United States Senate
HEALTH, EDUCATION, LABOR AND PENSIONS COMMITTEE

Edward M. Kennedy, Chairman

Discounting Death: OSHA's Failure to Punish Safety Violations That Kill Workers

April 29, 2008

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Committee on Health, Education, Labor and Pensions

Introduction

Executive Summary

1. **OSHA's Penalties System For Safety Violations Linked to Worker Fatalities Is Flawed**

   A. ***The Penalties OSHA Is Permitted By Law To Impose Are Too Low.***

   B. ***Even Within These Low Limits, OSHA Supervisors Consistently Reduce - By Almost 40% - Penalties Against Employers In Fatality Cases.***

   - OSHA Supervisors Reduce Penalties Even More For Employers Who Contest The Penalty – Thus, Fighting the Government Gets An Employer A "Contest Discount" of 300%.

   C. ***OSHA Supervisors Also Routinely Underrate Safety Violations In Fatality Cases.***

   D. ***Employers Fail to Pay Almost Half Of Assessed Penalties and OSHA Fails To Do Anything About It.***

2. **OSHA Rarely Refers Even The Most Flagrant Fatality Cases To the Department of Justice for Criminal Investigation**

3. **OSHA Does Not Effectively Use Its Enhanced Enforcement Program To Monitor Even the Worst Employers After Fatalities**

4. **Weak OSHA Enforcement Has Long-Term Tragic Consequences**

INTRODUCTION

Yesterday, April 28th, was Workers' Memorial Day, when we honor and remember those who have lost their lives to workplace accidents, injuries or disease. It is also the 37th anniversary of the creation in 1971 of the Occupational Safety and Health Administration, the federal agency with the responsibility for protecting the health and safety of America's workers. The passage of the Act creating the Agency was a watershed in achieving safe and productive working conditions, and was hailed on the Senate floor as "a legislative landmark of the utmost importance to every family in the nation…designed to ensure a safe and healthful work environment."[1]

Tragically, that promise is not being fulfilled for far too many of America's hardworking men and women. In 2006, 5,840 workers were killed on the job, a number which has been rising since 2002. As this report demonstrates, OSHA lacks both the legal resources and the enforcement vigor to stem this rising tide.

To force an employer to think twice about gambling with workers' lives, OSHA must pose a credible threat of discovering safety hazards and strictly penalizing employers. Unfortunately, today's report shows that, even where a fatality is involved, OSHA quickly backs down in the face of employer opposition and shies away from firmly enforcing the law against the most egregious offenders. In particular, the report shows that OSHA imposes minimal fines on employers whose violations of safety regulations cause workers' deaths.

In 2004, 19-year-old Jeremy Foster was killed while working at as a chipper attendant at Deltic Timber in Ola, Arkansas. Foster was strangled by a chipping machine – the design of which had been improperly altered by the company. An OSHA inspector cited the company for a serious safety violation and assessed a paltry $4,500 fine – which OSHA supervisors cut in half. Jeremy's stepmother Becky couldn't believe how weakly OSHA enforced the law:

[1] 116 Cong. Rec. 37628 (1970) Remarks of Senator Alan Cranston, November 17, 1970.

"…these 'penalties' will not give companies any incentive to create a safe workplace. It just seems so unfair to watch the news and see a story about a CEO or someone in a large company that does not follow some type of regulation regarding 'the books.' They get fines of hundreds of thousands of dollars and have to fight in court to stay out of jail. What kind of system penalizes a company more for monetary issue than it does for taking the lives of hard working people[?] These fathers, sons, brothers and uncles can never be replaced. Our lives have changed forever." -- Becky Foster

It is vital to remember that every decision to weaken safety laws and OSHA's enforcement of them imposes huge costs on society that are no less real simply because they are difficult to quantify. By virtually eliminating the deterrent effect on employers, these decisions lead to more workplace accidents, injuries, and deaths. The emotional toll of these tragedies on workers and their families is incalculable, and they also have a very clear economic cost – families that are left without a source of income or hit with huge medical costs, just a few bills away from bankruptcy.

Sometime in the next hour and a half, a worker will be killed on the job. On average, 16 workers are killed everyday. On this Workers' Memorial Day, we must rededicate ourselves to protecting every worker, in every industry, in every part of this country. That means strengthening our worker safety laws, giving OSHA the funds it needs to do its job, and insisting that it firmly, consistently, and fully enforces those laws.

Senator Edward M. Kennedy
Chairman

EXECUTIVE SUMMARY

OSHA's Penalties For Safety Violations That Result In Worker Fatalities Are Flawed.

- **Criminal and civil enforcement tools are weak and ineffective.**
  - In the criminal context, **the law permits a maximum prison sentence of six months** for willfully violating a safety standard or regulation which leads to the death of a worker. By contrast, the maximum sentence for mail fraud is **30 years**.
  - In the civil context, OSHA is empowered to impose a **$70,000 maximum penalty.** By contrast, the Department of Commerce is authorized to impose a **$325,000 penalty for a violation of the South Pacific Tuna Act.**
  - The total penalties that OSHA actually imposes in fatality cases are far below these maximums. In 2007, the median initial penalty was **$5,900** and the median final penalty (after negotiation and review by OSHA supervisors) was **$3,675**.
- Even within its meager civil penalty authority, OSHA supervisors consistently reduce **– by almost <u>40%</u> –** penalties initially imposed on employers in fatality cases. For all fatality investigations in fiscal year 2007,
  - **The median final penalty of $3,675 was 38% lower than the penalty initially assessed by the inspector**.
  - For "**willful" violations** in fatality cases**,** the median final penalty was **$29,400, less than half the statutory maximum** and a **58% reduction** from the median penalty initially imposed by the inspector.
  - **OSHA supervisors reduce civil penalty amounts even more for employers who contest the penalty, effectively rewarding resistance.** Fighting the agency gets an employer an additional "contest discount" of **300%**.
- **OSHA supervisors also routinely reduce the severity classification of safety violations in fatality cases.** For example, more than **a fifth of all willful penalties** initially cited by OSHA inspectors in 2006 fatality cases were later **downgraded by OSHA supervisors.**
- **OSHA fails to fully utilize its limited criminal referral authority.** Only 21.1% of eligible cases were referred to authorities for possible prosecution from 2003-2007, and of those eligible cases, the Department of Justice chose to pursue only 4.2%.

Employers Do Not Pay, and OSHA Fails to Collect, Almost Half of Assessed Penalties In Fatality Cases.

- **$27.5 million in penalties involving the death of more than 600 workers since 2004 remain unpaid**. OSHA has stopped trying to collect almost half of these penalties.

OSHA Does Not Effectively Focus On the Worst Employers Who Commit Serious Safety Violations.

- The Enhanced Enforcement Program, introduced in 2003 to target the worst safety violators, has not been effectively implemented. OSHA fails to conduct follow up inspections of the vast majority of employers targeted after a fatality.

1. OSHA's Penalties For Safety Violations Linked to Worker Fatalities Are Flawed

Other than the rare private lawsuit, OSHA's enforcement tools – civil monetary and criminal penalties – are the only deterrent against unsafe, potentially deadly workplaces. Therefore, the threat of penalties being imposed must be credible, and the penalty itself must be high enough to prompt the employer to correct the hazard. If either the likelihood of discovery of a violation *or* the penalty is too low, employers will find it cheaper to risk an OSHA penalty than spend the money to correct a safety hazard.

Unfortunately, this report shows that OSHA enforcement is neither sufficiently consistent nor strict, and many employers routinely flout safety laws as a result. In fiscal year 2007, "there were at most 2,094 federal and state OSHA inspectors responsible for enforcing the law at approximately eight million workplaces."[2] The deadly cost of this regulatory breakdown is borne by America's workers. This section examines three major flaws in OSHA enforcement – the weakness of the penalties authorized by law, OSHA's inconsistent and timid enforcement of those penalties, and OSHA's failure to collect penalties from employers who refuse to pay them.

A. *Penalties OSHA Is Permitted By Law To Impose Are Too Low.*

Criminal Penalties

The Occupational Health and Safety Act (the "Act") authorizes OSHA to impose only the most meager criminal penalties against employers whose willful violation of the law causes the death of a worker. Under section 17(e) of the Act, an employer convicted of willfully violating a safety standard or regulation which leads to the death of a worker is guilty of a class B misdemeanor, punishable by not more than six months in jail and/or fines of no more than $250,000 for an individual or $500,000 for an organization. If the employer has a previous conviction, these maximums are doubled.

Other provisions of federal criminal law authorize much harsher sentences to punish less serious conduct. For example, federal criminal law prescribes:

- A 2 year maximum jail sentence for improperly hunting migratory birds[3] or improperly importing exotic wild birds[4];
- A 20 year maximum jail sentence for dealing in counterfeit obligations or money,[5] or mail fraud,[6]
- A 30 year maximum jail sentence for mail fraud involving a financial institution,[7]

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[2] *Death on the Job,* AFL-CIO, April 2007, 16th Edition.
[3] 16 USC 703-712
[4] 16 USC 4901-4916
[5] 18 USC 473
[6] 18 USC 1341

- A maximum life sentence for operating a criminal financial enterprise earning at least $5 million in a 2 year period,[8]
- A mandatory life sentence for piracy.[9]

OSHA itself cannot prosecute a criminal case against an employer. It can only refer cases involving a worker fatality and a willful safety violation to the Department of Justice with a recommendation for prosecution. Classification of the offense as a Class B misdemeanor makes prosecution by overburdened federal prosecutors very unlikely. In FY 2006, for example, only 11.5% of cases charged by federal prosecutors were misdemeanors, more than a third of which were traffic offenses on federal lands.

Civil Monetary Penalties

When an inspector issues a citation describing a violation of safety rules, the inspector has two enforcement tools available -- imposing civil monetary penalties and requiring abatement of detected hazards. OSHA regulations set out four categories of citations that inspectors may issue:

Violation Type (ranked greatest to least severity)	Minimum Civil Penalty	Maximum Civil Penalty
Willful	$5,000	$70,000
Repeat	$0	$70,000
Serious	$100	$7,000
Other than Serious	$0[10]	$7,000
Unclassified (also known as "Section 17")	None specified	None specified

OSHA's internal guidelines make clear that civil monetary penalties for safety violations should be a major part of its enforcement arsenal:

> The penalty structure…is designed primarily to provide an incentive toward correcting violations voluntarily, not only to the offending employer but, more especially, to other employers who may be guilty of the same infractions of the standards or regulations…Large proposed penalties, therefore, serve the public purpose intended under the Act. Field Inspection Reference Manual ("FIRM") Ch. IV C.1.

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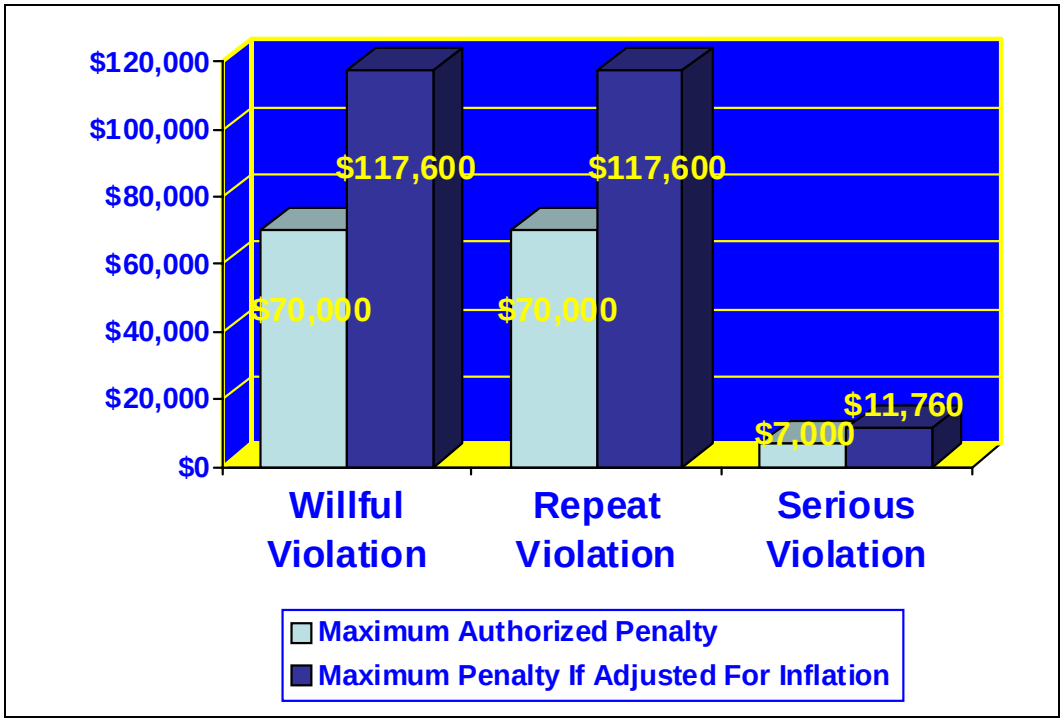
[7] 18 USC 1341
[8] 18 USC 225
[9] 18 USC 1651, 1652, 1653.
[10] Except for violations of employer hazard posting requirements.

OSHA's civil monetary penalty structure is inadequate. The Act authorizes only a maximum $70,000 penalty for a willful or repeated violation, a level that has not changed since 1990. The Inflation Adjustment Act of 1996 required 80 federal agencies to increase civil monetary penalties to account for inflation every four years.[11] Regrettably, OSHA penalties were specifically excluded from this requirement. As the Government Accountability Office noted in 2002, "as of June 2002, [OSHA civil penalties] were 38 percent less than if they had fully kept pace with inflation since 1990."[12] That disparity has since grown to 68%.



The inadequacy of OSHA's penalties is starkly apparent when compared to penalties that other agencies are authorized to impose. For example:

- The Department of Agriculture is authorized to impose a $130,000 penalty for a willful failure to pay, collect, or remit any assessment or fee or for a violation of a program under the Fluid Milk Promotion Act;[13]
- The Environmental Protection Agency is authorized to impose a penalty of $270,000 for violations of the Clean Air Act and a penalty of $1,000,000 for attempting to tamper with a public water system[14]
- The Department of Commerce is authorized to impose a $325,000 penalty for a violation of the South Pacific Tuna Act;[15]

[11] The Act required a one-time reconciliation in 1996, and reassessments every four years thereafter. Pub L. 104-134, Sec. 31001(s)(1), 110 Stat. 1321.373 (1996).
[12] GAO-03-409, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, March 2003.
[13] 7 CFR 3.91
[14] 40 CFR 19.4 for both EPA penalty provisions.

B. *Even Within These Low Limits, OSHA Supervisors Consistently Reduce - By Almost 40% - Penalties Against Employers In Fatality Cases*

Even within this weak civil penalty structure, the agency almost never exercises its full authority. In practice, the agency almost never approaches the low maximum civil monetary penalties. The inspector's issuance of a citation begins a complicated process – mandated largely by OSHA internal guidelines, not by federal law – of internal review, penalty recalculations and discounts. In the majority of cases – including fatalities – this process culminates in a final assessed penalty much smaller than the penalty initially imposed by the front line inspector.

After a workplace fatality, an OSHA inspector[16] investigates to "determine the cause of the event, whether a violation of OSHA safety and health standards or the general duty clause occurred, and any effect the violation had on the accident." OSHA CPL 02-00137, Section X.A. The inspector documents any violations, issues citations for the violations, and assesses monetary penalties. The inspector also sets a date by which the safety hazards must be abated by the employer. In fatality cases, the inspector's immediate supervisor – the Area Director– reviews all investigation materials and any citations issued.[17]

OSHA internal rules require the inspector and Area Director to evaluate whether the employer is eligible for penalty reductions of "as much as 95 per cent depending upon the employer's good faith, size of business, and history of previous violations." The inspectors' guidelines counsel that "up to 60 percent reduction is permitted for size, up to 25 percent reduction for good faith, and 10 percent for history" of previous violations. FIRM Ch. IV.C.2.i.

OSHA guidelines seem to *require* its inspectors and supervisors to calculate these discounts for all violations, including those issued in connection with a fatality, but the Act itself simply states that the Occupational Safety and Health Review Commission

> Shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations. OSH Act § 17(j).

(The Commission's enforcement power is delegated to OSHA inspectors for the purpose of the agency's work.) Thus, OSHA guidelines requiring inspectors and supervisors to calculate discounts are more lenient than the federal law, which simply permits consideration of discounts and is silent on discount amounts.

In practice, agency officials apply these factors to deeply discount the initial penalty. They do so at multiple stages in the process:

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[15] 15 CFR 6.4
[16] Known in agency terminology as a "Compliance Safety and Health Officer," or "CSHO."
[17] See generally, FIRM Ch. II.

1. OSHA requires inspectors themselves to make discount calculations on its template worksheet – so many initial penalties have already been discounted.
2. OSHA supervisors – including area directors, regional administrators, and Department of Labor attorneys[18] – can reduce penalties at any time after issuance, and they often do so after an "informal conference" with the cited employer in exchange for employer acceptance of the citation. FIRM Ch. IV D.1.e., 4.a.3.
3. In addition, if an employer formally contests the citations, these supervisors participate in formal settlement discussions. During these negotiations, agency officials have discretion to reduce assessed penalties.

The downward impact of this process on penalties is significant:

- For all fatality investigations in fiscal year 2007, the median penalty initially assessed by the inspector was $5,900. However, after this penalty went through the review and conference process, **the median final penalty was 38% lower – a drop of $2,225**.[19]
- Even when inspectors cited employers for the most serious kind of conduct in connection with a worker fatality – a "willful" violation, where "the evidence shows either an intentional violation of the Act or plain indifference to its requirements"[20] – the agency reduced monetary penalties by 58%, or $40,600 in the median case. This reduction is particularly striking since willful violations connected to a fatality are the only ones which OSHA can refer for criminal prosecution.
- The agency also reduced penalties assessed for repeat citations in a fatality investigation by the same amount – 58%, or $4,350 in the median case. Such large reductions are disturbing, since they blunt the impact of citations issued to punish employers who were previously cited for the same violation, but failed to correct it, and a worker was killed as a result of a second violation.

On February 7, 2007, a worker at SouthEastern Independent Delivery Services, Inc. in Suwannee, Georgia was crushed to death between two trucks. The inspector found that one of the trucks had not been properly secured and that the employer had not provided appropriate safety training. The inspector issued serious and willful citations and assessed total penalties of $68,600.

In spite of the gravity of these violations, after the company contested the citations, the agency signed a lenient settlement agreement, deleting the serious citation and reducing total penalties by <u>more than 50%</u>, to $34,000.

[18] Department of Labor attorneys are known as Regional or National Solicitors
[19] OSHA nationwide data, including both federal and state enforcement programs.
[20] FIRM, Ch. III, C.2.d.(1)

In November 2006, a worker was killed at a jobsite in Oshkosh, Wisconsin of Lapham-Hickey Steel Company which is headquartered in Wisconsin. The worker "was crushed when a 2,700 pound bundle of steel tubes he was helping to retrieve suddenly fell on him." The inspector assessed three willful violations, one serious violation and one other than serious violation, and imposed total penalties of $217,000.

Less than a month later, however, OSHA supervisors entered into an informal settlement with the employer that reduced the final penalty by 46% to $117,000 and downgraded one of the willful citations to serious.

- In February 2007, an employee at a Houston, TX jobsite of Empire Stevedoring, Inc. was killed after being struck by a 2 ton load of metal tubing that was not properly secured on a forklift. The company was cited for 11 serious violations and five "other" violations. After an informal settlement, OSHA supervisors deleted five of the serious violations and two of the "other" violations and cut total penalties by 70%, from $23,900 to $7,380.
- While conducting the fatality inspection, the inspectors discovered that the company had not reported another fatality on December 16, 2005 caused by the same kind of conduct. The worker was struck in the head by a forklift, sustaining massive brain injuries from which he died several days later. The inspector assessed one serious violation, five other violations, and $10,000 in penalties. As part of an informal settlement, OSHA supervisors deleted two of the other than serious violations and reduced the penalties to $5,400, a 46% cut.
- The next month, OSHA found that Empire violated the same safety standards that caused the February death. The inspector issued 14 serious citations, four other than serious citations, and one repeat citation. Again, as part of an informal settlement, OSHA supervisors deleted four of the serious citations and cut total penalties by 54%, from $17,100 to $7,900.

(Incidentally, the Empire February 2007 fatality presents an example of OSHA data and recordkeeping problems. The initial penalties for this inspection on the IMIS public database total $30,300, yet the initial penalties listed in another part of the record total $23,900.)

The Act does not require that victims of the cited hazard or families of workers who have been killed be allowed to participate in these negotiations or reviews, and families are often excluded from any meaningful participation in the decision to issue, modify, or withdraw a citation. Victim participation would add a needed counterweight to the apparent downward momentum in OSHA supervisory review of penalties.

"In the end, it is still cheaper for these companies to pay the fines than it would have been to do the job according to the original plans. Yet OSHA feels that the fines they have levied will be sufficient motivation for the companies involved to change the careless practices that lead to my brother's death. I am more skeptical."

---Julie Primeau, sister of Christopher Primeau, a 35-year old commercial diver who was killed at work at Cherry Point Refinery located Bellingham, WA. OSHA levied a total of just under $22,000 in fines regarding this accident.

C. *OSHA Supervisors Also Routinely Underrate Safety Violations In Fatality Cases*

OSHA also consistently undermines its front line inspectors by downgrading the severity classifications of penalties. As discussed above, inspectors assign penalties one of five severity classifications, ranging from willful to unclassified. A penalty classification is more than simply a name – more severe classifications are eligible for higher monetary penalty amounts. So when a penalty is downgraded from willful to serious, for example, the maximum monetary penalty is reduced as well. In addition, if an employer is caught violating safety standards in the future, the penalty classifications of *past* violations have a significant impact on the level of penalties, since agency guidelines instruct that a 10% discount "shall be given to employers who have not been cited…for any serious, willful, or repeated violations in the past three years."

OSHA Area Directors can downgrade or withdraw citations at any time after issuance, but they most often do so during the informal conference process with the employer.[21] When these negotiations result in a settlement, the guidelines authorize area directors

> to change abatement dates, to reclassify violations (e.g., willful to serious, serious to other-than-serious), and to modify or withdraw a penalty, a citation or a citation item if the employer presents evidence during the informal conference which convinces the Area Director that the changes are justified. FIRM Ch IV D.4.a.(2).

In 2006, OSHA supervisors downgraded willful citations to a lesser classification 21 times in 17 separate <u>fatality</u> cases, representing <u>22% of all initially assessed willful citations in fatality cases</u>. In other words, more than one fifth of all willful penalties initially cited by OSHA inspectors in fatality cases were downgraded by OSHA supervisors. Supervisors similarly downgraded almost 13% of all repeat citations initially issued by inspectors in fatality cases.

[21] "The employer, any affected employee or the employee representative may request an informal conference. When an informal conference is conducted, it shall be conducted within the 15 working day contest period." FIRM Ch. IV, D.1.a.

OSHA Downgrades of Citation Classifications in Fatality Cases, FY 2006[22]

Initial Penalty Classification	Number of Citations Downgraded	Downgraded Citations as % Of Total Fatality-Related Citations Of That Classification Initially Issued
Willful	23	21.9%
Repeat	6	12.8%

In November 2006, a worker was killed at a Tyson Foods plant in Hutchinson, Kansas by inhalation of toxic chemicals causing asphyxia. The inspector assessed three serious violations, one repeat violation and penalties of $40,000. After the company contested the citations, OSHA settled the case, cutting the final penalty 60% to $16,000, and downgrading the repeat violation to serious, one of the serious violations to other than serious, and deleting another serious violation. (The employer also contested the penalties – see the section below on the effect of contest on penalty amounts)

The next month, another worker was killed at a Tyson Fresh Meats plant in Holcomb, Kansas. The inspector issued two serious citations and one other than serious and assessed total fines of $10,000. After the company contested the citations, OSHA supervisors settled the case by *completely eliminating all citations and penalties.*

The guidelines further authorize officials to make willful and repeat citations disappear by transforming them into a "Section 17" designation.

> If an employer, having been cited as willfully or repeatedly violating the Act, decides to correct all violations, but wishes to purge himself or herself of the adverse public perception attached to a willful or repeated violation classification and is willing to pay all or almost all of the penalty and is willing to make significant additional concessions, then a Section 17 designation may be applicable. Decisions to make a Section 17 designation shall be based on whether the employer is willing to make significant concessions. FIRM, Ch. IV, D.4.a.(2)(a).

The guidelines describe "acceptable concessions" as "a corporate-wide settlement agreement … providing employee training of a specified type and frequency, hiring a qualified safety and health consultant and implementing the recommendations, effecting

[22] Since many FY2007 cases are still in negotiation, conference, or contest – processes which will likely result in penalty downgrades – FY2006 provides a more representative data set.

a comprehensive safety and health program, reporting new construction jobs or other worksites to OSHA, or waiving warrants for specified inspections/periods." The guidelines further instruct that agency officials can make willful and repeat classifications disappear "if the employer has advanced substantial reasons why the original classification is questionable but is willing to pay the penalty as proposed." FIRM, Ch. IV, D.4.a.(2)(b)

"Section 17" designations appear on the employer's record as "unclassified." As a result, if that employer is penalized by OSHA in the future, a larger "penalty history" discount is likely to be applied, since the downgraded past violation will appear as "unclassified," rather than as willful or repeat.[23] This type of downgrade occurred four times in fatality cases in 2006 – three times for willful citations and once for a repeated citation.

OSHA sources have told the Committee that these willful to unclassified downgrades usually occur prior to issuance of citations, when OSHA supervisors and attorneys enter into settlement agreements with employers. These "pre-citation" settlement agreements occur in severe cases when employers seek to settle in a manner in which they admit as little culpability as possible – in exchange, OSHA will demand substantial payment of penalties.

[23] Ch IV, C.i.(5)(c) of the FIRM instructs that, in calculating penalties, "[a] reduction of 10 percent shall be given to employer who have not been cited by OSHA for any serious, willful, or repeated violations in the past three years."

In July 2005, a worker was killed in a trench collapse at a Cincinnati, Ohio construction site of Sunesis Construction Company. The inspector issued thirteen serious and two willful violations and assessed total penalties of $150,500. After the company contested the citations, OSHA settled the case by deleting one willful citation and two serious violations, and reducing the penalties to $80,000, a 47% reduction.

Sunesis was designated as an Enhanced Enforcement Program target, but no followup inspection was conducted at the jobsite where the July fatality occurred.

OSHA conducted two planned inspections at other jobsites in Cincinnati in August and September of that year. In August, an inspector cited a serious violation of the same group of regulations that the inspector found had caused the July fatality – regulations protecting workers working in trenches or "excavations." The inspector issued a $3,500 fine, but, after the company contested the citations, OSHA settled the case by cutting the penalty to $500, an 85% reduction.

In September, the inspector cited the company for two willful and two serious violations, and assessed total fines of $119,000. One of the willful violations was for exactly the same safety standard cited in August. After the company contested the citations, OSHA settled the case, downgrading both willful violations to serious and cutting total fines to a mere $6,500 – an astonishing 95% reduction.

Tragically, in October 2005, another worker was killed in a trench collapse at a nearby Sunesis worksite. Among other violations, the inspector found that the fatality was caused by a violation of exactly the same safety standard for which inspector had issued a serious citation in August and a willful citation in September. All the October 2005 violations were in the same category of standards which the inspector found were violated in the July 2005 fatality investigation.

The inspector issued five serious violations, one willful violation, and assessed $71,750 in penalties. Again, the company contested the citations. In settling the case, OSHA downgraded the willful citation to "unclassified" and reduced penalties to $50,500, a 30% reduction. EEP logs indicate no followup or "related site" inspections for any of these fatalities.

- **OSHA Supervisors Reduce Penalties Even More For Employers Who Contest The Penalty – Employers Who Do So Can Get A "Contest Discount" of 300%.**

OSHA data indicate that employers who contest citations issued in connection with a worker fatality face lower final penalties than employers who do not. In other words, the data indicates that OSHA routinely buckles under the threat of litigation, reducing penalties in settlement more than they would absent a contest. Clearly, this strategy

sends exactly the wrong message to employers – that fighting regulators has concrete financial rewards.

Regulations under the Act entitle cited employers to formally contest "such citation or proposed penalty before the [Occupational Safety and Health] Review Commission." The notice of contest must be sent within 15 working days from the date the employer received the OSHA proposed penalty.[24]

- In 2007, there was a $1,350 difference in the median case between the initial and final penalty amounts assessed after fatality investigations where penalties were uncontested.
- The equivalent difference for contested penalties was $4,020.
    - In other words, employers who contest penalties assessed after a fatality can expect to almost triple their penalty discount – in the median case, an additional discount of $2,670.[25]
    - In the median contested case, this $4,020 discount was more than half of the initial penalty assessed.

It is important to note that this data includes cases that were the subject of a final ruling by an Administrative Law Judge or the independent Occupational Safety and Health Review Commission. Reductions pursuant to these rulings cannot be properly attributed solely to OSHA. However, the number of cases that reach this final order stage is very small.

> In October 2006, a worker was killed at a Martin Block Company worksite in Jackson, Ohio. The inspector assessed one willful citation, fifteen serious citations and one other than serious citation and assessed total penalties of $27,600. After the employer contested the willful citation, OSHA deleted one serious citation and reduced total penalties <u>by half</u> to $13,800.
>
> The employer was designated an EEP target, but no follow up or "related site" inspection was conducted.

In addition, the law allows employers to use the appeal process as a tactic to delay spending the funds to correct safety hazards. The Act provides that, if an employer contests citations, the period for correcting the cited hazard (known as the "abatement period") does not begin to run until the Occupational Safety and Health Review Commission has issued a final order.[26] The abatement period specified by the inspector can often be very short – less than a week – and OSHA guidance instructs inspectors that an "abatement period exceeding 30 calendar days should not normally be necessary, particularly for safety violations." FIRM Ch. IV, A(2)

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[24] 29 CFR 1903.17.

[25] OSHA nationwide data, federal and state enforcement programs.

[26] OSH Act, §10(b) (29 U.S.C 659(b)). A contest petition is first adjudicated by an Administrative Law Judge. The judge's decision becomes a final Commission order unless the Commission chooses to review it.

The Commission and its Administrative Law Judges ordinarily take much longer than 30 days to rule on a contest petition. The Commission's most recent annual report indicates that some cases have been pending for more than two years, and that a major performance goal for Administrative Law Judges ("ALJs") (who adjudicate cases before they reach the Commission) is to resolve cases in less than a year. By filing a contest petition, an employer can postpone expenditures on safety precautions and in some cases avoid such expenditures completely if the relevant worksite will be shut down (or the work completed) before the Commission or ALJ issues a decision.

The only deterrent against filing dilatory contest petitions is the statute's "good faith" requirement, which allows the Secretary to assess penalties for failure to abate pursuant to the original deadline if the contest was not filed "in good faith" but "solely for delay or avoidance of penalties."[27]

The Federal Mine Safety and Health Act, by contrast, requires immediate correction of safety hazards when they are cited by an inspector. If the employer wishes to postpone correction of the hazard, the employer must seek a stay of the agency's order from the Mine Safety and Health Review Commission. The Commission may grant such temporary relief only after a hearing "in which all parties were given an opportunity to be heard," a showing by the employer "that there is a substantial likelihood" that the Commission will find in its favor, and "such relief will not adversely affect the health and safety of miners."[28]

D. ***Employers Fail to Pay Almost Half Of Assessed Penalties and OSHA Fails To Do Anything About It.***

Even after a final penalty has been assessed and contests have been resolved and all that remains is payment, employers whose safety violations caused or contributed to worker fatalities often get away with not paying – simply by doing nothing. Clearly, a penalty which the employer can expect to ignore is the same as no penalty at all, completely undercutting the deterrent effect of monetary penalties. In addition, a substantial number of employers delay payment far beyond the legal deadlines, forcing OSHA to engage in costly debt collection efforts and undermining deterrence.

OSHA data shows that the agency has not yet collected two thirds of penalties assessed after a fatality in 2007 and that almost half – 47.7% -- of <u>all penalties assessed after a fatality since 2004</u> have not been collected.

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[27] *Id.*

[28] Federal Mine Safety and Health Act of 1977, §105(b)(2), 30 USC 815(b)(2)

Employers Who Have Not Paid Penalties In Full After a Fatality[29]

Year Penalty Assessed	Employers With Unpaid Penalties[30]	Employers With Unpaid Penalties As % of All Employers Penalized After Fatality	Dollar Value of Unpaid Penalties	Unpaid Penalties As % of Fatality Penalties Assessed That Year
2004	114	9%	$3,479,499	29.2%
2005	140	10.5%	$4,442,050	34.3%
2006	147	11.3%	$8,283,837	52.1%
2007	215	15.6%	$11,275,402	66.7%
TOTAL	**616**[31]		**$27,480,788**	**47.7%**

These findings deserve emphasis. 114 employers who were penalized *more than three years ago* after a fatality still have not paid their penalties in full. 254 remain in arrears after more than two years, and 401 after more than a year.

Even when employers do pay the penalties, a substantial number delay and pay well after the legal deadline of 30 days.

[29] As of 4/28/08. Data combines penalties from Federal and State OSHA.
[30] Includes employers who are in debt collection, under a negotiated payment plan allowing them to pay penalties in installments after the due date, or whose payment status is less than full but "not determined."
[31] Assumes that the same employer is not in arrears for separate years.

Employers Delaying Payment of Penalties After Fatality As of April 2, 2008

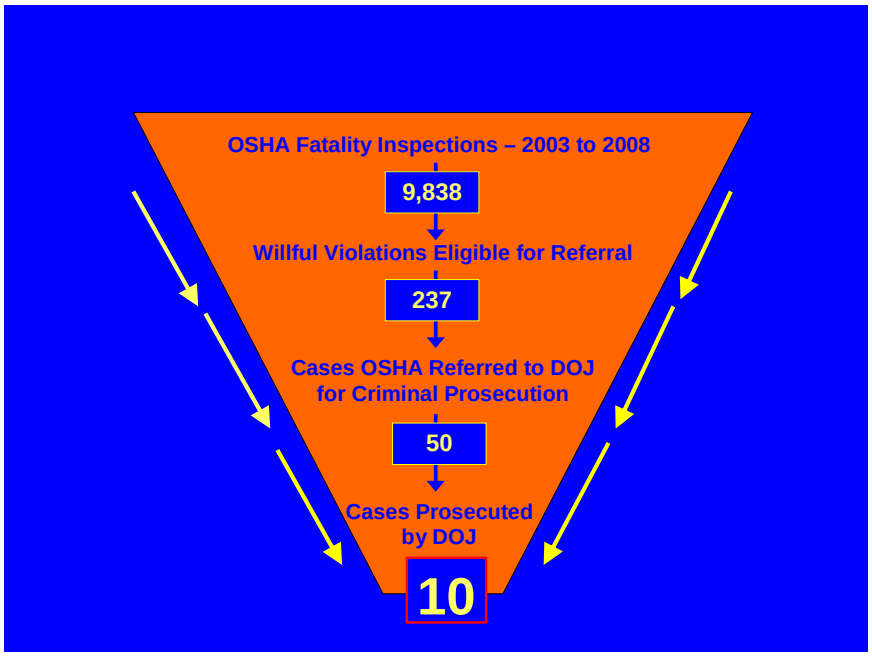
	DELAY OVER 30 DAYS		DELAY OVER 180 DAYS	
	Employers Delaying Payment	**Employers Delaying Payment As % of All Employers Penalized After Fatality**	**Employers Delaying Payment**	**Employers Delaying Payment As % of All Employers Penalized After Fatality**
2004	711	50.2%	310	21.9%
2005	719	48.0%	319	21.3%
2006	661	44.7%	242	16.4%
2007	587	38.4%	147*	9.6%*

* These 2007 numbers will increase, since many FY2007 fatality penalties were issued and/or due less than 180 days before 4/2/08.

2. OSHA Rarely Refers Even The Most Serious Fatality Cases To The Department of Justice for Criminal Investigation

Even given the meager criminal penalties authorized by the Act, OSHA rarely seeks criminal prosecution of the worst offenders, and the Department of Justice prosecutes only a fraction of the cases OSHA refers. As discussed above, given the weak criminal penalties authorized by the Act, federal prosecutors are generally unwilling to expend scare resources in prosecuting them. In consequence, employers face no credible threat of criminal prosecution, eliminating an important element of overall deterrence.

"Section 17(e) of the OSHA Act provides criminal penalties for an employer who is convicted of having willfully violated an OSHA standard, rule or order when the violation results in the death of an employee." April 14, 2005 OSHA Directive, CPL 02-00-137. OSHA guidelines prescribe that these cases should be evaluated for possible referral to the Department of Justice for criminal prosecution.



On June 14, 2002, 22 year-old Patrick Walters was crushed to death while working on a sewer pipe in a 10-foot deep trench. Patrick's employer, Moeves Plumbing of Cincinnati, Ohio, had failed to provide a support structure in the trench and had not sloped the walls as required by federal law. Only two weeks prior, OSHA had caught the company allowing workers to work unprotected in a 15-foot deep trench, issued five serious citations and one willful citation, and assessed fines of $47,500. But these fines were reduced during informal settlement by almost 50% to $24,000. Even more disturbingly, in 1998, another Moeves employee died in a nearly identical manner – buried alive in a deep trench without any safety equipment. For that fatality, the company paid only a $13,700 fine, reduced 40% from the initial level of $22,900.

In Patrick's case, the OSHA inspector issued three serious violations, one willful violation and total fines of $42,500. Four days later, however, in an informal settlement with the company, OSHA downgraded the willful designation to "unclassified" and cut the total fine almost 30% to $30,000. The Walters family wanted the Department of Justice to prosecute the company, but without a "willful" designation the case couldn't be referred for criminal prosecution.

Two years later, OSHA cited the company two more times for a series of repeat and additional willful violations totaling $165,000. However, OSHA once again reduced those fines by 65% to $57,500.

Patrick's father, Jeff Walters, stated **"My son's employer had total disregard for human life. I did my best to get the employer prosecuted but it seemed like OSHA did its best to make sure that the [employer] didn't. People think that OSHA is there to protect them. But once you go through this experience you realize that it's there to protect the employer. You see people die every day and OSHA comes in and gives the employer a gentle slap on the wrist. And then you hear that the employer kills again….Without true consequences, employer's won't change their behavior."**

3. OSHA Doesn't Effectively Use Its Enhanced Enforcement Program To Monitor Employers After Fatalities

In March 2003, OSHA announced a new inspections regime – the Enhanced Enforcement Program ("EEP") – aimed at employers who commit serious safety violations, especially where a fatality or repeated violations are involved. OSHA Director of Enforcement Richard Fairfax described the program in testimony to the House Energy and Commerce Committee in May 2007:

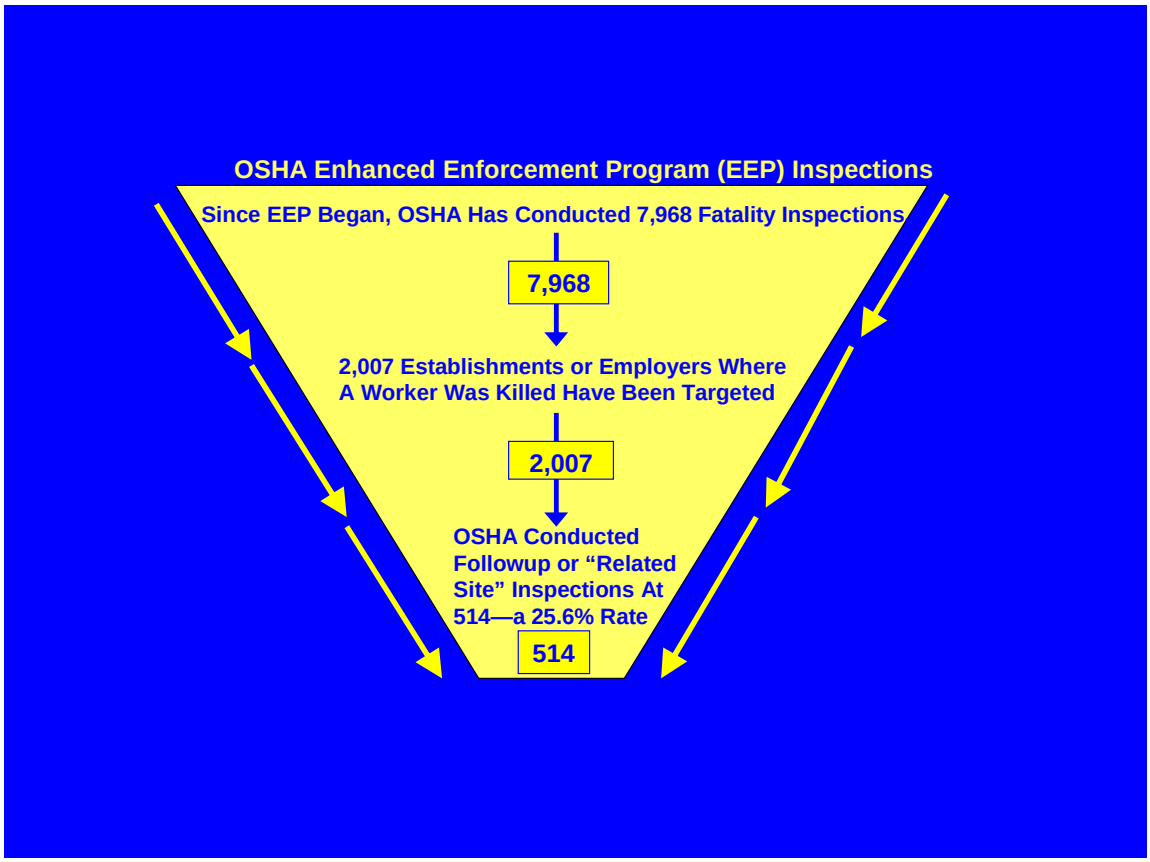
> The OSH Act provides us with the tools we need to deal with companies that have encountered systemic problems at multiple worksites. When OSHA encounters a company that repeatedly ignores its legal obligations and places workers at risk, the agency employs its Enhanced Enforcement Program. This program targets employers, such as BP Products, with serious violations related to a worker fatality or multiple, willful or repeated violations of the law. Since the EEP was launched in FY 2004, OSHA has identified 1844 establishments meeting the criteria defined by the EEP. These establishments were targeted for additional enforcement action. For these employers, OSHA schedules enhanced follow-up inspections, negotiates comprehensive settlement provisions to protect the site's workforce and may conduct inspections of other workplaces of the same employer, as well.[32]

In guidance issued on March 12, 2003, then-OSHA head John Henshaw instructed that followup inspections should be "normally conduct[ed]" at all EEP "establishments that were the subject of a High Gravity Citation Case." The guidance defined this category of cases to include "an enforcement case that has resulted in an OSHA citation with…multiple high gravity serious violations." Fatalities usually trigger citations with the highest gravity rating, and thus OSHA should typically conduct a followup inspection at every employer targeted under EEP after a fatality.

In practice, however, EEP has proven to be a paper tiger. Data maintained by OSHA's national office shows that, of 2,007 employers or establishments where a fatality occurred and the agency designated the company an EEP target, inspectors have conducted

[32] Testimony of Richard Fairfax, Director, Directorate of Enforcement Programs, OSHA, May 16, 2007, Committee on House Energy and Commerce, Subcommittee on Oversight and Investigations, Hearing on the 2006 Prudhoe Bay Shutdown.

followup or "related site" inspections for only 514 of them – a 25.6% followup rate.[33] In other words, this data shows that EEP has not intensified inspections in 1,492 EEP cases that were triggered by a fatality. While agency guidance requires field offices to document the reason why additional inspections are not conducted,[34] only 11% of the fatality EEP cases in OSHA's log reflect such a reason.[35] Even when those cases for which a "no followup" reason is noted are removed from the calculation, the followup rate is still only 33%.



[33] OSHA EEP data as of 4/11/08. After the Committee's request for the EEP log, the Department of Labor submitted an updated log which included 2008 new EEP designations not analyzed here. (Additional follow up inspections are accounted for. For 848 of the 1,492 fatality inspections that OSHA designed as EEP and did not conduct a followup inspection, OSHA's national office did not solicit or collect data from regional offices about the reason for failure to perform a followup.

[34] September 30, 2003 Letter from Deputy Assistant Secretary R. Davis Layne, *Interim Implementation of OSHA's Enhanced Enforcement Program (EEP)*; CPL 02-00-145, *Enhanced Enforcement Program (EEP)*, effective January 1, 2008.

[35] The log data reflects the following reasons for no followup inspection: 58 cases, worksite targeted was closed by time of followup inspection; 18 cases, employer had gone out of business by the time of the followup inspection; 44 cases, "operation/process has been discontinued, or process inactive at workplace;" 3 cases, employer "moved out of area office jurisdiction;" 12 cases, "case no longer meets any of the EEP criteria because citation is withdrawn/vacated;" 29 cases, "EEP violation(s) currently under contest." However, OSHA's public database – checked April 23, 2008 – reflects that *only 9* of the 29 cases that the EEP log notes are under contest are still actually in the contest process.

Unfortunately, in several EEP cases where OSHA did not conduct a follow up or "related site" inspection, another worker was killed at the same employer soon afterwards – sometimes at the *same worksite*.

In September 2004, a worker was killed at a Rome, Georgia worksite of F&P Georgia Manufacturing, which makes motor vehicle components. The inspector issued three serious violations, and one other than serious violation, and assessed total penalties of $13,300. After the company contested the citations, OSHA settled the case by deleting a serious citation and reducing the penalties 50% to $6,650.

The employer was designated an EEP target, but no followup was conducted.

Tragically, a fatality occurred at the same facility less than two years later, in May 2006, when an employee was struck or crushed by a lift truck. The inspector issued a serious violation and assessed $7,000 in penalties. Again, the company contested the citations, and OSHA settled the case by *eliminating all citations and penalties.*

In June 2005, a worker was killed in a fall at an Avalotis Painting Company jobsite in Pittsburgh, PA. (The company is headquartered in Verona, PA.) The inspector assessed nine serious violations and total penalties of $31,200. However, after the company contested the citations, OSHA settled the case by deleting four of the serious citations and cutting penalties by 41% to $18,400.

OSHA designated the company as an EEP target, but no followup was conducted.

In October 2006, another worker was killed at an Avalotis jobsite in Apollo Beach, FL. The inspector assessed two serious violations and $11,200 in penalties. Again, the company contested the citations. OSHA formally settled and eliminated the penalties completely.

Henshaw's 2003 guidance memo also instructed that "other establishments of the same overall corporate employer" should be inspected for EEP targets – this was not done either. (In between these two fatalities, OSHA inspected two New York Avalotis jobsites in response to complaints, not because of EEP targeting or planned inspections.)

In February 2007, OSHA cited the company's Philadelphia jobsite for 14 serious violations and $35,000 in penalties. Again, the company contested the citations, and again OSHA settled the case and cut back the penalties – the agency deleted four violations and reduced penalties 54% to $15,950.

An EEP designation has not disturbed typical agency practice of deeply discounting assessed penalties for fatality inspections. Indeed, even where an OSHA inspector finds safety violations at a followup inspection of a previously designated EEP employer, OSHA continues to apply significant penalty discounts, severely blunting the effect of EEP designation.

In March 2004, a worker was killed in a fall at a Rincon, Georgia construction site of W.G. Yates & Sons Construction Company. The inspector issued two serious violations and assessed total penalties of $9,500. However, after the company contested the citations, OSHA settled the case by deleting a serious citation and reducing the penalties to $5,000.

An "unprogrammed related" inspection was conducted five days after the accident at the Rincon facility (but OSHA's EEP log doesn't indicate any connection to the employer's EEP status.) In that inspection, the inspector issued seven serious and five other-than-serious citations and assessed total penalties of $15,000. After the company contested the citations, OSHA settled the case, withdrawing three serious and three other-than-serious citations and cutting total penalties 66% to $5,000.

Tragically, a fatality occurred at the same facility two months later in May 2004, when another worker was killed in a fall. The inspector issued a serious violation and assessed $7,000 in penalties. Again, the company contested the citations, and again OSHA settled the case, reducing the penalties to $5,000.

OSHA's history with Patterson-UTI Drilling Company, one of the worst violators of workplace safety laws, provides a sobering and instructive example of the agency's complete failure to check reckless and outrageous conduct. Since 2003, 13 workers have been killed at Patterson jobsites **in the state of Texas alone**. OSHA's attempts to stop Patterson from gambling with workers' lives are a study in weakness.

In November 2003, a worker was killed – and several others were "exposed to potential injury and/or death" – after being struck by a heavy piece of machinery at a jobsite in Midland, Texas of Patterson-UTI Drilling Company, which is headquartered in Snyder TX. The Inspector issued three serious citations and assessed $21,000 in penalties. However, after the employer contested the citations, OSHA supervisors settled the case by deleting three of the four violations and reducing total penalties to $7,000, a cut of 66%.

The employer was designated as an EEP target, but no followup inspections were conducted at the Midland jobsite or other Patterson jobsites in Texas between this inspection at the February fatality in Sundown.

Just three weeks later, another worker was killed at a Patterson jobsite in Ponder, TX. No penalties were issued by the inspector.

On January 16, 2004, a worker was killed at a Patterson jobsite in Canadian, TX. The inspector issued a serious citation and penalties of $4,900. After Patterson contested the violations, however, OSHA dropped the citations and penalties completely.

In February 2004, a worker was killed at a Patterson jobsite in Sundown, Texas. The inspector noted that "employees … were exposed to hazards associated with falls from heights of approximately 90 feet and resultant bodily impact with objects located at ground level, created by the improper installation of the Geronimo escape device." The inspector issued five serious violations and assessed $13,500 in penalties. Again, the company contested the citations and OSHA settled the case, reducing the total penalties to $8,500, a 37% cut.

The employer was again targeted under the EEP program, but no EEP followup inspections were conducted either at the Sundown jobsite or other Patterson jobsites in Texas between this inspection and the July fatality in Rhome. OSHA conducted a planned inspection at a site in Wellman, TX in April, but OSHA records show no connection to EEP.

In July 2004, a worker was killed at a Patterson jobsite in Rhome, Texas. The inspector assessed $5,000 in penalties, which OSHA reduced to $4,000 in a settlement after the company contested the citations.

The employer was again targeted under the EEP program, but no followup inspection was conducted at the Rhome jobsite.

OSHA conducted a "programmed planned" inspection on August 17 at a Patterson jobsite in Corpus Christi TX. The inspector issued five serious violations and total penalties of $13,925. However, OSHA supervisors settled the case by downgrading two of the serious violations to other and cutting total penalties by 68% to $4,485. OSHA records show no connection to EEP.

In response to a complaint, OSHA inspected a Patterson drill rig north of Zapata on July 23, 2004. The inspector issued two serious citations and one other than serious citation and assessed total fines of $7,975. After the company contested the citations, however, OSHA supervisors formally settled the case, deleting the serious citation with the highest penalty, thus cutting total penalties by 63% to $2,975. OSHA records show no link to EEP.

OSHA conducted other planned inspections at Troup, TX in December 2004 and Denver City, TX in April and September 2005 at which no violations were issued. OSHA records show no link between these inspections and EEP.

On April 20, 2005, a worker was killed at a Patterson jobsite in Decatur, Texas. The inspector issued two repeat and one serious citations and assessed total penalties of $75,000. However, in settling the case, OSHA supervisors deleted one serious and one repeat citation and cut total penalties by 54% to $35,000. Patterson was cited for identical safety violations in a August 2004 fatality in Oklahoma.

In January 2006, a worker was electrocuted and killed at a Patterson jobsite in Pierce, Texas. The inspector issued five serious citations and assessed penalties of $25,000. Again, Patterson contested the citations, and again in a formal settlement OSHA massively cut total penalties by 80% to $5,000. Patterson was cited for an identical safety violations in a November 2005 fatality in Colorado.

> The employer was again targeted under the EEP program. OSHA records show that a programmed inspection (not a followup through EEP) was conducted a few days after the fatality. It is unclear whether this inspection was part of the fatality investigation, or a separate programmed inspection. After this inspection, the inspector issued nine serious and two repeat violations and assessed $85,000 in penalties. The company again contested the citations, and again OSHA massively cut the inspector's enalties, deleting both repeat citations, one serious citation, and cutting total penalties 82% to $15,000.

In June 2006, a worker was killed and another seriously injured at a Patterson jobsite in Zapata, TX. The employee was killed by pressurized mud and gas ejected from a pipe. The inspector issued five serious citations, two repeat citations, and two other than serious citations and assessed total penalties of $35,500. Again, Patterson contested the citations, and again OSHA supervisors reduced the penalties in a formal settlement by 72% to $10,000 and deleted one serious and one repeat citations. While the inspection is designated EEP on OSHA's public website, it is not listed in the EEP log maintained by the National Office (see e.g. CPL 02-00-145).

> The employer was again targeted under the EEP program, but no followup inspection was conducted at the site. OSHA conducted a planned inspection at a site in Woodlawn, TX on June 15, but OSHA records show no link between these inspections and EEP.

In July 2006, two workers were killed at a Patterson jobsite in Kermit, TX from fatal falls. The inspector issued three serious and six other than serious citations and assessed total penalties of $8,000. Again, Patterson contested the citations, and again OSHA supervisors reduced the penalties in a formal settlement to $2,250, a 72% cut. OSHA also deleted one serious and four other than serious citations. While the inspection is designated EEP on OSHA's public website, it is not listed in the EEP log maintained by the National Office (see e.g. CPL 02-00-145).

> The employer was again targeted under the EEP program, but no followup inspection was conducted at the site.
>
> OSHA conducted an "unprogrammed" inspection of a Bay City, TX site on July 27, 2006. The inspector issued three serious citations, three repeat citations and one other-than-serious citation and assessed $22,200 in fines. The company contested one of the repeat citations, which OSHA deleted in a formal settlement. OSHA supervisors also cut penalties 66% to $7,350. While the inspection is designated EEP on OSHA's public website, it is not listed in the EEP log maintained by the National Office (see e.g. CPL 02-00-145).
>
> On August 9, OSHA conducted a programmed inspection of a Goliad, TX site. The inspector issued three serious citations, one repeat citation, and one other-than-serious citation and assessed total penalties of $15,500. Patterson contested the repeat citation, and, again, OSHA dropped it in a formal settlement. OSHA supervisors also cut total fines by 74% to $4,000.

On August 30, another worker was killed at the Kermit TX Patterson jobsite when a manlift machine caught the leg of the worker and ran over him. No safety penalties were assessed.

The next day, a worker was killed at another Patterson jobsite in Zapata TX. The inspector issued seven serious citations, two repeat citations and seven other-than-serious citation and assessed $57,500 in fines. In the repeat citation, the inspector notes that workers were "exposed to a fall hazard due to the improper installation of the Geronimo emergency escape device" and that this exact violation was previously cited "on 08/11/2004." Patterson had also been previously cited for identical safety violations in the June 2006 and February 2004 fatality investigations.

The company contested the citations, and OSHA supervisors have agreed to reduce the penalties on some violations by 35%. The contest of the largest penalty amounts – including the repeat citations – has been pending for more than a year. While the inspection is designated EEP on OSHA's public website, it is not listed in the EEP log maintained by the National Office (see e.g. CPL 02-00-145).

On September 7, OSHA conducted a programmed inspection of a Taft, TX site. The inspector issued three serious citations, two repeat citations, and one other-than-serious citation and assessed total penalties of $23,500. Patterson contested one of the repeat citations, and, again, OSHA dropped it in a formal settlement. OSHA supervisors also cut total fines by 66% to $8,000.

On November 14, OSHA conducted a planned inspection of a Tarzan TX site. The inspector issued four repeat citations, two serious citations, and assessed $33,000 in penalties. In an informal settlement, OSHA supervisors eliminated the repeat citations, downgrading them to serious and other-than-serious citations, and significantly cut the penalty amount to $9,500, a 71% cut.

On February 27, 2007, OSHA conducted a planned inspection of a Corpus Christi TX site. The inspector issued four serious citations, one repeat citation, and assessed $13,500 in penalties. In an informal settlement, OSHA supervisors deleted one of the serious citations cut the penalty to $9,000, a 33% cut.

On March 1, 2007, OSHA conducted a planned inspection of a Longview TX site. The inspector issued one serious citations and assessed $5,000 in penalties. In an informal settlement, OSHA supervisors deleted one of the serious citations cut the penalty to $3,000, a 40% cut.

On March 8, 2007, OSHA conducted a planned inspection of a Angleton TX site. The inspector issued two serious violations and assessed $2,625 in penalties. After the company contested the citations, OSHA deleted one of the serious citations and reduced total penalties to $562.50.

On March 16, 2007, OSHA conducted a planned inspection of a Crosby TX site. The inspector issued one serious violations and assessed $5,000 in penalties. OSHA supervisors reduced the fines in an informal settlement to $3,750.

OSHA conducted other planned inspections of other Texas drilling sites: Monahanas and Sonora in November, Arp and Miami in December, Troup and Eagle Pass in January 2007, and Tatum in March 2007. No violations were issued in these inspections. OSHA records show no link between these inspections and EEP.

In April 2007, a worker was killed at a Patterson jobsite in Floydada, Texas. The inspector reported that the employer, in repairing broken drill machinery, ordered too few men to work on moving a large piece of equipment. As a result, the men lost control of the equipment and the victim was pulled into operating machinery. "The victim was cut into two pieces and was pronounced dead by the justice of the peace." Patterson was cited for identical safety violations in the June, July and August 2006 fatality investigations.

The inspector issued two serious citations and two repeat citations and assessed total penalties of $23,083. Again, Patterson contested the citations, and again OSHA reduced the penalties in a formal settlement by 49% to $11,792. OSHA also deleted one of the serious citations.

The employer was again targeted under the EEP program, but no followup inspection was conducted.

OSHA's slap-on-the-wrist approach to Patterson has taken an unspeakable toll on Texas workers – 13 workers have been killed since November 2003. In inspections of Patterson's Texas facilities during this period (including fatality inspections), OSHA's frontline inspectors issued **$438, 208 in initial penalties for safety violations**.[36] However, after Patterson contested the citations and OSHA supervisors negotiated and settled cases, Patterson had to pay **only $151,164 in final penalties – a 66% discount from what was initially assessed**.

Secretary of Labor Elaine Chao strongly denounced Patterson's safety record after a worker was killed in at a Patterson facility in Chickasha, Oklahoma in August 2004. The inspector found that the company had "refused to remove a defective forklift from service which resulted in the death of one worker and serious injury to another."[37] There had been no OSHA inspections of Patterson jobsites in Oklahoma since 2001. The OSHA inspector issued two willful, one serious and two repeat violations and assessed $217,000 in penalties.

In a February 2005 press release, the Secretary said "[t]his tragic loss of life should in itself spur the employer to take greater precautions to protect workers. To increase worker protection, this Administration will continue to use strong enforcement to reduce workplace injuries and illnesses."

Ironically – but not surprisingly – a month after Chao's ringing statement, the company contested the penalty and – like all of the other Patterson citations examined here – OSHA settled the case for a fraction of the originally assessed penalty. **The agency deleted one of the serious violations, downgraded both willful violations to serious, and cut the penalty by more than half to $91,000.**

[36] This total, as well as the final penalties number, does not include penalties assessed in the August 31, 2006 Zapata fatality investigation, for which a contest petition is still pending.
[37] US Fed News, 2/11/05

4. Weak OSHA Enforcement Can Have Long-Term, Sometimes Tragic, Consequences

In case after case, OSHA inspectors have discovered and penalized employers for safety hazards identical or very similar to the hazards that later caused a worker fatality. But far too often, OSHA supervisors drastically reduced the penalties and classifications issued in these early inspections, blunting their deterrent force. These cases tragically illustrate the consequences of diluted enforcement, even when a fatality is not involved. If employers felt the full force of OSHA financial penalties when they first broke the rules, they might have acted to reduce or prevent future deaths.

- In January 2007, a worker was killed at a Big Dog Demolition worksite in Durham, NC. The inspector assessed three serious violations and one other. After informal settlements, OSHA deleted one serious violation and reduced the penalties from $9,450 to $3,675, a 61% cut.

- Four months later in May, a worker was killed at an Augusta, GA jobsite of Big Dog Demolition (headquartered in Marietta, GA). The inspector assessed three serious violations and two other violations. After an informal settlement, OSHA reduced the penalties from $13,300 to $11,000, a cut of 18%.

- OSHA previously penalized the company twice for the same safety violations, and substantially reduced penalties in each case.
    - In November 2005, a Big Dog jobsite in Charlotte, NC was cited with five serious violations. After a formal settlement, OSHA deleted three serious violations and reduced penalties from $4,375 to $1,750, a 60% cut. Several of the citations were for violations of exactly the same safety standards that the inspector found caused the fatality in May 2007.
    - In March 2003, a Big Dog jobsite in Albany, GA was cited for a serious violation. After an informal settlement, OSHA reduced the penalty from $1,225 to $918, a 25% cut. The citation was for violation of the same category of safety standards that the inspector found caused the fatality in May 2007.

In February 2007, a worker was killed in a fall at a Toledo, OH jobsite of Daimler Chrysler Corporation when his neck was broken after he was caught in a roller conveyor system. The inspector assessed two serious violations, one repeat violation and $17,500 in total penalties. The inspector cited Daimler for failing to properly safe guard ladderway openings and an open-sided platform with railing. After informal settlement, OSHA deleted one of the serious violations, and downgraded serious and repeat violations to other-than-serious. Total penalties were reduced 85% to $2,500.

OSHA had previously penalized Daimler Chrysler for the same safety hazard at the same worksite.

- In November 2004, OSHA inspectors cited the Toledo plant for 14 serious violations, two repeat violations, and two other than serious, assessing total penalties of $67,500. Two serious citations were for failing to properly guard an open floor or platform area with railing, and creating a serious fall hazard—the same violations cited in the February 2007 fatality investigation. After informal settlement, OSHA downgraded one repeat violation to serious and another repeat violation to other-than-serious and deleted a serious violation. Total penalties were cut 53% to $31,750.
- The Toledo worksite had been repeatedly cited for other violations, all of which were reduced by OSHA supervisors:
    - In July 2002, the company was cited for one serious violation and assessed $3,500 in total penalties. After informal settlement, OSHA changed the serious violation to other and reduced the penalties to $1,500, a 51% reduction.
    - In August 2002, the company was cited for two other violations and no penalties were assessed. After informal settlement, OSHA deleted one of the violations.
    - In October 2004, the company was cited for three serious violations and one other violation, and was assessed $6,750 in total penalties. After informal settlement, OSHA deleted one serious violation and reduced the total penalties to $2,300, a 66% reduction.
    - January 2006, the company was cited for one other than serious violation and assessed $1,000 in total penalties. After informal settlement, OSHA reduced total penalties to $600, a 40% reduction.

CONCLUSION

The data examined here demonstrate manifold weaknesses in both workplace health and safety laws and OSHA's enforcement of those laws. Congress must take immediate action to close the gaps in the law, strengthen its enforcement, and encourage an OSHA culture of persistent, firm enforcement.

The Protecting America's Workers Act, S.1244 addresses each of the problems identified in this report. It amends the Act to cover more workers, increase penalties, strengthen protections, and enhance public accountability.

Cover more workers.

- Over 8.5 million American workers are not covered by OSHA's protections. These include federal, state, and local public employees, and many private sector employees.

- The bill provides OSHA protections to these workers, who include flight attendants, state correctional officers, and employees in government agencies.

Increase penalties for those who break the law.

- The bill authorizes felony charges for an employer's repeated and willful violations of OSHA that result in a worker's death or serious injury.

- The bill updates OSHA's civil penalties, at which have been unchanged since 1990, and sets a minimum penalty of $50,000 for a worker's death caused by a willful violation.

Protect workers who blow the whistle on unsafe conditions in the workplace.

- OSHA's whistleblower provisions have not been updated since their adoption in 1970.

- The bill updates those whistleblower protections by incorporating successful administrative procedures adopted in other laws, such as the Surface Transportation Act.

Enhance the public's right to know about safety violations.

- The bill improves public accountability and transparency:
    - Mandating that the Department of Labor investigate all cases of death or serious injury.
    - Giving workers and their families the right to meet with the Department of Labor investigators.
    - Requiring employers to inform workers of their OSHA rights.