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Janice G. Murphy  
*University of Richmond*

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## EMPLOYER DUTIES AND DEFENSES TO OSHA VIOLATIONS

The Occupational Safety and Health Act of 1970<sup>1</sup> (hereinafter the Act) was designed to encourage both employers and employees to reduce the number of occupational safety and health hazards at their places of employment.<sup>2</sup> The Secretary of Labor is authorized by the Act to set mandatory standards applicable to businesses affecting interstate commerce,<sup>3</sup> and the Occupational Safety and Health Review Commission was created to handle the adjudication arising from enforcement of the Act.<sup>4</sup> An employer's duties under the Act are to provide employees a work environment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees,"<sup>5</sup> and to conform to the specific health and safety standards promulgated by the Secretary.<sup>6</sup>

When an employer is charged with a violation under the Act, there are a number of defenses available regardless of the charge. In several cases involving occupational health, employers have attacked various aspects of the cited standard itself, notably its economic or technological infeasibility.<sup>7</sup> Other defenses recognized by the Commission are impossibility of compliance, greater hazard by compliance, and isolated employee misconduct. In addition, the common law defenses of collateral estoppel and *res judicata* have also been successfully argued before the Commission.<sup>8</sup>

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1. 29 U.S.C. §§ 651-78 (1976 & Supp. III 1979).

2. *Id.* § 651(b)(1). This is accomplished generally "by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions." *Id.*

3. *Id.* § 651(b)(3). *See also id.* § 655. The Occupational Safety and Health Administration (OSHA) is the agency within the Department of Labor responsible for promulgating and enforcing standards under the Act. In this comment, "OSHA" and "the Secretary" are used interchangeably.

4. *Id.* §§ 651(b)(3), 661(a). In this comment, the Occupational Safety and Health Review Commission will be referred to as the "Commission," the "Review Commission," or "OSHRC."

5. *Id.* § 651(a)(1).

6. *Id.* § 654(a)(2).

7. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) presented, but did not resolve, the question whether the Act requires OSHA to compare costs and benefits of a proposed standard reducing permissible levels of airborne benzene. The Court found that the proposed lower standard was unenforceable because OSHA's rationale in lowering it was not based on a finding that leukemia had ever been caused by exposure at that higher limit. OSHA found rather that some leukemia might result from exposure at the higher level and that leukemia might be eliminated if the exposure level were reduced. *Id.* at 2860. The cost-benefit question was finally answered by the Supreme Court in *American Textile Mfrs. Inst., Inc. v. Donovan*, 101 S. Ct. 2478 (1981).

8. *See Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir. 1979); *Williams Enter-*

## I. THE ECONOMIC INFEASIBILITY ARGUMENT

The economic infeasibility of complying with toxic substance regulations has been hotly debated in the courts,<sup>9</sup> and has proved to be one of the most controversial aspects of the Act. Employers vigorously object to the frequently large investments required in order to comply with OSHA regulations, whereas labor groups urge the view that the Act does not always go far enough to protect workers from industrial hazards.

The Commission has held that the word "feasible" should be interpreted to mean "technically possible," but should also include a component of economic feasibility.<sup>10</sup> Accordingly, it asserts that the costs of the proposed controls should be balanced against the benefits to be derived therefrom, so that resources will be allocated in relationship to the degree of harm established.<sup>11</sup> The Secretary, on the other hand, had been of the opinion that economic factors related to compliance should be considered only if the costs involved would seriously jeopardize the financial health of the employer.<sup>12</sup>

The United States Supreme Court took a stand on the cost-benefit debate in *American Textile Manufacturers Institute, Inc. v. Donovan*<sup>13</sup> in which a statute regulating cotton dust exposure was attacked by cotton industry representatives. The Court held that cost-benefit analysis by OSHA in promulgating a standard under section 655(b)(5) of the Act<sup>14</sup> is not required because Congress itself defined the basic relationship between costs and benefits by placing the "benefit" of the workers' health above all other considerations, limited only by what is "capable of being

prises, Inc., [1980] OCCUP. SAFETY AND HEALTH DEC. (CCH) ¶ 24,597.

9. *E.g.*, *American Textile Mfrs. Inst., Inc. v. Donovan*, 101 S. Ct. 2478 (1981); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 649 (1980); *Industrial Union Dep't v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974).

10. *See RMI Co. v. Secretary of Labor*, 594 F.2d 566, 572 (6th Cir. 1979) (requiring Commission to balance costs against benefits); *Turner Co. v. Secretary of Labor*, 561 F.2d 82 (7th Cir. 1977) (requiring Commission to consider cost of implementation); *Continental Can Co.*, [1976-1977] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 21,009 (placing burden of establishing economic and technical feasibility on Secretary).

11. *RMI Co. v. Secretary of Labor*, 594 F.2d 566, 572-73 (6th Cir. 1979). In order to comply with noise standards, titanium producer would have been required to spend an estimated \$125,000. The court adopted a cost-benefit approach for determining economic feasibility, and remanded the case to the OSHRC for application of this standard.

12. *See RMI Co. v. Secretary of Labor*, 594 F.2d 566 (6th Cir. 1979); *Continental Can Co.*, [1976-1977] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 21,009.

13. 101 S. Ct. 2478 (1981).

14. 29 U.S.C. § 655(b)(5):

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

done."<sup>15</sup> In addition, section 652(8)<sup>16</sup> does not incorporate a cost-benefit requirement into section 655(b)(5) for standards dealing with toxic materials or harmful physical agents. To interpret section 652(8) as imposing an additional and overriding cost-benefit analysis requirement on the issuance of section 655(b)(5) standards would eviscerate the "to the extent feasible" requirement<sup>17</sup> of section 655(b)(5).

The Court closely examined the Act's legislative history, and concluded that Congress did not intend OSHA to conduct its own cost-benefit analysis before promulgating a toxic material or harmful physical agent standard. The Court found that the history reflected Congress' awareness that the Act would create substantial costs for employers but that the intent was to impose such costs when necessary to create a safe and healthful working environment.<sup>18</sup>

The *American Textile* decision comes as a great blow to employers, who can no longer argue that the Secretary has the burden of demonstrating that the benefits of a particular regulation outweigh the costs of its implementation. Once the Secretary establishes the general feasibility of the standard, the employer must bear the entire weight of producing substantial evidence that the benefits do not outweigh the costs of the regulation in question, a task that is certain to prove difficult.

## II. THE TECHNOLOGICAL INFEASIBILITY ARGUMENT

The employer often argues that compliance with an occupational health standard is technologically infeasible. The burden of showing technological feasibility remains with the Secretary, but may be rebutted by the employer with substantial evidence to the contrary.<sup>19</sup>

*Society of the Plastics Industry, Inc. v. OSHA*<sup>20</sup> was a 1975 case chal-

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15. 101 S. Ct. at 2490.

16. 29 U.S.C. § 652(8). "The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *Id.*

17. 101 S. Ct. at 2492.

18. *Id.* at 2495-96. For a discussion of cost-benefit analysis, see Note, *The Supreme Court, 1979 Term: OSHA Regulation of Toxic Substances*, 94 HARV. L. REV. 75, 242-51 (1980); Comment, *Cost-Benefit Analysis for Standards Regulating Toxic Substances Under the Occupational Safety and Health Act: American Petroleum Institute v. OSHA*, 60 B.U. L. REV. 115 (1980); Comment, *The Billion Dollar Benzene Blunder: Supreme Court Scrutinizes OSHA Standards in Industrial Union Department AFL-CIO v. American Petroleum Institute*, 16 TULSA L.J. 252 (1980).

19. *Diversified Indus. Div., Independent Stave Co. v. OSHRC*, 618 F.2d 30, 32 (8th Cir. 1980); *Stabilized Pigments, Inc.*, [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,160.

20. 509 F.2d 1301 (2d Cir. 1975), *cert. denied*, 421 U.S. 992 (1975). Manufacturers of vinyl chloride and vinyl chloride products filed for review of health and safety regulations promulgated by the Secretary. The court held that even though the ultimate facts in dispute

lenging the Secretary's exposure limit for vinyl chloride on the basis that, among other things, the technology did not then exist to achieve the very low level required by the Act. The Second Circuit held that the Secretary could establish an exposure limit that anticipated future advances in technology, but did not imply that an employer could be found in violation of such a standard by failing to implement currently unavailable technology.<sup>21</sup>

Technological infeasibility is closely tied to economic infeasibility, as was illustrated in *Samson Paper Bag Co., Inc.*<sup>22</sup> The Commission held that engineering controls to reduce the noise generated by paper bag machines were *technologically* feasible, but the Commission could not agree on the *economic* feasibility of the controls, and so remanded the case for reconsideration under the cost-benefit criterion set forth in *Continental Can.*<sup>23</sup>

Earlier cases, however, did not necessarily consider economic feasibility a controlling factor in the determination of feasibility in general. For example, in *Castle & Cooke Foods*,<sup>24</sup> the Commission stated that the fact that engineering methods presently exist to significantly reduce the noise levels in a certain plant is sufficient to show that engineering controls are technologically feasible, even though their implementation may require custom design. In an action involving the review of a Commission order vacating a textile manufacturer's citations for violations of noise regulations, *Marshall v. West Point Pepperell, Inc.*,<sup>25</sup> the Fifth Circuit found substantial evidence supporting the Commission's factual finding that there were no feasible technological methods for significantly reducing noise levels in the manufacturer's mill at the time the citations were issued. However, the court stated that, by virtue of its extensive operations and prominent position in the textile industry, the employer was obligated to explore all reasonable opportunities for solving the loom noise problem in a feasible manner.<sup>26</sup>

It is apparent from these cases that the Commission and the courts are

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are "on the frontiers of scientific knowledge," the duty of the Secretary is to act to protect employees in circumstances where existing methodology is deficient. 509 F.2d at 1308.

21. 509 F.2d at 1309.

22. [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,555.

23. *Id.* ¶ 24,555 at 30,046. The Commission in *Continental Can* stated that were it to hold that economic feasibility was irrelevant in enforcing a noise standard, the consequence would be that the standard would be applied without any consideration ever having been given to its economic consequences, either on a national basis or an industry-by-industry basis, which would be inconsistent with Congressional intent. *Continental Can Co.*, [1976-1977] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 21,009 at 25,256. *Cf.* *American Textile Mfrs. Inst., Inc. v. Donovan*, 101 S. Ct. 2478 (1981).

24. [1977-1978] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 21,854.

25. 588 F.2d 979 (5th Cir. 1979).

26. *Id.* at 985.

extremely willing to find that a particular regulation is technologically feasible, but that this tendency has been counterbalanced by the imposition of the economic cost-benefit requirement. However, in light of the *American Textile* decision, it is possible that reviewing bodies may be forced to regard technological feasibility as an element for consideration totally independent from economic feasibility.

### III. THE IMPOSSIBILITY OF COMPLIANCE DEFENSE

The Review Commission has also established the affirmative defense of impossibility of compliance with the violated standard. The burden of proving impossibility rests with the employer,<sup>27</sup> and is an onerous burden. In addition to demonstrating that compliance would be impossible or would preclude work performance, the employer must show that there are no alternative compliance methods.<sup>28</sup> A showing of impracticability or inconvenience has consistently been held to be inadequate to support an impossibility defense.<sup>29</sup> If full compliance is unachievable, there must be substantial compliance so that as much protection as possible is afforded the employee.<sup>30</sup>

The *Geisler Ganz Corp.*<sup>31</sup> case illustrates the type of evidence an employer must produce in order to establish impossibility of compliance. The employer had been cited and assessed a penalty for failure to guard the point of operation on manually operated mechanical power presses used to stamp out belt buckles and costume jewelry. A judge had previously vacated the citation on the ground that the Secretary failed to establish the feasibility of the guards; but that decision was remanded after the Commission ruling in *F.H. Lawson*<sup>32</sup> that the burden of proof was on the employer to establish the impossibility of compliance. The inspector

27. *F.H. Lawson Co.*, [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,277 (employer did not meet burden of demonstrating impossibility); *Geisler Ganz Corp.*, [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,775 (Commission satisfied that employer demonstrated impossibility of designing adequate guards).

28. *F.H. Lawson Co.*, [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,277 at 29,574-75 (employer offered no proof of attempt to alter production methods and expended no effort to develop guards for machines); *M.J. Lee Construction Co.*, [1979] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 23,330 (impossibility defense negated by evidence that acceptable alternate method used after inspection).

29. *E.g.*, *Perlite of Houston, Inc.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUPATIONAL SAFETY & HEALTH DEC.) ¶ 25,464; *General Steel Fabricators, Inc.*, [1977-1978] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 22,104; *Taylor Bldg. Ass'ns*, [1977-1978] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 21,592; *K & T Steel Corp.*, [1975-1976] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 20,445; *Sheet Metal Specialty Co.*, [1974-1975] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 19,546.

30. *Perlite of Houston, Inc.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,464 (failure to provide safety net; employee killed in fall).

31. [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,775.

32. *Id.* ¶ 24,277.

conceded that Geisler's operation was unique. Furthermore, the employer had tried guards suggested by an insurance company and the New York State Department of Labor, but both agreed that they were not feasible, and both granted variances. Despite the fact that there was no past history, experience, or technical data upon which a determination could be made that it was impossible to guard the point of operation, the citation and penalty were vacated by the judge.<sup>33</sup> Apparently, the judge was impressed by the efforts made by the employer to comply with the standard and the uniform conclusions of infeasibility reached by the employer's outside consultants. Although this employer used the impossibility defense successfully, in most cases where the defense has been tested it has failed because the employer could not overcome the burden of showing that it had no alternative means of compliance.<sup>34</sup>

#### IV. GREATER HAZARD DEFENSE

Another affirmative defense available to the employer is that compliance with the regulation would create a greater hazard than noncompliance. Very few courts have discussed this issue, but it is clear that in order to plead the greater hazard defense, the employer must show that (1) the hazards of compliance are greater than the hazards of noncompliance, (2) alternative means of protecting employees are unavailable, and (3) a variance application would be inappropriate.<sup>35</sup>

In *Donovan v. Royal Logging Co.*,<sup>36</sup> the employer was cited for a general duty clause violation<sup>37</sup> and for a failure to require the use of seat

33. *Id.* ¶ 24,775.

34. See *Perlite of Houston, Inc.* [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,464 (skylight opening guards were available but were not used); *Mississippi River Grain Elevator, Inc.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,041 (employer failed to show that new machine with improved safety features was not on market at time of inspection); *Caterpillar Tractor Co.*, [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,708 (expert witness admitted it was possible to guard point of operation with pullback restraints); *Masonry Contractors, Inc.*, [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,338 (compliance with guarding requirement not functionally impossible); *S & H Riggers and Erectors, Inc.*, [1979] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 23,480 (employer did not demonstrate alternate means of protection unavailable).

35. See, e.g., *H.S. Holtze Constr. Co. v. Marshall*, 627 F.2d 149, 152 (8th Cir. 1980); *Noblecraft Indus., Inc. v. Secretary of Labor*, 614 F.2d 199 (9th Cir. 1980); *General Electric Co. v. Secretary of Labor*, 576 F.2d 558 (3d Cir. 1978).

A variance application is an order issued by the Secretary stating that the employer has demonstrated by a preponderance of the evidence that the methods it uses or proposes will provide as safe and healthful an environment as those methods required by the standard. See, 29 U.S.C. § 655(d).

36. 645 F.2d 822 (9th Cir. 1981).

37. 29 U.S.C. § 654(a)(1) requires the employer to provide a working environment free from recognized hazards likely to cause death or serious harm.

belts<sup>38</sup> which resulted in the death of a logger whose tractor rolled over on him. The employer did not require its loggers to wear the seat belts in their tractors because the belts would hinder them in avoiding the debris often hurled into the cab during logging operations. The Secretary argued that construction industry seat belt requirements applied to the logging industry as well, and that the burden was therefore on the employer to show a greater hazard by compliance with the requirement. The employer asserted that construction industry protective equipment standards were not applicable to the logging industry, and then presented specific evidence regarding the dangers of the debris thrown into the cab.<sup>39</sup>

Whether the greater hazard defense existed or was appropriate in a general duty clause violation proceeding was a question of first impression for the Ninth Circuit. The court agreed with the Review Commission finding that the employer had rebutted the Secretary's feasibility showing with evidence of a greater hazard.<sup>40</sup> The court agreed with the Commission that the greater hazard by compliance defense does not apply in general duty clause proceedings as a rebuttal. Rather, the *Secretary* has the burden of showing that the proposed safety measure will not result in a greater hazard as part of his obligation to demonstrate feasibility.<sup>41</sup>

The court in *Royal Logging* commented that "[a]lthough feasibility requires that a measure be technologically and economically possible, the Secretary must also prove the utility and practicality of the precaution."<sup>42</sup> The standard for judging the safety measure is whether safety experts familiar with the pertinent industry agree that it meets these criteria.<sup>43</sup> This requires OSHA and the Review Commission to consider prevailing

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38. 29 C.F.R. § 1926.28(a) reads: "The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees."

39. 645 F.2d at 830-31. The administrative law judge concluded that § 1926.28 does not apply to the logging industry, but found that *Royal* violated the general duty clause by not requiring operators of tractors *not* exposed to debris to wear seat belts. The Commission affirmed but broadened the exemption to include *all* operators exposed to debris. The court held that employer did violate the general duty clause, *despite* its showing of greater hazard.

40. 645 F.2d at 830.

41. *Id.* Since the greater hazard defense does not belong in a general duty clause violation proceeding, it apparently was not allowed by the court.

42. *Id.* The court held that the Secretary failed to show the utility of seat belt use on tractors in the logging industry. Substantial un rebutted evidence supported the Commission's finding that the wearing of seat belts in cats countering debris exposes workers to a hazard commensurate with the rollover hazard.

43. See also *Voegle Co. v. OSHRC*, 625 F.2d 1075, 1080 (3d Cir. 1980); *Magma Copper Co. v. Marshall*, 608 F.2d 373, 377 (9th Cir. 1979); *General Dynamics Corp. v. OSHRC*, 599 F.2d 453, 464 (1st Cir. 1979); *National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).



industry customs and practices,<sup>44</sup> although they are not necessarily dispositive.

*S & H Riggers and Erectors, Inc.*,<sup>45</sup> used the "reasonable man" test to circumvent the employer's industry custom and greater hazard argument. The Commission held that a judge properly affirmed two safety belt charges involving employees at the roof levels of two buildings who were guiding crane-lifted concrete panels into position. The employer argued that the use of safety belts would hinder the employees' movement and prevent them from evading swinging panels. The Commission rejected this greater hazard defense because there was little likelihood of tied-off employees being crushed by falling or swinging panels.<sup>46</sup> Although the particular installation method may have been common practice in the industry, "a reasonable person familiar with the circumstances surrounding the alleged violations would have recognized hazards warranting the use of personal protective equipment."<sup>47</sup>

In arriving at its decision in *S & H Riggers*, the Commission declined to follow the Fifth Circuit decision in *B & B Insulation, Inc. v. OSHC*<sup>48</sup> which held that the Commission must not disregard industry custom in its application of the reasonable person test.<sup>49</sup> In *S & H Riggers* the Commission stated that it continued to adhere to its interpretation of section 1926.28(a) requiring personal protective equipment because the court's interpretation in *B & B Insulation, Inc.* would permit "industry to continue unsafe work practices by failing to protect against known hazards. Consistent with the purposes of the Act, industry may not set its own standard of reasonableness, when there are 'precautions so imperative that even their universal disregard will not excuse their omission.'"<sup>50</sup>

The Fifth Circuit recently reversed the Review Commission's decision, holding that in order to establish personal protective equipment violations, due process required a showing that employers either had failed to provide personal protective equipment customarily required in the industry or had actual knowledge that such equipment was required under the

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44. 645 F.2d at 830. See also *Tube-Lok Products*, [1981] 3 EML. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,235.

45. [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,336.

46. *Id.* ¶ 24,336 at 29,652.

47. *Id.* ¶ 24,336 at 29,651.

48. 583 F.2d 1364 (5th Cir. 1978).

49. *Id.* With respect to an interpretation of § 1926.28(a), the court in *B & B Insulation* had stated that "[w]here the reasonable man is used to interpolate specific duties from general OSHA regulations, the character and purposes of the Act suggest a closer identification between the projected behavior of the reasonable man and the customary practice of employers in the industry." *Id.* at 1370.

50. [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,336 at 29,651 n.9 (quoting *T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932), cert. denied, 287 U.S. 662 (1932)).

particular circumstances.<sup>51</sup> Here, there was insufficient evidence that S & H Riggers had actual knowledge that personal protective equipment was called for under the circumstances.<sup>52</sup> The court reaffirmed its decision in *B & B Insulation*, stating that the Secretary cannot impose standards more stringent than those customarily followed in an industry under the broad language of section 1926.28(a) because of these due process considerations.<sup>53</sup> The court further pointed out that under the Review Commission's approach, upon a finding by the Commission that safety equipment should be used which is not customarily being employed in an industry, the Commission may simply declare that industry practice is not controlling and find a violation of section 1926.28(a). If the Commission and industry disagree as to the need for personal protective equipment under particular circumstances, industry standards, as a matter of law, would be deemed unreasonable. This the court would not accept.<sup>54</sup>

In another circuit court decision reversing a Review Commission decision, a greater hazard by compliance was successfully argued.<sup>55</sup> The employer had been cited for failing to provide full protection to employees working on an open-sided floor more than nineteen feet above the ground. The court, examining the three criteria for establishing a greater hazard defense, determined that they did not apply in this case because a temporary hazard was in issue, not a permanent hazard such as an unguarded radial saw blade side.<sup>56</sup> The court held that the substantial evidence did not support the Commission's finding of a violation, inasmuch as the very reason for the employees working on an open-sided floor was to erect an exterior wall which would serve as the functional equivalent of the standard guardrail required by the regulations.<sup>57</sup> The court concluded by calling for "a reasonable interpretation of the purpose of the Act."<sup>58</sup>

The only successful greater hazard case which involves occupational health rather than safety is *Ralston Purina Co.*<sup>59</sup> The employer was cited for exposing pet food factory workers to excessive levels of noise. However, the court found that the acoustical wall tiles suggested by the Secretary to abate the noise level violation "would be difficult to clean and would provide space to harbor salmonella organisms . . . which in turn could contaminate the pet food being produced."<sup>60</sup>

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51. *S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273 (5th Cir. 1981).

52. *Id.* at 1284.

53. *Id.* at 1282.

54. *Id.* at 1281.

55. *H.S. Holtze Constr. Co. v. Marshall*, 627 F.2d 149 (8th Cir. 1980).

56. *Id.* at 152.

57. *Id.* at 151-52.

58. *Id.* at 152.

59. [1981] 3 *EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.)* ¶ 25,444.

60. *Id.* ¶ 25,444 at 31,718.

The greater hazard defense provides the employer with a more successful argument than the impossibility defense, not because the criteria are any less onerous, but because the reviewing bodies view the greater hazard defense in a more subjective light and are, therefore, more willing to find a greater hazard than to find an impossibility of compliance.

#### V. EMPLOYEE MISCONDUCT DEFENSE

The employee misconduct defense may be asserted successfully when the employer can demonstrate that: (1) all feasible steps were taken to avoid the occurrence of the hazard,<sup>61</sup> including the training of employees,<sup>62</sup> informing them of the dangers involved,<sup>63</sup> and adequately supervising the work site;<sup>64</sup> and (2) the actions of the employee were a violation of a uniformly and effectively communicated and enforced work rule, and that the employer had neither active nor constructive knowledge of the violation.<sup>65</sup>

While an employer is not an insurer under the general duty clause, the employer is responsible for a safety violation if he knew or, with the exercise of reasonable diligence, should have known, of the existence of the hazard.<sup>66</sup> The Secretary is not required to prove by direct evidence that the employer had actual knowledge of the violation where the record indicates that the employer did not properly train and supervise his employees.<sup>67</sup>

Thus, in *General Dynamics Corp. v. OSHRC*,<sup>68</sup> the First Circuit noted that when the employer's defense is that the hazard occurred as a result of unauthorized and idiosyncratic behavior by its employees, the issue of the employer's training and supervision of its employees *automatically* arises as part of the employer's showing that he took all feasible steps to avoid the occurrence of the hazard.<sup>69</sup> Moreover, a "showing by the employer that it has an adequate and effectively enforced safety program,

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61. *H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 818 (5th Cir. 1981). See also *General Dynamics Corp. v. OSHRC*, 599 F.2d 453, 458 (1st Cir. 1979).

62. 638 F.2d at 818; *Horne Plumbing and Heating Co. v. OSHRC*, 528 F.2d 564, 569 (5th Cir. 1976).

63. 638 F.2d at 818-19. An employer has a duty to warn its employees when they will be handling hazardous material. *Pittson Stevedoring Corp.*, [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,532. However, the Secretary is not required to promulgate regulations which would compel employers to inform employees of the levels and identities of all toxic substances in their workplace. *Public Citizen Health Research Group v. Marshall*, 485 F. Supp. 845, 847 (D.D.C. 1980).

64. See *General Dynamics Corp. v. OSHRC*, 599 F.2d 453, 465 (1st Cir. 1979); *Ames Crane & Rental Serv., Inc. v. Dunlop*, 532 F.2d 123 (8th Cir. 1976).

65. 638 F.2d at 818-19.

66. 599 F.2d at 458.

67. 638 F.2d at 818.

68. 599 F.2d 453 (1st Cir. 1979).

69. *Id.* at 459.

gives rise to the inference that the employer's reliance on employees to comply with applicable safety rules is justifiable; violations then are not foreseeable or preventable."<sup>70</sup> However, informal and infrequently enforced safety rules are inadequate to trigger this inference.<sup>71</sup>

The Fifth Circuit followed this reasoning in *Brown & Root, Inc. v. OSHRC*,<sup>72</sup> where the employer disregarded a safety standard calling for backup alarms on caterpillar tractors with an obstructed rear view, but initiated no alternative work rules, relying instead on constant repetition of the warning "be careful" as its only safety measure. A foreman was struck and killed by one of these tractors as it was moving in reverse. The court concluded that the employer's failure to comply with the safety standard caused its employee misconduct defense to fail, because the employer did not prove that the employee's act was the result of idiosyncratic behavior "which contravened company policy and practice."<sup>73</sup>

An isolated employee misconduct defense was also rejected where the OSHA inspector observed numerous violations on the work site.<sup>74</sup> In addition to the observations of the inspector, an employee testified that he did not always tie off his safety belt, and had seen other employees wearing safety belts without tying them off. Therefore, the "unpreventability" aspect of the defense was not sustained by the evidence.<sup>75</sup>

Where even the supervisors at a job site do not comply with the employer's safety rules under the Act, the odds are even greater that an employee misconduct defense will not be successful. The Fifth Circuit in *H. B. Zachry Co. v. OSHRC*<sup>76</sup> upheld a Review Commission decision which

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70. *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 157 n.3 (10th Cir. 1980) (supervisory employee who did not wear available rubber gloves was electrocuted).

71. See, e.g., *H.B. Zachry Co. v. OSHRC*, 638 F.2d 812 (5th Cir. 1981); *Abild Builders, Inc.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,447; *Prestressed Systems, Inc.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,358.

72. 639 F.2d 1289 (5th Cir. 1981).

73. *Id.* at 1293. The employer also argued that there was no specific showing of employee access to the hazard. The court responded that the Review Commission is not required to show "that a given employee was actually endangered by the unsafe condition, but only that it was reasonably certain that some employee was or would be exposed to that danger." *Id.* at 1294. The court then noted that the goal of the Act was "to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors." *Id.* See also *Murphy Pacific Marine Salvage Co.*, [1974-1975] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 19,205.

74. *Prestressed Systems, Inc.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,358 (employer failed to enforce rules requiring tying-off safety belts).

75. *Id.* See *Del-Cook Lumber Co.*, [1976-1977] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 21,088. Recent decisions have adhered to the same strict standard of enforcement of safety rules. E.g., *R. Zoppo Co.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,230; *CSY Yacht Corp.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,348.

76. 638 F.2d 812 (5th Cir. 1981).

found serious deficiencies in the communication and enforcement of safety rules. The employee involved in the fatal electrocution of another employee testified that he had skipped approximately half of the employer's regular safety meetings. The behavior of the supervisor also indicated a lack of familiarity with the rules, because he had failed to instruct the employee in a vital procedure which might have prevented the accident. The court reasoned that "the behavior of supervisory personnel sets an example at the workplace, [and] an employer has . . . a *heightened* duty to ensure the proper conduct of such personnel."<sup>77</sup> Focusing on recorded evidence of the employer's safety program and finding it deficient, the court rejected the employee misconduct defense.<sup>78</sup>

The Review Commission has taken a strict stand on the issue of disciplining employees who refuse to comply with safety and health rules regarding personal protective equipment. For example, in *Wallace Roofing Co.*,<sup>79</sup> it reversed an administrative law judge's ruling that beyond daily cautioning, an employer need not dismiss the employee or dock his pay in order to comply with the Act.<sup>80</sup> The Commission agreed with the Secretary that the Act imposes on employers a duty of compliance that cannot be delegated to employees. The employee cannot be permitted an "individual variance to set his own standard of care."<sup>81</sup>

Wallace Roofing argued that the real issue is whether an employer must discharge or suspend the offending employee for that employee's repeated failure to wear protective equipment required by the Act. The Review Commission held that in light of the employer's awareness of the ineffectiveness of oral reprimands in preventing the employee's exposure to a known hazard, further disciplinary action should have been taken.<sup>82</sup> Because this unspecified disciplinary action could have prevented the violation, the employee misconduct defense failed.

Wallace Roofing further argued that holding the employer responsible for the employee's refusal to wear personal protective equipment would be an imposition of strict liability for employee misconduct.<sup>83</sup> However, the Act states that "employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions."<sup>84</sup> An employer has a duty to prevent and sup-

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77. *Id.* at 819 (citing *National Realty and Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1267 n.38 (5th Cir. 1973)). See also *Floyd S. Pike Elec. Contractor, Inc. v. OSHRC*, 576 F.2d 72, 77 (5th Cir. 1978).

78. 638 F.2d at 819.

79. [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,515.

80. *Wallace Roofing Co.*, [1977-1978] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 21,997.

81. [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,515 at 29,973.

82. *Id.*

83. *Id.*

84. 29 U.S.C. § 651(b)(2) (1975).

press hazardous conduct by employees, and "this duty is not qualified by such common law doctrines as assumption of risk, contributory negligence, or comparative negligence."<sup>85</sup> Therefore, final responsibility for compliance remains with the employer.<sup>86</sup> When faced with a situation where an employee habitually disregards safety measures, the employer should, at the minimum, anticipate that the employee will continue to disregard the safety rules, and should either remove him from the particular task or more closely supervise his work.<sup>87</sup>

It is important for the employer to communicate its safety rules to all those who might be exposed to a hazard if a rule is breached.<sup>88</sup> However, the Commission has recognized that training may be unnecessary for a employee who is wholly disassociated from the operation in question, and who would not be foreseeably exposed to danger.<sup>89</sup>

Although the employee misconduct defense does not appear to have been raised in any occupational disease cases, it has been successfully argued in the area of occupational safety. For example, where the employer had an extensive safety program and monitored the safety records of its foremen, the Commission found the employer not responsible for a foreman's misconduct which caused his death.<sup>90</sup> Another case similarly held that an employer who had provided extensive on-the-job training and had

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85. *National Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 n.36 (D.C. Cir. 1973). One right the employee does have, however, is to choose not to perform his assigned task because of a "reasonable apprehension of death or serious injury, coupled with a reasonable belief that no less drastic alternative is available." *Whirlpool Corp. v. OSHRC*, 445 U.S. 1, 3-4 (1980). For related law review articles, see Drapkin, *The Right to Refuse Hazardous Work after Whirlpool*, 4 INDUS. REL. L. J. 29 (1980); Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981); Yerian, *The Supreme Court Chooses Employee Safety in OSHA*, 10 CAP. U. L. REV. 191 (1980).

86. *Loomis International, Inc.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,435 (employee cautioned frequently but no formal action taken against him). The argument that attempts at compliance have been thwarted by concerted refusals and by threats of strike or work stoppages by employees has been rejected, at least regarding hard hat standards. *Atlantic & Gulf Stevedores, Inc.*, [1975-1976] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 20,577.

87. *Loomis International, Inc.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,435.

88. *Stuttgart Mach. Works, Inc.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,216.

89. *Brennan v. OSHRC*, 501 F.2d 1196 (7th Cir. 1974) (employer's instruction to stay away from trucks unloading packaged railroad ties sufficient; employer could not have foreseen that employee would cut band holding ties together prior to unloading, thereby causing his death).

90. *Houston Sys. Mfg. Co., Inc.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,466. The Commission held that employer, a builder of offshore drilling platforms, was not responsible for an experienced foreman's operation of his crane within ten feet of high voltage lines. The foreman had had no previous accidents, and all of employer's cranes were equipped with warning signs.

established an effective procedure for the safe handling of an industrial gun could not have foreseen or prevented an employee's misconduct which resulted in the gun firing and fatally injuring him.<sup>91</sup> Thus, only by showing a well-communicated and enforced safety program can an employer's affirmative defense of isolated employee misconduct succeed.

## VI. COLLATERAL ESTOPPEL

A common law defense recognized by the Review Commission is collateral estoppel. This doctrine has been asserted in several cases involving occupational health and essentially operates to bar the relitigation of a factual issue which has been settled in an earlier proceeding. The leading case in this area is *Continental Can Co. v. Marshall*,<sup>92</sup> in which the Seventh Circuit affirmed an injunction enjoining the Secretary from prosecuting pending noise violation charges and from issuing future noise citations at defendant's can manufacturing plants. The Commission had ruled earlier<sup>93</sup> that noise control costs estimated at \$33,500,000 for the employer's eighty plants were economically infeasible. Evidence concerning the employer's economic status was offered in that case and determined in favor of the employer. As a result of that litigation, the circuit court in *Continental Can II* held that the doctrine of collateral estoppel applied, and that citing physically similar individual plants for the same violation and thereby requiring the employer to relitigate the same issues each time would amount to harassment.<sup>94</sup>

Using similar reasoning, a court refused to apply collateral estoppel to a situation in which the employer argued that he had already been cited for similar violations at the same locations, but failed to show a factual identity between the work place in prior proceedings and the instant case.<sup>95</sup>

Because there had been changes in the legal climate regarding the steelworking industry, the Commission, in *Williams Enterprises, Inc.*,<sup>96</sup> declined to apply either collateral estoppel or res judicata. The employer had been found to be in violation of personal protective equipment standards for its employees working up to ninety feet above ground. He argued that the issue of whether these particular standards applied to steel

91. *Koppers Co., Inc.*, [1981] 3 EMPL. SAFETY & HEALTH GUIDE (CCH) (OCCUP. SAFETY & HEALTH DEC.) ¶ 25,471. A worker was killed when the lanyard of the trigger mechanism trailing on the floor caught on a drain and the gun discharged. The gun had never before been left unattended or improperly transported, and there had been no accident involving the gun in twenty-three years of operation.

92. 603 F.2d 590 (7th Cir. 1979).

93. *Continental Can Co.*, [1976-1977] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 21,009.

94. 603 F.2d at 596-97. The court determined that each of the 80 can manufacturing plants uses the same machines to make the same product, and thus produces the same noise hazard. *Id.* at 593.

95. *ASARCO, Inc.*, [1979] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 23,695.

96. [1980] OCCUP. SAFETY & HEALTH DEC. (CCH) ¶ 24,597.

erection had been tried in earlier cases and decided in the employer's favor. The Commission held, however, that relitigation was justified because those cases were decided in 1975 and 1976, and there had been significant developments in the applicable legal principles upon which they were based.<sup>97</sup>

Collateral estoppel, although not used often, may be seen more frequently in situations involving highly mechanized industries, or employers with numerous plants struggling to maintain their facilities with up-to-date equipment which complies with OSHA standards.

## VII. CONCLUSION

As was illustrated in the cases discussed herein, the Act has served to protect employers from arbitrary OSHA violations by shifting certain burdens of proof onto the Secretary. In this manner, the Act serves to strike a balance by alleviating unfair evidentiary burdens which might otherwise fall on the employer.

However, despite the Commission's recognition of several affirmative defenses, it is readily apparent that the employer seldom wins a battle. This is true because each defense either involves one element employers can never seem to establish, or because the reviewing bodies find some extenuating factor that causes it to fail. Moreover, the employer is unlikely to obtain reversal of an unfavorable decision on appeal to a circuit court because the standard of review is "to treat the Commission's interpretations of OSHA with deference and . . . not overturn those interpretations where they are reasonable and consistent with the purposes of OSHA."<sup>98</sup>

Therefore, by not favoring employers' pocketbooks or convenience, the Act does accomplish its purpose of protecting employee health and safety. In the long run, if the *American Textile* decision is interpreted broadly, the judicial climate will remain one which is in favor of protecting employee safety and health above all else.

*Janice G. Murphy*

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97. *Id.* ¶ 24,597, at 30,193. The "significant legal developments" apparently refer to the Commission's refusal to follow a strict industry custom test, instead applying a higher standard than common practice.

98. *Bratton Corp. v. OSHRC*, 590 F.2d 273, 276 (8th Cir. 1979).



