

Testimony of David G. Sarvadi

Before the

U.S. House of Representatives Subcommittee on

Workforce Protections

Protections

Hearing on

"Addressing Concerns About the U.S. Department of  
Labor's Use of Non-Consensus Standards in Workplace Health  
and Safety"

10:30 a.m., Room 2175 Rayburn House Office Building

June 13, 2006

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Good morning. Mr. Chairman, Members of the Committee, and invited guests, thank you for the opportunity to participate in this important proceeding.

My name is David Sarvadi. I am an attorney with the Washington, D.C., law firm of Keller and Heckman LLP, and I am here to express support for H.R. 5554, the Workplace Safety and Health Transparency Act. I also have some suggestions to improve the bill. At Keller and Heckman LLP, we represent and assist employers in meeting their obligations under a variety of federal and state laws, as well as international treaties and the laws of Canada, Europe, and many countries of the Far East. In particular, we help clients maintain progressive health and safety programs intended to protect their employees in their workplaces, as well as to comply with national and international health and safety laws and standards. The Occupational Safety and Health Act is the primary focus of our compliance assistance here in the U.S.

I am appearing in this hearing on my own behalf, and any views expressed herein should not be attributed to my firm, my partners, or any other entities, including any of our clients. I am here solely as a person with a keen interest in the topic of occupational safety and health.

First and foremost, this bill is important because it affirms an important fundamental characteristic of modern American government: that citizens affected by OSHA's regulations

have the opportunity to participate in the process that will determine the standard to which they will be held. All of us benefit by such participation, and in my experience, people all over the world admire and envy our open system.

The problem the bill seeks to correct is the result of an acrimonious debate over alleged industry bias and influence in science that has been going on for more than 25 years. Some see the solution in attempting to completely eliminate bias by prohibiting participation by individuals with certain characteristics, most notably an alleged financial interest by being affiliated with an affected party, either as an employee or as a consultant. The presumption is that people whose financial support comes from public sources are free from undue influence, an egregiously erroneous assumption.

Bias is a fact of life for all human beings. We all bring individual experiences and prejudices, learning and judgments, to a decision-making process, and while it is important to know about the various interests that motivate participants, the best way to offset bias is to have a transparent process where bias can be exposed and attacked, and its influence can be limited. That means an open, transparent, and inclusive process must be the touchstone of public policy, especially when it comes to science-based decisions.

Our judicial system, and to a certain extent, our legislative system, seeks to obtain the best and most likely true result through the competition of advocacy in an open forum. It is unclear to me why some scientists think that such a process is inapt for applying scientific judgment to public policy. Indeed, even ostensibly objective scientists have their own biases,

driven in part by the need to find positive results so they can be published and funded in the future.

Worse, by excluding from the discussion people who have direct experience in a particular area, we reduce the ability to understand complex yet solvable problems. If we were to apply the current approach to selecting people for various public policy scientific panels to our personal lives, we would not, for example, ask a surgeon to advise on the need for the surgery. Yet it is obvious that the surgeon has been trained and has the specific experience we need to inform the judgment inherent in all decisions that involve extrapolation and inference.

In the public policy realm, some scientists have even claimed to find it necessary to be disingenuous to achieve their "better" objective. One such scientist was quoted as having to choose between being honest and being effective!<sup>1</sup> I do not believe that our public policy is better because one group is more effective if their efficacy is based on fundamental dishonesty. And who is to say that such a scientist's view results in better public policy?

We need to be vigilant about scientific misrepresentation. Dr. James L. Mills, a researcher with the National Institute for Child Health and Human Development, described the techniques as "Data Torturing" and classified it as two types: Opportunistic, wherein scientists

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<sup>1</sup> "[A]s scientists, we are ethically bound to the scientific method, in effect promising to tell the truth. The whole truth, and nothing but – which means that we must include all the doubts, caveats, the ifs, ands, and buts. On the other hand we are not just scientists, but human beings as well. And like most people we'd like to see the world a better place, which in this context translates into our working to reduce the risk of climate change. To do that, we need to get some broad-based support, to capture the public's imagination. That, of course, entails getting loads of media coverage. So we have to offer up scary scenarios, make simplified, dramatic statements, and make little mention of any doubts we have. This "double ethical bind" we frequently find ourselves in cannot be solved by any formula. Each of us has to decide what the right balance is between being effective and being honest. I hope that it means both." But apparently honesty is not an essential ingredient. Discover Magazine, October 1989, page 47. Copy attached.

manipulate standards of statistical significance in order to create apparently valid results, and Procrustean, wherein the scientist generates positive results by redefining exposure or other aspects of a study to again create artificial results.

My own training and education includes a Master's of Science Degree in Hygiene from the department of Occupational Health at the University of Pittsburgh's Graduate School of Public Health, so I started life as a budding scientist. Among my professors at Pittsburgh was Henry Smyth, a world-renowned toxicologist and one of the founding members of the American Conference of Governmental Industrial Hygienists (ACGIH) and the Threshold Limit Value (TLV) Committee on Chemical Substances. I received a law degree from George Mason University in 1986, and have been a certified industrial hygienist since 1978. I joined Keller and Heckman LLP in 1990. Since about the mid-1990s, I have been an associate member of the ACGIH, and as such, have never had the opportunity to vote on the adoption or creation of the TLVs.

My professional experience includes having worked as the Director of Industrial Hygiene for a large company in the chemicals and allied products industry, as well as a consultant while in law school. Early in my career, I became familiar with the then current members of the TLV Committee, including among them Herbert Stokinger, who was the chairman and another giant of the profession to whom I looked for guidance. The Committee's operation today bears little resemblance to the collegial process and symbiotic relationship between industry, academia, and government scientists that existed in the 1970s.

Indeed, at one point during that time, I initiated in my company the petition to the TLV Committee to establish a standard for a chemical that we manufactured, providing the Committee with all that we knew about the chemical at the time. The information included, if memory serves, information from animal studies that others in the company had contracted with a testing laboratory to conduct. We communicated with the Committee, and answered their questions and gave our opinions. This was all done on an entirely voluntary basis, knowing that the level established would be low, and that it would be a challenge to meet the standard. But we felt we needed the assistance of the Committee's expertise to validate our internal assessment through the eyes of a group of experienced toxicologists.

In contrast to that experience, a few years ago, I represented a trade association of industrial manufacturers who were directly affected by several proposals that had been initiated by the TLV Committee. We were more than a little surprised to find that the draft documentation of the TLV proposed was literally awash with errors, which we identified and brought to the attention of the full committee. I personally read both the draft documentation of the proposed TLV and all of the cited papers, with which I was very intimately familiar. The errors were fundamental, including misrepresentations of what the authors of the cited papers actually said, omitting relevant and much more recent papers, and simply getting the entire subject wrong. We prepared a reply to the Committee, pointing out the errors, directing their attention to the more recent papers, which we had previously submitted to the Committee, and asked for an opportunity to present our views. We received an acknowledgement that our submission had been received, but every attempt to seek an audience with the committee to

present our views, and to discuss the issues, was rejected, and we never received a response to the specific criticisms we made. This is not the kind of process designed to instill confidence that a fair hearing of one's views will result.

I believe that this experience, and that of others with which I am familiar, along with the avowed position of the ACGIH that it is not a consensus organization and does not purport to conduct its TLV reviews in compliance with the fundamentals of due process, means that neither OSHA nor any other government agency or organization, including the courts, should any longer rely in any way on the recommendations of the Committee. I in no way want to comment on the integrity of the individual Committee members, as I know what it means to be a committed volunteer in an effort like this. But long experience in many other fields has shown that open, transparent processes uniformly produce better and more acceptable results than private negotiations among insiders in the back room. Trust is a fleeting commodity, and its loss imposes long term costs. Renewing it requires a willingness to let all of one's actions and decisions to be examined in excruciating detail, and ACGIH has been unwilling to pay the price for renewed confidence in their procedures and practices.

Note that the TLVs are not subject to any kind of peer review process. If the TLV Committee decided to submit the Documentation as a paper to a peer-reviewed journal, at least the patina of third party review and objectivity would exist. In the present system, we simply do not know whether the person or persons who prepared the papers have any relevant qualifications, whether they actually read the papers they summarized and cited, or had inherent bias that was not countered by controls or systems in the Committee process. My more recent

experience, and that, I understand, of others, is that the current situation at the Committee is unreliable, and in the absence of transparency and openness, cannot be repaired. The attitude is simply one of "trust us, we're scientists." This is not sufficient.

I know what an effort it is to perform the kind of literature review that the development of an occupational health standard entails. In one of my former positions, I was the principal author under a contract with the National Institute for Occupational Safety and Health (NIOSH) working on a criteria document on a group of chemicals called secondary and tertiary amines. There were over 9000 published scientific papers, including a large number from the Russian literature that we had translated, and I read every one. My job was to prepare the summaries of the papers, and to synthesize, under the supervision of Ph.D.s and NIOSH scientists, the summary of the toxicity of those chemicals. The objective of the criteria document was to establish safe levels of exposure, along with information on methods of control and other technical issues. So I feel that I understand, perhaps better than other witnesses, both the scope of the task and its difficulty. I also understand how important it is to get it right.

There is an equally important aspect that OSHA recognition of the TLVs and other similarly developed positions creates. The imprimatur of governmental recognition and sanction via recognition in OSHA standards and in its rulemaking processes gives undue authority to the pronouncements of essentially private individuals, possibly far above what the scholarship that goes into preparing such documents would otherwise warrant. For example, in part because of OSHA's sanction of the TLVs as potentially authoritative, experts can rely on those standards in testifying in court. If the reliance on these standards is misplaced because they are based on

biased, factually wrong, and inherently unreliable analyses, how can a fair result obtain? These standards find themselves in wide use in just this way in proceedings in court, at the state level in setting air quality standards, and so on, in spite of the ACGIH disclaimer that they are not to be used as legal standards denoting safe from unsafe environments.

It is not that there are not viable alternatives. Several organizations, including the American Society for Testing and Materials (ASTM), American Industrial Hygiene Association Workplace Environmental Exposure Limits Committee, and several American National Standards Institute (ANSI) committees purport to adopt standards in an open, consensus-based process. Yes, it is expensive and takes time. But good work always does. Coupled with the nature of the ACGIH and other like organizations' penchant for secrecy, we can no longer afford the luxury of allowing OSHA to rely on non-consensus organizations. Thus, I strongly support the proposed statutory change, with some suggestions for improvement.

I believe that this proposal would allow OSHA to rely on consensus standards more fully, so long as it follows its normal rulemaking procedures under section 6 of the OSH Act. The statute already requires OSHA to justify deviating from consensus standards when it adopts standards on the same topic. This language would complement section 6(b)(8) by requiring OSHA to acknowledge and identify true consensus standards organizations and bodies, so that both OSHA and the regulated community can have faith in the standards OSHA adopts. Essentially, this bill merely says that Congress was serious when it spelled out which groups can wear the label of a "consensus" organization.

Note that OSHA is not permitted under current regulations governing the Federal Register from incorporating by reference updated versions of standards from third parties. Were OSHA to update the incorporated standards, it would need to do so in a rulemaking. Provided that the standards setting organization maintained its commitment to due process, a presumption in favor of the standard might be warranted, and the rulemaking could be abbreviated. I can provide specific language at a later date if the Subcommittee so desires.

I have reviewed the specific language of the bill, and find that the proposal is essentially sound. The one potential pitfall that needs to be addressed is to prevent OSHA from allowing superficial conformance with consensus procedures, when in fact the effort was anything but a good faith effort to involve all who might have an interest in participating. There are examples of such failures.

A good example was the unfortunate effort by the American National Standards Institute (ANSI)-sanctioned Z-365 Committee on Upper Extremity Disorders. After more than ten years of activity, the failures of the Committee and the secretariat to meet rudimentary consensus standards – publication of minutes of the meetings, inappropriate classification of members as to representation, inadequate representation of interests on subcommittees and review panels, among others – the ANSI Executive Standards Council ordered the secretariat to review the record for compliance with ANSI policies and procedures on representation, participation, appeals of committee decisions, and other procedural irregularities. Those failures led the Executive Standards Council to require that the first standard submitted by the Committee be subject to an audit by ANSI, according to the procedures outlined in the letter to the secretariat.

This points up the need for OSHA to be sure that any finding it makes be based not on a superficial review of nominal procedures, but a finding that in fact the procedures protecting due process have been followed, and that all interested parties have, in fact, been heard. People who have been excluded from such processes need to be able to raise their objections to OSHA to assure more than nominal compliance.

It is good that the language of the bill in section 6(a) makes the action of the Secretary final agency action, the basis of which would be published in the Federal Register. This is a necessary and proper step to assure that the Agency has made a good faith effort to assure compliance with consensus procedures and concepts. I would suggest some relatively important but in my view minor revisions to the language.

In section 6(a), I would add the words, "rely on" between "promulgate or incorporate" in the first sentence. Standards or other scientific documents prepared by private organizations should have no more standing than their inherent persuasiveness warrants.

The language in the bill that would apply these same standards to state plans under section 18 of the OSH Act is equally important, but perhaps it should be clarified that it would apply similarly only to standards the states adopt that are developed by third parties. Many states now adopt the TLVs as update Permissible Exposure Limits (PELs) by rulemaking, without understanding or investigating the underlying rationale for the standard.

Employers are not simply seeking standards that are lenient. As I mentioned above, many employers for many years have sought to "do the right thing" by participating in the

process of developing consensus standards and then adopting them. Indeed, nearly all of OSHA's early standards were derived from consensus standards that had been adopted by progressive employers over the previous 50 years. But if OSHA and MSHA or other agencies are going to rely on those standards as a substitute for rulemaking, then there needs to be real openness, transparency, and opportunity for real an effective participation by all affected parties.

No one can force ACGIH to conduct its Committee work in an open process, nor should we attempt to do so, so long as the Committee's work product is not used to establish legal limits on behavior. Likewise, other organizations, such as the International Agency for Research on Cancer (IARC), whose proceedings are closed, must have their work product subjected to the test of public review and comment before government agencies use them to impose sanctions and standards of care.

Thank you for the opportunity to make my views part of the record. I look forward to taking any questions you might have.

## Committee on Education and the Workforce

Witness Disclosure Requirement – “Truth in Testimony”  
Required by House Rule XI, Clause 2(g)

Your Name: David G. Sarvadi		
1. Will you be representing a federal, State, or local government entity? (If the answer is yes please contact the Committee).	Yes	No X
2. Please list any federal grants or contracts (including subgrants or subcontracts) which <u>you</u> have received since October 1, 1998:  None.		
3. Will you be representing an entity other than a government entity?	Yes	No X
4. Other than yourself, please list what entity or entities you will be representing:  None.		
5. Please list any offices or elected positions held and/or briefly describe your representational capacity with each of the entities you listed in response to question 4:  Not applicable.		
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Signature: David G. Sarvadi Date: June 12, 2006

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