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LITIGATION

Baruch A. Fellner helped shape the Occupational Safety and Health Administration's enforcement policy in the early days of the Occupational Safety and Health Act, when he joined the Solicitor's Office in the U.S. Department of Labor soon after the act was enacted.

In an interview with BNA last month, Fellner noted that the more things change, the more things remain the same. He cited OSHA's direction of its scarce resources and focus on combustible dust in the early days, which are issues still confronting the agency today. The attorney also gave his views on what lies ahead for the agency and the act.

After almost 10 years in the Solicitor's Office, Fellner joined the Pension Benefit Guaranty Corp., a federal agency responsible for administering the insurance program for private pension plans. Fellner joined the law firm of Gibson, Dunn & Crutcher LLP in Washington, D.C., in 1986 and founded the firm's occupational safety and health practice in 1990.

The More Things Change, the More They Remain the Same, Attorney Says

BNA. How did you get into this area of labor law?

BARUCH A. FELLNER. I had the opportunity to hear about a brand new statute. In 1970, the Occupational Safety and Health Act was passed. It really didn't get off the ground until 1971-1972. It took a little time for the elements of the statute to be put in place, for the regulations to be promulgated pursuant to Section 6(a).

I was invited to join the national Solicitor's Office in charge of OSHA enforcement in 1972 by a legend of the OSHA bar, Benjamin Mintz, who was associate solicitor at the time, and by the Solicitor of Labor, William Kilberg, who is my partner. The opportunity for a young lawyer to be involved, literally, at the ground level of the creation of enforcement policy and tangentially, regulatory policy, with respect to a brand new statute aimed at protecting the lives and well-being of America's employees was just extraordinarily exciting.

I stayed in the national Solicitor's Office for close to 10 years, in charge of the litigation before the [Occupational Safety and Health] Review Commission, appellate litigation, and also was involved in critical cases out in the field.

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BNA. What were the OSH Act's early years like?

FELLNER. The best way to answer the question is by indicating some of the issues that we worked on. We were responsible, for example, for creating the multi-employer worksite doctrine. We saw, particularly in construction work sites, that it did not seem to be entirely appropriate or fair, in terms of achieving the purposes of the Act, simply to cite the employer whose name was on the hard hat of the employee standing at the edge of a building without guardrails. Some of us thought, maybe there are other employers who may be as responsible as the employer that created the worksite hazard, but in a different way.

So we came up with this notion about the ability to cite employers whose employees are not necessarily exposed to the workplace hazard, but who otherwise are, in some fashion or other, in control or are responsible for it. Now that concept has become very elastic since then, such that even a tangentially involved employer on a multi-employer work site, simply because he's got, for example, the title general contractor, can be cited in many instances or in all instances. Our original theory was there really has to be some extensive ability to control the workplace, some involvement in the specific safety and health issue that is cited in that workplace, as opposed to simply a category of employer. But you can see, this is the issue in *Summit* [*Secretary of Labor v. Summit Contractors Inc.*, 21 OSHC 2020], this is the issue that's currently pending, and it's been pending for almost 40 years.

BNA. Was the original policy similar to the current policy in OSHA's Field Inspection Reference Manual?

FELLNER. It's very, very much like it. It hasn't changed much since the original theorizing, and what we would do is we would pursue these issues. In specific cases, we would get the right fact pattern and get the compliance officers to issue and we would maintain those cases and we would pursue them on through the courts. Sometimes we won, sometimes we lost. We created in that context a case called *Anning Johnson* [*Anning-Johnson Co. v. OSHRC*, 3 OSHC 1166 (7th Cir. 1975); *Anning-Johnson Co.*, 4 OSHC 1193 (OSHRC 1976)].

BNA. Was it a deliberate decision not to do a rulemaking for the multi-employer doctrine?

FELLNER. Well, very, very good question. Many of us came over to OSHA from the National Labor Relations Board, particularly from the appellate section of the NLRB. As you probably know, the NLRB does very little rulemaking. They make law and policy in the context of specific cases that they pursue and briefs that they write. They've been subject to some criticism over the years as a result of making law in that fashion as opposed to promulgating rules.

We recognized the paralytic nature of rulemaking. In order to do rulemaking right, you've got to follow the Administrative Procedure Act, and notice, comment, etc., are absolutely required insofar as rulemaking is concerned. It takes time. It may be a good idea to subject the multi-employer doctrine to notice and comment or to bring stakeholders into the process, but the truth of the matter is that from an APA perspective, that is one area you're entitled, as an administrative agency, to come up with your enforcement policies that do not require rulemaking.

Let me bring up an interesting contrast. One of the things that [OSHA Administrator] Ed Foulke's predecessor, John Henshaw, did with respect to the Site-Specific Targeting Program after it had been in effect for a long period of time, he put it out in the *Federal Register* and asked for notice and comment as to whether or not there were improvements to be made and issues under the SST Program. A very good idea in terms of bringing stakeholders in, but what it created was a revolution of rising expectations. Those of us who submitted comments expected those comments to be dealt with. OSHA never dealt with the comments and, as far as I'm concerned, they're proceeding with an enormously defective SST Program which waylays resources in areas that they ought not to be heading.

That, too, was an issue that we grappled with in the early years of OSHA. That is, we're dealing with an agency that will always have insufficient resources. There's no question you will never have enough compliance officers to inspect 7 million workplaces. So the given, from the time that OSHA was born, is that you're going to have insufficient resources in order to do the kind of outreach on the one hand or enforcement on the other hand or a combination of the two, and therefore, how are you going to establish priorities? The SST Program is one answer to that particular question.

BNA. How did you prioritize in those early days?

FELLNER. If my recollection serves me correctly, it was much more of an industry-specific kind of prioritization, and it was very random. In other words, we focused on certain industries, whether they were the oil and gas, petroleum, chemical industries, some of them are very similar to what you see being focused on now, trench and excavation, construction. We focused in on industries where the greatest fatalities and the greatest real injuries occurred.

One of the issues we were all over, believe it or not, was grocery stores, and one specific part of the grocery store, which is the area in which they cut and trimmed meat because nobody used wire mesh gloves in those days. Nobody used anything to protect the appendages, so you would not only, forgive me, get the meat, but you'd get the appendage of the saw cutter in your food as well.

Today, at this stage of the game, everybody's wearing the appropriate personal protective equipment. Everybody's protected. In those days, that was a big issue, and we had the flexibility to recognize that and anticipate it. We saw the trends before they were in the newspaper. We saw the injuries, and we directed the compliance personnel to those areas or to the source of the real problems.

Another area that we concentrated very, very hard on and talked about is grain dust.

BNA. Grain dust?

FELLNER. In the 1970s, we were all over grain silos insofar as their explosions were concerned. We issued an awful lot of citations in response to explosions that occurred and in anticipation of explosions that might occur. We didn't get into sugar refineries and the more esoteric places where combustible dust might happen, but combustible dust, particularly in grain elevators, was a subject of very, very focused attention by OSHA in its early days.

Interestingly enough, the agency then was in a position to be more flexible before entrenched views as to

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where it ought to be got involved. So it could move with a greater deal of flexibility when it was new than it can now. For example, today the agency is being forced to spend an enormous amount of time on diacetyl. That is problematic, in my view, notwithstanding the fact that you've got people with ''Popcorn Lung,'' the disease associated with diacetyl. But it is a very, very small issue compared with the enormous issues that are around out there that ought to be getting the attention of OSHA and OSHA's inspectors.

But, to tie it back to your first question, how did we grapple with priorities? Very, very difficult question to answer. No matter how you do it, you will be subject to being second guessed as an agency because you do not have enough resources to satisfy everybody all the time. And no matter what's going to happen, there will be a disaster that occurs in a place that you didn't anticipate.

BNA. In an April interview, union attorney George H. Cohen told BNA that he thought the first 10 years after the Act's enactment was the most exciting period for occupational health law.[1] Do you agree?

FELLNER. They were. I always refer to those days as the halcyon days. Those were the days in which you did not have the kind of entrenched opposition between labor and industry. The politics were not as entrenched and almost bitter as they are today, where motives are impugned, where interests are impugned, where the commonality of the interest in pursuing safety and health is questioned.

The truth of the matter is that in the first 10 years there were disagreements but everybody—the agency, business and labor—was committed. Everybody was committed, as well as Congress. And we had Jacob Javits, who was a senator and the father of OSHA and of the statute. He was a Republican, but he was a Republican who was committed, as many Republicans were at that particular time and continue to be today. He was committed to the objectives of the statute that he was responsible, in a large measure, for drafting.

So it wasn't a kind of political football the way clearly it is today. And you had a uniformity of interests with respect to making this statute succeed. Today, it's very, very difficult to move forward with respect to OSHA on any specific issue given the kinds of tension that exist between special interest groups.

BNA. Do you agree with George that after 1981, the good old days ended?

FELLNER. As George pointed out, Ronald Reagan became president at that time. And I had this blazing insight, as a person who was very committed to the statute, that the future of OSHA was not going to be absolutely [Reagan's] first priority. It was fun to come up with both practical and enforcement-minded theories and approaches to specific cases as well as the large issues. But as soon as that dried up and the interests at OSHA were going to probably shift, then I began to look elsewhere. So, yes, those were the 10 best years of OSHA, and things have changed markedly since then.

However, despite all of the criticisms and all of the political machinations that are going on, OSHA is demonstrably successful in terms of achieving the purposes of the statute. I'm not sure that the statistical successes that are reflected in lower fatality and injury rates are directly attributable to OSHA. I think much of that is directly attributable to the fact that OSHA has raised the consciousness of the issue among good and sophisticated employers in the United States, who, in turn, have taken the ball and run with it. But clearly, the agency has to take some credit for that. With all of the things that I would criticize over there at OSHA, the agency has got to be viewed as a success, as a monumental success story when you look at it over the span of some 38 years.

BNA. So you're saying that great strides in job safety have been made after 1981?

FELLNER. Absolutely, great strides have been made. I think George was looking at this primarily through the prism of rulemaking. I'm not sure he spoke to enforcement issues as much to rulemaking issues. If you want to look at rulemaking as the principal litmus test for the success of that agency as opposed to reduced fatalities and reduced injuries, which I think is a better measure of whether the agency has succeeded, then clearly the agency has not produced numerically, from 1980 going forward the kinds of rules that it did from 1970 to 1980 or 1981.

Part of that has to do with the agency's rulemaking priorities. If you look at the briefs filed by the Department of Labor in the [U.S. Court of Appeals for the] Third Circuit to explain the reason for delays in rulemaking for hexavalent chromium and for metalworking fluids, one of the arguments that the department made is that its resources were focused primarily on ergonomics.

Similarly, there was a huge attempt by the agency to change the permissible exposure limits for some 428 substances, which was overturned by the [U.S. Court of Appeals for the] Eleventh Circuit in 1989 [*AFL-CIO v. OSHA*, 15 OSHC 1729 (11th Cir 1992)]. That case was an attempt by the Department of Labor not to deal with a risk analysis in each substance but to deal with them as a group or as 19 different categories of substances. And the Eleventh Circuit held, sorry, you've got to deal with it substance by substance. The agency made a fundamental mistake in its approach to that particular ruling. Of the 428 substances that they attempted to regulate, if they would have concentrated on 350, it would have been like a knife through butter. Because these were permissible exposure limits that dated back 60, 70 years that clearly had to be updated, and nobody argued about the science, and nobody argued about the feasibility because most of industry was already at a much lower number than is in the rule books today. Had OSHA been smart, it could have changed 350 substances. That would have created a heck of a precedent for them to go forward and incrementally change other kinds of health standards.

We are struggling today, in the Congress, on trying to change OSHA's permissible exposure limits. We can't change one, and everybody's got an entrenched view with regard to PELs, all because OSHA was trying to do too much. That's why the agency is largely paralyzed in terms of rulemaking and has been since that time.

So to return to one of the central points I was trying to make, and that is, when you put ergonomics together with the Eleventh Circuit decision, one of the reasons

[1] BNA published an interview May 1 with George H. Cohen, another lawyer with extensive experience with the Occupational Safety and Health Act, starting in its earliest days (38 OSHR 344, 5/1/08).

why OSHA has not been able to devote itself to the kind of rulemaking that may be necessary is because it's frittering away its resources chasing bad science. And as long as it concentrates and is being led in that direction by interest groups in terms of concentrating on issues where the science is not there to support what it's attempting to do, then it's going to create not only opposition with respect to that issue but opposition to the central purposes of the statute as well. There will be that aura of skepticism attached to the agency which was never here when I was there because it is pursuing issues that are outlier issues insofar as safety and health are concerned.

BNA. When do you think the ''skepticism,'' as you label it, started creeping in?

FELLNER. Clearly it happened in the 1980s. It was part and parcel of a legitimate concern on the part of proponents of safety and health who looked at a rather blunderbuss attempt in the 1980s by the Reagan Administration to undercut the agency. In the 1980s, you were dealing with an agency that was being assaulted from within, and, again, I don't think that's true since 1986, '87, '88, but I do believe that has lingered in the minds of those who are fighting the battles that are now 20 years old. And that's why issues like, for example, ergonomics, there's never going to be any middle ground on ergonomics. There can't be. And I'm not sure that the agency has ever thoroughly recovered its reputation given the direct assault on its purposes that occurred in the eighties.

BNA. Comparing the current OSHA to the OSHA of the first 10 years, would you say the agency is on the right track?

FELLNER. I think it's on the right track in terms of achieving the appropriate results. It's not on the right track in terms of what it is devoting its resources to. Take, for example, ergonomics. It's not an issue in the current administration but clearly it will be in the next regardless of who's going to be president.

BNA. What do you think OSHA should be focusing on?

FELLNER. Well, one of the areas where it is focusing on which is appropriate is the whole question of the manufacture of chemicals, the industry dealing with oil refineries and the like. Clearly those are entirely appropriate. The NEP [National Emphasis Program] for that is a very good choice.

BNA. How about the NEP for combustible dust?

FELLNER. I think combustible dust is going to end up being an overreaction to the sugar refinery explosion, and I think there will probably be inordinate amounts of enforcement activity and probably regulatory activity addressed to combustible dust.

BNA. What do you think lies ahead for the OSH Act?

FELLNER. I think it is inevitable that the OSH Act is going to be amended. I think it's going to be amended for the first time in 40 years, probably in the next Congress. I think that part of that has to do with the political pendulum swinging, and I don't mean Democrats or Republicans. The act has been relatively immune from amendment except for raising its penalties in one instance. It was 1990 when it went from $1,000 to $7,000, and the willful violation went up to $70,000. But it is going to be very, very difficult for business interests to prevent the OSH Act from being amended.

I don't think amending the penalties necessarily is a good idea. There is a kind of knee-jerk reaction that says the higher the penalties, the more the compliance. I think the very fact that injury and fatality rates have been progressively lower in the context of what are admittedly modest penalties puts the lie to the whole notion that we've got to be Draconian and we've got to make sure employers pay for the workplace illnesses and injuries that compliance officers find.

The lawyers are the only ones who are going to benefit from the change of the OSHA statute. I think OSHA achieves much more in a cooperative atmosphere, reserving the sledgehammer for the selective employers who truly deserve it. One of the things the Bush Administration has been very, very successful at fostering over the last seven, eight years has been dispelling in the minds of many, not everybody, in American industry the notion that OSHA is a boogeyman, and in some fashion or other, is evil. And you're going to achieve more compliance in that way. You're going to raise more consciousness.

BNA. What do you think will happen with an increase in the penalty structure?

FELLNER. You're going to end up with more contests and more attempts to not comply as opposed to comply because it's relatively easy to not contest and to be responsive to the kinds of thing that OSHA finds. But as soon as penalties in and of themselves become the object of contests, which rarely is the case today, then you're going to create a much more belligerent atmosphere between OSHA and the business community.

BNA. Do you have any words of advice for attorneys who are practicing in this area?

FELLNER. It is one of the most interesting, demanding and intellectually challenging areas of the law. Literally, people's lives hang in the balance. I think regardless whether the attorney is representing a special interest, a union, an employer, or the agency, there is a larger good here and that is the safety and health of America's employees that should not be ignored in the process of representing that client.

And if you can achieve a win-win proposition, that's what I would suggest to an attorney, that they not view this exclusively as a how do I get my employers off this citation or how do I make this employer pay, if I'm on the union side of the issue or the OSHA side. But how do we work together, regardless of what happens to a specific citation, in terms of looking forward to how do we achieve the purposes of the statute? This becomes a very ennobling proposition.

BY YIN WILCZEK

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