A REVIEW OF OSHA'S PLAN TO REDUCE ERGONOMIC INJURIES

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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HEARING ON A REVIEW OF OSHA'S PLAN TO REDUCE ERGONOMIC INJURIES

Thursday, April 25, 2002

Subcommittee on Workforce Protections

Committee on Education and the Workforce

U.S. House of Representatives

Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:00 a.m., in Room 2175, Rayburn House Office Building, Hon. Charlie Norwood, Chairman of the Subcommittee, presiding.

Present: Chairman Boehner, Representatives Norwood, Biggert, Isakson, Goodlatte, Keller, Owens, Kucinich, Woolsey, Sanchez, Solis, and Hinojosa.

Staff present: Stephen Settle, Professional Staff Member; Molly Salmi, Professional Staff Member; Travis McCoy, Legislative Assistant; Paula Nowakowski, Staff Director; Ed Gilroy, Director of Workforce Policy; Greg Maurer, Coalitions Director for Workforce Policy; Kristin Fitzgerald, Professional Staff Member; Christine Roth, Professional Staff Member; Jo-Marie St. Martin, General Counsel; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Heather Valentine, Press Secretary; and, Dave Thomas, Legislative Assistant.

Peter Rutledge, Minority Senior Legislative Associate/Labor; Maria Cuprill, Minority Legislative Associate/Labor; and, Dan Rawlins, Minority Staff Assistant/Labor.

Chairman Norwood. A quorum being present, the Subcommittee on Workforce Protections will now come to order.

Good morning, everyone. The Subcommittee is meeting today to hear testimony on OSHA's comprehensive strategy to reduce ergonomic injuries. Joining us today is the Assistant Secretary for Occupational Safety and Health at the U.S. Department of Labor, Mr. John Henshaw. Welcome, Mr. Secretary.

We are honored to have someone with as much knowledge as Mr. Henshaw take the time to help us understand these complex issues, and we very much welcome you.

Under rule 12(b) of the Committee rules, any oral opening statements are limited to the Chairman and Ranking Minority Member of the Subcommittee. If other Members have opening statements, they may be included in the hearing record. Without objection, the record will be held open 14 days to allow Member statements, the written testimony of our witnesses, and other extraneous materials to be included in the official hearing record.

OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Before we begin our discussions today, I need to put on my “game face” and make a few things crystal clear. I need to do this because a lot of things have been said over the past two weeks, since OSHA announced its plan for ergonomics. Some of the things being said are not quite supported by fact. That is probably the kindest way I can describe this situation.

Of all that has been said, nothing that I have heard is more hurtful and further from the truth than the cavalier statements concerning Republican Members of Congress and the individuals representing this Administration; statements suggesting that we don't take ergonomic injuries seriously.

I hope most of you will respond to such school-type antics with a moment of thought. The truth is that many Republican Members of Congress have owned businesses before coming to Congress. All of us have employees in our offices. It is ridiculous to suggest that we do not take seriously the well being of our staffs in Congress or the employees we had while in business. Many of these people are close friends. And, in many situations, we know each other's families, and sometimes we even think of each other as a second family. Not caring? What a callous thing to say just to score a few political points.

So let me start by saying something I should not have to say, and thought I would never say as a Subcommittee Chairman. We are here today to talk about issues we all take very, very seriously. I think I speak for both sides of the aisle. Anyone who tells you otherwise has missed the point; and, if I might suggest, is playing so very far out in left field that he or she doesn't even

know the score.

Let me report on the score for those who have lost touch. Unless I have missed something, we have a golden opportunity before us to successfully reduce ergonomic injuries right now, starting today, not years down the road. We know what doesn't work. We learned those lessons the hard way through some painful but totally necessary political votes. And now, if we choose, we can build around those lessons learned rather than trying to force a solution into place that will never work without scientific support.

It is like straining to put a square peg in a round hole. It is just not going to work. We can decide to move forward, however. We have an opportunity to attempt a realistic approach, which will shift our focus to a positive plan of action that can, and I and most experts on safety and health think will successfully reduce ergonomic-related injuries. Now that is the bottom line, isn't it? Results.

In the OSHA context, results means reduced workplace injuries. Isn't that what this is all about? It is substance over form, not vice versa. I have to admit that when I first heard about OSHA's plan to reduce ergonomic injuries, I had some real concerns. The fact is I still have some concerns in some areas. The prospect of being cited under the general duty clause sends shivers down the spines of most employers. I'm thinking about the small businesses in Georgia when I say that. When I heard talk about best industry practices as a basis for establishing guidelines, I thought about whether these guidelines would set the bar so high it would jeopardize small enterprises in my state and in New York. I thought of a lot of reasons to find fault with OSHA's strategy; then I stopped and tried to direct my mind away from being an obstructionist into a more positive direction. I thought about the bottom line again. I remember what is at stake here, and thought about how obstructionism is maybe just the easy way out.

It is like sore losers playing checkers. When they realize that someone else's strategy is going to work, they turn over the board, send the checkers flying in all directions, thus, ending the game; and then they cry about how we should all begin to start over. In truth, whether for political reasons or whether based on a sincere belief that there is a better way to solve a problem, the bottom line is that when we have a problem to solve, Members of Congress, unions, employers, and employees can help and pitch in or hinder with obstruction. There really is a choice for us today.

In terms of Mr. Henshaw's strategy, we can look at this as a plan that can work, and just might work if together we make it work. Or we can look at this as someone else's plan and hinder its implementation with cries that we need to start over and play by new rules that a majority has already rejected once.

Which of these two tactics will reap the greater benefit for the workers? What comes to mind is a barrel of fresh Georgia peaches. Some people just stare at the barrel and spend all of their time thinking about a few rotten peaches that might be in that barrel; others grab one of those peaches and think about how sweet it tastes going down. Isn't that about the same as the difference between saying that this is just a plan to make a plan and walking away, versus looking at it as a plan that could and just might work, and lending a hand to help iron out details to make it

successful?

So despite my reservations, Mr. Henshaw, I intend to work with you and do everything I can to try to help make this plan work. Simply stated, I am going to do this because I want to see results begin to accrue right now, not years from now. Simply stated, I want to give a process where we work together a chance to work, not restart the political rhetoric. That does not mean I am going to forget about my concerns.

Right now, I am asking you, Mr. Henshaw, to agree to keep this Subcommittee fully informed about the process and progress of this strategy. Keep all of us informed, majority and minority. I want to let Secretary Chao know well ahead of time that I intend to conduct another hearing at an appropriate time in the future to review the progress that is being made. If you can give me the promise to keep us informed, Mr. Henshaw, then you have my word that I am not going to spend my time to pass any bill to force OSHA to use its resources to do anything other than make this plan work.

To my colleagues on the minority side, I want to ask you to join with us. Work with OSHA to help make this work. If you will give this a chance to work, together we can monitor its progress and help direct its success.

WRITTEN OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE – SEE APPENDIX A

Chairman Norwood. I hope that we can work together, Mr. Owens, to make this happen.

It is now my pleasure to yield to the Ranking Minority Member of the Subcommittee, Mr. Owens, for his opening statement.

OPENING STATEMENT OF RANKING MEMBER MAJOR OWENS, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Thank you very much, Mr. Chairman. Mr. Henshaw, I want to welcome you also. I look forward to your testimony. As I am sure you suspect, there are many on my side of the aisle that have doubts about how effective your program to reduce ergonomic injuries will be.

The Reagan Administration, the first Bush Administration, and the Clinton Administration all implemented comprehensive programs emphasizing guidelines, general duty clause enforcement, and voluntary compliance. Each of those administrations concluded that an ergonomic standard was essential to the protection of workers; half measures were grossly

inadequate.

Also, I am aware of Secretary Chao's argument that this program can be implemented immediately, whereas, a standard will take four-and-a-half years to develop. More than a few Senators believe that an ergonomic standard can be developed in less time.

More importantly, however, your program is not mutually incompatible with the development of a standard. The contention that this program can be immediately implemented, does not preclude the simultaneous development of a standard, nor does it justify your decision to forego the development of a standard.

I have heard the rhetoric that your program is not a “one size fits all” program, the implication being that the rule proposed by the Clinton Administration was a one size fits all program. In the first instance, it is an absolute untruth to say that the Clinton Administration rule proposed or required a single economic solution or program for all employers.

More importantly, our purpose in being here this morning is to hear how your program will reduce ergonomic injuries. I know that we are all guilty of this. But meaningless rhetorical slogans, as good as they may sound, do little to tell us how your program will actually reduce ergonomic injuries in the workplace.

You regularly refer to your program as a four-pronged, comprehensive approach to work-related ergonomic injuries. Let me note, however, that so far OSHA has only developed guidelines for the meat packing industry. I know you have begun to work on guidelines for the nursing home industry. But even once that is complete, you would have guidelines for less than 2 percent of the workforce.

Before one can fairly characterize this as a comprehensive program, I think OSHA has an obligation to explain more thoroughly how you are going to protect the remaining 98 percent of the workforce for whom the development of guidelines has not even begun. We need specific information about what you are going to do and when you will do it.

Ergonomic injuries are the leading cause of workplace injuries, accounting for 1.8 million injuries every year. They are responsible for more than one-third of all days away from work due to workplace injury. The National Academy of Science has estimated that in 1999, more than one million workers had to take time from work because of ergonomic injuries at a cost of approximately $50 billion.

There has been a decline in the number of days lost due to ergonomic injuries. At the same time, however, the number of cases involving light duty or restricted activity due to injury has increased significantly as a percentage of days lost from work due to ergonomic injuries is increasing. In certain key industries including air transportation, trucking, and nursing homes, recent data show a marked increase in ergonomic injuries. There are those who contend, despite numerous studies to the contrary, including two by the National Academy of Science, and another by NIOSH, that there is no such thing as an ergonomic injury. We have been through that over and over again. They contend that such injuries are not work-related, or that we do not know how to

reduce the incidents of such injuries through workplace interventions. Unfortunately, some of those who have advocated this nonsense in the past are now at the Department of Labor.

You proposed a plan that does not differ significantly from earlier unsuccessful efforts to combat ergonomic injuries. You tell us we can reduce ergonomic injuries through the use of guidelines. But there are no guidelines for 98 percent of the workforce, and you have not told us what industries or occupations you would develop guidelines for.

You tell us that your program would better prevent ergonomic injuries before they occur, but the only enforcement mechanism is the use of the general duty clause. In the past, the Department of Labor has only brought general duty clause enforcement cases after there have been significant injuries. In addition, both your own solicitor, and your own deputy administrator have stated that they believe a general duty clause case should not and cannot be successfully used to prosecute ergonomic cases.

You say that you want to increase outreach, especially to Hispanic and other minority workers; however, your budget cuts fiscal year 2003 training grants by 64 percent. That is $7 million. And it converts a successful program that has provided direct health and safety training for workers, including thousands of minority workers, into a web-based program that will be inaccessible to many minority workers.

The magazine Business Insurance ran a web poll yesterday that asked the question, "How effective do you think OSHA's volunteer ergonomic guidelines will be in preventing repetitive stress injuries?" The magazine is not one generally read by workers, and has itself editorialized in favor of a volunteer program. Nevertheless, as of 7 p.m. last night, only 5.4 percent thought the program would be very effective; 27 percent thought the program would be somewhat effective; and 68 percent, more than two-thirds, thought the program would not be effective at all.

Unfortunately, I am with the 68 percent. That is my initial impression as well. It is my hope, however, that I am wrong and that your commitment to reduce ergonomic injuries and your willingness to take the steps necessary to accomplish that are sincere. We won't go round and round in a circle for no reason. You will bring it to a productive end. Thank you.

Chairman Norwood. Thank you very much, Mr. Owens.

If our goal today is to review OSHA's strategy to reduce ergonomic injuries, we certainly have in the person of Assistant Secretary John Henshaw, someone capable of providing the information we need.

Now I know that Mr. Henshaw finds great pleasure in sailing, and golf, and four grandchildren. I also know for a fact that over the past 25-plus years, he has had another passion in life, workplace safety and health. I could go over a long list of honors and accomplishments but I will not, and instead just say that I cannot imagine a more qualified individual to lead a discussion on workplace protections.

With that said, Mr. Henshaw, I would like to ask you to begin the process of walking us through OSHA's strategy. I am not quite sure that we all will have questions following your presentation. But, at any rate, thank you very much for being here, John.

And, as we begin the questioning process, I want to take a minute and remind Members of the Committee rule that imposes a five-minute limit on questions. We will try to stick to that, but have as many rounds of questions as you like.

With that, Mr. Henshaw, if you would proceed.

STATEMENT OF JOHN L. HENSHAW, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C.

Thank you, Mr. Chairman, and Mr. Owens, and the Members of the Subcommittee. Thank you for this opportunity to describe OSHA's comprehensive plan for addressing ergonomic hazards. I have submitted a written statement for the record, but let me summarize in this oral statement.

As you know, in March of 2001, Secretary Chao made a commitment to develop a comprehensive approach to ergonomics. Just one year later, we have announced OSHA's plan, which I am confident will reduce ergonomic hazards in America's workplaces. We have produced a four-prong, comprehensive approach to ergonomics that I believe will be effective in addressing musculo skeletal disorders in the workplace.

First, our approach calls for the development of task-specific and industry guidelines. The first set of guidelines, which are specific to the nursing home industry, will be completed this year with many other guidelines. Second, it creates a new enforcement strategy under existing law to pursue employers who refuse to take the necessary steps to protect their workers. Third, we are establishing an outreach and assistance program to ensure that employers, workers, unions, and health and safety professionals are aware of ergonomic issues, and take measures to help address them in the workplaces of this country. Finally, while there is a large body of information available on ergonomics, there are many areas where additional research is necessary. The agency will create a national Advisory Committee, which will advise us on these gaps, as well as the development of guidance, outreach and assistance materials.

OSHA's plan is based on the Secretary's principles for a sound approach using good science, incentives, flexibility, and avoiding a “one size fits all” approach, addressing the feasibility questions, and clarity for practical solutions in the workplace.

Let me speak to each one of those four components. As the first prong of our approach, OSHA will develop industry and task-specific guidelines that reflect what is known in terms of best practices and effective and feasible abatement methods.

Why guidelines and why not a rule? Mr. Chairman, it took ten years and $10 million to develop the previous rule, which was discredited by this body. Our goal now should not be to rush out another rule for the sake of issuing a rule. The time to be effective is now. We already know that guidelines are helping employers to identify problems in their workplaces by providing practical and useful steps for them to take to reduce these hazards. They are effective. As many of you know, in the early 1990's, OSHA issued the guidelines for the meat packing industry. Subsequently, ergonomic-related injuries for that industry fell by 62 percent, more than twice the decline for all the private industry.

The second component of our plan is enforcement. This is a critical piece of our plan. Under Section 5(a)(1) of the Occupational Safety and Health Act, which is the general duty clause, employers must keep their workplaces free of recognized hazards. OSHA's new comprehensive approach to ergonomics incorporates an enforcement strategy for the first time that will result not only in general duty clause citations, but successful prosecutions where necessary. Make no mistake about it; OSHA will not tolerate employers who ignore ergonomic hazards. If employers fail to exercise their responsibility to protect employees from known hazardous conditions, we can assure you that they will hear from us.

I want to make it clear that we are not enforcing guidelines. Indeed, if we were, that would merely make them a rule by another name. Rather, we are enforcing the obligations that employers have under the Occupational Safety and Health Act that was passed in 1970, to keep their workplaces free of recognized hazards.

Secretary Chao has instructed me, as well as the Solicitor of Labor, to use Section 5(a)(1) of the Act, where appropriate, for ergonomic citations. In many cases, employers may be taking some steps to abate hazards, but problems still persist. In those instances, the Agency may issue ergonomic hazard alert letters when appropriate. These letters make employers aware of the hazards and provide information on feasible means of abatement and sources for assistance. OSHA will conduct follow up inspections within 12 months in certain work sites that receive these hazard alert letters.

The third component is compliance assistance and outreach. Compliance assistance and outreach are essential components of our ergonomic strategy. OSHA will provide assistance to businesses, particularly small businesses, to help proactively address ergonomic problems in the workplace.

Local OSHA offices have a compliance assistance specialist who works with the community and directly with employers and employees to determine best solutions and provide advice on safety and health. Also, OSHA now has about 134 partnerships with private sector participants throughout the nation. Many partnerships are at the local level, where an OSHA area office works with the local union and/or the employer organizations to improve workplace conditions in particular establishments. We will now focus development of similar new partnerships that highlight the value of ergonomic guidelines and active solutions.

The last piece of our plan is research. While there is a large body of research available on ergonomics, the National Academy of Sciences has identified gaps that still remain. These need to

be worked on and improved. They deal with measurements and assessments of physical stress and workplace solutions. We will soon publish in the Federal Register the details of a new national Advisory Committee on ergonomics, which, among other duties will be asked to identify gaps in research related to the application of ergonomic principles in the workplace. OSHA will also, of course, continue to work closely with NIOSH to encourage needed research in this field, and to ensure that advances in science are communicated in practical terms to employers and workers.

In conclusion, Mr. Chairman, while we implement our approach to reduce workplace musculo skeletal disorders, it is important to recognize that many American workplaces are already addressing these problems on their own. Musculo skeletal disorders have declined by 26 percent over the last decade, due in part to increased awareness of these problems. Many employers know that it is simply good business to prevent workplace hazards, and they are taking the appropriate steps to do so.

Mr. Chairman, I have spent my entire life, as my kids say, working in occupational safety and health as a professional, developing and advocating programs to protect workers that actually do work. Those are the real solutions. I have always taken a systematic approach to worker protection. There are very few workplace hazards that can be eliminated by quick fixes. Solutions come from gathering data, analyzing information, and utilizing a multi-faceted approach to problem solving. That means involving all parties including the workers.

Ergonomics is best addressed in this fashion by a multi-faceted approach. As the Secretary has said, reducing MSDs or musculo skeletal disorder hazards will make all workplaces safer, and improve the lives of thousands of American workers. We believe the comprehensive plan we have put forward can effectively advance that objective. And, yes, Mr. Chairman, we will keep you informed as we proceed with this plan. Thank you, and I will be glad to take questions.

STATEMENT OF JOHN L. HENSHAW, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C. – SEE APPENDIX B

Chairman Norwood. Thank you very much, Mr. Henshaw, and I will yield myself five minutes to ask questions.

I want to follow up on Congressman Owens statement that only two percent of the nursing home work force is covered under the nursing home guidelines that will be ready right away. Does the Federal Government actually know where the greatest amount of musculo skeletal disorders occur in the nation, and in what industries they occur? Do we know the answer to that?

Mr. Henshaw. Mr. Chairman, we know the answer with respect to how we define musculo skeletal disorders. As you know, certainly from the data of the last several years, that the definition of musculo skeletal disorders or MSDs, is an art in the scientific literature, since it combines all of these injuries that are in the workplace. The hazards, the definitions of the disorders, the causation of those disorders are very complex and multivariate.

Chairman Norwood. Then why did you select the nursing home industry first?

Mr. Henshaw. Using the BLS statistics that we have today, nursing homes have a high percentage of musculo skeletal disorders. So that is the reason why we selected the nursing home industry.

Chairman Norwood. What other industries have a high percentage of musculo skeletal injuries?

Mr. Henshaw. We have looked at all of the high hazard industries, and they are all on our target list for guidelines.

Chairman Norwood. This may come as a great shock for some, but personally I don't believe that every American needs your help. I don't believe every American worker out there, or 100 percent of the workers in this country really need anything from you, since they are not in a workforce area that is causing problems.

Now if that is the case, assuming you will never have all of the dollars or employees you believe you should have, wouldn't it be smart to go and work right now on the industries where you know you would do the most good? I presume this to be the case. In fact, my observation over the last year is you may have fewer employees than you need.

Mr. Henshaw. That is precisely what we should be doing. My job is to produce, as you mentioned, results. My job is to reduce injuries and illnesses. That is my only job, my only purpose in life.

Chairman Norwood. Your job isn't to reduce injuries in an industry that doesn't have injuries, is it?

Mr. Henshaw. That is correct.

Chairman Norwood. So I am glad you started with the nursing home industry. I want you to focus on where most of the injuries occur, under the assumption that you will never have every dollar you ever wanted.

Now you stated what I think is the $64,000 question: Why guidelines instead of standards?

I want to make sure we all heard you correctly. Are you telling us that a standard was not feasible, and that guidelines are, in fact, a better approach perhaps from a safety and health standpoint? Is that what you are saying?

Mr. Henshaw. That is what I am saying, yes, sir. The reason for that is the variation in hazards that deal with what are classified as ergonomic hazards. The American workplace is very diverse, and the combinations of the various hazards associated with the workplace are very diverse. The difficulty in determining exposure and effect or outcomes is very complicated. It is not easy to make those decisions. And, therefore, rules that try to make it easy are not successful. That is one reason why the effort of ten years and $10 million wasn't successful. This is a very complicated

issue.

Chairman Norwood. Some of my colleagues, Mr. Henshaw, have been saying that all you are really doing is coming up with a plan to come up with a plan, whatever the heck that is.Now, if I heard your testimony correctly, that is not necessarily supported by the facts. What I am hearing is that realistically you expect OSHA's guidelines to reduce injuries and illnesses related to musculo skeletal disorders. How?

Mr. Henshaw. In the real world there is a way to execute and develop plans. They are a design of a strategy to produce the results we are looking for, in this case, injury and illness reduction. Our plan is to identify a set number of industry and task-specific guidelines. We will develop those guidelines. The first one we announced was nursing homes. We will develop a number of other guidelines specific to industries and tasks.

We will also develop a strategy, which we are in the process of completing, for having successful 5(a)(1) prosecutions where necessary. Another part of the overall plan is the execution and delivery of outreach and educational services. We presently have a number of measures that we are executing that will accomplish the outreach and assistance that we are looking for.

With regard to research, I have heard some comments about this having been tried in the past. This has not been tried in the past. This is the first time we have put a comprehensive plan into action; a plan that produces results, and doesn't just tread water. This is a plan that will produce and therefore reduce injuries and illnesses in this country.

Chairman Norwood. Thank you, Mr. Henshaw.

Mr. Owens, you are now recognized for five minutes.

Mr. Owens. Mr. Henshaw, I wrote a quote down here. You didn't say it exactly as it is written in your testimony, but you said, "It took ten years to develop a rule which was discredited by this body." Can you explain what you mean by that?

Mr. Henshaw. Well, I meant discredited through a joint resolution of Congress.

Mr. Owens. What do you mean by discredit?

Mr. Henshaw. I am not here to argue the old rule. I think that was debated about a year ago, but the old rule was thrown out because it was discredited.

Mr. Owens. How was it discredited? There was a vote to throw it out. Is that what you are saying?

Mr. Henshaw. It was thrown out, yes.

Mr. Owens. There was a vote. How much debate was there on it?

Mr. Henshaw. I was not a part of that debate, so I don't know the details.

Mr. Owens. You know it did not come before this Committee for consideration?

Mr. Henshaw. If I implied that, I am sorry. A bipartisan vote decided to throw the rule out by a joint resolution; an act of Congress

Mr. Owens. One of the first acts of the new Congress was to rapidly move to throw out ten years worth of work. Now you seem to disparage ten years. You throw it aside as if it doesn't mean anything, but it took ten years. The National Academy of Sciences and the National Institute of Occupational Safety and Health did several studies. Over those ten years, Elizabeth Dole, Lynn Martin and a whole group of experts, both Republican and Democrats, endorsed the idea that this was needed. And yet you blithely say it is no good because it was discredited.

I think that your testimony is sort of discredited when you cast aside ten years worth of work so casually. Instead it is back to the future with your guidelines, you know that. We are going to do it all over again now, although it took ten years for the best and brightest minds in America to come up with that standard, which was quickly voted out in one act of Congress without any debate, without any hearings, and no deliberations. It is kind of an uncivilized act.

My next question is how many ergonomic cases alleging a violation of a general duty clause are currently pending?

Mr. Henshaw. We have had over the last ten years close to 300 5(a)(1) inspections, your term "general duty clause," dealing with ergonomics. Most of those have been settled.

Mr. Owens. How many are currently pending?

Mr. Henshaw. I don't know the precise number. We can get that for you, but I don't know the precise number. Most of those have already been settled with successful conclusions, as far as reducing the ergonomic risk.

Mr. Owens. Specifically, how is the Department going to focus enforcement efforts on those employers who do not have effective programs, and are not making good faith efforts to reduce injuries? How will you identify such employers? What will happen when such employers are identified?

Mr. Henshaw. We have two processes in place as part of our enforcement strategy. If you remember, we have the site-specific targeting process, where we identified through our data initiative those employers that have a high incident rate for lost time injuries. They are a part of our list for targeting inspections. Those facilities that have the higher predominance of ergonomic kinds of injuries are on our list as well. And so, we are going to be focusing on those facilities. When we visit, if they qualify, which means they have not exercised good faith, as you mentioned, in reducing ergonomic hazards, then they may be candidates for the 5(a)(1) citations.

Mr. Owens. How do they come to your attention? Is there a running statistical record of what is happening?

Mr. Henshaw. It is part of the OSHA data initiative for targeting our programmed inspections. We send out letters a year before, receive information back, and we target our programmed inspections. MSDs are part of the injuries that we look at. So as the Chairman mentioned, we are going to focus our inspections around the high hazard industries, whether it be ergonomic-related hazards, or other kinds of hazards.

Mr. Owens. You are familiar with the Pepperidge Farm case, I am sure. It took eight years to settle without ever reaching the courts. And also the Beverly Enterprises case took 11 years to settle without reaching the courts.

Employers are under no obligation to correct the hazard at the time the general duty clause case is pending, as is evident with both Pepperidge Farm and Beverly Enterprises. They can contest the case for a long time, and the hazard can continue. Doesn't this significantly compromise your ability to protect workers from ergonomic hazards when you are using the general duty clause?

Mr. Henshaw. With the use of the general duty clause, obviously, case law provides an opportunity for you to perfect the way you bring these cases forward. In litigating the Beverly case, we have learned a lot about how to bring 5(a)(1) cases. In the Beverly case, we performed inspections in five facilities, but the settlement we reached dealt with 270 facilities nationwide. To me, that is an excellent outcome. And, obviously, we want to capitalize on that and continue to employ that.

Mr. Owens. How many general duty clause cases alleging an ergonomic violation have been filed by this Administration?

Mr. Henshaw. I don't know that number, but we can get that for you.

Mr. Owens. What would you guess?

Mr. Henshaw. Well, I wouldn’t want to guess, but I can tell you it is not enough.

Mr. Owens. Is it 10 or less than 10?

Mr. Henshaw. I don't know what the number is. I can get the exact number, but it hasn't been enough. We have not applied 5(a)(1)'s like we should have over the last several years, and past administration as well. This is the first time we are putting a strategy together by building on case law, and taking advantage of what we have learned from both successes and failures.

We want to make sure these are successful. The Beverly case gives us the opportunity to say this can work and we can apply 5(a)(1) to cover not only one facility with one citation, but the result could cover industry-wide. We could get settlements that cover, as in the Beverly case, 270

facilities. To me, that is using our resources appropriately.

Chairman Norwood. Thank you very much.

Mr. Owens. Thank you, Mr. Chairman.

Chairman Norwood. Thank you, Mr. Owens. Mr. Henshaw, I ought to be happy to admit I was one of the ones that spent 10 years trying to discredit that rule, and that is why we got it thrown out. When you don't watch science, you get into trouble.

Now I am very delighted that we have with us the Chairman of the Education and Workforce Committee. Mr. Boehner, you are now recognized for questions.

Chairman Boehner. Mr. Chairman, thank you. And let me congratulate you on two counts.

First, I think it is important that we recognize the importance of conducting hearings such as this. It is important that workers, the regulated community, and even Members of Congress learn more about the details of critical plans, such as this Administration's strategy to reduce ergonomic injuries. I think we have come a long way toward accomplishing that today with Mr. Henshaw's appearance here before the Committee.

And, second, I want to thank you for focusing our attention on the need to work together in cooperation to make this plan a success. As Secretary Chao has noted, it is important that we begin the process of achieving results today, not years from now. If a strategy similar to what the Administration is proposing had happened 10 years ago, we could have actually reduced many ergonomic workplace injuries.

A little more than a year ago, I stood on the floor of the House, and I will quote, “No one is opposed to providing appropriate workable ergonomic protections in the workplace.” I meant what I said, and I also said that I looked forward to working with Secretary Chao. And I will say, “Pursue a comprehensive and workable approach to reduce ergonomic injuries.” While I think we have got a lot more work to do, I think we are on our way toward meeting that goal.

Now, like my colleague from Georgia, I like what I am hearing this morning. But I have to admit that I have some reservations, and I hope, Mr. Henshaw, you can help sort them out. One thing that sticks out in my mind, Mr. Henshaw, are the findings that appeared in the National Academy of Sciences report issued in January of 2001. The report stated on page 1, and I quote, “None of the common musculo skeletal disorders is uniquely caused by work exposures.” In fact, the National Academy report seems to be loaded with such findings, all of which seem to support either the Academy's conclusion that, and I quote, “It is therefore neither feasible nor desirable to propose a generic solution.”

So, Mr. Henshaw, tell me. How is OSHA's strategy going to account for these National Academy of Science findings, both in establishing your guidelines, and in implementing your

enforcement strategy?

Mr. Henshaw. Certainly. We have reviewed the National Academy of Science's findings, and obviously they did not suggest any other appropriate alternative, like a rule process. They clearly identified a number of gaps and issues that have to be addressed as we deal with musculo skeletal disorders.

What we intend to do in this plan is develop guidelines where the science is clear, where we know which solutions, we know the diagnostic ability, we have a better feel, maybe not absolute, but a better feel for work relationship kinds of issues. Guidelines will be centered on what we know, and what we don't know or the idea of the research component. The National Advisory Committee on Ergonomics will help us identify issues to include in a research process so we can fill those gaps.

We are not ignoring the fact that the science is not clear. We are trying to address that. And so, what we want to do is get that into the process. As we get more information, we hope to be a catalyst to drive the research and work with NIOSH. Once we get the knowledge, then we feed it back into the guideline process, so it is a continuous loop. We are not ignoring the fact that there are gaps; we are trying to fill those gaps.

Mr. Boehner. Mr. Henshaw, it was pretty obvious to me during the ten year debate over the so-called ergonomics rule that what eventually, in my view, killed that approach was that it was an attempt at a “one size fits all” mandate from the Federal Government for every business in America.

And I think one of the strongest parts of your presentation this morning, and one of the strongest arguments in favor of the approach that the Administration is taking, is that these in fact are voluntary guidelines. They are being developed and implemented in a cooperative effort between the government and the private sector to identify those workplace areas and businesses where these injuries are most likely to occur. And while that may fit my particular ideological position, and be opposed by some on the other side of the aisle, the fact is that this kind of cooperation, in my view, will in fact help reduce more ergonomic workplace injuries than the rule proposed last year would in the end.

Do you want to comment on this relationship between these voluntary guidelines as compared with your typical government mandate?

Mr. Henshaw. My belief is that real solutions to ergonomic problems are developed at the plant floor level by the people who do the work, with the engineers and with management. That is where real solutions occur, which last and sustain themselves because they are effective and valued. Trying to mandate a fix from outside of the work environment spends a lot of resources and time, and is not effective or sustained in the sense that workers are not going to do things that are not valuable.

I have a great deal of respect for the American worker. They know how to get the job done. They have been given a charge, and they do it. They also know some of the solutions. The

managers, the people who actually execute the work and decide what work needs to be done when and where, know how to fix these things. It cannot be done in Washington.

So what I intend to do with these guidelines is to capitalize on that experience, capitalize on that cooperation, and capitalize on that knowledge, and then build on that for further controls, further reduction of injuries, and specifically ergonomic injuries.

Mr. Boehner. Thank you, Mr. Henshaw, and thank you, Mr. Chairman.

Chairman Norwood. Thank you, Mr. Chairman, for spending some time with us this morning.

I would like to remind the Subcommittee Members of Committee rule 2 which allows five minutes of questioning, except, of course, for the Chairman. With that, I see my friend, Mr. Kucinich, has come in, and you are now recognized for five minutes.

Mr. Kucinich. I want to thank my good friend, the Chair, for this opportunity; and to the witness, welcome.

Secretary Chao recently received a letter from 37 physicians and academics, most of whom were paid consultants and witnesses for industries opposing the ergonomic standard, supporting the Administration's decision not to issue a standard. Now the letter states, and I quote, “It is not true, as some have assumed, that we can succeed” in reducing musculo skeletal injuries “merely by reducing the physical exposures that are within our control.” Is this Department of Labor's position?

Mr. Henshaw. I haven't read the letter you are referring to.

Mr. Kucinich. But do you know the position of the Department of Labor?

Mr. Henshaw. I know the position of the Department of Labor. Our position is that musculo skeletal disorders are a real cause of pain and suffering. They are real injuries, and there are real ways of accomplishing and reducing that pain and suffering by reducing the hazards that cause that pain and suffering.

The comprehensive plan around guidelines, the enforcement around the general duty clause, the outreach in education, and filling in the research gaps will accomplish that. That is our position. And I am confident we can make that happen. We can reduce the number of MSDs.

Mr. Kucinich. So do you think ergonomics is a science then?

Mr. Henshaw. Ergonomics is a relationship of human factors, or the human being at work. That is the definition of ergonomics.

Mr. Kucinich. Do you think people actually get hurt on the job because of those factors?

Mr. Henshaw. As I mentioned, injuries around ergonomic hazards are real. There are workplace circumstances where people do get hurt, as a result of repetitive motion, or awkward postures, and those sorts of things.

Mr. Kucinich. Now doesn't the recent agreement the Department signed with nursing home operator, Beverly Enterprises, in fact, call for reducing physical exposure to lifting hazards? Are you familiar with that?

Mr. Henshaw. I am familiar with the settlement. The settlement puts together a guideline and implements that guideline on lifting and avoiding the risk factors with respect to lifting in nursing homes, yes.

Mr. Kucinich. And would you tell me, and tell this Committee, if it is in fact the Department's position, as the letter states, that "musculo skeletal pain in workers, such as back and upper limb pain, are best seen as a personal health issue rather than an ergonomics issue." Is that the position?

Mr. Henshaw. I don't think you can categorically say any of that. It is absurd to say that is the way it is in every circumstance in every workplace in this country.

It is true there are many different psychosocial factors that go into judging whether an injury is a result of workplace hazards, or some other kind of hazard or experience. There are many factors that go into making these determinations.

Mr. Kucinich. But you wouldn't discount that as an ergonomics problem?

Mr. Henshaw. I think I have already stated that there are real ergonomic hazards that cause musculo skeletal disorders in workplaces across this country.

Mr. Kucinich. Now I remember, Mr. Chairman, listening to testimony from somebody in the poultry industry, who told OSHA in a hearing that they often hang more than 30,000 chickens a day. Now is it the Department's position that their risks, their shoulder, their back problems should be treated as personal health issues, or ergonomics problems?

Mr. Henshaw. I wish it were that simple to say whether that is a problem or not, Congressman. That is what the guidelines are all about; to determine what those risk factors are, what the physical conditions of the people are, and what else contributes to that injury.

It could be, Congressman, if you already have a preexisting injury it may result in some sort of pain. Is that work-related? There are a lot of issues and concerns that go into making those judgment calls.

Mr. Kucinich. I worked at a hospital as one of my first jobs, and there are nurses who lift 200-pound patients multiple times a day. Are these back injuries personal health issues, or are they ergonomic problems?

Mr. Henshaw. I would have to look at those cases.

Mr. Kucinich. Let me give you an example. I was an orderly at St. Alexis Hospital, one of my first jobs. There was a patient. I was in pretty good shape. I have to say that. I was running 20 miles a day. But there was a patient that weighed over 200 pounds, and I probably weighed about 125 then, and he was falling out of bed, and I caught him, and I ended up with a hernia.

What would you say? Did I have a personal health problem, or was that somehow a work-related injury?

Mr. Henshaw. Under those kinds of conditions, trying to lift 200 pounds in an awkward position like that is probably something that shouldn't have been done. Obviously, you know those are the kinds of guidelines, training, and experience we want to give to workers, so that they avoid those kinds of injuries.

Mr. Kucinich. But you do know there are nurses lifting these patients every day?

Mr. Henshaw. That is what the guidelines are for.

Chairman Norwood. Thank you very much, Mr. Kucinich.

Mr. Kucinich. Thank you, Chairman.

Chairman Norwood. Good questions. I would point out to you that you hit right on the subject. The problem is we don't understand why three people can hang 30,000 chickens a day, and two of them are fine their entire lives, and one isn't. That is the whole problem here. As the Secretary pointed out, we don't know. Did they come to the workplace with a problem that was exacerbated after lifting? We can never figure that out. We don't understand that.

Mr. Henshaw. You are right. You know, your point is well taken. I just want to make sure some people in labor don't count their chickens before they are hung. That is all.

Chairman Norwood. Mr. Keller, you are now recognized for five minutes.

Mr. Keller. Thank you, Mr. Chairman. And, Mr. Henshaw, I want to begin by thanking you for coming before our Subcommittee today. I am curious as to how OSHA is going to utilize this so-called general duty clause to penalize what it refers to as bad actors. Let me tell you the gist of what my concern is.

Back when we were considering the old rule in Congress, I had grocery store owners come to me and say that they were concerned that the bagboys who were loading 20-pound turkeys at Christmas time were going to be considered in violation of federal law because of the vagueness of that rule. People who delivered Coca-Cola, Pepsi, and beer said that some of the OSHA bureaucrats had told them that they thought they needed to have two people in the truck instead of one because that would lessen the load by half. They were really concerned that the vagueness of what OSHA

was about to do was going to hurt them in ways that really defied common sense.

How are we going to make sure that when OSHA utilizes this general duty clause that we are not going to be penalizing people who really aren't bad actors, people like these grocery store owners, and Coca-Cola distributors?

Mr. Henshaw. The whole premise behind this plan is to produce results, by reducing injuries and illnesses. The two elements of this that are most concerned with the issue just raised are the guidelines that are produced by OSHA, and the enforcement under the general duty clause. Those are two distinct processes.

Guidelines are being developed to provide the tools for best practices so when workers are hanging chickens, there is some guidance to determine whether there is a workplace relationship to any kind of hazard, or any kind of risk. That is what the guidelines are for.

We are also going to encourage other companies, associations, professional societies, and organizations to develop their own guidelines themselves. This will help employers do the right thing, investigate whether there are hazards, and try to control the hazards.

The enforcement strategy around 5(a)(1) only applies the general duty clause as it was originally written. It has to meet the four tenets of the general duty clause, which are: foreseeable hazards, the industry or the company site, the facility recognizing the hazard, or the industry itself recognizing the hazard. There is serious harm, and there are feasible solutions. Those are the four tenets. They have to be met to bring a 5(a)(1) case forward.

What we are going to do is make sure that an employer is exercising good faith, has a process, has a system, and is working on identifying and controlling hazards. These employers more than likely would not be candidates under 5(a)(1).

Mr. Keller. Well, let me stop you and ask you about that. Let's say an employer voluntarily implements OSHA's ergonomic guidelines with respect to bagging turkeys, or distributing beer or Coca-Cola products. Are they guaranteed not to be cited under the general duty clause?

Mr. Henshaw. I don't know if I can guarantee anything. What I can say is certainly somebody who is exercising good faith, and to me if they are implementing an OSHA guideline, somebody else's guideline, or somebody else's process, I don't care whether you call it guideline or not. If these employers are implementing some kind of process to identify and control hazards, then they wouldn't be candidates for the 5(a)(1).

Now you asked how we make sure that inspectors are applying these criteria properly?

We are retooling our inspectors, what I call retooling, in the sense that we are going to retrain them on what is successful for 5(a)(1). What we don't want to do is bring a 5(a)(1) that is not successful. We already know from the past where we have taken 5(a)(1)'s, and they weren't successful. And so, we don't want to duplicate that.

We have to be really rigorous in making sure that when we bring these cases forward, they are the right cases and not frivolous. We can be successful at that. Inspectors will be trained to know, what applies, and what doesn't. But if an employer is exercising good faith, they are not necessarily candidates for 5(a)(1).

Mr. Keller. Well, thank you, Mr. Henshaw. Mr. Chairman, I will yield back.

Chairman Norwood. Thank you very much, Mr. Keller.

Ms. Woolsey, you are now recognized for five minutes.

Ms. Woolsey. Thank you, Mr. Chairman.

Drip, drip, drip, this subject is like water dripping on a rock, a stone. At least, when that water drips it makes an indentation over time. We keep going backwards. We talk about ergonomics. We get the good science. We have the good science and the good information, and then we start all over.

I, for one, am really frustrated with this subject. From 1969 to 1980, I was a human resources professional. You sort of stay there if that is what you had in your background in the first place. The manufacturing company I worked for grew from 13 people to over 600 when I left. We went through the phase where our assemblers were getting repetitive motion stress problems. We called in OSHA. We called in our workers' comp carrier. We dealt with it. But I can tell you, without knowing that CALOSHA was in the background, I probably would not have been able to get the attention soon enough of the top, top, top management in order to make a difference.

In dealing with it, our workers' comp claims decreased; our lost work time decreased; employees participated; employees got better; employees felt cared about. And now it is just plain common sense.

Why are we going backwards? Why are we questioning? Was that the right thing to do? We learned. That was before 1980. This is 2002, and we are still talking about this subject instead of doing something about it. I am frustrated as you can see. Drip, drip, drip.

Okay. Now here is my question to you. With all you are talking about, what is happening with prevention? We talked about grocery stores. It is absolutely common sense that very soon now the checkers who are using the scanners are going to have some kind of stress problem. Are we doing something about it? What is OSHA doing about what is going to come? It is coming. Don't wait for it. It is going to be huge. What are we doing to address, to prevent? And what has OSHA done in the past year to reduce ergonomic injuries, those that we already know about?

Mr. Henshaw. Well, I share your frustration.

Ms. Woolsey. Yeah, I am frustrated.

Mr. Henshaw. And I also will acknowledge that we did the same thing that your company did. Ergonomic hazard preventions are integrated into the overall safety and health plan of the companies that I was associated with. We addressed them as they came up and found solutions.

We found solutions, not from a table somewhere, and not from publications that were generated in academic institutions. People that have worked day-in/day-out with our safety and health professionals devised solutions. That is how it was accomplished. But we developed our own process and solutions to do that. These solutions are still effective today in those workplaces.

You mentioned the California issue. Since 1997, when the California ergonomics rule was put in place, there were 250 inspections done in California; 54 employers were cited as a result. Most of those were public sector employers.

Ms. Woolsey. But if you will yield just a minute, they knew it could happen. It mattered to them that somebody was watching, and they didn't do all of this voluntarily. They learned from the people who were cited.

Mr. Henshaw. Well, I don't know if people did that because the California rule was out there, but there is a trigger involved. It required two injuries on the same, identical job

You mentioned prevention. Unlike the old rule, this plan is not waiting for injuries. The intent behind this plan, and what I am dedicated to do, is to stop the injuries, not count them. I want to stop them. What that means is these guidelines are trying to identify the hazards, and control them before injuries occur.

Now, specifically, you mentioned grocery clerks.

Ms. Woolsey. Scanners.

Mr. Henshaw. Scanners. Obviously, there is a lot of repetitive motion. On our radar screen, as far as developing guidelines, are those industries with high ergonomic hazards. And, certainly grocery scanning is an extreme repetitive motion.

Chairman Norwood. Thank you, Ms. Woolsey.

Ms. Woolsey. Thank you.

Chairman Norwood. The Chairman would like to go on record saying that we do have some science, but we don't have enough proper science on this issue, so it isn’t as if we can go back to an old rule. Congress said very explicitly that you were not to write a rule that was substantially similar. I think you have done a very good job of taking a new approach to this.

Now I would like to recognize Ms. Biggert for five minutes.

Mrs. Biggert. Mr. Henshaw, could you tell us more about the Advisory Committee that you talked about, and how that will play a role in structuring these guidelines with regard to scientific support?

Mr. Henshaw. As you know, under the OSH Act, Section 20(a)(1), HHS gets advice from the Labor Secretary on research issues. Part of the reasoning behind this Committee hearing is to help us identify where those research gaps are, from a practical sense.

Our job is to make sure that workplaces are safe. We have an obligation to assure that proper controls are put in place and applied, and guidelines and solutions are implemented. That is our rule. However, we have some gaps. We not only have gaps in diagnostic ability, but also in determining work relationships, exposure, and outcome assessments. We have gaps around solutions. We have a number of gaps that were clearly identified by the National Academy of Sciences.

What we want to do is establish an Advisory Committee, which we will be announcing very soon, that deals with all the aspects of this plan, aside from the enforcement. It will advise us on where the practical gaps are in the research, diagnostic ability, work relationships, and solutions. It will also advise us on what guidelines we should pursue, how to be more effective in guidelines, how to be more effective in outreach, and education, and how to provide assistance. The Advisory Committee will help advise us on how to effectively implement this plan across the country.

Mrs. Biggert. Are there research topics that you have already identified?

Mr. Henshaw. There are a number of research topics. And, certainly, you can go to the National Academy of Sciences report as the first place to start.

Mrs. Biggert. I think you probably answered how the enhanced outreach and assistance efforts envisioned by OSHA will serve to make employers more effective in addressing hazards?

Mr. Henshaw. As you know, it is the employer's responsibility to control hazards. What we need to do is make sure that the proper information, proper tools, proper education is out there for employers and workers, so that they can take the appropriate actions.

Mrs. Biggert. You have ergonomic hazard alert letters. How will those be used, and how do you identify a site? Do you go into a plant, and then issue the letters, or is this a systematic visiting of different industries?

Mr. Henshaw. It is systematic in the sense that this is part of our site-specific targeting process, SST, where we have already identified those sites with a high rate of total injuries. What we are doing is visiting. This is part of our program inspection process. We are visiting those facilities with inspectors.

As we uncover ergonomic hazards or injuries, then we issue the hazard alert letters advising that in fact they do have high rates of total injuries. Sometimes many employers are not aware of this. We want them to recognize it, and we put them on notice that there is assistance out there, there is guidance out there, and there are processes out there that we want them to get involved in

to control the hazards.

Mrs. Biggert. And what if they don't respond?

Mr. Henshaw. There is a return visit in 12 months. We will select those facilities to revisit in 12 months and see how they have made out. And then, if they meet the four tenets under 5(a)(1), they could be candidates for the general duty clause.

Mrs. Biggert. Okay. Thank you, Mr. Chairman.

Chairman Norwood. Mr. Henshaw, as Chairman, I would like to introduce two of our newest Subcommittee Members to you. Certainly, the prettiest two we have had in a long time. They are Katie and Karen Hinojosa. We certainly do welcome them here.

Mr. Hinojosa. Thank you, Mr. Chairman, for recognizing my daughters. They have been shadowing me since 8 o'clock this morning.

Chairman Norwood. That is fantastic, and they wanted to see what happens in the Education and Workforce Committee. Well, we are delighted to have them. Thank you.

Mr. Hinojosa. They are very happy to be here. Thank you.

Chairman Norwood. Mr. Secretary, we have three votes. It is going to take until 12 o'clock. There are a lot of people who still want to ask questions. Can you stay?

Mr. Henshaw. Yes, sir.

Chairman Norwood. Can you get some lunch and meet us back here at noon?

Mr. Henshaw. I will meet you at noon.

Chairman Norwood. We will go vote, ladies and gentlemen, and recess until 12 o'clock noon. Thank you.

[Recess.]

Chairman Norwood. Mr. Henshaw, I apologize for the interruption in our schedule; nothing can be done about it, however.

Ms. Solis, you are now recognized for questions for five minutes

Ms. Solis. Thank you, Mr. Chairman; and thank you also, Mr. Henshaw, for being here today. I am sorry I missed the first part of your presentation, but I did review your statement that was submitted for the record.

I did have some questions with respect to the outreach program that will be undertaken that the Secretary has outlined for us. My concern is particularly with respect to the Hispanic, and the immigrant population, because it seems to me that they have the highest incidence of work-related injuries. If I might, you probably know this; there are 849 Hispanic workers who died from workplace injuries just in the year 2000. I am very concerned about that, because I note, there is a cutback in the outreach program that is supposed to be taking place.

So my question is how are we going to provide incentives and training? What are those incentives and what will the training be? Are we going to hire personnel that speak the language? Because it seems to me that there are a couple of issues that are going on. One is language, and the ability to be able to enforce whatever rules or procedures are in place, and make them available to the employee; and secondly, is to make sure that literature and information are appropriately posted and placed, and in a language this population can comprehend.

California is doing a lot in this area and has been I think. Of course, they can do a lot more. We have to wait, as you said earlier, for two injury incidents to occur to go in and make an inspection.

But I worry that in this targeted population, especially the immigrant population. You have a high number of perhaps undocumented or even legal immigrants who are not prone to reporting any workplace injuries because of their fear that they may be either deported, or that the government might in some way be intrusive and actually harm them, causing them to lose their job.

So those are questions I have. Also, what are you doing with respect to women's work-related injuries since there is a high incidence of carpel tunnel syndrome among women, and what kind of outreach is there? I believe you also have to have some form of targeted outreach to that population as well.

Mr. Henshaw. Those are obviously very excellent questions and concerns with respect to immigrants, and especially Hispanics. That is a population group of workers that concerns the Secretary and OSHA.

We began a task force in August of last year, to focus attention on the Hispanic worker primarily, and other immigrants, on how to address cultural differences and language barriers. The task force has been meeting to identify what should be done. We have embarked on a whole host of things for reaching the Hispanic worker. In particular, we have started a Spanish-speaking 800 number, so callers can obtain information in Spanish. We have a Hispanic website, for both employers and employees. We have Spanish language documents explaining rules and responsibilities and worker rights. We will continue to address language barriers in all outreach documents.

Just recently we formed a partnership with the Hispanic contractors of North America. The purpose behind that is to inform the Hispanic contractors that Hispanic workers oftentimes are at higher risk. Immigrant workers are oftentimes given jobs that may be of higher risk than other populations, and ergonomics is a part of that as well.

Ms. Solis. The contracting industry is obviously one source of these injuries, but there are also a whole slew of workers in the poultry industry, as well as the service and janitorial industries that are exposed to perhaps chemicals, and may not be aware of it.

What efforts are being made to include in that task force representatives from unions that are probably the most representative of these types of populations? I think of SEIU, and some of the other labor organizations that exist.

Mr. Henshaw. The task force that was mentioned is an internal task force, so these are OSHA folks in this task force.

Ms. Solis. Do they consult and advise with the various labor groups? Is that something that we can get information on so there is some kind of a record, and I could see what plan has been in place or implemented?

Mr. Henshaw. Absolutely. We have a number of things on our website, www.dol.gov, which describe some of the actions and activities we are embarking on to inform Hispanic and immigrant workers. The partnerships that I mentioned are usually announced and available on our website as well.

The unions or organized labor are our stakeholder in the whole process of how we get to employers and employees, especially when we are talking about immigrant workers. So they are engaged in this process, as we go through the guidelines on ergonomics.

You mentioned Hispanics, and immigrants, and women. Our focus, as the Chairman mentioned, is going to be on the high hazards. For example, there are a significant number of women in the nursing home industry, as you know, where there are a number of employees that are at risk. So, obviously, we are going to be approaching a lot of women's ergonomic issues as we deal with nursing homes. As we identify those other high hazard industries, and focus on those high hazard industries, they are going to be involving immigrants, as well as women. But the focus is around the musculo skeletal disorders; that is going to be our key. In many cases, like in the nursing home, that impacts mostly women.

Ms. Solis. Mr. Chairman, I have another question. There was a recent court decision that was just handed down a couple of weeks ago, the Hoffman Plastics decision. This has had a chilling effect, particularly on the legal, as well as undocumented workforce.

My concern is that there are some businesses that are operating out there now who are using that particular case to instill fear into the employees. So if they get injured on the job, they are being misled in some cases, because we have gotten some calls that they are no longer covered by workers' comp, or there is no coverage for them, and that now there really is this urgency to kind of really go underground.

I think it is unfair for those legitimate businesses that are playing by the rules to have other businesses come in and say, "Well, you know, we don't have to play by the rules now because this is what this court decision says." There is a big misinterpretation.

I would like to know if there is going to be any review, or some kind of involvement there, because this is a very serious workplace issue that is affecting my district. I have seen reports on television now that it is popping up in New York and other parts of the country.

Mr. Henshaw. Yes, I am familiar with the decision. And shortly after the decision, the Secretary of Labor called a press conference and invited the Hispanic media, as well as other media to address the issue and make sure the chilling effect doesn't take place.

Wage and hour administrators, the solicitors, and myself were there to talk about the relationship of that case to what we are all about in the Department of Labor. In the case of OSHA, our job is to assure that workers are protected, regardless of their immigration status. Our job is to make sure the workplace is safe, no matter what worker is there, female, male, legal, or undocumented. That is our number one concern. We don't concern ourselves with other issues only the safety issues. When we go investigate, that is what we investigate.

We made it clear to the Hispanic media that the Hoffman case has no relevance to what we do in OSHA. Our job is to assure that workplaces are safe, regardless of where the person comes from, and what their status of documentation is.

Ms. Solis. As a last comment, I realize that your proposal is on the basis of volunteerism, and that you will work with local businesses to see that there will be some compliance. My fear is that there will be companies that will obviously abuse this and will not make the effort, especially with a population that may be disadvantaged because they lack appropriate language skills, or are not fully aware of their rights.

So I would underscore the hope that you can work with us, and share information about when those safeguards will be in place, or how they are being implemented.

Mr. Henshaw. I would be happy to do that.

Ms. Solis. Thank you. Thank you, Mr. Chairman.

Chairman Norwood. You are more than welcome.

Mr. Secretary, Congressman Owens and I have a couple of other questions, if we may. I am interested in the comment that Hispanics have the highest number of injuries. Is that true?

Mr. Henshaw. No. The statistics show the incidents or the number of fatalities, and the rate of fatalities in the Hispanic population in construction is going up, whereas the other fatality rates are going down. So that implies we have an issue in the case of fatalities with immigrants and Hispanics. We are addressing that as we speak.

Chairman Norwood. If that is true, the communication problem is logically, one would assume, part of the problem. Is there any thought that OSHA might provide a guideline telling employers

or employees that they have to learn to speak English as a safety factor?

Mr. Henshaw. We don't have that as a guideline. Our outreach is to make sure we provide information for whatever work environment it may be applied to. So if it is a non-English-speaking environment what we want to do is get that information to them.

That is why we have developed a partnership with the Hispanic contractors of North America. If we are focusing on construction and Hispanic fatalities, we need to get to the contractors, who may or may not speak English. We want to get to them to make sure they understand what they have to do to comply, and then communicate it to their workers.

The employer is responsible for assuring a safe workplace, and providing proper training of their workers. So our role is to make sure the employer has the right tools. If it means information in a different language, then that is what we will provide. Can we provide it in all languages? Right now, we have a Hispanic concern. There are other languages that we are looking at. I don't know what the exact percentage of bilingual people in the agency is. We are focusing on increasing that percentage so that we can get more bilingual people in the agency that can respond to questions from employers or employees in their native tongue, if that will be more productive in communicating information.

Chairman Norwood. Well, assuming that lack of communication is a serious health hazard problem, whose responsibility is it to make sure the employee speaks English, the employer or the employee?

Mr. Henshaw. I don't want to say how it should be done, but the employer is responsible for successful communication.

Chairman Norwood. OSHA in general is in place for all workers in America, not just union members and not just in ergonomics. Is that correct?

Mr. Henshaw. Absolutely.

Chairman Norwood. Well, then I would urge you not to think that unions actually represent most of the workforce groups because they don't. It is not necessarily a good idea to have a non-proportional number of union members sitting on the Advisory Committee. I mean 90 percent of the workforce isn't in unions. So I am not sure that the fact that 10 percent are in unions should sway you to have a group of advisors that is particularly leaning more toward union bosses.

I have asked you to outline for us very clearly how these guidelines are going to be put together and submit it in writing I want to have in the record an overview of precisely how you are going to go about doing that. I ask Mr. Owens and the other Members to ask now because I think it will take a little time, but it would be useful to us all to have that there.

Lastly, could you outline for me what industries you think these guidelines will cover so far?

Mr. Henshaw. There are several guideposts we will use in identifying which industries we are going to focus on. The first guidepost will be the high hazard industries with respect to ergonomic hazards, the ones where the higher number of MSDs occur, as defined by the BLS, the Bureau of Labor Statistics.

The second guidepost will be, the practical and real solutions and determining where the science is clear and less clear. Obviously, we will focus on those that are clearer, where we already have identified practical solutions, real solutions that work. That will be another piece of the puzzle.

Also, we will focus on individuals who use best practices for guidance. What we want to do is put a guideline together that works. So we want to examine the successes of other kinds of best practices, pull those together, and then produce the guidelines.

So, the first place you can look is the top "x" percent of the BLS statistics as the first target area, then marry it with all of the other data on best practices where the science is clear, and so on. Then bring those together. I can't give you the top five, but I can give you the top "x" percent based on the BLS statistics. But we have got to marry the other information into that before we make a decision.

Chairman Norwood. Well, as I said earlier, there is a limited amount of dollars, and a limited amount of employees that you can eventually have, but I certainly want you to focus in on that area.

What if I am an employer in an industry for which OSHA does not develop industry-specific guidelines? What should I tell those employees?

Mr. Henshaw. That is part of our outreach and our partnerships. What we want to do is encourage them, to whatever extent necessary, to develop their own guidelines and develop their own process to identify and control hazards. We want to facilitate that the best way we can because we are not going to get to every facility. We are not going to get to every workplace, every industry. What we want to do is encourage the smaller employers, where maybe a minor degree of hazards still exist, and still need to be controlled.

Chairman Norwood. Congressman Owens, I yield to you.

Mr. Owens. Mr. Chairman, for the record, I would like to enter a few statistics pertinent to the discussion with Ms. Solis before.

Hispanic workers who comprise 11 percent of the U.S. labor force experienced 14 percent of the fatal occupational injuries in 2000. That was up 11.4 percent from 1994 to 1999. Eight hundred forty-nine Hispanic workers died from workplace injuries last year, that is 58 percent, and 494 of these were immigrant Hispanics. That is an increase of 11.6 percent from the previous year, and 53 percent since 1992. Finally, Hispanics accounted for a disproportionate number of workplace fatalities in 2000, 13.8 percent, compared with their proportion of the population, which was only 10.7 percent.

I would also like to state for the record that I had asked earlier how many general duty clause ergonomics cases have been brought by this Administration. Mr. Henshaw said he did not know, but would find out. My impression is that this Administration has not filed a single general duty clause ergonomics case. It is my understanding that the 300 cases Mr. Henshaw talked about were all filed by other administrations. I would like a list of all of the ergonomic general duty clause cases, when they were filed, and what the outcome was, to go into this hearing's record.

I also would like to know how much it cost the Department of Labor to prosecute the Beverly Enterprises case. All I understand is that it was more than $10 million. I would like to know the exact figure. Would you provide this information for the record for this hearing?

Thank you, Mr. Chairman.

Chairman Norwood. Thank you, Congressman Owens.

And I will add, in addition to his requests, rather than just going back for the last 18 months determining how many general duty clause cases came up, let's go back the last 10 years and see how many cases under the general duty clause came up in ergonomics.

Mr. Henshaw. Okay.

Chairman Norwood. I want to reiterate my gratitude to Assistant Secretary Henshaw for taking the time to participate in what all of us consider a very important dialogue. I would like to summarize, if I may, what we decided today.

I think it is clear that a majority of this Subcommittee's Members are willing to do more than just wait and see. Most of us want to pitch in and assist to help make your plan work. It is important that this plan work, because the bottom line is results now, rather than years down the road. That does not mean that many of us do not have concerns about one or more elements of this strategy. To address this, we have agreed that OSHA will communicate regularly with this Subcommittee providing information on the process of this plan.

Let the record note that the Secretary is shaking his head affirmatively.

Mr. Henshaw. Yes, sir.

Chairman Norwood. We also have agreement that at an appropriate time, we will again assemble to review OSHA's progress.

Lastly, I think most of us want to see OSHA use its resources to make this plan work, and find this vastly superior to redirecting the resources back to the promulgation of standards. Because the strategy we have discussed today is, in fact, superior to a standard in terms of outcomes.

Once again, thank you, Mr. Henshaw, for your valuable testimony. If there is no further business, this Subcommittee now stands adjourned.

Mr. Henshaw. Thank you, sir.

Whereupon, at 12:22 p.m., the Subcommittee was adjourned

APPENDIX A - WRITTEN OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

The Honorable Charlie Norwood
Chairman
Subcommittee on Workforce Protections

Hearing on
"A Review of OSHA's Plan to Reduce Ergonomic Injuries"

April 25, 2002

Before we begin our discussions today, I need to put on my "game face" and make a few things crystal clear. I need to do this because a lot of things have been said over the past two weeks, since OSHA announced its plan for ergonomics.

Some of the things being said are not quite supported by fact – and that is the kindest way I can describe this situation. Of all that has been said, nothing that I have heard is more hurtful, and further from the truth, than cavalier statements concerning Republican Members of Congress and the individuals representing this Administration. Statements suggesting that we don't take ergonomic injuries seriously.

I hope most of you will respond to such elementary school-type antics with a moment of thought. The truth is that many Republican Members of Congress have owned businesses before. All of us now have employees in our offices. Isn't it ridiculous to suggest that we do not take seriously the well-being of our staffs in Congress, or the employees we had while in business? Many of these people are close friends and in many situations, we know each other's families and sometimes we even think of each other as a second family. Not caring – what a callous thing to say just to score a few political points.

So, let me start by saying something I should not have to say and thought I would never say as a Subcommittee Chairman. We are here today to talk about issues we all take very, very seriously – and I think I speak for both sides of the aisle. Anyone who tells you otherwise has missed the point and, if I might suggest, is playing so very far out in left field … that he or she doesn't even know the score.

Let me report on the score for those who have lost touch. Unless I have missed something, we now have a golden opportunity before us to successfully reduce ergonomic injuries right now, starting today, not years down the road.

We know what doesn't work. We learned those lessons the hard way, through some painful but totally necessary political votes. And now, if we so chose, we can build around those lessons learned rather than trying to force a solution into place that will never work without scientific support. It is like straining to put a square peg in

a round hole. It is not going to work.

We can decide to move forward, however. We have an opportunity to attempt a realistic approach, which will shift our focus to a positive plan for action that can – and I and most experts on safety and health think will – successfully reduce ergonomic-related injuries. That's the bottom line, isn't it? Results. In the OSHA context, results mean reduced workplace injuries and isn't that what this is all about? It is substance over form, not vice-versa.

I have to admit that when I first heard about OSHA's plan to reduce ergonomic injuries, I had some real concerns. Fact is, I still have concerns in some areas. I have to admit that the prospect of being cited under the General Duty Clause sends shivers down the spines of most employers.

I'm thinking about the small businesses in Georgia. When I heard talk about "best industry practices" as a basis for establishing guidelines, I thought about whether these guidelines would set the bar so high as to jeopardize small enterprises in my state. I thought of a lot of reasons to find fault with OSHA's strategy.

But then I stopped and tried to direct my mind away from obstructionism, into a more positive direction. And, I thought about the bottom line. I remembered what it is at stake here, and thought about how obstructionism is really just the easy way out.

It's like sore losers playing checkers. When they realize that someone else's strategy is going to work, they turn over the board sending the checkers flying in all directions, ending the game. And, then they cry about how they should start over.

In truth, whether for political reasons, or whether based on a sincere belief that there is a better way to solve a problem, the bottom line is that when we have a problem to solve, Members of Congress, unions, employers, and/or employees can help and chip-in, or hinder with obstructionism. There is a choice.

In terms of Mr. Henshaw's strategy, we can look at this as a plan that **can work** … and, just might work if, together, we make it work. Or, we can look at this as someone else's plan and hinder its implementation with cries that we need to start over and play by new rules that a majority has already rejected once. Which of those two tactics will reap the greater benefits for workers?

What comes to mind is a barrel of fresh Georgia peaches. Some people just stare at the barrel and spend all their time thinking about the few rotten peaches that might be in that barrel. Others grab one of those peaches and think about how sweet it tastes going down.

Isn't that about the same as the difference between saying that this is just a "plan to make a plan" and walking away – versus looking at it as a plan that could, and just might work, and lending a hand to help iron-out the details and make it a success?

So, despite my reservations, Mr. Henshaw, I intend to work with you and do everything I can to make this plan work. Simply stated, I am going to do this because I want to see results begin to accrue now – not years from now. Simply stated, I want to give a process where we work together a chance to work – not restart the political rhetoric. That does not mean I am going to forget about my concerns.

Right now, I am asking you, Mr. Henshaw, to agree to keep this Subcommittee fully informed on the progress of this strategy … keep all of us informed, Minority and Majority. I want to let Secretary Chao know, well ahead of time, that I intend to conduct another hearing at an appropriate time in the future to review the progress being made. If you can give me this promise to keep us informed, Mr. Henshaw, you have my word that what I am **NOT** going to do is spend my time trying to pass any bill to force OSHA to use its resources to do anything other than make this plan work.

To my colleagues on the Minority side, I want to ask you to join us. Work with OSHA to help make this work. If you will give this a chance to work, together we can monitor its progress and help direct its success. I hope that we can work together to make this happen.

APPENDIX B - STATEMENT OF JOHN L. HENSHAW, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C.

STATEMENT OF JOHN L. HENSHAW
ASSISTANT SECRETARY OF LABOR FOR
OCCUPATIONAL SAFETY AND HEALTH
BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

April 25, 2002

Mr. Chairman, Members of the Subcommittee:

Thank you for this opportunity to describe OSHA's overall strategy for addressing ergonomic hazards. As you know, in March 2001, Secretary Chao made a commitment to develop a comprehensive approach to ergonomics. Just one year later, we have announced OSHA's plan for reducing ergonomics hazards. I am confident that our approach will protect American workers from injuries associated with such hazards. Our plan is multifaceted, in order to address, in a practical way, the many aspects of this issue.

Over the past several years, few workplace issues have proven more contentious than ergonomics. Although injuries associated with ergonomic issues have declined by 26 percent since 1992, we need to achieve further reductions, and calls for Federal action have been widespread.

I want to emphasize what Secretary Chao has said repeatedly: injuries associated with ergonomic hazards are real, and we are committed to reducing them. Secretary Chao has spent more time on ergonomics than any other issue, meeting with dozens of leaders from organized labor and industry, as well as medical experts. Last July, when the Department conducted three public forums around the country, OSHA heard from 100 speakers and collected 368 written comments. OSHA also met with stakeholder groups and individuals who were concerned about this problem. We then analyzed the comments and recommendations and reviewed information from other sources, including relevant portions of the ergonomics rulemaking by the previous Administration. OSHA carefully studied various options for reducing ergonomic hazards and researched alternative approaches.

We have produced a four-pronged, comprehensive, approach to ergonomics that we believe will effectively address MSDs in the workplace. First, our approach calls for the development of industry-and-task-specific guidelines. The first set of guidelines, which are specific to the nursing home industry, will be completed this year. Second, it creates a new enforcement strategy under existing law to pursue employers who refuse to take the necessary steps to protect their employees. Third, we are establishing an outreach and assistance program, to ensure that employers,

workers, unions, and health and safety professionals are aware of ergonomic issues and measures that can be taken to address them. Finally, while there is a large body of research available on ergonomics, there are many areas where additional research is necessary. The Agency will create a national advisory committee, which will advise us on these gaps, as well as the development of ergonomics guidelines, and outreach and assistance materials. We also intend to work closely with NIOSH.

OSHA's plan is based on the Secretary's principles for a sound approach: sound science; incentives; flexibility and avoiding a one-size-fits-all approach; feasibility; and clarity in providing practical solutions. Our approach consists of steps we can take now, while science pursues a better understanding of the relationship between these injuries and workplace factors and tasks.

Guidelines

OSHA will develop industry-and-task-specific guidelines that reflect what is known in terms of best practices and effective and feasible abatement methods. We will issue the first set of guidelines this year. Guidelines will suggest specific action employers can take to address ergonomic hazards in the workplace, while recognizing that different workplaces have different needs.

One question will, and should, be asked: why guidelines and why not a rule? Mr. Chairman, it took 10 years and $10 million to develop the previous and now discredited ergonomics standard. Our goal now should not be to rush out another rule for the sake of issuing of a rule. After all, the rulemaking process is prospective and does not, by itself, alleviate ergonomic hazards. At some point, the rubber needs to meet the road; and, as Secretary Chao has said, the time is now. Our goal is to address ergonomic hazards in the most effective way possible. We have announced what we will do to accomplish this, and we will follow through. But, we will not spend more years trying to write a one-size-fits-all standard.

In addition, when promulgating a rule, OSHA should follow certain practices, such as making a scientifically valid determination regarding the degree of risk from various levels of activity. To the extent OSHA cannot establish a meaningful relationship between levels of risk and employees' workplace activities, for example, or determine types of controls that are feasible and effective for those activities, such information gaps confound efforts to construct a workable standard. The risk assessment does not have to be based on 100% perfect information, but we need to know more about many types of MSDs than we do at this point in time.

We already know that guidelines – that is, helping employers to identify problems in their workplaces and providing practical, useful steps to take to reduce hazards – are effective. As many of you know, in the early 1990s OSHA issued guidelines for the meat products industry. Ergonomics-related injuries in that industry have fallen by 62% since 1992, more than twice the decline for all of private industry.

Enforcement

Enforcement is the second prong of our ergonomics approach. Under Section 5(a)(1) of the Occupational Safety and Health Act (the General Duty Clause), employers must keep their workplaces free from recognized hazards. OSHA's new comprehensive approach to ergonomics incorporates an enforcement strategy that we believe will result not only in General Duty Clause citations, but also in successful prosecutions.

I want to make it clear that we are not enforcing guidelines – Indeed, if we were, that would merely make them a rule by another name. Rather, we are enforcing the obligation that employers have had since the Occupational Safety and Health Act was passed in 1970 --- to keep their workplaces free of recognized hazards. Historically, OSHA has issued over 500 General Duty Clause citations for ergonomics-related hazards. The number of such citations dropped off over the past few years, as the Agency did not pursue General Duty Clause citations during the pendency of the rulemaking. Secretary Chao has instructed me, as well as the Solicitor of Labor, to again use Section 5(a)(1), where appropriate, for ergonomics citations.

I know that there is skepticism, on the part of some, about whether enforcement using Section 5(a)(1) will be effective and meaningful. There has been much concern, on the part of others, about whether enforcement using Section 5(a)(1) can be fair. I believe we can address both concerns. Obviously OSHA, working with the Solicitor of Labor, will build on previous experience with Section 5(a)(1) citations, including the few cases that have been litigated, in developing a new enforcement strategy.

One illustration of effective, meaningful, and fair enforcement under Section 5(a)(1) is our recent settlement of a citation against Beverly Enterprises Inc. nursing homes, under which the employer agreed not only to institute a lifting program in the five facilities that were the subject of citations, but also to do so at each of its 240 nursing home facilities under Federal jurisdiction. Based upon the Department's litigation successes in the *Beverly Enterprises* and *Pepperidge Farm* cases, we know that OSHA can both effectively and fairly use the General Duty Clause to cite employers who fail to engage in good-faith efforts to abate ergonomic hazards. Make no mistake: OSHA will not tolerate employers that ignore recognized ergonomics hazards. The question, after all, is whether employers will responsibly protect their employees from known dangerous working conditions. Those that do not – I assure you – can expect to hear from us.

As appropriate, OSHA also will address ergonomic hazards in workplaces inspected through its Site Specific Targeting Plan for 2002. These 3,600 worksites were selected from the 80,000 sites required to send injury/illness data to OSHA. They have Lost Workday Injury/Illness Rates of 14.0 per 100 workers or higher, which is four times the national average, and many of these injuries are related to ergonomic hazards. Using the SST list will help us focus our enforcement efforts where injuries are occurring, and we will work with those employers to reduce hazards, issuing citations where appropriate to achieve worker protections.

In many cases, employers may be taking some steps to abate hazards, but problems still persist. In those instances, the Agency may issue ergonomic hazard-alert letters when appropriate. These letters make employers aware of hazards and provide information on feasible means of abatement and sources of assistance. Within 12 months, OSHA will conduct follow-up inspections or investigations in certain work sites that receive the hazard-alert letters.

To ensure that our staff can recognize ergonomic hazards and suggest effective abatement methods, OSHA will conduct specialized training for its employees, which will include information about "best practices," sources of expert assistance, and recent relevant case law development. On April 9, I named regional coordinators for ergonomics in each of OSHA's 10 regional offices. The coordinators have all had considerable experience in identifying ergonomic hazards and suggesting practical solutions. They will guide OSHA's compliance staff in conducting inspections and documenting hazards. The regional coordinators will also participate and track the ergonomics outreach efforts in each region.

Outreach and Assistance

Compliance assistance and outreach are essential components of our ergonomics strategy. OSHA will provide assistance to businesses, particularly small businesses, to help them proactively address ergonomic problems in the workplace. Once voluntary guidelines are released, OSHA will assist and train employers in implementing the guidelines. Local OSHA offices have a compliance assistance specialist who works with the community and directs employers and employees to the best sources of advice on safety and health.

OSHA's training grants are designed to enable private sector organizations to increase their occupational safety and health competency. In FY 2002, OSHA is targeting grants to address ergonomics. Grantee organizations will be expected to develop ergonomic training materials as well as to provide training to employers and employees on ergonomic risks and the prevention of MSDs. OSHA also funds 12 nonprofit Education Centers around the Nation, which provide safety and health training to private-sector personnel and safety and health professionals working for other Federal agencies. Ergonomics courses are an integral part of their curricula. In the past year, the centers have conducted almost 40 courses that included at least some discussion of ergonomics. Distance learning through the use of computers and other techniques will allow training materials to reach a wider audience.

OSHA's Internet and CD-ROM-based compliance assistance tools, known as *e-Cats* and *Expert Advisors*, have proven useful and very popular in providing information on how to deal with hazards such as asbestos, cadmium, confined spaces, and fire safety. The interactive tools are highly illustrated and enable the user to ask questions about a specific workplace and receive reliable advice on how OSHA's standards apply to that site. OSHA is developing a similarly comprehensive set of such tools to assist employers, particularly small businesses, in understanding ergonomic guidelines and addressing ergonomic problems. OSHA

will use examples of best practices within various industries to guide other employers in protecting their workforces.

OSHA now has 134 partnerships with private-sector participants throughout the Nation. Many partnerships are at the local level, where an OSHA Area Office works with a local union or employer organization to improve workplace conditions in particular establishments. Partnerships can also be national in scope, such as that among OSHA, Ford Motor Company and the United Auto Workers to develop joint inspection protocols for safety and health in auto manufacturing. We will now focus on developing similar new partnerships that highlight the value of voluntary ergonomic guidelines.

OSHA's Voluntary Protection Program (VPP), which recognizes workplaces that go beyond the Agency's requirements in protecting workers, will be used to showcase effective ergonomic solutions. There are 833 VPP sites throughout the Nation. VPP may choose to mentor other workplaces, using their experience with successful ergonomics programs to help others achieve the same results. In addition to VPP, OSHA will develop a new recognition program to highlight the achievements of worksites with exemplary or novel approaches to ergonomics.

One area of particular concern to the Department and to OSHA is the safety of immigrant workers, and the ergonomics plan includes special emphasis on assisting Hispanic and other immigrant workers. Many immigrant workers are employed in industries that have large numbers of ergonomic hazards. OSHA has begun to address this problem in a number of ways, including the establishment of a Hispanic Workers Task Force, creation of a 1-800 number accessible to Spanish-speaking individuals, and the translation of OSHA publications into Spanish. Our outreach to immigrant workers is not limited to Spanish-speaking workers. Many regions have in place or are developing programs and publications to address other languages. For example, OSHA's Chicago regional office is engaged in a major outreach effort to Polish-speaking workers and OSHA's Region IX, in the West, maintains an 800 number complaint and technical assistance line that provides information in Spanish, Korean and Tagalog.

Research

While there is a large body of research available on ergonomics, there are many areas where additional information is necessary. In the ergonomics studies mandated by Congress in recent years, the National Academy of Sciences has identified gaps in the available information, such as the need for improved methods to measure and assess physical stress in the workplace. OSHA will serve as a catalyst, encouraging researchers to design studies that would produce information that is currently lacking.

We will soon publish in the Federal Register the details of a new national advisory committee on ergonomics which, among other duties, will be asked to identify gaps in research related to the application of ergonomics and ergonomic principles in the

workplace, and advise on ergonomics guidelines, outreach and assistance. OSHA also will, of course, continue to work closely with NIOSH, and through the National Occupational Research Agenda process, to encourage needed research in this field and to ensure that advances in science are communicated in practical terms to employers and workers.

Conclusion

While we implement our approach to reduce workplace MSDs, it is important to recognize that many American workplaces are already addressing this problem on their own. MSDs have declined by 26% over the last decade in part due to increased awareness of this problem. Many employers know that it is simply good business to prevent workplace injuries and they are taking steps to do so. Several years ago, the Agency held a conference at which many employers presented the results of their own ergonomics best practices. We will build on these results to help other employers reduce ergonomic hazards and encourage the continued creativity and initiative that has been demonstrated by employers and workers over the past several years in response to this issue.

Mr. Chairman, I have spent a lifetime in the occupational safety and health profession developing and advocating for programs that protect workers -- programs that actually work. I have always taken a systematic approach to worker protection. There are very few workplace hazards that can be eliminated with a quick-fix. Solutions come from gathering data, analyzing the information and using a multifaceted approach to solving problems. Ergonomics is best addressed in this fashion. As the Secretary has said, "Reducing MSD hazards will make all workplaces safer and improve the lives of thousands of American workers." We believe the comprehensive plan we have put forward will advance that objective. Thank you. I would be pleased to answer any questions.

APPENDIX C – SUBMITTED FOR THE RECORD, LETTER FROM JOHN L. HENSHAW, ASSISTANT SECRETARY FOR OCCUPATIONAL SAFETY AND HEALTH, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C., TO CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE JULY 3, 2002

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

JUL 3 2002

The Honorable Charles Norwood
Chairman, Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515-1010

Dear Congressman Norwood:

Thank you for allowing me to appear before your Subcommittee on April 25, 2002 to discuss the Department of Labor's comprehensive approach to ergonomics. As I explained at the hearing, the Department's comprehensive approach will provide help to workers by reducing ergonomic hazards in the shortest possible time frame. At the hearing, the Subcommittee requested some additional information. The Subcommittee's requests and our responses follow.

1. How many ergonomics general duty clause citations have been issued since the beginning of this Administration and over the last ten years?

Below is a table that includes the number of inspections that resulted in general duty clause citations for ergonomics from fiscal year 1992 through 2001. As the table indicates, the Occupational Safety and Health Administration (OSHA) issued relatively few citations for ergonomic hazards from fiscal years 1995 through 2001, a marked decline from the mid-1980s and early 1990s, when OSHA cited many more employers under the general duty clause. This low level was due in large part to the past administration's focus on the development of an ergonomics standard. As I stated at the April 25, 2002 hearing, the Department's comprehensive approach will result not only in citations but in successful prosecutions as well.

Federal Data Only	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
Total Inspections	42802	39723	43377	29113	24024	34264	34442	34498	36350	35778
Total Inspections with 5(a)(1) Ergo Citations	50	30	18	7	3	12	2	4	5	0

2. How much did it cost to litigate the *Beverly Enterprises* case to completion?

The *Beverly Enterprises* litigation began in 1992, and concluded with a settlement executed in January 2002. Many records describing the Department's costs incurred during the discovery and trial phases of the litigation are no longer available since they were disposed of in accord with applicable Federal records retention policies. Furthermore, OSHA does not maintain cost-allocation systems that track expenses to a specific activity such as the *Beverly Enterprises* case. The Department has reviewed available documents and is able to reasonably estimate the cost of expert witnesses, travel, and other expenses incurred during the initial phase of the litigation and the remand phase. Most of the costs indicated below are estimates only and should not be cited as the exact costs of litigating the *Beverly Enterprises* case to completion.

Expert witness in the initial phase of the litigation (estimate based on conversations with expert witnesses used).	$145,000.00
Travel during the initial phase of the litigation (estimate based on existing documents).	$50,000.00
Stenography during the initial phase of the litigation (estimate based on existing documents).	$38,000.00
Supplies during the initial phase of the litigation (estimate based on existing documents).	$2,000.00
Expert witnesses in the remand phase (exact amount).	$34,842.60
Travel during the remand phase (exact amount).	$8,462.00
Total	$278,304.60

The Department estimates it also devoted approximately 7.5 Full Time Equivalent (FTE) years of attorney time to litigate the case, primarily at the GS-14 grade level and above (including 2 attorneys working full-time for two years on discovery and trial preparation, those attorneys plus others working full time for two months immediately before and during the trial and subsequent post-trial briefing; approximately 1 FTE on Commission litigation; and more than 1 FTE on remand and settlement). This estimate is based upon records of attorney time spent on the case from 1998 to the present (records of attorney time spent on the case before 1998 could not be accessed in the Solicitor's Office Time Distribution system), as well as the recollections of the attorneys' involved in the case. As with the costs above, the number of FTE years spent on the case is an estimate only and should not be cited as the exact amount of attorney time spent litigating the *Beverly Enterprises* case to completion.

3. What is OSHA's guideline development process?

Attached is a protocol that OSHA created to guide its development of industry and task-specific guidelines. The protocol describes the process for information gathering and analysis, as well as public participation in guideline development. As OSHA develops guidelines, it may amend this protocol. OSHA will keep the Subcommittee apprised of any changes made to the protocol as a result of its experience developing guidelines.

I look forward to continuing to work with you and the Subcommittee to protect workers from ergonomic injuries.

Sincerely,

John L. Henshaw

Enclosure

cc: The Honorable Major Owens

OSHA Protocol for Developing Industry and Task Specific Ergonomics Guidelines

Objective

To establish a fair and transparent process for developing industry and task specific guidelines that will assist employers and employees in recognizing and controlling potential ergonomic hazards.[1]

Description

Each set of guidelines will address a particular industry or task. The industry and task specific guidelines will generally be presented in three major parts:

- *Program management recommendations* for management practices addressing ergonomic hazards in the industry or task;
- *Worksite analysis recommendations* for worksite/workstation analysis techniques geared to the specific operations that are present in the industry or task; and
- *Hazard control recommendations* that contain descriptions of specific jobs and that detail the hazards associated with the operation, possible approaches to controlling the hazard, and the effectiveness of each control approach.

The scope, form, and content of the sets of guidelines will vary because the types of ergonomic hazards, injuries, and controls vary from industry to industry and task to task.

Information Gathering

Prior to developing an industry or task specific guideline, OSHA will review existing practices and programs, as well as available scientific information regarding ergonomic hazards and control methods, for the particular industry or task. The sources of this information will include trade associations, professional associations, labor organizations, the medical community, and individual firms. In addition, information will be obtained from the literature, OSHA's records, and settlement agreements.

Analysis

In assessing the assembled practices and programs and developing the guidelines, OSHA will consider factors such as the following:

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[1] This Protocol is intended to guide OSHA's development of industry and task specific guidelines. OSHA may amend this Protocol in the future as it continues to gain experience with the guideline development process.

(1) the extent to which the programs' provisions address the ergonomic hazards in the industry or task and are specific to the prevalent conditions in the industry or task;

(2) the extent to which the programs' provisions address the specific control methods that are available for the ergonomic hazards present in the industry or task;

(3) the extent to which the programs' provisions include a mechanism for reporting injuries, symptoms, and hazards which may be related to ergonomics in the workplace, and for responding to such reports;

(4) the extent to which the programs' provisions reflect a process for evaluating the nature and causes of injuries which may be related to ergonomics in the workplace and a process for identifying, implementing, and evaluating measures to reduce injuries; and

(5) the extent to which quantitative data or other information are available demonstrating the program's provisions are effective in reducing the number and severity of workplace injuries related to ergonomics or the number of ergonomic hazards.

Public Participation

The public will be involved at several points in the guideline development process. During the initial drafting of a guideline, one-on-one meetings with representatives of major stakeholder groups will be conducted. The purpose of these meetings will be to gather the best available information on the hazards that are present in typical operations and on practices, programs, and processes that have been successfully used in the particular industry or for specific tasks. In addition, OSHA will ask for information and clarification regarding programs that these groups have developed.

OSHA will publish a *Federal Register* notice announcing the availability of each draft guideline on OSHA's website. The public will be invited in the *Federal Register* notice to submit written comments within 30 days and to participate in a stakeholder meeting. The stakeholder meeting will be conducted if the public expresses sufficient interest. OSHA will provide a facilitator for this meeting and will prepare meeting minutes to be posted on OSHA's website.

Comments from stakeholders will be reviewed and considered by the Agency. Once finalized, each set of guidelines will be posted on OSHA's website and issued in a paper format.

APPENDIX D – SUBMITTED FOR THE RECORD, STATEMENT OF CONGRESSMAN DENNIS KUCINICH, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Ergonomics Standard Hearing

Statement of Dennis Kucinich

Thursday April 25, 2002

Mr. Chairman, after more than a year of waiting for the administration's ergonomics strategy, all the Department of Labor (DOL) has given us is a shell of a plan that does less than the 1st Bush Administration's plan instituted 10 years ago.The proposed plan calls for guidelines that are totally voluntary and will not be used as a basis for General Duty Clause citations. The choice of whether or not to protect workers from ergonomic hazards will be left to employers.

We know the DOL's plan does not work. Every one of its elements- General Duty Clause citations, enforcement, compliance assistance, training grants, and research has been tried for more than a decade. Yet Muscoskeletal Disorders (MSD) continue to be a big workplace health and safety problem. Although the number of MSDs involving lost workdays have come down slightly over the past few years, that decline has stopped and MSDs continue to comprise over 1/3 of total workplace injuries involving lost time.

DOL touts its use of General Duty Clause citations. But these are lengthy, burdensome, expensive, and resource intensive. In addition, the ability of OSHA to sanction employers for ergonomic violations under this clause has never been established in court. The General Duty Clause is not a preventive tool. It requires large numbers of serious injuries to be used, and therefore cannot substitute for a mandatory standard.

The Department of Labor claims that its plan is a major new initiative. Yet the Admininistration has not requested new funding for OSHA and has proposed cutting funding for compliance assistance, training grants, research and enforcement.

Mr. Chairman, this fact above all reveals the administration's true stance on ergonomics. I encourage my colleagues to reject this flaccid approach to tackling ergonomic injuries and instead join in the push for a mandatory standard.

APPENDIX E – SUBMITTED FOR THE RECORD, STATEMENT OF CONGRESSWOMAN HILDA SOLIS, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

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Statement of Congresswoman Hilda L. Solis
Subcommittee on Workforce Protections
Hearing on "A Review of OSHA's Plan to Reduce Ergonomic Injuries"
April 25, 2002

One of the most serious problems facing today's working families is the threat of a workplace injury. Each year over 1.8 million workers suffer a musculoskeletal disorder while at work because of ergonomic hazards.

Prior to leaving office, President Clinton issued an ergonomics rule that would have ensured workers that each day on the job would be a safe one. It required employers to establish preventive programs where work-related musculoskeletal disorders are reported. These programs included installation of new safety measures, acquisition of mechanical lifting equipment, and valuable training for employees and employers on how to prevent ergonomic injuries. I was extremely disappointed last year when the Republican Congress and President Bush repealed this rule with very little debate.

Despite the rule's repeal, I was encouraged by Secretary Chao's immediate promise that the Department of Labor would "pursue a comprehensive approach to ergonomics, which may include new rulemaking." However, the so-called plan released earlier this month by the Administration includes neither a rule nor any serious protections for workers. Instead, the Bush plan consists of mere guidance for employers who "can" or "may" take action to ensure a safe working environment and are "encouraged" to do so, but are not required. In effect, it is a weak plan full of empty promises to America's workers. Once again, it seems as though the Bush Administration has sided with employers and their cash flow concerns over the interests of American workers.

A plan that only encourages employers to take preventive measures with regard to ergonomic injuries, rather than mandate them, will have disparate effect on workers throughout this country, especially women. Recent statistics indicate that women account for 63% of repetitive motion injuries that result in lost-work time; 70% of carpel tunnel syndrome injuries; and 62% of tendonitis injuries. Without a rule that requires companies to institute ergonomic precautionary measures, women in my community and around the country continue to be at great risk for occupational injuries.

PRINTED ON RECYCLED PAPER

I am also particularly concerned about the impact – or lack thereof – that the Bush Administration's plan will have on the many Latino, Asian, and immigrant workers that I represent in Congress. While only 11% of the United States labor force, Latinos accounted for 14% of fatal workplace injuries in the year 2000. During 2000, 815 Latinos workers died from job-related injuries, an increase of 11.6% from 1999. Over 50% of those workers were immigrants.

Although I am pleased that the Bush Administration has acknowledged these troubling statistics and am encouraged that it has taken some steps to address it, its efforts are insufficient, and, in fact, contradictory. While it promises to "focus" outreach on those workers most at risk for injury, the Administration simultaneously plans to cut by 65% the very training programs that have been instrumental in ensuring that Latino and immigrant workers know how to protect themselves. An ergonomics plan without funding for the Susan Harwood Training Grant Program simply reduces the "focus" on Latino and immigrant workers to mere lip service.

The need for an ergonomics rule and the Harwood grants is especially evident given the United States Supreme Court's recent ruling in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*. In *Hoffman*, the Court held that undocumented immigrants who are illegally fired for union organizing activities are not eligible for back pay. Since the decision, I have heard of numerous stories where employers have exaggerated the ruling to instill fear among workers. Apprehension created by *Hoffman* may prevent many workers from reporting workplace hazards. The Department of Labor, OSHA, and other government agencies should work to ensure that workers are able to report dangerous working conditions without having to fear the loss of their jobs.

The duty of OSHA is to ensure a safe working environment for all workers, regardless of income, race, gender, national origin, or immigration status. The Administration should keep this responsibility foremost in its mind as it implements an ergonomics plan.

I am happy that Assistant Secretary Henshaw is here today, and I look forward to his testimony and his insight about the Administration's ergonomics plan.

Thank you.

APPENDIX F – SUBMITTED FOR THE RECORD, STATEMENT OF LPA (LABOR POLICY ASSOCIATION), WASHINGTON, D.C., APRIL 25, 2002

STATEMENT

OF

LPA

A REVIEW OF OSHA'S PLAN TO REDUCE ERGONOMIC INJURIES

SUBCOMMITTEE ON WORKFORCE PROTECTIONS
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE

WASHINGTON, DC

APRIL 25, 2002
(02-54)

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Mr. Chairman and Members of the Subcommittee:

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

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

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

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

Recorded Musculoskeletal Disorders Continue to Decrease

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

Cause of Many Ergonomics Injuries Unclear

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

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

Other research has cast doubt on the link between work and the existence of MSDs. A June 2001 Mayo Clinic study[1] explored the connection between heavy computer use at work and carpal tunnel syndrome, the first time such a connection had been scientifically studied. The study stated plainly that "[c]omparison of the characteristics of the employees with and without CTS revealed no differences that might implicate computer keyboard use as the causative factor in the CTS cases."[2] The study compared employees in similar occupations and evaluated the number of years they had used a computer and the number of hours they used a computer daily. None of these factors increased an employee's risk of developing carpal tunnel syndrome.

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

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

LPA Position on Ergonomics

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

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

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

OSHA's Guidelines Focus on Reducing Ergonomics Injuries

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

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

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

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

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

General Duty Clause Enforcement Must Be Approached Carefully

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

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

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

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

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

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

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

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

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

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

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

OSHA Deserves an Opportunity to Demonstrate Effectiveness of New Approach

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

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

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

Conclusion

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

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

Thank you for the opportunity to present our views.

Endnotes

[1] J. Clarke Stevens *et al.*, *The Frequency of Carpal Tunnel Syndrome in Computer Users at a Medical Facility*, 56 Neurology 1568-70 (2001).
[2] *Id.*
[3] *Id.* at 1569.
[4] *Id.*
[5] See generally the American Chemistry Council Website, http://www.americanchemistry.com/rc.nsf/0/a5df77344a25fa8c852567f9004989c5?opendocument.
[6] OSHRC No. 93-3327, 1998 OSHAHRC LEXIS 23 (Jan. 26, 1998).
[7] 17 O.S.H. Cas. (BNA) 1993, 2028.
[8] *Id.* at 2039.
[9] OSHRC Docket Nos. 91-3344, (Oct. 27, 2000).
[10] *Beverly Nursing Home Chain to Install Lifting Devices to Settle OSHA Citations*, Daily Lab. Rept. (BNA), Jan. 16, 2002, at A-6.

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