the nature of the violation, (2) possible or recommended abatement measures the employer could take to correct the observed violative condition, and (3) possible abatement dates OSHA may ask the employer to meet. As with other inspection requirements, the failure of a compliance officer to conduct a closing conference will not result in a dismissal of citations unless the employer can show that he was prejudiced by not having the benefit of a closing conference.[55]

The closing conference also gives the employer an opportunity to confer with the compliance officer before the citations are actually issued, share information the compliance officer may have missed or misunderstood, and identify abatement steps the employer will take or has already taken.

Practitioner's Tip: Pre-Citation Settlements

Following a closing conference but before OSHA has actually issued citations, OSHA may be willing to entertain a "pre-citation settlement." This can be a favorable way to resolve an enforcement action, because the employer can negotiate with OSHA, at the outset, the characterization and grouping of the citations, the actual citation language, abatement requirements and dates, and penalty amounts. However, the agency considers such settlements only in large, well-publicized cases.

---

[55] *See Townsend Tree Services Corp.*, 2005 OSAHRC LEXIS 66, *5-6 (Rev. Comm'n 2005) (citing *Kast Metals Corp.*, 5 OSH Cases 1861 [Rev. Comm'n 1977]).

Chapter 11

Understanding and Contesting OSHA Citations

Lauren Handel
McDermott Will & Emery LLP
New York, N.Y.

1.0 Overview

Most Occupational Safety and Health Administration (OSHA) citations are not contested, often because the proposed penalties are relatively low. Employers often feel that it is not worthwhile to contest an OSHA citation given the low amount of the penalty and the perceived risk of damaging the relationship with the agency. In many cases, however, there are good reasons to contest citations. Furthermore, favorable results often can be achieved without having to undergo the expense and effort of a full-blown administrative trial.

This chapter discusses the reasons why an employer might want to contest an OSHA citation. It also summarizes the elements of an OSHA citation and explains the deadlines and process for contesting a citation, from the notice of contest to informal settlements, to administrative review and appeals.

2.0 Why Should an Employer Contest a Citation?

An employer who is cited for OSHA violations may wonder why it should bother contesting the citations. Employers often feel that it is best to just pay the penalty, which is likely a relatively low amount, and be done with it. In many cases, this may be a wise course of action. However, in evaluating whether to accept or contest an OSHA citation, it is important to consider the hidden and long-term potential costs, liabilities, and responsibilities.

2.1 Abatement Costs Can Be Significant and Long Term

Although the penalty amounts from an OSHA citation may be modest as compared to other types of administrative fines, such as environmental penalties, the costs of abating the alleged violations may be high. Abating alleged violations may require substantial changes to manufacturing equipment or processes and may be indirectly extended to a company's other facilities, even if those facilities were not subject to the inspection giving rise to the citations. These costs include not only initial costs of purchasing and installing new equipment or making modifications to existing equipment or procedures, but also potential long-term costs of ongoing maintenance. These costs may be unavoidable if the law truly requires them or may be worthwhile if the abatement measures OSHA seeks are truly necessary to promote employee safety and health. However, there are often circumstances where OSHA seeks abatement measures that are not clearly required by the law and that have no real safety or health benefit but would impose significant costs—enough to create a competitive disadvantage as compared to other employers in the same industry who have not received similar citations.

2.2 Uncontested Citations Can Result in "Repeated" Violations Later

Another factor to consider in deciding whether to contest a citation is the effect the citation may have on future OSHA enforcement actions. Although the penalty for an initial violation of an OSHA standard may be modest, if an employer is cited again for the same violation, *at any of its workplaces*, that violation can be characterized as "repeated," with maximum penalties up to ten times higher than penalties for "serious" or "other-than-serious" violations. Repeated violations are also more likely to be characterized as "willful." Employers with high gravity willful or repeat violations may become targets of OSHA's Enhanced Enforcement Policy.[1] Under this policy, OSHA identifies employers for increased attention, including follow-up and more frequent programmed inspections at any of its workplaces. The Enhanced Enforcement Policy also provides for OSHA to seek more aggressive terms in any settlement with the employer, such as applying the settlement on a company-wide basis and requiring the employer to consent to a court-imposed enforcement order.

2.3 Citations Can Be Used Against an Employer in Tort Litigation

In addition, an employer should consider the effect an OSHA citation may have on civil tort liability, particularly if the citation is related to an accident that has

[1] Memorandum dated September 30, 2003 from Deputy Assistant Secretary R. Davis Layne to Regional Administrators, "Interim Implementation of OSHA's Enhanced Enforcement Program (EEP)."

resulted in a serious injury, fatality, or damage to neighboring property. Depending on state law, OSHA citations may be used in a variety of ways in civil lawsuits, such as a wrongful death or personal injury actions. For example, in some states, violations of safety standards can be introduced to prove that the employer was negligent per se—as a matter of law.[2] In many states, violations may be used as evidence of the employer's negligence.[3] Those who are not an employer's own employees (such as a contractor's employees) are not restrained by the exclusivity of the workers' compensation system in the claims they may assert. In contrast, the workers' compensation system generally provides the exclusive means for an injured employee to recover from his employer. However, in many states, an employee can recover damages from an employer whose "intentional" conduct caused the employee's injury or fatality.[4] OSHA citations characterized as "willful" related to employees' injuries are often used effectively by plaintiffs' attorneys to help come within this exception. In addition, uncontested OSHA citations can be used as evidence against an employer in a criminal action brought by state authorities for negligent homicide or manslaughter or by the federal government in a criminal prosecution under the Occupational Safety and Health Act (OSH Act or the Act).

2.4 Citations Can Interfere with Business Opportunities and Damage Reputations

Another important consideration for some employers is the effect an OSHA citation may have on the ability to obtain government and other contracts. This issue is particularly important in the construction industry. A history of OSHA violations may disqualify an employer from obtaining contracts or put it at a disadvantage in competing for contracts against other employers with clean OSHA records.

A final consideration that employers may overlook is the substantial effect on a company's reputation and good will from OSHA citations, particularly when citations are related to accidents that have resulted in serious injuries or deaths. In such cases, the press typically reports that OSHA has found an employer liable

[2] *Vickers v. Hanover Constr. Co.*, 125 Idaho 832, 835 (1994); *Kelley v. Howard S. Wright Construction Co.*, 582 P.2d 500 (Wash. 1978); *Koll v. Manatt's Transportation Co.*, 253 N.W.2d 265, 270 (Iowa 1977).

[3] *E.g., Toll Bros. v. Considine*, 706 A.2d 493, 498 (Del. 1998); *Cowan v. Laughridge Const. Co.*, 291 S.E.2d 287, 290 (N.C. App. 1982); *Wendland v. Ridgefield Constr. Servs.*, Inc., 184 Conn. 173, 181 (1981).

[4] *E.g.*, Tex. Lab. Code Ann. 408.001(b) (providing that workers' compensation does not preclude a surviving spouse from recovering damages when an employee's "death was caused by an intentional act or omission of the employer or by the employer's gross negligence"); *Woodson v. Rowland*, 407 S.E.2d 222 (N.C. 1991) (exception to exclusivity rule when "employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees" and that misconduct caused the employee's injury or death).

for "willful" or "serious" violations of the OSH Act that caused or contributed to an employee injury or death. An employer's decision not to contest such citations can be construed by the outside world as an admission of guilt.

3.0 Procedural Requirements for Issuance of a Citation

In issuing a citation, OSHA must comply with certain procedural requirements. Its failure to do so can be grounds for invalidating a citation.

3.1 OSHA's Time to Issue a Citation Is Limited

The OSH Act provides that OSHA may not issue a citation "after the expiration of six months following the occurrence of any violation."[5] This limitations period is tolled if an employer fails to report a fatality or if OSHA could not reasonably have discovered the violation due to some act by the employer to conceal it.[6]

In addition to setting a six-month limitations period, the Act also requires that citations be issued with "reasonable promptness."[7] A citation will not be vacated under this provision unless the delay adversely affected the employer's ability to defend against the citation.[8] A citation is not necessarily issued with "reasonable promptness" just because it has been issued within the six-month limitations period.[9]

3.2 OSHA Must Adequately Describe the Violation

The Act requires that a citation "describe with particularity the nature of the violation," and that it refer to the provision of the Act, standard, or regulation alleged to have been violated.[10] This procedural requirement is meant to ensure that the employer is appropriately put on notice of the alleged violation so that it can take corrective action and decide whether to contest the citation.[11] A citation may be vacated under this provision if the lack of particularity prejudiced the employer's ability to defend.[12]

5 29 U.S.C. § 658(c).

6 *Johnson Controls Inc.*, 15 BNA OSHC 2132 (Rev. Comm'n 1993); *Kaspar Wire Works, Inc.*, 13 BNA OSHC 1261 (Rev. Comm'n 1987); *Sun Ship, Inc.*, 13 BNA OSHC 1185 (Rev. Comm'n 1985); *Yelvington Welding Service*, 6 BNA OSHC 2013 (Rev. Comm'n 1978).

7 29 U.S.C. § 658(a).

8 *Stephenson Enterprises, Inc. v. Marshall*, 578 F.2d 1021, 1023 (5th Cir. 1978); *Coughlan Const. Co.*, 3 BNA OSHC 1636 (Rev. Comm'n 1975).

9 *See Southwire Co.*, 9 BNA OSHC 2034 (Rev. Comm'n 1981) (one month delay prejudicial where rented equipment returned to lessor could not be examined).

10 28 U.S.C. § 658(a).

11 *Del Monte Corp.*, 4 BNA OSHC 2035 (Rev. Comm'n 1977).

4.0 The Elements of OSHA Citations: What Can Be Contested?

An OSHA citation includes three basic elements: (1) an alleged violation, (2) an abatement date, and (3) a proposed penalty. The employer to whom a citation is issued can challenge any of these elements. Employees and their authorized representatives (i.e., unions) can challenge only the abatement date.

4.1 The Alleged Violation

An OSHA citation alleges that an employer has violated either the General Duty Clause of the OSH Act or an OSHA standard or regulation. The allegation includes a brief description of the facts that OSHA believes constitute a violation. The citation also includes OSHA's characterization of the alleged violation—i.e., its allegation that the violation was (1) "willful," (2) "repeated," (3) "serious," or (4) "other-than-serious." As discussed below, the characterization of a citation affects the penalty amount that OSHA may impose.

A contest of the allegation of violation may involve a dispute over the facts (i.e., that OSHA's understanding of the facts on which the citation is based is incorrect), a legal defense (such as preemption of the cited standard by a more specific standard), or a challenge to the characterization of the alleged violation as, for example, willful.

The most direct effect of a violation characterization is that it determines whether a penalty must be assessed and the amount that may be assessed. However, as discussed above, there may be indirect, practical effects of the characterization on an employer's legal liabilities and business. For example, a "willful" violation may help an injured employee or his family avoid the exclusivity of the workers' compensation system and recover damages from his or her employer through a civil lawsuit. In addition, a "willful" citation may encourage criminal prosecution. Furthermore, a "willful" or "serious" violation is likely more damaging to an employer's reputation than an "other-than-serious" violation.

12 *Ringland-Johnson, Inc. v. Dunlop*, 551 F.2d 117, 1118 (8th Cir. 1977); *Louisiana-Pacific Corp.*, 5 BNA OSHC 1994 (Rev. Comm'n 1977).

4.1.1 "Willful" Violations

Although the Act does not define the term *willful*, the Occupational Safety and Health Review Commission (Review Commission or the Commission) has. A violation is "willful" if it is "committed with intentional, knowing, or voluntary disregard for the requirements of the Act or 'with plain indifference to employee safety.'"[13] A "willful" violation is distinguished from a "serious" or "other" violation by "a heightened awareness—of the illegality of the conduct or conditions—and by a state of mind—conscious disregard or plain indifference."[14] An employer who commits an OSHA violation through negligence—that is, because he didn't know of the violation but he should have—has not committed a "willful" violation.[15]

4.1.2 "Repeated" Violations

A "repeated" violation is one that is "substantially similar" to a previous violation, by the same employer, that has resulted in a final order of the Commission.[16] If OSHA shows that an employer has violated the same standard as the previous violation, the later violation is presumed to be substantially similar to the earlier violation. An employer may rebut this presumption by showing that the circumstances of the violations were different.[17] OSHA's policy is to characterize violations of the same standard as "repeated" only if they occur within three years of the previous violation.[18]

Significantly, a violation is "repeated" if committed more than once by the same employer, even if the later violation occurs at a different worksite. OSHA maintains an electronic database of inspection and citation data, which it uses to determine if an employer has previously been cited for a similar violation. Although OSHA will not necessarily look for previous violations, its policy is to do so when

13 *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256 (Rev. Comm'n 1987) (citations omitted); *see also Daniel v. Occupational Safety and Health Review Commission*, 295 F.3d 1232, 1240 (11th Cir. 2002); *Active Oil Serv. Inc.*, 21 BNA OSCH 1184 (Rev. Comm'n 2005).

14 *Williams Enterprises, Inc.* at 1256–1257.

15 *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1264–1265 (D.C. Cir. 2003).

16 *Potlatch Corp.*, 7 BNA OSHC 1061 (Rev. Comm'n 1979); *see also Caterpillar, Inc. v. Herman*, 154 F.3d 400, 402 (7th Cir. 1998); *J.L. Foti Constr. Co. v. OSHRC*, 687 F.2d 853, 857 (6th Cir. 1982); *Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 1337 (10th Cir. 1982); *Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 837 (5th Cir. 1981); *Buffets, Inc., d/b/a Old Country Buffet*, 21 BNA OSHC 1065 (Rev. Comm'n 2005).

17 *Potlatch Corp.*; *see also Manganas Painting Co. v. Sec'y of Labor*, 273 F.3d 1131, 1135 (D.C. Cir. 2001); *but see Bunge Corp. v. Secretary of Labor*, 638 F.2d 831, 838 (5th Cir. 1981) (holding that Secretary must show substantial similarity even if same standard).

18 OSHA *Field Information Reference Manual*, CPL 2.103 (*FIRM*) Chapter III (C)(2)(f)(3).

it finds "high gravity" serious violations.[19] In general, OSHA will limit its search for prior violations to establishments that have the same Standard Industrial Classification (SIC) code as the establishment where the present violation occurred.[20]

4.1.3 "Serious" Violations

OSHA must assess a penalty when a violation is characterized as "serious."[21] A "serious" violation is one for which "there is a substantial probability that death or serious physical harm could result from a condition which exists" in the workplace.[22] It is not necessary for OSHA to show that there is a substantial probability that an accident or injury will occur. Rather, OSHA must show that, if an accident did occur, it would be substantially likely to result in serious physical harm.[23] Likewise, a serious violation exists if the standard violated was intended to protect against a life-threatening illness, even if it is not likely than an employee will become ill as a result of the conditions at the workplace.[24]

4.1.4 "Other-than-Serious" Violations

An "other-than-serious" violation is simply one that is not "serious." In other words, it is a violation for which there does not exist a substantial probability that death or serious physical harm could result from the cited condition. This characterization is often used for violations of recordkeeping requirements. There is no required minimum penalty for an "other-than–serious" violation. In general, OSHA does not propose penalties higher than $1,000 per violation characterized as "other-than-serious."

4.1.5 "De Minimis" Violations

A violation can also be characterized as "de minimis," meaning that it has "no direct or immediate relationship to safety or health."[25] For a "de minimis" violation,

19 *FIRM* Chapter III, (C)(2)(f)(4).

20 *Id*; Memorandum from P. Clark to Regional Administrators, "Penalties in Failure to Abate Cases; Application of Repeated Policy" (July 11, 1991).

21 29 U.S.C. § 666(b); *Wheaton Injection Molding*, 10 BNA OSHC 1589 (Rev. Comm'n 1982) (Cleary dissenting) (collecting authorities); *Logan County Farm Enterprise, Inc.*, 7 BNA OSHC 1275 (Rev. Comm'n 1979). Although the Act specifically requires employer knowledge for a serious violation, knowledge is required for all violations. *See Continental Elec. Co.*, 13 BNA OSHC 2153, 2154 n.4 (Rev. Comm'n 1989).

22 29 U.S.C. § 666(k).

23 *East Texas Motor Freight, Inc. v. OSHRC*, 671 F.2d 845, 849 (5th Cir. 1982); *Kent Nowlin Contr. Co. v. OSHRC*, 648 F.2d 1278, 1282 (10th Cir. 1981); *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986 (9th Cir. 1975).

24 *Phelps Dodge Corp.*, 11 BNA OSHC 1441 (Rev. Comm'n 1983).

25 29 U.S.C. § 658(a).

abatement is not required and no penalty is assessed. OSHA does not issue citations for "de minimis" violations but may send a letter to an employer regarding a condition it believes to be a "de minimis" violation.

4.2 The Penalty Amount and Characterization of Violation

The penalty amount for a violation depends on how OSHA characterizes the violation. Thus, an employer can challenge a proposed penalty on two grounds: (1) that the violation was characterized inappropriately; and (2) that, based on the factors provided in the Act for penalty assessment, the proposed penalty is too high.

The Act sets the following ranges of permissible penalties for violations characterized as "willful," "repeated," "serious," or "other-than-serious."[26]

Type of Violation	*Minimum Penalty*	*Maximum Penalty*
Willful	$5,000[27]	$70,000
Repeated	$0	$70,000
Serious	$1[28]	$7,000
Other-than-serious	$0	$7,000

In addition, penalties for failure to abate can be up to $7,000 per day.

Thus, the Act sets the outer limits of penalties based on how violations are characterized. Within those limits, penalties are assessed on the basis of factors, including the gravity of the violation, the size of the employer's business, the employer's good-faith efforts to comply with the Act, and the employer's compliance history.

4.2.1 Factors Considered by OSHA in Calculating Proposed Penalties

The penalty amount included in an OSHA citation is the agency's proposal; it is not binding on the Review Commission.[29] The Commission assesses penalties and, in so doing, is not bound by OSHA's internal policies for calculating its proposed penalties. Under the OSH Act, penalties are assessed on the basis of four

[26] 28 U.S.C. § 666.

[27] Willful violations may be settled for less than $5,000.

[28] OSHA's policy is to propose a penalty of at least $100 for a violation characterized as serious. *FIRM* Chapter IV (C)(2)(b)(4).

[29] 29 U.S.C. § 659(a) authorizes the Secretary to propose civil penalties. The Commission may assess a lower or higher penalty than proposed by the Secretary. 29 U.S.C. § 659(c), 666(j).

factors: (1) gravity of the violation, (2) size of the business, (3) the employer's good faith, and (4) the employer's history of violations. OSHA uses these factors in its calculation of proposed penalties.[30]

4.2.1.1 Gravity of the Violation

Gravity is the most important factor in the assessment of a penalty. Gravity includes the severity of the injury or illness that could result from a violation and the probability that such an injury or illness will occur, including the number of employees potentially exposed to harm. In calculating a proposed penalty, OSHA first determines the "gravity-based penalty," which it may then reduce, by as much as 95%, based on the other three factors.

4.2.1.2 Size of the Business

For small businesses, OSHA may reduce the proposed penalty up to 60 percent.[31] The size of the business is determined by the number of employees controlled by the employer in all of its workplaces over a 12-month period.[32] OSHA will not reduce a proposed penalty for employers with more than 250 employees.[33]

4.2.1.3 Good Faith

In considering an employer's good faith, OSHA looks at the employer's overall safety and health program.[34] If an employer has a written safety and health program, covering all of the OSHA-required programs (e.g., hazard communication, lockout-tagout), and has "effectively implemented" that program, OSHA may reduce the proposed penalty by 25percent.[35] If an employer has a documented safety program with only "incidental deficiencies," it may receive a 15 percent reduction in the proposed penalty.

4.2.1.4 Violation History

OSHA may reduce a proposed penalty by 10 percent for an employer who has had no serious, willful, or repeated violations in the last three years.[36]

[30] *See FIRM*, Chapter IV (C).

[31] *FIRM*, Chapter IV (C)(2)(i)(5)(a).

[32] *Id.*

[33] *Id.*

[34] *FIRM*, Chapter IV (C)(2)(i)(5)(b).

[35] OSHA's voluntary "Safety and Health Program Management Guidelines," 54 Fed. Reg. 3904 (1989), provides a model of the kind of program OSHA expects to reduce a proposed penalty by 25 percent.

[36] *FIRM*, Chapter IV (C)(2)(i)(5)(c).

4.2.2 Multiplied Penalties for "Egregious" Violations

OSHA ordinarily proposes one penalty for each standard violated, even though multiple employees may be exposed to the violation and even though an employer may have multiple instances of the same violation. For example, an employer's failure to install safety guards on 10 identical machines is ordinarily cited and penalized as one violation, not 10. Furthermore, OSHA normally would propose one penalty for a machine guarding violation, whether one employee or 10 employees used the machine. However, under a policy OSHA developed for "egregious" violations, the agency may treat each instance of a violation as a separate violation, thus multiplying the potential penalty amount.[37]

Under federal court and Review Commission precedent, OSHA may not propose separate penalties for each employee exposed to one violative condition.[38] Although penalties may not be assessed on a per-employee basis, in some circumstances, a violative condition may exist for just a single employee. For example, OSHA can cite an employer once for exposing three employees to the same tripping hazard; but it may cite the employer three times for failing to provide individualized training to each of three employees.[39]

Under OSHA's policy for "violation-by-violation" penalties, the agency will propose separate penalties for each instance of a willful violation when any of the following six criteria also exists:

1. Worker fatalities, a worksite catastrophe, or a large number of serious injuries or illnesses occur;

2. A violation results in a persistently high rate of worker injuries or illnesses;

3. The employer has an extensive history of prior violations;

4. The employer has intentionally disregarded workplace safety and health responsibilities;

5. The employer's conduct amounts to clear bad faith in the performance of its duties under the Act; or

---

37 The "egregious" penalty policy formulated in 1986 is now called the "violation-by-violation" policy. OSHA instruction CPL 2.80, "Handling of Cases to Be Proposed for Violation-by-Violation Penalties."

38 *Reich v. Arcadian Corp.*, 110 F.3d 1192 (5th Cir. 1997) (General Duty Clause violations may not be cited on a per-employee basis); *Hartford Roofing Co.*, 17 BNA OSHC 1361 (Rev. Comm'n 1995) (violations of OSHA standards may not be cited on a per-employee basis).

39 *See e.g., Sanders Lead Co.*, 17 BNA OSHC 1197, 1199-2000 (Rev. Comm'n 1995) (failure to remove employees with elevated blood levels from high lead area).

6. The number of violations at a worksite significantly undermines the effectiveness of any existing safety and health program.

The Review Commission has assessed penalties on a per-instance basis even when the violations were not willful.[40] In doing so, the Commission signaled that OSHA could similarly propose per-instance penalties for nonwillful violations. However, to date, OSHA does not appear to have done so.

4.3 The Abatement Requirements

An employer or employee may challenge a citation's abatement date, as with the other aspects of a citation, through a notice of contest. Alternatively, an employer can seek an extension of an abatement period through a petition for modification of the abatement period under Section 10(c) of the Act.[41] Unlike a contest, in which the burden is on OSHA to prove that the abatement period is reasonable, a petition for modification of abatement date requires the employer to prove that more time is necessary because of factors beyond his reasonable control.[42] Such a petition may be filed after the citation has become a final order.

5.0 Contesting OSHA Citations: From Notice of Contest to Judicial Review

An employer formally challenges an OSHA citation by filing a notice of contest with the agency. This notice begins the administrative adjudication process in which the citation is reviewed by the Occupational Safety and Health Review Commission. The Review Commission is an independent agency and is not part of OSHA or the Department of Labor. A citation is first reviewed by an Administrative Law Judge (ALJ) who conducts a hearing using trial-type procedures, including pleadings, discovery, and formal rules of evidence. *ALJ decisions are subject to appellate-type review by the three commissioners of the Review Commission, who are appointed by the president of the United States and confirmed by the Senate. Final orders of the Review Commission are subject to judicial review in United States Courts of Appeals.*[43]

---

40 *Caterpillar, Inc., 15 BNA OSHC 2153, 2177-78 (Rev. Comm'n 1993) (individual penalties assessed for each instance of nonwillful, other-than-serious recordkeeping violation).*

41 *29 U.S.C. § 659(c).*

42 *Commission Rule 37(d)(3); 29 C.F.R. § 2200.37(d)(3).*

43 *29 U.S.C. § 660.*

5.1 The Notice of Contest

5.1.1 Fifteen Working Day Contest Period

Timing is critical in challenging an OSHA citation. With few exceptions, a citation not timely contested becomes a final order of the Review Commission, which may not be reviewed by any court or agency.[44] Thus, if not timely contested, the employer loses any opportunity to directly challenge the citation and must pay the penalty and abate the cited condition in the time proscribed in the citation.[45]

An employer must notify OSHA of its intent to contest a citation by mailing a written notice to the agency within 15 working days after receiving the citation.[46] Oral notice is not sufficient.[47] The written notice must only be mailed, not received by OSHA, within the 15-working day period.[48] The fact that an employer is engaged in settlement discussions with OSHA does not stop the clock on the contest period.

There are a few limited exceptions to the rule that a citation not contested within the 15-working day period becomes a final order. The lateness of a notice of contest may be excused under Federal Rule of Civil Procedure 60(b).[49] Rule 60(b) allows a party to obtain relief from a final order on the following grounds: (1) a "mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct of an adverse party has occurred"; (2) it is no longer equitable that the order should have prospective application; or (3) there is not any other reason justifying relief. Unfamiliarity with OSHA procedures does not constitute a "mistake" or excusable neglect warranting relief from a final order under this rule.[50] However, an employer's lateness in filing its notice of contest may be excused if the delay was due to some misconduct by OSHA.[51]

---

44 29 U.S.C. § 659(a).

45 *See, e.g., Brennan v. Winters Battery Manf'g Co.*, 531 F.2d 317 (6th Cir. 1975); *Monarch Water Sys. Inc.*, 12 BNA OSHC 1897, 1900 (Rev. Comm'n 1986).

46 29 U.S.C. § 659(a).

47 29 C.F.R. § 1903.17(a); *Martin v. Pav-Saver Mfg Co.*, 933 F.2d 528 (7th Cir. 1991); *Acrom Const. Serv., Inc.*, 15 BNA OSHC 1123 (Rev. Comm'n 1991).

48 *Elec. Contractors. Assoc., Inc.*, 2 BNA OSHC 1627 (Rev. Comm'n 1975); *see also* 29 C.F.R. § 1903.17(a).

49 *J.I. Hass Co. v. OSHRC*, 648 F.2d 190 (3d Cir. 1981); *Missouri Gas Energy*, 21 BNA OSHC 1071 (Rev. Comm'n 2005); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (Rev. Comm'n 1981); *but see Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 229 (2nd Cir. 2002) (holding that Fed. R. Civ. P. 60(b) does not apply to allow the Review Commission to excuse certain late filings).

50 *Martin v. Pav-Saver Mf'g Co.*, 933 F.2d 528 (7th Cir. 1991); *Acrom Const. Serv., Inc.*, 15 BNA OSHC 1123 (Rev. Comm'n 1991).

51 *Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476, 478 (5th Cir. 1975).

5.1.2 Essential Contents of the Notice of Contest

In drafting a notice of contest, an employer must be careful to explicitly challenge all aspects of the citation that it wishes to contest (i.e., the alleged violation, the characterization of the violation, the penalty, and/or the abatement date). A notice of contest that mentions only the penalty is a valid contest only to the proposed penalty, not the underlying alleged violation or the abatement date.[52] An employer can avoid this harsh rule only if it can show that, during the 15-working day contest period, it intended to file a broader contest.[53] An employer whose notice mentions only the abatement date not only fails to contest other aspects of the citation, but actually fails to contest anything, for such a notice is considered to be only a petition for modification of the abatement period.[54]

5.2 Review by an Administrative Law Judge of the Review Commission

5.2.1 Rules of Procedure and Evidence

Proceedings before the Review Commission are governed by the Commission's Rules of Procedure, which provide for the conduct of pre-trial, trial, and post-trial matters.[55] To the extent that the Commission's rules do not address a particular procedural issue, the Federal Rules of Civil Procedure apply.[56] For example, because the Commission's rules do not address the filing of motions to dismiss or for summary judgment, Federal Rules of Civil Procedure 12(b)(6) and 56 apply in Commission proceedings.

Similarly, the Commission does not have its own rules of evidence, and in all cases follows the Federal Rules of Evidence.[57] Likewise, ALJs and the Commission apply the same privilege rules as would be followed in federal court.

5.2.2 Pre-Hearing Procedures

After the OSHA area director transmits the notice of contest to the Review Commission,[58] an ALJ is assigned to the case. The ALJ's role is to conduct prehearing

---

52 *Florida East Coast Props., Inc.*, 1 BNA OSHC 1532 (Rev. Comm'n 1974).

53 *Turnbull Millwork Co.*, 3 BNA OSHC 1781 (Rev. Comm'n 1975); *see also Monarch Water Sys. Inc.*, 12 BNA OSHC 1897, 1900 (Rev. Comm'n 1986); *Gil Haugan*, 5 BNA OSHC 1956 (Rev. Comm'n 1977).

54 *Maxwell Wirebound Box Co.*, 8 BNA OSHC 1995, 1997 (Rev. Comm'n 1980); *Gilbert Manf'g Co.*, 7 BNA OSHC 1611 (Rev. Comm'n 1979).

55 29 C.F.R. Part 2200.

56 Commission Rule 2(b), 29 C.F.R. § 2200.2(b).

57 Commission Rule 71, 29 C.F.R. § 2200.71.

58 Commission Rule 33, 29 C.F.R. § 2200.33 (transmittal of notice of contest must be done by the area director within 15 working days).

conferences, hold settlement conferences, rule on discovery disputes and motions, hold hearings, and issue an initial decision.[59] No later than 20 days following OSHA's receipt of the notice of contest, the Secretary must file a complaint stating the circumstances of each alleged violation in dispute.[60] Within 20 days of service of the Secretary's complaint, the employer must file its answer, which must include any affirmative defenses the employer wishes to assert.[61] The complaint and the answer may be amended before the hearing unless allowing such amendments would prejudice the opposing party.[62]

Before the hearing begins, parties may engage in discovery similar to discovery in federal court, including requests for admission, interrogatories, requests for the production of documents, and depositions.[63] However, the Commission's discovery rules are more restrictive than the federal rules. For example, a party's requests for admission and interrogatories are limited to 25 each, including subparts,[64] and depositions may not be taken unless the parties agree or the ALJ so orders.[65] Typically, the Secretary and the employer agree to make witnesses available for depositions. The parties may also obtain a subpoena to compel the testimony of witnesses at the hearing and the production of documents or other evidence in the witnesses' possession.[66] Discovery may be limited using the same tools as in federal court, such as protective orders and privileges. The Commission's rules provide for the issuance of protective orders where necessary to protect trade secret or otherwise confidential information.[67]

The ALJ will schedule a place and time for the hearing, which is required to involve "as little inconvenience and expense to the parties as is practicable."[68] The parties have a right to at least 30 days advance notice of the first hearing.[69]

5.2.3 Hearing Procedures

Hearings before ALJs follow trial-type procedures similar to those used in federal court. However, there is no right to a jury; in all cases, the ALJ is the finder of fact and decides all questions of law. Each party and intervener may appear

59 Commission Rule 67, 29 C.F.R. § 2200.67.

60 Commission Rule 34(a), 29 C.F.R. § 2200.34(a).

61 Commission Rule 34(b), 29 C.F.R. § 2200.34(b).

62 *See General Motors Corp.*, 10 BNA OSHC 1293 (Rev. Comm'n 1982).

63 Commission Rules 52–56, 29 C.F.R. §§ 2200.52-2200.56.

64 Commission Rules 54 and 55, 29 C.F.R. §§ 2200.54, 2200.55.

65 Commission Rule 56, 29 C.F.R. § 2200.56.

66 Commission Rule 57, 29 C.F.R. § 2200.57.

67 Commission Rule 52(e), 29 C.F.R. § 2200.52(e).

68 Commission Rule 60, 29 C.F.R. § 2200.60.

69 *Id.*

through an attorney or a representative who is not an attorney.[70] The Secretary is represented by attorneys from the Solicitor's Office in the Department of Labor.

The parties present evidence through fact and expert witnesses, documents, and physical evidence and have the right to cross-examine witnesses offered by the opposing side. Commission Rule 70 governs the use of exhibits by the parties at hearings. The Secretary has the burden of proving each element of the violation by a preponderance of the evidence.[71] The employer has the burden of proving every element of an affirmative defense by the preponderance of the evidence.[72] The preponderance of evidence is "the quantum of evidence that is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false."[73]

5.2.4 Post-Hearing Procedures

Upon request to the ALJ, parties may file post-hearing briefs, which are usually filed simultaneously on a date selected by the ALJ.[74] Following the close of all evidence and the submission of post-hearing briefs, the ALJ will issue a written decision. The ALJ's decision must be "in writing and shall include findings of fact, conclusions of law and the reasons or bases for them, on all material issues of fact, law or discretion presented on the record."[75] The decision becomes a final order of the Review Commission 30 days after it is docketed unless a Commissioner directs that the ALJ's decision be reviewed.[76]

5.2.5 Simplified Proceedings

The Commission has instituted a procedure to resolve certain cases quickly and inexpensively outside of the customary hearing procedures. These procedures are used for cases that involve fairly uncomplicated issues, relatively few citation items, and penalty amounts no higher than $30,000.[77] Cases involving fatalities are not eligible for simplified proceedings.[78] Any party may request in writing to

70 Commission Rule 22(a), 29 C.F.R. § 2200.22(a).

71 *Olin Construction Co. v. OSHRC*, 525 F.2d 464, 467 (2d Cir. 1975); *see also Ed Taylor Constr. Co. v. OSHRC*, 938 F.2d 1265, 1270 (11th Cir. 1991).

72 *Manganas Painting Co.*, 19 BNA OSHC 1102 (Rev. Comm'n 2000); *Rockwell International Corp.*, 17 BNA OSHC 1801 (Rev. Comm'n 1996); *Mississippi Valley Erection, Co.*, 1 BNA OSHC 1527, 1529 (Rev. Comm'n 1973).

73 *Ultimate Distrib. Sys., Inc.*, 10 BNA OSHC 1568 (Rev. Comm'n 1982).

74 Commission Rule 74, 29 C.F.R. § 2200.74.

75 Commission Rule 90, 29 C.F.R. § 2200.90.

76 29 U.S.C. § 661(j).

77 Commission Rule 202, 29 C.F.R. § 2200.202.

78 *Id.*

use the simplified proceedings, and the opposing party has only a limited right to object to the use of the simplified proceedings rules.[79] Under the simplified proceedings, the parties are required to meet and attempt to resolve their differences.[80] If the matter cannot be resolved among the parties, a hearing will be held before an administrative law judge.

Simplified hearings differ from the conventional proceedings in four significant ways: (1) there are no formal pleadings or motions—rather, the citation and notice of contest serve in their place;[81] (2) discovery is even more restricted and is only permitted by order of the ALJ;[82] (3) interlocutory appeals are prohibited;[83] and (4) the Federal Rules of Evidence do not apply.[84]

5.3 Review by the Commission

5.3.1 Interlocutory Review

A party may seek interlocutory review of an ALJ's ruling (an appeal of an ALJ's intermediate ruling before his final decision) by filing a petition with the Review Commission within five days of the ruling.[85] The Review Commission has discretion to grant or deny interlocutory review, and grants such review only for important questions of law or policy and when necessary to prevent disclosure of privileged information.[86] Denial of interlocutory review does not preclude a party from raising the issue again at a later time (e.g., in a petition for discretionary review after the completion of the ALJ hearing).

5.3.2 Appellate-Type Review

A party that loses before an ALJ has no guaranteed right to appellate-type review by the Commission. Rather, the Commission has complete discretion whether to order review of an ALJ decision.[87] Any commissioner may order review of an ALJ decision on his own motion or upon request of a party.[88]

---

79 Commission Rule 203(b), 29 C.F.R. § 2200.203(b).

80 Commission Rule 207, 29 C.F.R. § 2200.207.

81 Commission Rule 205, 29 C.F.R. § 2200.205.

82 Commission Rule 208, 29 C.F.R. § 2200.208.

83 Commission Rule 211, 29 C.F.R. § 2200.211.

84 *Id.*

85 Commission Rule 73, 29 C.F.R. § 2200.73.

86 *Id.*

87 Commission Rule 91(a), 29 C.F.R. § 2200.91(a).

88 Commission Rule 92(b), 29 C.F.R. § 2200.92(b).

A party who is adversely affected by an ALJ decision may file a petition for discretionary review (PDR) within 20 days following entry of the ALJ's decision.[89] A PDR should explain exactly what portions of the ALJ decision are challenged and why the Commission should grant review.[90] In general, a party loses the right to seek judicial review of the Commission's final order if it does not file a PDR.[91] If the Commission directs review, it usually requests that the parties file briefs.[92] It may also hold oral arguments, upon motion of the parties or its own order, but rarely does so.[93]

Although the Commission has authority to review an entire case, the Commission will ordinarily decline to review issues not specifically raised in the PDR or upon which the ALJ did not have the opportunity to rule.[94] Review by the Commission is de novo, meaning that the Commission looks at all questions of fact and law anew and is not bound by the ALJ's conclusions of fact or law.[95] The Commission does, however, defer to the ALJ's determinations about the credibility of witnesses.[96]

5.4 Judicial Review

Within 60 days following the issuance of a final order of the Commission—whether reached as a result of the Commission's refusal to review an ALJ decision or as a result of the Commission's review—an aggrieved party may petition for judicial review in a United States Court of Appeals.[97] Private parties who lose before the Commission may obtain judicial review in the United States Court of Appeals for the circuit either in which the violation is alleged to have occurred, where the employer has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.[98] The Secretary may appeal only to the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, not to the D.C. Circuit.[99] As with all cases decided by the U.S. Courts of Appeals, decisions of the

---

89 Commission Rule 91(b), 29 C.F.R. § 2200.91(b).

90 Commission Rule 91(d), 29 C.F.R. § 2200.91(d).

91 29 U.S.C. § 660(a); Commission Rule 91(f), 29 C.F.R. § 2200.91(f); *Keystone Roofing Co. v. OSHRC*, 539 F.2d 960 (3d Cir. 1976).

92 Commission Rule 93, 29 C.F.R. § 2200.93.

93 Commission Rule 95, 29 C.F.R. § 2200.95.

94 Commission Rule 92, 29 C.F.R. § 2200.92.

95 *Accu Namics, Inc. v. OSHRC*, 515 F.2d 828, 834 (5th Cir. 1975) ("The statutory scheme contemplates that the Commission is the finder of fact,"); *Am. Wrecking Corp.*, 19 BNA OSHC 1703 (Rev. Comm'n 2001).

96 *Wiley Organics, Inc. D/B/A Organic Techs.*, 17 BNA OSHC 1586 (Rev. Comm'n 1996); *Okland Construction Company*, 3 BNA OSHC 2023, 2024 (Rev. Comm'n 1976).

97 29 U.S.C. § 660(a).

98 *Id.*

99 29 U.S.C. § 660(b).

appellate court may be reviewed only by the U.S. Supreme Court on petition for writ of certiorari.

The Court of Appeals must affirm the Commission's findings of fact if supported by "substantial evidence on the record considered as a whole."[100] In accordance with this standard of review for findings of fact, the court defers to the Commission's determinations on whether the burden of proof has been met.[101] The court also gives great deference to the Commission's assessment of witness credibility.[102]

In contrast to the substantial evidence standard for review of factual findings, the Commission's penalty assessment is reviewed under an "arbitrary and capricious" or "abuse of discretion" standard.[103] This form of review is limited and presumes that the Commission's decision is correct.[104] Thus, it is rare that courts will overturn the Commission's penalty assessments.

The United States Supreme Court has held that courts must defer to the Secretary's reasonable interpretation of an ambiguous OSHA standard, rather than the Commission's reasonable but conflicting interpretation.[105] OSHA's interpretation of a standard is not entitled to deference if it is "unreasonable or contrary to the regulation's plain language."[106]

5.5 Recovery of Attorneys' Fees and Costs

Under the Equal Access to Justice Act, a private party who wins in an OSHA proceeding may be awarded attorneys fees, expert witness fees, and other costs unless the Commission or court finds that the agency's prosecution of the action was substantially justified.[107] A party seeking an award of fees must apply to the Commission or court within 30 days of the final disposition of the case (i.e., a final order of the Commission not appealed to the court or a final decision of the court).[108] Fees may be recovered only for the portion of time during which OSHA's action was not substantially justified.[109]

---

100 29 U.S.C. § 660(a).

101 *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 134 (6th Cir. 1978).

102 *Int'l Harvester Co. v. OSHRC*, 628 F.2d 982, 986–987 (7th Cir. 1980); *Olin Construction Co. v. OSHRC*, 525 F.2d 464, 467 (2d Cir. 1975).

103 *Brennan v. OSHRC* (Interstate Glass Co.), 487 F.2d 438, 442 (8th Cir. 1973); *Hern Iron Works Inc.*, 16 BNA OSHC 1619 (Rev. Comm'n 1994); *see also* 5 U.S.C. § 706(1)(A).

104 *Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-286 (1974); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C.Cir. 1976).

105 *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991).

106 *Albermarle Corp. v. Herman*, 221 F.3d 782, 785 (5th Cir. 2000).

107 5 U.S.C. § 504; 29 C.F.R. § 2204.106; *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 429-30 (5th Cir. 1982).

108 29 C.F.R. § 2204.302(a).

109 *Contour Erection & Siding Sys., Inc.*, 18 BNA OSHC 1714 (Rev. Comm'n 1999).

6.0 Resolving Citations through Settlement with OSHA

The vast majority of OSHA citations are not adjudicated. They are either not contested or resolved through settlement. Commission Rule 100 encourages settlement. In settlement negotiations, employers can frequently obtain favorable results. For example, through settlement, an employer may obtain a reduced penalty, amended characterization of violation, amended description of the violation, amended abatement dates, agreement as to what will constitute abatement, and recognition that violations have already been abated. In addition, a settlement agreement may include exculpatory language stating that the employer does not admit to having committed any violation of law. In exchange for these terms favorable to the employer, OSHA gets a commitment from the employer not to contest the citation and, frequently, a commitment from the employer to undertake extra measures to ensure employee safety, such as hiring a health and safety consultant.

There are three categories of settlement: pre-citation, informal, and formal.

6.1 Pre-Citation Settlements

A pre-citation settlement is an agreement between OSHA and an employer to resolve alleged violations before a citation is issued. The employer agrees not to contest the citation in exchange for some concession by OSHA, such as proposing a lower penalty or changing the characterization of violations. OSHA does not favor pre-citation settlements and is rarely willing to enter into them.

6.2 Informal Settlements

After a citation is issued but before it is contested, an employer may reach an informal settlement with OSHA. OSHA does not involve its lawyers in these negotiations and is generally less willing to negotiate over the form of the settlement. The informal settlement takes the form of an amendment to the citation. It is not submitted to the Commission for approval.

An informal settlement must be concluded during the notice of contest period—that is, within the fifteen working days after the citation is received. An employer's request for an informal settlement conference and settlement discussions with OSHA does not extend the period for filing a notice of contest.

6.3 Formal Settlements

A settlement entered after the filing of a notice of contest is formal. OSHA's attorneys typically negotiate formal settlements. In addition, the settlement must be filed with the Commission for approval, which is freely given unless an employee or union challenges an extension of an abatement period. The Commission also reviews the settlement to ensure that effected employees and unions have been served with the proposed settlement.[110]

7.0 Employee Participation in Challenges to Citations

The Act, Commission rules, legal precedent, and OSHA regulations give affected employees and unions various rights to participate in OSHA and Review Commission proceedings, including ALJ hearings. These rights include:

1. Requiring employers to post citations for review by employees;[111]

2. Permitting employees and unions to contest the abatement period of a citation on the ground that it is too long;[112]

3. Permitting employees and unions to participate in litigation resulting from their employer's contest of a citation or filing of a petition for modification of abatement;[113]

4. Participating in hearings on variances (conducted by OSHA);[114]

5. Conducting discovery, presenting and cross-examining witnesses, and submitting briefs on all issues raised in a case;[115]

6. Appealing a Review Commission decision holding that no violation occurred (so long as OSHA does not object);[116]

7. Requiring the Secretary to inform employees or unions, if they have elected party status, of any settlement negotiations between the employer and the Secretary as to any issue, and to have an opportunity to "offer input" concerning the proposed settlement before it is presented to the judge for approval;[117] and

8. Receiving a copy of any settlement agreement and having 10 days to object to the reasonableness of the abatement dates provided in it.[118]

However, unions and employees lack the right to object to OSHA's withdrawal of a citation[119] or to object to a settlement of a citation on grounds other than the reasonableness of the abatement date.[120]

---

110 Commission Rule 100, 29 C.F.R. § 2200.100.

111 29 U.S.C. §§ 658(b) and 666(i); *see also* 29 C.F.R. § 1903.16.

112 29 U.S.C. § 659(c); *see also Local 588, United Automobile Workers*, 4 BNA OSHC 1243 (Rev. Comm'n 1976).

113 29 U.S.C. § 659(c).

114 29 U.S.C. § 655(d).

115 *See Donovan v. OSHRC*, 713 F.2d 918, 927 n.13 (2d Cir. 1983); 51 Fed. Reg. 32,002, 32,004 (1986) (explaining employee rights under Commission rules); Commission Rule 20, 29 C.F.R. § 2200.20.

116 *See Oil, Chemical and Atomic Workers v. OSHRC*, 671 F.2d 643 (D.C. Cir. 1982).

117 *General Electric Co.*, 14 BNA OSHC 1763 (Rev. Comm'n 1990); , 14 BNA OSHC 1993 (Rev. Comm'n 1991).

118 Commission Rule 100(c), 29 C.F.R. § 2200.100(c).

119 *Cuyahoga Valley Railway v. United Transportation Union*, 474 U.S. 3 (1985).

120 *General Electric Co.*, 12 BNA OSHC 1597 (Rev. Comm'n 1985) (collecting cases).

Chapter 12

Criminal Enforcement of Violations

Marshall Lee Miller, Esq.[1]
Baise and Miller, P.C.
Washington, D.C.

1.0 Overview

It is well known that employers who are charged with violating Occupational Safety and Health Administration (OSHA) laws and regulations can face substantial civil penalties. Less well known is that prosecution may also be subject to criminal sanctions.

For other environmental laws, criminal penalties are threatened for a wide variety of offenses. For federal OSHA, the applicability of criminal charges is restricted to certain narrow circumstances: (1) if an employer's willful violation of an OSHA standard results in the death of an employee,[2] (2) if an individual gives advanced notice of an inspection,[3] or (3) if an individual or employer knowingly makes any false statement, representation, or certification under the OSH Act.[4] Unsurprisingly, the most stringent measures occur when violations result in the death of an employee. That means, however, that if a willful violation "only" causes paralysis, brain damage, or a comatose state without leading to death,[5] the OSH Act treats them as less serious and authorizes only civil penalties.

---

[1] Mr. Miller is a partner with the Washington, D.C., law firm of Baise & Miller, P.C., available at www.miller@baisemiller.com. A former firm associate, Michael Formica, was helpful in the preparation of this chapter.

[2] 29 U.S.C. § 666(e).

[3] 29 U.S.C. § 666(f).

[4] 29 U.S.C. § 666(g).

[5] All of these, of course, are situations that many victims might consider worse than death.

Moreover, unlike civil complaints, which OSHA prosecutes with its own staff, criminal charges are only prosecuted by the United States Department of Justice (DOJ), following referral by OSHA. The DOJ prosecutions, however, have been fairly limited. As a result, in an ironic reversal of roles, pressure has built on the states to reassert their authority to regulate workplace conditions and increase criminal enforcement for workplace safety violations.

While these attempts were originally successful in state courts, some argue that the OSH Act preempts any state efforts to regulate the workplace through criminal enforcement actions. The Supreme Court apparently agrees, finding in *Gade v. National Solid Waste Management Association*[6] that a state's ability to regulate occupational safety and health standards is preempted by the OSH Act, unless approved by OSHA.[7]

These legal constraints, and the requirement of death prior to criminal prosecution, have led to increased pressure on OSHA's sister agency, the United States Environmental Protection Agency (EPA) to prosecute for workplace violations under the various environmental statutes, including the Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act. This has also led to repeated attempts to persuade Congress to strengthen criminal enforcement provisions under the OSH Act.

2.0 Federal Prosecution

OSHA does not handle criminal enforcement under the OSH Act. Instead, OSHA simply refers potential cases to the DOJ for review. The actual process of referral, however, can be quite drawn out and complicated.[8] In most situations, the OSHA area director refers any potential actions to the appropriate regional administrator. He will then hand the case to an OSHA solicitor, either regional or national,[9] who makes a final decision to refer the case for DOJ prosecution. Following DOJ acceptance and assignment of a U.S. attorney, a grand jury is convened to set forth an indictment. As complex as the referral process is, OSHA spent 20 years devising an internal system to effectively keep track of referrals.[10]

6 505 US 88 (1992).

7 About half of the states currently have OSHA-approved state plans.

8 Of course, the process may always be shortened or expedited if the facts are such that media coverage and political pressure make swift prosecution necessary.

9 The "OSHA Solicitor's Office" is actually not a part of the OSHA organization; rather, it is a separate, assistant secretary–level position, in the Department of Labor.

10 OSHA Interpretation Memo, Leo Carey to Regional Administrators, "Procedures For Tracking Criminal Referrals," May 31, 1990.

2.1 Definition of "Employee"

In this age of temporary workers, independent contractors, and subcontracting, debate over who is an employee under the OSH Act has grown. Traditionally, an employee is someone directly under control of the employer. Under the common law of agency, independent contractors are not necessarily agents and therefore not necessarily considered employees. Neither are the employees of a subcontractor or temporary agency, especially in relation to many mandated employee benefits.

However, under the Multi-Employer Doctrine (MED), any employer who creates a safety hazard and willfully violates OSHA standards on a multi-employer work site may be criminally liable for the death of a worker, whether their own or that of another employer.[11] In *Pitt-Des Moines*, an accident resulting from a deviation from industry standards and inadequate training caused a structure to collapse, killing both a Pitt-Des Moines employee and a subcontractor's employee. Pitt-Des Moines was found guilty of a willful violation due to their failure to follow standard industry procedures in securing steel beams and fined $1 million. On appeal, the 7th Circuit Court of Appeals upheld application of the MED principle.

The doctrine, however, is not without controversy. In addition to complaints concerning this drift away from the usual law of agency, in the case of *IPB, Inc. v. Herman*, the Court of Appeals for the D.C. Circuit has criticized its broad expansion of liability outside the express language of the OSH Act.[12]

2.2 Willful Violations Causing Death to Employee

The most serious penalties follow from the willful violation of an OSHA standard or rule when that violation results in death to an employee. While for first-time offenders the penalty is identical to that for making false statements—$10,000 and six months imprisonment, maximum penalties—for a repeat offender these penalties double to $20,000 and one year in prison.[13]

A "willful violation" is a knowing violation.[14] An employer must know, prior to the fatal accident, the essential facts and legal requirements.[15] However, to be

11 *US v. Pitt-Des Moines, Inc*, 168 F.3d 976, (7th Cir. 1999).

12 *IPB, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998).

13 As discussed below, penalties are commonly increased by tying OSH Act prosecutions to additional prosecutions under existing environmental laws or raising more common criminal violations, such as conspiracy, at the same time.

14 *US v. Ladish Malting*, 135 F.3d 484 (7th Cir. 1998).

15 *Id*

prosecuted for a willful violation, the employer needs not to have exhibited "intentional disregard," but just "plain indifference," towards the safety requirements promulgated under the OSH Act.

The 1998 conviction of Roy G. Stoops is an example. Mr. Stoops, the owner of C&S Erectors of Nolesville, Indiana, allegedly failed to correct safety hazards and provide fall protection at a job site, even after receiving complaints from contractors. Following the fatal fall of an employee, an Indiana court found that Mr. Stoops' failure to act and listen to concerns amounted to a willful act. Taken together with C&S's substantial history of OSHA violations, the court decided to sentence Mr. Stoops to four months in prison.[16]

Knowing has also been interpreted as "know or *should* have known." In other words, a person cannot insulate himself from liability by either willful blindness or negligent conduct. As a strict liability statute, the normal criminal elements of malice or specific intent are removed.[17] While an omission or failure to act may be willful if voluntary or intentional,[18] the exact nature and extent of the employers' knowledge and understanding is an issue to be factored and examined by a jury considering criminal penalties.[19]

2.3 False Statements and Advance Notice

Perjury, or lying under oath, as well as false statements to federal officers are illegal under federal criminal law.[20] In making official filings required under the OSH Act, the signatory is affirming, under oath, the truth of any statements and documents. Knowing violation of this oath is a crime punishable by up to six months in prison and/or a $10,000 fine. In other words, since perjury is already a crime, with more substantial punishment under U.S. criminal statutes, there is nothing exceptional in specifying that this law also applies to workplace situations. In addition, the OSH Act also makes the unauthorized disclosure of forthcoming inspections punishable by a fine of $1,000 and imprisonment for up to six months.[21]

16 "Construction Worker's Death Results in Jail Time for Indiana Employer," OSHA National News Release, USDL 98-421, October 15, 1998.

17 *Ensign-Bockford Corporation v. OSHRC*, 717 F.2d 1419 (D.C. Cir. 1983).

18 *Daniel Intern Corporation v. Donovan*, 705 F.2d 382 (10th Cir. 1983).

19 *U.S. v. Ladish Malting*, supra.

20 18 U.S.C. § 1621 permits a fine and/or imprisonment of not more than five years for knowingly making any false material declaration or using any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, in a proceeding before or ancillary to any court or grand jury of the United States.

21 29 U.S.C. § 666(f).

3.0 State Enforcement

Because of the restricted criminal deterrence under the OSH Act, states were increasingly bringing their own actions against employers whose conduct resulted in death or serious injury to employees. For the most part, these efforts were initially successful. Starting with *People v. Chicago Magnet Wire Corp.*,[22] several state supreme courts have found that OSHA did *not* preempt criminal prosecution of corporate officials. In *Chicago Wire*, an Illinois manufacturer was indicted for reckless endangerment by failing to provide adequate safety precautions to prevent exposure to the chemicals used in manufacturing wire. Likewise, in the leading case *People v. Pymm Thermometer*, the New York Court of Appeals affirmed a decision that criminal prosecution for reckless endangerment associated with employee exposure to mercury was not preempted by the federal OSH Act.[23]

The state courts, looking at the OSH Act's definition of standards, have generally found that criminal laws are not standards. Instead, they find that criminal laws serve a general purpose separate from regulation of the workplace. In *Pymm*, the court held that unlike the OSH Act, which established standards to prevent death or injury from occurring, New York's criminal laws were reactive, designed for punishment of acts already committed, and this serves a purpose separate from regulation of the workplace.

In *Gade*, however, the U.S. Supreme Court looked at whether OSHA preempted an Illinois licensing standard applicable to hazardous waste workers. The Court held that where a federal standard is in effect, the unauthorized state regulation of occupational, safety, and health issues is in conflict with the purposes and objectives of the OSH Act and is therefore impliedly preempted.[24] Justice O'Conner, writing for the Court, found the statement in § 18(b), that a state "shall" submit a plan if it wishes to "assume responsibility" for development of standards, indicating Congress' intent to preempt state law. As a result, a state may not enforce its own standards without federal approval.[25]

The Court found that those dual-impact regulations, which embody several purposes in addition to regulation of occupational, safety, and health, cannot avoid preemption.[26] However, the Court acknowledged that general applicability statutes, such as fire and traffic safety laws, that do not conflict with OSHA regulations and regulate the conduct of workers and nonworkers alike, are not

22 *People v. Chicago Magnet Wire Corp.*, 534 NE.2d 962 (Ill. 1989).

23 *People v. Pymm Thermometer Company*, 561 NYS.2d 687 (NY 1991).

24 *Gade* at 98.

25 *Id.*

26 *Id.* at 107.

generally preempted.[27] To the extent that state prosecution is carried out under already existing general criminal and safety provisions, they should be allowed.

4.0 Prosecution under Environmental Statutes

Because of the limitations on criminal prosecution under OSHA and the concomitant problems under state and common law doctrines, some prosecutors have sought to deal with workplace situations by finding violations under the more flexible environmental laws.

At the federal level, the EPA is not constrained by the fatality requirement of the OSH Act. It has therefore been able to apply criminal laws in a wide range of circumstances, including some that touch on occupational situations. The major environmental statutes provide a host of criminal violations and penalties, and almost every environmental law provides some criminal liability. In most cases, violations can exist for both "knowing" and "negligent" conduct. It is not uncommon to find penalties of over $25,000 a day per violation and prison terms in excess of 15 years.

In light of this, EPA and OSHA have entered into Memorandums of Understanding (MOUs) whereby the two agencies work together to enforce both environmental and health and safety regulations in the workplace. These MOUs provide for joint inspections by EPA and OSHA investigators, a system for referrals of violations between the agencies, exchanges of data and other evidence uncovered during investigations, and cross-training.

For example, the Resource Conservation and Recovery Act (RCRA) provides "cradle to grave" controls and requirements on generators and transporters, and treatment, storage, and disposal facilities of hazardous wastes. RCRA imposes criminal penalties of up to $50,000 and two years imprisonment for knowing violations of the act. It also has put in place a system of heightened criminal liability for knowingly placing persons in danger of imminent death or serious bodily injury. Fines can run as high as $250,000 for an individual and $1,000,000 for a corporation, in addition to prison terms of up to 15 years.

The application of this approach is shown most clearly in the case of the McWane Company, a heavy industry company with foundries and factories under various names nation-wide. Over the past half-dozen years, the company has been featured unfavorably on TV programs such as "Sixty Minutes" and in features in the *New York Times* for the many deaths and serious injuries in its operation. The stories were also all critical of OSHA, which, despite the deaths, seemed unable to take decisive action under its criminal powers. However, criminal prosecutions and convictions were obtained under the environmental laws, most notably the Clean Air Act but also the Clean Water Act and RCRA.[28]

27 *Id.*

5.0 Recent Legislation

In light of the inability of the OSH Act to provide criminal penalties for violations causing serious bodily harm, in addition to a belief by some that the criminal penalties provided are inadequate to serve a deterrence effect, calls have been made to toughen the OSH Act by expanding the range of activities that result in criminal liability as well as increase the penalties provided under the Act.

So far, these demands have been on the political periphery. Consumer activist Ralph Nader made criminal enforcement of workers deaths a major point in his third party campaign for the presidency of the United States back in 1992, and the late liberal Senator Paul Wellstone (D-MN) introduced legislation in 1999 that expanded the coverage of the OSH Act to federal employees;[29] significantly increased the penalties for willful violations causing death to an employee by providing prison terms up to 10 years for initial violation and 20 years for subsequent violations, while at the same time removing the limits on the amount of financial penalty imposed;[30] and strengthened the whistleblower protections.[31] Although Senator Ted Kennedy (D-MA), an original sponsor of Senator Wellstone's bills, subsequently became chairman of the influential Senate Labor Committee, this and similar legislation went nowhere.

When Republicans captured both House and Senate, all impetus for this legislation faded away. Over the past several years Wyoming Republican senator Mike Enzi has prepared several OSHA reform bills, one of which would have increased the penalties for a fatal, willful violation of OSHA standards to 18 months in prison. However, this provision is missing from the legislation he has proposed in the past couple of years.[32]

28 *U.S. v. Union Foundry Co.* (N.D. Ala. No. 2.05-cr-00299, plea entered 6 September 2005), fine of $3.5 million and $0.75 million community service for RCRA violations, also OSHA willful violation; *U.S. v. McWane, Inc.* (N.D. Ala. No. CR-04-PR-199-S, 5 December 2005), jury found the company and three employees guilty of violating the Clean Water Act by illegally discharging industrial waste water through storm drains, making false statements, and so on; *U.S. v. Tyler Pipe* (E.D. Tex. No. 6:05-cr-00029, 22 March 2005), guilty pleas on felony violations of Clean Air Act, with fines of $4.5 million and mandatory $12 million in emission control equipment; *U.S. v. McWane, Inc.* (D.Utah, No. 05-00811), indictment filed November 2005 for falsifying data and other violations of Clean Air Act.

29 Federal Employee Safety Act S. 650 106th Congress-1st Session.

30 Wrongful Death Accountability Act S. 651 106th Congress-1st Session.

31 Safety and Health Whistleblower Protection Act S. 652 106th Congress-1st Session.

32 *See* S. 2065, 2066, and 2067 of 2005.

It seems that neither the AFL-CIO nor the Democratic leadership have shown much enthusiasm for remedying this legal hole in OSHA's enforcement, nor for expanding the scope of criminal penalties under the OSH Act. That will probably come, if it ever does, only after some highly publicized accident.

Chapter 13

Judicial Review of Enforcement Actions

John B. O'Loughlin, Jr., Esq.
Weil, Gotshal & Manges, LLP
Washington, D.C.

1.0 Overview

The primary adjudicative function under the Occupational Safety and Health Act (OSH Act)[1] is vested in the Labor Department's administrative law judges (ALJs) and the Occupational Safety and Health Review Commission (OSHRC). The role of the federal courts is therefore limited to three circumstances. First, final Commission orders in enforcement cases can be appealed to the federal circuit courts of appeal.[2] Second, the federal circuit courts also provide pre-enforcement judicial review of health and safety standards promulgated under the OSH Act if an adversely affected party petitions for judicial review within 60 days after the standard is promulgated.[3] Finally, jurisdiction of the federal district courts is limited to ancillary procedural matters.[4]

The OSH Act does not create a private federal cause of action for private parties to seek judicial enforcement for violations of health and safety standards.[5]

---

1 29 U.S.C. § 660. *See* chapter 1 for a comprehensive summary of the OSH Act.

2 For purposes of this chapter, a final order of the "Commission" can refer to (1) decisions of the Occupational Safety and Health Review Commission (OSHRC) or (2) unappealed decisions of Administrative Law Judges (ALJs) who conduct full evidentiary hearings on behalf of the Commission. Decisions of ALJs become final orders of the Commission if the employer or the Secretary of Labor does not seek review or if OSHRC declines a petition for discretionary review. For a fuller discussion, *see* chapter 11.

3 29 U.S.C. § 655(f). For a fuller discussion, *see* chapter 2.

4 The jurisdiction of the federal district courts in matters under the OSH Act is limited to (1) actions by the Secretary of Labor to enforce administrative subpoenas, 29 U.S.C. § 657(b); (2) actions by the Secretary to enforce the antidiscrimination provisions of the OSH Act, § 660(c)(2); (3) actions by the Secretary to restrain imminent dangers, § 660(c)(2); and (4) actions on behalf of the United States to recover civil penalties, § 662(a), (d).

5 *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6 (1985).

Although employees may not seek direct enforcement against employers in the federal courts, they may participate in judicial appeals of final Commission orders.

Parties seeking review of final Commission orders may not bring actions in the federal circuit courts of appeal without first exhausting their administrative remedies. Review by a circuit court panel is generally restricted to the issues preserved for appeal and is decided on the basis of the written record of the proceedings below, the briefs submitted by the parties, and oral argument.[6] As with a review of any final action of an administrative agency, the circuit courts generally give a high level of deference to decisions of the Commission. Orders will only be overturned if the Commission's factual findings are not supported by substantial evidence in the record or if the Commission's legal conclusions are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. A decision of a circuit court is final unless the court remands the case back to the Commission for further proceedings or the U.S. Supreme Court agrees to hear a discretionary appeal of the case.[7]

2.0 Jurisdiction

2.1 Parties Who Have Standing to Bring an Appeal

Under section 11(a) of the OSH Act, "any person adversely affected or aggrieved by an order of the Commission . . . may obtain a review of such order."[8] This provision provides direct access for employers to seek judicial review of an adverse Commission decision. Section 11(b) of the Act also authorizes the Secretary of Labor to seek judicial review of a final Commission order.[9] Other parties have the right to seek judicial review as well. For example, employees or their representatives (including unions) may file a notice with the Department of Labor seeking to become a party to a case and may file a Notice of Contest (NOC) to challenge as unreasonable the period set for an employer to abate a violation.[10] Any employee (or employee representative) who elected party status before the Commission and who is adversely affected by the Commission's final decision may seek judicial review of the decision.[11]

6 29 U.S.C. § 660(a).

7 29 U.S.C. § 660(a).

8 29 U.S.C. § 660(a).

9 29 U.S.C. § 660(b).

10 29 C.F.R. § 659(c); 29 C.F.R. §§ 2200.20–2200.22.

11 29 U.S.C. § 660(a).

Most courts do not interpret section 11(b) as granting the Commission standing to defend its actions in federal court.[12] The basis for the majority view that the Commission has no standing to appeal is that Congress intended the Commission to act like a court. The parties to the dispute are the Secretary of Labor (the plaintiff) and the employer charged with the violation (the defendant). Accordingly, the Commission is an adjudicative entity with no stake in the outcome of the litigation.[13] The Fourth and Fifth Circuit Courts of Appeal, however, have concluded that the Commission may participate in judicial proceedings on grounds that it serves an administrative function as well as an adjudicative one.[14] In that respect, the Commission's functions are similar to that of the National Labor Relations Board or the Federal Trade Commission.

The courts have also concluded that manufacturers do not have standing to appeal a Commission decision on an Occupational Safety and Health Administration (OSHA) violation involving the manufacturer's machinery. In *R.T. Vanderbilt Co. v. OSHRC*,[15] for example, although the Commission had allowed an equipment manufacturer to intervene in the administrative proceeding against the employer, the Sixth Circuit Court of Appeals held that the manufacturer did not have standing to seek judicial review of the Commission's decision because the manufacturer was not in the "zone of interest" covered by the Act.

To bring an appeal, a party must establish that it has been injured by a Commission order. In reality, this is a fairly easy standard to meet because any employer ordered to pay a civil penalty or take action to abate a violation has been aggrieved.[16] Similarly, employees and their unions may petition for judicial review of a final Commission order that affects them.[17] A court may dismiss the petition as moot, however, if OSHA announces that it will not pursue further enforcement against the employer irrespective of the circuit court of appeals' decision.[18]

12 *See Oil, Chem. & Atomic Workers v. OSHRC*, 671 F.2d 643, 651 (D.C. Cir. 1982); *General Electric Co. v. OSHRC*, 583 F.2d 61, 63 n.3 (2nd Cir. 1978); *Marshall v. Sun Petroleum Prods.*, 622 F.2d 1176 (3rd Cir. 1980); *Marshall v. OSHRC*, 635 F.2d 544, 547 (6th Cir. 1980); *Dale Madden Constr., Inc. v. Hodgson*, 502 F.2d 278, 280–281 (9th Cir. 1974); *Brennan v. OSHRC*, 505 F.2d 869, 871 (10th Cir. 1974).

13 *See Oil, Chem. & Atomic Workers v. OSHRC*, 671 F.2d 643, 652 (D.C. Cir. 1982).

14 *See Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1267 (4th Cir. 1974) (holding that the Commission may appear in federal court to defend its enforcement policies); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 648 n.8 (5th Cir. 1976) (holding that the Commission, as any administrative agency, is a proper party in suits brought by the Secretary of Labor or a third party seeking review of its decisions).

15 728 F.2d 815 (6th Cir. 1984).

16 *See RSR Corp. v. Donovan*, 733 F.2d 1142, 1145–1146 (5th Cir. 1984) (remanding case to administrative law judge for further findings, but holding that employer had established standing because OSHA had imposed a civil penalty). On the other hand, decisions on procedural issues are not reviewable. *CH2M Hill Central, Inc. v. OSHRC*, 131 F.3d 1244 (7th Cir. 1997).

17 29 U.S.C. § 660(a).

18 *See Oil, Chem. & Atomic Workers v. OSHRC*, 671 F.2d 643 (D.C. Cir.), cert. denied, 459 U.S. 905 (1982).

2.2 Courts That Have Jurisdiction over Appeals

Section 11 of the OSH Act states that final Commission orders may be appealed in the U.S. circuit courts of appeal. In particular, an employer may bring an appeal in the circuit where the violation is alleged to have occurred, in the circuit where the employer has its principal office, or in the U.S. Court of Appeals for the District of Columbia Circuit.[19] The Secretary of Labor also may appeal a final order in the circuit where the violation is alleged to have occurred or in the circuit where the employer has its principal office.[20] The jurisdiction of the U.S. circuit courts of appeal to review decisions of the Commission is exclusive, and the judgment of a circuit court is final unless the U.S. Supreme Court agrees to a discretionary review.[21]

3.0 Timing

3.1 Final Commission Orders

Any party with standing, including the Secretary of Labor, may appeal a final Commission order by filing a petition within 60 days of the final order with an appropriate U.S. circuit court of appeals. Under the Federal Rules of Appellate Procedure, appellants must adhere strictly to this deadline or the court may dismiss the petition for lack of jurisdiction.[22] An employer seeking an appeal may also submit a petition for a stay of a final Commission order because an appeal, by itself, does not delay enforcement of the order, and the Secretary of Labor may seek penalties or cite the employer for failure to abate a violation during the pendency of the appeal.[23] If no timely petition for appeal is received by the clerk of the court, the Commission's findings of fact, conclusions of law, and order are deemed conclusive. Because Commission orders are not self-enforcing (*see* chapter 11), the Secretary of Labor must petition the court to enforce an order if the employer does not comply.[24]

---

19 29 U.S.C. § 660(a).

20 29 U.S.C. § 660(b).

21 29 U.S.C. § 660(a).

22 29 U.S.C. § 660(a); *Fed. Reg.* App. P. 15. *See Consolidated Andy, Inc. v. Donovan*, 642 F.2d 778, 779 (5th Cir. 1981).

23 *See* 29 C.F.R. § 2200.94; 29 U.S.C. § 660(a); *Fed. Reg.* App. P. 18. The Court of Appeals has the power to grant temporary relief or an injunction during the pendency of an appeal. *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317 (6th Cir. 1976). In addition, the Commission itself has the discretion to stay its own orders pending an appeal. *Lance Roofing v. Hodgson*, 343 F. Supp. 685 (N.D. Ga.), aff'd, 409 U.S. 1070 (1972).

24 29 U.S.C. § 660(b).

3.2 Exhaustion of Administrative Remedies

A prerequisite to obtaining judicial review of a Commission order is that the order must be final. This means that the party (typically an employer) must have first exhausted all available remedies. As discussed in chapter 11, the employer must file a Notice of Contest (NOC) of the citation or penalty with the Secretary of Labor within 15 working days after receiving notice. If the party does not contest the citation or penalty, the citation will become a final Commission order that is not subject to judicial review.[25] The NOC must indicate whether the employer is contesting all or part of the citation, the civil penalty, or the abatement. If the employer contests only part of the order, the uncontested part of the order becomes binding upon the employer upon the expiration of the contest period.[26] Upon the filing of a timely NOC, an employer's challenge is subject to a full evidentiary proceeding before an Administrative Law Judge (ALJ). At the conclusion of the trial, an employer that is not satisfied with the ALJ's decision may file a Petition for Discretionary Review (PDR) of the ALJ's decision with the Review Commission.[27] (*See* chapter 11 for a complete discussion of the procedures for trials before ALJs and appeals before the Review Commission.) If the Commission declines to review the ALJ's decision, or if the employer is not satisfied with the Commission's decision after review, the employer may seek judicial review in an appropriate U.S. circuit court of appeal.[28]

An employer may not seek judicial review if it has not followed the required administrative procedures. In particular, an employer may not seek judicial review of a citation if it did not first submit an NOC. Similarly, it may not seek judicial review of an ALJ's decision if it did not first submit a PDR to the Commission, irrespective of whether the Commission agreed to review the case.[29] Furthermore, an employer may not raise issues before the court that were not identified in the PDR.[30] For example, in *P. Gioioso & Sons Inc., v. OSHRC*,[31] the employer attempted to raise issues on appeal that were argued before the ALJ but not expressly included in the PDR submitted to the Commission. The court held

---

25 29 U.S.C. § 659(a).

26 *Penn-Dixie Steel Corp. v. OSHRC*, 533 F.2d 1078, 1079–1081 (7th Cir. 1977).

27 29 C.F.R. § 2200.91.

28 29 U.S.C. § 660.

29 29 C.F.R. § 2200.91(f). *See, for example, Keystone Roofing Co. v. OSHRC*, 539 F.2d 960, 962 (3rd Cir. 1976) (order to employer which sought direct judicial review of ALJ decision was a final Commission order, but was unreviewable by the court of appeals because employer had failed to petition the Commission for discretionary review).

30 *Globe Contractors, Inc. v. Herman*, 132 F.3d 367 (7th Cir. 1997) (issues not reviewable if not included in PDR).

31 115 F.3d 100, 107 (1st Cir. 1997).

that it lacked jurisdiction over the issues because the petitioner had failed to preserve them for appeal.[32] In addition, in the event the Commission seeks on its own initiative to review an ALJ decision that was not appealed by the employer,[33] the employer must follow the Commission's review procedures to completion before seeking a judicial challenge. Finally, a decision of the Commission must be a final agency action in order to be reviewable in court.[34] Thus, a Commission order remanding a case back to an ALJ for final disposition is not reviewable, and intermediate decisions of the Commission on procedural questions (e.g., evidence, discovery, or procedure) are not directly reviewable.[35]

Section 6(f) of the OSH Act provides that any party adversely affected by an OSHA standard may seek pre-enforcement judicial review by filing a petition with the circuit court of appeals prior to 60 days after promulgation of the final rule.[36] The Act is silent, however, on the question of whether a safety standard upon which a violation is based can be challenged during judicial review of the enforcement order under section 11(a).[37] The courts are in agreement that substantive challenges to the validity of a standard may be raised either during pre-enforcement review or during an enforcement review. The courts are not in agreement, however, on whether a party may challenge the procedural aspects of a rule during an enforcement review. For example, in *Deering Milliken, Inc. v. OSHRC*,[38] the Court of Appeals for the Fifth Circuit held that the pre-enforcement review provision in section 6(f) of the Act did not bar a procedural attack on the validity of the underlying standard during a proceeding challenging an enforcement order. On the other hand, in *National Industrial Contractors, Inc. v. OSHRC*,[39] the Court of Appeals for the Eighth Circuit held that the procedural validity of OSHA standards may be challenged only during pre-enforcement review pursuant to section 6(f). The Eighth Circuit distinguished between procedural challenges, which it said were restricted to pre-enforcement review under section 6(f), and substantive challenges, which could be brought either during pre-enforcement review or during a challenge to an enforcement order under section 11(a). Other circuits, however, have declined to draw the distinction between procedural and substantive challenges.[40] In addition, the burden of proof in a legal challenge to a final OSHA rule during an enforcement action is different from what is required during pre-enforcement review of a final OSHA rule. In a proceeding under section 6(f), the Secretary of Labor has an affirmative obligation to demonstrate that the rule as adopted is "reasonable and consistent" with its purpose. In a challenge to an enforcement action under section 11(a), however, the petitioner must produce evidence showing why the standard, as applied to the petitioner, is arbitrary, capricious, unreasonable, or contrary to law.[41]

[32] Similarly, the Commission will ordinarily not review issues not first raised before the ALJ. 29 C.F.R. § 2200.92(c).

[33] 29 C.F.R. § 2200.92(b).

[34] *See, for example, Northeast Erectors Ass'n v. Secretary of Labor*, 62 F.3d 37, 40 (1st Cir. 1995)(change in OSHA enforcement policy concerning an OSHA standard was not subject to challenge by trade association until such time as an employer is cited for violation of the standard).

[35] *CH2M Hill Central, Inc. v. OSHRC*, 131 F.3d 1244, 1246–1247 (7th Cir. 1997).

[36] 29 U.S.C. § 655(f).

[37] 29 U.S.C. § 660(a).

[38] 630 F.2d 1094 (5th Cir. 1980).

[39] 583 F.2d 1048 (8th Cir. 1978).

3.3 Constitutional Challenges

A court of appeals has jurisdiction to consider the constitutionality of the OSH Act during an appeal of a final Commission order.[42] Although the Commission is not empowered to rule on challenges to the constitutionality of a particular action,[43] most courts have concluded that such fundamental issues should be raised at the administrative level in order to preserve the matter for judicial appeal.[44] In a few reported cases, courts have allowed fundamental challenges to Commission decisions that were not raised below to proceed on grounds that they are "extraordinary conditions" within the meaning of section 11(a) of the OSH Act.[45] As a general matter, however, the cautious approach for any practitioner would be to raise formally all issues at the administrative review level.

4.0 Scope of Judicial Review

4.1 Procedural Matters

The operating procedures for enforcement hearings before an ALJ incorporate the Federal Rules of Civil Procedure, which prescribe practice in the federal district

[40] *Deering Milliken, Inc., Unity Plant v. OSHRC*, 630 F.2d 1094 (5th Cir. 1980) (discussing the difference between challenges to OSHA's compliance with procedural requirements in promulgating a rule and substantive attacks on the rule itself, but declining to adopt a restriction on post-enforcement review of either type of challenge). *See also Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541 (3rd Cir. 1976); *Noblecraft Indus., Inc. v. Secretary of Labor*, 614 F.2d 199 (9th Cir. 1980).

[41] *Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541 (3rd Cir. 1976).

[42] *Mohawk Excavating, Inc. v. OSHRC*, 549 F.2d 859 (2nd Cir. 1977).

[43] *See Buckeye Indus., Inc. v. Secretary of Labor*, 587 F.2d 231, 235 (5th Cir. 1979).

[44] *See, for example, In re:* Establishment Inspection of Kohler Co., 935 F.2d 810 (7th Cir. 1991) (holding that Fourth Amendment challenge to inspection warrant should have been raised below).

[45] "No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 660(a). *See, for example, McGowan v. Marshall*, 604 F.2d 885, 892 (5th Cir. 1979) (holding that constitutional challenge of OSH Act before Commission would be "fruitless").

courts.[46] An ALJ will rule on evidentiary matters in accordance with the Federal Rules of Evidence.[47] A comprehensive discussion of the Commission's rules of procedure and evidence is provided in chapter 11. When a Commission decision is appealed to a circuit court, the Federal Rules of Appellate Procedure apply. In particular, Rules 15–20 set forth the rules governing review and enforcement of decisions of administrative agencies and commissions.[48] In addition, each circuit court has local rules that supplement the federal rules. The rules are quite detailed in establishing deadlines for the submission of transcripts and briefs, page limits on the length of briefs, the number of copies that must be filed and in what format, and the manner in which papers must be served. Because the rules can vary between jurisdictions, practitioners must pay close attention to the details of the circuit in which the appeal is filed.[49]

There is no evidentiary hearing on an appeal to the circuit court. Normally, a three-judge panel decides the appeal on the basis of the written record, the briefs filed by the parties, and the oral argument before the circuit court panel. Oral argument is usually limited to 15 minutes per side. The appeal is narrow in scope and, as discussed above, the issues are limited to those raised before the Commission in the PDR. In rare cases, a petitioner may seek permission from the circuit court to submit additional evidence and, upon reviewing such additional evidence, the Commission may revise its decision.[50]

4.2 Standard of Review for Conclusions of Law

The OSH Act does not include standards for judicial review of conclusions of law. Accordingly, the generic provisions in section 10(e) of the Administrative Procedure Act (APA) apply.[51] Under the APA, courts will not set aside an agency decision unless it is:

- Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

46 29 C.F.R. § 2200.2.

47 29 C.F.R. § 2200.71.

48 *Fed. Reg.* App. P. 15–20.

49 For example, the Seventh Circuit requires litigants to file 15 copies of briefs with the court along with a disk copy, and sets explicit limits on type size, page counts, and even the color of brief covers. The Seventh Circuit also imposes requirements for the content of briefs, such as the jurisdictional statement and appendices. *See* Circuit Rules of the United States Court of Appeals for the Seventh Circuit (Dec. 2005) and Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (2003 Edition).

50 "If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record." 29 U.S.C. § 660(a).

51 5 U.S.C. § 706(2).

- Contrary to constitutional right, power, privilege, or immunity;
- In excess of statutory jurisdiction, authority, or limitations;
- Short of statutory right;
- Without observation of procedure required by law;
- Unsupported by substantial evidence; and
- Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[52]

As a practical matter, this level of review is highly deferential to the Commission. For example, in *Reich v. Simpson, Gumpertz & Heger, Inc.*,[53] the court held that the Commission's legal conclusions must not be disturbed unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Courts give the Commission significant latitude in interpreting the OSH Act and OSHA safety standards unless a decision is arbitrary and capricious or an abuse of discretion. The U.S. Supreme Court has held that OSHA's construction of its own regulations is entitled to substantial deference "because applying regulations to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives."[54] In some cases, the Commission's interpretation of a safety standard may differ from that of OSHA. The Supreme Court has held that, in such cases, the Commission must defer to OSHA's reasonable interpretation of a safety standard because OSHA, and not the Commission, is vested with promulgating and enforcing safety standards and is, therefore, in a better position to interpret such standards.[55]

4.3 Standard of Review for Findings of Fact

The Commission's factual findings, and the inferences derived from them, must be supported by substantial evidence on the record considered as a whole.[56] The

52 5 U.S.C. § 706(2). Under the Administrative Procedure Act, in addition to the "abuse of discretion" and "arbitrary and capricious" standards of review, a court can also overturn a decision on grounds that it is "otherwise not in accordance with law." Where, as here, the agency's statute does not provide a specific standard of review for legal conclusions, any of these overlapping standards of the APA can be grounds for overturning a decision of the Commission.

53 3 F.3d 1, 2 (1st Cir. 1993).

54 *Martin v. OSHRC*, 499 U.S. 144, 150–151 (1991) (internal citations omitted).

55 *Id.* at 152–153.

56 29 U.S.C. § 660(a). *See Reich v. Simpson, Gumpertz & Heger, Inc.* 3 F.3d 1, 2 (1st Cir. 1993) (Commission's findings of fact must be based on substantial evidence in the record).

term "substantial evidence" has been defined by courts as that which a reasonable person would accept as supporting a conclusion.[57] Although this standard appears to be somewhat stricter than the abuse of discretion standard applied to questions of law, as discussed above, courts nevertheless accord substantial deference to the determinations of an ALJ concerning evidentiary and factual matters because the ALJ has had the opportunity to observe witnesses first hand, whereas the Commission and the courts have had no such opportunity. So long as the Commission sets forth a rational argument connecting the facts of the case with its decision, therefore, courts are unlikely to overturn a decision based on the facts.[58]

Not all courts apply the substantial evidence standard in the same manner. For example, in *Austin Road Co. v. OSHRC*,[59] the court overturned a Commission decision on grounds that the decision was speculative and not supported by substantial evidence in the record. The court held that the Secretary failed to prove that the defendant's activities "affected interstate commerce," an essential prerequisite to establishing OSHA's jurisdiction.[60] As a result, OSHA failed to demonstrate that the defendant was an "employer" within the meaning of the OSH Act, and the court declined to enforce the citation.

In other cases, courts have remanded Commission orders where the record was insufficient to provide a "substantial basis" for the Commission's decision. For example, in *Builders Steel Co. v. Marshall*,[61] the Eighth Circuit Court of Appeals held that the Commission did not provide an adequate factual foundation for the court to find that the Commission's order was reasonable. In *Builders Steel*, the employer was cited for failing to provide adequate fall protection for welders working approximately 29 feet above a concrete floor. The Commission concluded that the warehouse on which the employees were working was a single-story building subject to the regulation found at 29 C.F.R. § 1926.105(a), which required fall protection for workers operating higher than 25 feet. The employer contended that the building was a multitiered structure subject to a different regulation found at § 1926.750(b)(2)(i), which required fall protection for workers operating at heights of greater than 30 feet. After finding that there was insufficient evidence in the record to support the Commission's conclusion that the building was a single-story structure subject to section 105(a), the court vacated

[57] *Martin Painting & Coating Co. v. Marshall*, 629 F.2d 437, 438 (6th Cir. 1980).

[58] *Brennan v. OSHRC*, 501 F.2d 1196 (7th Cir. 1974).

[59] 683 F.2d 905 (5th Cir. 1982).

[60] *Id.* at 907. Under the Commerce Clause of the U.S. Constitution, the authority of Congress to regulate commerce is limited to interstate commerce. A long series of cases has included within that power commercial activities that merely "affect" interstate commerce even if they are conducted entirely intrastate. *See, for example, Wickard v. Filburn*, 317 U.S. 111 (1942).

[61] 575 F.2d 663 (8th Cir. 1987).

the order and remanded the case for the Commission to supplement the record to show which standard applied to the building.[62]

Penalty assessments are evaluated by a court using the highly deferential "abuse of discretion" standard. So long as a penalty is within OSHA's statutory authority and is based on some findings set forth in the record, a court is unlikely to vacate a penalty approved by the Commission.[63]

4.4 Precedential Effect of Judicial Decisions

The Commission is not bound by decisions of federal circuit courts even if they are in conflict with the Commission's interpretation of the OSH Act or OSHA standards. Unless the U.S. Supreme Court overturns one of its decisions,[64] the Commission acts in accordance with its own precedent. One circuit court has concluded that the Commission must respect the decisions of a circuit court at least with respect to cases arising in that circuit.[65] Moreover, when a case is remanded to the Commission by a circuit court, the Commission is bound to follow the instructions of the appellate court.[66] In addition, the Commission may not depart arbitrarily from its own precedent without a reasoned explanation in the record.[67]

5.0 Conclusion

The U.S. circuit courts of appeal have exclusive jurisdiction to hear appeals of final orders of the Commission.[68] Prior to obtaining judicial review, parties must first exhaust their administrative remedies or the Commission must decline to hear a discretionary appeal. Judicial review is not a full evidentiary hearing and is restricted to the issues preserved for appeal. Courts generally give a high level of deference to decisions of the Commission, and decisions will only be overturned if the Commission's factual findings are not supported by substantial evidence in

[62] *Id.* at 667.

[63] *See, for example, D&S Grading Co. v. Secretary of Labor*, 899 F.2d 1145 (11th Cir. 1990).

[64] A petition for review of Circuit Court decisions concerning OSHA enforcement can be submitted to the Supreme Court in accordance with 28 U.S.C. § 1254. 29 U.S.C. 660(a).

[65] *See Smith Steel Casting Co. v. Donovan*, 725 F.2d 1032 (5th Cir. 1984) (stating that holding by court of appeal on legal question is binding on Review Commission in all cases arising within that circuit until and unless court of appeals or Supreme Court overturns that holding).

[66] *Butler Lime & Cement Co. v. OSHRC*, 658 F.2d 544 (7th Cir. 1981) (holding that failure to follow Circuit Court's instruction was reversible error).

[67] *See Graphic Communications International Union v. Salem Gravure Division of World Color Press, Inc.*, 843 F.2d 1490 (D.C. Cir. 1988) (holding that Commission's unsupported departure from its own precedent was arbitrary and capricious).

[68] The role of federal district courts is limited to ancillary procedural matters.

the record or if the Commission's legal conclusions are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. A decision of a circuit court is final unless the court remands the case back to the Commission for further proceedings or the U.S. Supreme Court agrees to hear a discretionary appeal of the case.

Chapter 14

Imminent Danger Inspections

Frank D. Davis, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Dallas, Texas

1.0 Overview

- Worker's arm crushed in unguarded conveyor belt, causing amputation of her right arm below the elbow.

- Worker's leg crushed by falling steel beams forcing amputation when overloaded two-ton-rated crane broke and dropped almost three tons of steel less than three feet onto worker's leg.

- Worker loses hand to paper slicer because employer had disabled safety switch to increase production.

- Father and son carpenter team killed when they fell from mobile scaffolding because employer provided neither safety harnesses nor guardrails.

- All skin and muscle of worker torn from bone when worker tried to clean the rollers of a coating machine while they still rotated, which was consistent with plant procedures, instead of shutting down and de-energizing the machine first.

Each of these accounts represents a hazardous condition in the workplace that led to serious bodily injury or death. If the hazardous condition had been identified in advance, could these tragic consequences been avoided? The U.S. Congress thought so and passed legislation designed to identify and correct such hazards, or "imminent dangers," expeditiously and before tragic workplace injuries could result.

In this appeal process, all parties must exhaust all administrative remedies. The Administrative Procedure Act (APA) will not set aside an agency decision unless it is:

- arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- contrary to constitutional right, power, privilege, or immunity;
- in excess of statutory jurisdiction, authority, or limitations;
- short of statutory right;
- without observation of procedure required by law;
- unsupported by substantial evidence; and
- unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

Reading Assignment

Chapter 11:
Understanding and Contesting OSHA Citations

Chapter 12:
Criminal Enforcement of Violations

Chapter 13:
Judicial Review of Enforcement Actions

Key Terms

1. Administrative Procedure Act
2. Constitutional challenges
3. Egregious
4. Interlocutory, Appellate-type, Judicial Reviews
5. MED
6. MOU
7. Notice of Contest
8. OSHRC
9. Parties that have standing
10. PDR
11. Pre-citation, Informal and Formal Settlements
12. Procedural Matters, Conclusions of Law, Findings of Fact
13. Reasonable promptness
14. Willful, repeated, serious, other than serious, de minimis

Course Learning Outcomes for Unit VI

Upon completion of this unit, students should be able to:

1. Identify and illustrate the classifications of OSHA violations.
2. Analyze a citation and determine the procedure necessary to challenge the citation.
3. Discuss the administrative procedures for the proceedings of an Administrative Law Judge.
4. Analyze the review processes for interlocutory, discretionary, and commission reviews.
5. Discuss the criminal enforcement of willful violations that result in death of an employee.
6. Describe the prosecution of violations under environmental statutes.
7. Outline and discuss the judicial review of enforcement actions.

Unit Lesson

Unit VI explores contesting penalties, enforcement, and the judicial review. Even the most diligent health and safety programs cannot ensure that an inspector will find no faults. The key is to be to rebut or correct the findings. This information helps to prepare you to respond promptly, preserve your company's rights, and know how to correct any agency errors. It is important to be familiar with the applicable rules.

The various classifications of OSHA violations are presented and examined. They are the *De minimis* violation, other-than-serious violations, serious violations, willful violations, and repeat violations. OSHA separates the violations and applies a penalty to each violation separately.

The safety professional must identify what is necessary to challenge a citation. First, the employer will file a Notice of Contest (NOC). This is generally done in writing. There is opportunity for settlement even after the filing of the NOC. After this, the NOC is sent to the OSHA Area Director, this person sends the NOC to the Administrative Law Judge (ADJ).

It is well known that employers who are charged with violating OSHA laws and regulations face substantial civil penalties. Some of the criminal penalties that are attached to certain violations are discussed. OSHA does not handle criminal enforcement. This process is deferred to the Department of Justice.

The unit concludes with an exploration of judicial review of enforcement actions. Parties that are unsatisfied with a final order of the Occupational Safety and Health Review Commission (OSHRC) may seek judicial review of the decision.

What are the important findings in *Austin Road Co. v. OSHRC* and *Builders Steel Co. v. Marshall*?

Provide approximately 200-300 words in your response and a citation for your source material.

30 points

If the violation is determined by OSHA to be willful, the penalty range will be from _____ to ______.

- ☒ $5,000; $70,000
- ☒ $7,000; $70,000
- ☒ $10,000; $100,000
- ☒ $10,000; $50,000

4 points

Question 9

What is it known as when OSHA issues a separate citation for each instance of a violation?

- ☒ Repeat violations
- ☒ Egregious penalty policy
- ☒ Willful and serious violations
- ☒ De Maximus violations

4 points

Question 10

Which of the following is a false statement?

- ☒ After the OSHA area director transmits the notice of contest to the Review Commission, an ALJ is assigned to the case.
- ☒ Regarding intent to contest a citation by an employer to OSHA, oral notice is sufficient if it is communicated within 15 days after receiving the citation.
- ☒ Hearings before ALJ's follow trial-type procedures similar to those used in federal court.
- ☒ The Review Commission has assessed penalties on a per-instance basis even when the violations were not willful.

4 points

Question 11

Discuss and assess the potential for multiplied penalties for egregious violations.

Provide approximately 200-300 words in your response and a citation for your source material.

30 points

Question 12

- Section 8 (e)
- Section 6 (b)
- Section 10 (f)

4 points

Question 5

What section of the OSH Act provides that any party adversely affected by an OSHA standard may seek pre-enforcement judicial review by filing a petition prior to 60 days after promulgation of the final rule?

- Section 6 (f)
- Section 8 (e)
- Section 8 (c)
- Section 7 (f)

4 points

Question 6

A violation can be characterized as ________, meaning that it has "no direct or immediate relationship to safety or health."

- inadvertent
- other than serious
- de minimis
- unintentional

4 points

Question 7

In the OSHA area, the applicability of criminal charges is restricted to narrow circumstances. Which of the following is not one of those circumstances?

- If an individual gives advanced notice of an inspection
- If an employer's willful violation of an OSHA standard results in the death of an employee
- If an individual or employer knowingly makes any false statement, representation, or certification under the OSH Act
- If an OSHA designated employee or contractor does not show proper identification upon entering a private company's premises

4 points

Question 8

Unit VI Assessment

Legal Aspects

Question 1

Which of the following is not a standard citation for an OSHA violation?

- Criminal violation
- Other than serious violations
- Serious violations
- Willful violations

4 points

Question 2

Which section of the OSH Act states that final Commission orders may be appealed in the U.S. circuit courts of appeal?

- Section 9
- Section 11
- Section 12 (a)
- Section 8 (a)

4 points

Question 3

If a settlement agreement cannot be reached with the OSHA Area Director, a Notice of Contest of the citation or penalty must be filed with the Secretary of Labor within what period of time to preserve any right to challenge the citation?

- 10 working days
- 15 working days
- 30 working days
- 60 working days

4 points

Question 4

Under what section of the OSH Act authorizes the Secretary of Labor to seek judicial review of a final Commission order [29 U.S.C. § 660(b)] ?

- Section 11 (b)

2.0 Imminent Danger Defined

Section 13(a) of the Occupational Safety and Health Act ("OSH Act") defines imminent danger as "... any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."[1] It is the duty of the Occupational Safety and Health Administration (OSHA or the Administration) to administer the OSH Act and enforce provisions such as the imminent danger provision.

OSHA's front-line officer responsible for insuring employer compliance with the OSH Act is the compliance safety and health officer (CSHO). The primary responsibility of the CSHO is to carry out the Administration's general mandate "to assure so far as possible every working man and woman in the nation safe and healthful working conditions . . . ."[2] The CSHO's primary means of identifying workplace hazards is through on-site inspections of the employer's business. During these inspections, CSHOs evaluate an employer's compliance with the OSH Act's standards by interviewing employees, walking through the employer's facility, and reviewing employer safety records, training, and safety policies.[3]

3.0 Nuts and Bolts of an Inspection

OSHA utilizes various inspections or investigations to enforce the OSH Act. Imminent danger inspections are unprogrammed inspections that the Administration schedules in response to alleged hazardous working conditions identified at a specific worksite.[4] OHSA usually learns of conditions leading to imminent danger inspections through employee reports, but sometimes a CSHO may notice and address an imminent danger situation during programmed inspection.[5] Reports of imminent dangers in the workplace are subject to unprogrammed inspections. In either event, unprogrammed inspections involving imminent dangers receive top priority.[6] As described further below, the CSHO will require an employer to abate an imminent danger hazard and remove endangered employ-

1 29 U.S.C. § 663(a).

2 OSHA *Field Inspection Reference Manual* (*Ref. Man.*) § 2.103, Ch. I(A)(4).

3 *Id.*

4 *Id.* at Ch. I(B).

5 29 U.S.C. §657(f)(1); "Any employees or representatives of employees who believe that a violation of a safety or health hazard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice . . . of such violation or danger." OSHA Inspections, U.S. Department of Labor, OSHA 2098 (2000), p. 3.

6 *Id.*

ees from exposure voluntarily and immediately.[7] If the employer fails to comply with the CSHO's request, the Administration may apply to the local federal district court for an injunction prohibiting further work during the period in which the unsafe condition exists.[8]

When OSHA receives a complaint containing an allegation of imminent danger, the area director in charge of the OSHA area office evaluates whether there is a reasonable basis to support the allegation.[9] To constitute an imminent danger that requires immediate inspection, the alleged hazard must satisfy two criteria:

1. It must be reasonably likely that a serious accident will occur immediately or if not immediately, before abatement would otherwise be required; and

2. The threatened harm must be death or serious physical injury. For a health hazard, exposure to the toxic substance or other health hazard must be so severe as to shorten life or cause substantial reduction in physical or mental efficiency, even if the resulting harm may not manifest itself immediately.[10]

OSHA carefully evaluates all relevant information before ordering an imminent danger inspection. For instance, OSHA conducts imminent danger inspections even during strikes or other labor disputes.[11] The area director for the OSHA office that receives the complaint evaluates the reliability of any complaint prior to scheduling such inspections during a strike or labor dispute "to insure as far as possible that the complaint reflects a good faith belief that a true hazard exists."[12]

Unprogrammed inspections, like imminent danger inspections, can be comprehensive or partial. A comprehensive inspection entails a complete inspection of the high-hazard areas of an employer's establishment. A partial inspection is one in which the focus is limited to certain, identified hazardous areas, operations, conditions, or practices. Usually, an imminent danger inspection will be limited to the specific hazard that originated the complaint, but a CSHO may expand a partial inspection based on information gathered during the course of the inspection, including violations of the OSH Act he witnesses during the inspection.[13]

7 OSHA Inspections, U.S. Department of Labor, OSHA 2098 (2000), p. 3.

8 *Id.*

9 *Ref. Man.* at 2.103, Ch. I(C)(5).

10 *Id.*

11 *Ref. Man.* at Ch. II(A)(2).

12 *Id.*

13 *Ref. Man.* at 2.103, Ch. II(A).

4.0 The On-Site Visit

Upon receipt of an imminent danger complaint, OSHA will assign a CSHO and attempt to schedule an inspection of the facility within 24 hours of the complaint. While a copy of the complaint must be given to the employer no later than the time the CSHO begins his or her inspection of the employer's premises, the names of the employees referenced in the complaint and the name of the complainant him or herself may not be disclosed to the employer without permission of the complainant.[14] Moreover, no information shall be given to employers that would allow them to identify the complainant.[15]

Generally, CSHOs conduct investigations without advance notice. In fact, alerting an employer without proper authorization in advance of an OSHA inspection can bring a fine of up to $1,000 and/or a six-month jail term. This standard applies to both state and federal compliance officers.[16] Typically, OSHA does not give employer notice because it does not want employers to correct or change practices before a CSHO inspects the operation. In the case of an imminent danger inspection, however, OSHA may provide an employer advance notice up to twenty-four hours before the beginning of the inspection. OSHA does this hoping the employer will correct/address the hazardous condition immediately so as to allay employee exposure to imminent dangers in the workplace. Employers receiving advance notice of an inspection must inform the representative of their employees or arrange for OSHA to do so to ensure employee involvement in the investigation and resolution of the alleged hazard.[17]

When the CSHO arrives to conduct the inspection, the CSHO must present official credentials.[18] Prior to allowing the CSHO to conduct an inspection, an employer should always ask to see the compliance officer's credentials.[19] If the employer questions the credentials, the employer can verify the credentials of federal and state compliance officers by calling the local federal or state office. As a point of practice, compliance officers can never collect a penalty at the time of inspection or promote the sale of a product or service.[20]

A CSHO is authorized by the OSH Act "to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area,

14 *Id.*

15 *Id.*

16 OSHA 2098 at p. 1.

17 *Id.* at pp. 1–2; *Ref. Man.* at 2.103, Ch. I(E) ("Section 17(F) of the Act and 29 C.F.R. § 1903.6 contain a general prohibition against the giving of advance notice of inspections, except as authorized by the Secretary or the Secretary's designee").

18 29 U.S.C. § 657(a).

19 OSHA 2098 at p. 5.

20 *Id.*

workplace or environment where work is performed by an employee of an employer and 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."[21] Even though this language seems to give OSHA very broad inspection and entrance authority, a CSHO cannot enter an employer's premises without a search warrant unless the employer allows the CSHO access. Specifically, in 1978, the U.S. Supreme Court ruled that the OSH Act violated the constitutional prohibition against unreasonable searches insofar as it purported to authorize warrantless, nonconsensual searches of commercial workplaces.[22] As a result, OSHA inspections generally must be conducted pursuant to a warrant if the employer does not agree to the inspection.

In most cases, an employer allows a CSHO access to inspect the employer's facility. In some instances, an employer may choose to deny the CSHO access to the plant because of trade secrets, labor relation problems, or other any other reason.[23] In such instances, OSHA is authorized to seek a search warrant from the federal courts.[24] Thus, unless an employer is working on a military base or some other government facility or in a closely-regulated business or industry, the employer generally may refuse the CSHO access and require OSHA to seek a warrant before entering.

An employer may not precondition a CSHO's entry upon signing any form or release or any type of waiver.[25] This standard applies to any employer forms controlling the release of trade secret information equally. If the employer insists that the CSHO sign a waiver before allowing entrance, OSHA will treat that situation as an employer's refusal to allow the CSHO entrance and will seek a search warrant. Notwithstanding the CSHO's right to enter a workplace without signing a waiver, a CSHO still may sign a visitor register or other registration book indicating his or her visit to the plant.[26]

In any event, in order to secure a warrant in an imminent danger inspection, the Administration must set forth the following:

- The proposed scope of the inspection;
- A description of the alleged imminent danger situation;

21 29 U.S.C. § 657(a).

22 *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

23 *Id.*

24 *Ref. Man.* at 2.103 (A)(2)(c).

25 *Ref. Man.* at 2.103 (A)(2)(e).

26 *Id.*

- The date received and the source of the information;
- The original formal complaint, including an explanation for the reasonable expectation of death or serious physical harm and the immediacy of danger; and
- Whether all current imminent danger processes and procedures have been strictly followed.[27]

The warrant usually is narrowly construed, seeking to inspect only the condition at the employer's facility reported as an imminent danger.[28] This is especially true when the search of the workplace is triggered by an employee complaint only. For instance, federal circuit courts have held that search warrants covering an employer's entire facility are unreasonable and invalid when the breadth of the warrant exceeded the scope of the employee complaint that originated the inspection.[29]

Once the Administration secures a warrant, the inspection generally begins within twenty-four hours.[30]

In addition to a search warrant, the Administration may issue administrative subpoenas when a reasonable need for records, documents, testimony, or other supporting evidence exists and when the employer is unwilling to voluntarily disclose the information.[31]

Unlike search warrants, administrative subpoenas of employer safety records and policies may be broader than merely the area containing the reported hazard. To be enforceable, an OSHA subpoena for documents must be "reasonably relevant to the authorized inquiry."[32] Courts, however, have held the authorized inquiry to be reasonably broad. In one such case, an employer operated a three-location facility. At one location, an employee submitted a complaint to OSHA regarding specific conditions in his workplace, which was limited to one of the employer's three locations. OSHA inspected the employee's workplace pursuant to a warrant narrowly tailored to suit the complaint and conducted an inspection of the area of concern. Pursuant to its authority to ascertain whether other locations experienced significant employee injuries and required inspection, OSHA subpoenaed the employer's safety and health records for all three locations. The employer objected, arguing that the subpoena exceeded the scope of the employee complaint and refused to produce the subpoenaed records. The federal court concluded OSHA had authority to subpoena records from all three locations because the records were reasonably relevant to OSHA's authority to review health and safety records to ascertain whether a broader inspection of the employer's operation was necessary.[33]

27 *Id.* at Ch. II(A)(2)(c)(iv)(c).

28 *See, for example, Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982); *Marshall v. North American Car Co.*, 626 F.2d 320 (3rd Cir. 1980); *Marshall v. Central Mine Equipment Co.*, 608 F.2d 719 (8th Cir. 1979).

29 *Id.*

30 *Id.* at Ch. II(A)(2)(c)(vi).

31 *Id.* at Ch. II(A)(2)(c)(vi).

32 *See U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950); *U.S. v. Westinghouse Electric Co.*, 638 F.2d 570 (3rd Cir. 1980).

5.0 Employee Representatives

An employee representative is entitled to participate in the inspection of the employer's premises.[34] An employee representative "refers to (1) a representative of the certified or recognized bargaining agent, or, if none exists, (2) an employee member of a safety and health committee who has been chosen by the employees (employee committee members or employees at large) as their OSHA representative, or (3) an individual employee who has been selected as a walkaround representative by the employees of the establishment."[35] If an employer refuses to let an employee representative participate in the inspection, the CSHO will treat the situation as an employer's refusal to allow the inspection, and the Administration likely will seek a warrant, if it already had not done so, to pursue the imminent danger inspection.[36]

6.0 Opening Conference

Prior to walking the premises, the CSHO will convene an opening conference to explain how the employer was selected and to describe the expected scope of the inspection.[37] During the conference, the CSHO also will explain the specific purpose of the visit, the scope of the inspection, and the standards that apply.[38] In conducting this opening conference, OSHA "encourages employers and employees to meet together in the spirit of open communication."[39] If either the employer or the employee objects to engaging in a joint opening conference, the

33 *Dole v. Trinity Indus. Inc.*, 904 F.2d 867 (1990) (citing *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 [1943] [where an OSHA subpoena "was not plainly incompetent or irrelevant to *any* lawful purpose of [OSHA] . . . , it was the duty of the district court to order its production."]).

34 29 C.F.R. § 1903.8.

35 *Id.* at Ch. II(A)(2)(h).

36 *Id.*

37 *Id.* at Ch. II(A)(3); the Act 2098 at p. 5.

38 *Id.*

39 *Ref. Man.* at Ch. II(A)(3)(a).

CSHO will conduct separate opening conferences with each party.[40] Following the opening conference, the CSHO will ask the employer to select an employer representative to accompany the CSHO during the walk around portion of the inspection.[41]

The OSH Act also provides that an authorized employee representative will accompany the CSHO during the inspection. If an employee representative is unavailable to attend the opening conference and to accompany the CSHO on the plant inspection, the CSHO will interview employees during the course of his inspection of facility.[42] CSHO interviews with employees are private; however, an employee may request that an employee representative participate in the interview as well.[43]

At establishments where more than one employer is present or in situations where groups of employees have different representatives, the CSHO may allow a different employer or employee representative for different phases of the inspection. More than one employer and/or employee representative may accompany the CSHO throughout or during any phase of an inspection if the CSHO determines such additional representatives will aid, and not interfere with, the inspection.[44]

7.0 The Walk Around

With employer and employee representatives selected, the CSHO begins the inspection of the relevant work areas for safety and health hazards. The CSHO will determine the course and scope of the walkaround inspection, but an imminent danger inspection should be limited to the specific hazard identified in the complaint. During the course of the walkaround inspection, the CSHO is authorized to observe safety and health conditions and practices in the facility; consult with employees privately; take photographs and instrument readings; examine records; collect air samples; measure noise levels; survey existing engineering controls; and monitor employee exposure to toxic fumes, gases, and dusts.[45] During the course of the inspection, the CSHO may ask the employer to abate any hazard identified as an imminent danger and to remove employees from the area of a hazard identified as an imminent danger. Notwithstanding any hazard abated during the walk around inspection, as soon as reasonably practicable after the conclusion of

---

40 *Id.*

41 OSHA 2098 at p. 6.

42 *Id.*

43 *Id.*

44 29 C.F.R. § 1903.8(A).

45 OSHA 2098 at p. 7.

the walk around, OSHA will contact the employer and ask it to abate any hazardous situation identified as an imminent danger. OSHA also will ask the employer to remove employees from the area identified as an imminent danger until the identified hazard is abated.[46] The Administration encourages the employer to do whatever is possible to eliminate the identified hazard promptly and on a voluntary basis. When the employer voluntarily and permanently eliminates the imminent danger as soon as the Administration or CSHO identifies it to the employer, an appropriate citation notification of penalty shall be issued but no further abatement will be necessary. If an employer fails or refuses to correct an imminent danger, OSHA will issue a citation and initiate imminent danger proceedings, including the posting of a Notice of Alleged Imminent Danger at the workplace.[47]

8.0 Notices of Imminent Danger and Temporary Restraining Orders

In a case where the employer cannot or does not eliminate the hazard or remove employees from exposure to an imminent danger, the Administration takes swift and definite steps. Specifically, the CSHO will post a Notice of Imminent Danger and call the area director, who will decide whether to obtain a temporary restraining order (TRO) from a federal court. The purpose of the TRO is to force an employer to immediately abate the imminent danger and/or to remove employees from the hazardous area. The CSHO, however, has no authority to order the closing of the operation or to direct employees to leave the area of the imminent danger or the workplace.[48] Rather, the CSHO shall notify employees and employee representatives of the posting of the Notice of Imminent Danger and shall advise them of their rights to report any other perceived violation without fear of discrimination or retaliation from the employer.[49] If an employee agrees that the workplace poses an imminent danger, he may refuse to enter the area or perform the task that is the subject of the notice until the hazard is abated.[50]

In many cases, the CSHO may conclude no imminent danger exists at the time of the plant inspection. Further evaluation of the file, employer documents, and additional evidence may be required before OSHA can determine whether an imminent danger exists. In appropriate cases, a Notice of Imminent Danger

---

46 *Id.*

47 *Id.* at p. 8.

48 This authority is significantly different than that of a mines inspector, which is discussed below.

49 *Id.* at 2.103 Ch. II(B)(3)(c)(ii); 29 U.S.C. § 662.

50 *See, for example, Whirlpool.*

may be posted at the time the citations are delivered or even after the employer contests the citations.[51]

9.0 Closing Conference

At the conclusion of an inspection, the CSHO conducts a closing conference with the employer and employee representatives, jointly or separately, as circumstances dictate. The CSHO may conduct the closing conference either on-site or by telephone.[52] In the event the employer declines to have a joint closing conference with the employee representative, the CSHO normally holds the conference with the employee representative first, unless the employee representative requests otherwise, in order to ensure that worker input, if any, is received and that any needed changes are made before the employer is informed of violations and proposed citations.[53]

During the closing conference, the CSHO will describe to the employer and employee representative all unsafe or unhealthful conditions observed during the inspection. At the same time, the CSHO will describe all apparent violations for which a citation and proposed penalty may be recommended. Because the CSHO may not have all pertinent information at the time of the closing conference, a second closing conference may be held by telephone or in person to inform the employer and employee representative whether any additional concerns exist or whether additional citations may be issued or recommended.[54]

10.0 Citations and Penalties

Even if the CSHO posts a notice and/or OSHA seeks a TRO, the Administration still will issue citations to the employer of the imminent danger. The employer must post a copy of each citation at or near the place where the violation occurred for three days or until the violation is abated, whichever is longer.[55]

The ranges of penalties are extreme. For other-than-serious violations, the penalty can be as little at $0. In the case of a criminal willful violation, however, the penalty can be as much as $500,000. Accordingly, the classes of penalties attached to each alleged violation of OSHA standards is a significant aspect of the citation.

[51] *Id.* at 2.103 Ch. II(B)(4).

[52] *Ref. Man.* Ch. II(A)(5); Act 2098 at p. 8.

[53] *Ref. Man.* at 2.103, Ch. II(A)(5).

[54] *Id.*; Act 2098 at pp. 8–9.

[55] OSHA 2098 at p. 10.

Other-than-serious violations are those that have a direct relationship to job safety and health, but which are unlikely to cause death or serious physical harm. Penalties for other-than-serious violations range from $0 to $7,000 for each violation assessed and may be adjusted downward by as much a 95%, depending on the employer's good faith, such as the employer's demonstrated efforts to comply with the OSH Act, history of previous violations, and business size.[56]

A serious violation exists when a there is a substantial probability that death or serious physical harm would result from the employer's violation of OSHA standards. Penalties for serious violations range from $1,500 up to $7,000, depending on the gravity of the violation. Like an other-than-serious violation, the penalty for a serious violation may be adjusted downward based on the employer's good faith, history of previous violations, and size of business.[57]

If OSHA determines that the employer intentionally and knowingly violated an OSHA standard, it will issue a willful violation. In this case, OSHA must have concluded that (1) a hazardous condition exists; (2) the employer knew the condition violated a standard or other obligation of the OSH Act; and (3) the employer made no reasonable effort to eliminate it. Penalties for willful violations range from $5,000 to $70,000.

If an employer commits a willful violation that results in the death of an employee, the stakes are significantly raised. "An employer who is convicted in a criminal proceeding of a willful violation of a standard that has resulted in the death of an employee may be fined up to $250,000 (or $500,000 if the employer is a corporation)" and/or imprisoned up to six months.[58] A second conviction doubles the possible term of imprisonment.[59]

11.0 Abatement

Notwithstanding issuance of a TRO or a citation, OSHA also will direct the employer to abate any perceived violations of safety and health standards.[60] Abatement periods to correct deviations from standard requirements generally are short, less than thirty days. When the employer abates an identified hazard during the inspection, however, the abatement period listed on the citation shall note, "Corrected During Inspection."[61]

[56] *Id.*

[57] *Id.*

[58] *Id.* at p. 11.

[59] *Id.*

[60] *Ref. Man.* at 2.102, Ch. IV(A).

[61] *Id.*

OSHA instructs its field offices that the abatement period for safety violations should be no more than thirty days. At the same time, the Administration recognizes that certain situations may arise, such as for health violations, where extensive structural changes or new parts and equipment cannot be effected or obtained within thirty calendar days. When an identified imminent danger exists in the workplace, OSHA expects immediate abatement or that the employer will remove workers from the hazardous area.

In a situation where an employer contests either the period set for abatement or the citation itself, the abatement period usually will not begin until the employer and the Administration reach a settlement agreement or the matter is litigated and a decision is issued by the Review Commission. If the employer and the Administration reach a settlement agreement, the employer must abate any hazards within the period of that agreement. Alternatively, under the OSH Act, the abatement period begins when the review commission issues a final order regarding any challenge by the employer as to the abatement period or the citation, and the abatement period established by the review commission is not tolled while either the employer or the Administration appeals the decision, unless the employer was granted a stay. In situations where there is an employee contest of the abatement date, the abatement requirements of the citation remain unchanged. Also, where an employer contests only the proposed penalty, the abatement period established in the citation is unaffected by the employer's contest.[62]

The foregoing is the process for addressing abatement of all types of citations and also may be the process with regard to hazards and violations identified as part of an imminent danger in the workplace. If, however, the Administration established a short abatement period in an effort to immediately correct an imminent danger, the Administration may initiate appropriate imminent danger proceedings immediately and without regard for the employer's notice of contest.[63]

12.0 MSHA Imminent Danger Inspections

Few federal agencies are given such extensive power over an employer's operation as that bestowed upon the Mine Safety and Health Administration (MSHA). Under Section 107(a) of the Mine Safety and Health Act (the Mine Act), a mine inspector can shut down an entire mining operation if he identifies a hazardous condition that constitutes an imminent danger in a mine. Called a Section 107(a) Order or an Imminent Danger Order, a mine inspector can force an employer to cease all mining operations and withdraw all employees from the affected area or mine. The order may be given orally or in writing. When spoken, the mine inspector will memorialize the oral imminent danger order, noting to whom he issued the order as well as the time, date, location, and reason for the order.

[62] *Id.*

[63] *Id.*

Like OSHA imminent danger inspections, MSHA learns of hazardous conditions that may trigger an imminent danger inspection in a variety ways. For instance, MSHA maintains a hotline and a Web site wherein employees may call in or file written complaints of hazardous conditions in the workplace.[64] As in the case of a report of an imminent danger to OSHA, MSHA will attempt to inspect the reported mine within 24 hours. Unlike OSHA, however, MSHA need not seek a search warrant to enter an employer's facility because the Mine Act is drafted narrowly so as to ensure entry without invading an employer's constitutional right against unlawful searches.[65] MSHA delays its inspection only if the complaint on its face, assuming all allegations were true, would not support the finding of an imminent danger.

MSHA also may discover hazardous conditions that constitute an imminent danger during one of multiple inspections conducted of mines during each calendar year. Specifically, the Mine Act requires MSHA to inspect underground mines four times per year. These inspections are not summary or short inspections. Rather, even a nominally sized mine may take several days to inspect. As such, mine inspectors may spend weeks and months inspecting one mine. If during that time the inspector finds any condition that warrants an imminent danger withdrawal order, the inspector has authority to shut down machinery, close mines, and order the withdrawal of personnel.[66]

MSHA can cite and fine mine operators in much the same way OSHA cites and fines employers. Of significance, however, is that the Mine Act gives MSHA authority to levy citations and penalties against individuals, not just employers. That is, under sections 110(c) and (d) of the Mine Act, MSHA is authorized to propose civil penalties against directors, officers, or agents of a corporation if the individual knowingly ordered, authorized, or carried out a violation of a mandatory safety or health standard. Likewise, MSHA may bring criminal charges against an operator or a corporate director, officer, or agent who willfully violates a provision of the Mine Act. Unlike the OSH Act, such penalties and criminal proceedings do not originate only from employee deaths caused by an employer's willful violation of a safety or health standard. Rather, MSHA may consider bringing such actions anytime it issues a section 107(a) imminent danger order of withdrawal. MSHA usually will recommend such proceedings within 240 days

[64] http://www.msha.gov/codeaphone/codeaphonenew.htm.

[65] 30 U.S.C. §813.

[66] *Id.*

from the issuance of a citation or withdrawal order; however, the administration may take as long as 365 days to make such a determination.[67]

13.0 Employee Rights and Labor Unions

Mindful of the dire consequences associated with hazardous job assignments, the U.S. Supreme Court concluded in 1980 that employees could refuse to perform some work if the employee reasonably believed the work would result in death or serious injury or illness. In that decision, a unanimous Court reversed precedent in two other circuits and found an employer could not discharge or otherwise take disciplinary action against any employee who refused to perform a job that was inherently unsafe—that is, constituted an imminent danger.[68]

The *Whirlpool* case involved two workers whom the employer directed to venture out onto a screen that was suspended 20 feet above a concrete floor to clean debris. The identical assignment had recently resulted in the death of another employee who had fallen through the screen to the floor below and died only weeks earlier. While the employer had reinforced certain portions of the screen and represented that they were safe, it could not represent that the entire screen was safe. Nevertheless, when the employees refused to clean the screen, the employer sent the workers home and withheld a day's pay. Upon review, the Court ruled the employees had the right to refuse the dangerous assignment based on provisions of the OSH Act, and it warned that an employer may not discriminate against an employee for exercising this right. The Court, however, declined to conclude that an employer had to pay any employee for any period in which the employee refused to work, even in the face of a perceived imminent danger.[69]

While the Supreme Court elected to remain mute as to wages of employees involved in imminent danger scenarios, the Mine Act does not. Specifically, the Mine Act provides pay for employees when a mine is forced to close under a section 107(a) imminent danger withdrawal order. Section 111 of the Mine Act provides a statutory remedy for miners when their mine is idled or closed due to an MSHA order. In order to stake a claim to relief under this section, miners and/or their representatives must file a claim with the Federal Mine Safety and Health Review Commission.

Likewise, labor unions may seek through collective bargaining agreements to ensure their members receive pay for a scheduled shift even if the employee refuses to perform dangerous work. Regardless of their interest in remuneration,

[67] Interpretation and Guidelines on Enforcement or the 1977 Act, Dept. of Labor, Mine Safety and Health Administration, Vol. I (1996).

[68] *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).

[69] *Id.*

however, labor unions frequently inform their members of their rights under the OSH Act and *Whirlpool* through various publications. Such publications frequently outline the facts and findings of *Whirlpool* and provide recommended responses to hazardous work conditions. Some even advise as to how and when to report perceived imminent dangers and any discriminatory conduct by an employer to OSHA, the National Labor Relations Board, and the member's union.[70]

The OSH Act also provides relief for employees if the government does not act in the face of an alleged imminent danger. As discussed above, OSHA may petition a federal district court for a TRO to restrain an employer from engaging in operations that pose an imminent danger. The OSH Act does not give independent employees or their representatives this authority. Accordingly, in the event OSHA does not act, labor unions and employees have the right to seek a court order, called a writ of mandamus, that directs OSHA to seek a TRO and to stop an employer to correct a hazard in the workplace.[71]

14.0 Summary

In sum, Congress expanded the OSH Act and the Mine Act to include imminent danger inspections in an effort to avert workplace injuries that could be easily avoided by early identification and correction of workplace hazards. In accordance with this goal, Congress also afforded OSHA and MSHA broad authority to enter and inspect an employer's operation. In addition to OSHA and MSHA's authority to issue citations when imminent dangers are identified, both administrative agencies also have the authority to close an employer's operation until the hazardous condition is corrected.

An employer may avoid these actions, however, by accompanying the compliance officer on his or her inspection of the employer's facility and correcting any hazardous condition identified by the compliance officer during inspection. If an imminent danger cannot be corrected immediately, an employer may avoid a TRO or other consequences by voluntarily removing affected workers from the hazardous environment until the danger is corrected. In working with OSHA and MSHA cooperatively, an employer can ensure a safe work environment for its employees while also avoiding expensive and damaging conflicts with the administrative agencies.

[70] *See, for example, Right to Refuse Unsafe Work*, Communications Workers of America, Local 1101 (2000); *Understanding the Facts About Imminent Danger*, International Association of Machinists and Aerospace Workers (2005).

[71] 29 USC 662(d).

Chapter 15

OSHA-Approved State Plans

Rachel Schaffer

1.0 Overview

Although the federal government has overall responsibility for the administration and enforcement of the Occupational Safety and Health Act ("the OSH Act" or "the Act"), Section 18 of the Act allows states to develop and operate their own enforcement plans, which must be approved by the Occupational Safety and Health Administration (OSHA). To be approved, a state's safety and health standards must be "at least as effective as" comparable federal standards, the plan must provide for adequate inspections, and the plan must cover both state and local employers as well as private employers. Although the Act requires minimum acceptable safety standards, it does not require that the state plans be identical to OSHA's; states with OSHA-approved state plans may adopt standards that exceed OSHA's standards and may adopt standards that address hazards not covered by federal standards.

Currently, 22 states and jurisdictions operate state plans that cover both private and public sector employers, and four states and jurisdictions have state plans that only cover public sector employers. OSHA is responsible for approving all proposed state plans and for monitoring the plans once they are approved.

This chapter discusses how states may establish OSHA-approved state plans as well as when the Act preempts state laws in states without OSHA-approved state plans. It also provides an overview of the various state plans.

2.0 Establishing State Plans

2.1 Developmental Phase

To establish a state plan, a state must designate an agency to develop and administer it. The agency must be sure (1) the plan provides for the development and enforcement of safety and health standards that are "at least as effective as" federal OSHA standards; and (2) that within three years the state will have in place all the structural elements necessary for an occupational safety and health program. These structural elements include legislation, regulations and procedures for standards setting, enforcement, and appeal of citations and penalties; and a sufficient number of qualified enforcement personnel.[1]

While OSHA generally retains jurisdiction over private employers in the state during this developmental phase, OSHA has the discretion to enter into an "operational status agreement," which suspends OSHA's exercise of discretionary federal enforcement for activities covered by the state.

At the end of three years and after the state has met all developmental requirements, OSHA certifies in the *Federal Register* that the state has the legal, administrative, and enforcement means necessary to operate effectively. Certification marks the commencement of the state plan implementation.[2]

2.2 Probationary Phase

For at least one year following certification, OSHA' monitors the state's plan to determine whether it is "at least as effective as" the federal program.[3] OSHA's evaluation is, in theory, relatively straightforward. Where the state has adopted federal standards, the state's interpretation and application of these standards must conform with the applicable federal interpretation and application. Where the state has developed and promulgated its own standards, such standards must be interpreted and applied in a manner that makes them "at least as effective as" comparable federal standards. Along the same lines, the state must propose penalties in a manner that is "at least as effective as" those of the federal program.[4] The state must also participate in OSHA's computerized data system.

After one year of certification, the state can seek OSHA's final approval.[5] Under Section 18(e) of the Act, final approval means that OSHA relinquishes its authority to cover occupational safety and health matters to the state.[6]

1 29 C.F.R. § 1953.4 (2005).

2 For additional information regarding the criteria for developing a state plan, please refer to 29 C.F.R. §§ 1902.3–1902.6 (2005).

3 29 C.F.R. § 1902.36 (2005).

4 29 C.F.R. § 1902.37 (2005).

5 29 C.F.R. § 1902.39 (2005).

6 For additional information regarding final approval of a state plan, please refer to 29 C.F.R. §§ 1902.34–1902.46 (2005)

2.3 Rejection and Withdrawal

OSHA may reject or withdraw its approval of a state plan if the plan's structural elements or its implementation fails to achieve enforcement "at least as effective as" federal law.[7] Such rejections and withdrawals of approval must follow a formal hearing.[8] A state may voluntarily withdraw its state plan. The procedures for rejection and withdrawal of state plans are in 29 C.F.R. Part 1955.

3.0 Preemption Issues

If a state has an OSHA-approved state plan, it may legislate freely on the subject of occupational safety and health so long as state standards applicable to products do not unduly burden interstate commerce.[9] If a state lacks an OSHA-approved state plan, it may legislate on occupational safety and health issues only if they are not addressed by a federal standard.[10] If a state without a state plan adopts a dual-purpose requirement—that is, it regulates both an occupational safety or health issue addressed by an OSHA standard and a public safety issue, it is preempted by Section 18.[11]

In *Gade*, OSHA and Illinois (which lacked a state plan) had substantially different training requirements for workers who handle hazardous wastes; OSHA required three days of on-site training, while the state required 500 days. The Court held that the Illinois requirement was preempted even though it was adopted out of concern for public, as well as worker, safety. The Court also held that a state law requirement that "directly, substantially, and specifically regulates occupational safety and health is an occupational safety and health standard within the meaning of the Act," and is thus preempted, even if it exceeds OSHA standards.[12] The *Gade* Court concluded that "if the State wishes to enact a dual impact law that regulates an occupational safety and health issue for which a federal standard is in effect, Section 18 of the Act requires that the State submit a plan for the approval of the Secretary."[13]

7 29 C.F.R. § 1902.46 (2005).

8 29 C.F.R. § 1902.52 (2005).

9 29 U.S.C. § 667(c)(2) (2002); 29 C.F.R. § 1902.3(c)(2) (2006).

10 *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992); *Ben Robinson Co. v. Texas Workers' Comp. Comm'n*, 934 S.W.2d 149 (Tex.App. 1996) (OSH Act preempted state hazardous employer program, which required state safety consultants to inspect workplaces).

11 *Gade*, 505 U.S. 88 (OSH Act preempts state laws regulating issues covered by federal safety standards even though state laws have dual impact or purpose of protecting employees and members of the public).

12 *Gade*, 505 U.S. at 107; *see also Industrial Truck Ass'n v. Henry*, 125 F.3d 1305 (9th Cir. 1997); *Skilled Craftsman of Texas, Inc. v. Texas Workers' Compensation Comm'n*, 158 S.W.3d 89, 96 (Tex.App. 2005) (state law "essentially regulates occupational safety and health issues addressed by federal law" because it "effectively obligates private employers, under penalty of being publicly labeled as hazardous, to take action to reduce workplace injuries").

13 *Gade*, 505 U.S. at 108.

	State Statutes	*Final Approval of State Plan*	*State Plan Web Sites*
Alaska	Alaska Stat. §§ 18.60.010–18.60.105 (2005)	September 28, 1984 Alaska state plan; Final Approval Determination, 29 C.F.R. 1952.240 (2005)	http://labor.state.ak.us/lss/home.htm
Arizona	A.R.S. §§ 23-401–23-433 (LexisNexis 2005)	June 20, 1985 Arizona state plan; Final Approval Determination, 29 C.F.R. 1952.350 (2005)	http://www.ica.state.az.us/ADOSH/oshatop.htm
California	Cal. Lab. Code §§140–149.5, 6300–6719 (Deering 2005)		http://www.dir.ca.gov/occupational_safety.html
Hawaii	Haw. Rev. Stat. Ann. §§ 396.1–396.16 (LexisNexis 2005)	April 30, 1984 Hawaii state plan; Final Approval Determination, 29 C.F.R. 1952.310 (2005)	http://hawaii.gov/labor/hiosh/index.shtml
Indiana	Ind. Code Ann. §§ 228-1.1-1–51 (2005)	September 26, 1986 Indiana state plan; Final Approval Determination, 29 C.F.R. 1952.320 (2005)	http://www.in.gov/labor/iosha/
Iowa	Iowa Code §§ 88.1–88.21 (2004)	July 2, 1985 Iowa state plan; Final Approval Determination, 29 C.F.R. 1952.160 (2005)	http://www.state.ia.us/iwd/labor/index.html
Kentucky	Ky. Rev. Stat. Ann. §§ 338.010–338.991 (LexisNexis 2005)	June 13, 1985 Kentucky state plan; Final Approval Determination, 29 C.F.R. 1952.230 (2005)	http://www.labor.ky.gov/osh/index.htm
Maryland	Md. Code Ann. Lab. & Empl. §§ 5-101–5-1001 (LexisNexis 2005)	July 18, 1985 Maryland state plan; Final Approval Determination, 29 C.F.R. 1952.210 (2005)	http://www.dllr.state.md.us/labor/mosh.html
Michigan	Mich. Stat. §§ 408.1001–408.1094 (LexisNexis 2005)		http://www.michigan.gov/cis/0,1607,7-154-11407—,00.html
Minnesota	Minn. Stat. §§ 182.01–182.676 (2005)	July 30, 1985 Minnesota state plan; Final Approval Determination, 29 C.F.R. 1952.200 (2005)	http://www.doli.state.mn.us/mnosha.html
Nevada	Nev. Rev. Stat. Ann. §§ 618.005–618.900 (LexisNexis 2005)	April 18, 2000 Nevada state plan; Final Approval Determination, 20 C.F.R. 1952.290 (2005)	http://dirweb.state.nv.us/
New Mexico	N.M. Stat. Ann. §§ 50-9-1–50-9-25 (LexisNexis 2005)		http://www.nmenv.state.nm.us/OHSB_website/ohsb_home.htm
North Carolina	N.C. Gen. Stat. §§ 95-126–95-160 (2005)	December 10, 1996 North Carolina state plan; Final Approval Determination, 29 C.F.R. 1952.150 (2005)	http://www.nclabor.com/osha/osh.htm
Oregon	Or. Rev. Stat. §§ 654.001–654.991 (2005)	May 12, 2005 Oregon state plan; Final Approval Determination, 29 C.F.R. 1952.100 (2005)	http://www.orosha.org/

(continued)

Figure 15.1. The 22 State Plans that Cover Both Private and Public Employers

	State Statutes	Final Approval of State Plan	State Plan Web Sites
Puerto Rico	P.R. Laws Ann. Tit. 29, §§ 361–362 (2003)		http://www.osha.gov/fso/osp/PRstandards.html
South Carolina	S.C. Code Ann. §§ 41-15-10–41-15-640 (2005)	December 15, 1987 South Carolina state plan; Final Approval Determination, 29 C.F.R. 1952.90 (2005)	http://www.llr.state.sc.us/osha.asp
Tennessee	Tenn. Code Ann. §§ 50-3-101-50-3–2019 (2005)	July 22, 1985 Tennessee state plan; Final Approval Determination, 29 C.F.R. 1952.220 (2005)	http://www.state.tn.us/labor-wfd
Utah	Utah Code Ann. §§ 34A-6-101–34A-6-307 (2005)	July 16, 1985 Utah state plan; Final Determination, 29 C.F.R. 1952.110 (2005).	http://www.uosh.utah.gov
Vermont	Vt. Stat. Ann. Tit. 21, §§ 221–223 (2005)		http://www.labor.vermont.gov/sections/wcsafety/vosha
Virginia	Va. Code Ann. §§ 40.1-22–40.1-22.1, 40.1-49.3–40.1-51.4:5 (2005)	November 30, 1988 Virginia state plan; Final Approval Determination, 29 C.F.R. 1952.370 (2005)	http://www.doli.state.va.us/
Washington	Wash. Rev. Code Ann. §§ 49.17.010-49.17.910 (LexisNexis 2005)		http://www.lni.wa.gov/wisha/default.htm
Wyoming	Wyo. Stat. Ann. §§ 27-11-101–27-11-114 (2005)	June 27, 1985 Wyoming state plan; Final state plan Approval, 29 C.F.R. 1952.340 (2005)	http://wydoe.state.wy.us/doe.asp?ID=7

Figure 15.1. *(continued)*

	State Statutes	Final Approval of State Plan	State Plan Web Sites
Connecticut	Conn. Gen. Stat. §§ 31-367–31-385 (2004)		http://www.ctdol.state.ct.us/osha/osha.htm
New Jersey	N.J. Rev. Stat. §§34:6A-1–34:6A-50 (2005)		http://www.state.nj.us/labor/lsse/lspeosh.html
New York	N.Y. Lab. Law §§ 884–887 (Consol. 2005)		http://www.labor.state.ny.us/workerprotection/safetyhealth/DOSH_PESH.shtm
Virgin Islands	V.I. Code Ann. Tit. 24, §§ 31–51 (2005)	November 30, 1988	**Consultation** Safety in Paradise University of the Virgin Islands Community Engagement and Lifelong Learning Center http://cell.uvi.edu

Figure 15.2. State Plans that Cover Public Employees Only

Sometimes states without state plans have pointed to Section 4(b)(4) of the OSH Act to prevent preemption. Section 4(b)(4) of the Act, 29 U.S.C. § 653(b)(4), provides:

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law as to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

Courts have held that this provision prevents preemption of workers' compensation statutes, and other state laws providing compensation for occupational injury or disease, such as tort laws.[14] This is true even if the compensation has been awarded for injurious violations of scaffold safety regulations.[15] The courts also have held that Section 4(b)(4) prevents preemption by Section 18 of state criminal laws.[16]

4.0 Approved State Plans

Of the 26 current state plans, 22 cover both private and public (state and local government) employers, and four (Connecticut, New Jersey, New York, and Virgin Islands) cover only public employers.

[14] *See, for example, Pedraza v. Shell Oil,* 942 F.2d 48, 53 (1st Cir. 1991) ("Section 4(b)(4) operates to save state tort rules from preemption."); *United Steelworkers of America v. Marshall,* 647 F.2d 1189, 1235 (D.C. Cir. 1980), cert denied, 453 U.S. 913 (1981).

[15] *See Davis v. States Drywall and Painting,* 268 Ill. App. 3d 704, 709 (1994).

[16] *People v. Chicago Magnet Wire Corp.,* 534 N.E.2d 962, 968 (Ill. 1989).

Appendix

The standard under which a district court orders a preliminary injunction pursuant to an imminent danger determination differs slightly from the usual injunction test. Generally, a court will order a preliminary injunction if the movant establishes that: (1) there is substantial likelihood of prevailing on the merits; (2) the movant will suffer irreparable injury in the absence of relief; (3) the threatened injury to the movant outweighs any damage the relief would cause to the opposing party; and (4) the injunction is not adverse to public interest.

In the OSH Act Congress recognized that many states had effective programs for worker protection. Congress included provisions in the OSH Act permitting states (1) to exercise jurisdiction over any occupational safety and health issue where no federal standards exists; (2) to assume responsibility for development and enforcement of state rules equivalent to federal standards; (3) to operate an occupational safety and health program comparable to funding, authority, and staffing to the federal program; and (4) to enforce more stringent standards where compelled by local conditions and where the standards would not unduly burden interstate commerce.

Reading Assignment

Chapter 14:
Imminent Danger Inspections

Chapter 15:
OSHA-Approved State Plans

Key Terms

1. Abatement
2. Closing conference
3. CSHO
4. Developmental phase
5. Imminent danger
6. MSHA
7. Preemption, Gade
8. Probationary phase
9. TRO
10. Walk around
11. *Whirlpool Corp. v. Marshall*

Course Learning Outcomes for Unit VII

Upon completion of this unit, students should be able to:

1. State the need for imminent danger inspections.
2. Identify the statutory framework and regulatory guidance for imminent danger inspections.
3. Discuss the imminent danger inspection procedure to include the OSHA investigation, the Secretary of Labor's response and the employer's response.
4. Describe the rights of employees to include the right to inform and assist in the inspection, the right to request a writ of mandamus, and the right to refuse dangerous work.
5. Compare and contrast the Federal Standards with the Mine Safety and Health Agency and State OSHA.
6. Discuss the process by which state OSHA plans are approved.
7. Contrast various complaints about state plans.

Unit Lesson

Unit VII examines the circumstances that surround all aspects of imminent danger inspections and reviews the framework for various state OSHA plans.

One of the primary purposes of OSHA is to encourage employers and employees to reduce workplace hazards. The agency carries out this duty primarily through the development of occupational safety and health standards. In circumstances that do not have specific standards, employers must comply with the Act's general duty clause. Workplace inspections are the principal means by which OSHA enforces these mandatory job safety standards and the general duty clause.

Although OSHA inspectors follow the same inspection procedure regardless of the inspection-triggering event, an employer will want to note the type and purpose of the inspection when contesting a citation or proposed penalty—there are slight yet important differences between regular and imminent danger inspections.

Imminent danger determinations are not classifications of a particular type of violation; rather they categorize the practice or hazard at the workplace temporally. Imminent danger cases are controversial. In most cases, imminent danger inspections are triggered by on-the-job fatalities or catastrophic accidents; they typically become headline news. The classification of an alleged violation measures the degree of harm to an employee and the culpability of the employer. Imminent dangers, on the other hand, notify employees of grave risks that are certain to happen in the proximate future.

30 points

Question 12

Define "imminent dangers" and discuss OSHA inspections related to these potential events and how they might differ from a routine inspection.

Please provide approximately 200-300 words and a reference citation for your source material in your response.

30 points

The OSH Act also provides relief for employees if the government does not _____.

- negotiate with unions on serious violations
- act in the face of an alleged imminent danger
- negotiate with employers on serious violations
- allow as many employee representatives as want to join the walk around inspection

4 points

Question 9

Under what section is MSHA authorized to propose civil penalties against directors, officers, or agents of a corporation if they knowingly ordered a violation of a mandatory safety or health standard?

- Section 110 (c) and (d)
- Section 105 (d)
- 30 USC � 813
- Section 1200.120

4 points

Question 10

Which of the following is not true regarding state plans?

- Of the 26 current state plans, 22 cover both private and public employers.
- A state may voluntarily withdraw its state plan.
- A state with an approved plan may legislate freely on the subject of occupational safety and health so long as state standards applicable to products do not unduly burden interstate commerce.
- A non-plan state may not exercise authority over any hazard for which there is no corresponding federal standard in effect.

4 points

Question 11

List and discuss five important criteria that a state must meet in order to be approved by OSHA for safety- and health-related responsibility.

Please provide approximately 200-300 words and a reference citation for your source material in your response.

- Utah, Iowa, and Arizona
- Oregon, North Carolina, and California
- Washington, Puerto Rico and Connecticut
- Alaska, Arizona and Vermont

4 points

Question 5

Which section has been cited by the courts as preventing preemption of Section 18 of state criminal laws?

- There is no section. Preemption cannot be prevented.
- Section 2(a)(5)
- Section 4(b)(4)
- Section 18(b)(6)

4 points

Question 6

Which federal agencies have the authority to conduct workplace inspections and issue citations when imminent dangers are identified?

- OSHA and EPA (hazardous materials operations only)
- EPA (hazardous materials operations only), MSHA, and OSHA
- OSHA only
- MSHA and OSHA

4 points

Question 7

In the event that OSHA does not act in the face of an alleged imminent danger situation, labor unions and employees can take what action?

- File a lawsuit
- Seek a writ of mandamus
- Walk off the job site with full pay and benefits for 30 days
- They have no further action available to them

4 points

Question 8

Unit VII Assessment

Legal Aspects

Question 1

To secure a warrant in an imminent danger inspection, the Administration must set forth all the following, except which one?

- a description of the alleged imminent danger situation
- whether all current imminent danger processes and procedures have been strictly followed
- the date received, but not the source of the information
- the proposed scope of the inspection

4 points

Question 2

What, by definition, can exist where there is a reasonable certainty that a workplace hazard, practice, or danger exists that can be expected to cause death or serious physical harm immediately?

- serious violation
- willful and serious violations
- willful and de maximus violations
- imminent danger

4 points

Question 3

What Section of the OSH Act requires a state to submit a plan to OSHA if the state desires to assume responsibility for the development and enforcement of standards "relating to" any occupational safety or health issue, with respect to which a federal standard has been issued?

- Section 18
- Section 8 (e)
- Section 10 (d)
- Section 2 (a)

4 points

Question 4

At the time of printing of the textbook, which of the following states had final approval of their state plans?