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Robert D. Moran

*United States Occupational Safety and Health Review Commission*

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# INTERPRETING THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

## Some Early Principles and Commentaries

Robert D. Moran\*

*Commissioner Moran expounds upon several early interpretations of the provisions of the Occupational Safety and Health Act of 1970 concerning the definition of what constitutes a "recognized hazard" under the General Duty Clause of the Act, the responsibility of employers for the unsafe acts of their employees, the establishment of what constitutes a "reasonable time" between an inspection and the issuance of a citation, the appropriateness of penalties, and the extent to which stipulations should be accepted by the Commission. He suggests that, while the Act is undergoing growing pains, several of its more important sections have been sufficiently litigated so as to provide guidelines for those subject to its coverage.*

## INTRODUCTION

Although employers will soon be entering their third year under the Occupational Safety and Health Act of 1970,<sup>1</sup> many of those employers subject to its coverage are still unaware of its requirements. This article will seek to review briefly the history and substance of this law, and will investigate some of the principles which have emerged from cases adjudicated thereunder, such as what constitutes a "recognized hazard," and what comprise the new responsibilities of employers.

Like the National Labor Relations Act<sup>2</sup> and the Fair Labor Standards Act,<sup>3</sup> its statutory kindred spirits of three decades ago, this new law was conceived amid legislative controversy even though there was general agreement on the need to alleviate the social and economic ills it was designed to cure.<sup>4</sup> The Occupational Safety and Health Act

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\* Mr. Moran, a member of the Massachusetts Bar, is Chairman of the United States Occupational Safety and Health Review Commission.

1. 29 U.S.C. § 651 (1970).

2. 29 U.S.C. § 151 (1970).

3. 29 U.S.C. § 201 (1970).

4. The National Labor Relations Act of 1935, ch. 372, § 1, 49 Stat. 449, the famous "Wagner Act," providing the first federal recognition of the right to organize and bargain collectively, protected the workers' discharge for such activities. The Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060, protected the workers' pocketbooks by providing for

of 1970<sup>5</sup> is essentially a compromise among the often diverse desires of organized labor, management, forces pushing for environmental improvements and government leaders whose purposes often diverge from those of nongovernment supporters. In its final legislative stages, two different bills emerged from the two Houses of Congress which were similar, yet differed in many important provisions. Senator Harrison Williams of New Jersey was closely identified with one of the bills,<sup>6</sup> while the other was guided through the House under the leadership of Representative William A. Steiger of Wisconsin.<sup>7</sup> The Act has since become appropriately known as the Williams-Steiger Occupational Safety and Health Act of 1970.<sup>8</sup>

The Act vested in the Secretary of Labor the obligation to enforce compliance with its requirements.<sup>9</sup> To discharge this responsibility, the Act provided him with an Assistant Secretary of Labor for Occupational Safety and Health,<sup>10</sup> who heads a section within the Department already well known by its acronym, OSHA (The Occupational Safety and Health Administration). He, in turn, is assisted by "compliance officers," who conduct inspections of workplaces, both in response to complaints and on their own initiative. At the end of 1972, OSHA had about 500 of these compliance officers at work throughout the country.

The Act further authorizes "the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce . . .," and creates "an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act."<sup>11</sup>

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a minimum hourly wage rate, mandatory overtime pay, and the prohibition of wage differentials by sex and age. With the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1970); the federal government has moved decisively to protect the workers' lives and limbs.

Congress has long recognized the need for minimum safety and health standards. However, the legislators either thought their scope of authority did not extend to the promulgation of such standards or feared the reactions of the businessmen who would be forced to spend to improve the working conditions for their employees. Thus, while the Walsh-Healey Act of 1936, ch. 881, § 1, 49 Stat. 2036, prohibited the federal purchase of items manufactured under "unsanitary or hazardous" working conditions, it did not forbid the conditions themselves. It was not until 1960 that safety and health standards were promulgated under it.

5. 29 U.S.C. § 651 (1970).

6. The Williams' bill, S. 2193, 91st Cong., 2d Sess. (1970), which had the solid support of organized labor, placed total responsibility in the field of occupational safety and health with the Secretary of Labor. The Secretary would have set standards, conducted the compliance inspections, and adjudicated all violations under this version.

7. H.R. 16785, 91st Cong., 2d Sess. (1970). This was the administration's bill which featured promulgation of safety and health standards by an independent board, compliance inspections by the Secretary, and adjudication by an independent commission.

8. 29 U.S.C. § 651 (1970).

9. Occupational Safety and Health Act § 8(a), 29 U.S.C. § 657(a) (1970) [hereinafter cited as OSHA].

10. *Id.* § 29(a)(2).

11. *Id.* § 2(b)(3), 29 U.S.C. § 651(b)(3).

It should be noted that the Review Commission is an independent agency created by § 12 of the Act and is a body exclusively exercising judicial functions, notwithstanding its placement in the executive, rather than the judicial branch.<sup>12</sup> The statute provides that this Commission shall be composed of three members,<sup>13</sup> each of whom is appointed by the President for a six year term.<sup>14</sup> The Chairman of the Commission is empowered to appoint Review Commission Judges, who hold terms of career tenure,<sup>15</sup> and who hear all cases entered in the Commission,<sup>16</sup> rendering the final decision in better than 90 percent of them.

In the statute, the Review Commission Judges are called "hearing examiners,"<sup>17</sup> a designation perhaps more appropriate for federal regulatory agencies than for a commission whose *sole* function is to adjudicate adversary proceedings.<sup>18</sup> As the proper title for persons engaged in this function is "judge," the Commission, in its first year of existence, exercised its authority<sup>19</sup> to make this title official.<sup>20</sup> The Commission presently has 42 judges who travel throughout the country in order to conduct all hearings in the community where the alleged violation took place.<sup>21</sup>

The Act imposes numerous requirements upon management, which are set forth in just two clauses, covering only seven lines of print in § 5(a) of the Act:

Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.<sup>22</sup>

Few employers are excluded from its coverage.<sup>23</sup>

Pursuant to the Act, the Secretary of Labor has already promulgated

12. *Id.* § 12(a), 29 U.S.C. § 661(a).

13. *Id.*

14. *Id.* § 12(b), 29 U.S.C. § 661(b).

15. *Id.* § 12(e), 29 U.S.C. § 661(d).

16. *Id.* § 12(j), 29 U.S.C. § 661(i).

17. *Id.* §§ 12(e), (j), (k), 29 U.S.C. §§ 661(d), (i), (j).

18. *Id.* § 12(j), 29 U.S.C. § 661(i).

19. 5 U.S.C. § 5105(c) (1970).

20. 37 Fed. Reg. 16,787 (1972). See also OSHRC Release No. 15 (Mar. 23, 1972).

21. OSHA § 12(d), 29 U.S.C. § 661(e) (1970). Such is the case if adequate courtroom facilities are available there; but if not, then the nearest available facility appropriate for the conduct of a hearing is used.

22. OSHA § 5(a), 29 U.S.C. § 654(a) (1970).

23. The only workers not covered by OSHA are those whose jobs are covered by other federal legislation such as that regulating coal mining: Coal Mine Health and Safety Act, 30 U.S.C. § 801 (1970); and atomic energy: Atomic Energy Act of 1954, 42 U.S.C. § 2021 (1970).

numerous occupational safety and health standards, and many more will undoubtedly be forthcoming.<sup>24</sup>

If one of OSHA's compliance officers discloses what is believed to be a violation of the Act, the employer will, within a reasonable time, receive two documents from the Labor Department: (1) a citation describing the nature of the violation by referring to the particular "provision of the Act, standard, rule, regulation or order violated and fixing a reasonable time for the abatement of the violation . . ."<sup>25</sup>; and (2) a notification of the proposed monetary penalty, which will be stated as a sum certain.<sup>26</sup>

Upon receipt of these two documents, the employer has two alternatives: (1) correct the violation and pay the penalty as proposed; or (2) contest the issuance of the citation, the amount of the proposed penalty, or both. If the employer should decide to contest the citation and proposed penalty, he must take affirmative action by notifying the Secretary within 15 working days.<sup>27</sup> Should the employer fail to act within that time "the citation and the assessment, as proposed, shall be deemed a final order . . . and not subject to review by any court or agency,"<sup>28</sup> (which has, in fact, happened in 95 percent of the more than 40,000 enforcement actions initiated to date under this Act).

However, when an employer takes affirmative action within 15 working days to dispute the Labor Department's action against him, he thereby initiates a contest to the enforcement action. Since there has been no hearing (merely an allegation of a violation coupled with a proposed penalty), the employer's action putting them in dispute is called, for the purposes of this Act, a Notice of Contest.

As a statutory matter, the Notice of Contest can merely be a letter from the employer to the Secretary of Labor stating, "I contest the action you have initiated against me."<sup>29</sup> However, procedurally, there is a little more to it. The employer's letter must be sent to the Area Director of the Labor Department's Occupational Safety and Health Administration (OSHA),<sup>30</sup> whose name and address will be listed on both the citation and the proposed penalty, the latter informing the employer of exactly what he must do to contest. Then, the employer must notify his own employees that he is contesting the Labor Department's action. This has been imposed pursuant to the Rules of Procedure of the Occupational Safety and Health Review<sup>31</sup> Commission in order to effectuate the last sentence of § 10(c) of the Act:

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24. OSHA § 6(a), 29 U.S.C. § 655(a) (1970).

25. *Id.* § 9(a), 29 U.S.C. § 658(a).

26. *Id.* § 10(a), 29 U.S.C. § 659(a).

27. *Id.*

28. *Id.*

29. *Id.* § 10(c), 29 U.S.C. § 659(c).

30. 29 C.F.R. § 1903, 17(a) (1972).

31. OSHA § 12(g), 29 U.S.C. § 661(f) (1970).

"The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection."<sup>32</sup>

Once the OSHA Area Director receives the employer's Notice of Contest, he will mail it directly to the Executive Secretary of the Review Commission together with a copy of all citations and penalty proposals which the employer is contesting.<sup>33</sup> A docket number is then assigned to the case, and the parties are notified.

Henceforth, the procedure follows the traditional system for the hearing of a nonjury civil case: the Commission notifies all parties of the docketing of the case, the Secretary of Labor must file a formal Complaint within 20 days<sup>34</sup> of his receipt of the Notice of Contest, and the employer's Answer is due within 15 days<sup>35</sup> after receipt thereof. After completion of the pleadings, the case is heard as soon as a judge becomes available, unless a pre-hearing conference is decided upon.<sup>36</sup>

Hearings are conducted in accordance with the Administrative Procedure Act and the Federal Rules of Civil Procedure.<sup>37</sup> The burden of proof is on the Secretary of Labor,<sup>38</sup> and there is no presumption of regularity in favor of either the Labor Department's citation or its penalty proposal.

When the judge decides a case, there is no statutory right to review by the Commission. His decision will automatically become a final order 30 days after it is filed, unless, within such period, any one of the three members exercises his right of discretionary review.<sup>39</sup> However, since the Act provides that all final orders of the Commission may be appealed to the appropriate United States Court of Appeals,<sup>40</sup> it does not matter whether the final order is based on the decision of the Review Commission Judge or the action of the members of the Commission themselves after the exercise of their review rights.

Current figures indicate that the Commission has only exercised its discretionary right of review in approximately ten percent of the decisions filed with it by the judges. But when this does occur, the

32. *Id.* § 10(c), 29 U.S.C. § 659(c).

33. *Id.*

34. 29 C.F.R. § 2200.33(a)(1) (1972). The Rules of Procedure of the Occupational Safety and Health Review Commission became effective with their publication in the *Federal Register* on September 28, 1972. 37 Fed. Reg. 20,237. They are codified in volume 29 of the *Code of Federal Regulations*. 29 C.F.R. §§ 2200.1-110 (1972) [hereinafter cited as Rule]. (In this article the codification prefix "2200" which precedes each rule number as it is published in the *Federal Register* and the *Code of Federal Regulations* has been omitted.)

35. Rule 33(b)(1).

36. Rule 51.

37. OSHA § 10(c), 29 U.S.C. § 659(c) (1970).

38. *Id.*; Rule 73(a).

39. OSHA § 12(j), 29 U.S.C. § 661(i) (1970).

40. *Id.* § 11(a), 29 U.S.C. § 660(a).

parties are notified and given the opportunity to submit briefs and exceptions. Oral arguments have never been scheduled in any proceeding, the Commission basing its decision on the briefs and the record made before the Review Commission Judge. Although any one of the three members can exercise his statutory right of discretionary review, a majority of the members is needed to decide a case.

Some principles of law are already beginning to emerge from the first 500 decisions rendered by the Review Commission.<sup>41</sup> These include: the definition of what constitutes a "recognized hazard" under the General Duty Clause of the Act; the responsibility of employers for unsafe acts of their employees; the establishment of what constitutes a "reasonable time" between an inspection and the issuance of a citation; the appropriateness of penalties; and the extent to which stipulations (particularly with regard to penalties) should be accepted by the Commission.

#### "RECOGNIZED HAZARD" AND THE GENERAL DUTY CLAUSE

The General Duty Clause, § 5(a)(1), reads as follows:

Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;<sup>42</sup>

The General Duty Clause, contained above, was the result of legislative compromise, having both ardent supporters and vigorous opponents. The clause was inserted because there was general agreement among the bill's proponents that not every job safety and health situation could be covered by a specific standard. It was assumed that the clause would be invoked sparingly<sup>43</sup> in enforcement procedures, and that the Secretary would rely to the greatest extent possible on specific standards. While that, for the most part, has proven to be the case, there still have been a relatively small number of employers whom the Secretary has charged with violations of the General Duty Clause.

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41. A caveat is in order at this point. There are some who take the position that the opinions of its judges, which are allowed to become final by the failure of the Commission to exercise its 30 day option to certify a case for review, have no precedential value on the grounds that when the Commission permits the judge's order and decision to become final, it adopts the order only because it favors the result. The statute, however, specifies that decisions which become final in this way become the final order of the Commission. OSHA § 12(j), 29 U.S.C. § 661(i) (1970).

42. OSHA § 5(a)(1), 29 U.S.C. § 654(a)(1) (1970).

43. 116 CONG. REC. 42,206 (1970).

Obviously, the problem of the General Duty Clause arises from the vagueness of "recognized hazards." Congressman Steiger, speaking of the bill that emerged from the House-Senate conference said that: "Such hazards are the type that can be readily detected on the basis of the basic human senses. Hazards which require technical or testing devices to detect . . . are not intended to be within the scope of the general duty requirement."<sup>44</sup>

Representative Daniels of New Jersey maintained that:

A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is 'recognized' is a matter for objective determination; it does not depend on whether the particular employer is aware of it.<sup>45</sup>

A reasonable interpretation would seem that, to establish a violation of this clause, the evidence of record must show that the condition cited was readily determined by unaided human senses, and that the condition is recognized as a hazard likely to cause death or serious physical injury by reasonable and prudent people, not merely by safety experts or OSHA inspectors.

In most of the few cases decided under this clause, there was evidence that the employer either admitted that he knew his working conditions constituted a recognized hazard, or that fact had been affirmatively brought to his attention in some manner prior to the time he was charged. In two instances where it was my opinion that this was not the case, I found it necessary to dissent from the majority opinion which found the employer in violation.

In *Secretary of Labor v. Hidden Valley Corporation of Virginia*,<sup>46</sup> it was found that the employer, while in the process of digging trenches for a sewer pipe, allowed employees to work in a trench ten feet deep which had not been shored or sloped. The trench collapsed, killing two persons, which precipitated a citation of Hidden Valley for violating the General Duty Clause.

The judge made 15 findings of fact relative to the trench collapse, but in none of them did he find that the condition of the trench constituted a *recognized* hazard. He found that working in such a trench constituted a "hazard" and that such a trench "is considered unsafe,"<sup>47</sup> yet, he ruled (and a majority of the Commission agreed) that the employer had violated the General Duty Clause.

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44. *Id.*

45. *Id.* at 38,377.

46. Occupational Safety and Health Review Commission [hereinafter cited as OSHRC] Dock. No. 11, 2 CCH EMPLOYMENT SAFETY AND HEALTH GUIDE [hereinafter cited as 2 CCH EMPL. S. & H.G.] ¶ 15,035 (Feb. 8, 1972).

47. Judge's Report at 4.

I dissented, feeling that if merely establishing that a certain condition constitutes a "hazard" is sufficient to sustain a violation of § 5(a)(1) of the Act, there would be no need for the Labor Department ever to cite an employer under any other provision. It appeared that the purpose of the Congress had been ignored, and that the Commission's majority had converted a precisely-worded legislative enactment into a sweeping general requirement which endangered the usefulness of the detailed standards promulgated by the Secretary.<sup>48</sup>

Again, in *Secretary of Labor v. National Realty and Construction Co.*,<sup>49</sup> it did not appear to me that the facts established that the violation with which the employer was charged constituted a *recognized* hazard. The facts there indicate that in September of 1971, one of National Realty's foremen was riding on the "running-board" of a front-end loader at a construction site. As the loader descended a dirt ramp, the engine stalled; the loader continued down the ramp, overturned, and fatally injured the foreman. Shortly thereafter, the Secretary of Labor cited National Realty for a violation of the General Duty Clause.<sup>50</sup> The Review Commission Judge accepted the compliance officer's statement that "the general safety requirements of the Corps of Engineers prohibited riding on equipment . . ." <sup>51</sup> as sufficient evidence to find that such an act constituted a recognized hazard likely to result in serious injury or death, a finding with which the majority again agreed.

To my mind, this was clearly contrary to the intention of Congress. This decision said, in essence, that if general safety requirements of some standard-establishing authority prohibit an act, then that act should be assumed to be a recognized hazard. Obviously, as there are many acts prohibited by the general requirements of the Corps of Engineers in the interests of employee safety, by the standards promulgated by the Secretary of Labor, and by those of many other authorities, it would be clearly unreasonable to say that every act prohibited in the interests of safety constitutes a recognized hazard "causing or likely to cause death or serious physical injury."<sup>52</sup>

#### EMPLOYER RESPONSIBILITY FOR EMPLOYEE ACTS AND OMISSIONS

The Act exhorts employees to "comply with Occupational Safety and Health standards,"<sup>53</sup> but it places the real burden of providing a

48. OSHRC Dock. No. 11, 2 CCH EMPL. S. & H.G. ¶ 15,035, at 20,048-49.

49. OSHRC Dock. No. 85, 2 CCH EMPL. S. & H.G. ¶ 15,188 (Sept. 6, 1972).

50. *Id.*

51. *Id.* at 20,270.

52. OSHA § 5(a)(1), 29 U.S.C. § 654(a)(1) (1970).

53. *Id.* § 5(b), 29 U.S.C. § 654(b).

safe and healthful workplace on the employer.<sup>54</sup> Since there are no enforcement procedures or penalties for unsafe acts by employees, only the employer faces the punitive teeth of the Act.<sup>55</sup> Further, because the Act does not restrict violations to unsafe acts authorized or permitted by the employer, he can also be found in violation if he knew or could have known "with the exercise of reasonable diligence"<sup>56</sup> of an unsafe practice.

While the Act attempts to make it clear to employers that they have final responsibility for compliance, it would be unreasonable to assume that the employer is necessarily in violation of the Act whenever one of his employees fails to comply with a standard. For example, in *Secretary of Labor v. Standard Glass Co.*,<sup>57</sup> the judge ruled that the employer was not in violation for an isolated instance in which two of its employees failed to wear protective headgear in a "hard hat" area. On review, the Commission affirmed, stating:

An employer cannot in all circumstances be held to the strict standard of being an absolute guarantor or insurer that his employees will observe all of the Secretary's standards at all times. An isolated brief violation of a standard by an employee which is unknown to the employer and is contrary to both the employer's instructions and a company work rule which the employer has uniformly enforced does not necessarily constitute a violation of section 5(a)(2) of the Act by the employer.<sup>58</sup>

As was noted in *National Realty*,<sup>59</sup> the Commission found that the isolated act of the foreman in riding on the loader violated a company rule that had been the responsibility of the employer to enforce.<sup>60</sup> However, in view of the firm's history of not allowing anyone to ride on such equipment, there seemed to me no way in which the employer, in exercising "reasonable diligence," could have known about the act. Accordingly, I felt that there was no way the employer could have been aware of the unsafe act and taken measures to prevent it, short of assigning a supervisor to follow the foreman around during his working hours.<sup>61</sup>

Indeed, in *Secretary of Labor v. Hansen Brothers Logging Co.*,<sup>62</sup> the Commission adopted a rationale similar to that which I had espoused in

54. *Id.* § 5(a), 29 U.S.C. § 654(a).

55. *Id.* § 17, 29 U.S.C. § 666.

56. *Id.* § 17(k), 29 U.S.C. § 666(j).

57. OSHRC Dock. No. 259, 2 CCH EMPL. S. & H.G. ¶ 15,146 (June 26, 1972).

58. *Id.* at 20,219.

59. OSHRC Dock. No. 85, 2 CCH EMPL. S. & H.G. ¶ 15,188 (Sept. 6, 1972).

60. *Id.*

61. *Id.* at 20,268-71 (dissent).

62. OSHRC Dock. No. 141, 2 CCH EMPL. S. & H.G. ¶ 15,258 (Oct. 13, 1972). Respondent operated a small logging business employing about five people. In the operation of the business, it was necessary to load logs onto trucks with a crane-like log-loading machine

*National Realty*.<sup>63</sup> There, the Commission, in overruling the Review Commission Judge, stated:

The record shows that respondent's owner gave specific oral instructions to its employees to stay clear of the loading area while the equipment was in motion. The hazard was obvious. Respondent's employees were repeatedly reminded of the danger involved and were told to stay out unless they were instructed to approach the area after the machinery had been stopped. There is nothing in the record to show that respondent's owner knew or reasonably should have known that the deceased employee would disobey these instructions. In the presence of these conditions, and because of the nature of the operation, to require respondent to provide one-on-one supervision of its employees would place respondent under the unreasonably burdensome duty of having to establish the whereabouts of each of its employees prior to every operation of its equipment.<sup>64</sup>

However, the Commission has barely begun to move into this extremely difficult area. We are just beginning to ask the questions: answers, if there are any, will come only after an arduous struggle with Gordian complexities. Quare: To what extent is the employer responsible for the apparently negligent acts of his employees? Can the employer's duty of care be reduced or alleviated by providing his employees with detailed, mandatory safety instructions? Can the employer's responsibility be limited at all, or is he to be responsible for the unsafe acts and omissions of his employees under all but the most extraordinary of circumstances? Can rigid guidelines be established to define employer responsibility, or must an ad hoc determination be made? As the Commission rules on cases involving these questions, it is hoped that at least rudimentary guidelines will be established.

#### REASONABLE TIME BETWEEN INSPECTION AND ISSUANCE OF CITATION

The Act is vague with regard to the period of time the Secretary of Labor has to issue his citation after a job safety and health inspection. The Act requires merely that the Secretary "shall with reasonable promptness issue a citation to the employer,"<sup>65</sup> and may not issue one

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that would rotate through an arc of approximately 180 degrees during the loading operation. An employee, apparently having been struck by part of the machine, was killed. The record showed that the respondent had repeatedly warned his employees to stand clear of the area while the machine was in operation because of the obvious hazard it presented.

63. OSHRC Doc. No. 85, 2 CCH EMPL. S. & H.G. ¶ 15,188, at 20,268-71 (Sept. 6, 1972) (dissent).

64. Secretary of Labor v. Hansen Brothers Logging Co., OSHRC Dock. No. 141, 2 CCH EMPL. S. & H.G. ¶ 15,258, at 20,341 (Oct. 13, 1972).

65. OSHA § 9(a), 29 U.S.C. § 658(a) (1970).

subsequent to the passage of six months following the alleged violation.<sup>66</sup> The Secretary has, on at least one occasion, taken almost 80 days of "reasonable" time between the inspection and the issuance of a citation,<sup>67</sup> but that extent of delay was not intended by Congress. The "Statement of the Managers of Part of the House," commenting on the conference committee from which the Act emerged, addresses this point:

The Senate bill provided that if, upon inspection or investigation, the Secretary or his authorized representative "determines" that an employer has violated mandatory requirements under the act, he shall "forthwith" issue a citation. The House amendment provided that if on the basis of an inspection or investigation the Secretary "believes" that an employer has violated such requirements, he shall issue a citation to the employer. The conference report provides that if the Secretary "believes" that an employer violated such requirements he shall issue the citation with "reasonable promptness." In the absence of exceptional circumstances any delay is not expected to exceed 72 hours from the time the violation is detected by the inspector.<sup>68</sup>

The Commission has not, as yet, issued any decision regarding "reasonable time," but the manifestly clear intent of Congress is for the Commission to hold the Secretary of Labor to the 72 hour limit in routine cases. Thus, failure of the Secretary to issue a citation within 72 hours of an inspection should ordinarily be a strong argument for dismissal of any citation resulting therefrom.

#### APPROPRIATENESS OF PENALTIES

The area in which the Commission has established the firmest guidelines is that of penalties. At the outset, a point should be made that has proven very difficult to establish: the Labor Department merely *proposes* penalties,<sup>69</sup> while the power to *assess* penalties rests with the Review Commission. Only where an employer fails to file timely Notice of Contest<sup>70</sup> does the OSHA penalty proposal (no matter how unjust) become final, as the Commission and all other courts and

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66. *Id.* § 9(c), 29 U.S.C. § 658(c).

67. In a case still in review, *Secretary of Labor v. Plastering, Inc.*, OSHRC Dock. No. 1037, *rev'd ordered*, Oct. 31, 1972, the inspection took place on March 21, 1972; and no citation was issued until June 6, 1972. There are a number of other cases where the lag between inspection and citation is one of the issues to be decided in which shorter, but still unreasonably long, delays occurred.

68. 160 CONG. REC. 42,200 (1970).

69. OSHA § 10(b), 29 U.S.C. § 659(b) (1970).

70. *Id.*

agencies<sup>71</sup> are thereby excluded from the process. However, when a contest is filed, the Secretary's penalty proposal should be accorded no more weight than is given his evidence and argument on the alleged violation. If the Department of Labor establishes to the satisfaction of the Review Commission Judge that the employer has indeed violated the Act, the next question should *not* be whether the Secretary's penalty proposal is appropriate, but rather, what penalty, if any, is appropriate for the infraction.

During its first year and a half, there were a number of cases in which the Commission differed with OSHA on penalties. The first of these cases arose out of the OSHA Compliance Operations Manual,<sup>72</sup> which provided a formula to guide its people in arriving at an amount to be proposed as a penalty.<sup>73</sup> While § 17 (j) of the Act provided that, in assessing civil penalties, the Commission shall give "due consideration to the appropriateness of the penalty with respect to the size of the business . . . , the gravity of the violation, the good faith of the employer, and the history of previous violations,"<sup>74</sup> the formula called for calculations which began with the maximum permissible penalty, then applied varying percentage discounts for only three of the four penalty assessment criteria set forth above:<sup>75</sup> 20 percent for the employer's history of previous violations, ten percent for the size of the employer's business, and 20 percent for his "good faith."

This formula was challenged in *Secretary of Labor v. Nacirema Operating Co.*,<sup>76</sup> where the Commission observed that, although Congress had provided for a range of penalties from a minimum of one cent to a maximum of \$1000,<sup>77</sup> this formula always resulted in the administration of a minimum fine of \$500. The Commission accordingly rejected the formula, in that it clearly presented both the danger of an excessive and burdensome penalty for a violation of minimum gravity, as well as the possibility (for different reasons) of a nearly insignificant penalty for a violation of maximum gravity. Further, it was apparent that the Secretary had not only superimposed arbitrary percentage factors, but had given no consideration whatsoever to the gravity of the violation. Without more, the Commission could not, in good conscience, accept a proposed penalty which had not been based upon "due consideration" of the statutory criteria.

As the Commission's review in *Nacirema* was limited to the facts in that particular case, the Commission could not make a rule requiring the Secretary to abandon forever the formula. Whereas the Secretary

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71. *Id.*

72. See DEP'T OF LABOR, OSHA COMPLIANCE OPERATIONS MANUAL (rev. 1971).

73. *Id.* at x1-2 to x1-4.

74. OSHA § 17(j), 29 U.S.C. § 666(i) (1970).

75. *Id.*

76. OSHRC Dock. No. 4, 2 CCH EMPL. S. & H.G. ¶ 15,032 (Feb. 7, 1972).

77. OSHA § 17, 29 U.S.C. § 666 (1970).

must accept the Commission's ruling in each individual case. he is not compelled by law to apply that ruling to subsequent cases. This situation clearly illustrates that the Review Commission is not a substantive rule-making body, but one exercising a judicial function, irrespective of where it is placed in the federal government.

Following *Nacirema*, the Commission reviewed *Hidden Valley*,<sup>78</sup> in which OSHA proposed a penalty of \$600 for a serious violation of the General Duty Clause<sup>79</sup> that was affirmed by the Commission's judge as "not unreasonable." The Commission pointed out that considerations involved in one or more of the four statutory criteria<sup>80</sup> may well override all of the others in relation to the assessment of a penalty. In this case, it found that one of them, "[t]he gravity of the violation charged,"<sup>81</sup> was, as the decision termed it, "of signal importance."<sup>82</sup> On that basis, the proposed penalty was found to be inadequate, and the maximum of \$1000 was imposed.

After *Hidden Valley*, the Commission decided a number of cases in which the Secretary had issued citations for minor violations of safety and sanitation standards in which the proposed penalties were so small (some less than a parking ticket) that they clearly lacked deterrent effect. In *Secretary of Labor v. J. E. Chilton Millwork and Lumber Co.*,<sup>83</sup> for example, the Commission served notice that it believed that "[r]elatively minor monetary penalties do little to effectuate [the objectives of the Act]. We, therefore, will look carefully at cases involving such proposed penalties."<sup>84</sup> Not only does this sort of minor penalty do little toward achievement of a safe and healthful place of employment for all workers, but it may have exactly the opposite effect. As was stated in *Secretary of Labor v. General Meat Co.*:<sup>85</sup>

The Commission believes that the purposes and policies of the Act are better served by the encouragement of immediate abatement through other means than the proposal of small monetary penalties which do little to achieve voluntary compliance . . . . It has been the Commission's experience that the proposal of small penalties in these circumstances is often interpreted by employers as harassment. This understandable reaction of employers frequently results in the filing of a contest with its consequent tolling of the abatement period. Such contests tend to interfere with the swift accomplishment of the goals of the Act.<sup>86</sup>

78. OSHRC Dock. No. 11, 2 CCH EMPL. S. & H.G. ¶ 15,035 (Feb. 8, 1972).

79. OSHA § 5(a)(1), 29 U.S.C. § 654(a)(1) (1970).

80. *Id.* § 17(j), 29 U.S.C. § 666(i).

81. *Id.*

82. OSHRC Dock. No. 11, 2CCH EMPL. S & HG ¶ 15,035, at 20,048 (Feb. 8, 1972).

83. OSHRC Dock. No. 123, 2 CCH EMPL. S. & H.G. ¶ 15,069 (May 15, 1972).

84. *Id.* at 20,121.

85. OSHRC Dock. No. 250, 2 CCH EMPL. S. & H.G. ¶ 15,098 (June 20, 1972).

86. *Id.* at 20,156.

While there is nothing at all wrong with a penalty proposal of zero dollars and zero cents where the purposes of the Act are achieved by full abatement,<sup>87</sup> this should not be taken to mean that the Commission will vacate all small penalty proposals for minor violations as a matter of course. Thus, in the recent case of *Secretary of Labor v. Hydroswift Corp.*,<sup>88</sup> the Review Commission endorsed the action of one of its judges in assessing small penalties for minor violations. The Commission's decision stated:

We hold that the assessment of small monetary penalties for non-serious violations having the level of gravity of the violations found in this case (unguarded, opensided floors, two fire hazard violations, nine instances of failure to ground power tools) effectuates the purpose of this Act. Penalties of this caliber serve to remind all employers that their primary responsibility under the Act is adherence to its protective mechanisms. Failure to impose penalties relating to violations with higher levels of gravity serves only to restrain the Act's effective operation and hinder its function to reduce the hazards of the workplace for all employees.

... We stress that this caution in the face of seemingly minor violations reflects a strong intent on our part to see that violations of this type are not encouraged by the failure to assess penalties when penalties are proper under the circumstances.<sup>89</sup>

Although the Commission has established a number of guidelines in its early concentration on the area of the appropriateness of penalties, further refinement and clarification is still in order. The frequency of Commission decisions regarding penalties, however, will doubtless diminish as the members turn to other areas where vague outlines of law need the sharp focus of precedent.

### STIPULATIONS AND PRE-HEARING SETTLEMENTS

The Act grants the Secretary the opportunity to compromise, settle, and mitigate.<sup>90</sup> Section 10(c) requires that hearings of the Commission be conducted in accordance with 5 U.S.C. § 554, which provides, *inter alia*, for a hearing "to the extent that the parties are unable so to

87. This view is supported by Senator Williams of New Jersey, a co-author of the Act. In the course of responding to employer criticism of citations on the first inspection, he told the Senate on September 15, 1972: "This, of course, does not mean that first-instance penalties should be imposed in every case, nor does the Act require that penalties be assessed—at any time—for nonserious violations." 118 CONG. REC. 15,047 (daily ed. Sept. 15, 1972).

88. OSHRC Dock. No. 591, 2 CCH EMPL. S. & H.G. ¶ 15,275 (Oct. 27, 1972).

89. *Id.* at 20,368.

90. OSHA § 6(e), 29 U.S.C. § 655(e) (1970).

determine a controversy by consent . . . ."<sup>91</sup> It would seem that since the Secretary's good faith in enforcing the Act is unquestioned, the Commission should, in the absence of fraud, accept settlements reached by the Secretary and the employer without involving itself with issues not raised by the stipulation. This type of sua sponte involvement occurred in *Secretary of Labor v. American Home Products (Ekco Housewares Co.)*,<sup>92</sup> where the employer entered into a stipulation in which it agreed to withdraw Notice of Contest and pay the assessment as proposed, without admitting the alleged violations. The Review Commission Judge accepted the settlement, however, on further review, the majority of the Commission determined that the record transmitted by the judge indicated that the violation for which the respondent was cited was possibly of greater gravity than the judge had determined.<sup>93</sup> Accordingly, the Commission issued an order to show cause, in which they invited the parties to adduce additional evidence bearing on the appropriateness of the proposed penalty.

I disagreed with the majority on the theory that when the employer does not contest the amount of the proposed penalty, the Commission should not interfere. Although § 17(j) of the Act gives to the Commission the authority to "assess all civil penalties,"<sup>94</sup> I reasoned that that section is not in conflict with the Act's encouragement to achieve settlement whenever possible. As I stated in the dissent:

The sure and speedy concessions, the abatement of the hazard and the saving of the Commission's and the Secretary's resources which a settlement achieves outweigh, in my mind, the possibility that an employer may be made to smart more appropriately by a heavier or more propitious penalty.

Nor should the Commission fret about "whether the stipulated disposition is consistent with the provisions of the Act and accords with the public interest." In my opinion, the Commission does not have sole or even primary responsibility in this area. The Secretary of Labor's responsibilities include the determination of employer compliance with the Act (Sec. 9(a)) and he also has both inherent authority, as well as implicit authority within the Act itself, to compromise, mitigate and settle actions initiated by him (see, for example, Sec. 6(e)). Of course, he may also conduct a subsequent inspection at any time and initiate such action as he deems then to be warranted. In view of the Secretary's enormous responsibility and authority for occupational safety and health, I find his assent to the stipulated settlement of this case most persuasive.<sup>95</sup>

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91. Administrative Procedure Act, 5 U.S.C. § 554(c)(2) (1970).

92. OSHRC Dock. No. 3, 2 CCH EMPL. S. & H.G. ¶ 15,025 (Nov. 16, 1971).

93. *Id.* at 20,021-22.

94. OSHA § 17(j), 29 U.S.C. § 666(i) (1970).

95. OSHRC Dock. No. 3, 2 CCH EMPL. S. & H.G. ¶ 15,025, at 20,022 (Feb. 16, 1971).

After considering the responses to the order to show cause, the Commission decided to permit the employer to withdraw without change in the penalty previously agreed upon by the parties.

### CONCLUSION

From its nascence, the Occupational Safety and Health Act has had critics assailing it for what they see as its expansive imprecision. Despite the differing opinions of its members, the Review Commission has and will continue to strive to resolve and clarify those areas where ambiguities exist in the Act. It is hoped that this article's discussion of the Act's legislative history and the Commission's interpretations of it will serve to enlighten those unacquainted with its provisions and to familiarize the employer with its requirements and consequences. While the scope of this article does not encompass all areas and problems associated with the Act, it does provide an occasional glimpse through the obfuscation with which the Act has been surrounded by some of its detractors.