Washington Examiner

Trump Labor nominee Eugene Scalia fought OSHA ergonomics rules from their beginning

Sean Higgins

August 16, 2019

Trump labor secretary nominee Eugene Scalia fought Occupational Health and Safety Administration ergonomics regulations even before they were official.

It's a topic certain to be brought up by Democrats during the hearings on his nomination to run the Labor Department, which includes OSHA. Scalia was grilled on the same subject when he was nominated by President George W. Bush to be the agency's solicitor in 2001, with many lawmakers arguing it cast doubt on his ability to fully enforce the agency's rules.

Scalia argued in a series of writings and public comments before the rules went into effect on Jan. 16, 2001 that they were too vague and would result in the agency becoming overreaching and intrusive.

At a March 2000 public hearing on the proposed regulations held by OSHA, Scalia, a management-side lawyer with the firm Gibson Dunn, referred to himself as "somebody who has been following ergonomic regulation here in Washington and around the country for a number of years and written a fair amount about it."

He then pressed the agency's experts on what had been done to prevent fraud by workers falsely claiming musculoskeletal disorders, such as carpal tunnel syndrome.

"Under this proposed rule, what mechanism exists to ensure that employees claiming MSD symptoms aren't misrepresenting that?" he asked. Told that employers could require the worker to see a doctor, Scalia followed up with several questions about how that process would work. Members of the panel conceded there was no consensus on the subject.

Scalia was so eager to discuss the issue with the experts that he was the first person to ask questions to agency's panel. He was also the member of the public who had asked the most questions by the end of the day. When Scalia asked for extra time, the judge leading the panel jokingly replied, "OK, if you promise you're not coming back."

The room erupted in laughter, prompting Scalia to jokingly respond that his "twin brother" could be appearing.

Scalia had previously written in a *Wall Street Journal* op-ed that the regulations were a "major concession to union leaders, who know that ergonomic regulation will force companies to give more rest periods, slow the pace of work and then hire more workers (read: dues-paying members) to maintain current levels of production."

In the same article, Scalia argued, “If this policy is applied literally, telecommuters will have to install illuminated exit signs over their front doors.”

A key concern of Scalia in his comments and writings was when the ergonomic regulations triggered the “general duty clause” of the OSHA statue. The clause allows the agency to order a business to make changes. He repeatedly argued the ergonomic regulations gave the agency far too much latitude by putting the burden of proof on the employer not the agency.

He called the standard for determining MSDs a “vague and subjective rule would afford little benefit to workers because it is based on thoroughly unreliable science" in a June 2000 commentary for the libertarian Cato Institute,

“[N]o agency should be permitted to impose on the entire American economy a costly rule premised on a ‘science’ so mysterious that the agency itself cannot fathom it,” he wrote in the Cato commentary.

This stance became a problem for Scalia the following year when President George W. Bush nominated him to be solicitor for the Labor Department. Scalia told the Senate Health, Education, Labor and Pensions Committee that he was trying to bring attention to legitimate criticisms of the agency’s regulatory stance.

“In my judgment, there was not much recognition of some of the concerns being raised by other respectable organizations like the American Society for Surgery of the Hand or the California Orthopedic Association, and I tried to bring those into the discussion as well,” he said.