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THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 AS APPLIED TO THE CONSTRUCTION INDUSTRY: THE MULTI-EMPLOYER WORKSITE PROBLEM

Congress enacted the Occupational Safety and Health Act of 1970[1] for the purpose of assuring "so far as possible, every working man and woman in the Nation safe and healthful working conditions."[2] Congress had found prior state statutory and common law remedies[3] inadequate to protect employees from the problem of work-related deaths and injury.[4] The Act

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[1] Occupational Safety & Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-78 (1970)) [hereinafter referred to as the Act].

[2] 29 U.S.C. § 651 (1970).

[3] In all states most employees injured in the course of their employment can collect damages under workmen's compensation statutes. 1 A. LARSONS, LAW OF WORKMEN'S COMPENSATION § 5.30 at 39 (1972). Under these statutes the employer is strictly liable for all covered injuries and compensation for harm is often fixed by the legislation itself. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971) [hereinafter cited as PROSSER]. Those employees not covered by a workmen's compensation plan may rely on common law. At common law an employer is required to provide a reasonably safe place, safe appliances, necessary warnings of workplace dangers and reasonable work rules. The employer, however, may defend against liability on grounds of the employee's contributory negligence or assumption of risk. *See* Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 L. & CONTEMP. PROB. 612 (1974) [hereinafter cited as Miller]. Furthermore, the employer is not liable for the harm caused solely by the negligence of a fellow servant of the injured employee. PROSSER, *supra*, at 528.

The degree to which the Act incorporates concepts from common law is unclear. Comment, *OSHA and Multiple Employer Liability: A Discussion of* Anning-Johnson Co. v. OSHRC, 62 VA. L. REV. 788 (1976) [hereinafter cited as *Discussion of Anning-Johnson*]. Although Congress did not intend to allow employers the common law defenses, National Realty & Constr. Co. v. Occupational Safety and Health Review Commission (OSHRC), 489 F.2d 1257, 2165 n.34 (D.C. Cir. 1973), language in the legislative history indicates Congress felt that common law principles supported the rationale of the Act. H. R. REP. No. 91-1291, 91st Cong., 2d Sess. 21 (1970), *reprinted in* LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970 at 851 (Comm. Print 1971).

One commentator has indicated that common law principles can be used to at least a limited degree in enforcing the Act. Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 980, 1004-05 (1973) [hereinafter cited as Morey]. For example, as at common law the employer should not be liable when employees deliberately create a hazard. *Id.* The courts have accepted this posiition in cases where the employer has taken reasonable steps to reduce employee misconduct. *See*, I.T.O. Corp. v. OSHRC, 540 F.2d 543 (1st Cir. 1976); Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564 (5th Cir. 1976); Note, *OSHA: Employer Liability for Employee Violations*, 1977 DUKE L. J. 614 (1977).

[4] Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977). The legislative history of the Act shows that Congress considered the problem of work-related injuries among the primary issues facing the nation. *See* S. REP. No. 91-1282, 91st Cong., 2nd Sess. 2 (1970), *reprinted in* LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970, at 142 (Comm. Print 1971). Constant references were made in debates on the Act to the fact that nearly 14,500 persons were killed annually as a result of industrial accidents. *Id.* Also emphasized was the 20 percent increase from 1958 to 1970 in the number of disabling injuries per million man hours worked. *Id.*

Recent statistics indicate that the Act has been successful in reducing job-related acci-

supplements the traditional approach adopted by the states of limiting employer liability to the compensation of the injured employee.[5] Rather than merely imposing additional liability for actual harm suffered, the Act penalizes employers for maintaining unsafe working conditions.[6] The Act applies to virtually all employers and employees engaged in business affecting interstate commerce,[7] and has been hailed as a new bill of rights for labor.[8]

Congress placed the responsibility for enforcing the Act in the Secretary of Labor as head of the Occupational Safety and Health Administration (OSHA).[9] The Secretary is empowered to issue regulations establishing

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dents. According to a Bureau of Labor Statistics survey there has been a 17 percent decrease in the incidence rate of recordable-injuries for 100 full-time workers, from 10.9 in 1972 to 9.1 in 1975. *See* JOB SAFETY & HEALTH (Jan. 1977) at 5. Furthermore, the Act appears to be increasingly effective; the same survey showed a 16 percent decrease in work-related injuries between 1974 and 1975. *Id.*

[5] Under workmen's compensation acts and common law an employer will be held liable only if an injury actually occurs to an employee. PROSSER, *supra* note 3, at 525-530. For a discussion on employer liability under workmen's compensation and common law, see note 3 *supra*. An employer may find that compensating employee injuries is cheaper than abating a particular hazard and therefore allow a dangerous condition to exist. The Act eliminates this option by requiring the employer to remove most hazardous conditions. *See* 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4,219 (1975).

[6] *See* 29 U.S.C. § 666 (1970).

[7] For the purposes of the Act, an "employer" is defined as "a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State." 29 U.S.C. § 652(5) (1970). "Employee" is defined as a person whose employer's business affects commerce. 29 U.S.C. § 652(6) (1970). These definitions were chosen by Congress in part to bring the Act within the commerce clause of the Constitution, U.S. CONST. art. I. § 8, cl. 3, which permits Congress to pass statutes affecting interstate commerce. Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1260 (4th Cir. 1974). The Supreme Court has interpreted the commerce clause to encompass acts which, if committed by a few individuals may not affect interstate commerce, but could affect such trade if done by large numbers of individuals. Maryland v. Wirtz, 392 U.S. 183, 192-93 (1968); Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241, 258 (1964); Wickard v. Filburn, 317 U.S. 111, 127-28 (1942); United States v. Ohio, 354 F.2d 549, 555 (6th Cir. 1965), *rev'd per curiam on other grounds*, 385 U.S. 9 (1966). For example, one firm operating without providing employees necessary safety equipment may not affect commerce among the states; permitting one business to avoid the cost of safety equipment, however, could affect interstate commerce by forcing competitors similarly to cut their cost. Brennan v. OSHRC (Gordon), 492 F.2d 1027, 1030 (2d Cir. 1974) (states and employers insisting on high degree of safety should not be placed at economic disadvantage by failure of others to do so). The aggregate action of such employers may affect interstate commerce. *See* Godwin v. OSHRC, 540 F.2d 1013 (9th Cir. 1976) (clearing of tract of land for purposes of growing grapes held business affecting interstate commerce). Virtually any type of private economic activity can be held subject to federal authority under the commerce clause. *See* B. SCHWARTZ, CONSTITUTIONAL LAW 100 (1972). Therefore, the Occupational Safety and Health Act should be upheld against a constitutional attack based on the commerce clause. *See* Godwin v. OSHRC, 540 F.2d 1013 (9th Cir. 1976).

[8] *See* SEN. SUB. COMM. ON LABOR, 92d Cong., 1st Sess., REPORT ON THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970, *reprinted in* LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970, at iii (Comm. Print 1971).

[9] 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 527 (1977); Gross, *The Occupational Safety & Health Act: Much Ado About Something*, 3 LOYOLA-CHI. L.J. 247, 257 (1972) [hereinafter

safety standards with which employers must comply.[10] Citations are issued by OSHA area directors on the basis of inspection reports filed by OSHA compliance officers.[11] A cited employer has the right to have a citation[12]

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cited as Gross]. The Secretary is empowered to issue safety and health standards. 29 U.S.C. § 655 (1970). Such regulations require the employer to provide certain safety precautions that are reasonably necessary or appropriate to provide safe and healthful places of employment. 29 U.S.C. § 655 (1970). For examples of these standards, see note 24 *infra*.

[10] 29 U.S.C. § 655 (1970).

[11] 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4,326.2 (1976). Whether an administrative search warrant is required before a compliance officer can inspect a workplace is currently being decided by the Supreme Court. Barlow's Inc. v. Usery, 424 F. Supp. 437 (D. Idaho 1976), *prob. juris. noted, sub nom.*, Marshall v. Barlow's, Inc. 429 U.S. 1347 (1977), *appeal docketed*, No. 76-1143 (Sp. Ct. Feb. 17, 1977).

[12] Citations must "describe with particularity the nature of each violation" and the OSHA regulations involved. 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4121 (1977).

[13] 29 U.S.C. § 659(c) (1970); 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4515 (1974-75); *see, e.g.*, I.T.O. Corp. v. OSHRC, 540 F.2d 543 (1st Cir. 1976); United States Steel Corp. v. OSHRC, 537 F.2d 780 (3d Cir. 1976); Olin Const. Co. v. OSHRC, 525 F.2d 464 (2d Cir. 1975).

Congress created the OSHRC as a compromise between desires of the executive branch to have the rule-making, adjudication, and inspection powers of the Act in separate bodies, and desires of organized labor to have total consolidation of these functions in one federal agency. *See* Moran, *An Oversight of Penalty Increases and Adjudicatory Functions Under the Occupational Safety and Health Act of 1970*. 33 FED. BAR. J. 139 (1974) [hereinafter cited as Moran[1]]. These competing interests resulted in Congress granting the OSHRC the adjudicatory powers and the Secretary of Labor the standard-creating authority. *Id.* at 139. The Secretary, as nominal head of OSHA, was also given the duty to inspect worksites. *Id.; see* text accompanying note 9 *supra*. Neither the Act nor the legislative history actually delineates whether the Secretary or the OSHRC has the policy-making role. Moran,[1] *supra* at 140.

The issue of whether an employee must be exposed to a hazard or merely have access to the danger illustrates the necessity of determining how policy questions are to be decided under the Act. The OSHRC has held that to support a violation of the Act, the Secretary must show that an employee was likely to have "access" to a hazard. Gilles & Cotting, Inc. OSHD (CCH) ¶ 20,448, at 24,423 (OSHRC 1976); *cf.* Moran[2], *The Developing Law of Occupational Safety & Health*, 30 OKLA. L. REV. 354, 357 (1977) [hereinafter cited as Moran[2]] (OSHRC's adoption of the "access" standard not conclusive of OSHRC position because OSHRC failed to overrule prior decisions based on actual "exposure" test). "Access" exists where, for example, an employer creates a hazard by using an unsecured scaffold, and employees of another employer might walk beneath the scaffold on the way to their workplace. *See* Public Improvements, Inc., OSHD (CCH) ¶ 21,326, at 25,611 (OSHRC 1976); Staley & Lawrenz, Inc., OSHD (CCH) ¶ 21,153, at 25,448 (OSHRC 1976). Under the Secretary of Labor's proposed regulation concerning employers at a multi-firm worksite, the Secretary must find that employees are actually exposed to a hazard. 41 Fed. Reg. 17,639 (1976). The OSHA area director will issue citations only upon proof of such exposure. *See* 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4360.1 (1976). Under the Secretary's test, for example, an employer controlling an unsecured scaffold violates the Act only if employees do in fact walk beneath the scaffold. *See* Chicago Bridge & Iron Co., OSHD (CCH) ¶ 19,158, at 22,897 (OSHRC 1974), *appeal dismissed*, No. 73-1181 (7th Cir. May 31, 1975). Thus the Secretary has placed a heavier burden on OSHA inspectors than the OSHRC feels appropriate.

The federal courts disagree on whether the Secretary of Labor or the OSHRC is vested with the policy-making authority for determining when a violation of the Act has occurred. Budd Co. v. OSHRC 513 F.2d 201, 205 n.12 (3d Cir. 1975); *see* Brennan v. OSHRC (Brent Towing), 481 F.2d 619 (5th Cir. 1973). *Compare* Dale M. Madden Constr., Inc. v. Hodgson, 502 F.2d 278, 280 (9th Cir. 1974) (broad enforcement powers granted Secretary shows congressional intent that he have policy-making role) *with* Brennan v. Gilles & Cotting, Inc., 504

reviewed by the Occupational Safety and Health Review Commission (OSHRC).[13] Anyone adversely affected by a decision of the OSHRC may

F.2d 1255, 1262 (4th Cir. 1974) (OSHRC powers comparable to administrative agency). The conflict centers upon whether the policy determinations of the OSHRC, the body empowered to perform the final administrative adjudication, Brennan v. OSHRC (Fiegen, Inc.), 513 F.2d 713, 715-16 (8th Cir. 1975), or of the Secretary, whose setting of standards is within the policy-making sphere, Synthetic Organic Chemical Mfrs. Ass'n v. Brennan, 506 F.2d 385, 390 (3rd Cir. 1974) *cert. denied*, 423 U.S. 830 (1975), should be entitled to the deference that courts normally accord administrative policy determination. Note, *OSHA - on Multi-employer Worksites*, 87 HARV. L. REV. 793, 799 n.42 (1976). Because the Secretary and the OSHRC differ on how the Act should be applied to multi-employer worksites, resolution of the question of which body is vested with policy-making authority might be important. *See* Brennan v. Gilles & Cotting, Inc. 504 F.2d 1255, 1257 (4th Cir. 1974).

The Ninth Circuit has held that the Secretary has the sole policy-making power. Dale M. Madden Constr. Inc. v. Hodgson, 502 F.2d 278, 280 (9th Cir. 1974); *cf.* Langer Roofing & Sheet Metal, Inc. v. Secretary of Labor, 524 F.2d 1337, 1338 (7th Cir. 1975) (deference given to OSHRC's interpretation of Secretary's regulation). The *Hodgson* court based its decision on the broad enforcement powers Congress gave the Secretary of Labor as opposed to the limited trier of fact role provided the OSHRC. 502 F.2d at 280. The Fourth Circuit, however, has held that the OSHRC is vested with the policy-making authority and that federal courts should defer only to the OSHRC's view. Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1262 (4th Cir. 1974). In reaching this conclusion the Fourth Circuit emphasized some limited language in the legislative history comparing the OSHRC to administrative agencies with policy-making authority. *Id.* at 1262; *see* Moran,[1] *supra* at 140; Gross, *supra* note 9, at 260. The court placed particular emphasis on comments by Senator Javits, floor sponsor of the floor amendment creating the OSHRC, implying that the OSHRC would have the same authority as the Federal Trade Commission. 504 F.2d at 1262.

Nothing in the legislative history of the Act, however, clearly shows that Congress considered the issue. Moran,[1] *supra*, at 140. Consequently, there is no legislative basis for the courts to determine that either body has the policy-making authority. When there is a policy disagreement between the Secretary and the OSHRC, the courts should make their own decision on the merits without deferring to either body. *See, e.g.*, Brennan v. Southern Const. Serv., 492 F.2d 498 (5th Cir. 1974); Brennan v. OSHRC (Gerosa), 491 F.2d 1340 (2d Cir. 1974).

An issue comparable to the question of which body has policy-making authority is whether the courts should defer to the OSHRC's or the Secretary's interpretation of OSHA regulations. Whichever body is determined to have controlling authority in this area, courts would be bound to defer to that body's reasonable construction of OSHA standards. *See* Budd Co. v. OSHRC, 513 F.2d 201 (3d Cir. 1975); *cf.* Udall v. Tallman, 380 U.S. 1, 16 (1965) (Secretary of Interior's interpretation of executive order on disposition of public lands usually must be deferred to by courts); Roy Bryant Cattle Co. v. United States, 463 F.2d 418, 420 (5th Cir. 1972) (Department of Agriculture's interpretation of its own regulation is to be accorded greatest deference). *Compare* Clarkson Constr. Co. v. OSHRC, 531 F.2d 451, 457 (10th Cir. 1976) (Secretary's interpretation of OSHA regulation controlling if reasonable) *with* Brennan v. OSHRC, 513 F.2d 713, 715-16 (8th Cir. 1975) (OSHRC's interpretation of OSHA regulation controls if different from Secretary's interpretation). As with the question of policy-making authority, there is no legislative basis for the courts to determine that either the OSHRC or the Secretary of Labor has final authority in this area.

In Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977), an employer attacked the constitutionality of Congress placing the adjudicatory role in the OSHRC. The employer argued that the seventh amendment right to a jury trial barred Congress from assigning to an administrative agency rather than to district courts the power to adjudicate violations of the Act. at 449. The Court held, however, that the seventh amendment pertains only to common law rights and therefore is inapplicable to newly created statutory public rights. *Id.* at 455.

obtain judicial review in a federal appellate court.[14]

Implementation of the Act has given rise to a number of problems,[15] one of which is the application of the Act's requirements to multi-employer worksites.[16] The Act requires employers to provide a safe place of employment. It does not provide for any exceptions from this duty for firms at multi-employer worksites.[17] At such a worksite, however, a hazard can be created by one employer in areas controlled by another firm[18] and employees of a third company also may be endangered. Thus, application of the Act to multi-firm projects raises the question to what extent an employer's duty runs solely to his own employees, and to what degree does the Act obligate an employer to protect other employees at the worksite. Resolution of these questions is essential for determining whom to cite and whom to hold responsible for violations on a multi-employer worksite.

In handling citations from multi-firm worksites courts have focused on how the Act delineates the obligations imposed upon employers to protect employees.[19] These duties are listed at section 5(a) of the Act.[20] Section

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[14] 29 U.S.C. § 660(a)(b) (1970). Review of OSHRC orders may be sought either in the circuit court for the region where the violation occurred, where the employer has his principle place of business, or in the District of Columbia Circuit. *Id.* Since the OSHRC has rejected certain circuits' interpretations of the Act regarding multi-employer worksites, *see, e.g.*, Anning-Johnson Co., OSHD (CCH) ¶ 20,690, at 24,779 (OSHRC 1976); Grossman Steel & Aluminum Corp. OSHD (CCH) ¶ 20,691, at 24,791 (OSHRC 1976), the ability to choose among different circuits will undoubtedly lead to forum shopping until a Supreme Court determination is made. *Cf.* Hanna v. Plumer, 380 U.S. 460 (1965) (state and federal courts in same state reaching different decisions on same question of law encourages forum shopping in state).

[15] *See* Note, *The Occupational Safety & Health Act of 1970: Some Unresolved Issues and Potential Problem*, 41 GEO. WASH. L. REV. 304 (1972).

[16] A multi-employer worksite is one in which two or more independent firms cooperate in the completion of a common project. *See* White & Carney, *OSHA Comes of Age: The Law of Work Place Environment*, 28 BUS. LAW. 1309, 1315-16 (1973). Such worksites are common in the construction industry, where normally a number of subcontractors work simultaneously on a structure. *Id.*

[17] There is no reference to multi-employer worksites in the Act or its legislative history. *See* Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1088 (7th Cir. 1975). Congress apparently did not foresee the issues raised in applying the act to circumstances like construction sites. *See* Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974). Thus, courts attempting to discern congressional intent must rely on the structure of the Act and underlying congressional policy. Nutting, *The Reference of Legislative Intention Established by Extrinsic Evidence*, 20 B.U.L. REV. 601 (1940).

[18] An employer "controls" a hazard if he has the contractual authority to order another firm to abate the hazard or is obligated to correct dangerous conditions within the area containing the hazard. *See* Brennan v. OSHRC (Underhill), 513 F.2d 1032 (2d Cir. 1975); Beatty Equip. Leasing Inc., OSHD (CCH) ¶ 20,694, at 24,801 (OSHRC 1976); Otis Elevator Co., OSHD (CCH) ¶ 20,693, at 24,796 (OSHRC 1976).

[19] 29 U.S.C. § 654(a) (1970). Section 5(a) of the Act states that each employer:

> (1) shall furnish to each of his employees . . . a place of employment . . . free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.
>
> (2) shall comply with occupational safety and health standards promulgated under this chapter.

5(a)(1),[21] known as the general duty clause,[22] requires that every employer provide a work place free from recognized hazards[23] likely to cause death

29 U.S.C. § 654(a) (1970).

Subsection (1) applies only if a regulation promulgated by the Secretary of Labor under § 6 of the Act, 29 U.S.C. § 655 (1970), does not cover the particular danger involved. Sun Shipbuilding & Dry Dock Co., OSHD (CCH) ¶ 16,725, at 21,474 (OSHRC 1973). Violations of subsection (2) are classified as either serious or non-serious. 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4099 (1976). Congress defined serious violations as those in which there is a "substantial probability that death or serious physical harm will result . . . ." 29 U.S.C. § 666 (j) (1970). This language is essentially that of the general duty clause. *See* Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1088-89 (7th Cir. 1975). A non-serious violation is one not likely to cause serious harm. *Id.* In comparing the two subsections, the courts have emphasized that the general duty clause limits the employer's duty to "his employees." *Id.* The specific duty clause however does not state that the duty imposed runs to a particular class of individuals. *Id.*

[20] 29 U.S.C. § 654(a) (1970).

[21] *Id.* at § 654(a)(1).

[22] Morey, *supra* note 3, at 989. The legislative history of the Act shows that Congress based the general duty clause on the common law duty that a person refrain from conduct that is likely to cause harm to others. H.R. REP. No. 91-1291, 91st Cong., 2nd Sess. 21 (1970), *reprinted in* LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970 at 851 (Comm. Print 1971). A congressional report on the Act emphasized that employers are bound by common law not to harm employees during the course of their employment. *Id.* This common law origin may be very important when dealing with multi-employer worksites because the employer's general duty has been held to run only to his own employees. *See* Brennan v. OSHRC (Underhill), 513 F.2d 1032 (2d Cir. 1975). If, however, common law principles apply to general duty clause violations, an employer creating a hazard is culpable regardless of whose employees are endangered. For a discussion of employer's common law obligation to provide a safe workplace, see note 3 *supra*.

[23] The term "recognized hazard" as used in the Act is defined in terms of both knowledge of the entire industry and individual employer's knowledge. 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 1005 (1977). If a condition is acknowledged by an industry as being dangerous, the hazard is considered recognized whether or not any particular employer knew of the danger. National Cleaning Contractor, Inc., OSHD (CCH) ¶ 19,104, at 22,834 (OSHRC 1974), *aff'g* OSHD (CCH) ¶ 17,672, at 22,073 (ALJ 1974). Constructive knowledge is imputed to each employer within the industry. *See* R.J.H. Contractors, Inc. OSHD (CCH) ¶ 15,422, at 20,657 (ALJ 1973). A hazard is recognized by the industry if the danger connected with a circumstance is of common knowledge to safety experts familiar with the industry in question. National Realty & Constr. Co. 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973); *see* Miller, *supra* note 3, at 625. If the employer has actual knowledge of the danger, however, industry recognition is not required. Brennan v. OSHRC (Vy Lactos Laboratories), 494 F.2d 460 (8th Cir. 1974).

The legislative history supports application of constructive knowledge. The original version of the Act passed by the Senate contained the language "recognized hazard." LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970, 1007 (Comm. Print 1971). The House version, however, adopted the words "readily apparent." *Id.* The proponents of the Senate's language felt that "recognized hazard," unlike "readily apparent hazard," required an objective test and did not depend on any particular employer's knowledge. *Id.* Thus, the Senate form would impose liability on ill-informed and careless employers. *Id.* The adoption of the Senate's language in the final version of the Act supports imputing constructive knowledge of industry-recognized hazard to employers. Vy Lactos Laboratories, Inc., OSHD (CCH) ¶ 15,050, at 20,101 (OSHRC 1973), *rev'd on other grounds sub nom.*, Brennan v. OSHRC, 494 F.2d 460 (8th Cir. 1974).

The imputing of constructive knowledge to employers should result in increased worker

or serious harm. Section 5(a)(2) of the Act requires each firm to provide a work environment that complies with safety standards promulgated by the Secretary of Labor.[24] For purposes of determining whether an employer is providing a safe workplace, "workplace" has been defined by the OSHRC as including all areas to which his employees have access.[25]

The courts also have placed emphasis on how breaches of the employer's duties are categorized under the Act.[26] Violations are classified as being serious or non-serious.[27] Serious violations occur only if there is sub-

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awareness of hazards at multi-employer worksites. If the recognized construction industry hazards are assumed known by all employers at a worksite, constructive knowledge of all recognized hazards of other crafts at the project will be imputed to each employer. To avoid liability each employer will have to train his employees in the dangers common to other specialties. *See* Anning-Johnson Co. v. OSHRC, 516 F.2d 1081 (similar reasoning concerning non-serious violations of the Act). Support for this result can be found in the Act's emphasis on employee education. *See* 29 U.S.C. § 670(c) (1970). The requirement that the workplace be free from recognized hazards, however, does not impose strict liability on the employer. National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973). Unpreventable hazards are not considered recognized under this subsection. *Id.* at 1265-66. Courts should evaluate the feasibility and utility of protective measures in determining whether a hazard is preventable. *See* Satter, *Shedding Some Light on the Burden of Proof in Demonstrating a Violation of the General Duty Clause of OSHA: National Realty*, 15 B. C. IND. & COM. L. REV. 1075 (1974). Because an employer can always protect his employees at a multi-firm project by pulling them from the worksite, feasible protection must not encompass complete work stoppage. *Id.*

[24] 29 U.S.C. § 654(a)(2) (1970). *See, e.g.*, OSHA standards, Walking-Working Surfaces, General Requirements, 29 C.F.R. § 1910.22 (1976); Means of Egress, 29 C.F.R. § 1910.37 (1976); Personal Protective Equipment, Eye & Face Protection, 29 C.F.R. § 1910.133 (1976). An example of a standard applicable to the typical multi-employer construction site is 29 C.F.R. § 1910.23 (1976), which requires in part that "every stairway floor opening shall be guarded by a standard railing. . . ." *Id.* at § 1910.23(a)(1).

An employer creates a hazard by failing to comply with safety standards. *See* Moran, *Occupational Safety & Health Standards as Federal Law*, 15 WM. & MARY L. REV. 777 (1974). Anyone adversely affected by the creation of a particular standard may obtain judicial review in a federal court of appeals. 29 U.S.C. § 655(f) (1970). A court of appeals should uphold the standard if the requirement is reasonably necessary or appropriate to the providing of a safe workplace. Synthetic Organic Chemical Mfr. Ass'n v. Brennan, 503 F.2d 1133 (3rd Cir. 1974); National Roofing Constr. Ass'n v. Brennan, 495 F.2d 1294 (7th Cir. 1974). Economic as well as safety considerations should be evaluated in determining the validity of a standard. AFL-CIO v. Brennan, 530 F.2d 109 (3rd Cir. 1975). Compliance with a specific standard is considered compliance with the general duty clause to the extent the latter is covered by the standard. 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 1010 (1977). This result accords with the position of some commentators that the general duty clause is no more than a specific safety standard promulgated by Congress. Gross, *supra* note 3, at 270.

[25] *See* Gilles & Cotting, Inc., OSHD (CCH) ¶ 20,448, at 24,423 (OSHRC 1976). An employer breaches his duty imposed by § 5(a) when one of his employees has access to a "zone of danger." *Id.; see* Chicago Bridge & Iron Co., v. OSHRC, 535 F.2d 371 (7th Cir. 1976); REA Express, Inc. v. Brennan, 495 F.2d 422 (2d Cir. 1974); Underhill Constr. Corp., OSHD (CCH) ¶ 20,918, at 25,120 (OSHRC 1976). One commentator has indicated that whether the commission applies an "exposure" or "access" test is unclear. Moran,[2] *supra*, note 13, at 357. For a discussion of the conflicting results occurring under these tests, see note 65 *infra*.

[26] *See, Discussion of Anning-Johnson, supra* note 3, at 799.

[27] *See* 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶¶ 4135-37 (1977).

stantial probability that death or serious injury will result;[28] all other violations are non-serious.[29] General duty clause violations are always denoted as serious,[30] while breaches of the Secretary's safety standards promulgated under the Act may fall into either category.[31] Non-serious violations, however, occur only from non-compliance with specific safety regulations.[32]

Violations arising at multi-employer worksites occur in three distinct factual contexts. The first and least complex situation involves an employer at a multi-firm project who creates or controls a hazard and whose own workmen have access to the danger. The Secretary has taken the position that citations should be issued to firms whose workers are endangered by conditions their employer created or could have corrected.[33] This policy is in accord with the stated purpose of the Act.[34] No basis exists for excusing a firm from liability arising in a multi-employer worksite under circumstances substantially similar to a single-employer situation.[35] The OSHRC[36] and the federal courts[37] have accepted this view.

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[28] 29 U.S.C. § 666 (1970).

[29] *See, id.*

[30] *See, Discussion of Anning-Johnson, supra* note 3, at 790; 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 1003 (1977).

[31] *See*, 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶¶ 4098-99 (1977).

[32] *See, Discussion of Anning-Johnson, supra* note 3, at 790, 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 1003 (1977). The Act requires the Secretary to make a specific designation that a violation is "non-serious" if the violation does not involve a likelihood of serious harm. 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4099 (1976). If such a designation is not made, the violation will be treated as serious. *Id.*

The penalty assessed for a violation whether serious or non-serious may be up to $1.000. 29 U.S.C. § 666 (1970). As a matter of practice, however, the penalty for a non-serious violation is generally between $50 and $300. 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4161 (1977). The penalty imposed for a serious violation is generally between $300 and $1000. *Id.* Section 17(J) of the Act requires the OSHRC in setting penalties to consider the possible degree of employee injury, as well as the employer's good faith, prior history, and firm size in determining the fine for a violation. 29 U.S.C. § 666 (i) (1970).

[33] *See* 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4360.1, at 1589 (1977). At a worksite in which there is only one employer, there are four elements which the Secretary must prove in order to show an employer has violated the Act. Moran,[2] *supra* note 13, at 355; *see* National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973). There must exist a recognized hazard likely to cause serious harm or non-compliance with a safety standard, *see* 29 U.S.C. § 654(a) (1970); an employee must be endangered from such non-compliance or hazard, *see* City Wide Tuck. Serv. Co., OSHD (CCH) ¶ 15,769, at 21,050 (OSHRC 1973); the employer must have actual or constructive knowledge of the hazard or non-compliance; Brennan v. OSHRC (Raymond Hendrix), 511 F.2d 1139 (9th Cir. 1975); and there must be effective and feasible measures which the employer could have taken to avoid endangering the employee. *See* General Elec. Co. v. OSHRC, 540 F.2d 67 (2d Cir. 1976); National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1268 (D.C. Cir. 1973).

[34] *See* 29 U.S.C. § 651(b) (1970).

[35] *See* Brennan v. Butler Lime & Cement Co., 520 F.2d 1011 (7th Cir. 1975); Elmer R. Vath, OSHD (CCH) ¶ 18,161, at 22,335 (OSHRC 1974), *aff'g* ¶ 15,391, at 20,571 (ALJ 1972); Bob McCaslin Steel Erection Co., OSHD (CCH) ¶ 17,314, at 21,865 (ALJ 1974).

[36] *See* Lipsky & Rosenthal, Inc., OSHD (CCH) ¶ 15,256, at 20,333 (OSHRC 1972).

[37] *See* Bechtel Power Corp. v. Secretary of Labor, 548 F.2d 248 (8th Cir. 1977); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011 (7th Cir. 1975).

A second set of circumstances resulting in the issuance of citations arises where the only workers endangered by a hazard created or controlled by a particular employer are workers of other firms. The OSHRC's original position was that an employer who creates a hazard does not violate the Act if none of his employees are endangered.[38] The rationale supporting this position is that only the employer of the endangered workers has the authority to remove them from an unsafe work condition.[39] Two circuit courts have faced the conflict between this reasoning and the preventive purposes of the Act.

In *Brennan v. Gilles & Cotting, Inc.*,[40] the Fourth Circuit ruled that OSHA area directors could cite only those employers whose own employees were imperiled.[41] The Court based its opinion on an OSHA regulation issued by the Secretary of Labor that provided "in the event a standard protects on its face a class of persons larger than employees, the standard shall be applicable only to employees and their place of employment."[42] The court held that the regulation conditioned each employer's liability on his workers being endangered and not on his responsibility for the existence of the hazard.[43]

The court's interpretation is consistent with a definitional analysis of the Act. The regulation conditions liability on "employee" endangerment. "Employee" is defined under the Act in terms of a contractual relationship with a particular employer.[45] Consequently, the term "employee" as defined in the Act necessitates interpreting the regulation to restrict the issuing of citations to the particular employer of an endangered worker.[46]

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[38] Hawkins Constr. Co., OSHD (CCH) ¶ 17,851, at 22,196 (OSHRC 1974); *see* Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1260 (4th Cir. 1974); City Wide Tuck. Serv. Co., OSHD (CCH) ¶ 17,851, at 22,196 (OSHRC 1973).

[39] *OSHA — On Multi-employer Worksites, supra* note 13, at 797 (1976); *see* Humphreys & Harding, Inc., OSHD (CCH) ¶ 17,784, at 22,141 (OSHRC 1974). The position that an employer violates the Act only when his employees are endangered is supported by the emphasis of the Act on the employment relationship. For a discussion of the contractual relationship between an employer and his employees, see note 134 *infra*. The language of the general duty clause that an employer owes "his employees" a safe workplace further supports this position. *See* Moran,[2] *supra* note 13, at 356; Morey, *supra* note 3, at 597. *Contra*, Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1260 (4th Cir. 1974), (general definition of "employee" uninformative in determining multi-employer liability because definition is framed in terms of Congress's power over interstate commerce).

[40] 504 F.2d 1255 (4th Cir. 1974).

[41] *Id.* at 1262.

[42] 29 C.F.R. § 1910.5(d) (1970). *See OSHA — On Multi-employer Worksites, supra* note 13, at 797 n.39.

[43] 504 F.2d at 1260. The Secretary maintained that existing OSHA regulations permitted the citing of employers who controlled hazards to which employees of any firm at the worksite were exposed. For a discussion whether a court should defer to the OSHRC's or the Secretary's interpretation of an OSHA regulation, see note 13 *supra*.

[44] 29 C.F.R. § 1910.5(d) (1970).

[45] *See* Gilles & Cotting, Inc., OSHD (CCH) ¶ 16,763, at 21,512 (OSHRC 1973), *aff'd*, 504 F.2d 1255 (4th Cir. 1974).

[46] *But see* Gilles & Cotting, Inc., OSHD (CCH) ¶ 16,763, at 21,512 (OSHRC 1973), *aff'd*,

Since the Fourth Circuit based its opinion solely on the breadth of the Secretary's regulation[47] and because OSHA is bound by the court's interpretation of such regulations,[48] the court did not reach the issue of whether a broader regulation could be issued to allow OSHA to cite firms that have created or controlled a hazard but whose own workers are not endangered.[49]

The Second Circuit in *Brennan v. OSHRC (Underhill)*,[50] however, interpreted the regulation to cover creating and controlling employers regardless of whose employees are endangered. Thus the Second Circuit reached a broader question concerning the scope of the Act.[51] In *Underhill*, a construction company was cited by OSHA for non-serious violations under circumstances in which none of the firm's workers had access to the hazard.[52] The OSHRC vacated the citation on the ground that a firm violates the Act only when the firm's own employees have access to a dangerous condition.[53] In finding the OSHRC position unreasonable the Second Circuit ruled that to support a violation of section 5(a)(2) of the Act, the Secretary must show only that the areas of the hazard controlled and maintained by the cited firm were accessible to any employee at the worksite.[54]

In upholding the citation the Second Circuit primarily relied on the stated purpose of the Act "to provide as far as possible safe working conditions."[55] The court found support for its position in language of the Act limiting the employer's responsibility under the general duty clause, which requires the employer to provide a safe workplace for "his employees", and a corresponding absence of such limiting language under the specific duty clause, which requires only that an employer "comply" with safety standards.[56] Since the employer's specific duty is not limited to his employees the court reasoned that an employer's obligation under the specific duty clause is "over and above" that required by the general duty clause.[57]

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504 F.2d 1255 (4th Cir. 1974) (definition of "employee" in Act limits employer's duty to own employees).

[47] Gilles & Cotting, 504 F.2d at 1260.

[48] *Id.; see* United States v. Walden, 490 F.2d 372, 374-76 (4th Cir.), *cert. denied* 416 U.S. 983 (1974); United States v. Heffner, 420 F.2d 809 (4th Cir. 1969).

[49] 504 F.2d at 1260. The Fourth Circuit did not determine whether the Secretary has auhtority to cite employers in the absence of a limiting regulation. *Id.* This limitation on the ruling is important since the Secretary has proposed broader regulations to replace the one at issue in *Gilles & Cotting. See* 41 Fed. Reg. 17,639 (1976).

[50] 513 F.2d 1032 (2d Cir. 1975).

[51] *Id.* at 1037.

[52] *Id.* at 1034.

[53] Underhill Constr. Corp., OSHD (CCH) ¶ 19,276, at 23,054 (OSHRC), *rev'd sub nom.*, Brennan v. OSHRC, 513 F.2d 1032 (2nd Cir. 1975).

[54] 513 F.2d 1038; Comment, *Access Coupled with Control: New Standard for Liability Under OSHA's Specific Duty Clause*, 37 U. PITT. L. REV. 416, 420 (1975) [hereinafter cited as *New Standard*].

[55] 513 F.2d at 1038; *see OSHA-On Multi-employer Worksites, supra* note 13, at 797.

[56] 513 F.2d at 1038.

[57] *Id., see* Morey, *supra* note 3, at 989; *New Standard, supra* note 54, at 420.

The Second Circuit's opinions does not disclose whether the ruling applies to general

Inasmuch as the firm controlling the area where the hazard exists is in the best position to abate the hazard,[58] and the legislative history indicates that preventability is "the keystone of the Act,"[59] the Second Circuit's ruling is a reasonable interpretation of the Act.[60]

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duty clause violations. The court held that "to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that the area of the hazard [controlled by the cited employer] was accessible to any employee or any firm engaged in the common undertaking." 513 F.2d at 1038. The words "violation of OSHA" would usually include breaches of both the general and specific duty clauses. *See* Gross, *supra* note 9, at 252. The court's own reasoning, however, limits the application of the holding to only specific duty violations.

The court reasoned that since the general duty clause requires an employer to provide "his employees" a safe work environment, and the specific duty clause requiring compliance with specific standards does not contain language limiting the employers duty to "his employee", the specific duty must be broader than the general duty. 513 F.2d at 1037. This reasoning limits citations for breaching the general duty clause to those cases where a cited employer's own employees are exposed to a recognized hazard likely to cause serious injury.

If the *Underhill* holding is limited to specific duty violations, the ruling is unreasonable. Congress drafted the general duty clause to cover those hazards in which no specific standard was enacted and the possible injury severe. *See* National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973); Sun Shipbuilding & Dry Dock Co., OSHD (CCH) ¶ 16,725, at 21,474 (OSHRC 1973). Although the specific duty clause lacks the "his employee" language of the general duty clause, nothing in the legislative history indicates that Congress intended this language to be a distinguishing factor concerning the coverage of the clauses. *See New Standard, supra* note 54, at 422. The legislative history does show, however, Congress's concern with the number of work-related deaths. *See* S. REP. No. 91-1282, 91st Cong., 2nd Sess. 2, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177-78. If the scope of the employer's duty under the specific duty clause is "over and above" the obligation established by the general duty clause, Brennan v. OSHRC (Underhill), 513 F.2d 1032, 1038 (2d Cir. 1975), the Secretary's enforcement power in cases involving highly serious violations of the general duty clause is more limited than his enforcement power in circumstances involving non-serious violations likely to cause minimal injury. For a comparison between violations of the specific duty clause and breaches of the general duty clause, see note 19 *supra*. Thus, the implication of the *Underhill* ruling that the employer's obligation under the specific duty clause is greater than under the general duty clause, although supported by the structure of the Act, is contrary to legislative intent.

[58] Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1088 (7th Cir. 1975).

[59] 513 F.2d 1039; *see* National Realty & Constr. Corp. v OSHRC, 489 F.2d 1257, 1266-67 (D.C. Cir. 1973); *cf.* Frohlick Crane Serv. Inc. v. OSHRC, 521 F.2d 628 (10th Cir. 1975) ("employer" defined broadly so as to maximize employee protection).

[60] *OSHA — On Multi-employer Worksites supra* note 13, at 797. At common law a subcontractor at a multi-firm worksite was liable for injuries to other employers' workers if the subcontractor controlled the hazard and knew that the injured employee was likely to have access to the danger. *See* Perkins v. Henry J. Kaiser Constr. Co., 236 F. Supp. 484 (S.D. W. Va. 1964) *aff'd*, 339 F.2d 703 (4th Cir. 1964); Richards v. Watson Flagg Eng'r. Co., 9 N.J. Misc. 955, 156 A. 113 (1930), *aff'd*, 109 N.J.L. 128, 160 A. 500 (1931); Scalise v. F. M. Venzie & Co., 301 Pa. 315, 152 A. 90 (1930); *cf.* Arthur v. Standard Eng'r Co., 193 F.2d 903 (D.C. Cir. 1951) (subcontractor owes duty to another subcontractor's employees only if injury occurs during activity of mutual benefit to both firms). Thus, to the extent the purpose of the Act was to allow OSHA to enforce common law duties before injuries occur, the Second Circuit's opinion fosters the intent of the legislature. For a discussion on Congress' intent concerning incorporation of common law principles, see note 3 *supra*. The *Underhill* ruling does, however, appear to be broader than the underlying common law concept in that the court does not

In the cases of *Anning-Johnson Co.*,[61] and *Grossman Steel & Aluminum Corp.*,[62] the OSHRC adopted the Second Circuit's holding in *Underhill*.[63] The OSHRC, however, indicated that an employer who creates a hazard to which his or another firm's employees have access may be cited for violations of either the general or specific duty clauses.[64] Thus, the OSHRC expanded the *Underhill* ruling to include breaches of the employer's obligation to provide a workplace free of recognized dangers not covered by safety standards but likely to cause serious injury.[65] The legislative history

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require that the employer realize that the hazard is accessible to other firm's workers. *See* 513 F.2d at 1038.

[61] OSHD (CCH) ¶ 20,690, at 24,779 (OSHRC 1976).

[62] OSHD (CCH) ¶ 20,691, at 24,788 (OSHRC 1976).

[63] OSHD (CCH) ¶ 20,690, at 24,779 (OSHRC 1976); OSHD (CCH) ¶ 20,691, at 24,790 (OSHRC 1976); *see* Beatty Equip. Leasing, Inc., OSHD (CCH) ¶ 20,694, at 24,801-02 (OSHRC 1976).

[64] In *Anning-Johnson II*, the OSHRC held that "exposure" of one's employees to a hazardous condition is an element that gives rise to an employer's duty under § 5(a) of the Act. OSHD (CCH) ¶ 20,690, at 24,783. On the basis of Gilles & Cotting, Inc., OSHD (CCH) ¶ 20,448, at 24,423 (OSHRC 1976), the OSHRC must have been using the term "exposure" to mean "have access to." *See* note 65 *infra*. Section 5(a) includes both the general and specific duty clauses. 29 U.S.C. § 654(a) (1970). Therefore the *Anning-Johnson II* opinion applies to both general and specific duty clause violations. Furthermore, in *Grossman Steel* the OSHRC uses the word "hazards" without making any distinction between recognized hazards covered by the general duty clause or dangers arising from non-compliance with standards covered by the specific duty clause. *See* OSHD (CCH) ¶ 20,691, at 24,791. Thus the OSHRC has not followed the Second Circuit's emphasis on the general duty clause language that an employer owes "his employees" a safe work environment. *See id.*

Also raised in *Underhill* was the issue whether a subcontractor may contract away his duties under the Act. The Second Circuit stated that an employer can be liable only when he is responsible for maintenance of the area where the hazard exists. 513 F.2d at 1033. The OSHRC has held, however, that an employer's duties under the Act are non-delegable. *See* R. H. Bishop Co., OSHD (CCH) ¶ 17,930, at 22,224 (OSHRC 1974); Comment, *OSHA: Developing Outlines of Liability in Multi-employer Situations*, 62 GEO. L. J. 1483, 1496 n.74 (1974) [hereinafter cited as *Developing Outlines*]. The OSHRC's view is supported by the common law rule that the employer's obligation to provide a safe place to work is non-delegable. *See* Phillips Oil Co. v. Linn, 194 F.2d 903, 905 (4th Cir. 1952); J. Weingarten, Inc. v. Moore, 441 S.W.2d 223 (Tex. Cir. App. 1969); Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 401 (Tex. 1934).

Contractual assignment of the obligations imposed by the Act would have some beneficial effects. Most important of these is that as a result of negotiations concerning contractual redistribution of safety responsibilities, employers would consider safety problems at the start of the multi-firm project. *Developing Outlines, supra* at 1497. The use of such clauses, however, would decrease the employer's incentive to provide a safe work environment during the actual construction to the extent he is not obligated to correct dangerous conditions. *See id.*

[65] The Secretary of Labor failed to follow the thrust of the *Underhill* ruling, and proposed guidelines that require citing an employer who creates or controls a recognized hazard likely to cause serious injury to which any employee is exposed. *See* 41 Fed. Reg. 17,639 (1976). There is a distinction, however, between the Secretary's and OSHRC's positions. Under the Secretary's position a citation may be issued only upon proof of actual employee exposure to a hazard, *id.*, while under the OSHRC's *Gilles & Cotting* ruling, OSHD (CCH) ¶ 20,448 at 24,423 (OSHRC 1976), all that is required is that employees probably have access to the danger. *See* Moran,[2] *supra* note 13, at 357. For further discussion on the distinction between "access" and "exposure" see note 13 *supra*.

provides no evidence that Congress intended the general duty clause to impose a lesser obligation than the specific duty clause. It does display, however, Congress's concern for preventing serious injuries.[66] Since prevention is essential when dealing with hazards which could possibly cause death, the OSHRC position is more in accord with congressional intent than is the Second Circuit's.[67]

The purposes of the Act are furthered more by the OSHRC's rule than by the Secretary's regulation. According to the Secretary's position an employee must actually be in a place where he could be injured. *See New Standard, supra* note 54, at 427. Often the result is that before exposure can be shown an injury has occurred. *Id.* The OSHRC rule, however, lessens the Secretary's burden by requiring him to show only that an employee was likely to have access to an area where he might be injured. *Id.* Thus more accidents would be avoided under the OSHRC rules. *Id.* Since the purpose of the Act was to prevent injury, the "likelihood of access" standard is more in accord with the legislative history. *See* Brennan v. OSHRC (Gerosa), 491 F.2d 1340 (2d Cir. 1974) (regulations should be construed broadly to effectuate congressional objective of preventing accidents); H.R. REP. No. 91-1291, 91st Cong., 2nd Sess. 24 (1970) *reprinted in* LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970, at 853 (Comm. Print 1971).

[66] *See* H.R. REP. No. 91-1291, 91st Cong., 2nd Sess. 24 (1970). *reprinted in* LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970 at 853 (Comm. Print 1971).

[67] *See* Frohlick Crane Serv., Inc. v. OSHRC, 521 F.2d 628 (10th Cir. 1975) (cited employer need not have contractual relationship with endangered employee to warrant citation for serious violation of standards).

In *Anning-Johnson II* the OSHRC held that a cited employer has the burden of showing that he did not control the area of the hazard because the employer has greater access to facts than the Secretary. Anning-Johnson Co., OSHD (CCH) ¶ 20,690, at 24,783 n.14 (OSHRC 1976). The OSHRC supported placing the burden on the employer by finding statutory authorization for "effective enforcement programs" in § 2(b) of the Act. *Id.* at 24,783; *see* 29 U.S.C. § 651(b)(10) (1970). The OSHRC's allocation of the burden of proof allows the Secretary to cite firms at a multi-employer worksite without first determining that the firm had control over the hazard in question. *See* Anning-Johnson Co., OSHD (CCH) ¶ 20,690, at 24,787 (OSHRC 1976) (Moran, Comm'r, concurring in part and dissenting in part).

Commissioner Moran dissented from the portion of the Anning-Johnson II opinion concerning allocation of the burden of proof and maintained that this allocation of the burden of proof deprived employers of their constitutional presumption of innocence and would unjustly cost firms thousands of dollars in defense fees. *Id.* Commissioner Moran's constitutional objection is supported by the enforcement procedure of the Act. Citations are issued by the Secretary in his role as a prosecutor. *See* 29 U.S.C. § 663 (1970). The Secretary must prove the validity of the citation to the OSHRC, which is an adjudicatory body. *See* 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4659 (1974). Furthermore, the Act calls for fines and the use of criminal sanctions for obstructing the enforcing process. 29 U.S.C. § 666 (1970). Therefore, the OSHRC's hearings should be treated as quasi-criminal and the presumption of innocence should be accorded to the defendant. *See* Atlas Roofing Co. v. OSHRC, 518 F.2d 990, 994-95 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1976); Comment, *The Multi-employer Worksite Problem and the Review Commission's Response*, 57 B.U.L. REV. 409 (1976) [hereinafter cited as *Review Commission's Response*].

It is a well established principle of common law that a person is presumed to be innocent of a crime until proven guilty. *See, e.g.*, United States v. Fleischman 339 U.S. 349 (1950); Yee Hem v. United States, 268 U.S. 178 (1924). This presumption has been attached in circumstances involving a violation of a statute punishable only by fine. *See, e.g.*, Southern Pac. Co. v. Schuyler, 227 U.S. 601 (1913). The presumption of innocence relates to every fact that must be established against the accused to prove his culpability. *See* Kirby v. United States, 174 U.S. 47 (1899). Therefore, if the Secretary cites a firm on the basis that the

A third situation at multi-firm worksites has caused the most controversy.[68] The controversy concerns whether an employer should be cited for a violation because his employees had access to a worksite hazard which the employer neither created nor controlled.[69] The OSHRC faced this issue in *R. H. Bishop Co.*,[70] a case involving a non-serious violation of a safety standard.[71] In finding the cited firm in breach of the specific duty clause, the OSHRC held that an employer violates the Act whenever one of his employees is exposed to an area in which safety standards have not been observed.[72]

Under the *R. H. Bishop Co.* ruling, an employer cannot escape liability on the grounds that others created the hazardous condition, were responsible for its existence or had control of the areas encompassing the danger.[73] The OSHRC based its opinion primarily on the language of the specific duty clause requiring that an employer comply with safety standards.[74] The OSHRC reasoned that since the Act did not exempt non-controlling employees from the duty to comply with standards not likely to cause serious injury,[75] all employers must insure that the areas to which their employees have access comply with safety regulations.[76]

The Seventh Circuit in *Anning-Johnson Co. v. OSHRC (Anning-Johnson I)*[77] refused to adopt the OSHRC's interpretation of the Act. The

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employer controlled a hazard, the Secretary should have the burden of proving that such control existed. *See* Anning-Johnson Co., OSHD (CCH) ¶ 20,960, at 24,787 (Moran, Comm'r, concurring in part and dissenting in part).

The Supreme Court's determination in Atlas Roofing v. OSHRC, 430 U.S. 442 (1977), holding that a jury trial for violations of the Act was not required by the seventh amendment, is limited to that issue and therefore not determinative of the presumption of innocence question. *See id.* at 449. The Supreme Court relied heavily on the language of the seventh amendment requiring jury trials for "suits at common law," holding OSHRC actions not suits at common law. *Id.* at 449-50. There is no such limiting factor for the presumption of innocence as the presumption is incorporated into the due process clause of the fifth amendment. *See* Note, *Affirmative Defense and Due Process: The Constitutionality of Placing the Burden of Persuasion on a Criminal Defendant*, 61 GEO. L. J. 871 (1976).

[68] *Compare OSHA — On Multi-employer Worksites, supra* note 13, at 798, *with Discussion of Anning-Johnson, supra* note 3, at 791.

[69] *See, e.g.*, Alcap Elec. Corp., OSHD (CCH) ¶ 19,640, at 23,444 (OSHRC 1975); Robert E. Lee Plumbers, OSHD (CCH) ¶ 19,574, at 23,402 (OSHRC 1975); Savannah Iron & Fence Corp. OSHD (CCH) ¶ 18,233, at 22,383 (OSHRC 1974). The original position taken by the Secretary was that an employer violates the Act when his employees are endangered, regardless whether the cited employer controlled the hazard. *See OSHA — On Multi-employer Worksites, supra* note 13, at 798; 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4380.1 (1974).

[70] OSHD (CCH) ¶ 17,930, at 22,224 (OSHRC 1974).

[71] *Id.*

[72] *Id.* at 22,225.

[73] *Id.*

[74] *Id.*

[75] *See OSHA — On Multi-employer Worksites, supra* note 13, at 798 n.41.

[76] OSHD (CCH) ¶ 17,930, at 22,225 (OSHRC 1974).

[77] 516 F.2d 1081 (7th Cir. 1975). The citations involved in *Anning-Johnson* were for non-serious violations at the construction site of a building. *Id.* at 1082. The petitioners in the case, Anning-Johnson and Workinger Electric, were sub-contractors whose employees were

court held that a non-controlling employer does not violate the Act when his workers have access to a danger unless the hazard is likely to cause serious harm.[78] In reaching its conclusion the court developed a two part structural argument based on distinctions between the specific duty clause, which encompasses serious and non-serious dangers, and the general duty clause, which is limited to serious hazards.[79] The court first noted that the general duty clause is defined in terms of furnishing a safe place of employment, but that the specific duty clause is defined in terms of compliance with safety standards.[80] The court reasoned from this difference that the employer's general duty is to provide a workplace free of recognized hazards likely to cause serious injury, and his specific duty is to maintain reasonable compliance with safety regulations in the area controlled by his firm.[81] The court concluded that the employer's general duty extends to the whole worksite, but his specific duty extends only to the areas in which his firm has the contractual authority to correct conditions.

Although the first part of the court's analysis discusses the distinction between the duty clauses, the second part is based on the relationship between serious and non-serious violations of the Act. This second part of the decision expands the employer's duty to prevent serious noncompliance with standards to those areas outside the employer's area of control. The court emphasized that serious violations of specific safety standards and all violations of the general duty clause occur when there is possible serious injury to an employee.[82] The court maintained that since a general duty violation does not require the employer to control a hazard at issue, neither should a serious violation of a safety standard.[83] The Seventh Circuit completed its analysis by reasoning that since a non-serious violation is defined as one not likely to cause serious injury, treating such a breach in the same manner as violations of the general duty clause would create a broader duty than required by the Act.[84] The court determined that such a non-statutory duty would lead to results not intended by Congress and inappropriate without specific congressional authorization.[85] The Seventh

exposed to hazards created or controlled by the general contractor at the project, Wright Construction. *Id.* Foremen of both subcontractors were aware of the hazardous conditions, but allowed their men to remain at the worksite. *Id.* at 1083. The subcontractors took no steps to abate the hazard although they were not prohibited from doing so by their contract with Wright or the carpenters' union. *Id.*

[78] 516 F.2d at 1086.

[79] *See Review Commission's Response, supra* note 67, at 412; *OSHA — On Multi-employer Worksites, supra* note 13, at 795.

[80] 516 F.2d at 1086, *quoting* 29 U.S.C. § 654 (a)(1) (1970).

[81] 516 F.2d at 1086-87, *citing* 29 U.S.C. § 654(a)(2) (1970).

[82] 516 F.2d at 1086.

[83] *Id.*

[84] *Id.*

[85] The Seventh Circuit reasoned that employers may find themselves required to remove employees from worksites in order to avoid non-serious violations. *Id.* at 1090-91. The court maintained that Congress did not intend such a result when the possible injury to employees

Circuit therefore held that when a situation involves a serious violation of the Act at a multi-firm worksite the OSHA area director must cite employers whose employees have access because an employer is responsible to his employees for the existence of such hazards wherever they occur at the project.[86] If the alleged violation would be classified as non-serious, however, the hazard must be in the area controlled by a particular employer before the firm can be cited.[87]

The Seventh Circuit's reasoning is persuasive. The employer's general duty to provide a place of employment free from recognized hazards likely to cause serious injury applies in situations in which no standard has been promulgated.[88] An unreasonable result would occur if an employer's obligation within the areas he controls is lessened merely because of the issuance of a standard.[89] In order to avoid such a decrease in an employer's responsibility, the general duty to provide safe conditions throughout a worksite must be applied to violations of the specific duty clause in situations involving the possibility of serious harm.[90] Serious violations of the Act, therefore, should be treated alike whether they fall under the specific or general duty clause. Since the employer's general duty does not cover non-serious injuries,[91] the "place of employment" language of the general duty clause cannot be used to expand an employer's specific duty, making him responsible for correcting non-serious violations of standards outside his area of control.[92] Thus an employer should not be held to have violated the Act when his employees have access to non-serious hazards in areas in which he has no authority to correct conditions.

The Seventh Circuit supported its analysis by discussing the policy considerations behind the *Anning-Johnson I* holding. The court first asserted that making more than one employer responsible for abating particular non-serious hazards may cause confusion among the firms at a project concerning who is responsible for compliance with the safety standard.[93]

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was minimal. *Id.* The court further noted that at construction projects the removal of one subcontractor could halt the entire project. *Id.*

[86] *Id.* at 1090.

[87] *Id.*

[88] *See* Sun Shipbuilding & Dry Dock Co., OSHD (CCH) ¶ 16,725, at 21,474 (OSHRC 1973).

[89] Congress enacted the general duty clause primarily because it realized specific standards could not cover every conceivable situation. Note, *OSHA: Employer Beware*, 10 Hous. L. Rev. 426, 431 (1972).

[90] In support of its holding that employers are not responsible for non-serious violations by other firms the Seventh Circuit stated that the purpose of the Act was not to punish, but to achieve compliance with safety standards and the abatement of hazards. 516 F.2d at 1088. The court implied that holding employers in violation of the Act for hazards created by other firms and not likely to cause serious injury would be in the nature of a penalty. *Id.* The court does not, however, state why this position results in a "penalty" for non-serious violations but not for serious violations.

[91] *See Discussion of Anning-Johnson, supra* note 3, at 790.

[92] *See* 516 F.2d at 1088.

[93] *Id.* at 1089.

This confusion, the court maintained, could lead to the failure of any firm to assume responsibility for correcting the condition.[94] The result anticipated by the court, however, is no more likely to occur than the situation anticipated by the Secretary which is that the more firms responsible for alleviating a danger, the more likely the hazard will be corrected. Furthermore, if the court were correct in its "confusion" assumption, the same reasoning would apply to recognized hazards included under the general duty clause. The language of the general duty clause indicates, however, that Congress believed the purposes of the Act would be best achieved by citing each employer whose workers had access to a single hazard.[95] Therefore, the Seventh Circuit's view that citing more than one employer for non-serious violations would hinder abatement is not in accord with the rationale of the general duty clause.

The Seventh Circuit's policy argument also emphasizes that undesirable economic difficulties might result from placing responsibility for non-serious violations on more than one employer.[96] Foremost among these difficulties is that a noncontrolling employer may be forced to quit the worksite in order to avoid violating the Act.[97] The court also indicated that conflicts might arise among employers concerning who should pay for abatement of dangers,[98] and that wasteful multiple expenditures may occur if many employers attempt to correct a single violation.[99] The court felt that the distinction between serious and non-serious violations of the Act allowed for judicial consideration of economic consequences.[100] The court reasoned that the interrelationship between the minor injuries

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[94] *Id.*

[95] Under the *Anning-Johnson* decision mere exposure of a worker to a recognized hazard, not covered by a standard and likely to cause serious injury, is a violation of the general duty clause. *Id.* at 1086. Since more than one firm's employees can have access to such a hazard, more than one employer can be cited. *See* Morey, *supra* note 3, at 988.

[96] 516 F.2d at 1089-90.

[97] *Id.; accord, Morey, supra* note 3, at 998. If an employer is found responsible for hazards in areas he does not control, there may be circumstances in which he is unable to abate the hazard. Union craft rules often require only certain employees to do the work necessary to abate a hazard, *see* 516 F.2d at 1089, and the employer may lack the funds needed to hire the designated workers. For example, union carpenters may be required to put up guard rails along an open floor. Certain firms, however, such as a plumbing company, do not normally employ union carpenters and usually are without the capital for hiring them. *See id.* Such employers, whose men may need to cross the unguarded floors on the way to their worksite, might be forced to remove their workers from the project in order to comply with the Act. *See id.*

The court did not consider other deleterious economic consequences that might result from holding employers responsible for violations by other firms. *See Discussion of Anning-Johnson, supra* note 3, at 797 n.64. The most important of the consequences are that the subcontractor will probably not be reimbursed by the general contractor for any additional cost resulting from the negligence of other firms at the worksite, and the subcontractors' insurance may not cover injuries to employees performing safety repairs. *Id.*

[98] 516 F.2d at 1089.

[99] *Id.*

[100] *Id.* at 1088.

usually associated with non-serious violations and the deleterious economic effects resulting from multiple responsibility for violations required limiting culpability to the employer who created or controlled the non-serious hazard.[101]

The *Anning-Johnson I* court's consideration of the economic effects on business is directed by section 6(b) of the Act, which requires the Secretary to consider feasibility in promulgating standards.[102] "Feasibility" includes appropriate consideration of economic as well as technological factors.[103] The term "feasibility" was added to section 6(b) to prevent courts from interpreting the Act to require absolute safety regardless of practicality.[104] Since Congress intended economic realities to be considered in the implementation of the Act,[105] the Seventh Circuit was warranted in considering potential financial harm to employers as an element in its decision.[106]

Neither the Secretary of Labor nor the OSHRC, however, has accepted the *Anning-Johnson I* opinion. The Secretary has proposed guidelines that reject the Seventh Circuit's emphasis on the degree of employee endangerment as a criterion in issuing citations.[107] Under the Secretary's proposal a firm will be cited whenever its employees are exposed to "readily apparent" hazards.[108] If the OSHA area director finds that the danger is not

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[101] *Id.* at 1090.

[102] 29 U.S.C. § 655(B)(5) (1970).

[103] *See* Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 477 (D.C. Cir. 1974).

[104] S. REP. No. 91-1282, 91st Cong., 2nd Sess. 58 (1970).

[105] Other courts have looked to congressional intent to determine whether economic criteria should be weighed in implementing legislation. *See, e.g.*, Union Elec. Co. v. EPA, 427 U.S. 246 (1976) (economic feasibility not a factor in consideration of state implementation plan); North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036, 1055 (4th Cir. 1977), *cert. denied*, 46 U.S.L.W. 321 (U.S. Oct. 4, 1977) (No. 76-1675) (FCC cannot properly adopt technical requirements without considering economic impact); Calvert Cliffs' Coordinating Comm'n Inc., v. AEC, 449 F.2d 1109, 1123 (D.C. Cir. 1971) (balancing of economic considerations and statutory purpose required by National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1970)).

[106] On appeal of *Anning-Johnson I*, the Secretary of Labor and the OSHRC maintained that the Act required citing employers whose own workers were exposed to non-serious hazards created by other firms. *See* Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1089 (7th Cir. 1975). Since both bodies within the administrative agency implementing the Act were in agreement, their interpretation was entitled to deference. *Cf.* Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933) (deference given to tariff commission's interpretation of hearing requirements). The Supreme Court emphasized that deference is particularly due when the administrative practice at issue is new or untried. *See* Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961); Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153-54 (1946). Therefore, the Seventh Circuit was bound to uphold the administrative agency's construction of the Act unless the interpretation was unreasonable. *See* Udall v. Tallman, 380 U.S. 1, 4 (1965). Although the Seventh Circuit's opinion is supported by economic consideration, the ruling fails to prove the administrative agency's position unreasonable. *See OSHA — On Multi-employer Worksites, supra* note 13, at 799. For a discussion of the problems arising when the OSHRC and the Secretary disagree on an interpretation of the Act, see note 13 *supra*.

[107] 41 Fed. Reg. 17,639 (1976).

[108] *Id.*

"readily apparent," a citation will be issued only if the employer of the endangered worker created the hazard or had the ability to alleviate the condition.[109] If the guidelines are enacted, an employer will be considered able to abate a not readily apparent hazard if he has the workers, materials, and equipment necessary to correct the condition, or the contractual authority to order the creating firm to rectify the situation.[110]

The Secretary's proposed guidelines do not distinguish between serious and non-serious violations of the Act.[111] Consequently, an employer may escape liability even when his employees are in danger of serious injury if he neither created nor has authority to correct the hazardous condition. This result is contrary to the language of the general duty clause that an employer has violated the act whenever his employees have access to hazards likely to cause serious harm.[112] Furthermore, citing employers whose workers are exposed to readily apparent hazards might result in the economic dislocations envisioned by the court in *Anning-Johnson I*.[113] Since the ability-to-abate exception would not apply to either serious or non-serious readily apparent violations, an employer without the means to correct such a condition would be forced to remove his workers from the project in order to avoid being cited. Therefore, work stoppages could result even when minimal employee harm is involved. The Secretary's proposal, if enacted, could result in an application of the Act contrary to Congress's emphasis on preventing serious injury and its intent to avoid unreasonable economic hardship on employers.

Two particularly important OSHRC cases, *Anning-Johnson Co. (Anning-Johnson II)*[114] and *Grossman Steel & Aluminum Corp.*,[115] deal with the Seventh Circuit's opinion in *Anning-Johnson I*. In these two cases the OSHRC expounded a rule which is designated as the *Anning-Johnson/Grossman* rule.[116] This rule requires the citing of an employer at

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[109] *Id.*

[110] *Id.* The construction industry responded critically to the proposed guidelines. [1976 Transfer Binder] EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 10,451. The industry maintained that nothing in the Act or its legislative history showed congressional intent to make each employer a general insurer for correcting hazards of other employers. *Id.* The economic factors raised in *Anning-Johnson I* were also indicated as contrary to the proposal. *Id.*

[111] 41 Fed. Reg. 17,639 (1976).

[112] *See* Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1089 (7th Cir. 1975).

[113] *Id.*

[114] OSHD (CCH) ¶ 20,690, at 24,779 (OSHRC 1976).

[115] OSHD (CCH) ¶ 20,691, at 24,788 (OSHRC 1976).

[116] See 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 510 (1976). The *Anning-Johnson I* holding and the *Anning-Johnson/Grossman* rule arose in factual circumstances that limit their appication to the construction industry. In Central of Ga. R.R., OSHD (CCH) ¶ 21,688, at 26,033 (OSHRC 1977), the OSHRC refused to extend the *Anning-Johnson/Grossman* rule to cases not involving construction worksites. The OSHRC held that only the general rule that an employer violates the Act when his employees are exposed to any hazard would apply to non-construction sites. *Id.* This position accords with the Seventh Circuit's emphasis on the construction industry practice of limiting employer control to specific workplaces at a project. Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1090 (7th Cir. 1975). The Secretary

a multi-firm worksite whenever his employees have access to a hazard.[117] The OSHA area director must issue a citation regardless of whether the cited employer controlled the hazard, or of the severity of the likely injury to his employees.[118] Unlike prior OSHRC decisions, however, the employer is given two affirmative defenses when cited for a violation of the Act.[119] First, the employer may escape liability by showing that his employees were protected by reasonable alternative measures although the workers had access to an area not in compliance with safety standards.[120] Second, the OSHRC will vacate a citation if the employer can prove he did not have actual notice of a dangerous condition and should not be held to have had constructive knowledge.[121] Before these defenses can be asserted, however, the employer must demonstrate that he neither created nor controlled the hazard to such a degree that he could have corrected the condition in the manner contemplated under the Act.[122]

Like the Secretary's proposed guidelines, the *Anning-Johnson/Grossman* Rule does not distinguish between serious and non-serious violations of safety standards. An employer can avoid liability for serious violations by proof of either affirmative defense. As stressed in *Anning-Johnson I*, a serious violation of a regulation is defined as a hazard "likely to cause death or serious injury," the phrase used to define the employer's general duty to provide a safe workplace.[123] The general duty clause, however, is explicit in its requirement that employers provide a place of employment free from recognized hazards likely to cause serious harm.[124] The language of the general duty clause thus bars the availability of affirmative defenses to general duty breaches.[125] Yet, serious violations

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of Labor's proposed guidelines are not limited to construction sites, but such a limitation seems to be implied from the Secretary's reliance on *Anning-Johnson I*. *See* 41 Fed. Reg. 17,639 (1976).

[117] Anning-Johnson Co. OSHD (CCH) ¶ 20,690, at 24,783 (OSHRC 1976).

[118] *Id.*

[119] OSHD (CCH) ¶ 20,690, at 24,783; *see, e.g.*, Otis Elevator Co., OSHD (CCH) ¶ 20,693, at 24,799 (OSHRC 1976); Grossman Steel & Aluminum Co., OSHD (CCH) ¶ 20,691, at 24,791 (OSHRC 1976).

[120] Anning-Johnson Co., OSHD (CCH) ¶ 20,690, at 24,783 (OSHRC 1976). The OSHRC noted that while no distinction was made between "serious" and "non-serious" violations in applying its theory of liability, the OSHRC would consider the gravity of the hazard in determining what alternative measures qualify as "realistic". *Id.* at 24,783 n.16 (OSHRC 1976).

[121] The cited firm is deemed to have constructive knowledge that a condition is hazardous if a reasonable person with the actual knowledge of the employer would have realized the danger involved. Anning-Johnson Co., OSHD (CCH) ¶ 20,690, at 24,783 n.16 (OSHRC 1976); *see* McLean Trucking Co. v. OSHRC, 503 F.2d 8, 11 (4th Cir. 1974); Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974).

[122] Grossman Steel & Aluminum Corp., OSHD (CCH) ¶ 20,691, at 24,791 (OSHRC 1976); Anning-Johnson Co., OSHD (CCH) ¶ 20,690, at 24,783 (OSHRC 1976). The propriety of placing the burden of proving non-control on the employer is open to constitutional challenge. For a discussion of this issue see note 67 *supra*.

[123] Anning-Johneon Co. v. OSHRC, 516 F.2d 1081, 1086 (7th Cir. 1975).

[124] *Id.*

[125] *Id.*

of standards necessarily must be treated the same as violations of the general duty clause.[126] Therefore, the OSHRC's position, allowing affirmative defenses to serious violations, is contrary to the plain meaning of the general duty clause.

In addition to the lack of support for the *Anning-Johnson/Grossman* rule in the Act itself, the rule fails to provide employers with a reliable standard by which to gage their actions.[127] Although the OSHRC holds that realistic alternatives to strict compliance is a defense,[128] it fails to define clearly what type of protective measures qualify.[129] The *Anning-Johnson II* opinion apparently holds that providing effective protective equipment qualifies as an acceptable protective measure,[130] while the *Grossman* opinion allows such additional alternatives as requesting the general contractor to correct the hazard, and instructing employees to avoid dangerous areas.[131] Furthermore, one subsequent case indicates the OSHRC will find the daily inspecting of the worksite to discover hazardous conditions, the informing of employees of dangers at weekly safety meetings, and the scheduling of work in the safest possible areas to be realistic additional safety measures.[132]

In order to allow employers to evaluate the reasonable cost of protecting workers and to avoid wasteful litigation expenses by firms who have attempted to comply with the *Anning-Johnson/Grossman* rule,[133] the OSHRC should develop a specific standard as to what is expected of employers at multi-firm worksites. Since the purpose of the Act was not to punish employees, the OSHRC should accept all good faith efforts at protecting employees from non-serious violatons. When serious violations are involved the congressional intent of minimizing workplace fatalities dictates that effective protective equipment must be supplied in order to

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[126] For comparison between serious violations of standards and violations of the general duty clause, see note 19 *supra*.

[127] Anning-Johnson Co., OSHD (CCH) ¶ 20,690, at 24,786 (OSHRC 1976) (Moran, Comm'r, concurring in part dissenting in part).

[128] Anning-Johnson Co., OSHD (CCH) ¶ 20,690, at 24,783 (OSHRC 1976).

[129] *Id.* at 24,786 (Moran, Comm'r, concurring in part dissenting in part); *see* Grossman Steel & Aluminum Corp., OSHD (CCH) ¶ 20,691, at 24,794 (OSHRC 1976) (Moran, Comm'r, dissenting).

[130] Anning-Johnson Co., OSHD (CCH) ¶ 20,690, at 24,783 (OSHRC 1976); *see* Data Electric Co., OSHD (CCH) ¶ 21,593, at 25,916 (OSHRC 1977) (Barnako, Comm'r, concurring).

[131] Anning-Johnson Co., OSHD (CCH) ¶ 20,690, at 24,786 (OSHRC 1976) (Moran, Comm'r, concurring in part dissenting in part).

[132] Otis Elevator Co., OSHD (CCH) ¶ 20,693, at 24,798 (OSHRC 1976); *see* Truland-Elliot, OSHD (CCH) ¶ 22,116, at 22,648 (OSHRC 1977), *aff'g* ¶ 21,742, at 26,119 (ALJ 1977); Dear Constr. Co., OSHD (CCH) ¶ 21,792, at 26,205 (OSHRC 1977); A. Prokosch & Sons Sheet Metal, Inc., OSHD (CCH) ¶ 21,670, at 26,017 (ALJ 1977); Jess Howard Electric Co., OSHD (CCH) ¶ 21,624, at 25,970 (ALJ 1976).

[133] *See, e.g.*, Western Waterproofing Co., OSHD (CCH) ¶ 21,869, at 26,365 (OSHRC 1977); Paramount Plumbing & Heating Co., OSHD (CCH) ¶ 21,820, at 26,269 (OSHRC 1977); A. Pearlman Iron Works, Inc., OSHD (CCH) ¶ 21,939, at 26,440 (ALJ 1977); Colfry Bros. Terrazzo Contractors, Inc., OSHD (CCH) ¶ 21,647, at 25,994 (ALJ 1977).

comply with the Act.[134]

To work effectively, the Act must be enforced realistically with due

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[134] *See* H.R. REP. No. 91-1291 91st Cong., 2nd Sess. 24 (1970) LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970, at 853 (Comm. Print 1971).

Although the controversy involving citations at multi-employer worksites has primarily concerned the relationship between subcontractors and the Act, another major issue is whether the general contractor should be responsible for violations by the subcontractors at the project. The position originally taken by the Secretary of Labor was that the general contractor violated the Act when employees of his subcontractors were exposed to hazards. *See* Gilles & Cotting, Inc., OSHD (CCH) ¶ 16,763, at 21,512 (OSHRC 1973). The basis for this view is that the general contractor is in the best position to supervise overall project safety and therefore should be held responsible when proper conditions are not maintained. *See* Gilles & Cotting, Inc., OSHD (CCH) ¶ 15,140, at 20,216 (ALJ 1972). The OSHRC, however, rejected this view in Gilles & Cotting, Inc., OSHD (CCH) ¶ 16,763, at 21,512 (OSHRC 1973) *aff'd*, 504 F.2d 1255 (4th Cir. 1974).

In *Gilles & Cotting*, the OSHRC held that a general contractor could not be cited for violations unless he maintained a contractual relationship with the endangered employee. OSHD (CCH) ¶ 16,763, at 21,512 (OSHRC 1973). This result is supported by a definitional analysis of the Act. An "employee" is defined in terms of a singular relationship between the employee and his employer. For a discussion of the term "employee" as used in the Act see note 7 *supra*. The OSHRC reasoned, therefore, that since an employment relationship does not generally exist between a general contractor and a subcontractor's workers, the OSHRC could not find the general contractor in violation of the Act unless his own employees had access to a hazard. Gilles & Cotting, Inc., OSHD (CCH) ¶ 16,763, at 21,512 (OSHRC 1973).

In Grossman Steel, OSHD (CCH) ¶ 20,691, at 24,788 (OSHRC 1976), the OSHRC reversed its position that the general contractor could not be held responsible when a subcontractor's employees had access to a hazard. The OSHRC held that a general contractor is responsible for violations by his subcontractors which he could reasonably be expected to have prevented or abated in his supervisory capacity. *Id.* at 24,791. Thus, whether the general contractor will be in violation of the Act depends on what can be reasonably expected of such employers.

Although the *Grossman* opinion fails to provide standards for determining what should be reasonably required of the general contractor, OSHRC decisions subsequent to *Grossman* indicate that he is not obligated to scrutinize every phase of the project. *See* National Oil Recovery Corp., OSHD (CCH) ¶ 21,460, at 25,739 (ALJ 1976). The general contractor is, however, responsible for those hazards which are apparent from a reasonable inspection of the project. *See* Knutson Constr. Co., OSHD (CCH) ¶ 21,185, at 25,479 (OSHRC 1976); Austin Co., OSHD (CCH) ¶ 22,150, at 26,673 (ALJ 1977). The OSHRC position is supported by congressional intent that the Act be enforced in a practical manner. *See* AFL-CIO v. Brennan, 530 F.2d 109, 1020-21 (3rd Cir. 1975).

Support for the OSHRC's position can also be drawn from common law. At common law a general contractor in control of the structure or premises where the work is being done is liable to subcontractors' employees who, in the course of their duties, are injured by the failure of the general contractor to provide a safe work environment. *See* Southern Mineral Co. v. Barrett, 281 Ala. 76, 199 So. 2d 87 (1967); Grant v. Joseph J. Duffy Co., 20 Ill. App. 3d 669, 314 N.E.2d 478 (1974); Butler v. King, 99 N.H. 150, 106 A.2d 385 (1954). Employees of subcontractors under common law are business invitees of the general contractor, *see* Delgado v. W.C. Garcia & Assoc., 212 Cal. App. 2d 5, 27 Cal. Rptr. 613 (1963); Hooey v. Airport Constr. Co., 253 N.Y. 486, 171 N.E. 752 (1930), and are therefore entitled to a workplace free from all dangers which the general contractor might have discovered by reasonable inspection. PROSSER, *supra* note 3, at 386. Since the Act was designed to correct conditions before injuries occur, the general contractor should be responsible for hazardous conditions discoverable by such a reasonable inspection of the project. The Secretary's proposed guidelines, 41 Fed. Reg. 17,639 (1976), accords with the *Grossman* opinion as they allow

regard given both to the desire to provide labor with safe places of employment and the economic displacement resulting from too stringent requirements on business.[135] When dealing with serious violations of the Act, an employer's relevant workplace should be the entire project. Any employer whose employees have access to a danger likely to cause serious injury existing anywhere on the project should be cited regardless whether the firm created or controlled the hazard. Defining the "place of employment" in this manner accords with the OSHRC's *Annington-Johnson/ Grossman* rule.[136] When concerned with non-serious violations of the Act, the relevant workplace should be the area under each employer's control. An employer should not be in violation of the Act if his employees had access to dangers not likely to cause serious injury that were neither created nor controlled by the firm. This definition of the "place of employment" is supported by the Seventh Circuit'sholding in *Anning-Johnson I.*[137] As developed by the Second Circuit in *Underhill,*[138] however, creating and controlling firms should be culpable for both serious and non-serious violations occurring throughout the worksite as the duty to neither create nor control a hazard runs to all employees at the worksite and not just workers in a contractual relationship with the responsible firm.

By broadly defining the class of employees to which the creating and controlling firms owe a duty, and by defining the relevant workplace as the entire project for serious violations, courts can achieve Congress's goal of substantial employee protection from major injury. However, by limiting responsibility of employers for non-serious violations to the areas they control, wasteful expenditures and possible work stoppages could be avoided when only minimal employee injury is involved. This approach provides a realistic allocation of costs and benefits in applying the Act to multi-employer worksites.

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for the citing of the general contractor when a subcontractor's employee is exposed to a hazard.

[135] *Compare* Clarkson Constr. Co. v. OSHRC, 531 F.2d 451 (10th Cir. 1976) *with* Anning-Johnson Co. v. OSHRC, 516 F.2d 1081 (7th Cir. 1975).

[136] *See* Anning-Johnson Co., OSHD (CCH) ¶ 20,690, at 24,786 (OSHRC 1976); Grossman Steel & Aluminum Corp., OSHD (CCH) ¶ 20,691, at 24,791 (OSHRC 1976).

[137] *See* Anning-Johnson Co. v. OSHRC, 516 F.2d 1081 (7th Cir. 1975).

[138] *See* Brennan v. OSHRC (Underhill), 513 F.2d 1032 (2d Cir. 1975).