apparent when compared to penalties that other agencies are allowed to assess. For example, the Department of Agriculture is authorized to impose a fine of up to \$130,000 on milk processors for willful violations of the Fluid

Milk Promotion Act, which include refusal to pay fees and assessments to help advertise and research fluid milk products. The Federal Communications Commission can fine a TV or radio station up to \$325,000 for indecent content. The Environmental Protection Agency can impose a penalty of \$270,000 for violations of the Clean Air Act and a penalty of \$1 million for attempting to tamper with a public water system. Yet, the maximum civil penalty OSHA may impose when a hard-working man or woman is killed on the job – even when the death is caused by a willful violation of an OSHA requirement – is \$70,000.

In 2001 a tank full of sulfuric acid exploded at an oil refinery in Delaware, killing Jeff Davis, a worker at the refinery. His body literally dissolved in the acid. The OSHA penalty was only \$175,000. Yet, in the same incident, thousands of dead fish and crabs were discovered, allowing an EPA Clean Water Act violation amounting to \$10 million. How can we tell Jeff Davis' wife Mary, and their five children, that the penalty for killing fish and crabs is many times higher than the penalty for killing their husband and father?

The Protecting America's Workers Act makes much needed increases in both civil and criminal penalties for every type of violation of the OSH Act and would increase penalties for willful or repeat violations that involve a fatality to as much as \$250,000. These increases are not inappropriately large. In fact, for most violations, they raise penalties only to the level where they will have the same value, accounting for inflation, as they had in 1990.

Unlike most other Federal enforcement agencies, the OSH Act has been exempt from the Federal Civil Penalties Inflation Adjustment Act, so there have not even been increases in OSHA penalties for inflation, which has reduced the real dollar value of OSHA penalties by about 39 percent. In order to ensure the effect of the newly increased penalties do not degrade in the same way, PAWA indexes civil

penalties to increases or decreases in the Consumer Price Index (CPI). These penalty increases are necessary to create at least the same deterrent that Congress originally intended when it passed the OSH Act almost 40 years ago. Simply put, OSHA penalties must be increased to provide a real disincentive for employers not to accept injuries and worker deaths as a cost of doing business.

Throughout its history, OSHA has faced the problem of employers who have allowed multiple serious and repeated violations to exist across several of their workplaces. It isn't only the coal mining industry that faces employers like Massey Energy that rack up dozens or hundreds of violations throughout the corporation.

Sometimes even large penalties are ineffective. After OSHA cites these companies at one location, workers often continue to get hurt or die from the same kinds of hazards at another site within the same company. OSHA has only limited tools to require recalcitrant employers to abate life-threatening hazards. As I stated earlier, OSHA issued its new Severe Violators Enforcement program (SVEP) last week. SVEP is a refinement of the Enhanced Enforcement Program, designed as a supplemental special enforcement tool to address recalcitrant employers who fail to meet their obligations under the OSH Act. This program includes more mandatory inspections of an identified company; mandatory follow-up inspections, including inspections at other locations of the same company; and a more intense examination of an employer's history to assess if there are systemic problems that would trigger additional mandatory inspections. This is about as close as OSHA can come, within the limits of our law, to MSHA's "pattern of violations" system.

There are a number of improvements to OSHA's law that could allow us to implement a pattern of violations authority that would facilitate more severe penalties when a pattern is identified. Additional authority to propose higher penalties for "multiple repeat violations" could enable OSHA to address

situations in which companies demonstrate consistent and repeated disregard for the lives of their employees.

In addition, under current law, OSHA cannot cite a repeat violation if the original violation occurred in one of the nation's 21 "State Plan" states which administer their own OSHA programs. Permit me to explain this. If a roofer who was not provided fall protection is killed after falling from a roof in Ohio, OSHA will investigate and determine, among other things, if other employees of that contractor had ever been injured or killed under similar circumstances. If OSHA had previously cited that employer for violations of our fall protection rules in a state where we have jurisdiction, we could cite the employer for a repeat violation. However, if the previous violation had occurred in nearby Indiana or Kentucky, perhaps just a few miles from the site of the fatality, the law states that we could not classify the events around the fatality as a repeat violation, even if the original violation involved a worker who was killed under identical circumstances – simply because they were in State Plan states. This defies any common sense definition of a repeat violation.

Enhanced civil penalties and an improved mechanism for going after repeatedly recalcitrant employers are much needed. But also needed is a much more effective way of addressing the most egregious employer wrongdoing. The solution here is enhanced criminal sanctions and the real threat of incarceration for employers whose knowing violation of OSHA standards leads to the death or serious bodily injury of an employee. It is a sad truth that nothing focuses attention like the possibility of going to prison. Unscrupulous employers who refuse to comply with safety and health standards as an economic calculus will think again if there is a chance that they will go to prison for ignoring their responsibilities to their workers.

Under the OSH Act, criminal penalties are currently limited to those cases where a willful violation of

an OSHA standard results in the death of a worker and to cases of false statements or misrepresentations. The maximum period of incarceration upon conviction for a violation that costs a worker's life is six months in jail, making these crimes a misdemeanor.

The criminal penalty provisions of the OSH Act have never been updated since the law was enacted in 1970. The criminal provisions in the OSH Act are weaker than virtually every other safety and health and environmental law. Most of these other Federal laws have been strengthened over the years to provide for much tougher criminal sanctions. The Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act all provide for criminal prosecution for knowing violations of the law, and for knowing endangerment that places a person in imminent danger of death or serious bodily harm, with penalties of up to 15 years in jail. There is no prerequisite in these laws for a death or serious injury to occur. Other federal laws provide for a 20-year maximum prison sentence for dealing with counterfeit obligations or money, or mail fraud; and for a life sentence for operating certain types of criminal financial enterprises.

Simply put, serious violations of the OSH Act that result in death or serious bodily injury should be felonies like insider trading, tax crimes, customs violations and anti-trust violations.

PAWA would also amend the criminal provision of the OSH Act to change the requisite mental state from "willfully" to "knowingly." Most federal environmental crimes and most federal regulatory crime use the term "knowingly," rather than "willfully." Under a "knowing" standard, the government must only prove that the defendant had knowledge of the facts that constitute the offense – i.e., that the conduct at issue was not accidental or a mistake. Harmonizing the language of the OSH Act with that of these other statutes would add clarity to the law. PAWA would do that through the provision that any employer is subject to criminal prosecution if that employer "knowingly" violates any standard,

rule or order and that the violation results in death or serious bodily injury to an employee. OSHA strongly supports this change in the law.

ABATEMENT DURING CONTEST

Another major obstacle to protecting workers in the OSH Act is that OSHA cannot force employers to fix an identified workplace hazard if the employer has contested the violation until after the contest is decided.

When OSHA identifies a serious workplace hazard, one capable of killing or seriously injuring a worker, we cite that employer. Employers then have the right to contest that citation. This is as it should be. The problem – often the fatal problem – with the law as currently written, is that the employer is under no obligation to fix the unsafe condition until the contest is settled, which can be months – or even years – after the initial citation. Workers are, therefore, left without protection from identified health and safety hazards.

We don't tell truck drivers to continue operating on faulty brakes for weeks or months until their court appeal is heard. So why should we allow employers to continue operating dangerous machinery for months or years after the hazard has been identified and cited?

The OSH Act can allow dangerous conditions to exist for many years while litigation is under way. For example, in 1994, OSHA cited a Dayton Tire facility in Oklahoma City for multiple violations of the Lock Out/Tag Out standard that had already killed one worker. An Administrative Law Judge (ALJ) affirmed the violations almost three years later, and the Occupational Safety and Health Review Commission then accepted the case for review, but has still not issued a decision. In 2006, 12 years

after being cited, Dayton closed the facility without ever abating the violations.

This loophole in the law has had fatal consequences. OSHA has identified at least 30 cases between FY 1999 and FY 2009 where workers have been killed during the contest period after a citation was filed. The only situation worse than a worker being injured or killed on the job by a senseless and preventable hazard, is having a second worker needlessly felled by the same hazard.

The lack of any mechanism to force employers to abate hazards during the contest period also contributes to the low level of OSHA penalties. OSHA inspectors are primarily interested in making sure that workers are safe, not in collecting fines. Many employers have learned that by threatening to appeal even the most irrefutable hazard, they force OSHA staff to choose between immediate abatement of a life-threatening hazard, or pursuing violation through a lengthy appeal. Faced with a situation where it may be months or years until a contested citation is settled and a hazard is fixed, OSHA is often forced to settle at a much lower level than would be deserved in order to get faster abatement of the hazard so that workers are safe.

OSHA supports a provision of PAWA that would require employers to abate serious, willful and repeat hazards after a citation is issued during the contest period. This provision would also enable OSHA to issue “failure to abate” notices at a workplace with a citation under contest, enhancing the right of workers to be protected from the most egregious workplace hazards.

Now, it has been argued that mandated abatement during the contest period is “unjustified” and “an outrageous trampling of due process rights.” But those who feel this way should know that a similar requirement has existed in the mine safety laws for 40 years without wreaking havoc in the mine industry. OSHA is merely asking to provide general industry workers with the same protection that

miners have possessed for decades. In weighing the balance between employee protection and employer contest rights, employee safety should come first.

WHISTLEBLOWER PROTECTION

OSHA will never be able to inspect every workplace every day, or even every year. Far from it.

Which is why Congress designed the OSH Act to rely heavily on workers to help identify hazards at their workplaces. If employees fear that they will lose their jobs or otherwise be retaliated against for participating in safety and health activities or expressing concern, they are not likely to do so.

Secretary Solis flagged the importance of robust whistleblower protections in preventing workplace disasters by including a recommendation to improve the whistleblower provisions of the Mine Act in her report to the President last week.

The OSH Act was one of the first safety and health laws to contain a provision for protecting whistleblowers—section 11(c). Forty years ago, that provision was innovative and forward looking. In 2010, however, it is a legal dinosaur. It is clear that the OSH Act's whistleblower provision is in dire need of substantial improvement. Notable weaknesses in section 11(c) include: inadequate time for employees to file complaints; lack of a statutory right of appeal; lack of a private right of action; and OSHA's lack of authority to issue findings and preliminary orders, so that a complainant's only chance to prevail is through the Federal Government filing an action in U.S. District Court. Achieving the Secretary's goal of *Good Jobs for Everyone* includes strengthening workers' voices in their workplaces. Without robust job protections, these voices may be silenced.

In recent years, a number of more modern, more effective whistleblower protections have passed the Congress with strong bi-partisan support. Additionally, there has been bi-partisan consensus for the past twenty-five years on the need for uniform whistleblower protections for workers in every industry

– making the different whistleblower statutes more consistent and equitable. This Administration supports uniformity as well.

The Protecting America’s Workers Act expands the OSH Act’s anti-retaliation provisions. The bill codifies a worker’s right to refuse to perform unsafe work, protects employees who refuse work because they fear harm to *other* workers, prohibits employer policies that discourage workers from reporting illnesses or injuries, prohibits employer retaliation against employees for reporting injuries or illnesses, and grants workers the right to further pursue their case if OSHA does not proceed in a timely fashion.

Additionally, current laws give workers only 30 days to file an 11(c) complaint. It often takes workers more than 30 days to learn what the law says and how to file a complaint. Many complainants who might otherwise have had a strong case of retaliation have been denied protection simply because they did not file within the 30-day deadline. For example, we received an 11(c) complaint from a former textile employee who claimed to have been fired for reporting to management that he had become ill due to smoke exposure during the production process. The worker contacted OSHA to file an 11(c) complaint 62 days after he was fired, compelling OSHA to dismiss the case as untimely under existing law. PAWA would increase the existing 30-day deadline for filing an 11(c) complaint to 180 days, bringing 11(c) more in line with some of the other whistleblower statutes enforced by OSHA, and greatly increasing the protections afforded by section 11(c).

The private right of action is another key element of whistleblower protections that is lacking in OSHA’s current 11(c) provision. It is critically important that, if an employer fails to comply with an order providing relief, both DOL *and* the complainant be able to file a civil action for enforcement of that order in a U.S. District Court. Most of the other whistleblower provisions that OSHA enforces

have this private right of action provision – certainly the OSH Act should be amended to include it and PAWA does just that.

Finally, PAWA would codify a number of OSHA’s high standards for professionalism and transparency in conducting whistleblower investigations that are of critical importance to this Administration. For example, PAWA requires OSHA to interview complainants and to provide complainants with the respondent’s response and the evidence supporting the respondent’s position. PAWA affords complainants the opportunity to meet with OSHA and to rebut the employer’s statements or evidence. While we train our investigators on the critical importance of conducting thorough interviews with complainants and involving complainants in the rigorous testing of proffered employer defenses, we believe that requiring these investigative steps by statute could only assist OSHA in its mission of providing robust protection to occupational safety and health whistleblowers.

These legislative changes in the whistleblower provisions are a long-overdue response to deficiencies that have become apparent over the past four decades. This legislation makes good on the promise to stand by those workers who have the courage to come forward when they know their employer is cutting corners on safety and health and guarantees that they don’t have to sacrifice their jobs in order to do the right thing. OSHA has the responsibility of administering 16 other whistleblower statutes in addition to the provision in its own governing statute. The fact that almost all of those other statutes are more protective to workers is a fact that needs to be addressed now, and this Committee has been involved – with bipartisan support – in passing many of those whistleblower laws that provide far greater protection than OSHA’s law.

This hearing provides OSHA with the opportunity to identify areas where the Agency and the Administration have identified needed legislative changes that to go beyond those proposed in PAWA.

These changes would strengthen the OSH Act and provide an added deterrent to businesses that ignore workplace safety and health hazards.

I would propose amending the OSH Act to provide for assessment of civil penalties against employers who violate the whistleblower provisions. Currently, while an employer found to be discriminating against an employee must make the employee whole again, there is no provision for civil penalties against employers. The provisions are not in the current version of PAWA but similar provisions are included in the S-MINER Act that was passed in the House of Representatives in 2008. Under this provision, any employer found to be in violation of Section 11(c) of the Act would be subject to civil penalties of not less than \$10,000 and not more than \$100,000 for each occurrence of a violation.

Finally, as conclusion of these cases can often take many months, a provision should be made to reinstate the complainant pending outcome of the case. The Mine Act provides that in cases when MSHA determines that the employee's complaint was not frivolously brought, the Review Commission can order immediate reinstatement of the miner pending final order on the complaint.

FAMILIES AND VICTIMS

PAWA includes a number of sections that would expand the rights of workers and victims' families. OSHA has long known that workers, and often their families, can serve as OSHA's "eyes and ears," identifying workplace hazards. Workers injured in workplace incidents and their friends and family often provide useful information to investigators, because employees frequently discuss work activities and co-workers with family members during non-work hours.

In addition, family members and co-workers are sincerely interested in learning how an incident occurred, finding out if anything could have been done to prevent it, and knowing what steps the

employers and employees will take in the future to ensure that someone else is not similarly injured or killed.

While it is OSHA's policy to talk to families during the investigation process and inform them about our citation procedures and settlements, this policy has not always been implemented consistently and in a timely manner. In addition, OSHA's interactions with families and victims could certainly be expanded without slowing down the enforcement process.

PAWA would place into law, for the first time, the right of a victim (injured employee or family member) to meet with OSHA regarding the investigation and to receive copies of the citation or resulting report at the same time as the employer at no cost. PAWA would also enable victims to be informed of any notice of contest and to make a statement before an agreement is made to withdraw or modify a citation.

No one is affected more by a workplace tragedy than workers and their families, so we fully recognize and appreciate their desire to be more involved in the remedial process. However, we do believe that clarification is needed of the provisions allowing victims or their representatives to meet in person with OSHA before the agency decides whether to issue a citation, or to appear before parties conducting settlement negotiations. Our fear is that this process could result in significant delays in our enforcement process, which neither OSHA nor the families would want.

PREVENTING FRIVOLOUS CONTESTS

Some have argued that if OSHA's monetary penalties are increased, employers would be more likely to contest enforcement actions and clog the system with litigation. We have certainly seen that phenomenon in mine enforcement. The Labor Department's Report to the President on the Upper Big

Branch Mine disaster suggested one method of addressing this problem: requiring mine operators to put significant penalty amounts into escrow. The Committee should look into this option for OSHA as well.

PRESUMPTIVE WILLFULS

Not a week goes by that I don't read about a worker killed or seriously injured from a 10- or 15-foot deep trench collapsing on top of them. The law says that trenches more than 5 feet deep must be protected by a trench box or equivalent protection. These protections are well known and these deaths are completely, easily and cheaply preventable. I would attest – and I don't think there is a single construction safety expert in this country who would contradict me – there is no construction company owner in this country who does not understand the hazards inherent in deep trenches or how to prevent collapses. In fact, sometime in the 5th century BC, the historian Herodotus, observing the Phoenician army digging trenches wrote of the hazards of trench collapses and how to avoid them. Yet, 2,500 years later, workers continue to die in trenches.

There is no reason why such a well-recognized and easily preventable violation that leads to the death or serious injury of a worker should not be a presumptive willful citation. There are other violations that would fall into the same category; workers working at great heights without fall protection, for example.

IMMINENT DANGER

Currently, when OSHA identifies an imminent danger, such as a worker in a deep trench or at a high elevation without fall protection, the Agency cannot take immediate action to shut down the process or remove employees from harm until the hazard is corrected. OSHA must seek an injunction in Federal District Court if the employer refuses to voluntarily correct an imminent danger. While this process

can work smoothly and rapidly in many situations where relatively quick court action can be obtained, some hazards can result in death in minutes. In addition, inspectors often work far from the courthouse when worker safety demands quick action.

In contrast, the Mine Act treats imminent danger orders as essentially self-enforcing, requiring mine operators to evacuate miners in the affected area immediately, until the hazard is corrected, and then seek review in the Commission. Unfortunately, OSHA does not have the same authority as MSHA, which can order the withdrawal of miners or equipment if certain hazards are not abated.

The Committee might consider providing OSHA the authority, similar to the authority MSHA has, to “tag” a hazard or workplace condition that poses an imminent danger of death or serious injury. The employer would then be required to take immediate corrective action or have the workplace shut down. Internal procedures could be developed to ensure that compliance officers do not take unjustified actions.

CONTRACT EMPLOYEES AND MULTI-EMPLOYER WORKSITES

Another obstacle to effective OSHA enforcement is the growing use of contract employees and OSHA’s inability in certain circumstances to determine the hazards these employees face and to force the responsible party to control those hazards.

For example, the General Duty Clause of the OSH Act addresses an employer’s responsibility to protect its own employees from recognized hazards, even where no standard exists. But the employer is not responsible under the General Duty Clause for a hazard encountered by contract workers, even if the employer creates or controls the hazard. Contract employees receive less training than direct-hire employees so they may need added protection.

In modern, multi-employer work settings, employers are often responsible for the working conditions of many workers who technically may be employed by others. Employers with control of complex, multi-employer workplaces should bear responsibility for making the workplace safe and healthful not only for workers on their own payroll, but for all affected workers. The wording of the present 5(a)(1) of the OSH Act only requires an employer to provide safe working conditions for “his employees”.

Extending an employer’s general duty beyond its own employees to also protect contract employees from recognized hazards that the employer creates or controls would enhance the utility of the general duty clause.

The goal of this hearing is to identify barriers to enforcement and ways to encourage employer compliance with the law. To that end, I would be remiss if I failed to mention one additional barrier to protection for almost nine million workers in this country who provide this nation’s most vital services: public employees.

It is a fact little known among the American public that public employees in the United States – who respond in our emergencies, repair our highways, clean and treat our drinking and waste water, pick up our garbage, take care of our mentally ill, provide social services and staff our prisons – are not covered by OSHA unless the state in which they work chooses to do so. Today, almost 40 years after passage of the Occupational Safety and Health Act, half of the states still do not provide federally-approved coverage for public employees.

According to the Bureau of Labor Statistics, the total recordable case injury and illness incidence rate in 2008 for state government employees was 21 percent higher than the private sector rate. The rate for local government employees was 79 percent higher. Clearly, some public sector jobs are extremely

dangerous. Public employees deserve to be safe on the job, just as private-sector employees do.

In testimony before this Subcommittee in May 2007, Jon Turnipseed, Safety Supervisor for the City of San Bernardino Municipal Water Department in California, said it most succinctly:

From my own view as a public sector employee, the simplest but most compelling reason is that saving lives and preventing injuries always tops the list of values that our government holds dear in every other responsibility it undertakes. State and local government workers are, in many instances, the “first responders” upon whom we all depend. Whether a terrorist attack or a natural disaster, these first responders are the first people who rush in to help save lives. We put a premium on that capability in our society. These same people who protect the public from hazards deserve no less of a commitment to occupational safety and health protections from their employers, the public, and all of us here today.

Twenty-six states and one territory now provide federally-approved OSHA coverage to their public employees and you will find that they consider it not a hardship, but a necessary provision for the safety of their employees and the provision of good government. Nonetheless, in 2008 there were more than 277,000 injuries and illnesses with days away from work among state and local governmental employees. In a state that has public employee coverage, a public employer can be held responsible for safety violations. A crane operator in New Jersey died from injuries after his head was crushed by a cargo spreader in 2008. New Jersey, which has an OSHA program for public employees, issued a citation for willful OSHA violations. However, if this tragedy had occurred in Pennsylvania or Delaware, which have no public employee safety and health programs, the employer could not have been held accountable.

Again, we support the Protecting America’s Workers Act, which extends OSHA coverage to public-sector employees. Because the extension of such coverage will have costs, it should occur over time, and we welcome further discussion of implementation issues. But there is simply no good argument in the 21st century for allowing public employees to be injured or killed under conditions that would be

illegal and strictly punished if they were private sector employees. The days of treating public employee as second class citizens must come to an end.

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Mr. Chairman, as we prepare to observe Workers Memorial Day tomorrow we realize that our work is far from done. Whether it be the death of 29 workers in a coal mine in West Virginia, the loss of six employees in an explosion at an oil refinery in Washington State, or the single deaths that occur in workplaces each day in America, this carnage amounts to an unacceptable burden for the workers of America to bear in producing the goods and services that fuel our not only our economy, but also our country. To take from President Obama's statement last week in the wake of the Upper Big Branch mine disaster, we owe all workers action. We owe them accountability. We owe them assurance that when they go to work every day they are not alone. They ought to know that behind them is a government that is looking out for their safety.

I join with you, Mr. Chairman, in dedicating ourselves to bringing about the day when there will be no more workers memorialized for dying on the job. Thank you again for the opportunity to testify today. I am happy to answer your questions.