Statement of the U.S. Chamber of Commerce

ON: **UNDERREPORTING OF WORKPLACE INJURIES AND ILLNESSES**

TO: **THE HOUSE COMMITTEE ON EDUCATION AND LABOR**

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business— manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Statement of Baruch Fellner, Esq.

Gibson, Dunn, & Crutcher, LLP

Before the

House of Representatives Committee on Education and Labor

June 19, 2008

Chairman Miller, Members of the Committee, my name is Baruch Fellner, an attorney with the law firm of Gibson, Dunn & Crutcher, LLP. I very much appreciate your invitation to participate in this important hearing dealing with the extent of potential underreporting under OSHA's complex recordkeeping requirements.

I am appearing in this hearing on behalf of the U.S. Chamber of Commerce, the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

I serve on the Chamber's Labor Relations Committee and its OSHA Subcommittee. I am also here in my personal capacity as an attorney who has found himself on both sides, an observer and participant in the development of OSHA law and policy during its first decade and a frequent critic of it thereafter. I hope to draw on that balanced experience in attempting to answer the critical question that underlies this entire matter: *does the current recordkeeping system accurately reflect employer's understanding of their OSHA recordkeeping requirements?*

Some have suggested that the answer to that question is, "no." Indeed, in the last several years, the charge of underreporting has become something of a professional mantra. In perhaps the most comprehensive of these studies, Azaroff, et al. have identified several "filters" in the current recordkeeping process at which underreporting could occur, including possible motivations of both workers and employers for suppression of information.[1] Essentially, the allegations are twofold: first, employers are deliberately underreporting because of a perverse incentive structure that encourages them to make their workplaces appear as safe as possible. Second, employees are incentivized not to report injuries because they fear stigma or retaliation.

[1] Azaroff et al., *Occupational Injury and Illness Surveillance: Conceptual Filters Explain Underreporting*, 92 Am. J. Pub. Health 1421 (2002).

I respectfully submit that both of these claims overstate the extent of and motive for underreporting. Based upon almost 40 years of experience, I believe that the steadily declining injury rates provided by OSHA and the Bureau of Labor Statistics ("BLS") are and must be substantially reliable. These statistics are the lynchpin of OSHA enforcement and compliance policies and priorities. That is precisely why the Agency inspects workplaces not only with high injury rates, but also those with low ones. Thus, as I will discuss in greater detail below, the appropriate mechanisms for detection are already in place. Many of the witnesses before this panel want OSHA to discover underreporting that simply is not there. In the words of Richard Fairfax, OSHA's Director of Enforcement under both Democrat and Republican administrations, inspectors search for underreporting but "[w]hen we try to track it down, it goes nowhere."[2] My testimony today discusses that search and why the numbers it yields are far more reliable than critics claim.

A. OSHA's own audits establish that underreporting is minimal and concentrated among very few workplaces

Let us be clear that no one is suggesting that employer candor about injury rates should be taken for granted. To its credit, OSHA recognizes that some may try to game the system by deliberately suppressing the number of injuries actually occurring. That is why it conducts an annual OSHA Data Initiative (ODI) analysis of its audits of employer injury and illness recordkeeping. After compiling occupational injury and illness data from around 80,000 establishments in high-hazard industries, ODI ensures the accuracy of that data in order to measure the Agency's performance in reducing workplace injuries and illnesses. The audits first evaluate the internal consistency of employer records by comparing the information in an employer's OSHA 300 Log with the information that employer submits to OSHA. The audits then evaluate the reliability of the OSHA 300 Logs themselves by comparing them with employees' medical records. If an employer is improperly recording injury information or keeping it off the books entirely, OSHA auditors would find it through this investigation. The only way that injuries could escape OSHA's attention is if employees are seeing private physicians without telling their employers, or, more likely, if employees simply are not telling anyone at all. But regardless of the potential for employee self-censorship, about which more is said below, the ODI audit at the very least provides a means of detecting underreporting by employers.

The results of the 2006 ODI audit analysis[3] demonstrate a high level of accuracy in employer records—roughly 95 percent of both total recordable cases and DART (days away from work, restricted work activity, and job transfers) injury/illness cases. Furthermore, a small number of establishments account for a large part of that five percent. Four establishments out of a total of 251 accounted for over 27 percent of the underrecorded DART cases and almost 25 percent of the cases that went entirely unrecorded on the OSHA 300 Logs. Overall, 92.43 percent of the establishments audited were at or above a 95 percent accuracy rate with respect to underrecording of total recordable cases. That the vast majority of establishments are

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[2] Kerry Hall, Amy Alexander, and Franco Ordonez, *The Cruelest Cuts: The Human Cost of Bringing Poultry to Your Table*, Charlotte Observer, at 1A (Feb. 10, 2008).

[3] *See* OSHA Data Initiative Collection Quality Control, *Analysis of Audits on CY 2003 Employer Injury and Illness Recordkeeping: Final Report*, (2006).

maintaining accurate records, with the small degree of inaccuracy concentrated among a few employers, demonstrates widespread compliance with OSHA recordkeeping.

In addition, OSHA has implemented a second check on the accuracy of its recordkeeping system. Since 1999, OSHA has conducted Site-Specific Targeting inspections ("SST") for non-construction workplaces with 40 or more employees. Based on the data received from ODI, SST selects for inspection individual workplaces with high rates of DART or DAFWII (days away from work injury and illness). But lest anyone conclude that this only encourages employers to "cook the books," SST also selects for comprehensive inspection a number of establishments reporting low rates in traditionally high-rate industries. In 2008, for example, approximately 175 of these low-rate establishments will be added to the SST primary inspection list. Similarly, a random sample of establishments that do not provide rate information in accordance with the ODI survey will also be added to the primary inspection list. Workplaces that fall into any of these categories—high rates, low rates, or non-respondents—may be liable for any recordkeeping violations discovered. This enforcement structure is specifically designed to discourage deliberate underreporting.

The success of OSHA's enforcement system is evident in the numbers. Of the 61 establishments audited for low rates in 2006, only eight were cited for recordkeeping violations. Of these, only five were serious enough to warrant a monetary penalty. In 2005, 15 out of 103 establishments were cited, only seven of which warranted a penalty. None of these citations suggested a premeditated attempt to withhold information. Instead, employers were cited for a lack of precision in what was already recorded and not for "hiding the ball" by not recording at all.

B. The recordkeeping decisions that employers must make are too complex for any reasonable observer to expect perfect accuracy

1. Musculoskeletal disorders ("MSDs")

Those who are attributing a more malevolent rationale to employers must consider the complexity of the legal, factual and regulatory framework that human resources personnel are asked to implement. First, they must decide whether an injury has occurred. Then, they must also determine whether the workplace is the "discernable cause."[4] Those determinations are self-evident when a digit is amputated by an unguarded machine or an arm is broken as a result of a fall from an unguarded platform; no one at this hearing would seriously suggest that such injuries are not being systematically recorded. However, the recordkeeping controversy erupts when the focus shifts to working with pain. Let there be no mistake—we do not trivialize pain. Pain is real. But the subjectivity of its symptoms, whether those symptoms constitute pathoanatomic injury, and the difficulty of ascertaining its discernible causes, raise a number of distinct challenges for any record keeper who aspires to perfect accuracy. These points were salient when OSHA promulgated – and the Congress rejected – the ergonomics regulation eight years ago, and they remain so today. Given the increasingly clear value of and trend toward data-

[4] Settlement Agreement: Occupational Injury and Illness Recording and Reporting, 66 Fed. Reg. 66,944 (Dec. 27, 2001).

driven medicine, the decision on the recordability of MSDs in the absence of demonstrable injury and in the absence of the workplace as a discernable cause is by no means an easy one.

Furthermore, it appears that the attribution of cumulative pain to work-related causes is a matter of generational, subjective perception – the older you get, the smarter you get about coping with the discomfort ancillary to work and non-work circumstances. Thus, since the allegedly debilitating effects of physical activity build up over time,[5] one would expect that if serious underreporting of MSDs exists, injuries of older employees would be disproportionately represented. In fact, research has shown precisely the opposite. A study of health care workers in the Veterans Administration found that employees with a service of over five years were almost 40 percent *less* likely to report injuries than their counterparts with less service, as were care-givers over 50 years of age.[6] This explanation accords strongly with the findings of a study that compared British employees' occupational attribution of repetitive arm strain injuries with expected estimates for persons exposed to their particular workplace risk factors.[7] That study found that the ratio of cases that employees subjectively deemed work-related to the objectively expected attributable number was substantially higher for respondents below the age of 50 than above 50. It estimated that this over-attribution ratio was nearly *twice* as large (5.4 to 3.0) if the employee was part of the younger cohort.[8]

In sum, these studies and much more data-driven medicine underscore the complexities of the decisions that must be made every day by this nation's OSHA record keepers. It is little wonder that OSHA gave up any pretense of even defining an MSD in 2000, much less providing a separate column for recording MSDs in its recordkeeping regulation. To suggest a vast conspiracy to underreport injuries is to ignore the complexities of ergonomic issues.

Dr. Fred Gerr of the University of Iowa, a major proponent of ergonomic regulation and hardly an apologist for the business community, succinctly summarized these difficulties in an editorial in the *Journal of Occupational and Environmental Medicine*:

"It is not news that musculoskeletal disorders are common among working age persons and that some considerable proportion of the burden of these conditions is attributable to factors other than exposure to risk factors in the work place. Given this fact, we are faced with the larger question of when is arm pain (or other, more specific musculoskeletal disorders) attributable to work? . . . [W]hen a considerable proportion of the disease burden would still occur, independent of occupational exposures, what method do we have to attribute to work those musculoskeletal conditions that are truly work-related and how do we ensure that is done accurately and uniformly across industry and various worker characteristics?"[9]

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[5] In the preamble to the Clinton administration's final ergonomics rule, OSHA stated matter-of-factly that "persistent signs or symptoms of MSDs will progress and become more severe and disabling if they are not treated and the employee remains in the job unabated. . . . [T]he pain usually increased if exposure to the ergonomic risk factors continues." Ergonomics Program, 65 Fed. Reg. 68,262, 68,753 (Nov. 14, 2000).

[6] Siddharthan et al., *Under-reporting of Work-related Musculoskeletal Disorders in the Veterans Administration*, 19 Int'l J. Health Care Quality Assurance. 463, 470 (2006).

[7] Keith Palmer, et al., *How Common is Repetitive Strain Injury?*, 65 Occupational & Envtl. Med. 331 (2008)

[8] *Id.* at 333.

[9] Fred Gerr, *Surveillance of Work-related Musculoskeletal Disorders*, 65 J. Occupational & Envtl. Med. 298, 299 (2008).

2. Other injuries

The recording of MSDs is not the only hard question human resource personnel must answer in trying to assess whether an injury is recordable. Even the more routine, day-to-day decisions, are difficult given the complexity of the recordkeeping regulations. Any rule that has 46 subsections and over 200 pages of frequently asked questions is susceptible to innocent error in its implementation. For example, how many milligrams of over-the-counter Motrin is prescription strength (recordable as medical treatment) and non-prescription strength (non-recordable)? Did the employee have a soft splint on his wrist (non-recordable) or a hard splint (recordable)? Was oxygen administered as a treatment (recordable) or prophylactically (non-recordable)?

Put yourselves in the shoes of the staff charged with making these fine-toothed distinctions. Innocent error is unfortunate but inevitable. The numbers show that while OSHA must continue to educate employers to reduce unintended recordkeeping mistakes—and let us all be perfectly candid about that concession—it is not faced with the sinister conspiracy of employers hiding injuries that are recordable under the law.

C. OSHA's Critics Rely on Dubious Assumptions

Much of the momentum leading up to this hearing resulted from the publication of a study by Kenneth D. Rosenman, et al., in the Journal of Occupational and Environmental Medicine ("the Michigan Study").[10] In calculating the extent of underreporting, the Michigan Study relied principally on a workers' compensation database, with an average number of reports nearly fifteen times the size of the next largest source (35,310 to 2,483). But workers' compensation claim rates should not be a referendum on OSHA recordkeeping. First, workers' compensation is a completely different statutory and regulatory regime that bears no relationship to the definition of recordable injuries under OSHA. Second, we should not necessarily assume that every payment is the result of a meritorious claim. When faced with questionable claims, many employers would simply rather not litigate what constitutes an injury or what is work related and just let the insurance company make the payout. Third, claim frequency itself is falling, suggesting that even workers' compensation rates support the conclusion that workplaces are becoming safer.[11]

Another oft-cited piece of evidence for underreporting is a purportedly perverse incentive structure in which employers are encouraged to hide actual injuries in order to avoid OSHA targeting inspections. The reality is that the size of these incentives has been drastically overblown. The information in OSHA 300 Logs does not create liability for workers' compensation or any other insurance scheme since it does not indicate whether the employer or worker was at fault, nor does it indicate whether an OSHA standard was violated. Employers are

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[10] Kenneth D. Rosenman, et al., *How Much Work-related Injury and Illness is Missed by the Current National Surveillance System*, 48 J. Occupational & Evtl. Med. 357 (2006).

[11] *See* National Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage, and Costs* 5 (2004); National Council on Compensation Insurance, Inc., *Workers Compensation Claim Frequency Continues to Fall in 2006* (2007).

made explicitly aware of this on the Log coversheets.[12] Moreover, we must recall that a substantial proportion of purportedly underrecorded cases are MSDs[13], which only rarely trigger enforcement activities. No ergonomics regulation exists, and only the most egregious MSD violations can be cited for a "recognized hazard" under the General Duty Clause. Since January 2001, only 19 such citations have been issued. Instead, OSHA has implemented non-mandatory guidelines for employers. If failure to follow a guideline does not give rise to an enforceable citation, employers have no incentive to deliberately underreport MSDs.

What employers *do* have to worry about, however, is doctoring the record. As discussed above, they are far more likely to be penalized for excluding recordable MSDs from the OSHA 300 Logs than they are for acknowledging the marginal increase in ergonomic risk.[14] Even the most calculating, profit-maximizing employer would recognize that there is less potential liability associated with recording non-citable MSDs than with an underreporting audit.

D. Conclusion

Employers are doing a good and conscientious job. This is a modest point. I have resisted the more polemical response—that underreporting is a myth. We can all agree that there is clearly some underreporting, and OSHA must remain vigilant to minimize it in order to maintain the integrity of its enforcement and regulation programs. However, the Committee should focus its attention on the scope of the problem. The title of this hearing declares in no uncertain terms that we are dealing with a tragedy of deliberately hidden injuries. Such a conclusion ignores the real efforts that employers are making to accurately identify all work-related injuries in a complex regulatory and medical environment. The question I posed at the outset—whether the current recordkeeping system reflects the best understanding of employers—should be met with a resounding yes.

This concludes my remarks and I would ask that my more extended testimony be submitted for the record. I look forward to any further questions you may have.

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[12] Available at http://www.osha.gov/recordkeeping/new-osha300 form1-1-04.pdf/.

[13] *See* Azaroff et al., *supra* note 1.

[14] The extent of that risk cannot be reduced to partisan politics. In fact, OSHA has never been hesitant to issue such citations for faulty recordkeeping. The average penalty for recordkeeping violations between 1985 and 1987 was $8,589 . Though the Reagan administration was never considered especially pro-employee, that figure dwarfs the Clinton administration's $1,734 average.