

OSHA: EMPLOYER LIABILITY FOR EMPLOYEE VIOLATIONS

Hailed as a “safety bill of rights”¹ for America’s workers, the Occupational Safety and Health Act of 1970 (OSHA)² was enacted to protect working men and women from job-related safety and health hazards.³ The Act penalizes employers when hazardous conditions are found in the workplaces they control. There is, however, significant confusion in the case law concerning the extent to which employers will be held liable when OSHA violations result from the conduct of their employees. This Note will examine the development and application of the criteria which have been applied in employee misconduct cases and present some guidelines for employers to follow in order to ensure their compliance with the Act.

THE ACT: SOURCE OF THE PROBLEM

Employers⁴ are subject to two duties under OSHA: first, they have the “general duty” to provide a work environment that is free of “recognized hazards” which are causing or are likely to cause death or serious injury; and second, they have the “specific duty” to comply with specific occupational safety and health standards promulgated by the Secretary of Labor.⁵

THE FOLLOWING CITATION WILL BE USED IN THIS NOTE:

SUBCOMM. ON LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (Comm. Print 1971) [hereinafter cited as LEGISLATIVE HISTORY].

[Editor’s Note: all cases decided by the Occupational Safety and Health Review Commission (OSHRC) referred to in this Note are cited to the Occupational Safety and Health Cases (OSHC) section of the BNA Occupational Safety and Health Reporter (OSH REP. (BNA)). Parallel OSHC cites are also given for federal courts of appeals decisions for the convenience of the reader.]

1. LEGISLATIVE HISTORY at iii.
2. 29 U.S.C. §§ 651-78 (1970).
3. Congress’ declared purpose was “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . .” 29 U.S.C. § 651(b) (1970). Congress acted in response to a perceived increasing trend of work-related deaths, injuries and diseases and the inadequacy of state regulatory efforts. *See* S. REP. NO. 91-1282, 91st Cong., 2d Sess. 2-4 (1970), reprinted in LEGISLATIVE HISTORY at 142-44. It was found that some 14,500 persons died annually in industrial accidents and another 2.2 million were disabled. *Id.* Congress estimated that 390,000 new cases of occupational disease occurred each year. *Id.*
4. An employer is defined as “a person engaged in a business affecting commerce who has employees” but does not include federal, state or local governments. 29 U.S.C. § 652(5) (1970). Allocation of responsibility has been a problem when more than one employer has control of a workplace. *See generally* Note, *OSHA and Multi-Employer Liability: A Discussion of Anning-Johnson Co. v. OSHRC*, 62 VA. L. REV. 788 (1976).
5. 29 U.S.C. § 654 (1970) provides that:
 - (a) Each employer—
 - (1) shall furnish to each of his employees employment and a place of employ-

The Secretary of Labor is charged with enforcement of the Act and may issue citations to employers for violations of either specific standards or the general duty clause.⁶ If a citation is challenged, the employer is entitled to an administrative hearing.⁷ The Administrative Law Judge's determination is then subject to review by the three-member Occupational Safety and Health Review Commission (the "Commission"),⁸ and Commission orders may be appealed to the courts of appeals.⁹

OSHA's contradictory treatment of employee duties has resulted in substantial uncertainty regarding an employer's legal responsibility for violations caused by his employees. Occupational safety necessarily requires cooperative efforts by employer and employee: employee conduct can contribute to hazardous working conditions just as easily as employer neglect, and both the employer and employee must be equally safety-conscious to produce a hazard-free working environment. Congress, recognizing this need for cooperation, imposed on employees a duty to comply with OSHA standards issued by the Secretary.¹⁰ OSHA's enforcement section, however, provides that only *employers* may be cited for violations of the Act¹¹—no sanctions are provided which run against employees.¹² Although the duty placed on employees is largely meaningless because it is unenforceable, it appears that Congress intended this precise result.¹³

While employers are thus left with the "final responsibility for compliance with [OSHA's] requirements,"¹⁴ the ambiguity of the Act itself

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- ment 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.

Section 654(a)(1) is usually called the "general duty" clause, section (a)(2) the "specific duty" clause.

6. 29 U.S.C. § 658 (1970). A citation becomes final unless the employer contests it (and any proposed penalty) within 15 days. *Id.* § 659(a), (b).

7. *Id.* § 659(c). For a discussion of the Act's penalty sections, see notes 15-21 *infra* and accompanying text.

8. 29 U.S.C. §§ 659, 661 (1970).

9. *Id.* § 660(a), (b). For an expanded discussion of the structure of the Act, and the enforcement and review procedures under it, see Hunt, *The Elusive Burden of Proof Under the Occupational Safety and Health Act of 1970*, 30 Sw. L. J. 693, 693-99 (1976).

10. 29 U.S.C. § 654(b) (1970) provides: "Each employee shall comply with occupational safety and health standards and all rules, regulations and orders pursuant to this Act which are applicable to his own actions and conduct."

11. 29 U.S.C. § 658 (1970) provides: "If, upon inspection or investigation, the Secretary . . . believes that an *employer* has violated a requirement of [the Act] he shall . . . issue a citation to the *employer*" (emphasis added).

12. For a careful analysis rejecting the argument that authority to cite employees may be implied from the Act, see *Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541, 553-54 [4 OSHC 1061, 1070-71] (3d Cir. 1976).

13. Apparently, neither labor nor management wanted the government in the business of disciplining employees, and both lobbied against authorization to cite employees. See *id.* at 554 n.18 [4 OSHC at 1070 n.18].

14. S. REP. NO. 91-1282, *supra* note 3, at 10, LEGISLATIVE HISTORY at 150. "The committee

makes it unclear whether that responsibility includes strict liability for violations caused by employee misconduct. Employers cited for OSHA violations are subject to statutory penalties which are assessed according to the nature of the violation. A fine is mandatory for "serious" violations, and non-mandatory fines are provided for "willful" and for "non-serious" violations.¹⁵ A notice in lieu of citation may also be issued for de minimus violations which have no direct relation to safety or health.¹⁶

Under the statute, a "serious" violation exists if it is substantially probable that death or serious injury could result from a hazard, "unless the employer did not and could not with the exercise of reasonable diligence, know of the presence of the violation."¹⁷ A critical question arises as to whether a similar requirement of actual or constructive knowledge must be implied as an element of a non-serious violation, which is nowhere defined. In the leading case of *Brennan v. OSHRC (Alsea)*,¹⁸ the Ninth Circuit answered that question in the affirmative. Relying on a structural analysis of OSHA and its policies, the court found that the Act considered as a whole disclosed a congressional intention that "violation" have a uniform meaning throughout the Act and that the only difference between violations of a serious or non-serious nature is the mandatory or permissive nature of the penalty.¹⁹ It would have been consistent with this analysis to find that the uniform meaning of violation is mere non-compliance with the duties imposed by the Act, and that a non-serious violation may exist even if an employer had no actual or constructive knowledge of its presence; however, the *Alsea* court rejected this construction as contrary to the Act's remedial and preventive purposes. According to the court, Congress intended to

does not intend [the employee duty clause] to diminish in anyway [sic] the employer's compliance responsibilities or his responsibility to assure compliance by his own employees. Final responsibility for compliance with the requirements of this act remains with the employer."

15. 29 U.S.C. § 666 (1970). The maximum fines are \$1,000, \$10,000, and \$1,000 for serious, willful, and non-serious violations, respectively.

16. *Id.* § 658(a).

17. *Id.* § 666(j). Most courts and the Commission have held or assumed that the quoted language establishes actual or constructive knowledge as an element of a serious violation. *See, e.g., Brennan v. OSHRC (Alsea)*, 511 F.2d 1139 [2 OSHC 1646] (9th Cir. 1975); *Brennan v. OSHRC (Vy Lactos)*, 494 F.2d 460 [1 OSHC 1623] (8th Cir. 1974); *Cam Indus. Inc.*, 1 OSHC 1564 (1974). Nevertheless, one Commissioner has taken the position that the word "unless" establishes lack of knowledge as an exception to the definition and renders it a defense which the employer must raise. *D.R. Johnson Lumber Co.*, 3 OSHC 1124, 1127 (1975) (Cleary, C., dissenting). The Labor Department apparently agrees with the majority trend of decision. The Field Operations Manual, a set of instructions and policy guidelines issued by the Labor Department for use by Occupational Safety and Health Compliance Officers (inspectors), lists employer knowledge or lack of reasonable diligence as a requirement for issuance of a serious violation citation and does not list it under non-serious violations. FIELD OPERATIONS MANUAL ch. VII, B. 1, 2, reprinted in OSH Rep. (BNA), 77:3103-07 (Mar. 31, 1977).

18. 511 F.2d 1139 [2 OSHC 1646] (9th Cir. 1975).

19. *Id.* at 1144 [2 OSHC at 1650].

foster employer-employee cooperation in safety efforts, and charging the employer with a non-serious violation for the individual act of an employee contrary to the employer's instructions and of which he had no knowledge would not further that end.²⁰

While open to question,²¹ the *Alsea* analysis has been generally followed by the Commission and the courts which have considered the issue.²²

20. *Id.* at 1145 [2 OSHC at 1651]. The court explicitly rejected strict liability, relying on the assertion made in *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265-66 [1 OSHC 1422, 1427] (D.C. Cir. 1973), that Congress intended the employer's duty to be an achievable one. 511 F.2d at 1145 [2 OSHC at 1651]. This reliance is misplaced; *National Realty* construed the general duty clause only, and its references to the penalty sections of the Act indicate a disagreement with *Alsea's* holding. See note 33 *infra* and accompanying text.

21. It would be entirely reasonable and more consistent with the purposes of the Act to hold that a non-serious violation has characteristics which fall between serious and de minimus violations, both of which are defined. See notes 16-17 *supra* and accompanying text. Under such a scheme a non-serious violation would exist, regardless of employer knowledge, when there was non-compliance with the Act and the health or safety of any person was threatened, but no penalty would be assessed if it were found that the employer had been diligent in his efforts to comply—the violation would be considered merely technical.

A similar interpretation was advanced by former Commissioner Van Namee in his opinions in *Mountain States Tel. & Tel. Co.*, 1 OSHC 1077, 1080 (1973) (concurring opinion), and *Cam Indus. Ind.*, 1 OSHC 1564 (1974). After the Ninth Circuit's decision in *Alsea*, Commissioner Van Namee abandoned his position and accepted that court's holding. See *D.R. Johnson Lumber Co.*, 3 OSHC 1124, 1125 (1975) (concurring opinion).

Although the legislative history is generally silent on the point, there is evidence that Congress recognized and anticipated citation for "technical" violations. The bill reported by the House Committee on Education and Labor contained a very complex section on citations which differentiated between violations involving a "serious danger" of death or serious injury and violations where no such danger was present. Penalties were provided for the former but not for the latter. See H.R. REP. NO. 91-1291, 91st Cong., 2d Sess. 6, 8-9 (1970), reprinted in LEGISLATIVE HISTORY at 836-39. The accompanying report stated the committee's opinion that occupational safety and health would not be furthered by a statute which emphasized penalties:

[T]he Committee believed there was an inherent need for a [non-serious danger] violation, which serves to warn as well as educate [This provision] recognizes that specific violations, even of objective standards based on performance, can be more technical than real. So, it states that if an employer has either violated the [general duty clause] or an occupational safety and health standard, and no serious danger will result, a civil or criminal penalty shall not be levied.

Id. at 23, LEGISLATIVE HISTORY at 853. Citation without penalty would notify the employer of the existence of the hazardous condition, and in contrast to a de minimus notice, would serve to emphasize the Act's concern with, and the hazard's potentially detrimental effect on, health and safety.

Mere issuance of a citation imposes a public relations type of sanction since the citation must be "prominently posted." 29 U.S.C. § 658(b) (1970). Additionally, a citation is, in effect, an order to the employer to correct the condition within the specified abatement period, and he is subject to fine if he fails to do so. *Id.* § 659(b). Should the employer abate the first violation, but subsequently violate the same standard again and be cited for a repeat violation, the Field Operations Manual provides that at least a \$100 fine should be imposed. FIELD OPERATIONS MANUAL ch. XI, 8.d., reprinted in OSH REP. (BNA), 77:3705 (Mar. 31, 1977).

22. See *Dunlop v. Rockwell Int'l*, 540 F.2d 1283 [4 OSHC 1606] (6th Cir. 1976); *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 [3 OSHC 2060] (5th Cir. 1976). Some courts may subscribe to a contrary position but have given the issue only cursory consideration. See *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1101 n.37 [3 OSHC 1490, 1497, n.37] (5th Cir. 1975) (footnote statement that penalties may be assessed for non-serious violations irrespective of

The result is that the same inquiry into employer knowledge is required for both serious and non-serious violations: in order to be cited, the employer must have actual or constructive knowledge of his noncompliance. As will be shown in the following section, the concept of "employer knowledge" has become a term of art which is critical to understanding employer responsibilities under OSHA.

DEVELOPMENT OF THE PREVENTABILITY TEST

Under the preventability test formulated by the District of Columbia Circuit in *National Realty & Construction Co. v. OSHRC*,²³ an employer is held to have violated the general duty clause if, under the circumstances, he could have prevented the occurrence of employee misconduct by taking demonstrably feasible precautions.²⁴ Forced to construe the employer's general statutory duty to render his workplace "free from recognized hazards,"²⁵ the *National Realty* court rejected strict liability as contrary to Congress' intent and adopted a test which was more sensitive to the circumstances of each particular case. Writing for the court, Judge Skelly Wright concluded that the general duty clause was "intended to require elimination only of preventable hazards" since the duty imposed by the clause "was to be an achievable one."²⁶ Thus unpreventable hazards are not "recognized" within this construction of the clause.²⁷

scienter), *aff'd* 424 U.S. 964 (1976); *Brennan v. OSHRC (Vy Lactos)*, 494 F.2d 460, 463 [1 OSHC 1623, 1624] (8th Cir. 1974) (dicta that employer knowledge is irrelevant to non-serious violations). See also note 33 *infra*. At least two of the present members of the Commission appear to subscribe to the *Alsea* holding. See note 44 *infra*.

23. 489 F.2d 1257 [1 OSHC 1422] (D.C. Cir. 1973).

24. *Id.* at 1267 [1 OSHC at 1428]. See Note, *Employee Noncompliance with OSHA Safety Standards: Atlantic & Gulf Stevedores, Inc. v. Occupational Safety and Health Review Commission and I.T.O. Corp. v. Occupational Safety & Health Review Commission*, 90 HARV. L. REV. 1041, 1049-50 (1977): "Demonstrably feasible measures are those enforcement techniques which it is reasonable to require of employers faced with a problem of employee noncompliance, given the character of the hazard and the economics of the industry."

25. 29 U.S.C. § 654(a)(1) (1970), quoted in note 5 *supra*.

26. 489 F.2d at 1265-66 [1 OSHC at 1428]. One basis for this assertion is the Act's stated purpose "to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions . . ." 29 U.S.C. § 651 (1970) (emphasis added). This oft-repeated ground for rejecting strict liability is ambiguous by itself—it could refer to technological or economic feasibility. This ambiguity is made strikingly clear by Commissioner Cleary's use of the same phrase in support of the issuance of a citation and abatement order without penalty in a case where the employer had no knowledge of the violation: "once violations are revealed, . . . the Act contemplates that steps be taken for prevention of any future hazards We are applying an Act that is intended to prevent job injuries and illnesses *so far as possible*." *Knutson Constr. Co.*, 4 OSHC 1759, 1764 (Oct. 12, 1976) *appeal filed*, No. 76-1979 (8th Cir. Nov. 10, 1976), (separate opinion of Cleary, C.) (emphasis added).

The *National Realty* court is on firmer ground when it cites OSHA's legislative history to the effect that the general duty clause does not impose an absolute duty, 389 F.2d at 1266 n.35 [1 OSHC at 1427 n.35] (quoting H.R. REP. NO. 91-1291, *supra* note 27, at 21, LEGISLATIVE HISTORY at 851).

27. "Though a generic form of hazardous conduct, such as equipment riding, may be

In order to determine whether a hazard was preventable within the meaning of the Act, the court focused on the employer's development of feasible safety programs. Under the test adopted in *National Realty*, an employer may not be held in violation of the general duty clause because of employee misconduct if the employer has implemented a program designed to eliminate all preventable hazards. The actual occurrence of employee misconduct is not necessary, however, to establish a violation since the inadequacies of an employer's program may be apparent even without such occurrence.²⁸ Conversely, the mere occurrence of hazardous employee conduct does not of itself establish a violation²⁹—“[t]he record must additionally indicate that demonstrably feasible measures would have materially reduced the likelihood that such misconduct would have occurred.”³⁰

As construed by the *National Realty* court, whether the employer knew or could have known of the presence of a specific preventable hazard is irrelevant to the question of whether the general duty clause has been violated:

[A]n instance of hazardous employee conduct may be considered preventable even if no employer could have detected the conduct, or its hazardous character, at the moment of its occurrence. Conceivably, such conduct might have been precluded through feasible precautions concerning the hiring, training, and sanctioning of employees.³¹

The employer's knowledge is only relevant in determining whether the violation is serious or non-serious. In a final footnote, the court suggested

recognized, unpreventable instances of it are not, and thus the possibility of their occurrence at a workplace is not inconsistent with the workplace being free of recognized hazards.” 489 F.2d at 1266 [1 OSHC at 1427]. See also LEGISLATIVE HISTORY at 1007 (the test of whether a hazard is “recognized” is an objective one, *i.e.*, whether the condition is known generally in the industry to be hazardous).

28. For example, in the case before the court, there was substantial evidence that equipment riding was regarded by the industry as a dangerous practice. 489 F.2d at 1265 n.32 [1 OSHC at 1426 n.32]. If the Secretary had been able to show that *National Realty* had taken no precautions to prevent its occurrence, a violation would have been established even if the accident had not occurred. See 489 F.2d at 1265 [1 OSHC at 1426].

29. In *Brennan v. OSHRC (Republic Creosoting)*, 501 F.2d 1196 [2 OSHC 1109] (7th Cir. 1974), for example, an inexperienced employee was killed when he rushed forward to help unload railroad ties from a truck, and the load fell on him. The foreman had explicitly told him not to go near the trucks during unloading. The employee's act was held unforeseeable, and no liability was imposed.

30. 489 F.2d at 1267 [1 OSHC at 1428]. The court attached great weight to the opinion of safety experts in defining the specific content of the employer's safety program:

Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program. Nor is misconduct preventable if its elimination would require methods of hiring, training, monitoring, or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods infeasible.

Id. at 1266 [1 OSHC at 1427]. See also note 36 *infra*.

31. 489 F.2d at 1266-67 n.37 [1 OSHC at 1427 n.37].

that an employer should not be penalized for a *serious* violation³² of the general duty clause because of hazardous employee conduct unless either the misconduct involves a substantial risk of harm and is substantially likely to occur despite the employer's safety program, or the employer could have known with the exercise of reasonable diligence that its safety program had failed to preclude the occurrence of preventable misconduct.³³ Only under these conditions should the employer be held to have constructive knowledge that his safety program is defective. Thus, under *National Realty*, the question of whether conduct in violation of OSHA's general duty clause is preventable is a separate question from whether the employer knew or should have known that a hazard might occur.

Cases decided after *National Realty* have transferred the preventability test to the constructive knowledge language in the section of the Act defining a serious violation³⁴ and have extended its application to violations of the specific duty as well as the general duty clause. In *Cape and Vineyard Division of New Bedford Gas Co. v. OSHRC*,³⁵ for example, the First Circuit explicitly relied on *National Realty* in absolving an employer of liability for an alleged serious violation of a specific standard which had resulted from the misconduct of an employee. After hearing a safety expert's testimony that, by the standards of the industry, the employee's working conditions were not dangerous,³⁶ the court ruled that the conduct of the employee which had caused the accident was unforeseeable and therefore that the employer could not be held liable.³⁷ The court appears to have read the *National Realty* test into the vague wording of the specific standard alleged to have been violated and not into the constructive knowledge requirement for serious violations, but the case indicated the court's desire to use the preventability test outside the confines of its general duty clause origin.

32. For the definition of a serious violation, see text accompanying note 17 *supra*.

33. 489 F.2d at 1268 n.41 [1 OSHC at 1428-29 n.41]. The court suggested that, while the Act authorized the imposition of a penalty for a non-serious violation, a zero penalty and an order to abate would be appropriate when an employer who was cited for a non-serious violation was found to have had no actual or constructive knowledge of the violation. *Id.* See note 21 *supra*.

34. 29 U.S.C. § 666(j) (1970). See note 17 *supra* and accompanying text.

35. 512 F.2d 1148 [2 OSHC 1628] (1st Cir. 1975).

36. *Id.* at 1153 [2 OSHC at 1631]. The court in *Cape & Vineyard* expressly stated that knowledge of the practices of the particular industry is indispensable in determining the foreseeability of a specified type of hazardous activity and that the Commission is incompetent to make that determination without the benefit of testimony from safety experts familiar with the industry. *Id.* at 1154-55 [2 OSHC at 1632]. Thus, while the Commission may be "an independent body of safety experts," *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1261 [1 OSHC 1422, 1423] (D.C. Cir. 1973), it may not rely on its expertise if it is unfamiliar with the practices of an industry. The statute requires only that the commissioners be "persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission . . ." 29 U.S.C. § 661(a) (1970). This does not insure that they will be familiar with the practices of every industry under OSHA regulation.

37. 512 F.2d at 1154 [2 OSHC at 1632-33].

In *Brennan v. OSHRC (Alsea)*,³⁸ the Ninth Circuit found support in *National Realty* for its holding that knowledge is an element of a non-serious violation. The court misread that case as stating that every duty imposed on employers by OSHA was intended by Congress to be achievable and that therefore citation for a non-serious violation of which the employer had no knowledge, actual or constructive, would not further the purposes of the Act.³⁹ The court thus implicitly equated preventability and constructive knowledge in a special duty context.

This equation was confirmed by the Seventh Circuit in *Brennan v. Butler Lime and Cement Co.*,⁴⁰ a case involving a citation for employee non-compliance with a specific standard. The court held that an employer is required to take reasonable precautionary steps to protect its employees from reasonably foreseeable dangers.⁴¹ These precautionary steps include an adequate safety program with safety instructions to employees. And, since the test of foreseeability focuses not on the incident as it actually occurred, but on the foreseeability of the general danger to which the standard alleged to have been violated is directed, the instructions which employees receive as part of the safety program must encompass that general danger: "[w]hether a serious violation of the standard was foreseeable with the exercise of reasonable diligence depends in great part on whether Butler's employees . . . had received adequate safety instruction."⁴²

Butler represents the complete integration of the *National Realty* preventability test into the constructive knowledge language of the definition of a serious violation. By extension, in such cases as *Alsea*, it thus becomes applicable to all serious and non-serious violations. The extended *National Realty* preventability test thus holds that the failure to establish and administer an adequate safety program is constructive knowledge that a preventable hazard may arise because of employee misconduct, and if the employer is cited for such a hazard when it occurs he may not escape liability by pleading that it came about as a result of the "idiosyncratic and implausible" act of an employee.⁴³ While this is not what one would normally regard as constructive knowledge, the rule appears to serve the purposes of the Act adequately.

APPLICATION OF THE TEST

Regardless of which party is given the burden of producing facts

38. 511 F.2d 1139 [2 OSHC 1646] (9th Cir. 1975). See notes 18-22 *supra* and accompanying text.

39. 511 F.2d at 1145 [2 OSHC at 1651]. See notes 20, 26 *supra* and accompanying text.

40. 520 F.2d 1011 [3 OSHC 1461] (7th Cir. 1975).

41. *Id.* at 1017 [3 OSHC at 1465].

42. *Id.* at 1018 [3 OSHC at 1465-66].

43. The quoted language is from *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 [1 OSHC 1422, 1428] (D.C. Cir. 1973). See note 30 *supra*.

concerning the employer's safety program,⁴⁴ the purpose of the preventability test is to weigh all of the facts and circumstances in an effort to assess the adequacy of that program. In the absence of published regulations specifying the elements of an adequate program, the task of definition has fallen to the courts⁴⁵ and the Commission. While the results of individual cases

44. One cause of the inconsistent results in applying the preventability test, at least for the Commission, has been a continuing controversy over the burden of proof on the issue of employer knowledge. If that knowledge is a necessary element of a serious or non-serious violation, it would appear that the Secretary should have the burden of presenting, as part of his case in chief, evidence that the employer had actual or constructive knowledge of the existence of the hazard. *See, e.g.*, *General Elec. Co. v. OSHRC*, 540 F.2d 567 [4 OSHC 1512] (2d Cir. 1976); *Dunlop v. Rockwell Int'l*, 540 F.2d 1283 [4 OSHC 1606] (6th Cir. 1976). The Commission, however, greatly confused the issue by developing the *defense* of "isolated brief occurrence." The elements of this defense, which the employer must prove, are "a (1) deviation [by an employee], (2) from a company work rule or instructions, (3) which are enforced, and (4) that the deviation was unknown to the employer." *Murphy Pac. Marine Salvage Co.*, 2 OSHC 1464, 1465 (1975) (Moran, C., concurring). The rationale for requiring the employer to prove these elements is that the best information concerning his safety program and practices are in his possession. *Id.* at 1465. However, the fourth element of the defense, the employer's lack of knowledge, would appear to require disproof of part of the Secretary's case in chief. As a result, when the holding is for the employer, it is often impossible to discern the basis of the Commission's decision—whether the Secretary has failed to meet his burden or the employer has successfully met his. *See, e.g.*, *Robert T. Winzinger, Inc.*, 4 OSHC 1475 (July 22, 1976) (holding defense not made out but stating no facts showing employer knowledge).

Each of the present members of the Commission has his own view of where the burden should lie. Commissioner Moran now holds that knowledge is an element to be proven by the Secretary. *Scheel Constr., Inc.*, 4 OSHC 1824, 1826 (Nov. 8, 1976) *appeal filed*, No. 77-1022 (8th Cir. Jan. 7, 1977); *Ocean Elec. Corp.*, 3 OSHC 1705, 1710 (1975) (dissenting opinion). Commissioner Cleary disagrees and regards lack of knowledge as a defense. *Scheel Constr. Inc.*, *supra*, at 1827 (dissenting opinion). Chairman Barnako's vote thus decides the issue. In *Green Constr. Co.*, 4 OSHC 1808 (Oct. 21, 1976), he took the position that knowledge is a necessary element of the Secretary's case which he has the burden of proving, but the Secretary will get the benefit of a presumption of employer knowledge where the violation is visible and occurs at a worksite controlled by the employer, or where the violation is not visible but was created by the employer or those under his control. *Id.* at 1809-10. With this presumption, which will be available in all but a very few cases, a *prima facie* case is established and the burden shifts to the employer. *Id.* at 1810.

Burden of proof is not a mere technical issue; it will often be determinative of liability. The Commission should therefore reassess its position. While it is true that the employer may be in the best position to produce evidence regarding the adequacy of his safety program, a policy of even-handed enforcement requires that the employer have the opportunity to show, through cross-examination of the Secretary's expert witnesses and through his own experts, that he has met the requirements for an adequate safety program (which the Secretary should be compelled to set forth in his theory of compliance), or to show that such requirements could not possibly realistically be met. *See National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267-68, [1 OSHC 1422, 1428] (D.C. Cir. 1973). The Commission should not impose liability on the basis of the unsupported generalization that the employer has not done enough. *See General Elec. Co. v. OSHRC*, 540 F.2d 67, 70 [4 OSHC 1512, 1514] (2d Cir. 1976).

For a general discussion of burden of proof on this issue and others, see Hunt, *supra* note 9.

45. Some courts have not been happy in this role. The Second Circuit, in a case charging violation of a standard requiring employers to provide their employees with protective goggles under certain conditions, 29 C.F.R. § 1910.133(a)(1) (1976), said that

dealing with violations caused by employee misconduct are sometimes conflicting, general guidelines for employer compliance in this area can be discerned. The basic elements of an adequate safety program are established work rules or instructions on safe procedures, diligent supervision to ensure that safety rules are complied with, and the imposition of sanctions for non-compliance.⁴⁶ All of these elements must be present simultaneously—the absence of any one exposes the employer to liability.

Safety Instruction and Work Rules

*Utilities Line Construction Co.*⁴⁷ suggests that work rules or safety instructions must conform quite closely to published OSHA regulations.⁴⁸ In that case, the employer was cited for serious violation of two standards after an employee lineman was electrocuted while installing a transformer on a pole. The Commission found that the employee had violated the employer's established work rule requiring linemen to wear insulating rubber gloves,⁴⁹ and it dismissed one citation on that ground.⁵⁰ It let stand a second citation

if employers are to be held to an obligation requiring something more than instructing employees to use protective equipment but something less than guaranteeing use, the promulgation of a standard fleshing out the employer's obligation would provide useful guidance to employers, the Commission, and reviewing courts.

General Elec. Co. v. OSHRC, 540 F.2d 67, 69 [4 OSHC 1512, 1514] (2d Cir. 1976).

46. These are essentially the elements of the "isolated brief occurrence" defense. See note 44 *supra*. This defense has also been included in the Department of Labor's Field Operations Manual, which contains instructions to OSHA Compliance Officers. The Manual states that if a violation resulted exclusively from employee conduct unknown to any supervisory personnel and the conduct was contrary to a well-established company policy or work rule which was actively enforced, the Compliance Officer should take these conditions into account in determining whether a violation should be alleged. FIELD OPERATIONS MANUAL ch. X, E. 1. b., reprinted in OSH REP. (BNA) 77:3506 (Mar. 31, 1977). While the Manual is, of course, not binding on employers, this instruction gives an indication of what the Secretary considers to be an adequate employer safety program.

47. 4 OSHC 1681 (Sept. 16, 1976).

48. *Accord*, Brennan v. Butler Lime & Cement Co., 520 F.2d 1011 [3 OSHC 1461] (7th Cir. 1975) (violation of a particular standard is foreseeable if the employer fails to instruct its employees specifically regarding the danger to which the standard is directed). Where a violation of the general duty clause is charged, the employer must show a workrule directed at the "recognized hazard" which occurred. Cf. Getty Oil Co. v. OSHRC, 530 F.2d 1143, 1145 [4 OSHC 1121, 1122] (5th Cir. 1976); Fry's Tank Service, Inc., 4 OSHC 1515, 1517 (Aug. 13, 1976).

49. The employer had a comprehensive safety program. Line crews were checked three times daily by a supervisor who could stop a job for safety violations. There was a full-time safety director who met with crews three times a year. Each crew was inspected twice a year by the employer's insurance carrier. Hour-long monthly safety meetings were held. Special safety bulletins were issued from time to time. Safety dinners were held for supervisors. Linemen were trained in pole-top rescue and cardio-pulmonary resuscitation. Linemen had actually been suspended for violation of the safety rule requiring the wearing of rubber gloves. This employer's program suggests that one factor which will tend to "establish" work rules is the holding of monthly meetings at which the rules are repeated. The Commission has been inconsistent, however, in its requirement of regular meetings. See note 63 *infra*.

50. The citation was for violation of 29 C.F.R. § 1926.950(c)(1) (1976), which requires that no employees be permitted to work on energized parts unless protected by rubber gloves or otherwise insulated.

for violation of a standard requiring that all lines in the vicinity be checked to determine if they are energized before work begins.⁵¹ The employer's work rule that all unknown lines should be considered energized was not considered sufficient⁵²: "as this case shows, the assumption that a line is energized is not an adequate substitute for the actual knowledge of whether it is or is not energized."⁵³

The major problem with this literal approach is the sheer number of OSHA regulations—industry standards currently occupy some 1058 pages of the Code of Federal Regulations and many other standards are incorporated by reference.⁵⁴ Of course, not all of these standards apply to employee conduct—many are definitions or equipment specifications. Still, a substantial number are so phrased as to be capable of violation by an employee. A solution adopted by one employer was to require all supervisory employees to carry copies of the applicable OSHA regulations.⁵⁵ Even this device will not ineluctably produce compliance, however, unless the foremen know all the rules and enforce them,⁵⁶ and unless instructions are also directed specifically at those employees who are in the best position to avert the hazard to which the standard is directed.⁵⁷

Supervision

Simply providing employees with safety training and the equipment necessary to perform a task safely is not enough.⁵⁸ In addition, an employer

51. 29 C.F.R. § 1926.950(b)(1) (1976).

52. 4 OSHC at 1684. The Commission expressed doubt that the employer in fact had such a rule, but implied that even if he did, it would have been an inadequate substitute for one tracking the language of the regulation. What appeared to convince the Commission that the rubber glove rule was "established" was the fact that it had been enforced by suspension of violators, whereas the second rule had not. *Id.*

53. It should be noted that the employer's work rule closely tracked other OSHA standards which require that unknown lines be considered energized until determined otherwise. 29 C.F.R. §§ 1926.950(b)(2) & .954(a) (1976). This indicates that a work rule designed to implement one OSHA regulation may not be sufficient to constitute a defense to a citation for violation of related OSHA regulations.

54. See 29 C.F.R. §§ 1910, 1915-20, 1924-28 (1976). A frequent complaint voiced at congressional oversight hearings held in 1972 was that the standards were too complex, thus making it next to impossible to determine which standards applied to any particular business. See, e.g., *Implementation of the Occupational Safety and Health Act, 1972: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 243 (1972) (statement of Charles J. Whittey).

55. B.D. Click Co., 4 OSHC 1849 (Oct. 29, 1976).

56. Cf. *Ames Crane & Rental Serv. Inc. v. Dunlop*, 532 F.2d 123 [4 OSHC 1060] (8th Cir. 1976) (supplying employees with several hundred pages of written safety material which they were free to read or disregard was not compliance).

57. A citation was upheld in *Candler-Rusche, Inc.*, 4 OSHC 1232 (1976) because the person in the best position to avert the hazard, the crane operator, had not been instructed that employees were not to ride the load. Conversely, an employee need not be instructed or trained for a job he is directed not to perform. *Brennan v. OSHRC (Republic Creosoting)*, 501 F.2d 1196 [2 OSHC 1109] (7th Cir. 1974).

58. See *Weatherhead Co.*, 4 OSHC 1296 (June 10, 1976) (where standard requires *use* of a

must adequately supervise his employees to enforce the work rules. Supervision may be delegated to other employees,⁵⁹ but supervisory employees must themselves be supervised regarding safety matters.⁶⁰ Their training must be better than that of other employees since they will often be called upon to exercise judgment as to how work should be performed⁶¹ and since their conduct should set an example in the workplace.⁶² For these reasons, the Commission has taken the position that where the misconduct involved is that of a supervisory employee, a showing of unpreventability will be more difficult for the employer to prove.⁶³ In addition, where it is a supervisory employee who creates a hazard, his actual knowledge of his own violative conduct will be imputed to the employer.⁶⁴ The same is true if the supervisor knows or should know of the incident of employee misconduct.⁶⁵

Again, an employer's best protection against OSHA liability appears to be an adequate safety program. As the recent case of *Horne Heating & Plumbing Co. v. OSHRC*⁶⁶ suggests, the supervisor's knowledge is not imputed to the employer as a matter of law; even a violation by a supervisor will be held unpreventable if the employer can satisfactorily prove that he has an adequate safety program. In *Horne Heating*, the employer plumbing contractor met this burden by showing a good safety record, regular group safety meetings, on the job meetings with individual employees and the issuance of written safety instructions.⁶⁷ The court vacated the citation for

device, mere provision of it without instruction to employee to use it is not compliance). *Cf. General Elec. Co. v. OSHRC*, 540 F.2d 67 [4 OSHC 1512] (2d Cir. 1976) (suggesting without deciding, that where standard requires that eye-protective equipment be "provided," employer is not in violation where he had provided the equipment but has not ensured that the employees wear the equipment).

59. *See Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 [3 OSHC 2060] (5th Cir. 1976).

60. *Ocean Elec. Corp.*, 3 OSHC 1705, 1707 (1975).

61. *Id.*

62. *Id. Accord*, *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 n.38 [1 OSHC 1422, 1428 n.38] (D.C. Cir. 1973).

63. *Ocean Elec. Corp.*, 3 OSHC 1705 (1975). The employer's defense failed in that case because the employer did not show the details of his safety program; specifically, he failed to show that safety work rules were established and enforced, and that regular safety meetings were held which employees were required to attend. *Id.* at 1707. The Commission has not consistently held that the latter are always necessary. *See Scheel Constr. Co.*, 4 OSHC 1824, 1827 (Nov. 8, 1976) (no regular meetings held, incident held unpreventable).

For the suggestion that where the supervisor endangers only himself, the employer's duty should be the same as toward line employees, see *Andrews & Cross, Defending an Employer Against an Alleged Violation of the General Duty Clause*, 9 GONZAGA L. REV. 399, 411 (1974).

64. *Ocean Elec. Corp.*, 3 OSHC 1705 (1975).

65. *Raymond J. Pitts*, 4 OSHC 1058 (1976) (foreman watched employee work in unshored trench); *Warnel Corp.*, 4 OSHC 1034 (1976) (violation pointed out to foreman working on same floor as misbehaving employee).

66. 528 F.2d 564 [3 OSHC 2060] (5th Cir. 1976).

67. *Id.* at 566 [3 OSHC at 2063].

violation of a trench shoring standard because "Mr. Horne [the employer] did everything within his power to ensure compliance with the law, short of remaining at the job site and directing the operations himself,"⁶⁸ and the court held that this final effort—constant personal supervision—was not required of the employer.⁶⁹

A particularly troublesome problem has been the extent to which the employer may rely on the experience of his employees as a counterweight to the need for supervision. It was early established that constant over-the-shoulder supervision of experienced employees is neither feasible nor necessary.⁷⁰ What supervision short of that is required is unclear. In *B-G Maintenance Management, Inc.*,⁷¹ for example, the employer contended that supervision of his employee window washers was difficult because of the nature of the business. However, he did admit that some additional part-time supervision was possible and the Commission held him to that admission. The journeymen linemen in *Utilities Line Construction Co.*,⁷² were recognized as highly trained and experienced employees, yet each line crew was checked at least three times a day by a supervisor, and this was found to be merely adequate even considering their experience.⁷³

In *Fry's Tank Service*⁷⁴ the Commission appears to have gone too far. An employee with twenty years experience in the tank cleaning business⁷⁵ was overcome by noxious fumes in an oil field separation tank which he had entered without first testing the atmosphere. His employer was held to have

68. *Id.* at 569 [3 OSHC at 2063].

69. *Id.* at 570 [3 OSHC at 2064]. "It is unrealistic to expect an experienced [employee] . . . to be under constant scrutiny . . . [A] holding . . . requiring that each employee be constantly watched by a supervisor would be totally impractical and in all but the most unusual circumstances, an unnecessary burden." *Id.* (quoting *Bennan v. OSHRC (Hanovia)*, 502 F.2d 946, 949 [2 OSHC 1137, 1140], (3d Cir. 1974)). Mr. Horne, the employer, had also shown that he had provided all of the materials needed to shore the trench and had checked the worksite, repeating his instructions, the day before the cave-in occurred. 528 F.2d at 565-66 [3 OSHC at 2060].

70. This rule was announced in *Canrad Precision Indus., Inc.*, 1 OSHC 1073 (1972), where an employee with twenty-one years experience was electrocuted in the course of conducting an experiment with high voltage test equipment which he had set up. The Commission vacated the citation for violation of the general duty clause, holding that daily supervision of such an employee was adequate. On review, the Third Circuit agreed, but remanded for consideration of whether the employer should have assigned only teams of employees to conduct such tests. *Brennan v. OSHRC (Hanovia)*, 502 F.2d 946 [2 OSHC 1137] (3d Cir. 1974). On remand, the Commission found that the team system was not a consistent industry practice and that because of this employee's experience and good safety record, his employer was justified in permitting him to work alone. *Canrad Precision Indus., Inc.*, 3 OSHC 1198 (1975).

71. 4 OSHC 1282 (1976).

72. 4 OSHC 1681 (1976).

73. *Id.* at 1684-85 n.7.

74. 4 OSHC 1515 (1976).

75. *Id.* at 1519. Although Thach, the employee, had only worked for Fry's for two years, he had been an independent contractor in the same business for the prior eighteen years. Thach was Fry's only employee, and he had as much experience in the field as did his employer.

violated the general duty clause because he failed to ascertain whether entry into the tank would be necessary on this particular job and warn his employee of the dangers.⁷⁶ While length of experience alone is not an infallible indicator of good judgment, this employee had entered the same tank on five or six occasions in the preceding ten years, each time without incident.⁷⁷ If the employer may not rely on the demonstrated safety consciousness of such an employee, it is difficult to see when he may do so.⁷⁸ The Commission's admonition that the employer's rule against tank entry was insufficient in view of the gravity of the hazard gives no guidance as to what further steps the employer should have taken to comply. One is forced to the conclusion that while employee experience is a relevant consideration for an employer in structuring his safety program, it is easily outweighed by other factors.⁷⁹

76. All employees must receive supervision concerning the hazards inherent in their employment. The experience of an employee is . . . relevant in determining the degree of supervision necessary . . . [but] an employer does not fulfill its duty if it fails to ascertain the hazards to which the employee may be exposed.

Id. at 1517 (citations omitted).

77. *Id.* at 1516-17.

78. It is impossible to reconcile *Fry's* with *Brennan v. OSHRC (Hanovia)*, 502 F.2d 946 [2 OSHC 1137] (3d Cir. 1974), see note 70 *supra*, unless the Commission is seen as having tightened its standards of review in this area considerably. One is also hard pressed to avoid the conclusion that the Commission was reluctant to relieve the employer of liability here because three other persons died attempting to rescue the employee. The fact of an actual death or injury should be relevant only on the question of whether a hazard is "causing or likely to cause death or serious injury," 29 U.S.C. § 654 (1970). However, the cases indicate that an actual death has influenced the Commission toward finding the *existence* of a violation as well. See Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988, 991 (1973).

79. *Getty Oil Co. v. OSHRC*, 530 F.2d 1143 [4 OSHC 1121] (5th Cir. 1976), relied on in *Fry's*, also appears to discount employee experience. Robeson, a field engineer for Getty with thirty years experience, was repeatedly instructed by his supervisor to have a fluid booster tank pressure-tested before installing it. On the day the accident occurred, Robeson called his supervisor to say that he was "going to Palacios to put the unit in service," and hung up. *Id.* at 1144 n.1 [4 OSHC at 1121 n.1]. Palacios was the location of the welding shop which had made the tank, and on arrival Robeson was told that it had not been tested. He took it to the installation site anyway and was killed when it exploded after installation. The court upheld a citation for violation of the general duty clause because Robeson's supervisor had not asked him again during the phone call whether the tank had been pressure tested. As the dissent noted, this seems to impose a rule of continuous supervision on employers: if an experienced employee has been told N times how to do his job, the number of times that he should have been told is N + 1. *Id.* at 1148 [4 OSHC at 1124]. "Requiring that the employer ask such an experienced employee if he did his job seems merely a way of holding this employer strictly liable for this reckless and unexpected act." *Id.* [4 OSHC at 1124] (quoting Commissioner Moran's dissent from the Commission ruling).

The majority attempted to distinguish *Brennan v. OSHRC (Hanovia)*, 502 F.2d 946 [2 OSHC 1137] (3d Cir. 1974), on the basis that only one employee was exposed to danger in that case, whereas two other persons were threatened along with Robeson. 530 F.2d at 1147 n.4 [4 OSHC at 1123 n.4]. This distinction is unconvincing: an employer's duty to protect his employees from danger should not depend on the number who are exposed to the danger—if he has complied as to one, he has as to all.

Enforcement

The third essential element of a safety program is the disciplining of employees who violate safety rules. Usually, reprimands and/or fines imposed on employees will be sufficient in the absence of any indication that they are not having the desired effect.⁸⁰ Stricter discipline, to the point of dismissal, is necessary if lesser measures are ineffective. As previously noted, when the Act was under consideration by Congress, employers lobbied against permitting the Secretary to sanction employees, since that would disrupt labor management relations.⁸¹ In *Atlantic & Gulf Stevedores, Inc. v. OSHRC*⁸² the Third Circuit indicated that it would hold management to its half of the bargain—employers must dismiss misbehaving employees if necessary to achieve compliance, even in the face of assured retaliatory wildcat strikes.⁸³ On the basis of *Atlantic & Gulf*, employers must bargain collectively in good faith to the point of impasse for the unilateral right to dismiss union employees for non-compliance with OSHA regulations and seek a *Boys Market* injunction⁸⁴ against any resulting strike before a defense of unpreventability will be considered.⁸⁵

Another factor which apparently has weight *against* employer liability is the safety record of the employer and the employee. See *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 [3 OSHC 2060] (5th Cir. 1976); *Canrad Precision Indus., Inc.*, 3 OSHC 1198 (1975). However, this factor did not sway the balance in *Fry's*, and the Commission has indicated that it will not uncritically accept assertions of unblemished employee safety records since every record will be perfect if no attempt is made to discover violations. *Ocean Elec. Corp.*, 3 OSHC 1705, 1707 n.3 (1975).

80. See *Engineer's Constr., Inc.*, 3 OSHC 1537 (1975) (foreman reprimanded and pay docked for first violation of rule against entering unshored trenches; citation vacated); *accord*, *Ross Island Sand & Gravel Co.*, 4 OSHC 1797 (Oct. 8, 1976). In *Ross Island*, reprimands were held sufficient since infrequent prior occasions of misconduct did not establish a "pattern or practice" of non-compliance. *Id.* at 1798. "Pattern or practice" appears to be more a label for a result than a tool of analysis. In *A.J. McNulty & Co.*, 4 OSHC 1097 (1976), for example, two simultaneous prior occasions of misconduct were held to establish that noncompliance was a recurring practice. See also *Brennan v. OSHRC (Alsea)*, 511 F.2d 1139 [2 OSHC 1647] (9th Cir. 1975).

81. See note 13 *supra*.

82. 534 F.2d 541 [4 OSHC 1061] (3d Cir. 1976).

83. *Atlantic & Gulf* was cited for violation of the longshoring hardhat standard, 29 C.F.R. § 1918.105(a) (1976). Despite strenuous efforts to achieve compliance (furnishing the hats, holding regular safety meetings, posting signs, putting notices in pay envelopes and messages on hiring tapes), most of the company's employees refused to wear the hats. *Atlantic & Gulf* did not take the step of firing employees for noncompliance because it feared a retaliatory strike, justifiably so in the court's opinion. 534 F.2d at 547-48 [4 OSHC at 1064-65].

84. *Boys Markets, Inc., v. Retail Clerks Local 770*, 398 U.S. 235 (1970), held that the Norris-La Guardia Act, 29 U.S.C. §§ 101-15 (1970), does not bar the issuance of an injunction to prevent a strike in violation of a no-strike agreement over a grievance subject to mandatory arbitration under the collective bargaining agreement if the employer is ready to proceed to arbitration when the injunction is sought and is otherwise entitled to relief.

85. In *Atlantic & Gulf*, the employer actually proceeded on a theory of economic infeasibility of the standard, *i.e.*, compliance would require efforts which would force him out of business. The court decided that it had jurisdiction to judge the validity of the standard but refused to declare it infeasible as applied in the case since the employer had not done all that he

CONCLUSION

OSHA is clearly technology-forcing legislation: it “looks to improvement in the techniques of industrial safety.”⁸⁶ It is designed to change employer behavior⁸⁷ and therefore the burden on the employer to achieve compliance is properly a heavy one. The courts and the Commission have not always been consistent in striking a balance between fairness to employers and the need to improve occupational safety and health, but the parameters of a compliant safety program are emerging. While requiring the impossible from employers achieves nothing, requiring their very best efforts may achieve a great deal—the prevention of needless loss of life.

The analysis which the courts and the Commission have applied to the issue of what liability the Act imposes on employers for violations by their employees has been defective, but the preventability test which has evolved is now fairly widely used. The requisite features of a safety program which will shield the employer from liability under that test cannot be precisely stated, but the guiding principles are as follows:

- (1) The employer must establish a set of work safety rules which conform closely to the OSHA regulations applicable to his business;
- (2) His employees must be instructed in these safety procedures at the commencement of their employment and repeatedly reminded of them;
- (3) Supervisory employees are the representatives of the employer in the workplace, and while the nature of their duties necessarily requires flexible responses to situations as they arise, these employees must be vigilant in enforcement of the work rules and safety procedures. Some consideration may be given to the degree of experience of the employees, but generally, where supervision is possible it must be provided. Supervisors must themselves be supervised and, since their actions serve as examples for the non-supervisory employees, they must be trained to a degree that is proportionately greater than other employees; and
- (4) Work rules must be enforced through sanctions commensu-

could to comply. The same considerations would appear to apply to an unpreventability defense. For a comparison of the economic infeasibility and preventability defenses, see Note, *supra* note 24, at 1044-47.

The court also suggested that if a *Boys Market* injunction were not available, the employer could petition for a variance under section 6(d) of the Occupational Safety and Health Act, 29 U.S.C. § 655(d) (1970), or seek an extension of the abatement period under section 10(c), 29 U.S.C. § 659(c) (1970). There are problems with both of these alternatives. To obtain a variance requires a showing of equally effective alternative means of protecting employees—a difficult task for head protection. The abatement period may be extended, but the day of reckoning will eventually come and compliance will have to be accomplished.

86. *Atlantic & Gulf Stevedores, Inc., v. OSHRC*, 534 F.2d 541, 548 [4 OSHC 1061, 1065] (3d Cir. 1976).

87. See generally LEGISLATIVE HISTORY 413.

rate with the history of past violation; prior instances of employee misconduct are notice that the employer's program is deficient and that stepped-up efforts are required.

Unless each of these requirements is satisfied, the employer is likely to be held responsible under OSHA for any violations in his place of business, even if they are the result of misconduct by his employees.