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THE ELUSIVE BURDEN OF PROOF UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

by

David Ford Hunt*

THE Occupational Safety and Health Act of 1970,¹ which became effective on April 28, 1971, is designed by the exercise of congressional interstate commerce powers "to assure so far as possible every working man and woman in the nation safe and healthful working conditions."² Aimed at private employers in interstate commerce,³ OSHA requires employers to furnish to employees a place of employment free from recognized hazards that are causing or are liable to cause death or serious injury.⁴ Although employees are also required to comply with the health and safety standards,⁵ OSHA provides for no penalty against employees for failure to comply. As yet not amended, OSHA operates on an annual appropriation of $150 million per year.

OSHA grants to the executive branch, the Secretary of Labor (the Secretary), enforcement and prosecution powers, and to a newly created agency of the executive branch, the Occupational Safety and Health Review Commission (OSHRC),⁶ initial review powers if an employer petitions or appeals from a citation or proposed penalty issued to the employer by the Secretary.⁷ Thus, OSHA vests both legislative and quasi-judicial functions in the executive branch of government.⁸ The Secretary is granted the power both to issue a citation against an employer for violation of safety and health standards or the general duty clause, and to assess a monetary penalty. The citation and penalty are final unless the employer, within the time limits prescribed, contests the citation and penalty to OSHRC.⁹ An employer must, therefore,

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¹ 29 U.S.C. §§ 651-78 (1970) [hereinafter referred to as "OSHA" or "the Act"]. The Act is also known as the Williams-Steiger Occupational Safety and Health Act of 1970.


³ Id. § 654(a)(2).

⁴ This requirement is known as the general duty clause. Id. § 654(a)(1).

⁵ Id. § 654(b).

⁶ Id. § 661(a). The Fifth Circuit prefers "OSHRECOM." See Atlas Roofing Co. v. OSHRC, 518 F.2d 990 (5th Cir. 1975), cert. granted, 96 S. Ct. 1458, 47 L. Ed. 2d 731 (1976) (No. 75-746).


⁸ For a discussion of some problems created by this unique mixture see Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1973).


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initiate his contest of a citation and penalty to OSHRC as prescribed by OSHA, and may not appeal directly to a court. Simply, an employer must exhaust all administrative remedies before seeking court review.¹⁰

Following a notice of contest, an employer is provided two levels of review by OSHRC. An employer must first attend a hearing before a local hearing examiner (judge).¹¹ If either the employer, the employees, or the Secretary is dissatisfied with the OSHRC judge’s findings and conclusion, then that party may request review by OSHRC.¹² The Commission, however, may refuse to review the judge’s decision. In the case of such a refusal the decision of the judge is final and the aggrieved party’s next step is to the United States court of appeals for the circuit in which the employer is located or the violation occurred.¹³ If a review to OSHRC is granted, the Commission may affirm, modify, reverse, or remand the decision of the hearing judge.¹⁴ Unless remanded to the judge for further hearing, the decision of the Commission is final,¹⁵ and the next step for any party is to the appropriate court of appeals. The court of appeals is bound by the substantial evidence rule and no defense or points on appeal are allowed unless raised before OSHRC. Further review to the United States Supreme Court is provided, although to date only two cases have been granted a writ by the Supreme Court, and these cases¹⁶ are limited to a review of the effect of the seventh amendment.

Finally, OSHA provides that the states may take over functions of the Secretary and OSHRC,¹⁷ although control of OSHA functions by the several states would erode any possibility of a uniform enforcement program. Since such a take-over has not yet occurred, this Article assumes exclusive federal control and discusses the currently existing procedures for enforcement and review under OSHA provisions.

I. ORGANIZATION FOR ENFORCEMENT

A. Powers and Duties of the Secretary of Labor

Promulgation of Specific Safety Standards. The Secretary is granted powers by the Act to create two national advisory committees composed in part of both management and labor representatives. A twelve-member committee¹⁸ appointed by the Secretary advises the Secretary on administration of the

¹⁰ Restland Memorial Park v. Secretary of Labor, No. 75-1189 (3d Cir., July 30, 1976).
¹¹ 29 U.S.C. § 661(a) (1970). There are 45 OSHRC judges located in 10 offices throughout the country, but the judges hold hearings in 75 or more different sites.
¹² Id. § 661(a). The Third Circuit, however, recently held that an employer who is dissatisfied with a judge’s decision must request a review by OSHRC as a prerequisite to appeal to the courts. Until such a request for OSHRC review is made, the employer has not exhausted his administrative remedies. Keystone Roofing Co. v. Dunlop, No. 75-2010 (3d Cir., June 8, 1976).
¹⁴ Id. § 661. The 3-member Commission is required by the Act to reach a 2-member majority before rendering an opinion. See Shaw Constr., Inc. v. OSHRC, No. 75-3495 (5th Cir., July 12, 1976) (petition for rehearing filed).
¹⁵ The Review Commission may hold a further hearing with the parties, but to date has not done so. In fact, only on rare occasions has the Commission even allowed oral argument by counsel. Briefs are, however, required from all parties by the Commission on certified points of review.
¹⁶ The two cases are currently under consideration by the Court. See note 47 infra and accompanying text.
¹⁸ Id. § 656(a)(1).
Act, and a second committee, with as many as fifteen members, advises him on new safety standards. Specific standards adopted by the Secretary are published in the Federal Register so that interested persons may within a certain period of time comment on or object to a proposed standard. In the event of objection or comment the Secretary may order a hearing prior to the final adoption of the standard.

Under OSHA an employer may either contest the enactment of a standard or apply for a temporary or permanent variance. In addition, the employer may petition the United States court of appeals for judicial review of the standard. Despite their existence, none of these remedies has been widely utilized by employers for at least two reasons: employers are generally unaware of what the Secretary is proposing as a safety standard, and unwilling to comply with OSHA standards until a compliance officer inspects a jobsite. An employer who does contest a citation for violation of a safety standard will normally base his appeal upon the ground that the standard was promulgated by the Secretary following the recommendation of an advisory committee which did not include a representative of the trade, craft, or industry of the employer. In such a case the employer has the burden of showing that the lack of representation was prejudicial to his interests.

Enforcement of Safety Standards. Safety standards, after promulgation, are enforced by the Secretary through citation and assessment of a penalty against an employer pursuant to either specific statutory authority or the general duty clause. The latter provision is more aptly described as the "catch-all clause." When the Secretary is unable to fit a given situation to a specific standard published in the Federal Register, he invokes the general duty clause to find a violation. Both OSHRC and the courts have given the Secretary's interpretation of specific safety standards and violations of the general duty clause wide latitude.

Enforcement Procedures. The Secretary is empowered under OSHA to conduct an inspection of any employer's workplace in order to investigate and determine if the employer is in violation of a specific safety standard or in violation of the general duty clause. The statute specifically provides:

In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

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19. Id. § 656(b). The Act provides that these safety standards may also be recommended by NIOSH, an agency under the Secretary of HEW. Id. § 671(b).
20. Id. § 655(b).
21. Id. § 655(f).
22. Id. § 655(b)(6).
23. Id. § 655(d).
24. Id. § 655(f). Petition for judicial review must come before the standard is enacted.
27. Id. § 654(a)(1).
28. Id. § 657(a).
(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.  

For some time the Secretary's right to enter a work area was unchallenged. In 1976, however, an employer successfully persuaded a federal district court that the statutory right of the Secretary to enter an employer's workplace was not absolute. The court held that the Secretary, when challenged by an employer, must secure from the nearest United States district court a search warrant based upon probable cause that a safety violation exists at the employment site. In deciding the case, however, the court considered four limitations: (a) The employer must initially object to the inspection; (b) the Secretary may be barred by the employer only from "non-public portions" of the worksite; (c) an emergency must not exist at the worksite nor the inspection be conducted following a complaint; (d) the employer must not be a licensed business, e.g., a liquor or gun business. The court's holding was apparently a response to the Secretary's contention that OSHA provisions compelled an employer to submit to an inspection. Refusing to hold the inspection procedures unconstitutional under either the fourth or fifth amendments, the court pointed out that "[t]he statute does not explicitly authorize warrantless searches. While it does authorize entries 'without delay,' this is not an unambiguous equivalent for 'without a warrant.' "

A compliance officer, sent by the Secretary to inspect a worksite, must present his credentials prior to the inspection, afford walkaround rights during the inspection to the employer and a representative of the employees, and at the end of the inspection inform the employer of the safety violations discovered. Following an inspection of a worksite, the area director decides whether to issue a citation and penalty for the alleged violation. The area director may delegate to a compliance officer the authority to issue "on the spot" citations, but such citations are infrequent since the area director can usually be consulted either in person or by telephone. Either way, the area director reviews the compliance officer's report to determine whether a citation should issue, and if so, the amount of penalty. The actual issuance of a citation and penalty is often more burdensome to the Secretary than a

29. Id.
32. Id. at 162. Although arising in the United States District Court in the Eastern District of Texas, a 3-judge panel (Judge Gee, Fifth Circuit, and District Judges Steger and Justice) was empaneled to hear the case pursuant to 28 U.S.C. § 2282 (1970). See also In re Inspection of Rupp Forge Co., No. C76-385 (N.D. Ohio, April 29, 1976).
33. 29 C.F.R. §§ 1903.7-.8 (1975); see notes 193-96 infra and accompanying text.
34. There are 63 OSHA area directors in 10 regions covering the 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.
determination that a safety hazard exists at a worksite. First, the area director must decide which specific standard, if any, out of the thousands in the regulations, applies. 36 To prosecute an employer for a hazard for which a specific standard does not exist, the area director must determine that a violation of a hazard recognized in the industry as sufficient to constitute a violation of the general duty clause has occurred. The area director must then characterize the violation as "willful," "serious," "non-serious," or "repeated." 37 Finally, the area director must assess a penalty 38 and set a date by which the employer must correct the hazard. 39

Once a citation is issued, an employer may within fifteen working days contest the citation and penalty by filing written notice of contest with the Secretary. 40 Of course, the employer may by inaction choose to allow the citation and proposed penalty to become final, but if he decides to contest the citation and penalty, he must assume the burden of notifying the Secretary of his decision. At this point the employer has no remedy either in administrative proceedings or in the courts. 41

Finally, the Secretary must serve a written citation on the employer 42 with

36. There are thousands of specific safety standards for employers to follow. Construction employers, for example, have a thousand specific safety standards that apply to their activities alone. Id. § 1926.

37. The Act defines a "serious violation." 29 U.S.C. § 666(j) (1970). "Willful," "non-serious," and "repeated" are not defined in the statute but are found in the Code of Federal Regulations. The Act requires the Secretary to make specific findings before the violation is characterized as not serious. Id.

38. Id. § 666(i).

39. Id. § 658(a).

40. The Act seems to require the employer to specify whether he is contesting the citation, the penalty, or both.


42. Service of the citation and proposed penalty must be made on a corporate officer and not a jobsite superintendent. Buckley & Co. v. Secretary of Labor, 507 F.2d 78 (3d Cir. 1975). The citation must identify the employer, the worksite, the hazard, the penalty, and a period for abatement.
"reasonable promptness" after the inspection. If the employer does not raise the issue of improper service before an OSHRC judge, then the employer's right to contest improper service is waived. An employer also has the burden to raise the issue of improper service.

B. Powers and Duties of OSHRC

Once notice of contest is received by the Secretary from an employer, the burden is on the Secretary to forward the notice of contest to OSHRC in Washington, and prepare the Secretary's complaint. Upon receipt of a notice of contest OSHRC assigns the case a number and a hearing judge. Procedures as to pleadings, discovery, stipulations, and a non-jury hearing before the OSHA judge accord with the Federal Rules of Civil Procedure. Thereafter, the judge makes findings of facts, renders an opinion, and advises the parties that the decision is final unless OSHRC grants a review of the case within thirty days.

The Review Commission may grant a review of a judge's decision upon application by an employer or upon its own motion. The Commission may affirm, modify, or reverse the judge's decision. In addition, the Commission may raise or lower the penalty determined by the judge. The imposition by OSHRC of greater penalties than those proposed by the Secretary, however, has been criticized by the courts. Nevertheless, the Commission's decision is a final order and thereafter appealable to a United States court of appeals.

OSHRC is viewed by the courts as an agency empowered to reach a

43. Seven days after the inspection has been held to be "reasonable promptness." L.D.L. Land Dev. Co., 8 O.S.A.H.R.C. 418, 1 O.S.H.C. 3099 (1974) (No. 3248).
44. In one case service did not take place until eighty-three days after inspection. Nevertheless, since the employer did not raise the improper service issue before the hearing judge, OSHRC did not consider it. Lee Way Motor Freight, Inc., 70.S.A.H.R.C. 1128, 1 O.S.H.C. 1689 (1974) (No. 1105).
46. The Secretary's complaint will not contain allegations which are not contained in the citation or notice of penalty, although in case of conflicts in cited safety standards and multicitation situations the order of the allegations may be significant.
47. Early attacks by employers stressed the unconstitutionality of the Act on grounds that while the Act provides for monetary fines up to $10,000 and possible jail sentences of six months, there is no provision for a jury trial. On March 22, 1976, the Supreme Court granted writs of certiorari in two cases for review of the seventh amendment question under the Act. Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1974), cert. granted, 96 S. Ct. 1458, 47 L. Ed. 2d 731 (1976) (No. 75-748); Atlas Roofing Co. v. OSHRC, 518 F.2d 990 (5th Cir. 1975), cert. granted, 96 S. Ct. 1458, 47 L. Ed. 2d 731 (1976) (No. 75-746). These two cases have been consolidated. The majority of both circuit courts denied the employers' claims of unconstitutionality by virtue of the seventh amendment, but the well-reasoned dissenting opinion of Judge Gibbons in the Frank Irey, Jr. case is significant. 519 F.2d at 1219-26.
49. Any of the three members of the Review Commission may order a review. The Commission has long been divided as to whether OSHRC may review a judge's decision on a point not raised by any party before the judge. See, e.g., Hartwell Excavating Co., 4 O.S.H.C. 1263 (May 21, 1976) (No. 3841). The majority holding is that OSHRC is limited to the actual issues raised before the judge.
50. Dale M. Madden Constr., Inc. v. Hodgson, 502 F.2d 278 (9th Cir. 1974). Employers have also asserted in the courts that the power and inclination of OSHRC to raise proposed penalties, as well as the provision that the penalties continue to accrue due to non-abatement during the contest, discourages employers from exercising their statutory right of contest and appeal, and creates thereby a "chilling effect" on the employers' actions. The Supreme Court has rejected opportunity to review this issue.
51. Dan J. Sheehan Co. v. Dunlop, 520 F.2d 1036 (5th Cir. 1975), cert. denied, 96 S. Ct. 1458, 47 L. Ed. 2d 731 (1976). Motions by parties for a rehearing before the Review Commission have been consistently overruled.
decision by findings of fact and conclusions of law. In practice, however, OSHRC, similar to an appellate body, may affirm, reverse, or modify a hearing judge's decision depending upon whether a preponderance of the evidence supports the judge's decision. Despite the fact that the courts view a judge's decision as a final decision of OSHRC, an unreviewed judge's decision is not binding upon other judges.

C. Court Review: The Substantial Evidence Test

The employer, employees, or the Secretary may file a notice of appeal to the United States court of appeals only after they have exhausted all their administrative remedies. The scope of circuit court review is limited to legal issues: OSHA provides that "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence in the record considered as a whole, shall be conclusive." The burden of the initial determination of constitutional issues rests with the court because OSHRC refuses to rule upon a constitutional question raised by the parties. Otherwise, the court is empowered to pass generally only on those matters raised before OSHRC and preserved in the record by the parties for appellate review.

II. THE SECRETARY OF LABOR'S BURDEN OF PROOF OF JURISDICTION

The Secretary's burden of proof in a proceeding under OSHA is clear from the language of the statute. The Secretary has the burden of showing by a preponderance of the evidence the three jurisdictional elements: the existence of affected employees, a workplace as defined by the statute, and a business affecting interstate commerce. In addition, the Secretary must show the five elements of a violation of either the general duty clause or a specific safety standard: the existence of a hazard, exposure of employees to the hazard, knowledge by the employer of the hazard, knowledge by the employer of the violation, and the failure of the employer to correct the hazardous condition.

The rules and regulations originally enacted by OSHRC and published in 1971 merely required the Secretary to offer proof necessary "to sustain the assertions contained in his citation, notification of proposed penalty, and notification of failure to correct a violation." In 1972, however, the Secre-
tary's burden of proof was enlarged to include "all proceedings commenced by the filing of a notice of contest." If the Secretary contends a particular violation was "willful," "non-serious," or "repeated," then he must allege and prove that fact because OSHA presumes that all violations are classified as "serious" violations. This proof is especially important to employers because the classification of the violation determines the maximum penalty that either the Secretary or OSHRC can assess.

An Employer. An "employer" is defined by OSHA as "a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State." This definition has frequently been the subject of disputes regarding who is actually the employer of persons exposed to hazardous conditions. For example, the employer may contest a violation on grounds that the employees in question are loaned employees, or employees of a subcontractor, materialman, or supplier, or even volunteers. As a result, the multi-employer worksite has been the subject of extensive court interpretations, and, recently, of a new OSHRC rule. An employer now has the burden of showing that the employees exposed to the hazard did not belong to the employer, or that the hazard was not created by, under the control of, nor subject to correction by, the employer.

An employer has some non-delegable duties under OSHA. For instance, in *Dayton Tire & Rubber Co.* OSHRC held that an employer was responsible under OSHA for record-keeping requirements even though the employer had contracted with a personnel referral service to do that work. Citing *Brennan v. Gilles & Cotting, Inc.*, the Commission stated that a determination of who is an "employer" should take into consideration the purpose of the reporting requirements and the economic reality of the situation.

Affected Employees. The Secretary has the burden of showing that there are "affected employees" of the employer and that said employees are exposed to the hazardous conditions constituting the safety violation. An "employee" is defined by OSHA as one "who is employed in a business of his employer which affects commerce." The cases applying this definition have considered whether an employee was exposed to a hazard and have concluded that

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59. 29 C.F.R. § 2200.73(b) (1975). In a petition for modification of abatement the petitioner has the burden of showing the necessity for the requested modification. *Id.* 60. 29 U.S.C. §§ 666(b), (c), (j) (1970). See California Stevedore & Ballast Co. v. OSHRC, 493 F.2d 1064 (9th Cir. 1975).

61. See 29 U.S.C. § 666(a) (1970) (willful or repeated: $10,000 fine); id. § 666(b) (serious: $1,000 fine); id. § 666(c) (non-serious: $1,000 fine); id. § 666(d) (failure to abate violation: $1,000 per day); id. § 666(e) (willful violation resulting in death: $10,000 and six months' prison); id. § 666(f) (person giving advance notice of inspection: $1,000 fine and/or six months' prison); id. § 666(g) (false statements of records: $10,000 fine and/or six months' prison); id. § 666(h) (employer who violates posting requirements: $1,000). See discussion at text accompanying note 146 infra regarding penalty.


63. See discussion at text accompanying notes 106-19 infra regarding *Anning Johnson* rule.


65. 504 F.2d 1255 (4th Cir. 1974).

66. 29 U.S.C. § 652(6) (1970). Such definition is of little assistance in defining "employee." From the wording of OSHA it is not plain whether an employee whose activities are not related to the employer's business affecting commerce is covered under OSHA.
all employers whose employees are exposed to a hazardous condition are liable under OSHA, regardless of whether the employer created, was responsible for, or could not eliminate the hazard. An employer who could have eliminated the hazard is liable regardless of whether an employee was actually exposed to the hazard.

This interpretation of "employee" appears inconsistent with OSHA's original intention to hold an employer responsible only for the safety of his own employees. Nevertheless, the trend is to hold an "employer" liable for a violation of a safety standard if the "employer" creates, controls, or has the power to correct a hazardous condition regardless of whether any employee is present or whether anyone injured is an employee. Accordingly, the Secretary has cited two separate employers for the existence of a single hazardous situation, alleging that the exposed workmen were employees of both employers at the same time.

A Work Place. The Secretary has the burden of proving the existence of a worksite, a place of employment, or a place where work is performed. The burden is easily met since any site where any employee is working constitutes a "place of employment." Generally, employers have been unsuccessful in refuting the Secretary's contention that a particular worksite is a "place of employment" even in the extreme case where employees were working in prohibited or unauthorized areas.

Business Affecting Interstate Commerce. Since the language of OSHA is phrased as broadly as possible, the Secretary's burden with respect to "busi-

67. Id. § 654(a) merely requires the employer to furnish to each of the employees a safe place of employment. This provision, however, is found only in the general duty clause provision, § (a)(1). The specific safety standard, § (a)(2), has no such limitation, and the court in Anning Johnson, discussed at notes 106-19 infra, soon found and probed this fissure to broaden the scope of an employer's responsibility.

68. Two volunteers were in a sandtrap. The sandtrap collapsed, killing one and injuring the other. The "employer" responsible for the existence of the sandtrap was found in violation of a safety standard by an OSHRC judge even though there was no evidence that either volunteer was an "employee," and the surviving volunteer denied being an "employee." The judge presumed the employer-employee relationship and the acts of the volunteers as somehow being beneficial to the employer. Arlie R. Hawk, General Contractor, 4 O.S.H.C. 1248 (May 19, 1976) (No. 6688). The Review Commission affirmed the decision. The majority of the Commission found, as did the judge, that "'[i]t strains credulity that two grown men tarried at a construction site for the better part of a day then leaped into a 13-foot excavation to spread sand with shovels merely for the sake of friendship and healthful exercise.'" Id. The dissenting commissioner rejoined, with equal logic, that "'[o]ne could wonder why [the employer] would employ two men to stand around his worksite for the better part of a day just so he would have them there for a few minutes in order to do light sand-smoothing work.'" Id. at 1249. But see S.H. Pridgeon—Logging Contractor, 13 O.S.A.H.R.C. 71, 2 O.S.H.C. 3210 (1974) (No. 7092) (judge dismissed a citation against an employer whose employee was killed while voluntarily helping another employer, an exempt municipal utilities company, to clear trees from power lines in violation of a specific safety standard).


70. A "site" may include moving vehicles, airplanes, or other mobile sites under the control of an employer.

71. Specifically, OSHA imposes a duty on the employer to furnish a safe "place of employment." 29 U.S.C. §§ 654(a), 651(b)(1) (1970). To enforce the imposition of this duty OSHA authorizes the Secretary to inspect any "factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer..." Id. § 657(a)(1).

72. REA Express, Inc. v. Brennan, 495 F.2d 822 (2d Cir. 1974).
ness affecting commerce' is virtually non-existent. The definitions of "employer" and "employee" contain the broad phrase "business affecting commerce" which is "a phrase often used when Congress means to signal an intention to go beyond the regulation of businesses engaged in commerce."

According to one of the authors of the statute, Congress intended to make "[t]he coverage of this bill . . . as broad generally speaking as the authority vested in the Federal Government by the commerce clause of the constitution." Thus, OSHRC and the courts have for the most part sustained the Secretary's burden by interpreting "business affecting commerce" to include the purchase of equipment and insurance policies produced by out-of-state sources, employer-supplied services to other businesses engaged in interstate commerce, and the use of supplies produced by out-of-state sources, even if purchased locally.

Although the Secretary clearly has the burden to show an employer is engaged in a business affecting commerce, one commissioner in a recent case voted to require an employer to demonstrate that his business was not one "affecting commerce." This commissioner would also prohibit OSHRC from disposing of an employer's "not affecting commerce" claim on the ground that OSHRC rules reserve constitutional questions for court review. These proposals have little merit. The commissioner has confused matters required to be included in a citation by the Secretary with jurisdictional matters necessary for a complaint.

III. THE SECRETARY OF LABOR'S BURDEN OF PROOF: VIOLATION OF OSHA

Burden of Proof. The Secretary has the burden of proving whether an employer has violated a particular provision of OSHA. The amount of proof necessary to meet the burden will vary according to whether the cited em-

73. See note 62 supra and accompanying text.
74. See note 66 supra and accompanying text.
75. Brennan v. OSHRC, 492 F.2d 1027, 1030 (2d Cir. 1974).
78. Brennan v. OSHRC, 492 F.2d 1027 (2d Cir. 1974). In Franklin R. Lacy, however, the Secretary's citation was dismissed for failure to prove the employer was engaged in interstate commerce even though an employer, building his own apartment addition, was shown to be using tools purchased from Sears, Roebuck & Company and lumber from Weyerhaeuser, two obvious interstate businesses. 4 O.S.H.C. 1115 (April 5, 1976) (No. 3701) (judge's decision). OSHRC affirmed the judge's dismissal. The Review Commission's opinion is dependent upon whether a judge should take either "judicial notice" or "official notice" of the interstate commerce nature of a business. The Secretary is expected to appeal the case.
79. Anchorage Plastering Co., 18 O.S.A.H.R.C. 459, 3 O.S.H.C. 1284 (1975) (No. 3322). The Commission by a one-to-one split decision affirmed the judge's decision to vacate the citation for failure of the Secretary to meet his burden of proof with respect to jurisdiction. The case has been appealed to the Ninth Circuit. Appeal docketed, No. 75-2747, 9th Cir., Aug. 8, 1975. In view of the stipulations in that case as to the employer's use of supplies from interstate commerce, and the employer's work on buildings for firms that are engaged in interstate commerce, the indication is that the Ninth Circuit will reverse OSHRC and reinstate the citations.
80. Id. at 460, 3 O.S.H.C. at 1285.
82. Les Mares Enterprises, Inc., 16 O.S.A.H.R.C. 854, 3 O.S.H.C. 1015 (1975) (No. 2455). Appeal docketed, No. 75-2196, 9th Cir., June 27, 1975. The Ninth Circuit is expected to leave the burden of proof on the Secretary to show that the employer is engaged in a business affecting commerce.
Employer has allegedly violated the general duty clause or one of OSHA's specific safety standards. Under the general duty clause the Secretary must demonstrate that (1) the employer's workplace is not free of safety hazard, (2) the safety hazard is one recognized as a hazard in the industry or business of the employer, and (3) the hazard is likely to cause death or serious physical harm to the employees.

A specific safety standard takes precedence over the general duty clause. Consequently, both OSHRC and the courts will dismiss the Secretary's citation when a specific safety standard is shown by the employer to be applicable and the Secretary has issued the citation based upon the general duty clause. If the application of a specific safety standard is raised successfully by the employer in the initial hearing, the Secretary can usually exercise the right to amend his complaint under the Federal Rules of Civil Procedure to allege violation of the specific standard raised by the employer at the initial hearing. Since failure to allege the inapplicability of the general duty clause constitutes a waiver of that specific defense, the employer must raise an argument sufficient to preserve error with respect to the applicability of a specific safety standard, but insufficient to persuade the Secretary to amend the citation to allege violation of the specific safety standard. Regardless of the complaint, under OSHA administrative procedures OSHRC may find the proper violation even if the Secretary fails to assert the correct safety standard in the citation.

In National Realty & Construction Co. v. OSHRC the issue before the court was the Secretary's burden of proof under the general duty clause. The specific inquiry was directed toward what constitutes a failure by an employer to render a workplace "free" of a hazard. The court noted that an employer is neither strictly liable for injuries occurring at the place of employment nor responsible for unpreventable hazards, nor is he expected to make extreme efforts to prevent hazards. The Secretary's failure to introduce evidence showing how the worksite could have been rendered free of the hazard convinced the court that the employer could not be held liable for the alleged hazard. OSHRC cannot create a theory for the Secretary nor speculate outside the record about what the employer might have done to correct

84. Id. § 654(a)(1).
85. The Act does not provide in the stated purposes, the general duty clause, or the specific standards any reference to mental or psychological harm to employees. Accordingly, the threat of physical harm to employees is not protected under OSHA unless that threat is either a recognized hazard in the industry or has been defined as a safety standard.
88. This should be appropriately called "The Secretary of Labor's Shifting Sands Doctrine."
89. See note 86 supra and accompanying text.
90. 489 F.2d 1257 (D.C. Cir. 1973).
91. Id. at 1267. An employee, while riding as a passenger on a front-end loader, was killed when the machine went out of control. This accident occurred before the promulgation of specific standards by the Secretary that would now apply to this situation. The Secretary relied heavily on the death of the employee to show a violation by the employer.
92. The court stated that "the hearing record [was] barren of evidence describing and demonstrating the feasibility and likely utility of the particular measures which [the employer] should have taken to improve its safety policy. Having the burden of proof, the Secretary must be charged with these evidentiary deficiencies." Id.
the situation. To prevail under the general duty clause the Secretary must formulate and demonstrate a safety method by which an employer could have protected his employees.

A specific safety standard requires the Secretary to prove all the essential elements stated in that standard and the definitions related thereto. The citation must state with particularity the elements of violation contained in the standard. Thus, oral statements by a compliance officer to an employer relating to deviations from the standard are not sufficient to allege a violation. In addition, if the Secretary alleges and proves a violation of the general duty clause when a specific standard should have applied to the situation, the citation should be vacated unless the parties tried the issues under the specific standard by consent.

The various courts and the Review Commission have not consistently applied the specific safety standards to a given set of facts. For example, the standard for the guarding of opensided floors has been expressly held by two courts of appeals not to apply to the guarding of flat roofs. OSHRC insisted, however, that its contrary interpretation of that standard applied and was to be binding on OSHRC judges until such time as the Supreme Court ruled on the OSHRC interpretation. As a result, OSHRC judges followed the OSHRC interpretation unless the judge was sitting in a circuit which had overruled the OSHRC interpretation. OSHRC finally acquiesced to the interpretation of the courts of appeals.

Existence of a Hazard. Upon the issuance of a citation under the general duty clause or a specific safety standard the Secretary must demonstrate the existence of a "hazard" or a dangerous situation which may result in injury or death to an employee. Under the general duty clause a hazard is shown by reference to safety standards of the industry. The existence of a hazard is presumed, however, in the case of a work situation encompassed by one of OSHA's specific safety standards, and evidence that a worksite situation

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93. The majority of OSHRC had, in this decision, speculated about what the employer could have done to upgrade its safety program. The court stated that the Commissioners had attempted, in effect, "to serve as expert witnesses for the Secretary," and that this was not their function. Id. at 1267 n.40.

94. This requirement upon the Secretary assures "even handed enforcement of the general duty clause." Id. at 1268.

95. For example, an alleged violation of a trenching standard must show that the sides of the trench are in "unstable" [soil] or [soil of] "soft material." 29 C.F.R. § 1926.500(d)(1) (1975). "Unstable" soil is defined in the standard, but "soft material" is not. Id. § 1926.653(q).


99. Diamond Roofing Co. v. Usery, 528 F.2d 645 (5th Cir. 1976); Langer Roofing & Sheet Metal, Inc. v. Secretary of Labor, 524 F.2d 1337 (7th Cir. 1975).


101. See OSHRC Judge Burroughs' opinion in Western Waterproofing Co., 9 O.S.A.H.R.C. 979, 2 O.S.H.C. 3083 (1976) (No. 14237) (judge's decision). OSHRC has directed a review. Judge Burroughs was writing before the opinion of the Fifth Circuit in Diamond Roofing Co. v. Usery, 528 F.2d 645 (5th Cir. 1976).


103. A "hazard" is implicitly defined as a dangerous condition which may result in injury or death to an employee. 29 U.S.C. § 654 (1970).

104. See Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864 (10th Cir. 1975).
has existed for a long period of time without injury or death to any employee will not overcome that presumption. 105

Employee Exposure to Hazard. One of the most noticeable changes in the burden of proof requirements under OSHA is the "employee exposure to hazard" element. The Review Commission originally required the Secretary to show that employees of the cited employer were "exposed" to the hazard. 106 The Commission later modified its position to require the Secretary to show that employees had "access" to the hazardous condition. 107 Most recently, the Commission has stated that the Secretary need not show that any employees were exposed or had access to a hazardous condition; rather, the burden of proof is on the employer to show that no employee was exposed. 108 Naturally, the courts are divided with respect to the applicability of the rules and the Commission's modifications. The Fourth Circuit follows the Commission's original rule 109 while the Second Circuit follows the rule as first modified. 110 The same question is now on appeal in the Sixth Circuit, 111 but the Seventh Circuit has simply refused to consider the question. 112

In a related context, burden of proof requirements have also changed with respect to a showing of whose employees were exposed to a hazard. Originally, the Secretary was required to show that employees of the cited employer were exposed. 113 The Second Circuit modified this rule to require the Secretary to demonstrate only that an employer is in control of a hazardous condition or has created a hazardous condition. Under the modification the Secretary need only establish that the hazard was accessible to any employee. 114 None of the circuits explicitly follows either the original rule or its modified version; rather, the circuits are in discord with respect to the degree of control necessary to hold an employer liable. The Ninth Circuit, for example, has held that the lessor of hazardous equipment and not the lessee was responsible for complying with the standards. 115 The Tenth Circuit, on the other hand, has held that a showing by the Secretary that an employer had control over the employee of another was sufficient to justify the citation. 116 Generally, circuits focus on control over the employee or control over the

110. Brennan v. OSHRC, 513 F.2d 1032 (2d Cir. 1975).
114. The employee need not be an employee of the cited employer. Brennan v. OSHRC, 513 F.2d 1032 (2d Cir. 1975).
115. Frohlick Crane Serv. v. OSHRC, 521 F.2d 628 (9th Cir. 1975).
situation; at least one circuit, however, would vary the responsibilities depending upon whether the violation is serious or non-serious.\textsuperscript{117}

The Review Commission has recently adopted a rule\textsuperscript{118} which incorporates the Second and Seventh Circuits' modifications but is not limited to serious violations. The Review Commission will now affirm citations issued against employers who (a) have their employees exposed to the hazard, or (b) create the hazard, or (c) have control over the hazard. This rule is expressly aimed at the multi-employer worksite situation common among building construction employers. The rule requires an employer to demonstrate that he has made reasonable efforts or taken realistic protective measures to eliminate a hazardous condition regardless of whether the condition is one of his creation or under his control.\textsuperscript{119} An employer who has created or controls a hazardous condition remains responsible to any and all employees.

**Employer's Knowledge of a Hazard.** As well as showing that a hazard exists, the Secretary must demonstrate that an employer knows or should know of the hazard. One court, applying a "reasonable, prudent man" test, has held that the Secretary must show either that an employer had actual knowledge of a hazard, or that the employer's conduct was "unacceptable in light of the common understanding and experience of those working in the industry."\textsuperscript{120} On the other hand, OSHRC has held that an employer's actual knowledge of a hazard is insufficient to warrant a citation and penalty under the general duty clause unless the alleged hazard is a condition recognized in the employer's industry or business as hazardous.\textsuperscript{121} Nevertheless, one OSHRC decision has been reversed on the ground that the record did not contain evidence which established the safety practice as one recognized in the employer's industry.\textsuperscript{122} Knowledge of the hazard, therefore, was imputed to the employer, and the Secretary, in effect, was granted a second chance to prove the employer's knowledge of the hazardous condition.\textsuperscript{123}

**Employer's Knowledge of a Violation.** Having established an employer's knowledge of a hazardous condition, the Secretary must next demonstrate\textsuperscript{124} that the employer knew or should have known, according to the standards of the industry, that the condition was in violation of OSHA. The courts have refused to impute knowledge of a violation of OSHA unless the employer had knowledge of a hazardous condition or had failed to institute an adequate

\textsuperscript{117} The Fifth and Seventh Circuits follow the original position set out in Gilles & Cotting, although the Seventh Circuit has applied a modified position in the case of a serious violation. See Anning-Johnson Co., v. OSHRC, 516 F.2d 1081 (7th Cir. 1975), noted in 62 VA. L. REV. 788 (1976); Southeast Contractors, Inc. v. Dunlop, 512 F.2d 675 (5th Cir. 1975).

\textsuperscript{118} Anning-Johnson Co., 4 O.S.H.C. 1193 (May 12, 1976) (Nos. 3694 and 4409); see Commissioner Moran's vigorous dissent, id. at 1200-03.

\textsuperscript{119} Id. at 1199.

\textsuperscript{120} Cape & Vineyard Div. v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975).

\textsuperscript{121} But under some circumstances actual knowledge of a hazard by the employer is sufficient to warrant a citation and penalty under the general duty clause (even if the hazard is not one recognized in the industry). Brennan v. OSHRC, 494 F.2d 460 (8th Cir. 1974).

\textsuperscript{122} Brennan v. Smoke-Craft, Inc., 530 F.2d 843 (9th Cir. 1976).

\textsuperscript{123} Id. at 845.

\textsuperscript{124} Despite his objections, the burden of proof rests with the Secretary. Brennan v. OSHRC, 511 F.2d 1139 (9th Cir. 1975).
safety training and supervising program. Generally, a court will impute knowledge of a violation if an employer could have reasonably foreseen harm to an employee from a hazardous condition. The question of whether the harm was reasonably foreseeable has been confused in some cases by an employer's attempt to show that the cause of the harm was a rare occurrence.

The Employer's Failure To Correct the Violation. If an employer fails to abate a violation after he has received a citation, the Secretary may issue a second citation. For a second citation to issue, the Secretary must demonstrate that the employer has failed to abate the violation, and, if the initial citation was uncontested by an employer, which is frequently the case, then a necessary element of proof of failure to abate is proof of the original hazard. In other words, the violation for which the employer was initially cited will not be presumed for the second citation.

Classification of the Violation. A violation of OSHA is placed into one of four categories: willful, serious, non-serious, and repeated. A willful violation, unfortunately, is not defined by OSHA. As may be expected, OSHRC and the courts have defined the term differently. Consequently, what the

125. Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564 (5th Cir. 1976). See also Brennan v. OSHRC, 502 F.2d 946 (3d Cir. 1974), remanded to OSHRC and citation still vacated by OSHRC, 18 O.S.A.H.R.C. 154, 3 O.S.H.C. 1198 (1975) (No. 89); Brennan v. OSHRC, 501 F.2d 1196 (7th Cir. 1974).
126. The employer is not required to supervise every employee every minute of every working day. See Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564 (5th Cir. 1976).
129. Kit Mfg. Co., 16 O.S.A.H.R.C. 80, 2 O.S.H.C. 1672 (1975) (No. 603). One dissenting Commissioner would place the burden of proof upon the employer to rebut the presumption of an initial violation. Id. at 82, 2 O.S.H.C. at 1675.
131. OSHRC has defined "willful" conduct as "intentional, knowing, or voluntary conduct, as distinguished from accidental conduct ... marked by careless disregard." C.N. Flagg & Co. d/b/a Northeastern Contracting Co., 15 O.S.A.H.R.C. 379, 2 O.S.H.C. 1539 (1975) (No. 1409). One OSHRC judge has so confused the meaning of "willful" as to define it as follows: "[A] 'serious' violation committed 'wilfully' will be found whenever an employer consciously and intentionally causes or allows conditions constituting a 'serious' violation to exist, and either knows that these conditions might violate the requirements of the Act or is plainly indifferent to his compliance responsibilities under the Act." Ford Motor Co., CCH 1975-76 OSHD 20,626 (March 15, 1976) (No. 13682) (judge's decision; review ordered by OSHRC on March 22, 1976). OSHRC has also held that a violation is not "willful" if an employer simply persists in his claim that no violation has occurred but desists from the activity that has been cited as violative. See C.N. Flagg & Co. d/b/a Northeastern Contracting Co., 15 O.S.A.H.R.C. 379, 2 O.S.H.C. 1539 (1975) (No. 1409).
132. The First Circuit has defined a "willful" violation to be "a conscious, intentional, deliberate, voluntary decision." F.X. Messina Constr. Corp. v. OSHRC, 505 F.2d 701, 702 (1st Cir. 1974). The Fourth Circuit has added that "willful means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary." Intercounty Constr. Co. v. OSHRC, 522 F.2d 777, 779-80 (4th Cir. 1975), cert. denied, 96 S. Ct. 854, 47 L. Ed. 2d 82 (1976). The Third Circuit, however, has opted for a more restrictive definition: "Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission—it involves an element of obstinate refusal to comply." Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1975), cert. granted, 96 S. Ct. 1438, 47 L. Ed. 2d 731 (1976) (No. 75-748). The court reasoned that so restrictive a definition was necessary in order to provide a "distinction between a 'serious' offense and a 'willful' one." Id. The Tenth Circuit has taken a moderate position by adopting its district court's definition of a "willful" violation as one "done knowingly and purposely by an
Secretary must prove to establish a willful violation will vary according to the forum before which the contest is pending. Nevertheless, in all forums the Secretary has the burden of proving the elements of a willful violation,133 whatever those elements might be.

A serious violation has been defined by OSHA.134 The statutory definition consists of three parts: (1) the existence of a hazardous condition; (2) employee exposure; and (3) knowledge of the violation by the employer.135 Although the Secretary is not required to prove knowledge of the hazard on the part of the employer, proof that an employer had knowledge of a violation would normally include proof that the employer had knowledge of a hazard.136 The distinction, nevertheless, may be critical at times. In a Seventh Circuit137 case an untrained employee was fatally injured at a hazardous unloading area. Affirming the OSHRC decision to dismiss the citation, the court refused to find a serious violation because the employer, while knowing of the potentially hazardous condition, could not have reasonably foreseen exposure to the condition of an untrained employee.138

The Secretary of Labor’s burden of proof as to the existence of a non-serious violation is the same as the burden for a serious violation except that he need not show a substantial probability that death or serious injury could result from the hazardous condition.139 Thus, the Secretary’s attempt to distinguish between “serious” and “non-serious” in the burden of proving knowledge by the employer of a hazardous condition has been rejected.140 Nevertheless, the Secretary must assess some penalty for a serious violation, but need not do so for a non-serious violation.141

employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement. An omission or failure to act is willfully done if done voluntarily and intentionally. United States v. Dye Constr. Co., 510 F.2d 78, 81 (10th Cir. 1975). The court rejected a contention that an evil motive or moral turpitude is an essential element of a “willful” violation. Id. at 82.

134. 29 U.S.C. § 666(j) (1970) defines “serious” violation as follows:

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.


136. Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1975), cert. granted, 96 S. Ct. 1458, 47 L. Ed. 2d 731 (1976) (No. 75-748) (to support a finding of a “serious” violation there must be a finding that the condition was hazardous and that the employer knew or should have known of the condition).

137. Brennan v. OSHRC, 501 F.2d 1196 (7th Cir. 1974).

138. Id. at 1200. But see both the majority and dissenting opinions in Getty Oil Co. v. OSHRC, 530 F.2d 1143 (5th Cir. 1976).


140. Brennan v. OSHRC, 511 F.2d 1139 (9th Cir. 1975).

141. Continental Steel Corp., 19 O.S.A.H.R.C. 223, 3 O.S.H.C. 1410 (1975) (No. 3162), appeal docketed, No. 75-1819, 7th Cir., Sept. 8, 1975. 29 U.S.C. § 666(b) (1970) provides that employers “shall be assessed a civil penalty of up to $1,000 for each violation.” (Emphasis added.) In contrast, id. § 666(c) provides for non-serious violations: “[Employers] may be assessed a civil penalty of up to $1,000 for each such violation.” (Emphasis added.)
A repeated violation is also not defined by OSHA, but the Secretary has defined the violation as one which continues after the employer has been served with a citation and which is discovered upon a reinspection. One circuit court has held, with questionable reasoning, that a repeated violation may be an initial violation of a different standard if the standards were "violated in such a way as to demonstrate a flaunting of the requirements of the Act."144

**Assessment of Penalty.** Under OSHA maximum penalties are assessed pursuant to the classification of a violation. In addition, the statute provides fines or terms of imprisonment for ancillary offenses. The Secretary and the Commission have discretion to assess penalties up to the maximum provided by the statute. Under the statute the discretion of the Secretary and the Commission to assess the appropriate penalty means a consideration of (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's previous violations.

One would presume that the employer should raise and prove these four factors which the area director should treat as mitigating circumstances when assessing a proposed penalty. These factors, however, are deemed "credits" in determining a penalty, and OSHA places the burden of demonstrating the degree of reduction on OSHRC. The Commission shifted this burden to the Secretary, who promulgated guidelines for implementing the "reduction" or "credit" procedures.

Few cases have questioned the credits granted an employer by the Secretary pursuant to the promulgated guidelines because most employers choose to ignore the assessed penalty and prefer to defend by challenging the application of a safety standard to their worksite or the existence of the statutory elements required for a violation. When confronted with the assessment issue, the courts have considered penalty assessment within the statutory limit to be a discretionary determination which is not subject to review, rather than a factual finding which is subject to review. Moreover, OSHRC requires that the Secretary establish the appropriateness of the proposed penalty but does not require the Secretary to take into account every possible credit.

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143. Bethlehem Steel Corp. v. OSHRC, 4 O.S.H.C. 1451 (July 20, 1976) (No. 75-2301).
144. Id. at 1454-55 (emphasis added).
146. 29 U.S.C. § 666(f) (1970) (giving advance notice of an inspection); id. § 666(g) (filing false documents); id. § 666(h) (assaulting OSHA personnel).
147. Id. § 666(i).
148. Id. § 666(j).
149. Id.
151. Beall Constr. Co. v. OSHRC, 507 F.2d 1041 (8th Cir. 1974). The court also refused to decide whether OSHRC was empowered to increase the penalty proposed by the Secretary. Id. at 1045-46. The Ninth Circuit has answered that question in the affirmative. California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986 (9th Cir. 1975).
Although discretionary, a Secretary’s proposed penalty is subject to revision by OSHRC, depending on the facts of the alleged violation and an employer’s actions subsequent to a citation. In a recent case, for example, an employer, wishing to avoid a citation, sought to frustrate a compliance officer’s inspection of a worksite. In an effort to prevent the compliance officer’s observation of an employee exposed to a hazardous condition, a prerequisite to a citation, the employer removed all employees from the worksite during the inspection. Unfortunately for the employer, the scheme backfired. The OSHRC judge found that the employer’s action demonstrated a lack of “good faith” on the part of the employer, pronounced the violation as “willful,” and increased the penalty.

IV. THE EMPLOYER’S BURDEN OF PROOF

An employer’s dispute with the Secretary may begin as a simple jobsite dispute between a job foreman and the Secretary’s compliance officer. As the dispute proceeds through the many administrative and judicial stages, perhaps ultimately to the United States Supreme Court, the litigants are subjected to many formal and sophisticated trial practices. Although the primary statutory responsibility under OSHA is compliance with the safety standards promulgated therein, an employer also has certain ancillary duties. After issuance of a citation, an employer must comply with OSHA procedures for notice of contest if he expects to contest the citation or penalty, and, as a contest develops further, the employer must take responsibility for pleading and proving any general, specific, or procedural defenses that may exist to an alleged violation.

A. General Defenses

Once the Secretary has met the burden of establishing that a violation exists, an employer is entitled to assert affirmative defenses. A general defense raised by an employer imposes on that employer a burden of proof; the burden will never shift to the Secretary or OSHRC. The most frequently asserted general defenses are contentions that the safety standard in question is vague, indefinite, or inapplicable to a particular worksite, or that the general duty clause should not apply to the cited employer.

General defenses have enjoyed mixed success. Immediately after the passage of OSHA the courts would almost summarily sustain a Secretary’s interpretation of a safety standard, even if OSHRC had previously declared the standard vague. Employers continued to challenge vague and indefinite standards, however, and the courts began to scrutinize more closely OSHRC decisions when the Secretary failed, after admonitions from the courts, to
amend the vague language of the standards. With no subsequent action from the Secretary, judicial criticism became increasingly intense until, finally, the Eighth Circuit held that the vague language in the standards promulgated by the Secretary deprived an employer of due process of law.\footnote{Brennan v. OSHRC, 513 F.2d 713 (8th Cir. 1975). The court stated specifically that “[i]f the Secretary desires by this regulation to achieve certain goals which he deems consistent with the purpose of the Occupational Safety and Health Act but which the wording of the regulation, as interpreted by the Commission, will not justify, he should amend or clarify it.” Id. at 716. See also Brennan v. OSHRC, 488 F.2d 337 (5th Cir. 1973).} The Fifth Circuit soon followed this precedent by handing down a decision which greatly restricts the power of OSHRC to interpret broadly the standards promulgated by the Secretary.\footnote{Diamond Roofing Co. v. OSHRC, 528 F.2d 645 (5th Cir. 1976). The court reprimanded the Secretary as follows: The purpose of OSHA is to obtain safe and healthful working conditions through promulgation of occupational safety and health standards which tell employers what they must do to avoid hazardous conditions. To strain the plain and natural meaning of words for the purpose of alleviating a perceived safety standard is to delay the day when the occupational safety and health regulations will be written in clear and concise language so that employers will be better able to understand and observe them. Id. at 650.} Accordingly, until the Secretary elects to reword many of the present safety standards, the general defense that a particular standard is vague and indefinite should continue to prove successful.

An employer may assert as a general defense either that a specific safety standard under which he has been cited does not apply to his particular situation, or that a specific safety standard, rather than the general duty clause cited by the Secretary, is applicable. A problem for an employer with the latter defense is that the Secretary is allowed wide latitude in amending the citation and complaint. Thus, an employer asserting this defense may accomplish no more than the correction of the Secretary’s pleadings.\footnote{See notes 86-89 supra and accompanying text.} Indeed, OSHRC may on its own motion amend the citation to reflect the correct standard and, thereafter, rule that the parties tacitly consented to try the case upon the correct standard because all of the issues material to the correct standard were heard before the OSHRC judge.\footnote{29 U.S.C. § 660(a) (1970).} In any event, the assertion of a general defense will usually accomplish only a delay of the proceedings and may help the Secretary, to an employer’s detriment, to adopt a more sustainable posture. An employer is wise, therefore, not to rely entirely upon a general defense.

### B. Specific Defenses

A wide range of specific defenses have been pleaded, proved, and accepted by both OSHRC and the courts. These defenses are based partly upon an interpretation by the courts of the statutory language which sets as OSHA’s goal the elimination of health and safety hazards “so far as possible,”\footnote{29 U.S.C. § 651(l) (1970).} and partly upon the judicial finding that OSHA was not intended to make an employer strictly liable for unavoidable occupational hazards.\footnote{Brennan v. OSHRC, 502 F.2d 946 (3d Cir. 1974).} The burden to allege and prove a specific defense is entirely on the employer.
Compliance with Standard Impossible. Soon after the enactment of OSHA, OSHRC held that impossibility of performance by an employer was a valid defense.\textsuperscript{165} Courts which have agreed with that holding have reasoned that OSHA was not intended to eliminate a business or work activity when the nature of the performance of the work precluded full compliance with a safety standard.\textsuperscript{166} The question which results from this reasoning is what safety measures in a particular situation are required of the employer for compliance with OSHA? At present, there is controversy as to whether an employer can sustain a defense of impossibility of performance by testimony either that he has no knowledge of a method which would allow him to comply with a standard,\textsuperscript{167} or, in the case of machinery, that a safety device sufficient to comply with the standard has been neither manufactured nor devised.\textsuperscript{168}

A trend has yet to emerge from the decisions. In one case an OSHA safety standard required that platforms six feet or more above the ground be equipped with guard railings. When an employer who had received a citation for failure to equip certain platforms with guard railings demonstrated that the work for which the platforms were deployed could not be performed with the guard railings in place, OSHRC dismissed the citation.\textsuperscript{169} In other cases, however, the Commission has sustained a citation on grounds that performance was not impossible, but merely inconvenient.\textsuperscript{170} In fact, some administrative judges have refused to recognize impossibility as a defense at all.\textsuperscript{171} OSHRC has consistently stated, in any event, that the burden of proof for an impossibility of performance defense rests entirely with the employer;\textsuperscript{172} the Secretary is not required to show that compliance under a specific standard is possible.

Interference with Work To Comply with a Safety Standard. The impossibility of performance defense is closely related to a defense which claims that compliance with safety standards will create an interference with the work effort of an employer. The interference defense will not bring about a dismissal of the citation; the defense will merely reduce the penalty for non-


\textsuperscript{166} For example, in Industrial Union Dep’t, AFL-CIO v. Hodgson, 499 F.2d 467, 478 (D.C. Cir. 1974), the court noted that “Congress does not appear to have intended to protect employees by putting their employers out of business—either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible.” Compare the language in AFL-CIO v. Brennan, 530 F.2d 109, 120-23 (3d Cir. 1975), in which the court discussed the question of present technology versus future technology in a study of possibility versus impossibility of compliances.


\textsuperscript{169} Underhill Constr. Corp., 15 O.S.A.H.R.C. 366, 2 O.S.H.C. 1556 (1975) (No. 1307); cf. Robert W. Settlerin & Sons, 4 O.S.H.C. 1214 (May 11, 1976) (No. 7377). In that case OSHRC denied the Secretary’s last-minute attempts to amend the citation to change the alleged violation from failing to install railings to one of failing to install safety nets.

\textsuperscript{170} K & T Steel Corp., 3 O.S.H.C. 2026 (Feb. 24, 1976) (No. 5769).


\textsuperscript{172} U.S. Steel Corp. v. OSHRC, No. 75-2095 (3d Cir., April 30, 1976); Buckeye Indust., Inc., 3 O.S.H.C. 1837 (Dec. 22, 1975) (No. 8454).
compliance. The current trend toward strict enforcement of safety standards may render this defense of little effect.

A Greater Hazard by Compliance. If an employer can demonstrate that a greater hazard would be created by compliance with an OSHA standard than would be created by non-compliance, the employer may apply for a variance. Even if an employer neglects to apply for a variance, however, an allegation that compliance will cause a greater hazard may constitute an affirmative defense. The defense, like other specific defenses, must be established by a preponderance of the evidence.

Current Methods Safer than Compliance. An employer may also plead and prove as a defense that current safety measures are equal, if not superior, to those required by OSHA standards. The safer measures defense may be relied upon when two sets of OSHA standards conflict with one another, and the employer cannot comply with both. In this situation the employer is forced to guess which standard is the safer method, and he may assert, as an affirmative defense, that he elected the better method. Once a conflict between two sets of OSHA standards is established, the burden is upon the Secretary to reconcile the conflicting requirements. Otherwise, the employer has the burden of proving that his current safety measures accomplish at least the same degree of protection as those urged by the Secretary.

Cost of Compliance Prohibitive. As a general rule, an employer's claim that the cost of compliance with an OSHA standard is prohibitive is not a valid defense. Nevertheless, OSHA does recognize the economic hardship the standards may bring to a small business. The statute, to alleviate that hardship, allows small employers to qualify for loans from the Small Business Administration in order that the employer may take the steps necessary to effect compliance with the safety standards.

Violation as a Rare Occurrence. As a defense an employer may demonstrate that he was complying with applicable safety standards when an employee, in an isolated and rare occurrence, violated a safety standard, without the employer's knowledge. When an employer raises this defense, a court will consider whether the employer permitted the employee to break a safety rule.

174. See notes 22-23 supra and accompanying text.
180. National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973). The court stated the often repeated words concerning an employer's foreseeability concerning his em-
or whether the violative acts of an employee were reasonably foreseeable by the employer. 181

The rare occurrence defense originated with a case before OSHRC involving an employer cited for the employees’ failure to comply with a safety standard requiring the wearing of hard hats in designated areas. 182 OSHRC in that case recognized that an employer is not an “absolute guarantor” that an employee will at all times comply with OSHA safety standards. The Commission outlined the boundaries of the rare occurrence defense by stating that “[a]n isolated brief violation of a standard by an employee which is unknown to the employer and is contrary to both the employer’s instructions and a company work rule which the employer has uniformly enforced does not necessarily constitute a violation of section 5(a)(2) of the Act by the employer.” 183

The courts expect the employer to demonstrate that the incident causing the violation was a rare occurrence, and OSHRC imposes no obligation on the Secretary to show that the incident was not a rare occurrence. 184 The specific elements of the rare occurrence defense, however, have not as yet been enumerated by either OSHRC or the courts. One commissioner, in a concurring opinion, has suggested that a rare occurrence defense is appropriate when an employer can show that an alleged violation is “a deviation . . . from a company work rule or instructions . . . which are enforced,” and that “the deviation was unknown to the employer.” 185

The distinction between the Secretary’s burden of demonstrating knowledge of a violation and an employer’s burden of showing a rare occurrence is often difficult to determine. As could be expected, the members of OSHRC have divergent views. 186 The greater number of OSHRC decisions sustain a citation when the Secretary has proved the existence of the violation, the foreseeability of employee injury, and the employer’s failure to implement a work rule requiring employee compliance with the OSHA standard.

Lack of Control over Affected Employees. Multi-employer worksite situations have been a problem in both the substantive and procedural aspects of OSHA. The courts are frequently confused about burdens of proof and the elements of a violation in multi-employer situations; OSHRC often ignores the statute and places substantially all burden of proof requirements upon employers: “Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program.” 187 Id. at 1266. The court also held that under the general duty clause the burden of proof is on the Secretary to show that the employer’s safety program was inadequate. That burden extends to a showing that feasible measures would have materially reduced the likelihood that unsafe misconduct by an employee would have occurred. Id. at 1265-67.

181. Cape & Vineyard Div. v. OSHRC, 512 F.2d 1148 (1st Cir. 1975).
182. Standard Glass Co., 1 O.S.A.H.R.C. 594, 1 O.S.H.C. 1045 (1972) (No. 259). While the case involved a citation for a general duty violation, the same defense is available to the employer under § 5(a)(2) of the Act.
183. Id. at 596, 1 O.S.H.C. at 1046 (emphasis added).
each employer at a multi-employer worksite. Consequently, the multi-employer worksite cases often raise the following issues: Who has control over the exposed employees? What employer created the hazardous condition? Who had control over the hazardous condition? Who had the power to correct the hazardous condition? Who exposed the employees to the hazardous condition? An employer would be wise, therefore, to present evidence which establishes that he did not create or control the hazards, and that none of his employees was exposed to the hazard.

C. Procedural Defenses

The Secretary, when enacting standards for the enforcement of OSHA provisions, is required to comply with certain procedural rules. The Secretary's non-compliance may excuse an alleged offender if prejudice can be shown. Prior to the final promulgation of an emergency standard, for example, the Secretary must show by a preponderance of the evidence that such a standard is necessary to accomplish the purposes of OSHA. Affected employers are entitled to question and comment upon the efficacy of the proposed emergency standard. For this reason, the Secretary normally releases the proposed standard to the public and schedules a hearing prior to the standard's final adoption.

The Secretary's actions with respect to the enactment of a safety standard are subject, prior to final promulgation, to attack in the courts by affected employers. The court may vacate the standard and instruct the Secretary to comply with correct promulgation procedures. Similar attacks may be raised as a defense by employers receiving a citation for violation of standards improperly promulgated.

The Secretary may also violate OSHA provisions by improper inspection procedures. The inspection procedures require a presentation of credentials prior to beginning an inspection and grant walk-around rights to an employer's representatives and employees. The majority of OSHRC cases have interpreted the inspection procedures to be "advisory" rather than "mandatory." Consequently, an employer's proof of an improper inspection will not result in a successful defense to a violation of a safety standard absent a showing of prejudice to the employer by the improper inspection.

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187. See notes 106-19 supra and accompanying text.
189. Florida Peach Growers Ass'n v. U.S. Dep't of Labor, 489 F.2d 120 (5th Cir. 1974) (an attack on the promulgation of an emergency standard by an industry group filing a direct suit in the U.S. district court).
190. Dry Color Mfrs. Ass'n v. Dep't of Labor, 486 F.2d 98 (3d Cir. 1973).
192. One member of OSHRC considers such an attack to be a matter for decision only by the courts. Noblescraft Indus., Inc., 3 O.S.H.C. 1727 (1975) (No. 3367), appeal docketed, No. 76-1106, 9th Cir., Jan. 9, 1976. See also U.S. Steel Corp., 2 O.S.H.C. 1343 (1974) (Nos. 2975 and 4349), appeal dismissed, No. 75-1031 (3d Cir. 1975); see note 29 supra and accompanying text.
193. See note 29 supra and accompanying text.
In one of the first challenges of an improper inspection to come before a court an employer proved that a compliance officer, prior to conducting his inspection, neither identified himself, presented credentials, nor afforded the employer walk-around rights.\textsuperscript{195} The court found that these facts, even if true, did not constitute a valid defense to a citation because the compliance officer had not inspected an area that was not open to the public and the employer had failed to show prejudice by the officer’s conduct.\textsuperscript{196} An improper inspection, therefore, will not automatically constitute a valid defense to a citation unless an employer demonstrates prejudice to the case brought about by the improper inspection.

The Secretary may also violate OSHA provisions by the improper issuance of a citation and penalty. The statute provides that “[i]f upon inspection or investigation, the Secretary . . . believes that an employer has violated [a standard] he shall with reasonable promptness issue a citation to the employer.”\textsuperscript{197} Soon after OSHA was enacted, OSHRC promulgated a rule providing that the Secretary must issue the citation within seventy-two hours after the area director determines that a violation has occurred.\textsuperscript{198} This rule has been struck down, however, as being unsupported by the legislative history of OSHA and illusory as to any procedural protection to employers.\textsuperscript{199} Even before this decision, OSHRC had ruled that citations issued over seventy-two hours after the inspection, but within the six months’ statutory period, would be vacated only if the employer showed that he was prejudiced by the delay.\textsuperscript{200} This prejudice test has apparently become the present OSHRC rule.\textsuperscript{201} The employer, therefore, has the burden of showing prejudice\textsuperscript{202} by the Secretary’s delay as in other procedural defenses.

Finally, the Secretary may violate OSHA provisions by failing to forward promptly the employer’s notice of contest. The statute provides that an employer who wishes to contest a citation or penalty must file with the Secretary, within fifteen working days, a notice of contest.\textsuperscript{203} The Secretary is required to “immediately advise” OSHRC of the notice of contest at which time OSHRC will docket the “appeal” so that administrative hearing procedures may begin. “Immediately advise” under OSHRC rules means within


\textsuperscript{196} Accu-Namics, Inc. v. OSHRC, 515 F.2d 828 (5th Cir. 1975), cert. denied, 96 S. Ct. 1492, 47 L. Ed. 2d 752 (1976).

\textsuperscript{197} 29 U.S.C. § 658(a) (1970). The statute also prohibits issuance of a citation after six months following the “occurrence of any violation.” Id. § 658(c). This prohibition, however, pertains to discovery of a violation by the Secretary, and does not afford a defense to the employer who has been in violation of the standard for more than six months prior to the Secretary’s inspection.


\textsuperscript{199} Brennan v. Chicago Bridge & Iron Co., 514 F.2d 1082 (7th Cir. 1975).


seven days of receipt of notice of contest. A delay by the Secretary in forwarding to OSHRC the notice of contest, however, will only be a successful defense to a citation if accompanied by a showing of prejudice to the employer.

D. Constitutional Defenses

From its inception, and long before its enactment, OSHA was met with a battery of constitutional challenges. The courts refused, however, to rule upon the constitutionality of OSHA until employers had exhausted their administrative remedies, and OSHRC held that it lacked jurisdiction to determine the constitutionality of the law. Constitutional challenges to OSHA have raised questions of a right of jury trial, the denial of procedural due process, the denial of fifth amendment rights, and the denial of fourth amendment rights. All constitutional objections to OSHA were denied by the United States Supreme Court until March 22, 1976, when the Court granted a writ of certiorari in two cases. But review under the certiorari grant is confined to an employer's seventh amendment right to a jury trial.

E. Abatement of the Violation

Once the Secretary finds a violation, a citation and penalty are issued. The Secretary then orders the employer to abate the violation by correcting the hazardous condition within a specified time period. Failure of the employer to abate the violation subjects the employer to additional penalties of not less than $100 per day for a non-serious violation and not less than $1,000 per day for a serious violation. A notice of contest cuts off the abatement period until a final order of OSHRC or the courts is entered, at which time the abatement period resumes running. If OSHRC determines that the contest was not in good faith but maintained solely for delay or avoidance, then a non-abatement per day penalty may be assessed.

Although OSHA does allow an employer, after he appeals to a circuit court

204. OSHRC Reg. 2200.32, 29 C.F.R. § 2200.32 (1975).
205. Brennan v. OSHRC, 487 F.2d 230 (5th Cir. 1973). The court suggested that the Secretary could structure its citation form so as to enable the employer to "check boxes" on the form returned to the Secretary and clearly designate whether he is appealing or not. Id. at 234 & n.7. The suggestion has been ignored.
207. In addition to cases cited in note 206 supra, see Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1974), cert. granted, 96 S. Ct. 1458, 47 L. Ed. 2d 731 (1976) (No. 75-748); Atlas Roofing Co. v. OSHRC, 518 F.2d 990 (5th Cir. 1975), cert. granted, 96 S. Ct. 1458, 47 L. Ed. 2d 731 (1976) (No. 7-746).
209. Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1974), cert. granted, 96 S. Ct. 1458, 47 L. Ed. 2d 731 (1976) (No. 75-748); Atlas Roofing Co. v. OSHRC, 518 F.2d 990 (5th Cir. 1975), cert. granted, 96 S. Ct. 1458, 47 L. Ed. 2d 731 (1976) (No. 7-746).
211. Id. §§ 659(b), 666(d).
212. Id. § 658(c).
of appeals, to file an application for a stay of the OSHRC final order, such a procedure is not favored by the courts. Thus, the employer who contests a citation and penalty may sometimes risk an additional fine for failure to abate. In fact, the risk is two fold since OSHRC may increase the amount of a contested penalty. The Fifth Circuit recently rejected an employer’s claim that the risks of contest chilled his constitutional and statutory rights of appeal. The court held that the employer’s right to appeal to the circuit court the increase of a penalty against him by OSHRC was a sufficient “insulating factor.”

V. Conclusion

A fair reading of the cases both before OSHRC and the courts reveals that a prima facie case of the Secretary is easily attained while defenses raised by an employer are difficult to sustain. The procedural defenses are rarely successful, and the constitutional attacks have all been denied except for the fourth amendment questions currently pending before the United States Courts of Appeals, and the seventh amendment challenge pending before the United States Supreme Court. If the Supreme Court upholds the seventh amendment challenge, major changes of OSHA will be required, and it is doubtful that Congress will attempt to reenact those forceful measures more often criticized than applauded by the people.

Nevertheless, OSHA clearly needs major revisions. For example, OSHA provisions may be revised to activate the passive and indifferent role of the employee by a cooperative program designed to integrate the employee into the compliance officer’s search for hazardous working conditions. Currently, employees, rather than welcoming an inspection by compliance officers, resent the inspection as a threat to employment. Pre-inspection conferences between compliance officers and employees could alleviate these fears.

The administrative procedures under OSHA are also faulty. Although review by OSHRC should be review in a neutral forum, many OSHRC judges are former hearing examiners who served as advocates of the Government position. Consequently, the OSHRC judge is often as much of a prosecutor as the Secretary. The administrative procedures under OSHA, however, should
insure that a presumption of innocence prevails in the OSHRC hearing; the Secretary must carry his burden of proof without the aid of the OSHRC judge. Similarly, an employer who has established a defense by a preponderance of the evidence should not be defeated by an OSHRC judge's interpretation of the Secretary's scintilla of evidence.

Out of the scramble for a workable system to increase job safety to fifty million employees in the private sector has evolved the present confusion regarding the rights and duties of both employers and employees. The administration of OSHA has created an oppressed attitude among employers and employees that the Government is not creating the safer workplace, but rather havoc and hindrance in the business and industrial world. To reverse this attitude and to make OSHA approach its lofty purposes will require a gradual, judicially inspired improvement upon the present procedures of the Secretary and OSHRC. Such an improvement must include an effort to delineate precisely the rights, duties, and burdens of the Secretary, OSHRC, and the employer.
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