

Assistant Secretary of Labor OSHA Nominee: Dr. Michaels
Senate Committee on Health, Education, Labor and Pensions
October 9, 2009
Questions for the Record: Senator Isakson

- 1) You have written about the need for an electronic recordkeeping system and how such a system may help improve the accuracy of injury and illness numbers compiled by the Department of Labor. Do you attribute the decline in injury, illness and fatality rates over the last decade to underreporting or to safety and health measures taken by employers? What role, if any, do you think OSHA's alliances and partnerships—which were initiated by the Clinton administration—played in the decline of injuries, illnesses, and fatalities?

There is very limited empirical research on which to base conclusions as to the causes of the decline in injury rates, and this is an area deserving of additional study by OSHA. Given this caveat, however, it is reasonable to assume that the decline in reported injury and illness rates is likely to be the result of a combination of several factors operating in different ways in different industries. These may include improved safety and health practices, the decline of the manufacturing sector where high-hazard jobs were concentrated, and changes in OSHA-required injury reporting guidelines.

In order to evaluate the contribution of OSHA's alliances and partnerships to the declining rates, it would be necessary to undertake an evaluation of the programs. If confirmed, I hope to work with the BLS and NIOSH to improve the accuracy of injury and illness rates.

What are your three biggest regulatory priorities?

There are many regulatory changes needed at OSHA. Three of the most important ones are:

- *Completing rulemaking on some of the proceedings that are currently underway, including silica, beryllium, cranes and derricks, and GHS.*
 - *Promulgating a combustible dust standard.*
 - *Initiating rulemaking for an occupational safety and health program standard.*
- 1) On February 7, 2008, a massive explosion occurred at the Imperial Sugar Refinery in the Savannah suburb of Port Wentworth. As a result of the explosion, 14 of my constituents working at the facility died and another 30 were injured. In July 2008, OSHA concluded that the employer in this case was aware of the hazard that combustible dust collections presented, but did little to abate the problem. Over the course of a separate investigation, Chemical Safety Board investigators determined that the initial explosion originated inside an enclosed

steel conveyor belt that was not properly designed to protect employees from dust explosion hazards and that massive secondary explosions were caused and exacerbated by large accumulations of combustible dust. Chemical Safety Board investigators believe that if the fire protection guidelines had been followed by Imperial Sugar, this tragedy would have been prevented. I support the Chemical Safety Board's recommendation that OSHA promulgate regulations on combustible dust expeditiously. What are your views on OSHA regulation of combustible dust?

I also support the CSB's recommendation and will make promulgation of a combustible dust standard one of my top priorities if confirmed.

- 2) Will you commit to working with me on the promulgation of regulations modeled upon the existing National Fire Protection Association guidelines? Do you agree with me that OSHA regulation in this area should be informed by the findings of the two Imperial Sugar investigations, on the best available science, the experience of stakeholders, and the notice-and-comment process?

Yes to all parts of this question.

- 3) As you know, the OSHA already enforces a vertical standard for the grain handling industry on grain dust. Do you pledge to avoid the double-regulation of that industry as you promulgate new standards in this area?

I will make my best effort to ensure that the grain handling industry is not burdened with unnecessary or redundant regulation.

Ergonomics

- 1) In past testimony, you indicated your support of the expanded use of the general duty clause in all situations where a hazard is present. How would you seek to implement this belief? Could this open the door to implementing ergonomics standards as well as other standards without going through the current standard setting process?

According to its Field Operation Manual, OSHA applies the general duty clause only in situations where there is no standard that applies to the particular hazard, and in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard. OSHA could not use the general duty clause to implement ergonomic standards or other standards but can and currently does use the general duty clause in those situations described in the Field Operations Manual.

- 2) As a result of the Congressional Review Act resolution of disapproval of the Clinton Administration's ergonomics standard, OSHA is prohibited from issuing an ergonomics standard that is "substantially the same" as the rescinded rule. Do you believe that an ergonomics standard that focused just on one industry would be substantially the same as the rescinded rule? What about a standard that did not include work restriction protection or an incident trigger?

The determination of "substantially the same" is a legal question, and I would defer to the opinion of the Solicitor of Labor as to whether any proposed new standard, should one be proposed, is "substantially the same" as the rescinded rule.

Standard Setting

- 1) There are concerns about your support for the issuance of a Comprehensive Workplace Safety and Health Program Standard. How does the Professor think that a standard program could meet the needs of so many different industries that would have to adopt the standard? Would the creation of such a standard assist in the attempt to expand the use of the general duty clause?

Two important tools used by employers in abating hazards are their expertise (and that of their personnel) and common sense. These exist across all industries. OSHA should not attempt to issue a standard for prescribing employer behavior for every potential hazard – employers should apply their expertise and common sense. A program standard would encourage employers to do that, without taking a one-size-fits-all approach to hazard abatement.

- 2) With regard to the standard setting process, Professor Michaels had indicated he views the process as difficult and resource intensive. In addition, that he considers reviews by SBA, OMB, and economic analyses as barriers in the process. Why don't you consider such steps as an asset in developing a reasonable rule that can be successful in real life applications? What might work as a theory might have real world complications and the standard setting process and appropriate reviews is meant to determine the real life impact.

I believe that reviews by SBA and OMB, as well as economic and technological analyses, add value to the standard setting process, and I consider them an asset in the standards promulgation. However, the challenge OSHA faces is how to obtain the very important advice and information that come through these reviews without taking so long as to paralyze the standard setting process. The standard setting processes for silica and beryllium have been underway for a decade or more. I believe this is far too long. If confirmed as Assistant Secretary I would work to have these reviews done as efficiently as possible.

- 3) You have written extensively about the need for employers to implement Injury and Illness Prevention Programs. How does your view of such a program differ from OSHA's Safety and Health Program draft rule developed in the mid-1990s under the administration of President Clinton? Will you add an Injury and Illness Prevention Program rule to OSHA's regulatory agenda?

I am not familiar with OSHA's Safety and Health Program draft rule developed in the mid-1990s. If confirmed, I plan to consider promulgation of safety and health program standard, and if I do so, it will be added to OSHA's regulatory agenda.

- 4) On September 27, 2007 Senators Kennedy, Murray, Isakson and Enzi sent a letter to OSHA supporting the Tree Care Industry Association (TCIA)'s May 10, 2006 petition to OSHA requesting safety standard specific to tree care operations (arboriculture). The Senators urged OSHA to immediately initiate a negotiated rulemaking. While on September 18, 2008, OSHA issued an advanced notice of proposed rulemaking, it has not initiated the negotiated rulemaking process. Would you commit to initiating the negotiated rulemaking process for an arboriculture standard?

I am not familiar with this particular issue, but I am a supporter of the concept of negotiated rulemaking. I will work with the stakeholders involved in this issue to address their concerns.

On September 30, OSHA proposed a rule to modify the current Hazard Communication Standard (HCS) to align with the provisions of the United Nations Globally Harmonized System of Classification and Labeling of Chemicals (GHS). How do you plan to go about finalizing this rule?

I will follow the requirements of the Administrative Procedures Act and other applicable legislation.

OSHA Staffing

- 1) This Administration has asked and been granted the funding for 150 new OSHA inspectors. As you know, MSHA Inspectors must have five years experience in the field and then attend MSHA college for two years. OSHA Inspectors, on the other hand, do not have to have experience in the field or required training. Do you believe that OSHA inspectors currently are qualified to be in the field? Please articulate your plans to better train OSHA inspectors in the very near future.

I do not know whether current OSHA inspectors are qualified to be in the field, but I strongly believe that inspectors must be well-qualified and need to receive adequate training. I am not familiar with OSHA's current training programs and facilities; if confirmed, I look forward to working closely with career staff in ensuring that adequate training is offered, especially to new inspectors.

- 2) It has been noticed that many career OSHA employees have been moved or are in the midst of being transferred from Outreach to enforcement. Is it your plan to emphasize enforcement over outreach? What role do you see OSHA outreach such as VPP, alliances and partnerships playing in this Administration's OSHA?

Both consultation and enforcement are important OSHA functions, vital to the mission of the agency. If confirmed, I would continue to support OSHA's successful programs in both of these areas.

Summit Contractors Decision

- 1) As you know, the Eighth Circuit in the Summit Contractors decision held that one provision of OSHA's regulations (29 CFR 1910.12(a)) did not prohibit application of OSHA's multi-employer enforcement policy to general contractors at multi-employer construction sites. Given this decision, will you increase the use of the policy against general contractors?

I am not sufficiently familiar with the Summit Contractors decision to have an informed opinion of it or its implications. I look forward to working with the Solicitor of Labor, career OSHA staff, and the members of this Committee in addressing the issues raised in this set of questions.

- 2) In the Summit Contractors decision, the majority questioned whether the policy underlying the application of the multi-employer enforcement doctrine to general contractors was sound, suggesting that it places an overwhelming responsibility on the general contractor "to monitor all employees and all aspects of a worksite." The majority, however, did not follow through on these concerns, stating that they should be addressed to Congress or the Secretary. Do you agree with the majority that application of the multi-employer enforcement policy may place an inordinate burden on general contractors, which makes ultimate compliance almost impossible?

Please see answer to previous question.

- 3) In the Summit Contractors decision, the majority also suggested that the multi-employer enforcement policy may have needed to be promulgated through

informal rulemaking. Among other things this would elicit stakeholder participation in constructive and hopefully collaborative effort to address some of the aforementioned practical problems with the multi-employer enforcement policy identified by the Eighth Circuit and others. Would you commit to putting the multi-employer enforcement policy on the regulatory agenda?

Please see answer to previous question.

Other

- 1) You have written about *Daubert v. Merrell Dow Pharmaceuticals Inc.*, a 1993 Supreme Court case in which the Court ruled that judges could hold hearings without juries to determine whether expert testimony is relevant. Presumably, the Court's intent was to preclude the possibility that a trial could be corrupted by hired experts who could sway a jury without proven scientific evidence. You have written that judges "have routinely misinterpreted and broadened the reach of *Daubert*" and concluded that "polluters and manufacturers of dangerous products are successfully using *Daubert* to keep juries from hearing scientific evidence or any other evidence against them." Please state your current views on *Daubert* and provide the Committee with examples of cases where judges "misinterpreted" the decision. Where do you draw the line between sound science and junk science?

I believe that the scientific evidence used in litigation should be, as the Daubert decision holds, "relevant and reliable." Daubert does not merely allow but actually requires judges to be gatekeepers, to determine relevance and reliability of scientific evidence. However, there is not convincing evidence that judges are more capable than juries in evaluating complex scientific evidence, and I am uncomfortable in the shift of decision-making power to judges from juries, since the right to trial by jury is one of the foundations of our legal system.

As I have written, there is evidence that Daubert has played a useful role in helping keep inaccurate or invalid science from being used in litigation. However, my concern with Daubert is that it forces judges, many of whom have no scientific background, to rule on issues beyond their expertise, and that this will result in the inconsistent application of justice. In this regard, I agree with the dissent of former Chief Justice Rehnquist who voiced concern about judges taking on the role of "amateur scientists." In his partial dissent, Justice Rehnquist wrote: "Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony."

One powerful example of this problem was identified by Dr. Jerome Kassirer, former editor of the New England Journal of Medicine, and Dr. Joe S. Cecil of the Federal Judicial Center, in an article published in the Journal of the American

Medical Association. Kassirer and Cecil examined a group of similar cases involving Parlodel, a drug used to stop postpartum lactation. When women in several jurisdictions sued the manufacturer, claiming Parlodel was responsible for their strokes, seizures, or other adverse health effects, the same scientific evidence was considered by judges in these varying jurisdictions. In some cases judges refused to allow jurors to consider the opinion of scientific and medical experts who would have testified that Parlodel could cause these conditions. In other cases, judges allowed jurors to consider this same testimony. In one case, the judge decided to enlist the help of a panel of independent scientific experts. He arranged for the court to hire three prominent scientists from different disciplines and asked them to assess whether the plaintiff's medical experts used scientifically reliable methodologies to form their opinions about causality, and to judge whether the techniques could be applied to the facts of the case. The three scientists did not come to the same conclusion.¹

In this example, I do not know which judges misinterpreted the scientific evidence, but they all cannot have been correct since they reached different conclusions concerning the same evidence.

The final component of this question illustrates the problem that Daubert attempts to address. I cannot provide a blanket statement that defines the line between "sound science" and "junk science." I can provide specific examples of what I consider poorly done studies, or theories that are not supported by adequate scientific evidence, but studies that I respect may be dismissed by other scientists. As illustrated by the Parlodel example above, scientists often disagree: theories disputed in the past may be accepted today and dismissed in the future as research provides new evidence on the theory's validity. If scientists have a difficult time agreeing on the meaning of certain scientific evidence, how can we expect judges, who often have little or no scientific training, to be the arbiters in disputes among scientists?

- 2) Some past Assistant Secretaries have named liaisons to the employer and labor communities to improve dialogue and access between the communities and OSHA. Will you commit to doing that during your tenure? What is your message to employers who have been hearing very aggressive rhetoric from the Secretary and the Acting Assistant Secretary and, as a result, are wary of interacting Department?

¹ Kassirer JP, Cecil JS. Inconsistency in evidentiary standards for medical testimony: Disorder in the courts. *JAMA*. 2002;288(11):1382–87.

I recognize the value of having employer and labor liaisons. However, I have not had the opportunity to review OSHA's personnel distribution, and cannot commit to creating these positions before doing so.

My message to employers is that employers who provide a safe workplace or are seeking help from OSHA in providing a safe workplace have no reason to be concerned. It is my understanding that OSHA is eager to assist those businesses, especially small businesses, who think there are hazards in their workplaces and need help identifying or abating those hazards.

Furthermore, this Administration and the Secretary of Labor are committed to transparency and open government, and I share that commitment.

- 3) A little-known program within OSHA is the Nationally Recognized Testing Laboratory (NRTL) program. This program recognizes laboratories to perform testing and certification of certain equipment used in the workplace. These laboratories serve a critically important function for OSHA, in particular, by certifying that electrical equipment used in the workplace is safe. The recognition of NRTLs is tightly controlled by OSHA and the agency must approve any new laboratories for participation in the program. In addition, any time an existing NRTL would like to be recognized by OSHA to test and certify a new product, OSHA must approve that expansion of recognition before the laboratory can do so. Unfortunately, due to resource and other issues, this approval results in significant delays. Some laboratories have been waiting for several years to become recognized by OSHA. These delays simply hurt businesses who are trying to ensure workplace safety and health, as a partner with OSHA. How will you address these delays to improve the functioning of the NRTL program – ultimately to the benefit of employees?

I am not familiar with the NRTL program, but, if confirmed, will work with career staff to identify and address the program's shortcomings.