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THE OCCUPATIONAL SAFETY AND HEALTH ACT: A PROMISE THAT FAILED

HOWARD M. METZENBAUM*

WHEN CONGRESS PASSED the Occupational Safety and Health Act (OSHA) in 1970,¹ it commanded industry to provide its employees with workplaces free from recognized dangers. The legislation declared that the safety of workers is a public concern, a concern vital to the community at large. Spokesmen for the then-presiding Nixon Administration praised the Act heartily and vowed to implement it energetically. "This bill opens up a whole new vista for the Labor Department," said the Secretary of Labor. "We plan to launch the administration of the Act with all the vigor and momentum we can generate."²

Four years later, the "vigor" is exhausted, the "momentum" has fizzled, and the "vista" ahead is the same bloody stream of injuries and fatalities that has marred the past.

Some 100,000 workers are still dying every year from diseases contracted while trying to earn a living;³ in contrast, ten years of fighting in Vietnam took 46,000 American lives.⁴

Still being killed in work accidents every year are 14,500 workers;⁵ exactly the same number of American soldiers, 14,500, were killed in the deadliest year of the Vietnam war.⁶

Two million workers are still disabled, permanently or temporarily, every year at work;⁷ the full Vietnam war wounded fewer than 304,000 Americans.⁸

Behind these aggregate statistics are grim stories of human tragedy exacerbated by official indifference.

In Norco, Louisiana, a worker at the Shell Oil Company was burned and permanently disfigured in 1973 when a container of sulphuric acid broke. There should have been safeguards, but there were not. OSHA

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¹ Occupational Safety and Health Act, 29 U.S.C. § 651-78 (1970).

² Statement made by Secretary of Labor, James D. Hodgson, December 29, 1970, on occasion of signing the Act.

³ HEW, PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, 111 (1972) [hereinafter cited as PRESIDENT'S REPORT].

⁴ DEPT. OF DEFENSE, SELECTED MANPOWER STATISTICS, 63, Table No. P82.2 (May 15, 1974) [hereinafter cited as DEPT. OF DEFENSE].

⁵ NATIONAL SAFETY COUNCIL ACCIDENT FACTS, 23 (1974).

⁶ DEPT. OF DEFENSE, *supra* note 4, at 63.

⁷ PRESIDENT'S REPORT, *supra* note 3, at 111.

⁸ DEPT. OF DEFENSE, *supra* note 4, at 63.

issued no citation. The inspector felt that a citation was unnecessary because the employer repaired the defect after the accident. However, the worker's scars remain.⁹

In Tyler, Texas, almost 900 workers at an asbestos products plant were exposed, over an 18-year period, to some of the highest levels of asbestos dust ever recorded. The plant closed in 1972, but at least 300 of its workers are now dying of asbestosis, lung cancer, or cancer of the colon, rectum, or stomach. Prior to the closing, OSHA responded to the plant's threat to all life in it by issuing one citation for a non-serious violation. The penalty: \$210, or 70 cents for each of the 300 dying workers.¹⁰

In Marietta, Ohio, Union Carbide operates a plant that was cited by OSHA in 1972 for over-exposing employees to ammonia and sulfuric acid fumes, fumes which can dissolve the lungs. First, the OSHA citation set no period at all for Union Carbide to eliminate the deadly gases; then it gave the company five months to submit a *plan* for abatement; then OSHA permitted the employer seven months (or a full year from the first citation) for abatement; and, finally, when the Oil, Chemical, and Atomic Workers Union contested the length of this abatement period, OSHA withdrew it.¹¹ So far as is known, while OSHA and Union Carbide politely take their time, plant workers are still breathing deadly acid fumes.

The repetition of such tragedy is not what Congress had in mind in 1970 when it enacted work safety legislation. The law directed the Secretary of Labor to prescribe safety and health standards for virtually all employers to meet. To enforce these standards, a basically simple procedure was established. An inspector examines a workplace. If he finds a violation, he issues a citation specifying an "abatement period"—an interval during which the violation must be corrected. OSHA may assess a penalty up to \$1,000 for a violation,¹² and up to \$10,000 for willful or repeated violations.¹³ Even imprisonment may be imposed in some cases.¹⁴ For hearing contested cases, the law allowed for a three-man, presidentially appointed agency,¹⁵ the Occupational Safety and Health Review Commission, whose decisions are reviewable in the U.S. Appellate Courts.¹⁶ And the National Institute for Occupational Safety and Health (NIOSH) was

⁹ Prepared statement of Anthony Mazzochi, Oil, Chemical and Atomic Worker's International Union, AFL-CIO, submitted for *Hearings on Review of the Occupational Safety and Health Act of 1970 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. at 792 (1974) [hereinafter cited as *OSHA Review Hearings*].

¹⁰ *OSHA Review Hearings*, *supra* note 9, at 794. See also, Brodeur, *Annals of Industry*, 49 THE NEW YORKER, 92 (Nov. 5, 1973).

¹¹ *Id.* at 794, 795.

¹² 29 U.S.C. § 666(d) (1970).

¹³ 29 U.S.C. § 666(e) (1970).

¹⁴ 29 U.S.C. § 666(e), (f), (g) (1970).

¹⁵ 29 U.S.C. § 661 (1970).

¹⁶ 29 U.S.C. § 660 (1970).

created¹⁷ to conduct research into occupational disease and to develop appropriate safety standards.

The record of enforcement, however, is riddled with subtle and blatant neglect, resulting in little increase in safety and no decrease in deaths and disability. Administration policy and Labor Department practice have sought to vitiate the intent of Congress. Budgets have been too low to support any agencies of the Act effectively. Research is insufficient, underfunded, skewed by political and economic considerations, and badly monitored.

Both OSHA and NIOSH, according to the AFL-CIO, have been enfeebled by the "systematic replacement of career civil servants with unqualified appointees,"¹⁸ many of whom seem to be bent upon undermining rather than upholding the law. The OSHA Review Commission shows a penchant for vacating and weakening those penalties that are levied. In the field, the contact point of enforcement, there are too few inspectors, making superficial inspections, and issuing weak and compromised citations.

An atrocious example of how the intent of Congress is being subverted showed up in public print recently. According to *The New York Times*, there was a wide variance among the states in the enforcement and recording of OSHA violations. The *Times* report further indicated that in Ohio only 3% of all violations recorded were major violations, while in other states the percentage was as high as 25%.¹⁹ Enforcement in Columbus has been such that a major union, the Oil, Chemical and Atomic Workers, has labeled the Columbus office as one of the two OSHA regional operations least responsive to unsafe industrial conditions.²⁰

Regional administrators who believe it is better to be safe than sorry, who fear an adverse decision on contested citations by the Review Commission, and whose sympathies lie strongly with the problems of employers rather than the rights of employees, cannot enforce the law honestly or forcefully. Step by step, the process of inspection, citation, penalty, and correction of violations becomes compromised.

Nationally, OSHA has a staff of 700 inspectors. In the last three years, they have inspected less than 3% of the nation's businesses.²¹ They fine a few at an average rate of \$16 per non-serious violation.²² At

¹⁷ 29 U.S.C. § 671 (1970).

¹⁸ 32 CONG. Q. W. REP. 1972 (July 27, 1974).

¹⁹ N.Y. Times, Sept. 12, 1974, at 42, col. 2.

²⁰ Letter from Anthony Mazzochi of the Oil, Chemical and Atomic Workers International Union, AFL-CIO, to John Stender, Assistant Secretary of Labor, Sept. 6, 1974, on file AKRON LAW REVIEW office.

²¹ Scott, *What Work Can Do for You*, N.Y. Times, Sept. 16, 1974, at 35, col. 1.

²² OSHA Review Hearings, *supra* note 9, ISSUE PAPERS PREPARED BY LABOR SUBCOMM. STAFF WITH ASSISTANCE FROM GAO AUDITORS, APPENDIX II at 963 (1974) [hereinafter cited as ISSUE PAPERS, APPENDIX II].

that rate, it is cheaper to pay the fine than to make the plant safe. With enforcement notoriously weak, employers could probably take more advantage of the law than they do.

Not all employers are culprits. It is a fact that many companies have spent a lot of money and effort on safety. DuPont, for instance, has developed a safety manual for the construction industry which serves as a model for other industries.

But such conscientious initiative may well be the exception rather than the rule—a condition for which responsibility must be placed on the drooping shoulders of the lackadaisical federal enforcers.

The Senate Subcommittee on Labor, chaired by Sen. Harrison A. Williams of New Jersey, has recently reported the results of a General Accounting Office investigation of OSHA enforcement. The Subcommittee issued the following bill of indictment against the inspection system: Inspectors often see violations but issue no citations; when inspectors do issue citations, they classify an incredibly low 1.2% as serious, and less than 1% more as willful, repeat, or imminent dangers; and, they fine the "serious" violations an average of \$648, a sum that mocks the law's intent.²³

Inspectors also may respond to employee complaints only weeks or months later; delay citations weeks or months beyond the 72-hour limit set by law; permit abatement periods far longer than reasonable or necessary, and fail to make mandatory follow-up inspections—among other shortcomings.

Some inspectors try to rationalize their behavior. Though their explanations cannot be found in the inspectors' own compliance operations manuals, they are instructive about the unwritten rules in OSHA field offices. When an inspector refuses to issue a citation for a clear violation, it may be because he did not see a worker near the hazard at the instant of the inspection, or because he could not locate the responsible subcontractor—so he pursues the matter no further.

If an inspector rates virtually all violations as non-serious, it may be because it takes more time and effort to document a serious citation—an expenditure he is not motivated to invest because he is not getting much encouragement from his superiors.

As inadequate as the inspection process is, the review procedures does not hold much more promise for the employee. When a citation is issued, an employer may choose to contest the fact of violation, or the specified abatement period, or the amount of penalty assessed, before the Occupational Safety and Health Review Commission. The employee, however, may contest none of these actions (with one exception),²⁴ nor may he contest inaction; the failure to issue a citation or to impose

²³ *Id.*

²⁴ 29 U.S.C. § 659(c) (1970).

a penalty. The sole parties to an OSHA action are the Secretary of Labor and the cited employer.

The single exception is that employees do have direct statutory standing to contest the length of the period permitted for abatement of penalties.²⁵ In cases in which the employer has himself contested a citation, employees may file for party standing. OSHA has informal review procedures as well. But none of these avenues give employees a mechanism of any force, either within OSHA or in the courts, to counter either OSHA inaction or any irregularity if the employer chooses not to contest citations.

There is an eminently reasonable premise for this legislative design: that the Secretary of Labor can be counted upon to observe and enforce the law, a law written solely to protect workers. The Secretary has the clear duty to pursue the required adjudicatory and judicial procedures.

But this pursuit has not happened. Administration policy and OSHA practice have reflected not concern for the letter of the law, but concern for the employer's wallet. OSHA penalties tend to be laughably weak—but even so, the Review Commission has habitually reduced them or vacated citations altogether. A computation made from a 1973 compendium of Commission cases showed that employers were given relief in 93 cases—and fines were increased in only 13 cases.²⁶

One trade union leader has labeled the Review Commission a "needless employer protection operation."²⁷ Many union leaders are calling for abolition of the Review Commission as an "additional bureaucratic layer between the Department of Labor and final appeal to the courts."²⁸ Organized labor's disenchantment with OSHA's ineffectual enforcement practices has led to demands by labor for equal administrative and judicial review rights for employees and employers.

In 1972, a top OSHA administrator in Washington wrote a memo to the Undersecretary of Labor in which he proposed to use OSHA as "a great sales point for fund raising" in the Nixon campaign. He wanted to assure Nixon supporters in the business community that OSHA would issue no controversial standards during the presidential campaign.²⁹

It is not known whether the plan was carried out, and whether new standards were deliberately withheld. Labor Secretary Peter J. Brennan, appointed in 1973, did not deny that such may have been the case. He testified before the Senate Labor Subcommittee that "*at the present time there is no hanky-panky going on...I don't*

²⁵ *Id.*

²⁶ Statement by Pat Greathouse, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, *OSHA Review Hearings*, *supra* note 9, at 317.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See note 18 *supra*.

know what went on in the past, but I can assure you that it won't happen in the future."³⁰ (emphasis added)

To Senator Williams of New Jersey, the subcommittee chairman, the memo "strongly suggests that the administration never attempted to effectively implement" the act; and, to an AFL-CIO representative who testified, the memo "explains the attitude that permeated OSHA" since 1972.³¹

Whether or not the memo was acted upon, the willingness of presumably responsible officials to play this kind of game means that union demands for full legal rights to challenge OSHA decisions and non-action must be taken very seriously indeed. Fears that such rights would permit frivolous harassment of employers by employees, and either turn OSHA into a union tool or drain OSHA's resources on investigating numerous minor complaints, have not been confirmed by OSHA's experience so far. No union efforts to exploit the agency have been made since the passage of the Act. In any case, between a hypothetical danger of improper pro-employee bias, and a real and demonstrated danger of pro-employer politics, it is essential to confront the demonstrated danger first.

On the research side of the ledger, OSHA's record is no better than it is in enforcement and review. OSHA derives safety standards from several sources. These include federal laws or contracts bearing on safety standards for using specific substances, and recognized standards from industrial and professional organizations.

As useful as these guidelines may be, the fact remains that extant guidelines are addressed to a limited number of substances—in many cases, materials in wide enough use to have been evaluated routinely, or those whose properties are obvious. There are literally thousands of substances of known or unknown danger for which no standards exist anywhere.

For this very reason, the Act that created OSHA also created a National Institute for Occupational Safety and Health (NIOSH), within the Department of Health, Education, and Welfare. NIOSH is expected to conduct research and to recommend safe standards for using harmful substances to OSHA.³² NIOSH submits its recommendations in the form of a "criteria document" for each hazard, setting forth both data and a comprehensive standard for use.

The 1973 Annual Toxic Substances List includes 25,000 chemical substances and physical agents.³³ Of these, three to five percent are covered by OSHA standards.³⁴ NIOSH estimates, however, that another

³⁰ *Id.*

³¹ *Id.*

³² 29 U.S.C. § 671 (1970).

³³ HEW, NATIONAL INSTITUTE OF OCCUPATIONAL SAFETY AND HEALTH: TOXIC SUBSTANCE LIST (1973).

³⁴ See note 26 *supra*.

1,000 to 2,000 are dangerous enough to require the development of standards.³⁵ Of that number, NIOSH has sifted a "priority list" of 471 substances which have the most effect at the workplace.³⁶

From February, 1971, to November, 1974, NIOSH submitted to OSHA exactly 21 criteria documents and two letters of recommendation. OSHA had promulgated final standards for just three of the documented hazards by November, 1974. Just three—*asbestos, carcinogens, and vinyl chloride*—in four years.³⁷

When the Secretary of Labor receives a criteria document from NIOSH, he must first determine that a rule is necessary, and then he may request a recommendation from an advisory committee on the rule. Recommendation in hand, he publishes the proposed rule in the Federal Register, allowing an opportunity for objections and hearing requests to be filed. After hearings are held, the Secretary promulgates the final, enforceable standard.

Twenty criteria documents remain for which no standard has been adopted. Although 12 of these were submitted from one to two and a half years ago, OSHA has not as yet published a proposed rule in the Federal Register for even one of them.³⁸ It has not appointed an advisory committee for most of them. In fact, until recently OSHA had taken no discernible action whatever on many criteria documents submitted years ago.

Because the above dozen criteria documents have resulted in no standards, over five million American workers remain unprotected. Millions more may be in danger from the hundreds of substances on NIOSH's "priority list" whose properties remain undescribed in criteria documents. In effect, substances used without standards, and without proper research into their properties, make guinea pigs of their users. If the users die, the substances must be lethal. As a congressional committee witness remarked, "We sit back and wait for 20 years and we count the bodies."³⁹

NIOSH suffers many of the same afflictions that OSHA does: conflicts of interest, badly trained, undertrained and poorly supervised personnel, undermanned and inadequate facilities, and, in NIOSH above all, starvation budgets.

An AFL-CIO official has testified: "We made a special plea for

³⁵ ISSUE PAPERS, APPENDIX II, *supra* note 22, at 1061.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Testimony of Dr. Samuel Epstein, *Hearings on Occupational Standards Before the Select Labor Subcomm. on OSHA of the House Comm. on Education and Labor*, 93d Cong., 2d Sess. (1974) (Unpublished transcript.) [hereinafter cited as *House Hearings on Occupational Standards*].

field studies [of petrochemicals] in NIOSH . . . but research programs specifically aimed at the study of petrochemicals such as—and including—vinyl chloride were not funded and staffed. The studies were eliminated from the program plans of these agencies. . . . The task is mammoth, so mammoth that it is impossible to estimate what *should* be spent.”⁴⁰

On the same subject, a medical expert said that “Fire fighting is all that is happening. Vinyl chloride is a good example. . . . Five to 15% of all vinyl chloride workers will die with hemangiosarcoma of the liver, which is always fatal. This disease is extremely rare elsewhere. [But NIOSH has done no research on it], not because NIOSH officials are callous or don’t understand what is going on. They are simply too busy putting out fires in other areas,” a limitation required by their inability to recruit enough professional staff and by an inadequate budget, the expert added.⁴¹

NIOSH requested \$30,000,000 for fiscal year 1975. This budget would permit NIOSH to generate 18 to 20 new criteria documents on the use of potentially dangerous substances. The Office of Management and Budget cut the request by \$4 billion. This would mean that only 14 new studies could begin.⁴² Fortunately, Congress added to the OMB budget figure new funds specifically earmarked for criteria documents, but the number will remain a pitiful record when matched against the need for standards for as many as 2,000 chemicals.

The fund shortage has affected the quality as well as the quantity of research at NIOSH. Since NIOSH does not have either the facilities or the manpower to do much in-house research, most work must be done by contractors. Contractors currently produce 80% of all criteria documents.

Clearly, then, contract monitoring is a major NIOSH function, but when GAO investigators reviewed NIOSH contract files for the Senate Labor Subcommittee, they found many irregularities.⁴³

Among other things, the investigators learned that numerous contractors had not submitted one or more of the required periodic progress reports and that some contractors submitted no reports at all.

The GAO also learned that contractors’ final reports to NIOSH were often submitted long overdue and that a few were not delivered at all. On occasion, project officers kept this information to themselves, maintained contract files with documents missing, and wrote no reports of visits to evaluate the contractors’ performance.

⁴⁰ Testimony of Jacob Clayman, AFL-CIO, *OSHA Review Hearings*, *supra* note 9, at 111.

⁴¹ Testimony of Dr. Irving J. Selikoff, *House Hearings on Occupational Standards*, *supra* note 39.

⁴² ISSUE PAPERS, APPENDIX II, *supra* note 22, at 1064.

⁴³ *Id.* at 1066-1070.

These deficiencies can presumably be corrected. Another problem, conflicts of interest among contractors, is far more serious. Despite OSHA's claim that NIOSH is concerned only with basic research, there is evidence that some contractors have business loyalties in conflict with their obligations to NIOSH. For example, the medical director for NIOSH is also the medical director of a second corporation which has a direct, commercial interest in manufacturing and using the same chemicals.⁴⁴

Furthermore, a variety of observers have expressed serious doubts about the reliability of NIOSH results. The AFL-CIO representative testified that OSHA has been "pressing NIOSH to compromise the integrity of its criteria documents by covertly placing economic issues before health. In essence, they are being asked to twist scientific data into molds prescribed by the selfish interests of the lowest common denominators in the trade associations."⁴⁵ Another commentator, a medical school professor, said that "The quality of these reports is very mixed and recommendations are usually based on technological and economic feasibility more than health factors."⁴⁶

This testimony casts some doubt on the accuracy of a statement by John H. Stender, Assistant Secretary of Labor, before the Senate Labor Subcommittee:

NIOSH is a research oriented agency. It is composed of experts in various disciplines whose research is purely scientific. As a result, criteria packages are the product of what is fundamentally basic research. NIOSH does not consider economic feasibility. OSHA, on the other hand, must consider the technical and economic feasibility of translating the criteria package into standards which are adequate to protect workers and at the same time can be feasibly put into law and enforced.⁴⁷

Mr. Stender notwithstanding, it is often hard to believe that NIOSH standards are based on "purely scientific" criteria. In California, for instance, state law sets lead standards for the population in general which are 100 times stricter than what NIOSH recommends for workers.⁴⁸ Does science or business explain the disparity?

We may have an answer to this and some other questions about NIOSH and OSHA when the Department of Labor responds to the

⁴⁴ Testimony of Dr. Samuel Epstein, *House Hearings on Occupational Standards*, *supra* note 39.

⁴⁵ See note 18 *supra*.

⁴⁶ Testimony of Dr. Samuel Epstein, *House Hearings on Occupational Standards*, *supra* note 39.

⁴⁷ Testimony of John H. Stender, *OSHA Review Hearings*, *supra* note 9 at 221.

⁴⁸ Testimony of Dr. Samuel Epstein, *House Hearings on Occupational Standards*, *supra* note 39.

Report of the Senate Subcommittee on Labor. Secretary of Labor Brennan has promised a detailed response.

But it will not be enough to draft detailed executive reports. Urgent reforms are required in OSHA's enforcement, review, and research functions—reforms that can be achieved only by de-politicizing OSHA's administration. Only when this occurs can the workers of America look forward to fulfillment of the congressional intent in enacting the Occupational Safety and Health Act: a national effort, pursued with "vigor and momentum," to protect their safety and health.