



July 9, 2010

Honorable George Miller
Chairman
Committee on Education and Labor
House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Miller:

The American Industrial Hygiene Association (AIHA) would like to take this opportunity to provide comments on your legislation, HR 5663, known as the “Miner Safety and Health Act of 2010. AIHA commends you and the cosponsors of this legislation for your continued interest in the health and safety of miners and workers in other workplaces, an issue that impacts every family in America. We are aware that any legislation amending the Mine Safety and Health Act and the Occupational Safety and Health Act will undergo considerable discussion. It is our hope that our comments will assist in these efforts.

AIHA is the premier association serving the needs of professionals involved in occupational and environmental health and safety. We represent members practicing industrial hygiene in industry, government, labor, academic institutions, and independent organizations. AIHA and our members are committed to protecting and improving worker health and safety, and the health, safety and well-being of everyone in our communities. One of AIHA’s goals is to bring “sound science” and the benefit of our collective professional experience as practicing industrial hygienists to the public policy process directed at improving regulatory protections for worker health and safety.

It is unfortunate that one of the reasons for introduction of this legislation is the tragedy that occurred at the Upper Big Branch coal mine where 29 workers lost their lives. It is just as tragic that 11 workers were lost in the Deepwater Horizon oil rig explosion in the Gulf of Mexico and that just over 5,000 worker deaths are reported each year in the United States. The number of worker fatalities shows us the need to put our full attention and resources behind efforts to protect each and every worker.

AIHA is aware that the major focus of HR 5663 is to amend the Mine Safety and Health Act and provide major reform in response to serious health and safety concerns raised by miners and their families. As you stated “these reforms would provide stronger oversight to ensure that employers comply with the law, empower workers to speak up about safety concerns and give the Department of Labor the tools it needs to ensure that all workers go home safely at the end of the day”.

While AIHA is supportive of your efforts to reform the Mine Safety and Health (MSH) Act, we are also pleased you have included within HR 5663 some of the major reform measures proposed for the Occupational Safety and Health (OSH) Act. Many of these reforms were found in HR 2067, the Protecting America's Worker Act. Introduction of HR 5663 is another in a long line of legislative measures that attempts to provide the Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA) with a fresh look at various issues.

With this in mind, AIHA would like to provide the following comments:

REFORMS TO THE MINE SAFETY AND HEALTH ACT

The responsibilities of AIHA members fall predominately under the rules and regulations of the Occupational Safety and Health Act, yet we have numerous members who work within the context of mine worker safety and health. In addition, AIHA members work to protect the safety and health of all workers, so our interest in proposals to reform the Mine Safety and Health Act is of importance.

In reviewing the mine reform provisions of HR 5663, AIHA offers our support for the following reforms to miner health and safety:

- Making Mines with Serious and Repeated Violations Safe – Criteria for 'pattern of violations' sanctions should be revamped to ensure that the nation's most dangerous mine operations improve safety dramatically.
- Ensuring Irresponsible Operators are Held Accountable – Maximum criminal and civil penalties should be increased and operators should be required to pay penalties in a timely manner.
- Giving MSHA Better Enforcement Tools – MSHA should be given the authority to subpoena documents and solicit testimony. The agency should be allowed to seek a court order to close a mine when there is a continuing threat to the health and safety of miners. MSHA should require more training of miners in unsafe mines.
- Protecting Miners Who Speak out on Unsafe Conditions – Protections for workers who speak out about unsafe conditions should be strengthened and should guarantee that miners wouldn't lose pay for safety-related closures. Miners should be provided protection from dismissal unless the employer has just cause. Miners should also receive protections allowing them to speak freely during investigations.
- Updating Mine Safety Standards to Prevent Explosions: Outdated standards need to be updated and new standards on issues such as combustible dust need to be considered. New monitoring technology needs to be promoted.
- Increasing MSHA's Accountability – MSHA must assure independent investigation of the most serious accidents, require that mine personnel are well qualified, and ensure that inspections are comprehensive and well targeted.

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AMENDMENTS TO THE OCCUPATIONAL SAFETY AND HEALTH ACT

Over the course of the last fifteen years there have been numerous attempts to amend the Occupational Safety and Health Act. Other than a very few minor amendments, nearly every attempt ended in failure because of the inability of labor, industry and other stakeholders to reach an agreement on the kind of changes necessary and how best to make those changes. The result has been the continuation of an agency agenda that has become nearly impossible to complete. A lack of adequate funding, a shortage of personnel and a standard-setting

process that many believe is “broken” has resulted in a view by most employees and employers, as well as occupational safety and health professionals, of an agency that was losing its focus in an attempt to protect workers. It is our hope that the proposed changes in HR 5663 will alter this view.

Inclusion of several reform proposals in HR 5663 is another in a long line of legislative measures that attempts to provide the agency with a fresh look at various issues. With this in mind, AIHA would like to provide several comments on the provisions of HR 5663 that would amend the Occupational Safety and Health Act.

SECTION 701. ENHANCED PROTECTION FROM RETALIATION.

AIHA supports efforts to provide whistleblower protections to employees reporting any injury, illness, or unsafe condition to the employer. For those employees who report such conditions, employees should not face retaliation nor should an employee be required to perform any employer work if the employee has a reasonable apprehension that performing such duties would result in serious injury to, or serious impairment of the health of the employee or other employees.

SECTION 703. CORRECTION OF SERIOUS, WILLFUL, OR REPEATED VIOLATIONS PENDING CONTEST AND PROCEDURES FOR A STAY.

AIHA supports efforts to protect workers by requiring correction of a hazard during such time that a citation for a serious, willful, or repeated violation has been filed yet is being contested by the employer.

However, for those employers who file a notice of contest of the citation and request a stay of correction of the hazard, AIHA supports language that would provide the employer with the means to demonstrate likelihood of success on its contest to the citation, the employer will suffer irreparable harm absent a stay, or a stay will adversely affect the health and safety of workers.

SECTION 705. CIVIL PENALTIES

SECTION 706. CRIMINAL PENALTIES

There continues to be much debate on whether or not civil and criminal penalties are adequate to deter health and safety violations. While most employers are “doing the right thing” with investment in healthy and safe workplaces, there are still too many who avoid this investment in their workers because they feel the investment is not worth the cost. It is these employers who must be educated about the benefits of providing a safe and healthy workplace, and if education does not affect their decision-making behavior, they must be held accountable for making decisions that injure, kill, or sicken workers.

For many, the minimal penalties for health and safety violations are a small price to pay and do not affect their decision making. It’s just a small cost of doing business.

Over the course of the last ten years, there have been numerous bipartisan legislative proposals to amend the OSH Act to increase the penalty provisions, both civil and criminal, for those who violate OSHA rules and regulations that result in serious injury or a workplace fatality. While these proposals have not made their way into law, it goes without saying that the sponsors of these measures all had the same goal – to assure the health and safety of every worker.

In a position statement and white paper first adopted by AIHA more than ten years ago, AIHA stated that “OSHA penalties, including criminal penalties, are woefully inadequate and should be at least as stringent as penalties for violations of environmental laws.” AIHA’s position on this issue has not changed over the years.

Amending the OSH Act to address the issue of civil and criminal penalties is long overdue. AIHA supports increasing the penalties for both civil and criminal penalties.

Civil Penalties.

AIHA supports the increase in civil penalties as outlined in HR 5663.

In addition, AIHA supports language in HR 5663 that considers the employer’s history of violations and would provide for additional monetary increases in civil penalties if a willful or repeated violation caused or contributed to the death of an employee.

Criminal Penalties.

Under the “Protecting America’s Worker Act” (PAWA, HR 2067), an employer could not be convicted under the criminal law unless that employer has acted “willfully” and such willful act caused the death or serious injury to a worker. This would require proof that an employer knew not only that its actions were wrong, but that they were unlawful as well. This “willful” standard is not a familiar one in the criminal law context and the norm is to require a “knowing” standard of proof in which an actor knows that his or her conduct was wrong. Under this standard, employers cannot escape liability by claiming that they did not know what the law required. Note: under either standard a prosecutor would still have to prove that an actor is guilty beyond a reasonable doubt.

AIHA is pleased that proposed language in HR 5663 would change a “willful” act to “any employer who knowingly violates”. AIHA supports this change.

Another proposed change in HR 5663 as compared to PAWA would alter the definition of an employer who would be subject to criminal penalties from “any responsible corporate officer” to new language stating “any officer or director”. Under current law, only a corporation or sole proprietor can be liable for criminal penalties. The language in HR 5663 broadens this definition so high-level officials (individuals) who act criminally can be prosecuted. This change clarifies that the criminal penalties can reach up to the higher levels of a company, providing that an officer or director who has engaged in criminal conduct that causes the death or serious injury to a worker can be prosecuted.

Finally, AIHA supports language that would increase a criminal penalty violation from a misdemeanor, resulting in minimal penalties, to a felony.

Consistent and substantial penalties are one of society’s primary means to deliver some measure of justice and improve conditions that affect public health and worker health and safety. However, criminalizing willful violations through changes in the regulations must be carefully considered and applied. The standard of evidence for willful violations will have to be higher than it is today and OSHA and MSHA inspectors will need increased training and skill development to meet the level of evidence required.

AIHA supports OSHA’s efforts to ensure compliance officers achieve professional certification as CIHs and CSPs. A similar effort is needed of MSHA inspectors. Establishing criminal violations needs to be based on the weight of evidence collected and evaluated by health and safety professionals using a variety of information sources, both quantitative and qualitative. It

is essential that the regulatory process provide for carefully considering the complex conditions affecting risks in the workplace and the determination of risk at a given point in time.

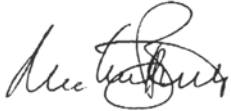
Conclusion

AIHA applauds your efforts and sincerely hopes you will be successful in your endeavor to advance the cause of worker health and safety. We hope the input we have provided will be of benefit to you during the upcoming discussions and debate on MSHA and OSHA and the efforts to protect workers.

AIHA offers our full assistance to Congress, OSHA, MSHA, and others to deliver the standards, regulations, compliance assistance and enforcement necessary to help achieve our mutual goal to provide workers and communities a healthy and safe environment and the prevention of occupational disease and injury.

Should you require additional information about AIHA or if we can be of any further assistance to you, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael T. Brandt". The signature is fluid and cursive, with the first name "Michael" and last name "Brandt" clearly distinguishable.

Michael T. Brandt, DrPH, CIH, PMP
AIHA President

cc: AIHA Board of Directors
Peter O'Neil, AIHA Executive Director