

PANEL II

THE OCCUPATIONAL SAFETY AND HEALTH ACT

MR. KILBERG: Good morning, everyone.

I'm Bill Kilberg. I'm a partner with Gibson, Dunn & Crutcher and I had the distinct pleasure to serve as Solicitor of the Labor Department in the Nixon-Ford years or some of those years, following Larry Silberman and a couple of others. So I was there at the Department in 1970 when the Occupational Safety and Health Act was passed.

OSHA is probably the perfect example of a law of unintended consequence. It was from the very start. It is hard to think of a more controversial statute than the Occupational Safety and Health Act. Yet, at the time of its passage, OSHA was very popular. It passed by huge majorities.

There was bipartisan recognition of the need for a Federal occupational safety and health law. The debates that took place on the statute were largely procedural. They were issues of administrative law. Separation of enforcement from rulemaking was a very, very big issue. The bill that had been introduced by the Democrats and was the lead legislative bill, as distinguished from the Administration's bill, would have conjoined rulemaking and enforcement in the Department of Labor.

The bill that came out had an independent Occupational Safety and Health Review Commission. The type of standards that were to be used in a standard setting in rulemaking were a big issue -- again, the administrative APA-type debate. But, there were no debates over the basic substance of the bill; no debate over the issues that were to become most controversial, even in its early years.

It was only six years later, in 1976 -- and there are a few of you here old enough to remember the 1976 elections -- that OSHA was at the center of political debate during those elections, first by Ronald Reagan challenging President Ford in the Republican Primaries, and then Jimmy Carter in the National Election. Both were railing against the Occupational Safety and Health Act and its bureaucracy, and what they each described is "Mickey Mouse" rules.

Some of you may remember the cartoon of the OSHA cowboy that appeared in that election, on his horse with guardrails on his side and a large pooper-scooper in the rear. That was symbolic of the public's perception of OSHA. Yet, that was probably the earliest example, in this statute, of unintended consequences. Most of the rules laughed at (and there were such things as split toilet seats, the height of fire extinguishers in a building, and the distance between rungs in a ladder) were rules that were the result of the statute's requirement. They were not OSHA's choices. They were rules that the statute required OSHA to develop, so-called national consensus standards, which rules were written by prominent safety councils, all of whom had significant -- and still do -- management representation on them. This was not the result of the bureaucracy. This was the result of legislation.

In the legislative debates, there was no debate at all over that question. It was assumed from the very beginning in all of the bills that there would be what they thought of as early standards, that OSHA needed a head start. And, what better way to give OSHA a head-start than to require it to adopt as matters of law what had been advisory or recommended standards developed by bipartisan, multi-partisan groups. That is just one example.

Unions, of course, were, and still are, big supporters of the Occupational Safety and Health Act. Yet, any objective observer would conclude that OSHA, specifically when joined with the other body of Federal, state and local law that regulates the workplace, has served to displace unions. With government providing worker protection for free, why pay union dues? Although I can not prove empirically that the development of workplace regulation and its growth, and the shrinkage of union membership are tied together, I would point out that those charts go pretty much in tandem.

Both employers and unions at the time of OSHA's passage were suspicious of splitting OSHA's enforcement between Federal and state governments. Management, although tending in general to be more conservative, has never been particularly inclined toward the Federalist ideal, because, if you are a national company, you want to be regulated in the same way in one place as you are in another throughout the country. The variations in state regulation can be very, very costly.

It was a Republican administration and Republican legislators, although the Democrats did not oppose this. This was, again, one of those things in the bill that were generally agreed to in all versions of the bill, that there would be a major role for the states in development of standards and enforcement of occupational safety and health rules.

President Nixon, of course, for those of you who remember, had what we call the "New Federalism. " That was a big part of the Nixon Administration. And a major part of New Federalism was the opportunity for states to develop state plans under the new Occupational Safety and Health Act.

One wonders whether President Nixon, although himself a Californian, would appreciate what has come about in California, the state that enforces OSHA differently than we enforce at the Federal level. Indeed, California was the first state to implement an ergonomics regulation, for example. Or, Minnesota -- Minnesota is very aggressive in its enforcement of state OSHA. They have moved to cite the Vikings football organization for the death, this past summer, of a player for heat stress.

Imagine the results if Federal OSHA had decided to enforce its regulations in professional sports or in applying ergonomic theories to baseball or to football. It would be an interesting exercise. Catchers, of course, would not be able to crouch down for more than three minutes at a time, twelve minutes in an hour. You could not wear spikes -- well, at least you could not slide into bases. But yet, Minnesota is moving us down that road.

There is no question that the concerns that caused Congress to enact the William Stiger Occupational Safety and Health Act were real. And to a very substantial extent, the law and its enforcing agency have, in fact, made progress in addressing the concerns that Congress had in 1970.

We are fortunate to have with us two speakers, both OSHA mavens of many years' standing, to address the direction OSHA has taken and will take in the coming years. Let me introduce, first, John Henshaw, who is the Assistant Secretary of Labor for Occupational Safety and Health. Mr. Henshaw has, for more than 26 years, been involved in environmental safety and health programs in the chemical industry. He has served most recently as Director of Environment Safety and Health for Astaris, LLC, which is a joint venture between Solutia and FMC Corporation. Previously, he held a

similar position for Solutia and for Monsanto.

Mr. Henshaw received his Masters degree in environmental health administration, industrial health, from the University of Michigan in 1974, and his Undergraduate degree at Appalachian State University.

He has served as President of the American Industrial Hygiene Association, which is one of the largest professional organizations of its kind, with 12,000 members. His appointment as Assistant Secretary was greeted warmly both by management and labor, which is a somewhat unusual feat these days, especially at the Department of Labor. Mr. Henshaw is a recognized professional in this area, who has earned the respect of everyone who has practiced occupational safety and health law or who has worked in the field. With that, I will introduce Mr. Henshaw, and then I will introduce our other speaker when Mr. Henshaw is finished.

Thank you.

MR. HENSHAW: Thanks, Bill.

As Bill mentioned, I have about 26 years experience from the private sector, from the business side. And most of those years, I have been trying to educate companies. I happened to work for great companies, so it is not difficult. But I still had to compete with the resources. I still had to compete with all the other things that companies were doing, and make sure we did the right thing in respect to environmental safety and health.

I also did quality issues. I did project registration stuff with the company, as well, which gave me a great deal of experience.

Incidentally, there is no greater honor, no greater responsibility and no

greater opportunity, in my view as an occupational safety and health person, to serve as the occupational safety and health administrator. There are great opportunities here. As I told Ted Kennedy during the confirmation process, I firmly believe there are greater opportunities for achieving injury and illness reduction and, therefore, cost, and adding value to companies in an approach other than enforcement.

I will talk little bit later about achieving compliance, or achieving results, which is illness and injury reduction. And that produces higher productivity, higher quality, and reduced cost in American businesses. So, part of my tenure is really going to be driving that home as I serve in this role in the next few years.

Before I get into some priorities, and I will speak about how I see some of that happening in the next few years, I want to speak about the World Trade Center. And it is an example of priority for the Agency.

As some of you know -- I think you saw the OSHA green jackets on NBC, last night. I think they were heading towards the school they were trying to open up. I went to the World Trade Center two days after the incident and our regional administrator Pat Clark was in Paris. He could not get back.

I happened to be at Wisconsin Dells. I was there at a meeting and I drove back from there overnight to get back to Washington, by the time we were evacuating the building. So, we had some problems finding our office. But nonetheless, on Thursday I went to the World Trade Center and tried to figure out, what is OSHA's role in this whole incident? And in the Q&As, if anybody has any ideas as to the Agency's role, after September 11th, during wartime on our soil; I'd be interested in those kinds of ideas because we are trying to develop those now.

At the World Trade Center, what we did was we said, "How can we help? How can the Agency help?" The first concern people had was, "How can you enforce?" Well, there are a lot more -- and those are the tools that I'm talking about -- a lot more things the Agency can do to show positive results than just enforcement.

What are those things? We decided we were going to be there hand-in-hand with the firefighters and the policemen and the rescue squads. As you know, the Federal Agency doesn't have jurisdiction over municipal employees, and all these were municipal employees and volunteers.

What we were doing is coaching. We were providing respirators; we were handing out respirators; we were fit-checking the respirators; we were educating the firefighters to remember, here is the respirator. You ought to wear it and here are the reasons why. We knew there was some asbestos out there. We knew there were some other hazards out there. So, we were coaching as much as we could.

We had 30 people on the ground, 24 hours a day, helping the rescue squads, making sure they were as safe as they possibly could be. That was our primary role, to provide that technical assistance.

We also worked with the EPA, as well. They were doing some monitoring; we were doing the same. We also had the Department of Health and, of course, we were working under the auspices of the Office of Emergency Management, which is the city. For those of you who do not know, they had a state-of-the-art facility in the World Trade Center. It had just opened up the year before, and that was completely destroyed, so they were working out of a tent. We were also dealing with FEMA. So, we were trying to work with all the appropriate agencies in providing

assistance. There was no enforcement action. We were wearing green jackets to show that we were out there in force to try and help out. And that is what we continue to do to this day. We have people out there trying to help educate, distribute equipment, and assure that those people who are out there doing their jobs are protected as well as we can.

The other arm of our activities was to characterize exposures. This is a workplace, in essence. People are out there working. In fact, EPA was there first doing some monitoring on Tuesday and Wednesday. We started monitoring on Thursday, on behalf of the White House, because they were concerned about bulk samples, and how that translates to airborne samples or what people are exposed to. That is our job.

So, we were out there monitoring along with the EPA and found that the asbestos levels were below any recognized standard, and that was the cause for opening up Wall Street that Monday morning. There is an example of how we were helpful in respect to the White House, the mayor, the governor, in helping assure the public that it was okay to open up the financial district. That was our role at that time.

We continue to do monitoring. We have collected over 300 personnel and airborne samples, along with EPA, and continue to provide that assurance to the public, that it is okay to come into those areas outside the hot zone. The hot zone, of course, is still unstable. There are a lot of exposures, a lot of conditions; you can not characterize that every day. It changes. And we, along with the EPA and all the other health authorities are still recommending that people provide the necessary protection, which is respirators, protective clothing, helmets, hard hats and so on.

Now we are in a sort of interesting dilemma. The Mayor has not declared

this a clean-up mode or a recovery mode. It's still search-and-rescue. Therefore, a lot of volunteers and firefighters are out there doing what they do best, which is, unfortunately, risking their lives. We have had a number of near-misses out there. We do not want to lose another life; and, we need to work with some people to take some action to avoid that.

We are dealing with the contractors and the White House and the Mayor's office to get him to declare this a clean-up operation, as opposed to a search-and-rescue. That would bring the contractors in. And the contractors, of course, we have jurisdiction over in respect to enforcement. But we do not intend to do that. We intend to establish a partnership with those five primary contractors and make sure we are working side-by-side with them to make sure the proper systems are in place; to make sure no one else gets hurt at the World Trade Center.

Then, when a body is uncovered, the contractor will stabilize the work environment. That will allow the rescue squads to come in and extract the remains. That is going to take a little bit of time. The Mayor is not too anxious to ask the firefighters to step out. There still is, obviously, a very emotional situation. But we are going to work to see that happen, just so we do not have any more incidents. We had had too many near-misses and we are going to see what we can do to make that happen.

But OSHA's role is more as a partner, more as a contributor adding value. And the value add is not on the enforcement side. The value add is education, training, coaching, providing, enabling the right kind of safe behaviors.

When we first got there, the respirators were located a mile and a half away. What firefighter is going to walk a mile and a half away to go get a respirator

when, in ten minutes, they could be on the pile looking for their buddy. We decided that we were going to have the respirators with us, and we are going to be right there as they enter the hot zone and hand it to them, to enable them to do the right thing and protect themselves.

We still see photographs of people not wearing respiratory protection in the hot zone. We are still working on that, and we will continue to work on those kinds of situations. But that is new thinking, new wave. And that is the way we could add value at the World Trade Center. We will continue to do that until it is done. That is just an example of new thinking, new ideas, new approaches.

Let me talk about three priorities that I have. The first one is going to be a strong, fair, and effective enforcement strategy. I came into this business in 1975, and OSHA was just beginning to get its feet on the ground. There were obviously some controversial issues that Bill talked about. But, if it hadn't been for the Act, probably I would not have had the job I have. We would not have this kind of emphasis on occupational safety and health. We would by all means, have some, but probably not to the same degree. We would not have the same degree of activity we have today if the OSHA Act did not exist. I recognize that. And I think all of us recognize that.

The threat of enforcement is an effective tool. It does establish some sort of foundation. It does establish some sort of platform from which to work. In my view, it is only that. It is only a platform upon which to work. It is not the end of all means, or the process by which we will get injuries and illnesses reduced in this country.

I come from the private side. We work very hard to achieve good results in our company, regardless of whether OSHA existed or the threat of inspection was

there. We did it because we knew it was the right thing to do. However, I think the Act helped create that.

So, having said that, enforcement has to be there. But as I mentioned before, it is not the place where you get the biggest bang for the buck, in my view. You still get a bang, and you still have employers for whom the threat of inspection and the hammer is the only way that they are going to succeed. I firmly believe that is a very small percentage of the population of employers out there. There is a very small minority that enforcement works on. The rest are good employers out there trying to do the right thing. What we need to do is get OSHA working with them to help them succeed.

Nonetheless, we've still got to maintain fair enforcement. And "fair" means hitting the right audience, the ones that we know. The only way they'll have attention given to safety and health is around the enforcement. We want to direct our efforts to those people.

Fair -- we want to make sure that our policies, as far as citations and penalties, are consistent and they do not vary. State policy and enforcement is an issue, the various state programs. One of our jobs in the next few years is to make sure we standardize to some extent, to make sure they are consistent. If they are not consistent, our image is tarnished, if they are doing something that is a little different. We want to see what we can do to standardize that the best we can.

The second priority is going to be outreach education and compliance assistance. I firmly believe in the compliance assistance side. That is where the biggest bang for the buck is. I am operating under the premise that most people want to do the right thing. They want to comply. They want to reduce risk and reduce injuries and

illnesses because they know it costs businesses money, and the economy will do better if our costs decrease, improve our quality and productivity. If I go under the premise that it's outreach, education and training is the way to reach that.

Outreach -- we are doing a lot of that. I have been with the Agency now for two months and I have learned an awful lot about the good things they are doing. We do not hear that; I never heard about it in the private sector, mainly because I was not looking for it, maybe because we were doing our thing and we did not need that kind of assistance from the Agency. But they have done an awful lot in the last few years.

My role, I think, is going to be to grow those, make them more prominent, more visible, and look for more opportunities to grow those kinds of tools. We now have a compliance assistance specialist in every area office. I want to grow those even more, get more of those people out there.

They are different than enforcement. They came from the enforcement side. But they are marketers, and that is what I like about them. They are outgoing people who sell the value of what they are articulating, what they are talking about. Not demanding it; not saying it is because it is an OSHA standard. That does not add value, just because it is an OSHA standard. What adds value is demonstrating the results you get; the reductions of injuries and illnesses. That is the value. "Here is the value to your business, because you reduce cost, you improve quality and productivity."

These compliance assistance specialists are sales people, and I like to look at them as sales people. They sell the value of the Agency, the standards and the value of safety and health. I want to grow that. That's where I think the greatest opportunity is for the Agency.

The third priority is voluntary programs and partnerships. This goes hand-in-hand, to some extent, with compliance assistance. But it's probably more than that because a voluntary protection program is included. I call that, the top of the ladder. And that ladder may have many rungs, one of which may be the VPP Star. It is allowing companies to succeed on their own. And OSHA and other groups recognize them as being leaders in these areas, to progress, to be innovative, to be creative, and achieve higher results than a standard could achieve. We want to grow those kinds of partnerships, those kinds of voluntary programs. We want to encourage people to get on that highest rung of the ladder; I do not care where they are, as long as they are on one rung and hopefully moving up to higher performance.

We want to grow so that; give them the opportunity, give them the recognition, to get on that ladder and begin to use their own creativity, their own innovation, and do it their own way -- I do not care how it is done. It is the result that we are looking for. It is not the "how", it is the "what". And, as long as they are moving and getting that "what", which is reducing injuries and illnesses, OSHA needs to step back and give them all the credit and additional resources, meaning compliance assistance and tools. We need to step back and watch them do good things. We need to grow those kinds of programs more and more.

The Agency has a lot of those partnerships. VPP is probably the most visible one. Sharp is another one. But there are a lot of other partnerships. As I mentioned, the five contractors we have in the World Trade Center -- I called the CEOs of each and said, "We need to get some real visible presence around safety and health." Because they're liable if a firefighter gets hurt, a lot of them are threatening to back out of

operations in the World Trade Center because they can not control. They fear somebody is going to get hurt and they are going to be liable. We are meeting today, in fact. I am not going to be there, but Pat Clark is meeting with the CEOs of the five contractors and trying to impress not only their employees but also workers for the Mayor's office to see if we can't control that workplace so we have no more fatalities.

That's an example of a partnership. A lot more partnerships are going on within the Agency. My job in the next few years is going to be to grow the partnership programs, make them more prominent and sell them, to the rest of the community. These partnerships work; they progress; they allow companies to do it on their own and be successful in respect to reducing injuries and illnesses.

OSHA does not have to set a standard of one-size-fits-all, which, coming from the private sector, would hurt us. That takes away valuable resources from my company, if OSHA sets a one-size-fits-all. It is very simple, in that, it says exactly what I have got to do: The trouble is, there is no flexibility in it. It does not meet my culture, coming from the private sector, and that takes valuable resources that I have to fight for year after year, coming from the private side.

So, all OSHA should allow people to understand what the value is, give them some tools, but let them be creative in how to reach the result, which is injuries and illness reduction.

I am going to stop there. I know there are many questions about standard-setting, and the reg agenda we have just been talking about. I can talk a little philosophically around that. I can not talk about ergonomics. You know what is been announced on ergonomics. The record-keeping rule -- I will be able to talk a little bit

about that.

MR. KILBERG: Thank you. Thank you very much John.

(Applause.)

MR. KILBERG: Our other speaker is Ken Klineman, who is a very prominent management practitioner in the area of occupational safety and health, a partner with the firm of Stevens & Lee in Wayne, Pennsylvania. Ken is the Management Chair of the Occupational Safety and Health Committee of the American Bar Association and has been a fairly prominent speaker and practitioner in this field for some time.

He prepared the safety and health standards chapter in BNA's treatise on Occupational Safety and Health law. Ken is a graduate of both of my alma maters, the School of Industrial and Labor Relations at Cornell University and Harvard Law School, although a few years after me, I am sad to say. I think we're the only two Republicans who ever graduated from the ILR School at Cornell.

(Laughter.)

MR. KLINEMAN: Who said I was Republican?

(Laughter.)

MR. KLINEMAN: I get a lot of work out of the Democrats.

I actually agree wholeheartedly with what Secretary Henshaw had to say, and I applaud his comments. I think they are really right on point with what the management bar and employers are looking for.

Unfortunately, I have agreed with Assistant Secretaries before who have similar emphases or similar comments. Even though the intentions are right at the National Office level, those of you who practice in the field will know that it does not

always filter down to the troops at the area offices.

One of the comments I want to make is the importance of a bottom-up approach, as well as a top-down approach. One of the focuses of my comments is the integration between compliance assistance; cooperation and enforcement -- they have historically been seen as completely separate. -- such that once you are in an enforcement mode, OSHA can not help you anymore. That is what OSHA says very often. We will litigate this, and then we will help you when we are all done. I am not sure that is a particularly helpful way of approaching it.

Obviously, the topic of unintended consequences of Federal legislation is one that suggests an answer, especially for a management attorney. I think the issue is very complex. The cost of compliance is enormous, as we all know. One recent study said that employers spend \$50 billion a year; half of all of the money spent on all of the Federal regulations, simply for safety and health.

There is a law -- the Government Performance and Results Act -- that requires the government agencies to establish methods to measure whether what they do is achieving the intended results. There is not any question that if you look from 1970, obviously, injuries and illnesses have decreased. If there is a correlation between decrease of injuries and illnesses and OSHA enforcement, then, obviously, that huge cost of compliance is offset by increased productivity, the decrease of lost work time and the like. That may be part of the reason why OSHA's estimate is only \$7 billion a year for the cost of compliance.

So, on a macro level, I think that it is hard to argue that OSHA's not a good idea. On a micro level, with the area office, which is where I operate on a day-to-

day basis litigating OSHA cases, there are any number of counter-productive aspects to the way OSHA does business,. I want to talk a little bit about that.

The emphasis, although there has always been discussion and there has always been some compliance assistance, has always been on enforcement of promulgated regulations that are seen in the hundreds of pages of the *Federal Register*. It is a very static system, which is trying to regulate a very dynamic workforce. The promulgation of new regulations is extremely time-consuming. It is very difficult, partially because there is very often, as we get into new areas, no scientific consensus. Ergonomics is one example of that. If an employer waits for a regulation to come down, then obviously, you are not going to be protecting the employees in the interim.

The old standards, because they are static, are not able to keep up with rapidly changing technology and the changing nature of the work environment. Telecommuting, for example -- dealing with the fact that now there are international standards that we have to deal with, with multi-national employers dealing with the global workplace.

The emphasis on enforcement means that there is more and more use of the general duty clause, to deal with all those areas that are not covered. The problem with that is, there is not a great uniformity or consistency, even across area offices, let alone across regions. There are industrial consensus standards upon which to base a violation so that there is not a lot of guidance that employers necessarily have. In fact, the national consensus standards -- the ANSI standards, for example -- you have to pay for. You can not just get them the way you can get the *Federal Register*. You have to call ANSI, and they will send them to you at a price.

It is also implemented by inspectors who have adequate training on a general level. But unfortunately, they do not have expertise on specific levels, very often when they're inspecting the industries that require a specific expertise.

I have had examples with respect to the transmission and distribution standard of electric power. There are highly complex issues dealing with the hazards that affect linemen and the like. Because they do not get a lot of work on the issue, the area office does not usually have a lot of expertise. I have had a case, for example, where it was very clear that neither the inspector nor the area director really understood what the requirements and what the effect of the requirements would be.

OSHA has discussed an increase in consultative services and cooperation. But outside of VPP, there has not been a lot of evidence of the increased utilization of that at the local level. Part of it is because of a lack of resources. We are still in the early stages. It is not clear who is going to be doing this compliance assistance. In Pennsylvania they often suggest you go to the Indiana University of Pennsylvania, which is a state college that has a contract with OSHA to provide services. But they are so overwhelmed that, if you are an employer of more than a hundred employees, they tell you, we are not going to be able to get to you for at least a year. Well, that is not a particularly helpful thing.

One of the questions is, should we have inspectors, compliance officers, who are in the local office, should we have them do consultative services, as well as inspections, to show the kind of partnership that we need to have?

What are some of the unintended consequences of this system? Because of the emphasis on enforcement, because of the overabundance of regulations, everything

seems to be considered a serious violation. There is no prioritization that employers are given. Employers have limited resources. So, what happens?

For example, there have been discussions over the last ten years of the fact that the hazard communication standard was the most frequently cited of all the standards. That is a paper standard. Is it important? Sure. Is it where you want to put your resources, if you have limited resources compared to things that really have a direct impact on safety and health? Of course not. So, OSHA announced, well, we are going to cut back on that, but that was an endemic problem of resource allocation.

Once you are cited, OSHA does not give a lot of direction on abatement. They tell you that you must comply. If you are not in an enforcement setting, you can write a letter to OSHA asking for a letter of interpretation. They will give you a response. Once you are in the enforcement context, they will not respond to letters like that. They will say, you are in enforcement and we can not help you.

I understand the problems between setting policy outside the enforcement context and setting it inside. But there is not any reason why, when trying to determine the best way to comply with an OSHA regulation, you can not get some kind of guidance from OSHA that gives the best way to do it. Or, "If you do this, then you will be in compliance." Very often, they will tell you they can not tell you. They just need you to comply.

There are very often times when OSHA does not know as much as the employer. There are times when the employer does not know very much. OSHA needs to work together with the employer, and get the resources of the National office involved.

I have had situations where employers have spent millions of dollars on

ventilation controls, where it has not had an impact because OSHA said, "You are going to have to do this because it is the only way you are really going to comply with the standard. But we knew that, what was really at issue was work practices. And we could spend as many millions as we wanted and it was not going to do as much as getting the employees to change the way they were doing their job.

The regulations are very specific, and they do not necessarily keep up with what is going on in the workforce. And you have to comply with them. It stifles innovation and the kind of creativity that Secretary Henshaw was discussing.

There is an Office of Variance Determination that you could go to in DC, where if you say, "I want to do this a different way than the standard states," then they would look at it and they would issue a variance. The problem is that has been interpreted for years only to apply before the standard is at issue. And so, it's a moribund office.

I would suggest that that office be beefed up, and that employer be permitted to go to that office, or something like that office, to say, "This is a new situation; we should not have to chock the wheels on trucks anymore, now that we have got air brakes. We have a different situation now than we used to. Listen to what we would like to do, consider that, come out and see and permit us to do that. There really is not the kind of opportunity for that at this particular time.

In the litigation mode, there is an unintended consequence in an employee misconduct defense. I suppose we could apply it to Ty Cobb in the example that Bill gave, because he used the spikes up whenever he slid. But, the employee misconduct defense, you can only establish if you establish that there is consistent enforcement.

And what OSHA says is, you have got to show that people have been disciplined. So, if employers do not discipline people, they are not going to be able to use the defense.

They are going to have to discipline people, even for minor infractions. It encourages a "we" versus "they" atmosphere. It encourages unions to use this as a bargaining chip against employers, especially when it comes to negotiation time, as opposed to encouraging team-building.

Why could not the defense say, as long as you are working with employees on safety committees, in training, on discussions on this issue, and the employee doesn't do what you say, then you have the employee misconduct defense. Why do you need to show discipline? The unintended consequence of that is, we are forced to discipline people, even when we do not necessarily want to.

There is also the problem that ignorance is very often a defense. There is a couple of situations where this comes up and is counter-productive to what OSHA would want employers to do. OSHA has much better record-keeping now than they used to. So, they can go on the computer and you can go on the Internet and see every citation against companies, anywhere in the country. When they have a citation against a company that is based in New York, they go on the website and they see that they had a prior citation for the same thing in Washington State, and they hit them with a repeat.

Employers, in order to deal with that, may very well want to decentralize safety and health so that they at least have an argument that they did not have anything to do with Washington which was a completely separate issue. Why is OSHA penalizing employers for having centralized safety and health?

If you do not investigate, if you do not take the initiative to try to comply, very often you have a stronger argument against a willful violation. One of the things that I have seen time and time again -- and I would dare say that many people in private industry and perhaps Secretary Henshaw have seen it -- is that when employers attempt to comply with a standard but do not comply completely, very often that will be used by OSHA to establish a willful because they will say, you knew about this standard because you went three-quarters of the way. And so, we are going to hit you with a willful. You are almost better off if you do not go three-quarters of the way, because then it is harder to show that there was intentional disregard for the rest.

I have that case right now for a very large supermarket company that has a distribution center under process safety management. They had a fully computerized refrigeration system with anhydrous ammonia. It is fully computerized. It was operated by qualified and trained technicians. There was no risk of harm.

But, they hired an expert and, nonetheless, OSHA came in and said, well, you did not have it compiled in a particular way. It was not in a book the way it was supposed to be in a book. You did not have this; you did not have that. And they hit him with a \$230,000 citation with five willfuls.

We went to a mediation with an administrative law judge. The administrative law judge said, "You do not have a willful case here." They said, "Well, the only way we are willing to settle it is if you essentially buy the willfuls. We will settle it for X amount of dollars, if you keep the willfuls, and Y amount of dollars if you do not keep the willfuls.

What sense does that make? What is the logic behind that? It is purely a

mercenary approach, which, unfortunately, discourages settlement. The point of that example, however, is that it is counter-productive to say, "You did all these great things, but you did not do 100 percent of it."

OSHA should reward initiative. You should reward innovation, rather than penalizing it. Now, clearly, if the employer refuses to do a particular thing that they are required to do, and they know that they should do it, then of course they should be penalized for that -- but not because they did not cross every T and dot every I.

Where do we go from here? If we look at some of the success stories that OSHA has had, they can be used as a methodology for going forward. There are a couple of examples. The focused inspection program in construction is a great example of how OSHA, rather than going in and looking at a million different things and not prioritizing, does prioritize. "We are going to tell you that these are the issues that are the most critical. These are the issues where people are injured the most, with fall protection and struck-by and the like." And so, employers know exactly what they're up against and what they need to do. That kind of focus is helpful.

The lead standard is an example of the use of OSHA expertise. Clearly air leads and blood leads have come down. That has been assisted through the use of the expertise applied by OSHA. And then, the VPP Program, for those that have been part of it, that shows a cooperation. So, focus, expertise and cooperation.

I think employers are motivated much more by their concern for health and safety than they are by OSHA funds. They are motivated by worker comp costs; they are motivated by productivity; they are motivated by lost work time. What you need to do is have incentives for initiative. Have incentives for the use of audits by insurance

companies, or by OSHA, if available: Permit different ways to abate hazards: Use a variance determination mechanism: Use OSHA as experts. Have the compliance officers work hand-in-hand, even in the enforcement context. And then penalize if they do not take the initiative.

There needs to be better monitoring of area offices, solicitors' offices, and state plans -- because the approach taken from area office to area office is different. The approach taken from solicitor's office to solicitor's office is different.

I was in Puerto Rico last week. I am representing a large retailer, that was inspected because the Puerto Rico OSHA inspector was upset because his wife could not use the bathroom because the water was not working. He said to them, "Look at my face; I'm going to be back here tomorrow; I'm from OSHA." And he was back there "tomorrow" and he issued a couple citations.

When I went down there, they dropped the citation. They should have dropped the citation immediately; they should not have made me spend the money to go to Puerto Rico. They did not drop it immediately because they figured, well, let us give it a shot. If they do not raise it, then maybe we can keep the citation.

There is something called CASPA; but it is not effective. There needs to be, perhaps, an Ombudsman of some sort within OSHA, some effective way to raise complaints about inconsistent or, unfair enforcement. If you are going to say, this is a goal, then there must be a way to raise the issue to the level of effectiveness.

Finally, I think that it is important to have the National Office work with the local offices, both the solicitor's office and the area office, in establishing liaisons to work on policy issues in the enforcement context, to announce how they should be doing

these things. We are going to now use that as a policy. There is no reason why cooperation and enforcement policy and enforcement can not be more integrated.

MR. KILBERG: Thank you, Ken.

Let me just say, I stand corrected. I guess I am the only avowed Republican graduate of the School of Industrial Labor Relations. But, Ken, you sound like one.

Mr. Secretary, before we go to the floor, is there anything that Ken said that you'd like to address?

MR. HENSHAW: I couldn't write fast enough --

(Laughter.)

MR. HENSHAW: -- but, I mean, all of the points that you made -- almost all of them -- are very good points and things that we need to address. I just realized that the acronym for our National Office is "NO".

(Laughter.)

MR. HENSHAW: And it took me a long time. I'd say, what is the "NO" acronym? Well, it means National Office.

But the separation between the National Office and the regional offices and the area offices are critical, and there is a divide there. There is a dichotomy in approach and process that we have got to address. We are putting in systems to address that. It is going to take a long time to make all these things happen, but we are going to be working in the right direction.

I would like to know a little bit more about some of those details you gave me. I really could not write fast enough. I think we are on the same page, in the sense

that the Agency needs to be productive, add value, because we are working on the same goal, which is reducing injuries and illnesses. Maybe that is the unintended consequence: the way the Agency is set up and the way we do some things might have some consequences that are counter-productive in achieving injury and illness reduction. And that has got to be our primary goal.

The "how", as I mentioned before, is not so relevant, as far as I am concerned. Now, our solicitors have a different view; obviously, they have got to write standards that have to be enforceable.

But, our goal has to be achieving the "what", which is the injury and illness reduction. So, in general, those are my comments to his comments. We will be looking into a lot of this.

MR. KILBERG: Yes, sir.

AUDIENCE PARTICIPANT: There has been a lot of publicity since September 11 about the possible introduction into the country of chemical and biological toxins. The toxin that's received the most publicity lately, of course, involves the introduction of anthrax in the workplace. I wonder, first, whether you believe that OSHA has some role in promulgating new regulations, to educate and maybe require employers to train people in the use of respirators?

Mr. Klineman, I'm also going to ask that OSHA should step into this form of terrorism, or do you think that is area where doing so would have unintended detrimental consequences?

MR. HENSHAW: Maybe I should let him talk first.

(Laughter.)

MR. KLINEMAN: My view is that, when you look at OSHA as experts, they are extremely helpful. That is where Secretary Henshaw and I really agree on a lot of things. There are regulations that already address emergency preparedness generally, as well as in the context of hazardous waste and the like. I think that that would be a natural segue for OSHA to provide assistance.

It would be a mistake to have OSHA put on their enforcement hat, both because it would take too long to come up with something that they and that employers could agree on, and it would put a different kind of spin on the issue.

But, I do think that it is very appropriate for OSHA to be working on compliance assistance with employers, to recognize that there are a lot of employers that have raised this concern. There are a lot of employees that are concerned about what could happen in office buildings, where people do not usually have respirators. "Here are some suggestions as to what your risk managers should be looking at, what kind of procedures they should be following, in order to address this kind of question." I think OSHA should have a very significant role in that.

MR. HENSHAW: That is to some extent, what we are looking at, in the sense that we have evacuation process and procedures in place. However, chemical and biological agents that are not emanating principally from the workplace are coming from different sources, obviously. Our intent is to beef up those aspects and provide more educational tools, more detail.

Obviously, we are relying on CDC and others who have more expertise. We have some expertise, but certainly, the military and CDC, they are going to be valuable partners in providing additional detail.

As I mentioned before, we are looking at our role in this kind of environment, as a result of September 11. And the immediate role has got to be educational, in providing technical assistance. And so, we are in the process of determining what that might look like, and how can we beef up our existing tools. We have existing websites; we have other existing tools. We want to beef those up and try to incorporate this new threat.

But, certainly no enforcement action. This is going to be in a coaching and education and technical assistance kind of mode for a few years to come, that's for sure.

MR. KILBERG: Sir.

AUDIENCE PARTICIPANT: You asked for comments about the World Trade Center. Before the collapse of the two buildings, the firefighters were working their way up through the stairs, carrying equipment. From the reports, they said they were exhausted after they reached about 30 floors up. In tall buildings, if the elevators are knocked out, how do firefighters manage to get up to the top of these buildings.

MR. HENSHAW: The authorities are obviously looking at this now, in excruciating detail, as to how to fight high-rise fires. As you know, probably, there were people up on the roof scaling down, trying to reach and rescue those. And a lot of the firefighters -- this is sort of an elite group of firefighters. They were lost, as well, with the collapse of the two buildings.

The entire design community is looking at how to fight high-rise fires. As you know, getting water up there, getting foam up there, the ability to fight fires, even at the mid levels, is not an easy task. How to get people out is not an easy task.

I think we are going to see new designs in high-rises new learnings, anyway as a result of what happened in World Trade Center. That is going to impact our landscape for many, many years to come.

OSHA is not necessarily involved in that. Obviously, the engineers and the other folks who are designing such structures will be looking at that. We do not know, at least at this juncture, whether there was a failure in the ability to evacuate the building. If you imagine how many people were in those buildings, that most of them got out, and we've lost nearly 5,000, that is a tremendous feat.

There are also discussions around asbestos and whether asbestos could have delayed collapse. In Tower 1, asbestos insulation on the beams went up to about the 64th floor, and the other was the 50-something floor. What would have happened? Would the buildings have sustained that heat for a little bit longer and allowed more people to evacuate? Obviously, that is going to be a policy debate in respect to future design and whether we use asbestos or non-asbestos or other materials.

So, a lot of things are going to happen in the next several years about how to design buildings to prevent this kind of disaster again.

MR. KILBERG: Ma'am.

AUDIENCE PARTICIPANT: This morning on NPR, the New York chief for the schools is talking about his decision to reopen the school that is three blocks from ground zero. Parents are concerned about their children being exposed to asbestos, and he reiterated that the city and other agencies had actually tested the exposure level and found it to be satisfactory.

Does OSHA have a role in reassuring parents and citizens of New York

City that the area around ground zero is actually a safe area to breathe and have kids in school?

MR. HENSHAW: We started on the 13th of September to do monitoring, along with the EPA and the Department of Health, and allowing the City to use that information to explain to the public and to the citizens what the hazards are.

OSHA and EPA have issued a number of press releases. We have been in the press lot in the last two weeks trying to explain that, to help provide that reassurance about the exposures to asbestos. While it may be in the bulk material, and right after the incident, there was a lot of dust around. Most of that has been cleaned up. There was some asbestos in that bulk material, but we are within limits as far as airborne sampling, from EPA's data and ours, and we've taken thousands of samples, between EPA, OSHA, the Department of Health, and NIOSH. That data is on the website. We have made it available to radio, TV, and have tried very hard to make sure that information is out there, to reassure the public.

I do not know what else we could do. Certainly, EPA and FEMA have a role here. EPA has the role in respect to clearance, the O'Hara standard for clearing, after the remediation work is done on a school, for removing asbestos. They come in and they apply those standards for the schools, and to the general public areas, as well as our data to the workplaces. All of that information is available. We are trying to communicate that to whoever we can.

The problem is that we have got a few people out there who want to create an alarm. A recent report in *Newsweek* this weekend is based on old information, an old reading that was done two days after the incident, using a different technique than either

EPA or OSHA or NIOSH uses. The problem is, how do you dissolve the negatives? How do you get rid of the naysayers and the ones who are creating the unfounded concerns?

All we can do is continue to broadcast the information we have and reassure the public that there is no concern. The concern is, again, on the pile, in the debris area, the hot zone. That continues to be a concern to us.

MR. KILBERG: Mr. Secretary, Ken, thank you very much. We've reached the end of our time.

Thank you very much.

