TESTIMONY

OF

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BEFORE THE

WORKFORCE PROTECTIONS SUBCOMMITTEE

OF THE

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ON

"Unsafe and Untenable: Examining Workplace Protections for Warehouse Workers"

On November 17, 2022

Good morning, Chair Adams, Ranking Member Keller, and members of this Subcommittee. I am grateful for the opportunity to speak before this Subcommittee on this issue today.

I am Manesh Rath. I am a partner at the law firm Keller and Heckman LLP, here in Washington, D.C. In large part, my practice is centered upon occupational safety and health (OSHA) law. For twenty-seven years in practice, I have represented industry groups and employers in collaborating with labor, professional associations, the scientific community, and government to develop and maintain a safer and more healthful workplace. I have taught several thousand safety and health professionals, labor-management professionals, attorneys, and university students on matters involving OSHA law, litigation, employment law, and legal ethics. With a few esteemed OSHA law attorneys, I have served on the panel of authors and editors of two authoritative books in the field of OSHA law.

In my testimony today, I am expressing only my own understanding of the fields of occupational safety and health law and administrative law. I am not here as a representative of my firm, any of our clients, or any other interest.

1. An Employer's Internal Injury and Illness Data Forms A Part of An Ongoing Feedback Cycle That Leads to Self-Driven Improvements in Safety and Health

An employer's internal injury and illness data contributes to a feedback cycle whereby an employer can detect patterns, underlying causation, and other contributors. This feedback better enables the employer to develop and implement interventions, improving workplace safety and health.

The U.S. Bureau of Labor Statistics notes that employers can use their own injury and illness data for the purposes of education and prevention.[1] While the concept of isolating a root cause is of debatable merit, nevertheless employers strive to understand contributing factors and search for effective interventions.

2. Using Its Own Data, the Warehousing and Distribution Sector Has Implemented Numerous and Intensive Improvements In Safety and Health, Leading to Significant Reductions in Injuries and Illnesses

Employers in the warehousing and distribution sector have benefited from careful, introspective examination of internal injury and illness data. On that basis, in our work we have observed that employers have devised a number of improvements, both to their physical plants and to the administrative practice of their operations, which, in our observations of those worksites, has led to significant reductions in workplace injuries and illnesses. Here are some examples:

- Employers in the warehousing and distribution sector have concluded that a slow acclimatization to job tasks that involve materials handling can significantly reduce the onset of work-related musculoskeletal disorders. While in the short term this is by no means the most productive method of onboarding workers, warehouse and distribution employers embrace this approach for its safety and health benefits.

- Increased and improved educational programs have led to reductions in injuries and illnesses in the warehouse and distribution sector. Again, while this can be costly, employers in this sector have adopted it for its safety and health benefits.

- Some employers have implemented a buddy system, assigning workers to perform tasks in pairs. In some cases, this buddy system imposes, as a job duty, a responsibility for each other's safety. In other cases, a buddy system assigns more experienced employees to newer hires so that safe procedures can be taught and reinforced for periods much longer than a workers' initial safety orientation and job education.

- Many employers that we have worked with have embraced the use of periodic breaks and start-of-shift warm-up exercises in an effort to reduce the risk of workplace injuries associated with materials management.

- Employers in warehousing and distribution have installed costly ergonomic adaptations to the workplace. These include the use of conveyor systems; weight-bearing picking hoist arms; hydraulic-lift adjustable lift tables and work surfaces; hydraulic and powered forklifts and scissor lifts; and mechanical and powered pallet trucks and stackers.

- In addition, some employers in warehousing and distribution that are among the most dedicated to workplace safety and health are using or examining the costly use of machination, robotics, and other forms of automation for those tasks that have the highest statistical case for injuries.

[1] William J. Wiatrowski, "Using workplace safety and health data for injury prevention," Monthly Labor Review, U.S. Bureau of Labor Statistics, October 2013, https://doi.org/10.21916/mlr.2013.34

These examples form a part of warehousing and distribution employers' continuous cycle of interventions, internal data collection, evaluation of efficacy, and rededication to additional or improved interventions.

Indeed, neither OSHA nor this Subcommittee can generate any rule, requirement, enforcement or other intervention that could hope to rival the effectiveness, scale, cost, and speed of the interventions already underway or being considered by employers in the warehousing and distribution space.

3. Overall, Injuries, Illnesses, and Fatalities in the Workplace Have Been Declining For the Past Eight Decades

Data trends, when they are presented over a short interval, must necessarily be greeted with skepticism, for the brief interval clearly signals the possibility of data cherry-picking. Additionally, 2020 was an anomalous year. The pandemic led to skewed injury and illness rates due to reported cases of COVID-19. Therefore, any change in data between 2020 and 2021 will necessarily fail to support any reliable conclusions about workplace safety.

The long-term national statistics, however, present evidence that leads to an unmistakable conclusion: employers in all sectors have successfully reduced the number of non-fatal injuries and illnesses continuously for more than the past fifty years. See Appendix at Table 1.[2]

With respect to workplace fatalities, transportation, or motor vehicle related fatalities, contribute the largest fraction of fatalities in the sector; thus, when examining safety and health inside the warehouse, the fraction of any sector-based statistics that derives from motor vehicle fatalities should be parsed out in order to better understand hazards inside the warehouse or distribution facility. See Table 2.

The rate and total number of work-related fatalities, like non-fatal injuries and illnesses, have steadily declined, regardless of the time scale being examined. See Appendix at Table 3.[3] While changes to the size of, and disruptions within, the labor pool may create fluctuations from one year to the next in total fatalities, the fatality rate, over time, has thankfully experienced ongoing decline. See Table 3. Even OSHA has stated the same, noting that the workplace fatality rate is now one third of the figures experienced fifty years ago.[4]

This national trend is also prevalent in the warehouse and distribution sector. While the number of warehouses has doubled in the past decade, and employees in the sector have doubled from 645,200 in 2010 to 1,304,900 in 2020, (see Appendix at Table 4)[5] the total number of non-

[2] Jeff Brown, "Nearly 50 years of occupational safety and health data," Beyond the Numbers: Workplace Injuries, vol. 9, no. 9 (U.S. Bureau of Labor Statistics, July 2020), https://www.bls.gov/opub/btn/volume-9/nearly-50-years-of-occupational-safety-and-health-data.htm

[3] See BLS chart at Appendix at Tables 1-3. See also Work-related Fatality Trends, National Safety Council, 2021, available at https://injuryfacts.nsc.org/work/work-overview/work-related-fatality-trends/

[4] See Occupational Safety and Health Administration's Commonly Used Statistics, available at https://www.osha.gov/data/commonstats

[5] See: U.S. Bureau of Labor Statistics, Databases, tables, & Calculators by Subject.

transportation fatalities in warehousing has remained relatively steady, increasing by only 9 additional fatalities during that time.[6] This data, when adjusted for growth in the industry and after removing motor vehicle accidents, indicates that the fatality rate has been decreasing over time in the warehousing and distribution sector.[7] This indicates that, while motor vehicle safety presents the largest opportunity for reducing workplace fatalities, attention needs to be paid with specificity to in-warehouse fatalities and their causative factors in order to better apply resources to those hazards which may have a contributing effect.

Unsurprisingly, the long steady reduction in workplace fatalities precedes the advent of the Occupational Safety and Health Administration, indicating that the reason for the ever-safer American workplace can be credited to employers, and not to OSHA's agency intervention. See Appendix at Table 5.[8]

4. Warehouse Work Speed and Worker Safety Can Co-Exist

Work acclimatization, proper education, administrative interventions like breaks, start-of-shift warm-ups, and other interventions are widely believed by employers in the warehouse and distribution sector to have a beneficial effect on safety and health. However, there is no or poor evidence to support an assertion that worker speed affects worker safety. On the contrary, one of the largest and most reliable studies ever conducted indicates that employers can increase work speed while dramatically reducing injury rates. A pilot study, conducted by The National Advisory Committee on Microbiological Criteria for Foods, began in 1997 and involved 20 chicken processing plants.[9] This was called the Hazard Analysis and Critical Control Point (HACCP) Inspection Models Project (HIMP).[10] While the study's objective was to test alternatives for food inspection, the data revealed something else of great interest to workplace safety.[11] As part of the study, the processing plants increased their line speed from 140 birds per minute (BPM) to 175 bpm.[12] What the committee discovered was that, although line speed increased by 25 percent, the incidence of workplace injuries and illnesses declined by 86 percent.[13]

Series ID: CES4349300001. All employees, thousands, warehousing and storage, seasonally adjusted, January 2012 to January 2022. See also: Fady Attia, Five Insightful Statistics Related to Warehouse Safety, January 5, 2021, Damotech, available at https://www.damotech.com/blog/5-insightful-statistics-related-to-warehouse-safety

[6] id.

[7] News Release, Bureau of Labor Statistics, U.S. Department of Labor, USDL-21-2145, "National Census of Fatal Occupational Injuries in 2020," at Table 3.

[8] Marian L. Tupy, The market is the real driver of better working conditions, Sep. 16, 2018. Foundation for Economic Education, available at https://fee.org/articles/workplace-fatalities-fell-95-in-the-20th-century-who-deserves-the-credit/

[9] FDA, HACCP Principles and Application Guidelines, August 14, 1997, available at https://www.fda.gov/food/hazard-analysis-critical-control-point-haccp/haccp-principles-application-guidelines

[10] id.

[11] National Chicken Council, Poultry Line Speeds: What are poultry processing line speeds? Are line speeds in the U.S. regulated by the government? Are faster line speeds unsafe for poultry processing workers? available at https://www.chickencheck.in/faq/poultry-line-speed/

[12] id

[13] id.

This dramatic improvement in worker safety, occurring concurrent with increases in line speed, was achieved through continued improvements implemented by employers, such as improved machine guarding, improved designs to personal protective equipment, increased use of automation, and intensive worker educational programs.[14] These are the same interventions that have been studied and implemented – and which will continue to be improved upon - in the warehousing and distribution sector.

In sum, an employer can innovate to find ways to improve both operational efficiency and worker safety, as indeed it has a duty to maintain excellence in both.

5. OSHA Can Play a Valuable Role In Improving Safety and Health in Warehousing and Distribution Through Consultation and the Issuance of Practical Guidance

The U.S. Occupational Safety and Health Administration has a valuable role to play in improving safety and health in warehouse and distribution establishments. OSHA can assist in worker safety through consultation with employers; the development of practical guidance; and industry alliances.

While OSHA's performance standards set forth a safety objective, a required endpoint, and leave the method of achieving it up to the employer to figure out, by contrast guidance documents can provide more practical input into specific measures that employers can consider. During the COVID-19 pandemic, for example, OSHA issued at least twenty guidance documents, and translated them into fourteen additional languages. It accomplished this within a matter of a few months; by contrast, it can take a couple of years or more to promulgate a single standard. OSHA should therefore consider the value that it can add by sharing industry practices through the development of guidance documents.

OSHA has developed a consultation program, one which it currently underfunds and often overlooks. Yet consultation with industry creates a collaborative relationship that can solicit the acquired knowledge of management, employees, and the agency. This program should be revitalized to better serve the common objective of improving safety and health in the warehouse and distribution sector.

Over the years, OSHA has engaged in dozens of alliances with industry groups. In these alliance arrangements, the agency and industry groups have exchanged information and collaborated on the development of safer practices that are industry specific. This Subcommittee can encourage the agency to enter into an alliance with groups representing and attended by the warehousing and distribution sector.

These suggestions present OSHA with opportunities to improve warehouse safety and health that are collaborative – and they are also preventative rather than remedial.

[14] Id.

6. Conclusion

Any endeavor to understand and improve the safety and health of workers in the warehouse and distribution sector should begin by learning about the significant improvements that employers in this sector have already implemented, and by evaluating the impact of those interventions.

As I have testified herein, my observation of the distribution and warehousing industry is that employers in that sector have utilized their own internal injury and illness data to advance safety and health in the workplace. Employers in this sector have developed and implemented thoughtful and impactful interventions to improve worker safety. As a result, they have succeeded in presiding over significant reductions in worker injuries and illness.

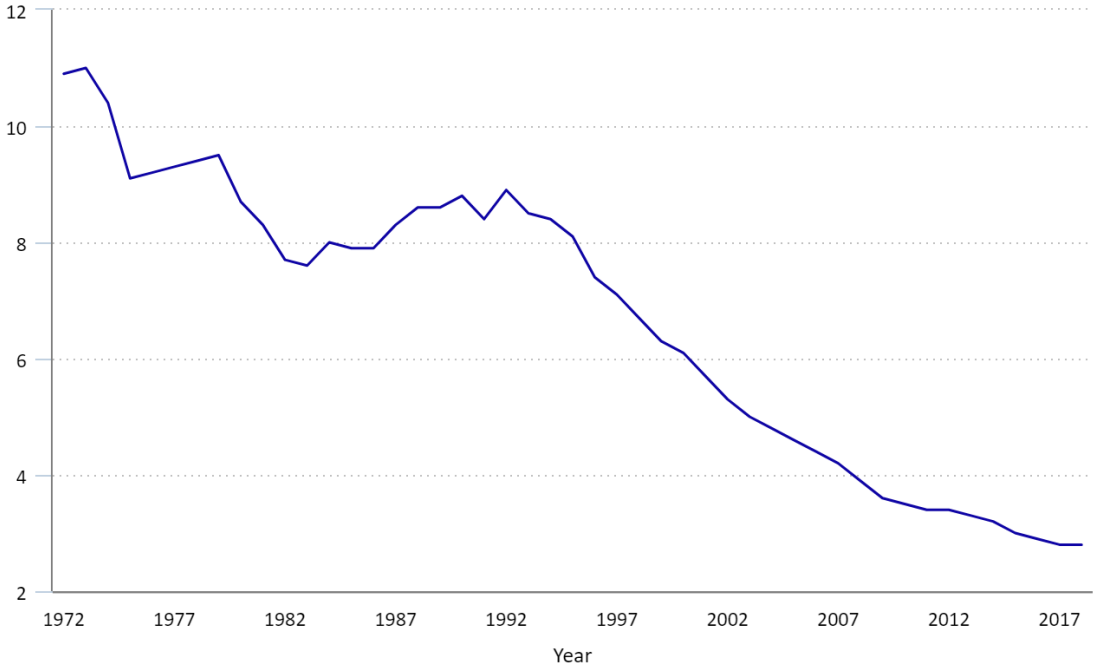
OSHA can play a valuable role in this process by providing consultation services, issuing guidance, and by sharing practices between employers that have been successful.

Thank you for the opportunity to appear before this Subcommittee. I look forward to addressing any questions you may have.

APPENDIX

TABLE 1

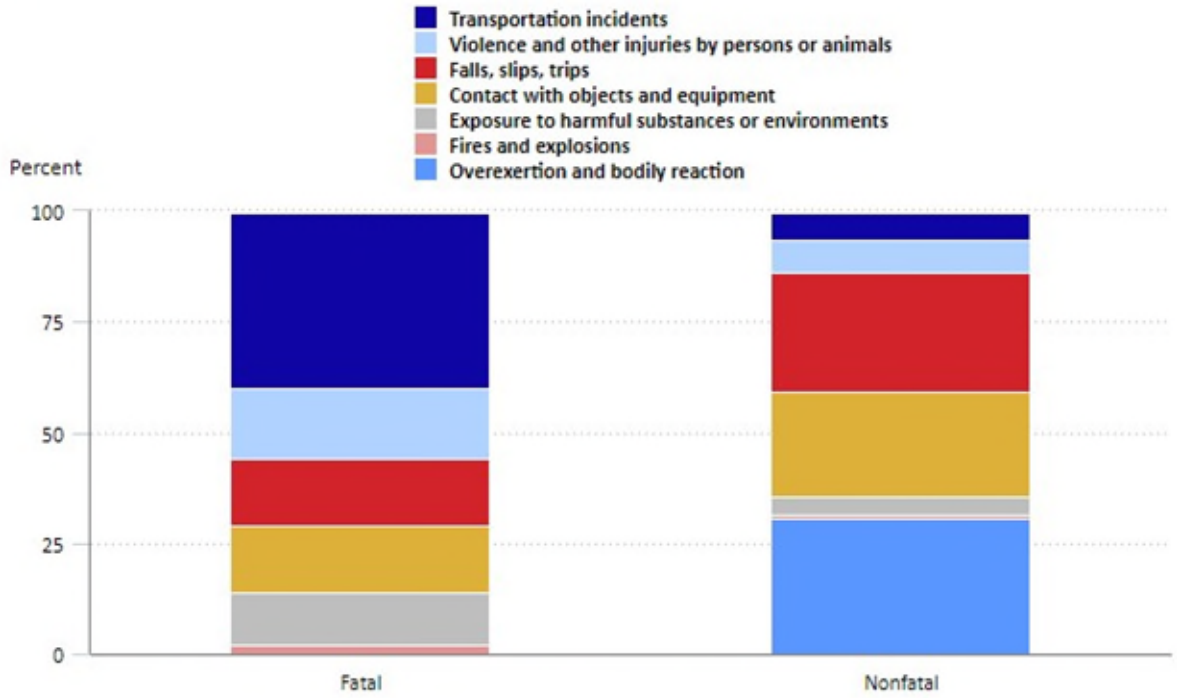
Chart 1. Incidence rates of nonfatal occupational injuries and illnesses, private industry, 1972–2018



Hover over chart to view data.
Source: U.S. Bureau of Labor Statistics, Survey of Occupational Injuries and Illnesses.

TABLE 2

Chart 3. Distribution of fatal work injuries and nonfatal work injuries and illnesses by major event category, 2018



Click legend items to change data display. Hover over chart to view data.
Source: U.S. Bureau of Labor Statistics, Census of Fatal Occupational Injuries and Survey of Occupational Injuries and Illnesses.

TABLE 3

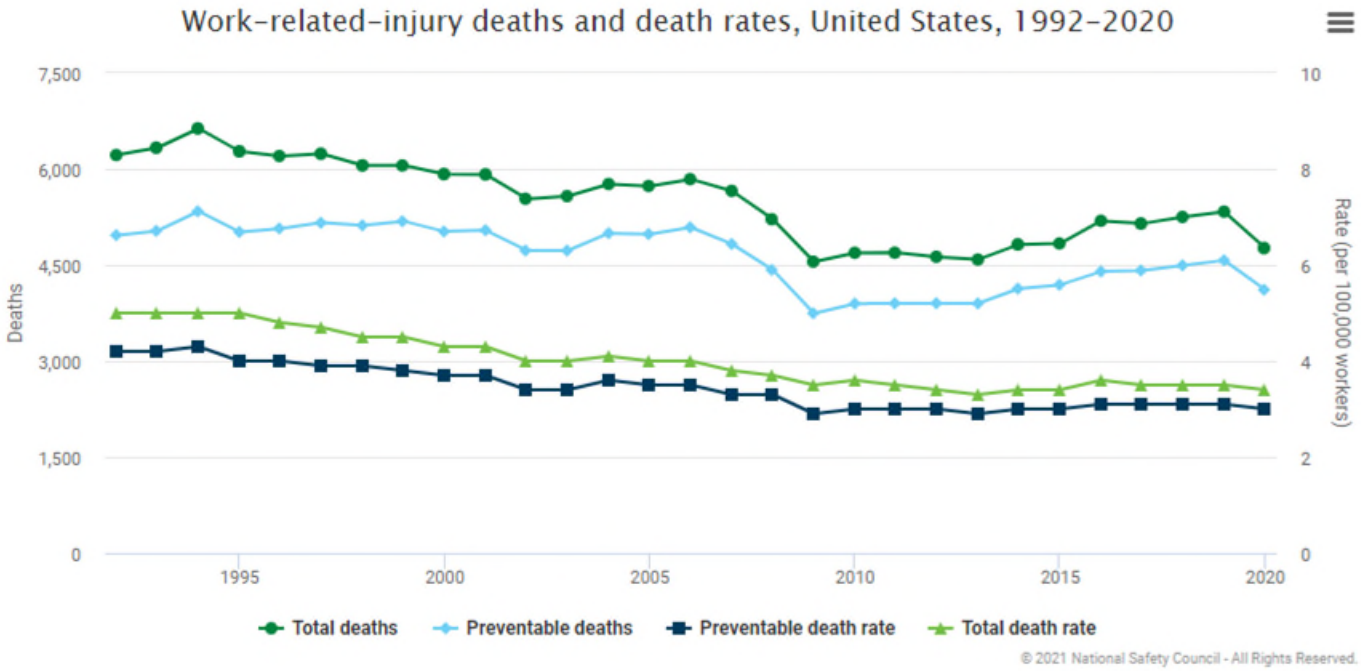

Work-related-injury deaths and death rates, United States, 1992-2020
Deaths
Rate (per 100,000 workers)
7,500
6,000
4,500
3,000
1,500
0
10
8
6
4
2
0
1995
2000
2005
2010
2015
2020
Total deaths
Preventable deaths
Preventable death rate
Total death rate
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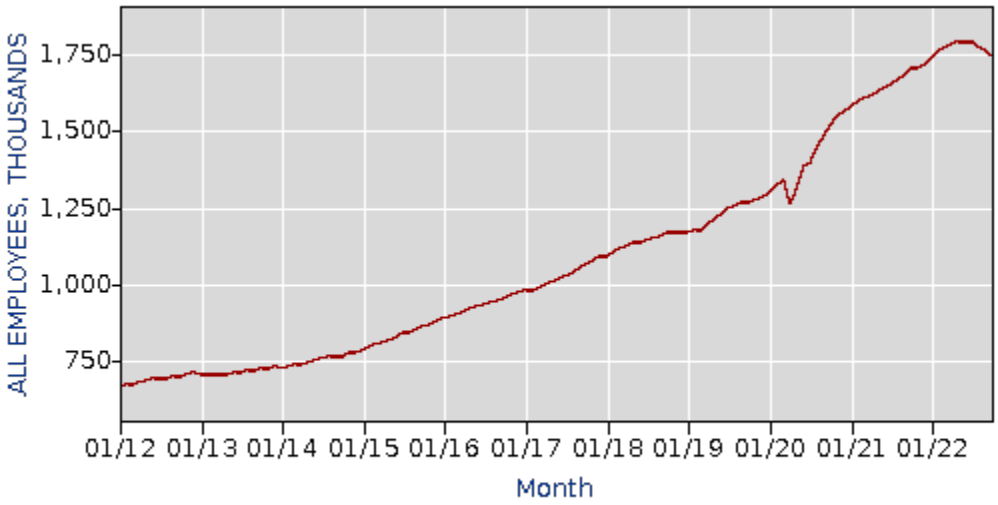
TABLE 4



Source: U.S. Bureau of Labor Statistics, Databases, tables, & Calculators by Subject.

Series ID: CES4349300001. All employees, thousands, warehousing and storage, seasonally adjusted, January 2012 to January 2022.

TABLE 5

Source: Foundation on Economic Education