

**INTRODUCING MEANINGFUL INCENTIVES FOR SAFE
WORKPLACES AND MEANINGFUL ROLES FOR
VICTIMS AND THEIR FAMILIES**

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT AND
WORKPLACE SAFETY

OF THE

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

EXAMINING INTRODUCING MEANINGFUL INCENTIVES FOR SAFE WORK-
PLACES AND MEANINGFUL ROLES FOR VICTIMS AND THEIR FAMI-
LIES

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INTRODUCING MEANINGFUL INCENTIVES FOR SAFE WORKPLACES AND MEANINGFUL ROLES FOR VICTIMS AND THEIR FAMILIES

TUESDAY, APRIL 28, 2009

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:34 a.m., in Room SD-430, Dirksen Senate Office Building, Hon. Patty Murray, chairman of the subcommittee, presiding.

Present: Senator Murray, Isakson and Brown.

OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. This hearing of the Subcommittee on Employment and Workplace Safety will come to order. Today marks the 20th anniversary of Worker's Memorial Day. It's a day many mark by honoring loved ones lost in a workplace tragedy.

And to all of those families and friends who are here today we offer our sincerest condolences and want you to know that we all join you in honoring the memory of your loved ones. Thank you so much for being here. I want to extend a very special welcome to those families here today who've lost family members due to tragedies on the job and who continue to fight for better workplace safety policies. All of us want to thank you for your efforts.

We are here today to talk about how government can be a stronger partner in helping to ensure that every worker who punches in for their next shift returns home safe and healthy at the end of the day. To do that we have to think about the role of penalties in preventing workplace injuries. We also have to ensure that when a worker is killed, injured or made sick on the job, those workers and their families are respected and honored throughout the process.

In 2007 alone, 5,488 workers were killed on the job. Nearly four million were injured, and an estimated 50,000 to 60,000 died from occupational diseases.

These aren't just numbers. They're men and women with families who now have to live every day with the memory of their loss. We must honor those families and their memories by working to reduce worker deaths and injuries.

Unfortunately over the last several years OSHA has not lived up to its mission to make workers safer on the job. Many of us have been truly concerned about an enforcement strategy that relied too heavily on voluntary employer compliance programs and watered

down fines against bad actors. We remain concerned about the validity of workplace safety data and the adequacy of resources given to our State OSHA programs like the one in my home State of Washington.

Our country has made great progress since the passage of the Occupational Safety and Health Act, 39 years ago. But we need to do more. A new year, a new Administration and a new Congress provide us with a fresh opportunity to revisit the law's effectiveness and the agency responsible for administering it.

I look forward to working with Secretary Solis and the next Assistant Secretary for OSHA to ensure that the agency is enforcing the law and doing all it can to prevent workplace tragedies. Because where the policy is currently inadequate it is our job to change it. So we're here to talk about how increased penalties in the law can help increase accountability, prevent future accidents and provide parity to other public safety laws.

We're also here to talk about how to better engage workers and their families in the OSHA process. While no fine or penalty could ever make up for losing a loved one, families like the ones here in this room today deserve a voice in ensuring there's a price to pay. Their participation in this process will help hold bad actors accountable and help to spare other families the same pain they have experienced.

Tomorrow marks the fifth anniversary of the introduction of Chairman Kennedy's OSHA Reform bill Protecting America's Workers Act. It's a bill that I've been proud to co-sponsor. And we carry that work on here today sending a clear message that one workers death, injury or illness is unacceptable if it's preventable.

We depend on our workers everyday to keep our economy going. And they should be able to depend on us to protect them on the job. So I look forward to hearing from our witnesses today.

I will introduce them in a few minutes after members of this committee deliver their opening statements.

[The prepared statement of Senator Murray follows:]

PREPARED STATEMENT OF SENATOR MURRAY

This hearing of the Subcommittee on Employment and Workplace Safety will come to order.

Today marks the 20th anniversary of Workers Memorial Day. While some may not be aware of today's significance, others will mark this day by remembering loved ones lost in a workplace tragedy. And to those, we offer our sincerest condolences and we honor the memory of your loved one.

I want to extend a special welcome to those with us today, who have lost family members to tragedies on the job, and who will testify about their fight for better workplace safety policies. But we would do a disservice to those workers and their families if we were to stop there.

We're here today to talk about what more government can do to ensure that every worker who punches in for their next shift, returns home safe and healthy at the end of the day. And to do that, we have to think about the role of penalties in preventing workplace injuries.

We also have to ensure that when a worker is killed, injured or made sick on the job, those workers and their families are respected and honored throughout the process. It's part of recognizing the value of every worker and the job they do to support their families and this country.

In 2007 alone,

- 5,488 workers were killed on the job,
- nearly 4 million were injured, and
- an estimated 50,000 to 60,000 died from occupational diseases.

Those aren't just numbers—they're individuals who represent a family or other loved ones equally impacted by the tragedy.

Our country has made great progress in protecting workers on the job since the passage of the Occupational Safety and Health Act 39 years ago. But, clearly, more needs to be done.

A new year, a new Administration, and a new Congress provides us with an opportunity to revisit the law's effectiveness and the agency responsible for administering it.

I look forward to working in partnership with Secretary Solis and her future Assistant Secretary for OSHA to ensure that the agency is enforcing the law and doing all it can to help prevent workplace tragedies.

For far too long, many of us were deeply disturbed by OSHA's failure to live up to its mission to make workers safer on the job.

We were concerned about an enforcement strategy that relied too heavily on voluntary employer compliance programs and watered down fines against bad actors.

As policymakers, we remain concerned about:

- the validity of workplace safety data; and
- the adequacy of resources given to our State OSHA programs, like the one in my home State of Washington.

But where the policy is inadequate, it's our job to change it. So, we're here to talk about how increased penalties in the law can help:

- hold bad actors accountable,
- prevent future accidents, and
- provide parity to other public safety laws.

We're also here to discuss what role the workers who are hurt or who get sick on the job or the families of those who are fatality injured in the workplace should have in the OSHA process.

And, we celebrate another anniversary of sorts. Tomorrow marks the 5th anniversary of the introduction of Chairman Kennedy's OSHA reform bill, Protecting America's Workers Act. It's a bill that I've been proud to co-sponsor.

We carry on that work here today, sending a clear message that one worker's death, injury, or illness is unacceptable if it's preventable.

The foundation of our economy is the hard-working Americans across this country. And they deserve a government that works as hard as they do to protect them on the job.

I look forward to hearing from our witnesses today on this important topic.

Dr. Celeste Monforton is a lecturer and researcher for the Project on Scientific Knowledge and Public Policy at George Washington

University's School of Public Health and Health Services. Her research interests include regulatory policy and its affect on implementing timely protection for workers from occupational health hazards. Dr. Monforton served as a senior investigator on the Governor of West Virginia's special investigation of the January 2006 Sago Mine disaster.

Jim Frederick is the Assistant Director for Safety and Health for the United Steelworkers.

Tammy Miser founded the United Support Memorial for Workplace Fatalities, a Web page for the families of workers who have died on the job. She was inspired to do this project by the death of her brother, Shawn Boone, who was killed in an October 2003 explosion at a manufacturing plant in Huntington, IN.

Mr. Brown has 33 years of occupational safety and health experience, working for major manufacturers in Ohio. He is currently President of the American Society of Safety Engineers. He is a Certified Safety and Health Manager and possesses an MBA from the University of Dayton.

Welcome to all of you.

Senator MURRAY. At this point I would turn it over to Senator Isakson for his opening statement. Thank you.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Well, thank you very much, Senator Murray. I would like to welcome our witnesses today. I look forward to their testimony. And with all due respect and appreciation for those who are here as loved ones for victims of workplace accidents, we're delighted to have you here today. And welcome you anytime to this committee and the Senate.

This is the fourth year that Senator Murray and I have worked together on workplace safety issues. And it remains our challenge to persuade every employer and every employee to make safety the top priority at all levels of their organization. Through a concerted effort on the part of Congress, workers and employers we've made some progress.

Related workplace fatalities is now down to 3.8 deaths per 100,000. While zero is the targeted goal, the numbers are moving in the right direction. Similarly the national injury and illness rate is down to 4.2 per 100 workers. Both of these are the lowest levels in the 33-year history of OSHA.

OSHA issued 26 standards in the last Administration. The last fiscal year the agency conducted nearly 39,000 inspections, an increase of 6 percent over the last fiscal year. During these inspections the agency issued 87,000 violations, 11 percent more than OSHA issued in fiscal year 2000.

I continue to favor to ensure that family members are fully informed of OSHA's findings when a workplace fatality occurs. Last Congress Senator Kennedy and I co-authored and co-sponsored an amendment to the budget that would have provided families with fatally injured workers with an opportunity to meet with the Secretary of Labor prior to the release of the final OSHA report. While no legislation has been introduced in the Senate as of yet on this proposal, like any other OSHA reform proposal we must receive

proper consideration and hearings by the entire HELP Committee and must go through regular order.

We all recognize that achieving workplace safety requires an effort on all fronts. OSHA only governs the physical environment in which employees work. It in no way regulates the worker's behavior within that environment which is every bit as important nor does OSHA have jurisdiction over transportation accidents and workplace homicides which account for more than half of all workplace fatalities.

When I was in business I recognized my biggest asset were my employees. For most American employers, employees have never been just an expenditure. They have always been an asset.

Rather employees are the people with goals, opportunities and families. It should be our goal to return them every night safely to their home.

Thank you, Madame Chairman.

Senator MURRAY. Thank you, Senator Isakson. Thank you for your hard work over the years. I really appreciate the opportunity to work with you on this important issue.

Senator ISAKSON. Thank you.

Senator MURRAY. Senator Brown.

STATEMENT OF SENATOR BROWN

Senator BROWN. Thank you, Madame Chairman. I appreciate the courage of people who showed up today in honoring their loved ones. Thank you for joining us. I appreciate this hearing today and that we celebrate Worker's Memorial Day.

Some 10 years or so ago I was at a Worker's Memorial Day event in Lorraine, OH and right on Lake Erie at City Hall. I was given at that event this pin I've worn ever since. It's a depiction of a canary in a bird cage and other people have that same pin on.

I've worn it for 10 years to show understanding what so many do. The canary in the coal mine was used at a time when workers had no unions strong enough to protect them and no government that cared enough to protect them. The worker was so much on his own. And there are still too many cases of that in this country.

The creation of OSHA, as the Chairwoman pointed out—the creation of OSHA back in 1970 was a huge step forward. We need to continue those steps forward evidenced by the fact that loved ones of people that were killed on the job are still here today.

I wanted to bring up one particular issue. While we've made progress we saw a good bit of back sliding in the last few years. And there is, as many know, there's something called the Popcorn Lung Disease—diagnosed in hundreds of workers including Keith Campbell in Caledonia, OH.

The danger of diacetyl exposure is well documented. Even the companies that make diacetyl recognize the danger so that American workers need protection from it. For too long the Bush administration relied on voluntary compliance from food manufacturers to keep their workers safe from this toxin.

Fortunately this is a new day. Secretary Solis has withdrawn the proposed rule on diacetyl so that the Administration can develop a standard that actually protects workers. It's too often a national tragedy like a mining disaster that brings these issues out and

causes us to modernize and keep up with the times on what OSHA needs to do.

This hearing today, the courage of people who are here representing family members who were killed, really does inspire all of us to continue to make a difference and to make sure as Senator Isakson said, that that number gets to zero. Decreases are great. But that number needs to get to zero. I thank the Chair.

Senator MURRAY. Senator Brown, thank you very much for your opening statement and being a great part of this discussion. I appreciate it.

With that we are going to hear from our witnesses. I'll introduce them to you. And then they will speak in the order I introduce them.

We begin with Dr. Celeste Monforton who is a lecturer and researcher for the Project on Scientific Knowledge and Public Policy at George Washington University's School of Public Health and Health Services. Her research interests include regulatory policy and its effect on implementing timely protection for workers from occupational health hazards. Dr. Monforton served as the Senior Investigator on the Governor of West Virginia's special investigation of the January 2006 Sago mine disaster.

Jim Frederick is the Assistant Director for Safety and Health for the United Steelworkers.

Tammy Miser founded the United Support Memorial for Workplace Fatalities. It's a Web page for families of workers who've died on the job. She was inspired to do this project by the death of her brother Shawn Boone, who was killed in an October 2003 explosion at a manufacturing plant in Huntington, IN.

And finally, Warren Brown who is the President of the American Society of Safety Engineers. He's worked as a safety expert with Delphi GM and a number of other companies.

Welcome to all of you.

Dr. Monforton, we'll begin with your statement.

STATEMENT OF DR. CELESTE MONFORTON Ph.D., MPH, LECTURER AND RESEARCHER, PROJECT ON SCIENTIFIC KNOWLEDGE AND PUBLIC POLICY AT GEORGE WASHINGTON UNIVERSITY'S SCHOOL OF PUBLIC HEALTH AND HEALTH SERVICES, WASHINGTON, DC

Ms. MONFORTON. Senator Murray, Senator Isakson, Senator Brown, thank you for allowing me this opportunity. I'm Celeste Monforton. I'm an Assistant Research Professor at the George Washington University School of Public Health. And I ask that my written statement be made part of the record.

One of the most rewarding and enlightening experiences in my public health career was my involvement in 2006 in the Sago mine disaster investigation. I came to understand and appreciate that family member victims can make a meaningful contribution to the accident investigation process. There is no one more interested in finding the truth about the cause of an on-the-job death than a worker's loved one.

I heard then and I still hear today that family members will impede the investigation. That family members will have a conflict of

interest. And that family members are too emotional for fact finding purposes.

My experience tells me that nothing is further from the truth. With Sago no one paid closer attention to the details, pressed the investigators harder for answers and raised the bar higher for mine safety reforms than those daughters, wives and brothers. Proponents of the status quo reject proposals for family member involvement saying they'll want to bring their lawyers as if attorneys are not already part of OSHA's settlement process.

Besides the OSHA process does not offer any personal economic gain for family members. In contrast to employers who do have an economic and reputational interest in reducing the impact of OSHA's actions. Families simply want to know what happened and to see that it doesn't happen again.

Putting oneself in the shoes of family members you realize that dozens of people, people they don't know, people they have never met, are learning the circumstances that led to their loved one's death. But they—the parent, the child, the spouse—are left in the dark. Traditionally, MSHA, like OSHA's policy is to not share details about the incident until the investigation is completely closed, potentially years down the road.

But with Sago we realized that we needed to balance the family's right to know with the needs and the legal responsibilities of the technical investigators. In an unprecedented decision we gave each family a complete set of the interview transcripts. This happened as soon as all the interviews were completed, but well before the investigation was done and any final citations issued.

Despite the unease and anxiety expressed by some, no calamity ensued. In fact, some of the family members devoted long days and nights to studying the transcripts and were able to alert us to inconsistencies in witnesses' testimony and identify topics deserving further scrutiny. Their contributions to the process eclipsed any potential administrative hurdles.

I recommend among other things that family members or their designee be given full party status in OSHA investigations. And that the Secretary of Labor appoint a Federal Advisory Committee made up of injured workers and family member victims to provide advice to the Solicitor's Office, OSHA and MSHA on improving the prevention potential of the Department's enforcement systems. Our surveillance data, limited as it is, shows us that the same hazardous conditions that killed workers 20 years ago are largely the same hazardous conditions that kill or maim U.S. workers today.

In 2009 in the richest country on earth there is no acceptable reason why U.S. workers still suffocate to death in unshored trenches. Yet last year at least two dozen workers in our Nation died this way. Likewise workers in the United States continue to die from falls in residential construction projects or become tangled in unguarded equipment and so on. Because of OSHA's responsibilities which are grossly mismatched with its budget and resources, we need to amplify the prevention potential of OSHA citations and penalties.

In my written statement I provide a number of recommendations to enhance their deterrent effect. These include OSHA's penalty calculations should include a specific factor that assesses the eco-

conomic benefits reaped by employers for violating health and safety regulations. Employers who comply and embrace the letter and spirit of occupational safety and health regulations should no longer be placed in an economic disadvantage because their competitors are failing to invest in worker safety.

OSHA must have the authority to compel immediate abatement of hazards that are known to contribute to serious injury, illness or death. Our Nation can't make advances in preventing harm to workers when our system forces local OSHA managers to bargain with employers choosing between leveeing a hefty penalty or getting a hazard corrected quickly.

In closing people around the globe are marking Worker Memorial Day, a day of remembrance and action. By making improvement to our Nation's occupational health and safety system we can honor the men and women whose lives were cut short or irreparably harmed by hazards at work. I would be pleased to answer your questions.

[The prepared statement of Ms. Monforton follows:]

PREPARED STATEMENT OF CELESTE MONFORTON, MPH, DRPH

Senator Murray, Senator Isakson and other members of the subcommittee: I am Celeste Monforton, an assistant research professor in the Department of Environmental and Occupational Health at the George Washington University School of Public Health & Health Services, and chair of the Occupational Health & Safety Section of the American Public Health Association. I appreciate the opportunity to appear before you today to discuss occupational health and safety policy, including:

- Using civil penalties to censure employers who disregard their legal and moral responsibility to provide a healthy and safe workplace;
- Remodeling the OSHA penalty system to spur implementation of worksite-specific illness and injury prevention programs; and
- Promoting avenues for meaningful participation in OSHA's citation and penalty process by current workers, injured workers and family-member victims of workplace hazards in order to address the *social consequences* of worker injuries, illnesses and death as well as the economic and legal factors that dominate the current OSHA system.

Today, people around the globe are marking Worker Memorial Day, the day set aside to remember workers killed, disabled, injured or made unwell by their work, and to act to improve protections for the world's workers. In our own country, we can honor the men, women and young workers whose lives were cut short or irreparably harmed by on-the-job conditions by making needed changes to our Nation's occupational health and safety system.

Ultimately, our Nation's health and economy would be served best by an occupational health and safety regulatory system that emphasizes *prevention* of work-related injuries and illnesses. The topic "prevention of occupational injuries and illnesses" could be the subject itself of the entire subcommittee hearing, but one piece of prevention—penalties—is the topic for today.

In a regulatory system like OSHA's, penalties must be severe enough to compel violators to change their behavior, and to deter lawbreaking by those who might be tempted to flout safety and health regulations in an effort to increase production or cut costs.

Davitt McAteer, former Assistant Secretary of Labor for Mine Safety and Health, notes that employers (and individuals) generally fall into three categories. One group is the top performers: companies that strive for operational excellence. They don't worry about OSHA inspections; they already have worker injury and illness prevention programs that are grounded in employee involvement and continuous improvement and, frankly, put OSHA's bare-minimum regulations to shame.

At the other end of the spectrum are the bad actors. These individuals intentionally disregard the law or are indifferent to it—they act as though the rule of law doesn't apply to them. Unfortunately, there are employers who fall into this category. These are employers who violate the law, without care or concern for the individuals or communities potentially affected by their decisions. They flout rules designed to protect our air, water and other natural resources, defy minimum wage

and overtime rules and collective bargaining rights, and ignore workplace health and safety standards. Employers in this category deserve to get the book thrown at them—not just the book, the whole book shelf.

Our occupational health and safety (OHS) regulatory system must provide harsh penalties for employers who fall into this category. The system should require the equivalent of “points on their permanent record.” Employers who flagrantly, willfully or repeatedly violate laws designed to protect workers from injuries and illnesses should see their finances and reputations suffer. Our system should take advantage of the times when such employers are caught, and capitalize on these grievous situations for their value as a deterrent for companies nationwide. It may not deter other bad actors, but it will catch the attention of those who might be tempted to cut a few corners when under pressure.

The majority of employers and the majority of people in general are neither stellar performers nor bad actors. We respect laws’ aims and purposes, and we comply with them—most of the time. At times, however, competing forces color our judgment, and we break a rule because we think the likelihood of causing harm is low, as is the risk of getting caught. I’m going to make a confession: a time or two I’ve run through a traffic light as it turned red. Did I know I was breaking the law? Yes. Did I do it intentionally? Yes. Were there extenuating circumstances? Yes, but regardless, I violated a traffic law.

I was probably running late for an appointment, and made a risk calculation that considered the chances of causing an accident and the chances of getting caught by the police, with the benefits of making it to my appointment on time. I obey traffic safety rules nearly all of the time, but on occasions, I used bad judgment. Do I deserve an appropriate penalty? Yes. If the penalty is stiff enough (i.e., a steep fine and points on my driver’s license), will I think twice before running a red light again? You bet.

I believe that many employers and their managers act similarly when it comes to OHS rules. They know that workplace OHS standards are based on lessons learned and have a public health and safety purpose. But, from time to time, when certain competing forces weigh on them, they make a calculation. They weigh the risk of suffering harm or causing harm to another and the likelihood of getting caught breaking the law. Whether it is my late-for-an-appointment red-light running analogy, or a manager’s decision to allow Joe Laborer to work on inadequate scaffolding because they’re running behind schedule and Joe Laborer will only be up there a few minutes, competing forces (e.g., production goals, time constraints, economics, competitors) influence our judgment. The deterrent effect of OSHA’s penalty system could be amplified to outweigh the influence of competing forces. This is particularly relevant today; the U.S. needs an effective system to prevent occupational injuries and illnesses, but OSHA’s responsibilities are grossly mismatched with its budget and resources.

OSHA CIVIL PENALTIES AND THE DETERRENT EFFECT

A penalty’s effectiveness as a deterrent is influenced, in part, by its economic impact on the individual or entity that pays it. With respect to OSHA’s civil penalties, many employers will make a practical calculation to assess economic factors such as:

- the cost of implementing safety and health interventions (e.g., purchase and maintenance of equipment, continuous worker training);
- the cost savings associated with foregoing safety and health interventions (e.g., delaying equipment maintenance for another few months);
- the benefits to safety and performance of the intervention; and
- the potential financial cost of an OSHA citation and penalty (e.g., monetary fee, human resource time corresponding with OSHA, legal services).

These economic costs are weighed against the likelihood of having an inspection and being cited for OHS violations.

The present OSHA enforcement system ignores, however, the potential role of reputational damage in enhancing the deterrent effect of OSHA penalties. For many firms, the average OSHA penalty for a serious violation is just a rounding error in their overall budget. If the firm’s customers learn of its violations and then decide to take their business to competitors, however, the firm could suffer a penalty much larger than an OSHA fine. Companies value their reputations, which are built on the quality of their products and services and their relationships with the communities in which they operate. By making violation information available to the public and press, OSHA could demonstrate to companies that OHS violations put their reputations at risk. For example, OSHA could make prominently available and easily searchable on its Web site items such as the following:

- details of a fatality or serious injuries or illnesses among the company's employees or contractors;
- evidence that the company's management allowed employees to be exposed to serious safety or health hazards, or knowingly violated OHS standards; and
- data depicting the company's nationwide inspection history, violations cited, performance in abating hazards promptly, and history of contesting citations and penalties.

OSHA could use its Web site much more effectively to make workers, competitor businesses and the public much more aware of companies who have violated worker protection laws. The agency should also explore what other tools it has at its disposal to ensure that the public and the press can take workplace OHS data into effect when they evaluate companies' reputations.

The final major factor influencing the deterrent effectiveness of a penalty system is the likelihood of enforcement—that is, the probability of getting caught exposing workers to OHS hazards. With respect to OSHA's presence in workplaces, the facts are well-known: there are about 8.97 million workplaces nationwide,¹ and in 2007, the Federal and State OSHA programs combined conducted 96,704 inspections. A substantial portion of these (about 40 percent) were conducted in response to fatalities and catastrophes, employee complaints about hazardous conditions and referrals. Less than 1 percent of non-mining workplaces were visited last year by Federal or State OSHA inspectors.

I've developed a model I'm calling the "Deterrent-Effect Matrix" (Figure 1) to evaluate the potential capability of a penalty system. Using the matrix to examine the current OSHA penalty system, I'd classify it as "inadequate" as a deterrent. On the y-axis, the probability of having an inspection is low; on the x-axis, the economic cost of an OSHA civil penalty is low (i.e., *initial* assessed penalty for a serious violation is \$1,400) and the risk of reputational damage is also low. Modifications to one or both axis-factors are needed to transform OSHA's penalty system into one with a sufficient deterrent effect.

Figure 1: Deterrent-Effect Matrix

Likelihood of Enforcement (Probability of Getting Caught Violating the Law)	Economic and Reputation Cost of the Penalty (Monetary Penalty, Damage to Reputation)		
	High	Medium	Low
High	+++++	++++	+++
Medium	++++	+++	++
Low	+++	++	+

Legend	Degree of Deterrent Effect
+++++	= Robust
++++	= Significant
+++	= Modest
++	= Trivial
+	= Inadequate

In contrast, I'd classify the penalty authority given to the U.S. Environmental Protection Agency as "significant" or "robust." Under the Clean Water Act and Clean Air Act, for example, there are requirements for continuous monitoring *and* the initial penalty for violating emission and discharge standards is typically \$25,000 per violation *per day*.² In this case, the likelihood of enforcement *and* the economic cost of the penalty are both in the medium to high range. Moreover, under EPA policy, the penalty amounts assessed to companies are supposed to take into account the economic benefit the firm *gained* from not complying with the law. As noted in a 1992 GAO report,

"... allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage, which creates a disincentive for compliance. EPA's policy is to remove the incentive to violate the law."³

This particular GAO report was not, however, about EPA; rather, it was an assessment of how well OSHA had implemented the 1991 Congressional mandate increasing OSHA penalties. In this GAO report "OSHA: Penalties for Violations are Well Below Maximum Allowable Penalties," the auditors recommended that the economic benefits reaped by an employer for violating health and safety regulations should be a specific factor included in OSHA's penalty calculation. I suspect that

firms that have invested in progressive, effective worker health and safety programs would welcome a penalty system that levels the playing field. Employers who comply and embrace the letter and the spirit of OHS regulations should no longer be placed at an economic disadvantage because their competitors are failing to invest in OHS.

Finally, the OSHA enforcement system does not operate in a vacuum. I urge this committee to consider its deterrent effect in conjunction with other related social institutions: the independent Occupational Safety and Health Review Commission (OSHRC) and our State-based, exclusive remedy workers' compensation system. I offer recommendations about these institutions at the end of my testimony.

DELINKING CITATIONS AND PENALTIES WITH ABATEMENT OF HAZARDS

Law-abiding employers are not the only ones put into a difficult position by OSHA's inadequate response to violations. Because of the way the OSH Act is written, local OSHA managers often have to choose between levying a tough penalty and getting a hazard corrected quickly. Under the OSH Act, employers are *not* required to correct a hazardous condition(s) until the citation(s) assessed by an OSHA inspector becomes a final order of the OSHRC.⁴ Briefly, when an employer receives an OSHA citation and penalty, s/he has 15 working days to: (1) accept the citation, abate the hazards and pay the penalties; (2) schedule an informal conference with the local OSHA area director to negotiate an informal settlement agreement; or (3) formally contest the citation and/or penalty before the OSHRC.

An employer has the right to contest four aspects of the citation: (1) the classification of the violation (e.g., serious, willful); (2) the OSHA rule, standard or statutory clause affixed to the violation; (3) the abatement date; and/or (4) the proposed penalty. Instead of formally contesting one of these aspects, an employer may request to meet with the director of the local OSHA office for an informal conference before the 15-day period to file a notice of contest expires. The majority of employers who receive OSHA citations participate in informal conferences, and the majority of OSHA inspection cases are resolved this way. OSHA's area directors have the authority to reclassify violations (e.g., downgrade from willful to serious, serious to other-than-serious); withdraw or modify a citation, an item on a citation, or a penalty; and negotiate the proposed penalty. If both parties agree to the negotiated terms, the employer must then abate the hazard in the agreed upon time period; if no agreement is reached, the employer will likely choose to formally contest it through the OSHRC system and can refrain from correcting the safety problem in the meantime.

When cases move through the OSHRC system, the administrative law judges and Commissioners typically reduce the penalty amount proposed by OSHA. (OSHA proposes a penalty amount, but the OSHRC determines the final penalty.) In practical terms, when a citation is contested, years and years can pass before an employer can be compelled to abate the workplace safety or health problem. Even if the employer doesn't succeed in their OSHRC appeal, they have bought substantial time (and saved money) by not correcting the hazard during the appeal process. Furthermore, by holding in abeyance the correction of hazardous conditions, these employers have gained an economic advantage over their competitors, employers who do obey OSHA standards and regulations.

OSHA's area directors offer penalty reductions and reclassifications of citations (e.g., from serious to other-than-serious) in order to compel prompt correction of the hazard. From a local OSHA manager's perspective, s/he would rather get the dangerous situation rectified so that workers at the site are protected from potential harm, rather than risk a chance that the employer will contest the citation and penalty.

OSHA's inspectors and local managers are truly in a difficult position because the citations and penalties are linked to hazard abatement. Compare the situation of OSHA inspectors and supervisors to that of their colleagues at the Mine Safety and Health Administration (MSHA). Under the Mine Act, when a Federal mine inspector identifies a violation of an MSHA standard or regulation, mining companies are required to begin fixing the problem immediately. Employers in the mining industry have the right to challenge citations and penalties before the Mine Safety and Health Review Commission (MSHRC), but an employer's decision to litigate an inspector's finding and/or the proposed penalty does not give him permission to let workplace hazards persist. OSHA needs comparable authority.

The principle of prevention must be enshrined in our workplace OHS regulatory system. This means providing OSHA the authority to compel immediate abatement of hazards that are known to contribute to serious injury, illness or death. We can't make advances in *preventing* harm to workers when our system forces local OSHA

staff to bargain with employers for worker protections that they are already *required* to implement. The informal settlement process should not only expedite abatement of the hazard, but also give OSHA leverage to require employers to implement measures that go above and beyond what is required by OSHA.

I envision a transformed OSHA penalty system that would offer a more significant deterrent effect and would provide incentives for employers to enhance their OHS systems beyond the bare-minimum OSHA requirements. For example, modest reductions in the penalty amount could be reserved exclusively as a negotiation tool to compel abatement of other-than-serious violations. (As noted above, immediate abatement should be required for a class of hazards known to contribute to serious injury, illness or death.) In order for an employer to secure a reclassification of a violation (e.g., from serious to other-than-serious), the firm would be required to implement a meaningful worker injury and illness prevention measure at their work-site (e.g., a worker-involved hazard identification and correction program). Likewise, if an employer sought a reclassification of a willful violation to a serious violation, the firm would be required to implement a comprehensive health and safety management system, or would be required to implement a meaningful and verifiable intervention at all of the firm's locations.

The pragmatist in me recognizes that making such changes to the current penalty system is likely to increase the number of citations and penalties that are contested. That's true. In fact, MSHA staff tell me that since the agency's penalties were increased substantially in April 2007, the contest rate has quadrupled.* In order to temper employers' race to the courtroom (which would be a windfall for attorneys who specialize in employer OHS defense), OSHA could capitalize on the reputation costs to firms of OHS violations, by making accessible to the public in a searchable format data on employers' specific violations, informal settlement demands, contest history, etc. Potential employees, communities, competitors and the press should have access to employer-specific data, to make an assessment for themselves about a firm.

MANDATORY MINIMUMS FOR EXPOSING WORKERS TO WELL-KNOWN EXTREME DANGER

An examination of occupational injury, illness and fatality data shows that the same hazardous conditions that killed and maimed U.S. workers 20 years ago are largely the same hazardous conditions that kill or maim U.S. workers today. In 2009, in the richest Nation on earth, there is *no* acceptable reason why workers still suffocate to death in unshored trenches. Trench collapses are preventable: the methods are well-established, and the equipment inexpensive and available. Yet last year, at least two dozen workers in our Nation died this way. Likewise, workers in the United States continue to die or be seriously maimed on the job from falls on residential construction site projects or because of unguarded equipment, inadequate lock-out/tag-out procedures, and uncontrolled combustible dusts and gases.

Isn't it time that we, as a nation, proclaim that certain hazardous conditions in workplaces are not tolerated? Just as drunk drivers now receive hefty legal penalties and scorn from their peers, employers should pay dearly for allowing workers inside an unshored trench, permitting unguarded floor openings, tolerating inoperable safety devices and sending workers into confined spaces without proper training and equipment.

Congress should direct OSHA to publish a list of specific hazardous conditions or work practices that will be deemed automatic willful violations. Citations issued under this provision would not be eligible for reclassification and would remain on the company's enforcement history record for a minimum of 10 years. This congressional mandate would include a requirement for OSHA to update the "automatic willful" list biennially.

INADEQUATE STATUTORY MINIMUM AND MAXIMUM PENALTY AMOUNTS

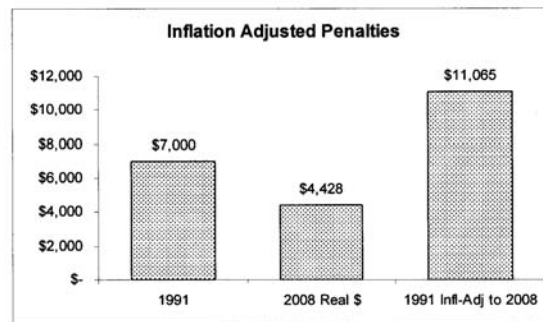
In 1991, after 20 years on the books, Congress amended Section 17 of the OSH Act, authorizing OSHA to assess no less than \$5,000 but no more than \$70,000 for a willful or repeated violation, and up to \$7,000 for serious, other-than-serious and posting violations.⁵ It's time for another congressional update of OSHA's minimum and maximum penalty amounts, along with a mandate for OSHA to index them regularly to account for inflation.

Figure 2 shows the inflation-adjusted equivalent of \$7,000, the current maximum for a serious violation. In today's dollars, this maximum penalty—which, by the

*Recall however that contesting an MSHA citation does not absolve the mine operator from abating the hazard. This substantial jump in contested cases is a resource and management problem, but has far less significance for workers' immediate health and safety.

way, is rarely proposed by OSHA—has eroded to \$4,428. If indexed to inflation, the \$7,000 maximum would now be \$11,065.

**Figure 2: Inflation-Adjusted
Maximum Penalty for Serious Violation**



Under the OSH Act, OSHA proposes the penalty amounts and the OSHRC assesses them through a final order. Within the minimum-maximum structure established by Congress in 1991, OSHA and OSHRC are also required by statute to consider four factors when determining the penalty amount:

- (1) the size of the business;
- (2) the gravity of the violation;
- (3) the employer's good faith; and
- (4) the employer's history of previous violations.

The gravity of the violation, assessed in terms of the severity and the probability that an injury or illness could result from it, is the primary consideration in determining the penalty amount. This gravity-based penalty amount ranges from \$2,000 to \$5,000,⁶ from which OSHA considers percentage reductions for the remaining three factors.⁷ For example, a firm with 1–25 employees nationwide will typically receive a 60 percent reduction off the gravity-based penalty amount; for an employer with 26–100 employees or 101–250 employees, typical business-size reductions are 40 percent and 20 percent, respectively.

Congress should reset these penalty amounts and express its intent on how the statutory reduction factors should be applied. OSHA's current operations manual, for example, directs inspectors that the starting point for serious violation is \$5,000, not \$7,000 as authorized by Congress.⁶ In addition, the Department of Labor (that is, OSHA and the Solicitor's Office) should be prohibited from using the so-called "Section 17" designations to make willful and repeat violations disappear.⁸ They use this reclassification scheme even in the case of a worker's death or maiming. This practice poisons the potential deterrent effect of OSHA citations, and improperly allows a firm to preserve its reputation. The lawyers who negotiate these deals with OSHA on their employer-clients' behalf know a firm's bottom line is contingent on its reputation—a precious commodity in the business world. Most employers who receive willful or repeated violations from OSHA will pay almost any monetary fee to get a "Section 17" designation. Ultimately, these designations convey that their grievous violation of worker protection standard never occurred. By contrast, the families of workers maimed or killed on the job cannot pretend it never happened.

Finally, Congress should consider the 1992 recommendation by GAO in their report examining OSHA penalties, specifically, that the economic benefits reaped by an employer for violating health and safety regulations should be a specific factor included in OSHA's penalty calculation.³

AMPLIFY THE PREVENTION POTENTIAL OF OSHA CITATIONS

Forty years ago, when businessmen needed sales, production or other information from factories or construction sites across the country, secretaries used shorthand, typewriters and carbon paper to prepare memos. The U.S. mail was the communication messenger. Businesses today have data at their fingertips, and with the click of a mouse can share critical information with their facilities across the county and the globe. With the power of this instantaneous communication, it's time to capitalize on the prevention potential of OSHA citations. For example, if a serious hazard or violation of a workplace standard is identified in an employer's workplace,

that company should be *expected* to look for this same hazard in all of its other operations, once it has been put on notice that the hazard exists. With 21st-century communication tools at their fingertips, businesses are well-equipped to correct hazards and strengthen prevention programs across all of their sites.

The OSH Act places a duty on employers to provide safe and healthy workplaces,⁹ but it imposes no obligation on them to address hazards on a company-wide basis. Congress should mandate such a duty on large companies. When a serious hazard has been identified by OSHA at one facility, the firm should be required to conduct an audit to determine whether the same hazard exists at other facilities. If comparable hazards or violations are found at another site, citations for those violations should be classified using the new category of “reckless disregard.” The corresponding civil penalty should be hefty (e.g., \$220,000 as provided in the MINER Act of 2006.)¹⁰

MEANINGFUL ROLES FOR VICTIMS AND FAMILIES

In the wake of the January 2006 Sago mine disaster, I had the privilege to serve on the special investigation team appointed by West Virginia Governor Joe Manchin. Through that experience, I came to understand and appreciate the fundamental right of family-member victims to have a meaningful role in formal accident investigations, and the vital contribution that they can make to the process. There is no one more interested in finding the truth about the cause of an on-the-job death than a worker-victim’s loved ones.

I heard then, and still hear today, proponents of the status quo argue that family members will impede the investigation, that family members have a conflict of interest, or that family members are too emotional to be useful in the fact-finding. My experience with the Sago families tells me that nothing is further from the truth. Yes, the logistics were more complicated managing the needs of 12 different families, and yes, many times our interactions were heart-wrenching, but no one paid closer attention to details, pressed the Federal and State investigators harder for answers, or raised the bar for mine safety reforms higher than those daughters, wives and brothers.

Of the many memorable experiences, one in particular stands out as relevant to our purposes today. For many weeks following the disaster, MSHA and State investigators conducted closed-door interviews with the miners who escaped after the explosion, mine rescue team members, other mine workers and management officials. More than 70 private interviews were conducted, and investigators collected supporting documents used during the interviews (e.g., mine maps, pre-shift examination records, etc.). What do you think happened as soon as these interviews commenced? Understandably, the families wanted to know who was being interviewed and what the investigators were learning. From the prudent perspective of the investigators, they will not typically share any information until the investigation is completely closed, and this had historically been MSHA’s firm practice. At the same time, the family members yearned to learn as much as they could about their loved ones’ final hours.

Putting oneself in the family members’ shoes, you realize that dozens of people (people you don’t know and have never met) are learning the circumstances that led to your loved one’s death, but you—his parent, his wife, his child—are left in the dark. As I talked with family members in the early days of the Sago investigation, as these interviews were first taking place, I realized that we needed to balance the families’ right to know with the needs and the legal responsibilities of technical investigators. In an unprecedented move, we quickly identified a compromise. It was not perfect, but it served both goals: once all the witness interviews were completed, but well before the investigation was closed, we gave each family a complete set of the transcripts and supporting documents. Despite the unease and anxiety expressed by some, including the historically based assertion that such disclosures would impede the investigation, no calamity ensued. In fact, some of the family members devoted long days and nights to studying the transcripts and were able to alert us to inconsistencies in witnesses’ testimony and identify topics deserving closer scrutiny. In my professional life, my involvement with the Sago investigation and the families has been one of the most rewarding and enlightening experiences in my public health career.

In my recommendations listed below, I offer several suggestions to provide fundamental rights to family-member victims of serious workplace incidents and opportunities for their meaningful participation in incident investigations.

RECAP AND RECOMMENDATIONS

Family-Member Victims of Workplace Fatalities and Catastrophes

1. I respectfully suggest that members of the committee read “Workplace Tragedy: Family Bill of Rights,”¹¹ a document prepared by family members who have lost loved ones to workplace disasters. It contains powerful examples of how the current enforcement system ignores the needs of family-member victims. I concur with the spirit of many of its recommendations.

2. The Secretary of Labor should appoint a Federal advisory committee made up of injured workers and family-member victims of workplace fatalities and catastrophes, to give SOL, OSHA and MSHA officials advice on improving the prevention potential of the enforcement and accident investigation systems. The advisory committee would provide a mechanism for senior DOL officials to interact with individuals who have personal knowledge and interest in achieving substantial improvement in our Nation’s injury and illness prevention system.

3. Victims’ family members or their designated representative should have status equal to that of employers in OSHA and MSHA investigations of fatalities and catastrophes.

4. Family members should be given access to all documents gathered and produced as part of the accident investigation, including records prepared by first responders and State and Federal officials, and all fees related to the production of documents should be waived for family members. The release of this information should be prompt, and no later than the day that any citations are issued to the employer. Exceptions should be permitted when bona fide evidence demonstrates that a criminal investigation could be hampered by such release.

OSHA’s Civil Penalty System

5. Congress should give OSHA the authority to compel abatement of hazards regardless of an employer’s decision to contest a citation and/or penalty. Moreover, reclassification of citations (e.g., from serious to other-than-serious) should be reserved for circumstances in which the employer agrees to implement an intervention that goes above and beyond mere compliance with an OSHA standard.

6. OSHA should capitalize on the reputation costs to employers who violate OHS standards by making workers, competitor businesses and the public much more aware of companies’ OSHA enforcement history. This would entail offering a web-based system with data on employers’ specific violations, informal settlement demands, contest history, etc.

7. Congress should direct OSHA to publish a list of specific hazardous conditions or work practices that will be deemed automatic willful violations and that will not be eligible for “Section 17” designations or other reclassification by OSHA.

8. Congress should reset the current statutory minimums and maximums for OSHA civil penalties and mandate that OSHA index them regularly to account for inflation.

9. OSHA’s penalty calculation should include a specific factor that assesses the economic benefits reaped by an employer for violating health and safety regulations, which will level the economic playing field for firms that invest in progressive, effective OHS labor-management systems.

10. Congress should impose an obligation on large firms to address hazards on a company-wide basis, once they have been identified by OSHA at one of the firm’s facilities. A new category of violation, “reckless disregard,” should be created for employers who fail to use an OSHA citation as notice of a hazardous condition to be corrected elsewhere.

Occupational Safety and Health Review Commission

11. Congress should examine the impact on our workplace injury and illness prevention program of OSHRC’s decisions and administrative performance. Some cases before the OSHRC languish there for years (e.g., the April 2009 decision in *Secretary of Labor v. E. Smalis Painting Co.*, dating back to a 1993 inspection), and these delays likely have a downstream effect on OSHA’s enforcement practices.

12. Congress should examine whether OSHRC’s resources are sufficient to ensure speedy resolution of disputed citations; indecision and delay at OSHRC obstruct the potential deterrent effect of OSHA citations and penalties. Appendix A presents data on the number of cases received and disposed of by OSHRC in recent years.

13. Congress should direct OSHRC to provide more information on its public Web site about pending cases. This could be a simple electronic spreadsheet with data fields such as case number, employer, worksite location, date of OSHA citation, status of litigation, date of final decision and the URL for the final decision text. Mak-

ing this information available increases the likelihood that frequent and severe offenders will suffer deserved reputational damage.

State-Based Workers' Compensation System

14. Congress should reauthorize for a 2-year period the National Commission on State Workers' Compensation Laws. It has been almost 40 years since the Congress has examined the adequacy and effectiveness of these laws for occupational injury and illness prevention. As the Administration and Congress move forward on proposals to improve our healthcare delivery and financing systems, it would be appropriate for the debate to include an informed assessment of State workers' compensation laws.¹²

REFERENCES

1. U.S. Bureau of Labor Statistics. Table 1 "Total coverage (UI and UCFE) by ownership: establishments, employment and wages, 1998–2007, annual averages, BLS establishment data" Available at: <http://www.bls.gov/cew/ew07table1.pdf>.
2. Grad FP. The Public Health Law Manual, 3rd ed. Washington, DC: American Public Health Association, 2004. See Chapter 11 "Civil Sanctions."
3. U.S. General Accounting Office. Report to the Subcommittee on Health and Safety, Committee on Education and Labor, U.S. House of Representatives. Occupational Safety and Health: Penalties for Violations are Well Below Maximum Allowable Penalties," April 1992.
4. Section 10(b) of OSH Act.
5. H.R. 5835, Omnibus Budget Reconciliation Act of 1990 (Enrolled as Agreed to or Passed by Both House and Senate).
6. OSHA's Field Operations Manual states, "if the Area Director determines that it is appropriate to achieve the necessary deterrent effect, a GBP of \$7,000 may be proposed instead of \$5,000. Such discretion should be exercised based on the facts of the case. The reason for this determination shall be fully explained in the case file." OSHA's Field Operations Manual, CPL 02–00–148, March 26, 2009. Pages 4–5, 4–6. Available at: http://www.osha.gov/OshDoc/Directive_pdf/CPL_02–00–148.pdf at page 6–6.
7. OSHA's Field Operations Manual, Chapter 6: Penalties and Debt Collection.
8. U.S. Senate. Committee on Health, Education, Labor, and Pensions. "Discounting Death: OSHA's Failure to Punish Safety Violations that Kill Workers," April 29, 2008.
9. Section 5(a) of OSH Act.
10. Under the Miner Act of 2006, Congress created a new violation category called "flagrant" representing "reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." A civil penalty of up to \$220,000 can be assessed. Since the law was passed, MSHA has used the "flagrant" classification 92 times with assessed penalties totaling \$14,552,400.
11. "Workplace Tragedy: Family Bill of Rights" available at: <http://www.usmwf.org/>.
12. See also: Woeppel P. Depraved Indifference: The Workers' Compensation System. IUniverse, 2008.

APPENDIX A

Occupational Safety and Health Review Commission Performance Measures

Fiscal year	ALJ decisions				Commission decisions			
	Cases carried over from previous year	No. of new cases	No. of cases disposed of	Balance for the next year	Cases carried over from previous year	No. of new cases	No. of cases disposed of	Balance for the next year
2008	625	1,962	1,848	736	25	13	18	20
2007	685	1,998	2,058	625	27	25	27	25
2006	nr	nr	nr	nr	40	13	26	27

nr = Not reported.

Percentage of Cases Over 2 Years Old Disposed Of

Fiscal year	Percent of cases
2008	23
2007	32
2006	22
2005	52
2004	42

Source: Occupational Safety and Health Review Commission. Performance and Accountability Reports. Available at: <http://www.oshrc.gov/performance/performance.html>.

Senator MURRAY. Thank you very much.
Mr. Frederick.

**STATEMENT OF JIM FREDERICK, ASSISTANT DIRECTOR FOR
SAFETY AND HEALTH, UNITED STEELWORKERS, PITTS-
BURGH, PA**

Mr. FREDERICK. Thank you and good morning. I appreciate the opportunity to appear before you this morning to discuss the Union's response to workplace fatalities and severe injuries.

My name is Jim Frederick. I'm a member of the United Steelworkers and also the Assistant Director of the Union's Health, Safety and Environment Department. I've spent my 19-year career identifying and addressing workplace health and safety hazards and responding to worker deaths, injuries and illness. Over the course of my career I have personally investigated dozens of fatalities. And have overseen the investigation of hundreds of fatal and catastrophic injuries.

On Friday April 18, 2008 a USW member named Roger said good bye to his wife and went to work like he had done almost every day for the past 41 years. His plant had seen its ups and downs, bankruptcy, buyout and a new ownership. He had been laid off, had lost his job when the plant went out of business, lost much of his retirement and rehired in recent years.

His co-workers described him as an extremely capable, conscientious and competent maintenance person. He and his crew had performed maintenance on a piece of equipment that he had helped install and maintained over the years. He knew the piece of equipment well. He had walked past the machine many times every day to get back and forth to the maintenance shop.

Through a miscommunication Brother Roger returned to check on the equipment while it was operating and in manual mode because the machine didn't sound like it was running correctly. While he was checking the equipment it was placed into automatic mode. When the machine started running Brother Roger's head was crushed in the equipment due to a missing machine guard.

The employer, OSHA and the USW all investigated the fatality. OSHA eventually issued four citations and proposed a penalty of \$13,000. OSHA then met in a conference with the employer, dropped one of the citations and reduced the penalty to a little bit over \$6,000.

Through the course of the Union's investigation, we contacted Roger's family. But the family did not receive information from OSHA except for the letter that they received from Washington

asking the family to accept OSHA's sincerest sympathy. The family cared about the OSHA investigation, but was not afforded an opportunity to participate in the process.

This scenario was unfortunate. It's unfortunately typical of OSHA's practice today. But it doesn't have to be the norm.

The USW usually receives notification of USW members killed at work within hours of the accident. The USW responds to every member fatality and many serious injuries every year. We respond as quickly as possible, 24 hours a day and 365 days a year.

Our response is twofold.

First the member of the Union's health, safety, environment department responds to assist the local union regulators and others investigating the accident. Our role is to identify root causal factors, serve as an advocate for the victim, co-workers and local union and to assist the local union in advocating for changes needed to prevent such a tragedy from happening again.

Second, a member of the USW Emergency Response Team is dispatched to act as a liaison between the victim and/or their family, the local union and the employer. The ERT staff also provides the family with access to support and services from the USW local union, the international union and other sources. Finally the ERT staff facilitates counseling and assistance for witnesses and co-workers to assist them in dealing with their own emotional trauma.

Both elements of the response are equally important to the process and aid us in correcting the hazards at the workplace that caused the incident and sharing the information about the incident to others.

When the USW team arrives at the local union hall we evaluate the facts available. The team recognizes that there are three sets of victims, the injured or deceased members, the co-workers or witnesses and the family members of those involved. We recognize that each has much to offer in the investigation process.

In some instances valuable information about a faulty piece of equipment or bad process has been shared between the accident victim and their co-workers or family. Although there are inherent challenges with obtaining information from any person the information from co-workers and sometimes family members is often crucial to the union's investigation. The USW investigation response process provides us with a framework to obtain information from these valuable sources.

It's impossible to express the extent of the depth of a loss to a family that a family experiences when a loved one is killed at work. The emotions involved are immense. In some cases involvement by the family in the OSHA process provides them an outlet for the family members to address some measure of these emotions and understand how and why their loved one was killed.

The first question almost always asked to us by the family is, "What happened to my loved one?" Our department, the Union's Health Safety and Environment Department spends as much time as we can working with local unions to establish proactively good health and safety programs in our workplaces. But, unfortunately, the union still experiences a fatality to a member at a rate of approximately one every 9 days. This doesn't take into account occu-

pational disease and when we take that into account, we recognize that we lose a member due to workplace hazards daily.

The Protecting American Workers Act will provide an important link for injured workers and families of workers killed on the job to meet with OSHA regarding the inspection or investigation conducted and to ensure that the agency and family understands everything they can about the circumstances of the accident. Before OSHA determines what citation needs to be issued, the family and the victims must have a say. The Union also should have a better opportunity to provide OSHA with relevant details to ensure that the agency is working with all the facts.

The proposed act will also provide victims and their families with access to the citations issued in a timely manner. Currently many serious injury and fatality inspections take place and neither the local union nor the international union receives copies of the citations in a timely fashion. Sometimes the union does not receive them at all. The victim, their family and the union should receive copies of the citation on the same day as the employer.

So, Madame Chair, you and your subcommittee have a unique and important opportunity. By taking the lead in advocating for standard rights of injured workers and their families in the OSHA process, you can ensure that the voices of workers and family members who have much to contribute will be included in the deliberations of the OSHA inspection, thus insuring the agency's better implementation of the intentions of the Occupational Health and Safety Act. Thank you again. And I'll submit my written testimony as well.

[The prepared statement of Mr. Frederick follows:]

PREPARED STATEMENT OF JAMES S. FREDERICK

Madame Chair and members of the subcommittee, thank you for the opportunity to appear before you this morning to discuss the Union's response to workplace fatalities and severe injuries. This issue is extremely important to me and to the United Steelworkers' officers, staff, our thousands of health and safety activists, and the Union's membership generally. My name is Jim Frederick. I am a member of the United Steelworkers, and the assistant director of the Union's Health, Safety and Environment Department in Pittsburgh, PA. I have spent my 19-year career identifying and addressing workplace health and safety hazards and responding to worker deaths, injuries and illnesses. Over the course of my career, I have personally investigated dozens of fatalities and have overseen the investigation of hundreds of fatal and catastrophic injuries.

The USW represents workers in a diverse set of industries and occupations. They manufacture steel, slurry and smelt aluminum, mine for iron ore and create cement. They make glass and mattresses, produce paper and paper products, craft energy-saving wind turbines that help save our Earth, and toil as nurses and nurses' aides helping to save lives. We represent the rubber workers who make your tires; metal workers who make the materials that go into buildings, homes, automobiles, planes and roads. Our members serve you at banks, assist you in retail stores, drive school busses and work at universities. You will find our members working in oil refineries, utility companies, and chemical plants. We represent workers in the public sector in town libraries and water treatment plants. Our members log forests. In total, the USW represents 1.2 million active and retired members in the United States, Canada and the Caribbean.

SAFETY INCENTIVES

The title of this hearing is "Introducing Meaningful Incentives for Safe Workplaces and Meaningful Roles for Victims and Families." I will spend my time discussing the role of victims and families in accident and fatality investigations; however, I want to mention the concern raised by the connotation of incentives in workplace safety and health from the perspective of workers and unions.

The USW recognizes that the incentive reference in today's hearing as it relates to the legislation before the subcommittee deals with increased penalties and other provisions to improve workplace safety and streamline the role of OSHA in protecting workers and workplaces. However, we want to make a distinction between "incentives" used in the title of this important hearing, and the problematic way in which a growing number of employers link "incentives" to "safety" in their version of "safety incentive programs," because these are, in fact, incentives to underreport workplace injuries and illnesses.

Workers and Unions in every sector of the economy are struggling with employer-implemented programs, policies and practices that discourage the reporting of workplace injuries and illness. Employers' "safety incentive programs" provide prizes or rewards to individuals or workplace groups based on the absence of reported injuries and illnesses. Last year, Congressman George Miller, Chair of the U.S. House of Representatives' Committee on Education and Labor, convened a hearing and released a report titled "Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses" which documented that up to 70 percent of job injuries and illnesses go unrecorded. The report presented four employer "incentives" to underreport workplace injuries and illnesses: low injury/illness rates decrease the chance of having an OSHA inspection; they decrease workers' compensation claims; they can earn businesses and supervisors bonuses; and, they look good to customers and the public.

Our goal in occupational health and safety is to create safe workplaces and prevent workplace injuries, illnesses and death. Unsafe workplace conditions that put our members' health and lives at risk are identified in many ways, including injury reports and subsequent incident investigations. When injuries are not reported, unsafe conditions go unchecked. As a result, the unsafe condition or hazard remains in the workplace, threatening the health, limbs or lives of others. I have personally investigated a steelworker workplace fatality where a co-worker of the victim explained that if he would have only reported the minor injury that he received from the same process, perhaps the hazard would have been addressed and his co-worker and friend would still be alive. This workplace had a safety "incentive" program that rewarded the group of workers in the area each month if none of them reported an injury. These kinds of employer-implemented safety "incentives" are the opposite of the incentives being promoted today; the two should never be confused.

USW FATALITY EXPERIENCE AND VICTIM ASSISTANCE TO OSHA INSPECTION PROCESS

On Friday, April 18, 2008, a USW member named Roger said goodbye to his wife and went to work like he had done almost every day for the past 41 years. His plant had seen its ups and downs, bankruptcy, buyout and new ownership. He had been laid off, lost his job when the plant went out of business, lost much of his retirement and rehired in recent years. His co-workers described him as an extremely capable, conscientious, and competent maintenance person.

He and his crew had performed maintenance on a piece of equipment that he had helped to install and maintain over the years. He knew this piece of equipment well. He walked past the machine many times to get to the shop. The plant maintenance staff had been reduced at the plant and the job classifications combined.

Through a miscommunication, Brother Roger returned to check on the equipment while it was operating in manual mode because the machine didn't sound like it was running correctly. While he was checking the equipment it was placed into automatic mode. When the machine started running, Brother Roger's head was crushed in the equipment due to a missing machine safeguard.

The employer, OSHA and the USW all investigated the fatality. OSHA eventually issued four citations and proposed a penalty of \$13,375. OSHA then met in conference with the employer, dropped one of the citations and reduced the penalty to about \$6,375. Through the course of our investigation and the OSHA investigation process, the USW contacted Roger's family, but the family did not receive information from OSHA except for a perfunctory letter from Washington, asking the family to accept OSHA's sincerest sympathy in the tragic death of Roger. The family cared about the OSHA investigation, but was not afforded an opportunity to participate in the process. This scenario is, unfortunately, typical of OSHA's practice today. But it doesn't have to be the norm. OSHA's Compliance Directive for fatality investigations (CPL 02-00-137) states, "Whenever practical, contact family members of employees involved in fatal or catastrophic occupational accidents or illnesses at an early point in the investigation and give the family an opportunity to discuss the circumstances of the accident or illness." The Protecting America's Workers Act will codify this guideline, making it a mandatory part of the investigation.

The USW usually receives notification of USW members killed at work within hours of the accident. The USW responds to every member fatality and many serious injuries each year. We respond as quickly as possible; 24-hours a day and every day of the year. We also respond to non-member fatalities (contractors, managers, etc.) in USW-represented facilities, when our members are exposed to the same or similar hazards.

The USW response is two-fold. First, a member of the Health, Safety and Environment department responds to assist the Local Union, regulator and others investigating the accident. Most of the time, this involves immediate travel to the site to participate in the investigation. Our role is to identify root causal factors; serve as an advocate for the victim, co-workers, and Local Union; and, to assist the Local Union in advocating for the changes needed to prevent such a tragedy from happening again. Second, a member of the USW Emergency Response Team (ERT) is dispatched to act as a liaison between the victim and/or their family, the Local Union, and the employer. The ERT staff also provides the family with access to support and services from the USW Local Union, International Union and other sources. Finally, ERT staff facilitates counseling and assistance for witnesses and co-workers to assist them in dealing with their own emotional trauma. Both elements of the response—accident investigation and family/co-worker support and assistance—are equally important to the process and aid us in correcting the hazards at the workplace that caused the incident and sharing the information about the incident, hazards and causal factors to the broader USW membership, other workers, employers and others so that we can prevent future tragedies and catastrophes.

When the USW team arrives at the Local Union hall we evaluate the facts available. The team recognizes that there are three sets of victims; the injured or deceased member(s), the co-workers or witnesses, and the family members of those involved. We recognize that each has much to offer to the investigation process. In some instances, valuable information about a faulty piece of equipment or bad process has been shared between an accident victim and their co-workers or family. Although there are inherent challenges with obtaining information from any person, the information from co-workers and sometimes family members is often crucial to the Union's investigation. The USW investigation and response process provides us with a framework to obtain information from these valuable sources.

It is impossible to express the extent and the depth of the loss that a family experiences when a loved one is killed at work. The emotions involved are immense. In some cases, involvement by the family in the OSHA process provides an outlet for the family members to address some measure of these emotions and understand how and why their loved one was killed, and to heal. The first question almost always asked by the family is, "What happened to my loved one?" They have very little access to information and sometimes hear directly or indirectly from the employer that their loved one was at fault.

When our members die at work, they are almost always single incidents involving one member. Major catastrophes involving many workers occur occasionally, such as the explosion at BP Texas City, TX in 2005 killing 15 and injuring more than 170. These large events are documented on the evening news, but the single fatalities tend to be unnoticed beyond the local media. Few people beyond the workplace recognize the extent of worker fatalities. For the industries covered by the Occupational Safety and Health Act, OSHA provides a consistent thread in the investigation of fatalities and the Protecting America's Workers Act will add support to victims and their families.

The USW Health, Safety and Environment Department spends most of our time working with our Local Unions to establish and maintain workplace effective health and safety programs, active safety committees, and to prevent injuries and illnesses. We provide a variety of assistance including training to our members and for joint labor-management groups. However, the USW experiences a member killed at work at a frequency of one every 9 days in workplaces that we represent. Most of these fatalities are in workplaces covered by OSHA and usually the fatality involves a recognizable workplace hazard. The Union's experience of fatalities over the past several years is summarized in the following table:

Year	USW member workplace fatalities
2004	47
2005	44

Year	USW member workplace fatalities
2006	38
2007	44
2008	43
2009 ¹	8

¹ 2009 USW member fatality number through April 20, 2009.

However, this does not tell the whole story. We believe that we receive notice of almost every member of the USW Union killed at work, but we rarely receive information on member deaths from occupational disease. Occupational disease deaths often occur after retirement; many are not recognized as work-related. Although some programs exist to address occupational disease, such as the U.S. Department of Energy's Former Worker Program, the vast majority of occupational disease is not properly counted. We recognize that for every member killed at work in a traumatic injury, that 8 to 10 members will die from occupational disease. In other words, a USW member or retiree dies from work-related hazards daily.

The Protecting America's Workers Act will provide an important link for injured workers and families of workers killed on the job to meet with OSHA regarding the inspection or investigation conducted and to ensure that the Agency and family understands everything they can about the circumstances of the accident. Before OSHA determines that no citation needs to be issued, the victim, their family and the Union must have the opportunity to provide OSHA with relevant details to ensure that the Agency is working with all the facts.

The proposed Protecting America's Workers Act will also provide victims, their families and Unions with access to the citations issued in a timely manner. Currently, many serious injury and fatality inspections take place and neither the Local Union nor the International Union receives copies of citations in a timely fashion, and sometimes the Union does not receive them at all. Even in those cases where the Area OSHA office and/or the OSHA State plan regulator provide copies of the citations to the Union or the family, they are often received after-the-fact, and not in time for effective participation in the process. The victim, their family and the Union should receive copies of the citations at the same time as the employer. Given the technology available today, the Union can facilitate communication between OSHA and the family, in organized workplaces.

THE NEXT STEPS

Madame Chair, you and your subcommittee have a unique and important opportunity. By taking the lead in advocating for expanded rights of injured workers and their families in the OSHA process, you can ensure that the voices of workers and family members who have much to contribute will be included in the deliberations of an OSHA inspection, thus ensuring the Agency's better implementation of the intentions of the Occupational Safety and Health Act of 1970.

Thank you again for the opportunity to testify this morning.

Senator MURRAY. Thank you very much.

Ms. Miser.

STATEMENT OF TAMMY MISER, FOUNDER, UNITED SUPPORT MEMORIAL FOR WORKPLACE FATALITIES, LEXINGTON, KY

Ms. MISER. Hi. I would like to thank you for holding this meeting, caring enough to invite all of us and for the honor of being able to represent family members here. When a loved one dies or they are injured on the job usually the families have no clue where to go for answers.

They have a special need to understand the death and the grief persists and it stays unresolved until they get certain answers. There are usually some answers, but it's kind of like a homicide. Whether it's voluntary or involuntary the questions are, "Did my son suffer?" "Was my Dad alone when he passed?" "How did my sister die?" "Has it happened before and will it happen again?"

When they start asking OSHA these questions, these simple questions, they usually explain how the process works. But they are also told that they can not disclose any information until the investigation is finished. They hardly ever tell these families that there are extensive settlement and appeal opportunities. So this can go on for years and years.

If there is a union on site they can have representation. But if the union chooses not to represent in this case then there is not a voice for the injured, killed or any worker that was made ill because of this place. So there's really no voice for these individuals.

It's not about money. So often we hear well it's about the money or they're taken care of. Well sadly, half these States don't even cover worker's comp.

So they have had their loved one taken away from them and they are footing the bill too. And you know, that right there is a tragedy. They should have at least that done, that taken care of.

So it's not about the money. It's about the individual families knowing that they have fought for the rights of their loved one when they could not do that anymore. It's also so that we know that there's not another worker having to go through what our loved ones have went through. And that there's not another family suffering like we have.

Families should be given the opportunity to participate in these investigations. After speaking to dozens and dozens of families and employers, we all agree that these changes need to be made in OSHA. The average OSHA fine is \$903 for a serious violation. These fines need to be raised because it is not a deterrent against a poor safety record.

As important as raising the fines are collecting these penalties. OSHA fails to collect almost half of these penalties. So even though they are low, they're not even collecting these. This makes it cheaper to kill somebody, put somebody at risk than it is to fix the immediate danger.

An advisory committee. We would like to see the Secretary of Labor appoint this committee. And it should be comprised of the family members, injured or ill workers and other worker safety advocates.

The committee would serve as a conduit between the family members, the victims and the Department of Labor. The group would share their first-hand experience with OSHA, MSHA and the Solicitor's Office and make recommendations from the family member's point of view. This would help to make health and safety—it would put more of a focus on prevention instead of an after-the-fact.

Families want to have full party status in these legal proceedings. We would like to have a designated representative, whoever that may be, act on the behalf of the families and be notified of all meetings, calls, hearings, communications. The involvement of the family members would make a huge difference. We would also like to see these representatives actually involved in the actual meeting itself, not just have the information because families have information that nobody else can have.

If you have a family member that's worked there for 14 years, they know just as much as the worker that was injured or killed.

We get information from the workplace itself. We would like to have access to all these documents and not have to pay for it.

Family members have to pay for this information. And really they should not have to. I mean there's really no need to charge them for the paperwork.

Employers, themselves, on another note, need to be able to call OSHA when they have a question and not have the fear of being audited. Almost every employer that I've talked to, this is their main fear. That they are going to be audited for the issue that they are calling for.

They really do—there are employers out there that are good. And they need the guidance. They need to be able to get the information when they need it and be directed to the correct training because I really believe that some of these employers do want to keep our families safe. And they really do need this option.

Thank you very much.

[The prepared statement of Ms. Miser follows:]

PREPARED STATEMENT OF TAMMY MISER

I would like to thank Chair Senator Murray and Ranking Member Senator Isakson for caring enough to hold this hearing and for the honor of being invited to represent the family member victims of workplace tragedies.

When a loved one is injured or dies on the job families do not know where to turn for answers. Families have a special need to understand the death because grief persists and is unresolved unless all available information about the circumstances of the work-related fatality or injury is shared in a timely manner. It is like homicide, whether the incident was voluntary or involuntary, the family strives to find out certain information. Simple questions like: Did my son suffer? Was my dad alone when he passed? How did my sister die? Has it happened before in other workplaces? Can we keep it from happening again? Why was this allowed to happen?

Families may be told how the investigation process will work, but this information often comes at a time when you cannot understand it. When family members get to a place in their grief where they need information about the status of the investigation the standard information is repeated and they are dismissed from further participation. The most typical response from the agency is that they can't disclose any information until the investigation is finished. (On the OSHA side that is about 6 months, as required by statute; on the MSHA side it can be much longer.) It is rarely explained to family members that employers have extensive settlement and appeal opportunities which can make the case drag on for years. When this happens, family members' long wait for answers goes on and on. Until the case is closed, and it becomes a final order of the OSH Review Commission, the details and documents assembled by the Labor Department are off limits to family members.

Even when an accident investigation case file is closed, family members may still have to fight to obtain all the written records in the case file. Being shut-out of the investigation process breeds resentment, distrust and compounds their grief, especially in those circumstances when families learn that company workers and co-workers know more about their loved one's death because they were participants in OSHA's investigation. For many family members, it seems like everyone else at the worksites knows more about what happened than they do even though this information may not be factual. Family member victims should be given the opportunity to participate in the investigation process throughout the entire process.

Currently, the investigation involves DOL staff (OSHA, MSHA, and SOL) representatives of the company and their attorneys and experts, and if there is a union at the site, a representative of the workers may also participate. So if there is no union or the union chooses to have no representation then there is no one that can speak on the behalf of workers killed, injured or made ill by exposures at work. Families can often have substantial factual information that could impact the case such as prior problems with hazards involved in the incident.

Now before I go any further I want to dismiss the myth that family member victims of workplace deaths are money hungry. Time and time again I hear "well at least the families are taken care of" or that families are all driven by greed. Nothing could be further from the truth. In fact, in some States the burial allowance provided under workers' compensation barely cover today's funeral expenses. That's a

real slap in the family's face; not only did they have a loved one ripped out of their lives but they have to foot the bill too.

Families cannot sue the employer; some may get involved in third party lawsuits but this is rare. When private civil action is taken we often can't learn of the end result because gag orders are imposed. There is absolutely no way for families to secure compensation through participating in the OSHA investigation process. The only thing families have (and want) to gain is the knowledge that they fought for the rights truth and justice of their loved one when they are no longer able to, and that they may be able to keep another worker from suffering harm and another family from unbearable loss and grief.

After speaking with dozens and dozens of families from across the country and with concerned employers, these are the changes that we think need to be made:

1. The average OSHA fine is \$900.03 for a serious violation. OSHA fines need to be raised so that they serve as a deterrent against poor safety records.

2. As important as raising the fines are the collection of the penalties. OSHA fails to collect almost half of the fines imposed meaning these employers know it is cheaper to risk killing someone at work than to address the immediate danger.

3. An advisory committee should be appointed by the Secretary of Labor to be comprised of family members, injured or ill workers, or other worker safety advocates. The advisory committee would serve as a conduit between family member victims and the Department of Labor. The group would share their first-hand experience with OSHA, MSHA and SOL officials, and make recommendations from the family member's point of view for a H&S regulatory system that focuses on prevention.

4. Families want to have full party status in these legal proceedings by:

- a. Having a designated representative to act on their behalf that will be notified of all meetings, phone calls, hearings or other communications involving the accident investigation team and the employer.
- b. The representative should be given the opportunity to participate in these events, recommend names of individuals to be interviewed and any pertinent information that may help with the investigation. Because many times families have information that OSHA will never gain otherwise. Such as the employers past history with deaths injuries and safety conditions.
- c. Have access to all documents gathered and produced as part of the accident investigation; including records prepared by first responders, State and Federal officials and all fees related to the production of documents should be waived for family members.

Now on a final note: Concerns from employers echo a common theme. Employers want to feel free to call OSHA when they have questions and be directed to materials and training without the fear of being audited and fined for the very reason they are asking for help. They want real guidance and if they are truly interested in keeping our families safe and I believe many are, they need to have this option.

I have inserted the family bill of right which covers most of this and has examples of what some families have had to deal with during this time.

[The information referred to above can be found at <http://www.usmwf.org>.]

Senator MURRAY. Mr. Brown.

STATEMENT OF WARREN K. BROWN, PRESIDENT, AMERICAN SOCIETY OF SAFETY ENGINEERS, DES PLAINES, IL

Mr. BROWN. Senator Murray, Senator Isakson, Senator Brown, panel members and guests, I am Warren Brown. As the President of the American Society of Safety Engineers, ASSE, I am pleased to be here today on Worker's Memorial Day representing the more than 32,000 safety, health and environmental professionals who belong to the ASSE. We too want to extend our sympathies to the families here and everywhere today who lost loved ones in the workplace.

ASSE was founded in 1911 shortly after the Triangle Shirtwaist Factory tragedy in New York City when a group of safety engineers decided it was time to build a profession committed to helping employers improve workplace safety. Now ASSE members work with

employers to protect workers in every industry, every State and across the globe. They all work hard to help make sure workers go home to their families every day, safe and healthy. That's why I've been committed to doing every day of my nearly 33 years managing occupation safety and health for major manufacturers in Ohio, producing vehicle air conditioning compressors in diesel engines.

Employers have much to say about their responsibility for safety. Workers, especially those victimized by failure to make a workplace safe, have much to offer this subcommittee. Safety and health professionals however are responsible for working with both management and workers to get safety and health done.

OSHA has been subjected to strong criticism over enforcement, rulemaking and its cooperative programs. ASSE has expressed some similar concerns. A strong effective OSHA is necessary to this Nation's commitment to safety. No doubt some changes are necessary, but ASSE cautions against wholesale changes that will diminish OSHA's capability to be this Nation's leader in occupational safety and health.

In safety and health a leader must be many things. To lead as a safety and health professional, I, like OSHA, must identify hazards and work to make sure employers and employees can avoid those hazards. I help my employers set safety rules and I often have to be tough and uncompromising to make sure a rule is carried out.

But the most important part of my job and plant is building relationships, reaching, teaching, selling safety and communicating with both employers and employees. The Federal agency leading this Nation's commitment to worker safety must have this same multi-faceted capability to meet its mission. The fact is the vast majority of employers do not implement safety programs out of fear of OSHA, its monetary penalties or even the threat of criminal prosecution. They do so because it's the right thing to do.

They also do so because proactive safety programs make sense from a productivity and monetary perspective. Just as companies target resources where they will reap maximum benefits. So too should OSHA direct its enforcement resources where the greatest gains in safety can be achieved towards those employers with a history of ignoring their compliance responsibilities.

I've been involved in numerous OSHA inspections. On more than several occasions inspections help me deal with risk. Overall however, most of these inspections were not needed at the companies where I work. These companies had a commitment to safety. As OSHA knew they had well-trained safety staff and highly developed safety management systems.

While some level of OSHA inspections were needed. With OSHA's limited resources how much more would it have accomplished had many of those inspections been done at workplaces less committed to safety. That's why ASSE is disappointed to learn that the Department of Labor's Inspector General recently found OSHA's enhanced enforcement program not nearly as effective as it should be in identifying high-risk employers to target with increased enforcement.

We urge this subcommittee to make sure this program works. That program can be improved in the same way OSHA has im-

proved its positive capability to help employers, employees and the safety and health community to achieve safer and healthier workplaces. These capabilities have made OSHA a more open organization and better engaged with others responsible for safety and health.

The VPP and SHARP programs have provided real incentives for companies to do safety and health well. The Alliance and Partnership programs have developed a meaningful sense of cooperation across many industries and organizations. OSHA has also strived to help lead, what may be after the moral argument for safe workplaces, the most compelling argument in the private sector for safety and health commitment. ASSE has a white paper that provides insight into the current focus of safety and health professional leadership that ASSE wants OSHA to continue to help lead.

There's little doubt among the Nation's leading employers that commitment to effective safety and health programs provides U.S. business with a competitive advantage. It is especially important in today's harsh economic times that we need a vocal leader to help convince companies that the last place that cuts should be made is in the safety and health programs. To be effective safety programs must have commitment from senior management for strong corporate safety culture. This is not a change that OSHA can bring about solely through enforcement.

We ask a lot of OSHA. It has a tough job and is an easy target for complaint. But any changes, OSHA must go beyond simple solutions.

Some complain OSHA misses hazards during inspections. But OSHA's Web site indicates just how many standards and guidance documents inspectors must know. So better training is an issue.

Some complain OSHA negotiates fines away. But OSHA's front line staff has forced to balance further legal action against a company willing to address the problem and OSHA wanting to address other employers.

Some complain OSHA does not issue enough standards. But overlooked is just how the existing standards pose a challenge to employers, employees, safety and health professionals and even OSHA inadequate in enforcing those standards.

In summary, please be careful. There are no easy answers. The ASSE looks forward to providing constructive suggestions on OSHA reform legislation. We also look forward to working with OSHA's new leadership to continue to advance protection for the safety and health of American workers. Thank you.

[The prepared statement of Mr. Brown follows:]

PREPARED STATEMENT OF WARREN K. BROWN

I am Warren K. Brown, CSP, ARM, CSHM, and as the President of the American Society of Safety Engineers (ASSE) I am pleased to be here today representing the more than 32,000 safety, health and environmental professionals who belong to ASSE.

ASSE was formed in 1911, shortly after the Triangle Shirtwaist Factory tragedy in New York City when a group of safety engineers decided it was time to build a profession committed to helping employers improve workplace safety. Now, ASSE's members work with employers to protect workers and workplaces in every industry, every State and across the globe. ASSE has 16 practice specialties and is the secretariat for numerous ANSI consensus standards that help shape safe workplaces. Our members work with employers small and large. Some are members of

organized labor. Some work for government. Some are academics. But all work hard to help make sure workers go home to their families each day safe and healthy.

That is what I have been committed to doing every day of my nearly 33 years managing occupational safety and health for major manufacturers in Ohio producing vehicle air conditioning compressors and diesel engines.

I appreciate this opportunity to share the perspective of safety and health professionals that I believe can help inform this subcommittee as it considers OSHA reform legislation. Employers have much to say about their responsibility for safety. Workers—especially those victimized by failure to make a workplace safe—have much to offer this subcommittee. Safety and health professionals, however, are responsible for working with both management and workers to get safety and health done. We see the challenges employers face in managing safety and the challenges workers face in trying to work safe. And we know well the risks workers and employers face when those challenges are not met.

Yes, the Occupational Safety and Health Administration (OSHA) has been subjected to strong criticism over enforcement, rulemaking and its cooperative programs. ASSE has expressed some similar concerns. A strong, effective OSHA is necessary to this Nation's commitment to safety. Some changes are necessary. But ASSE cautions against wholesale changes that will diminish OSHA's capability to be this Nation's leader in occupational safety and health.

In safety and health, a leader must be many things. To lead as a safety and health professional, I—like OSHA—must identify hazards and work to make sure employers and employees can avoid those hazards. I help my employer set safety rules, as in making sure lockout/tagout is done properly to guard against incidents. And I often have to be tough and uncompromising to make sure a rule like lockout/tagout is carried out. But the most important part of my job in a plant is building relationships, teaching, selling safety, and communicating with both employers and employees. Being good at these skills is the best shot I have at keeping an employee safe and healthy.

The Federal agency leading this Nation's commitment to worker safety must have this same multi-faceted capability to meet its mission.

The fact is, the vast majority of employers do not implement safety programs out of fear of OSHA, its monetary penalties or even the threat of criminal prosecution. They do so, first, because it is the right thing to do. They also do so because proactive safety programs make sense from a productivity and monetary perspective.

Just as companies target resources where they will reap maximum benefits, so, too, should OSHA direct its enforcement resources where the greatest gains in safety can be achieved—towards those employers with a history of flagrantly ignoring their compliance responsibilities.

I've been involved in numerous OSHA inspections. On more than several occasions the inspections helped me deal with risks. Overall, however, most of these inspections were not needed at the companies where I worked. These companies had a commitment to safety. As OSHA knew, they had well-trained safety staff and highly developed safety management systems. While some level of OSHA inspections were needed, I can only wonder, with OSHA's limited resources, how much more it would have accomplished had many of these inspections been done at workplaces less committed to safety.

That is why ASSE is disappointed to find in a March 2009 report that the Department of Labor's Inspector General found OSHA's Enhanced Enforcement Program not nearly as effective as it could be in identifying high-risk employers to target with increased enforcement. We urge this subcommittee to make sure this program works. No matter how high penalties are, OSHA must work at improving its ability to target its resources.

That program can be improved in the same way OSHA has improved its positive capability to help employers, employees and the safety and health community to achieve safer and healthier workplaces. These capabilities have made OSHA a more positive, open organization better engaged with others responsible for safety and health. The Voluntary Protection Program (VPP) and the Safety and Health Assessment and Research for Prevention Program (SHARP) have provided real incentives for companies to do safety and health well. The alliance and partnership programs have developed a meaningful sense of cooperation across many industries and organizations resulting in impressive guidance materials and e-tools that our members use in their jobs.

OSHA has also strived to help lead what may be, after the moral argument for safe workplaces, the most compelling argument in the private sector for safety and health commitment. ASSE's white paper *Addressing the Return on Investment for Safety, Health and Environment Programs* (<http://www.asse.org/search.php?var>

Search=business+of+safety) provides insight into the current focus of safety and health professional leadership that ASSE wants OSHA to continue to help lead, as reflected in OSHA's Safety Pays Program (<http://www.osha.gov/dcsp/smallbusiness/safetypays/index.html>) and other initiatives.

There is little doubt among this Nation's leading employers that a commitment to effective safety and health programs provides U.S. business with a competitive advantage. It is especially important in today's harsh economic times that we need a vocal leader to help convince companies that the last place that cuts should be made is in their safety and health programs.

The 2007 Workplace Safety Cost Index found workplace injuries cost society \$48.3 billion in direct losses, and the indirect costs of injuries may be 20 times the direct costs. Conversely, a Liberty Mutual survey reported that 61 percent of executives say \$3 or more is saved for each \$1 invested in workplace safety.

To be effective, however, the programs must have commitment from senior management for a strong corporate safety culture. This is not a change that OSHA can bring about solely through enforcement.

We ask a lot of OSHA. It has a tough job and is an easy target for complaint. But any changes in OSHA must go beyond simple solutions.

Some complain OSHA misses hazards in inspections, but OSHA's Web site indicates just how many standards and guidance documents its inspectors must know. So better training is an issue, too. Some complain OSHA negotiates fines away. But OSHA's front-line staff is forced to balance further legal action against a company willing to address the problem and wanting to move on to other complaints. Some complain OSHA does not issue enough standards. But overlooked is just how the existing standards pose a challenge to employers, employees, safety and health professionals, and even OSHA in adequately enforcing those standards.

So, please be careful. There are no easy answers.

We hope our perspective is helpful as the subcommittee considers how it will help edit the new chapter in OSHA history about to be written. ASSE looks forward to providing constructive suggestions on OSHA reform legislation. We also look forward to working with OSHA's new leadership to continue to advance protections for the safety and health of American workers.

Thank you for this opportunity. I will be more than happy to respond to any questions.

Senator MURRAY. Thank you very much. Excellent testimony from all of our panelists this morning. Let me start with Ms. Miser.

You began advocating for families of victims because of an incident that occurred to you. Can you share a little bit with the committee today what happened to your brother, Shawn?

Ms. MISER. Yes, my brother was killed in an aluminum dust explosion in 2003. I guess what started it was I was curious as to where to get the information to find out if there was a problem and what could be done. But there just was no place. There was no place for us to understand how OSHA worked or who to even get a hold of.

You find out through the grapevine that there are fire reports and there are police reports. So we had no real place to go for the answers for these. Plus when this happens it is different than anything else.

When your loved one goes to work and they do not come home it's not like a heart attack. Not that that's not important or any other thing. You're not expecting it. It's unexpected. So it is kind of like a homicide.

Then you find out that the companies—a lot of times there were things to keep this from happening and this didn't. Or if there isn't, why isn't there? You know, in my brother's case everybody knows about dust.

We were finding this out with everything. I just felt like the families needed one place to go to for all this information, if they had worker's comp questions, if they just needed an ear, if they just needed somebody to vent to.

Senator MURRAY. In your experience talking to many other families, are families treated with respect by agencies when they ask for information?

Ms. MISER. It kind of goes both ways. My inspector was honest. I didn't like everything he said.

[Laughter.]

But he was honest and he was good to me. But we had experiences where even Coit Smith, he's in the family bill of rights that is in there. He had the worst time. Even after the investigation was over they would refuse to give him the paperwork for just the investigation.

So I think it depends on what area you're in and who you're talking to.

Senator MURRAY. Ok.

Ms. MISER. Just like anything else, you know.

Senator MURRAY. Well, thank you very much for all your work on this.

Dr. Monforton, in your written testimony you mention the need to update the OSH Act's minimum and maximum penalty amounts and the need to index them for inflation. You specifically talked about the \$7,000 maximum fine for serious violations. Given inflation what would \$7,000 in 1991 equate to in today's dollars?

Ms. MONFORTON. Yes, that \$7,000 maximum was instituted in 1991 and if that was in current dollars that would be \$11,065. I think the other thing that's important to know is even though that maximum is allowed by Congress, OSHA's own manual to the field tells the area office that the starting point is really \$5,000. And that they apply the reduction factors after that.

It's only if they really want to go to \$7,000 they have that authority. But they really have to make the case that they're going to go to the \$7,000. So this \$11,000 is really probably less than that in current dollars.

Senator MURRAY. In current dollars. But since it hasn't been increased, it's basically been a reduction in fines?

Ms. MONFORTON. Exactly. About \$4,400.

Senator MURRAY. So is that less incentive for some employers to follow safety procedures?

Ms. MONFORTON. In my opinion when you talk about a company that has more than 100 employees. If you had a violation, assessed at \$4,400 and then you apply the reduction factor for size and the reduction factor for history and so on, you're talking about something that's comparable to a rounding error in their budget.

Senator MURRAY. Mr. Frederick, did you want to comment on that?

Mr. FREDERICK. Just that OSHA penalties and strong enforcement of OSHA regulations provide a level playing field for employers. Without strong enforcement and there are many examples of OSHA standards that are not adequately enforced today. Employers have much less incentives take away a few thousand dollar possible penalty after an accident or after a complaint. They've much less incentive to comply with that standard.

So good, firm and fair enforcement is certainly an incentive for employers across the board to raise to the minimum standards.

Senator MURRAY. Ok. I'm out of time. But I will come back and ask additional questions.

Senator Isakson.

Senator ISAKSON. Thank you, Chairman Murray. I would comment Chairman Murray that good things can happen from what this committee does. Last week I was fortunate enough to see L3 communications share with me the new device they have invented which is two way communications from mines to the surface which if that have had existed in the Sago disaster, Junior Hamner and the others that died could have been saved.

The technology—I'm not saying the committee should take credit for it. But we held a roundtable here you recall and had scientists from Australia and around the world who've been working on this. I think that significantly contributed to the discovery of that piece of equipment which now is already, I understand, being employed by several mines. And hopefully will be employed more widely soon. That's the biggest breakthrough in mine safety in history.

You know I would say on behalf of employers and I don't represent employers except I was one. And I had a couple of operations that were high workers comp operations because they were golf course management and construction. The biggest incentive for employers is to not have an accident because of the cost of that accident.

And I think everybody needs to—there are some bad apples out there. And that's what most regulatory agencies are established for. But there are an awful lot of people who realize their employees are their best asset. And do everything they can to see to it they don't get injured.

Ms. Miser, you had made a comment that families shouldn't have to pay for the information. What were you referring to when you said that?

Ms. MISER. There are just some basic costs. We have to pay for any part of the investigation that we want. A lot of times we have to go through a process even to get this.

We have to go through the full FOIA process. If that doesn't work then we have to do an appeal. And this is another thing that the families have no clue about. So, you know, we had to put together a sample letter for this.

But they have to pay for this information. How much is it going to cost—you know one of their bills? I just don't feel that the families should have to pay for this information. This is their loved one.

Senator ISAKSON. Is this after the adjudication or the decision is made?

Ms. MISER. Yes. If they want the materials they can request it. And not everybody has to use the FOIA. I'm not saying every OSHA office is going to be this strict. Some of them do, some of them don't.

However, we still have to pay for the information.

Senator ISAKSON. Well, I don't disagree. The families should have that information when it's in its final form. I appreciate your making that public.

Mr. Frederick, you had made a comment about—and if I didn't listen well I apologize. But you made the comment about shared information with families and co-workers. Are there any disincen-

tives to workers and families providing or contacting companies with regard to suspected potential problems? Are there any disincentives or are there any incentives to cause that to be voluntarily offered by the employer and the company?

Mr. FREDERICK. Prior to an accident or following?

Senator ISAKSON. For example, under the Americans with Disabilities Act.

Mr. FREDERICK. Sure.

Senator ISAKSON. A lot of us have been advocates for some time. If you find a violation of the act, nobody is hurt, nothing has happened. But, if somebody got hurt it would have been a violation. There's a right to cure that incentivizes the company to change whatever that thing that's turned into them before it causes an accident.

Are there any incentives for workers to make those reports or disincentives for them not to make them?

Mr. FREDERICK. Not thinking of any incentives, but there are many disincentives for workers to bring hazards to the attention of employers. There are reward programs in place in many workplaces that provide cash and prizes if no one reports injuries and illnesses. There are discipline programs if people report injuries. They are disciplined.

What these create is a very chilling effect on workplace health and safety so that workers do not bring up hazards in the workplace. One of the most troubling things for my colleagues and I in our department is when we investigate a fatality and someone else from that workplace tells us about the same hazard that caused them to have an incident or a minor injury. But they didn't bring it forward for one of these reasons of an incentive or disincentive program. And then that same hazard caused the fatality.

We, unfortunately, have many examples of that. I've experienced that personally on at least one investigation of a fatality.

Senator ISAKSON. I would appreciate it if you would send me any evidence or documentation on anybody that has incentives not to report.

Mr. FREDERICK. Sure.

Senator ISAKSON. I'd like to see that if I could. Can I take one extra minute?

Senator MURRAY. Absolutely.

Senator ISAKSON. Ms. Miser, I would like to tell you, probably as—when was your brother lost? What year?

Ms. MISER. He was killed in 2003.

Senator ISAKSON. It was an aluminum dust explosion?

Ms. MISER. Yes.

Senator ISAKSON. We had an agricultural dust, in this case sugar explosion at Port Wentworth in Georgia last year. And I'm sure as a part of your advocacy what has happened in that investigation, post that accident, OSHA's fines levied for violations of existing OSHA standards were the highest fines in the history of the organization. I think \$8.4 million. And they may be prosecuting under the criminal code.

Second, as an addition to that the Chemical Safety Board still has not finished their report and I want to commend OSHA. I know they're thinking about going ahead and publishing a combus-

tible dust rule. But the Chemical Safety Board is within a couple of months of making their findings known publicly on their investigation.

I would hope that we wouldn't pass a restriction before that comes in because we'd—like in Sago, where we finally learned what actually caused the accident. In this case we can find what actually caused the accident. Then we'll be able to hopefully further reduce combustible dust explosions in the future.

But I think OSHA has certainly, since 2003, changed and is improving in terms of enforcement of the occupational dust explosions. So, I thought you ought to know that.

Ms. MISER. Thank you.

Senator ISAKSON. Thank you, Madame Chairman.

Senator MURRAY. Thank you. Mr. Brown, I appreciate your testimony about the necessity of a strong and effective OSHA to fulfill this Nation's commitment to workplace safety. I agree with you that some changes are necessary to make the law and the agency more effective.

I am particularly interested to hear more about the incentives for safer workplaces that you mentioned in your testimony. Incentives that mean we, "often have to be tough and uncompromising with companies to make sure rules are carried out." The presence of strong penalties could be viewed as something similar to being tough and uncompromising to ensure that, even in today's economic times, all employers will really strive to do the right thing.

Can you share with us how you think or whether you think strengthening penalties is a critical tool to more effectively protect American workers?

Mr. BROWN. Yes, ma'am. We understand fully that OSHA's current penalties are not high enough. We are concerned however, that if the effort at this time is simply to increase penalties the purpose for doing so may fail.

We're concerned that no matter how high you raise these penalties if they're not aimed at the people in the company who are truly responsible for safety and health they will not be effective. If they're allowed to be applied against those who do not have the real authority in an organization they will not be effective. So much research goes on in occupational safety and health which is appropriate.

Australia for example, has a law that aims responsibility at those who fail to establish the safety culture of an organization. We have dedicated people wanting to change OSHA in the political process. Some energy can be put into figuring out maybe, without OSHA's help, how penalties can be designed and targeted to bring about the penalties we all want, and to result in safer workplaces.

Senator MURRAY. Well, Dr. Monforton mentioned in her testimony the potential role of reputational damage and enhancing the deterrent effects of OSHA penalties by making violation information available to the public and to the press. Do you think that would be an effective deterrent?

Mr. BROWN. To my knowledge that's already available. I know I can get online and check our facility out and other facilities. So I think it's already available.

Senator MURRAY. Dr. Monforton, would you comment?

Ms. MONFORTON. There is information available on OSHA's Web site. But it's very minimal information. OSHA doesn't even put information about recent fatalities on its Web site.

And in speaking with family members, they know that. Their whole message that I hear time and time again is what can we do to make sure that this doesn't happen to someone else? And the fact that the OSHA investigation goes on for 6 months and then you may have a contest period.

The fact that you want to learn a lesson from the fatality, you want to do that in a very quick period of time. You want to do it in 2 weeks, 3 weeks after the fatality. Not 2 years down the road when that information is stale and potentially have had other people killed in exactly the same way.

I think that OSHA's Web site could be used in a much more robust way where you actually post current information about the fatality that happened yesterday. Not making judgment about what happened, but to let someone know that a young man like Steve Lillicrap was wearing a harness that got pulled into a crane and that he shouldn't have been wearing that harness and so on. I mean, that's useful information that can be put on OSHA's Web site.

I do think the name of the company and the contractor that should be up there too, as well. So that in this case, in the St. Louis region, people know that this was Ben Hur Construction. And this happened on their site.

I think that that really can make a difference for competitors in the area. And if you're someone who is thinking of doing a big job. And you say, "gosh, this particular firm just had a fatality."

And you know what? I can go on OSHA's Web site and see and they had similar ones in the past. I might think twice about whether I'm going to hire that particular contractor.

I just think that given the limited resources that OSHA has and that the penalties aren't the whole thing. I think for many firms their reputation, which can affect their bottom line, can be a much more effective deterrent than any OSHA penalty.

Senator MURRAY. It's an interesting concept. And one of course, we have to be very careful with. But it does seem to me that if people had the information that there was a crane accident in Nevada, it may give them pause to think what they are doing in their workplace today?

But I understand Senator Isakson's comments about the sugar factory. We want to know exactly what happened so we don't raise alarms in the wrong way.

Ms. MONFORTON. Right.

Senator MURRAY. But it does seem to me that having more information would cause people to at least stop and think.

Ms. MONFORTON. Exactly.

Senator MURRAY [continuing]. At their workplace so that they are reducing fatalities and injuries.

Ms. MONFORTON. Right. My father is an 85-year-old businessman. And he gets very nervous when we talk about OSHA. It's a four letter word as far as my Dad is concerned.

But he does recognize that you have companies that do not invest in safety. His firm is at a competitive disadvantage. And that's the way he looks at it.

Also, in terms of these penalties, these are not taxes. These are not fees. These are monetary penalties for companies that have violated the law. And so that needs to be put in the calculation.

Senator MURRAY. Senator Isakson.

Senator ISAKSON. Just one question. Mr. Frederick and anybody else can comment if they wish. Under MSHA, under the Mine Safety laws there is shared responsibility with the employee and the employer.

For example, if a miner is caught smoking underground in a mine that's a violation that the miner is responsible for, OSHA only governs the employer, not the employee. Should there be a provision for shared responsibility on safety in terms of cause of an incident?

Mr. FREDERICK. Well truly there is a shared responsibility in the cause of an incident if it results in an injury, an illness or a death. The victim has already suffered by the pain and suffering they've experienced. They also often have a loss of income, a loss of the ability to come to work.

In represented workplaces by the steelworkers we proactively seek out working with our employers to have a say in workplace health and safety to be involved from the beginning and not just to come in at the end of the process and talk about something being done jointly. But to actually step back and start at the beginning of the process. Be it with compliance to a standard or to put in place a comprehensive health and safety program and work with the employer from the very beginning.

So I see in workplaces that we work with the employees and the unions are involved and invested in the process much earlier on than compliance.

Senator ISAKSON. Well I understand the victim suffering. But oftentimes many of the victims were not the violator. For example, in an explosion that's caused by a lighted cigarette. Yes, the victim who was smoking ends up suffering because they started the explosion. And that's their punishment.

But the other co-workers around that were injured or damaged weren't, so if there was a shared responsibility, and if you were in fact the cause, then that might be the same type of incentive on the other side that the increased fines are on the employer side, which I don't disagree with.

In many cases when there's culpability. That's the only point I was making because safety is everybody's business. It's not just the employer's business. It's the employee's as well.

And the Mine Safety Act having addressed that, I just wondered if it was something that OSHA might think about doing.

Yes, Ma'am.

Ms. MONFORTON. Yes, in the Mine Act and we certainly know having smoking materials underground, potentially mixed with coal mine dust is, what caused a lot of disasters, a big kaboom. In the Mine Act there is that provision, smoking materials are prohibited under ground. There's a responsibility on my management to do random checks for smoking materials.

As I discussed in my testimony, I think that people in general, companies in general, fall into three categories. There's a super good actor, stellar performers. We don't need to worry about them. We don't need OSHA for them.

You have at the other end, the really bad actors. People you need to throw the book at.

And in the middle is most of us. Right? Where we aim to obey the law, but sometimes there are forces—economic forces, competing forces—that color our judgment. So when the light turns yellow, I don't stop, I proceed through it.

I think the same situation occurs among workers. I mean we have great workers. We have workers that have many competing forces in the workplace. And so you need to have rules in place and protection, so that when you have a hazard that they feel comfortable speaking up about, they have a right to not be discriminated against.

Certainly for that small percentage of workers who flagrantly violate something like having smoking materials underground. Yes, there should be rules for those things that have the potential to cause major disasters.

Senator MURRAY. Last Congress I introduced a bill, the Mine Disaster Family Assistance Act of 2007. The purpose was to make sure that mine operators create a plan to address the needs of the victims' families during the accident and the time right after. It was a bill that includes a family support service point of contact within the Federal Government to act as the liaison between the operator and the families and the press.

I'm particularly interested in how families are treated during an accident or an accident investigation, and what role they play in that process. I was wondering, Dr. Monforton, if I could start with you, based on your experience on the special investigation team for the Sago mine disaster.

Would you recommend that victims, if possible, and their families be included in a meaningful way in other types of workplace accident investigations?

Ms. MONFORTON. I believe, one, that they have a right to do it. No one has more of an interest in finding out what happened. So it would be a tremendous asset to the prevention potential of OSHA to have family members involved.

I think it's very useful for family members to have, you know, that one or two people that they know are their contact so that they don't have to be going to a lot of different people, that they have someone that they can develop a relationship with, that they can trust, someone who has the proper temperament and patience and training to know to listen to families. Not every family has the same needs as another family to really listen and understand and get the families the information that they need and so on.

Senator MURRAY. You know the majority of employers who get an OSHA citation choose to negotiate with their local OSHA office for an informal settlement. For statutory reasons that has to be completed, I understand, within 15 days of the employer's receipt of that citation. So given that short timeframe, how do we meaningfully involve families in that process?

Ms. MONFORTON. That's an excellent question. I think that we can change—there's nothing in the statute that says that family members or labor representatives can't get the citation the same time as employers. It just says employers can get the citation. But there's no prohibition against anyone else getting the citation.

Senator MURRAY. No prohibition, but it rarely happens.

Ms. MONFORTON. Yes. Well, and it happens I mean, actually in OSHA's manual to the staff what it says is you send the citation to the company. You send it certified mail. When you receive the little green card back, back to the OSHA office then you shall make copies of it and send it out to the labor representative.

What we know that happens, however, is that inspector who sent it in certified mail, it probably lands on his desk. He might be out for 4 days, out in the field doing inspections. By the time he comes back the next week, the company has already scheduled their informal conference meeting with the company.

So I think a simple solution is you make it in triplicate. As soon as you send the citations to the company, you send them to the family. You send it to the labor representative.

I guess my preference would be when you're getting ready to send it to the company that you call the family and let them know that the citations are being sent.

Senator MURRAY. Mr. Frederick, today OSHA's compliance directive for fatality investigation directs them, when practical, to contact family members. In your experience how often does that occur?

Mr. FREDERICK. Definitely a minority of the time and not very often at all is our experience. In the cases that families do engage and discuss the situation with the OSHA inspection, it's often as a result of the union and/or the family themselves making the initial contact to OSHA. And you know, be it the level of their staffing and the amount of workload that the OSHA inspectors have or whatever the reason being. They just are not typically pro actively searching out the family members to make certain that they've had that conversation.

Senator MURRAY. Dr. Monforton.

Ms. MONFORTON. Senator Murray, just this morning Jim Frederick, the Lillicrap family, and I were speaking about this very issue. Their experience was that Steven was killed and they never heard from the company.

The first thing they heard from OSHA was this letter that they received from OSHA Headquarters which, I think Diane you said it, was 17 days after Steven's death. And in that letter it said, here's the name of the OSHA office that's going to be handling the investigations. So she called them. She made the reach out to them to find out how this process was going to go.

The other thing that I thought was very troubling to hear from her was there was equipment and so on that Steven had, his lanyard and the harness. She has that material. No one from OSHA has asked her for it. It seems like it could be a critical piece of physical evidence.

Senator MURRAY. She had that in her hands?

Mr. RICK POWER. It was given to her by the hospital.

Ms. MONFORTON. So you know when he went to the hospital they removed all that. And then she got the belongings. But the fact is

that she reached out to OSHA and she may have even told me, she asked them wouldn't you like this evidence?

It shows you what kind of disconnect we have. And that there's—

Senator MURRAY. It seems to me most families would have no idea that there is an agency named OSHA to even begin to contact. It seems to me that it has to be OSHA's responsibility to reach out and let people know who they are.

Let me ask one more question. Ms. Miser, you said that there's no monetary compensation that's adequate. Nobody is asking for that. I totally understand that.

But it does seem to me very striking that when you look at the burial costs, most workers compensation programs provided by States barely covers it. I think the average cost today is, without any kind of markers or flowers or anything, is a little over \$7,000. Mr. Frederick, I was listening to you earlier describing a penalty that was reduced to half its monetary value. I think you said something about \$6,000?

Mr. FREDERICK. Yes.

Senator MURRAY. I mean it just seems incongruous to me that families who have a fatally injured family member that they're burying gets less compensation than what we are fining the employer.

Ms. MISER. Yes. You can get more for a finger than you can sometimes in a death which is sad. And I'm not saying the person that lost their finger shouldn't be compensated.

I think a lot of their reasoning behind that is as far as workers compensation goes it's like in my case, my brother had no siblings and he didn't have a wife. So basically there was no reason to compensate him. You know, there was nobody there to take care of. But at the very least the funeral should be paid for.

Senator MURRAY. Well in your experiences working with victim's families, are they aware of the penalties that are assessed to the employers?

Ms. MISER. Well the ones that get involved are. And sometimes these families don't even find out about penalties until it's done because they had no clue there was even an investigation going on. So they'll get these papers and find out that their—to them when they see that their family member was only worth \$2,000, like in Tanya's case.

Usually these are whittled down to nothing. And it's just like I was—

Senator MURRAY. I would sense that's a source of frustration.

Ms. MISER. It is because although they're not investigating the death, we know that. To a family member, that's their loved one. You know, you're investigating what happened to the person that they loved.

It can be the father, the mother, the brother, the bread winner, you know, the rock in their family. It was an important person to them and so yeah, it's just devastating when they find that out.

Senator MURRAY. Senator Isakson, do you have anything?

Senator ISAKSON. I just want to thank the witnesses for the testimony.

Senator MURRAY. Well let me say as well, I really appreciate all of our witnesses. I appreciate the families that are here today speaking up for other families. I think it's important that we remember when someone is hurt or injured, it's not just them, it's the people around them who have to live with this for a very long time.

It's incumbent upon all of us to do everything we can to make sure the lessons learned from these tragedies are not forgotten. We need to make sure that it doesn't happen again. I appreciate everybody being here today. If any members want to submit additional questions for written response, they are welcome to do so.

So the hearing record will be open for the next 7 days. And again, thank you to all of you for being here today. Hearing is adjourned.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR KENNEDY

This morning our committee takes up the important issue of protecting the workplace safety and health of the hard-working men and women of America. I commend Senator Murray for holding this hearing and for her leadership on this major issue.

Twenty years ago, workplace safety advocates and families of employees killed on the job launched Workers Memorial Day—a day of remembrance and advocacy. Their goal was to express their grief over lost friends, co-workers and loved ones, and to encourage more effective action to avoid these senseless losses. Since the first observance of Workers Memorial Day, however, almost 125,000 men and women have been killed on the job, an average of almost 6,000 a year. Clearly, we must do much more to protect hard-working Americans.

In President Obama and Vice President Biden we have leaders who are committed to worker safety. When he was on the HELP Committee, then-Senator Obama built a record of making workplace safety and health a priority. As President, he is continuing that commitment. He and Secretary Solis have stated they intend to make protecting workers on the job a top priority at the Department of Labor.

As the executive branch does its part, so too must we do ours. Enacting of the Occupational Safety and Health Act in 1970 was a major step in guaranteeing the basic right of workers to be safe on the job. Since the law was signed, however, we have not substantially amended it to improve worker protections.

We have, however, learned much in the 40 years since OSHA was enacted and it is long past time to use this knowledge to make significant reforms. We know that many workers are left out of the act's protections, and expanded coverage is essential. We know that whistle blowers are indispensable in bringing safety problems to light, but they won't come forward unless they have strong protections. A HELP Committee report last year showed that even when employers' violations of the act result in workers killed on the job, the employers often walk away with just a slap on the wrist. Clearly, civil and criminal penalties should be increased.

Today's hearing will focus on the needs of families and the contribution they can make to improve the OSHA process. Tammy Miser, one of today's witnesses, will share first-hand how the OSHA process fails victims and their families. Tammy lost her brother Shawn in 2003 in an explosion at the Hayes Lemmerz manufacturing plant in Huntington, IN.

His death was an immense tragedy for Tammy and her family. But in the true spirit of Workers Memorial Day, Tammy's grief spurred her to action. She has become a tireless advocate for others who have lost family members on the job. She stands up and speaks out for the rights of workers to come home safely at the end of each day. She has touched many lives and we're grateful to her for testifying today.

Tammy and families like hers have an important contribution to make after a workplace accident, but the law gives them no right to participate in OSHA procedures. All too often, the first contact

by families with OSHA comes after a case is closed. By then, the citations have been written and the penalties have been assessed, frequently, the family is not sure about what actually happened to their loved one or to the employer who was responsible.

That's not right. Victims and their families deserve better. No one cares more about a workplace fatality than the family of the worker who died. Yet, of all the parties involved—they are the only ones who don't have a seat at the table.

It's also not good policy. Victims and their families often have valuable information about what happened and why. They may know that workers had complained about unsafe conditions, or that certain supervisors or managers were cutting corners. When victims, families, and their representatives are left out of the process, this critical information is lost. Including victims and their families and representatives is good for them, and it may also save the lives of other workers.

These inadequacies in the law need to be corrected, and only Congress can do it. That's why we've introduced the Protecting America's Workers Act in the past, and I plan to introduce it again. The principal reform in the bill will give workers and their families and representatives a seat at the table. It also includes sensible reforms to ensure that victims and their families have a right to talk to OSHA before a citation issues, to obtain copies of important documents, to be informed about their rights, and to have an opportunity to have their voices heard before OSHA accepts a settlement that lets an employer off the hook for violations.

Our committee is committed to the right of all Americans to a safe workplace. I look forward to working with members of our committee and the Administration, to make the process better—in memory of those who we've lost and in honor of the hardworking Americans who deserve real protecting.

[Whereupon, at 11:38 a.m. the hearing was adjourned.]

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