

OSHA & Ergonomics

Enforcement under the General Duty Clause

By Adele L. Abrams

CONGRESS RESCINDED OSHA's comprehensive ergonomics standard in March 2001, pursuant to the Congressional Review Act. In April 2002, OSHA responded by releasing a public notice that "guidelines" addressing workplace ergonomic hazards would be developed, targeting certain industries with high rates of injuries that fall under the "ergonomic hazard" rubric. Under this nonregulatory approach, the agency will:

- Conduct inspections for ergonomic hazards and issue citations under the General Duty Clause [GDC—Section 5 (a)(1) of the OSH Act] and issue ergonomic hazard alert letters where appropriate.
- Not focus its enforcement efforts on employers that have effective ergonomic programs or are making good-faith efforts to reduce ergonomic hazards.
- Address ergonomic hazards in its National Emphasis Program, and through notifications and inspections under the Site Specific Targeting program.

OSHA's approach has been met with much skepticism from various stakeholders. In addition, some have criticized the agency's plans for enforcement under the GDC, noting that this may result in indiscriminate enforcement that will saddle employers with significant legal costs (Testimony of LPA Inc.).

The ergonomic guidelines will not be promulgated through "notice and comment" rulemaking, which means they are not mandatory, cannot carry the force of law, and can be altered or withdrawn by the agency at any time. The guidelines simply interpret agency policy at a given point in time. They also help the regulated community to identify and prevent recognized hazards. Failure to implement an OSHA guideline is not a violation of the GDC.

To issue citations for ergonomic hazards, it is necessary to identify what hazards are known to an

employer; what harmful exposures exist in the workplace; what actions were taken to address such hazards; and whether it is possible to eliminate such hazards. Despite the presence of OSHA guidelines, the em-

ployer need not abate the hazard by the suggested means and is free to choose any effective method of hazard reduction.

Development of voluntary consensus standards related to ergonomics may be used to impute knowledge to employers in specific industries, even in the absence of a stand-alone standard. Although consensus standards cannot be enforced (except when incorporated by reference into a standard), ANSI and ASTM publications influence what constitutes an "industry standard" or a "recognized hazard."

In the absence of a specific standard, it is critical to determine whether OSHA will be able to use its enforcement powers to ensure that all workplaces with hazardous exposures take appropriate corrective action. Also, it is important to establish how OSHA will identify the "bad actors" that should be selected for intensive enforcement. Finally, OSHA has been criticized for taking up to 10 years to litigate ergonomic citations issued under the GDC, specifically because hazards need not be abated while citations are under contest, which can delay any modification of cited work processes and allow additional injuries to occur.

OSH Act Requirements

Under Section 5(a)(1) (the GDC), the OSH Act imposes two complementary duties on an employer. The first is an employer's legal obligation to keep its workplace free from recognized hazards—those likely to cause death or serious physical harm and considered to have a feasible means of abatement. The second legal obligation is the employer's duty to comply with OSHA's specific health and safety standards, pursuant to Section 6 of the OSH Act. OSHA's authority to set standards is limited to ameliorating "conditions that exist in the workplace" (*Industrial Union Dept. AFL-CIO v. American Petroleum Institute*). Before OSHA can promulgate a standard, it must make a threshold finding that a place of employment is unsafe.

The following elements constitute a GDC violation where no specific OSHA standard addresses the identified hazard: 1) the employer failed to keep the workplace free of a "hazard"; 2) the hazard was

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"recognized" either by the cited employer individually or by the employer's industry generally; 3) the recognized hazard was causing or was likely to cause death or serious physical harm; and 4) a feasible means was available that would eliminate or materially reduce the hazard. Whether or not ergonomic guidelines exist, an employer is subject to the same legal requirements of Section 5(a)(1). However, an employer's duty will arise only when all four elements are present.

By contrast, it is far easier for OSHA to "make its case" when litigating citations issued under Section 6(b). To validate a citation, OSHA must only demonstrate that: 1) the cited standard applies; 2) the employer failed to comply with it; 3) its employees were exposed to the violative condition; and 4) the employer knew or should have known of the violative condition with the exercise of due diligence. Unlike a GDC citation, OSHA need not prove that the exposure would result in serious injury or death.

The gravity of this information is only relevant in determining whether a citation is "serious" or "other-than-serious" and the appropriate amount of civil penalty. By definition, all GDC citations are classified as "serious." Moreover, the existence of a Section 6(b) standard infers that a feasible means of abatement exists, as this is required under the rule-making process itself. Thus, it eliminates the most critical hurdle OSHA faces when taking enforcement action under the GDC.

Recognition of Ergo Hazards Under the GDC

By definition, the GDC requirements encompass threats that result in occupational illness or injury. Thus, findings that identify ergonomic hazards and recommend solutions—such as those published by NIOSH, voluntary consensus organizations (e.g., ANSI and ASTM) and American Conference of Governmental Industrial Hygienists (ACGIH)—are likely to satisfy the requirement for GDC applicability under the appropriate legal tests. Because ANSI, ASTM and ACGIH are developing new standards to address ergonomic hazards, the activities of these organizations remain highly relevant to OSHA's future enforcement posture under the GDC.

Myriad publications and materials by recognized experts and organizations, both in the scientific literature and in the administrative record developed during OSHA's ergonomics rulemaking, state that a series of actions or a workplace configuration may result in MSDs, carpal tunnel syndrome (CTS) or other soft-tissue injuries.

The principles articulated within the ergonomic guidelines will likely be culled from the findings of these public and private organizations. Such findings may be sufficient to place an employer on notice to address ergonomic hazards or face sanctions up to \$70,000 per violation under the GDC.

As noted, employers are free to utilize OSHA guidelines. However, standing alone, these documents do not create any specific duties under the OSH Act. Therefore, an employer's failure to implement them—absent other findings—does not consti-

tute a GDC violation. All of this notwithstanding, employers can be cited under the GDC when there is a "recognized hazard" and steps are not taken to "prevent or abate the hazard."

Occupational Safety and Health Review Commission (OSHRC) case law holds that a work practice may be a "recognized hazard" even if an employer is unaware of its existence or potential harm (*Brennan v. OSHRC & Vy Lacto Laboratories Inc.*). It is an objective test, generally interpreted to include hazards of common knowledge or general recognition in the particular industry in which it occurs and that is detectable by means of the senses (*Secretary of Labor v. American Smelting and Refining Co.*). Another commonly used standard for determination of whether a "recognized hazard" exists under the GDC is the common knowledge of safety experts familiar with the work practice in question (*Kingery Construction Co. v. OSHA*).

Factual proof of actual hazard or past injuries is not needed to show noncompliance under the GDC because the OSH Act is directed at prevention of the first injury or illness (*Arkansas-Best Freight System Inc. v. OSHRC & Secretary of Labor*). A GDC violation occurs whenever the employer fails to take precautionary steps to protect workers from reasonably foreseeable hazards that are likely to result in death or serious injury or illness.

OSHA's History of Ergo-Related Enforcement

Publication of ergonomic guidelines for specific industry sectors will likely be found to impute the requisite knowledge to those general industry or construction employers that have ergonomic-related injuries/illnesses on their OSHA 300 log. Others will be targeted due to a history of ergonomic hazards arising from routine operational procedures.

However, OSHA has been enforcing ergonomics requirements under the GDC for about a decade even in the absence of such guidelines or targeted enforcement programs. In fact, the agency has issued more than 500 citations related to ergonomic hazards (Testimony of John Henshaw). OSHA confirms that, in most cases, cited employers recognized that ergonomics programs were in their best interest and that of their employees. The citations were abated by implementation of ergonomic programs.

GDC enforcement related to ergonomics was largely suspended in the last years of the Clinton administration, however, as the agency focused its efforts on finalizing the ergonomics standard. A 1994 report concluded that ergonomic cases were costly to prosecute and required the inspectorate to have substantial knowledge of hazards in order to issue valid citations. That report directed the agency to conserve resources by issuing no more than 10 ergonomic citations per year (*Inside OSHA*).

Two actions—*Secretary of Labor v. Pepperidge Farm Inc.* and *Secretary of Labor v. Beverly Enterprises*—are considered the landmark ergonomics/GDC cases. They are noteworthy because they resulted in high-dollar civil penalties under the GDC for failure to protect workers from ergonomic-related illness/injury and/or required employers to enter into con-

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sent orders that revamped workplaces at the company's expense in order to abate citations.

In the *Pepperidge Farm* case, OSHRC acknowledged that excessive lifting and excessive repetitions were recognized ergonomic hazards that had caused and were likely to cause serious physical harm to employees. In finding that CTS and other soft-tissue injuries at the cited workplace were work-related, OSHRC considered medical evidence and opinion, injury incidence rates, and epidemiological studies and testimony in the record. The Commission held that an employer could be forced to embark on a process-based, incremental approach to abating ergonomic hazards.

In this action, citations relating to excessive lifting were affirmed, while those involving excessive repetitions were vacated. Significantly, in this extensively litigated matter, OSHA ultimately was unable to demonstrate that altering production line speed, increasing the number of workers, imposing rest breaks or job rotation would reduce injury rates or be feasibly implemented.

In *Beverly Enterprises*, OSHRC held that lifting practices at the company's nursing homes exposed workers to a serious recognized hazard. Nursing assistants suffered a disproportionate number of cases of lower back pain, often requiring long periods of sick leave, ranging from six months to more than a year. OSHRC held that manual lifting of nursing home residents was a known and recognized risk factor for lower back pain and that the company recognized the hazard but failed to control it. The case was remanded to determine whether there was a feasible way to abate the recognized hazards, but the company ultimately entered into a consent order with OSHA to develop and implement a company-wide ergonomics program. Nearly 11 years elapsed between the issuance of the citations and approval of the settlement agreement.

Work-Relatedness Enforcement Issues

Many of the adverse health conditions OSHA seeks to prevent can be caused by nonwork as well as work activities. This remains a major objection to an ergonomics standard. Debate continues over whether CTDs and repetitive strain injuries constitute "material impairment of health or functional capacity" under the OSH Act.

Given OSHA's authority under the GDC, with respect to ergonomic hazards, a critical question in enforcement actions is whether injury-based targeted enforcement programs can accurately screen out those injuries caused by off-duty activities that involve repetitive motion, stress factors or lifting of heavy loads. Prior to the furor over ergonomics, courts held that OSHA could regulate workplace conditions giving rise to a significant risk of impairment, even if such impairments can also be caused by nonwork activities (*Forging Industry Assn. v. Secretary of Labor*).

Case law supports a finding that while nonoccupational hazards may contribute to the adverse health effect, OSHA need not refrain from regulating workplace conditions that are shown to cause such loss.

Similar conclusions are likely to be reached in litigation challenging OSHA's authority to regulate ergonomics in the workplace—whether under the GDC or some future ergonomics standard. In fact, the *Pepperidge Farm* decision included a finding that OSHA established a causal connection between MSDs affecting the employees, even though many of the injuries may have had more than one causal factor and the specific cause of such injuries was "unknowable or presently unknown" (*Pepperidge Farm at 2029*).

Conclusion

Enforcement of ergonomic hazards under the General Duty Clause has a long history with mixed results. The fourth prong of the GDC criteria—feasibility of abatement—will likely remain the stumbling block for successful prosecution. One potential advantage of this approach is that GDC enforcement can cover all workplaces—including general industry workplaces, construction, maritime and agriculture—whereas the rescinded standard covered only general industry. Whether the agency will be able to expend adequate resources to educate its compliance officers so that true hazards can be identified and cited with the necessary precision remains to be seen.

If history is any indication, prosecution through the GDC will be a long, costly process. Moreover, it delegates to the OSHRC power to define what constitutes recognized ergonomic hazards through case law development. One can only hope that such decisions will be carefully drafted because of their impact on the future practice of safety and health and on the lives of American workers. ■

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