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# Occupational Safety and Health Act of 1970

Lee Hornberger\*

MORE THAN FOURTEEN THOUSAND WORKERS DIED as a result of occupationally related accidents in 1970.<sup>1</sup> This is more than died in Vietnam during the same period.<sup>2</sup> During the 1960's, more than 150,000 Americans died under similar conditions.<sup>3</sup> This was in spite of occupational safety and health legislation in most of the states.<sup>4</sup> Federal safety legislation in limited areas had failed to stem the fatal tide in even those limited areas.<sup>5</sup> It had become apparent that unless a new comprehensive approach was used the worksite would become even more deadly than the battlefield. The Occupational Safety and Health Act of 1970<sup>6</sup> was the federal government's answer to this continuing threat. This article will review the OSH Act and attempt to predict its future effect upon American industry and employees.

## Legislative History

### *The House*

Hearings held by Congress in the late 1960's revealed the urgent need for new safety and health legislation.<sup>7</sup> As an answer to this now apparent need, several bills were introduced in the House Education and Labor Committee.<sup>8</sup> The most prominent of these, the Daniels' Bill,<sup>9</sup> would have provided the Secretary of Labor with the authority to promulgate standards, conduct investigations and hearings, and establish an administrative appeals system within the Department of Labor for aggrieved employers. This bill was reported out of the House committee in March of 1970.<sup>10</sup> Placing of both adjudicatory and enforcement powers in the hands of the Secretary of Labor provoked much opposition.<sup>11</sup>

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<sup>1</sup> SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92d Cong., 1st Sess. 142 (1971). [hereinafter cited as LEGISLATIVE HISTORY]

<sup>2</sup> *Id.*

<sup>3</sup> See generally SOMERS AND SOMERS, WORKMEN'S COMPENSATION 1-7 (1954).

<sup>4</sup> U. S. Department of Health, Education and Welfare, Occupational Health and Safety Legislation (1970); see OHIO REV. CODE ANN. § 4101.02 *et seq.* (Page 1965).

<sup>5</sup> Senator Muskie has pointed out: "Even in fields where strong Federal laws do exist, such as coal mine health and safety, lack of enforcement has meant virtually no decline in the accident and death rates." LEGISLATIVE HISTORY at 513.

<sup>6</sup> Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C.A. § 651 *et seq.* (1971).

<sup>7</sup> BUREAU OF NATIONAL AFFAIRS, JOB SAFETY AND HEALTH ACT OF 1970 13 (1971).

<sup>8</sup> H. R. 843, 91st Cong., 1st Sess. (1969); H. R. 3809, 91st Cong., 1st Sess. (1969); H. R. 4294, 91st Cong., 1st Sess. (1969); H. R. 13373, 91st Cong., 1st Sess. (1969); H. R. 16785, 91st Cong., 2d Sess. (1970); H. R. 19200, 91st Cong., 2d Sess. (1970).

<sup>9</sup> H. R. 16785, 91st Cong., 2d Sess. (1970).

<sup>10</sup> LEGISLATIVE HISTORY, *supra* note 1, at 846.

<sup>11</sup> *Id.* at 877. Professor Davis has pointed out that one of the principal barriers to the development of administrative law has been the theory of the separation of powers. See K. DAVIS, ADMINISTRATIVE LAW 25 (1965).

President Nixon reflected the views of many during his message to Congress on August 6, 1969.<sup>12</sup> While indicating his support for an occupational safety and health act, he maintained that a better approach would:

separate the function of setting safety and health standards from the function of enforcing them. Appropriate procedures to guarantee due process of law and the right to appeal will be incorporated.<sup>13</sup>

An administration bill had previously been rejected in the House committee. This was largely because the Democratic majority felt that the powers mentioned by the President should be united with the Department of Labor. As would be discovered later, this view was not shared on the floor of the House.

Another administration proposal,<sup>14</sup> the Steiger-Sikes amendment, was presented to the House as a substitute to the Committee bill. This bill would have separated the enforcement and adjudicatory functions. Most importantly, an independent commission would have been established not only for review purposes of proposed penalties,<sup>15</sup> but, in addition, another independent commission would have been established to promulgate standards.<sup>16</sup> Such a "separation of powers" approach was just the opposite of that used in the Daniels bill. Under the substitute amendment, the Secretary would have had only the authority to investigate. He would not have had the authority to promulgate standards or the power to review employer appeals. The Steiger-Sikes amendment was adopted by a vote of 220 to 172.<sup>17</sup>

### *The Senate*

Meanwhile the Senate's Labor and Public Welfare Committee had witnessed the turmoil occurring in the House Committee. Apparently the need for moderation and compromise was heeded. Senator Williams introduced the prototype of the ultimate Senate bill in May of 1969.<sup>18</sup> An administration bill was submitted by Senator Javits the following August.<sup>19</sup> In September of 1970, the Williams bill was reported out of the committee.<sup>20</sup>

Reflecting the more liberal complexion of the Senate, a bill similar to the Steiger-Sikes bill was rejected by a vote of 41 to 39 on the Senate floor.<sup>21</sup> Subsequently, administration-sponsored amendments were adopted. These amendments substantially altered the provisions

<sup>12</sup> 21 BNA OCCUPATIONAL SAFETY AND HEALTH REP. 141-142 (1971).

<sup>13</sup> *Id.*

<sup>14</sup> H. R. 19200, 91st Cong., 2d Sess. (1970).

<sup>15</sup> *Id.* at § 11.

<sup>16</sup> *Id.* at § 8(a).

<sup>17</sup> LEGISLATIVE HISTORY, *supra* note 1, at 1112.

<sup>18</sup> S. 2193, 91st Cong., 1st Sess. (1969).

<sup>19</sup> S. 2788, 91st Cong., 1st Sess. (1969).

<sup>20</sup> LEGISLATIVE HISTORY, *supra* note 1, at 145.

<sup>21</sup> *Id.* at 449.

concerning imminent danger and employer appeal rights.<sup>22</sup> The Williams bill, as amended, was passed by a vote of 83 to 3 on November 17, 1970.<sup>23</sup>

*The Conference Committee and Final Passage*

A conference committee resolved the many differences which existed between the House Steiger-Sikes bill and the Senate Williams bill. Several of the more important resolutions will be reviewed later in the consideration of individual aspects of the OSH Act. The conference bill was adopted by the Senate on December 16, 1970,<sup>24</sup> and by the House one day later.<sup>25</sup> President Nixon signed the bill into law on December 29, 1970. After a long and sometimes bitter struggle, a comprehensive safety and health act would become law on April 28, 1971.<sup>26</sup> As will be seen, vast changes would be made upon the industrial scene by this law. For the first time, a body of qualified experts would be empowered to inspect worksites for unsafe conditions. Backing them up would be enforcement and penalty mechanisms. Enforcement of the OSH Act and the regulations promulgated pursuant to it could become as comprehensive as that of the Fair Labor Standards Act<sup>27</sup> provisions concerning minimum wage, overtime, and sex discrimination.

**Applicability**

The OSH Act applies to all employers who have employees whose business affects interstate commerce.<sup>28</sup> Quite clearly the coverage of this law is much broader than that of the Fair Labor Standards Act. The size of the business is irrelevant. Its type of activity is irrelevant. As long as it has employees and does business that affects interstate commerce, it must comply with the law's requirements. It is clear that Congress intended to assert its jurisdiction over nonpublic employees to the complete extent permitted by the Constitution.<sup>29</sup>

Congress did exclude from coverage those employers whose working conditions were subject to standards enforced or promulgated by any other Federal agency.<sup>30</sup> This would probably exclude those firms which are under the jurisdiction of the Secretary of the Interior, who exercises authority under either the Federal Coal Mine Health and Safety Act of 1969<sup>31</sup> or the Federal Metal and Non-Metallic Mine

<sup>22</sup> *Id.* at 478.

<sup>23</sup> *Id.* at 528.

<sup>24</sup> *Id.* at 1150.

<sup>25</sup> *Id.* at 1225.

<sup>26</sup> BNA, *supra* note 7, at V.

<sup>27</sup> The Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C.A. § 201 *et seq.* (1964). guarantees employers in industry covered by the Act compensation at a certain minimum rate and at a premium rate for "over-time" work.

<sup>28</sup> 29 U.S.C.A. § 652 (Supp. 1971).

<sup>29</sup> LEGISLATIVE HISTORY, *supra* note 1, at 1216.

<sup>30</sup> 29 U.S.C.A. § 653(b) (1) (Supp. 1971).

<sup>31</sup> 30 U.S.C.A. § 801 *et seq.* (Supp. 1970).

Safety Act.<sup>32</sup> Congressional purpose for the latter was to authorize the Secretary of the Interior to promulgate health and safety standards, inspect mines, enforce the standards, and, if necessary, close a mine, require accident and related reports, and cooperate with state agencies to develop state plans. This law applies to mines that are not coal or lignite.<sup>33</sup> "Mine" is broadly defined to include the land from which the mineral is extracted, private transportation facilities to such land, and all structures utilized in extracting material from such land. The Secretary of the Interior is required to inspect all covered mines at least once a year.<sup>34</sup> It seems that the investigative powers of the Secretary of the Interior are at least as broad as those given to the Labor Department under the OSH Act. Mines that are not covered by the above Mine Safety Act are covered by the Federal Coal Mine Health and Safety Act of 1969. This is a similar law which authorizes the Secretary of the Interior to promulgate safety and health standards, conduct inspections and investigations of mine working conditions, administratively close a mine if there is an imminent danger, and issue proposed citations and penalties. Unless the Secretary of the Interior declines to assert jurisdiction,<sup>35</sup> it would seem that at least nominally the mine workers are subject to a safety act as comprehensive as the OSH Act. Nevertheless absent a complete abstention by the Secretary of the Interior, it is clear that Congress intended to preclude the Secretary of Labor from asserting jurisdiction over employees subject to the above two laws.

This was pointed out by Congressman Daniels when he was responding to a question concerning a similar provision in the Daniels bill. During the course of debate on his proposal, the question of whether the new federal law would transfer safety jurisdiction to the Secretary of Labor was raised. Daniels responded that:

...the answer is "No." [This section] would allow the Secretary of Labor to assert jurisdiction over health and safety conditions within the mining industry now subject to the Federal Metal and Non-Metallic Mine Safety Act when the Secretary of Interior has failed to exercise his statutory authority to set health and safety standards or otherwise declines to assert any jurisdiction over the mining industries under the Act. In other words, only when the Secretary of Interior completely abrogates his responsibilities under the Federal Metal and Non-Metallic Safety Act would the Secretary of Labor be allowed to invoke [the OSH Act] and set standards for the mining industries subject to the Mine Safety Act.<sup>36</sup>

Therefore, it is clear that an employer whose mine is subject to the Federal Metal and Non-Metallic Mine Safety Act or the Coal Mine

<sup>32</sup> 30 U.S.C.A. § 721 *et seq.* (Supp. 1970).

<sup>33</sup> 30 U.S.C.A. § 721(b) (Supp. 1970).

<sup>34</sup> 30 U.S.C.A. § 723 (Supp. 1970).

<sup>35</sup> 30 U.S.C.A. § 722 (Supp. 1970).

<sup>36</sup> LEGISLATIVE HISTORY, *supra* note 1, at 1037.

Health and Safety Act is not subject to the Secretary of Labor's jurisdiction under the OSH Act.

### The General Duty Clause

The general duty clause of the OSH Act provides that:

Each employer 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>36a</sup>

It has always been a nondelegable duty of an employer to furnish his employees with a reasonably safe place to work, reasonably competent and safe employees with whom to work, and reasonably safe and suitable equipment with which to work.<sup>37</sup> The majority of states has passed laws to help enforce these basic common law principles.<sup>38</sup> In addition, several federal laws have statutorily implemented the common law principle. For example, the Longshoremen's and Harbor Workers' Compensation Act provides that:

Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for employees. . . .<sup>39</sup>

Needless to say, there is a large body of law interpreting the common law, state, and federal requirements. To what extent can this body of law be considered in determining the requirements of the OSH Act's general duty clause?

Congressional managers of the Daniels bill maintained that the relationship of the clause was close to the common law. For example, Congressman Perkins announced that:

The [House Education and Labor Committee] believes that employers are equally bound by this general and common duty to bring no adverse effect to the life and health of their employees throughout the course of their employment. Employers have primary control of the work environment and should insure that it is safe and healthful. [The general duty clause] merely restates that each employer shall furnish this degree of care. There is a long established statutory precedent in both Federal and state law to require employers to provide a safe and healthful place of employment. Over 36 states have these provisions, and at least four Federal laws contain similar clauses. . . .<sup>40</sup>

Similar thoughts were echoed by Senator Williams in the Senate committee report.<sup>41</sup> These reports in both Houses used two reasons for placing a general duty on employers to provide a reasonably safe place of employment for their employees. First, such a duty was already placed upon employers by prior common and statutory law. Second,

<sup>36a</sup> 29 U.S.C.A. § 654(a) (1) (Supp. 1971).

<sup>37</sup> See generally *Great Atlantic & Pacific Tea Co. v. Jones*, 294 F.2d 495 (5th Cir. 1961).

<sup>38</sup> SOMERS AND SOMERS, *supra* note 3; see OHIO REV. CODE ANN. § 4101.11 (Page 1965).

<sup>39</sup> 33 U.S.C. § 941 (1964).

<sup>40</sup> LEGISLATIVE HISTORY, *supra* note 1, at 851.

<sup>41</sup> *Id.* at 149.

a general duty requirement was needed in order to enable the Secretary of Labor to protect those employees who might be working under conditions for which no standards have yet been promulgated.<sup>42</sup>

Of course, the old common law concept of "duty" did not by itself impose liability upon an employer or grant a right of recovery to an employee.<sup>43</sup> Under the common law and most state laws, no such liability existed until the failure to comply with the duty was the proximate cause of a loss or injury. Congressman Steiger felt that this fact should be considered in determining whether to enact a broad general duty requirement. He stated:

Another argument offered in support of the committee bill's requirement is that it is comparable to the general duty of care imposed by the law of torts. This argument is also unpersuasive. Tort law is concerned with providing for after-the-fact payment of damages by one whose negligent act caused the injury. . . . In tort law the general duty of care does not exist in isolation. It is surrounded by other factors which sharply limit it, and thus give it real meaning and practical application in the field of law in which it is used.<sup>44</sup>

So actually the OSH Act's general duty clause imposed an additional duty on the employer. Henceforth he would be liable for his negligently created unsafe employment conditions which have not yet resulted in death or serious bodily harm.

### Violations of the General Duty Clause

Civil penalties may be imposed upon employers who violate the general duty clause.<sup>45</sup> Whether to allow the imposition of such penalties for violations of the general duty clause even if there was no violation of an applicable standard was extensively discussed in Congress. The general duty clause in the Daniels bill provided that:

Each employer shall furnish to each of his employees employment and a place of employment which is safe and healthful. . . .<sup>46</sup>

It was made clear by the Committee report on the Daniels bill that a violation of the general duty clause would not have subjected the employer to a mandatory penalty.<sup>47</sup>

Citations for violations of the general duty clause could have been issued only if a "serious danger" existed.<sup>48</sup> Under the House committee bill, the Secretary of Labor would have been authorized to assess a civil penalty of no more than one thousand dollars for such a citation. It was intended that the general duty clause would

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<sup>42</sup> *Id.* at 150, 1217.

<sup>43</sup> MALONE & PLANT, *WORKMEN'S COMPENSATION* 1-53 (1963).

<sup>44</sup> LEGISLATIVE HISTORY, *supra* note 1, at 992.

<sup>45</sup> 29 U.S.C.A. § 666 (Supp. 1971).

<sup>46</sup> H. R. 16785, 91st Cong., 2d Sess., § 5(1) (1970).

<sup>47</sup> LEGISLATIVE HISTORY, *supra* note 1, at 833.

<sup>48</sup> *Id.* at 150.

be used to protect those employees who might work under conditions that are so unique that no standards have yet been promulgated.<sup>49</sup>

As noted previously, the House committee proposal was rejected in favor of the Steiger-Sikes substitute amendment. The general duty clause of this bill provided that:

Each employer shall furnish to each of his employees employment and a place of employment which are free from any hazards which are readily apparent and are causing or likely to cause death or serious physical harm to his employees. . . .<sup>50</sup>

The Secretary of Labor would have been authorized to issue a citation if he "believes that an employer has violated the requirements of section . . . 5 [which includes the general duty clause and safety and health regulations promulgated by the Secretary] . . . ."<sup>51</sup> This was more comprehensive than the Daniels bill in that now a citation could have been issued for a general duty clause violation even if it were not a serious violation. Furthermore, the penalty provisions of the Steiger-Sikes bill did not differentiate between a citation issued under the general duty clause and a citation issued for a violation of a promulgated safety and health regulation. In this respect at least, the Steiger-Sikes bill would have increased the authority of the Secretary rather than limited.

The general duty clause of the amended Williams bill as passed by the Senate provided that:

Each employer shall furnish to each of his employees employment and a place of employment free from recognized hazards so as to provide safe and healthful working conditions . . . .<sup>52</sup>

Citations under the Senate bill would be authorized for violations of both the general duty clause and promulgated standards. But a civil penalty could not be assessed for an initial violation of the general duty clause.

Any employer who violates any standard promulgated . . . [by the Secretary of Labor] . . . and has received a citation therefor, shall be assessed a civil penalty of not more than \$1,000. . . .

Therefore, a citation could have been issued for a violation of the general duty clause. This citation could have included an abatement date. The employer could have been assessed civil penalties for failure to comply with the abatement date.<sup>53</sup> But there would have been no penalty for the initial violation of the general duty requirement in the Senate bill.<sup>54</sup>

The conference committee adopted the Steiger-Sikes approach. In issuing a citation, it would make no difference whether there was

<sup>49</sup> LEGISLATIVE HISTORY, *supra* note 1, at 852.

<sup>50</sup> H. R. 19200, 91st Cong., 2d Sess., § 5(a) (1970).

<sup>51</sup> *Id.* at § 10(a).

<sup>52</sup> S. 2193, 91st Cong., 1st Sess. § 5(a) (1) (1969).

<sup>53</sup> *Id.* at § 15(a).

<sup>54</sup> LEGISLATIVE HISTORY, *supra* note 1, at 150.



a violation of the general duty clause or a specific standard. Additionally, penalties could be issued for a violation of the OSH Act regardless of whether it was a violation of the general duty clause or a promulgated standard.<sup>55</sup> It is interesting to note that the conference committee's report failed to recognize that there had even been a difference between the House and Senate bills in this area.

As a result, it is clear that under the OSH Act an employer can be cited and assessed a penalty for an initial as well as a continuing violation of the general duty clause.

### Safety And Health Standards

As noted previously,<sup>56</sup> employers must comply with occupational safety and health standards promulgated by the Secretary of Labor. Such standards require conditions and practices necessary or appropriate for a safe or healthful employment or place of employment.<sup>57</sup> There are three different ways in which standards can become effective.

Some standards already in effect under certain other federal laws and safety enforcement schemes remain in effect as OSH Act standards. These include those standards previously applicable to employers subject to the Walsh-Healey Act,<sup>58</sup> the Longshoremen's and Harbor Workers' Compensation Act,<sup>59</sup> and others.<sup>59a</sup>

In addition, the Secretary is authorized to promulgate standards initially without regard to the rulemaking procedures of the Administrative Procedure Act.<sup>60</sup> These standards must be put into effect before April 28, 1973.<sup>61</sup> Some commentators have described these as "interim" standards.<sup>62</sup> This description is not accurate. It must be noted that once promulgated these "interim" standards are as permanent as any other standard. The only difference between them and those promulgated after a formal hearing is the procedure initially used in their promulgation.

Of course, if he wishes, the Secretary of Labor may utilize the formal procedures established in the OSH Act.<sup>62a</sup> Additionally, there will arise a need for modified or additional standards after April 28, 1973. At this point, the Secretary will be required to follow the pro-

<sup>55</sup> *Id.* at 1154.

<sup>56</sup> *Id.*

<sup>57</sup> 29 U.S.C.A. § 652(8) (Supp. 1971). Broad delegation of rule making authority has been found constitutional by the Supreme Court in similar circumstances. *See generally* FCC v. RCA Communication, Inc., 346 U.S. 86 (1953).

<sup>58</sup> Walsh-Healey Public Contracts Act, 41 U.S.C.A. § 35 *et seq.* (1964).

<sup>59</sup> 33 U.S.C.A. § 901 *et seq.* (1964).

<sup>59a</sup> Service Contract Act of 1965, 41 U.S.C.A. § 351 *et seq.* (1964); National Foundation on Arts and Sciences Act, 20 U.S.C. 951 *et seq.* (1964).

<sup>60</sup> 29 U.S.C.A. § 655(a) (Supp. 1971).

<sup>61</sup> *Id.*

<sup>62</sup> BNA, *supra* note 7, at 23.

<sup>62a</sup> *See generally* 29 CFR § 1911 *et seq.*

cedure in the OSH Act which allows effected parties the right to participate in a hearing. Subsequent to such a hearing, an aggrieved party has the right to petition the Court of Appeals for review of the Secretary's determination.<sup>63</sup> This determination concerning the proposed standard must be sustained by the court if it is supported by substantial evidence in the record considered as a whole.<sup>64</sup>

The standards which have been promulgated thus far effect almost all employees in every area of their employment environment.<sup>65</sup> Some employers are seriously effected because of the inadequate enforcement of standards which have existed in the past. Others who might be more seriously effected are small firms who have not previously been subject to stringent laws with a determined administrative agency enforcing them.<sup>66</sup>

## Investigations and Inspections

### *Constitutional Questions*

Every major version of the Safety and Health Act authorized the Secretary of Labor to enter a workplace and conduct inspections and investigations.<sup>67</sup> The OSH Act allows a Compliance Officer<sup>68</sup> to enter any workplace at reasonable hours without notice and delay in order to inspect and investigate.<sup>69</sup>

Two Supreme Court cases are pertinent here. The first concerned the need for a search warrant when a municipal housing inspector is conducting routine inspections for violations of the municipal health code. In *Camara v. Municipal Court*,<sup>70</sup> the Supreme Court held that a warrant is required for a non-consent search of a residence under such conditions. Two reasons were advanced for this. First, violations discovered during the search could lead to the imposition of criminal sanctions. Second, and probably more important, it was deemed better policy for a magistrate to determine the authority of an inspector. Such a prior determination would preclude the home owner from having to guess the authority of the inspector. If he assumes he has more authority than he actually has, an illegal search occurs. If he underestimates the authority of the investigator and refuses him entry, he runs the risk of going to jail. A similar result was reached by the Court in *See v. Seattle*.<sup>71</sup> In this case it was held that the fourth amendment bars criminal prosecution of a person

<sup>63</sup> 29 U.S.C.A. § 655(f) (Supp. 1971).

<sup>64</sup> *Id.* On the meaning of the substantive evidence rule see *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) and K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 29.02 (1959).

<sup>65</sup> 29 CFR §1910.1 *et seq.*

<sup>66</sup> 5 BNA *OCCUPATIONAL SAFETY AND HEALTH REP.*, 89 (1971).

<sup>67</sup> S. 2193 § 8(a); S. 4404 § 9(a); H. R. 16785 § 9(a); H. R. 19200 § 9(a).

<sup>68</sup> 29 CFR § 1903.3.

<sup>69</sup> 29 U.S.C.A. § 657(a) (Supp. 1971). See generally 29 CFR § 1903.

<sup>70</sup> *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967).

<sup>71</sup> *See v. City of Seattle*, 387 U.S. 541 (1967).

who has refused to permit a warrantless search of his commercial premises. This was based upon the ground that:

The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.<sup>71a</sup>

Based upon these two cases alone, it would seem clear that an employer has the constitutional right to refuse a warrantless search and inspection by an OSH Compliance Officer.

That is, unless the more recent case of *Wyman v. James*<sup>72</sup> limits the application of the *See* doctrine. This case involved the right of a mother who was receiving welfare payments to refuse a warrantless home visit by a representative of the welfare bureau. Refusal of this warrantless visit resulted in the termination of her welfare payments. The majority of the court felt that denial of permission is not a criminal act. There was no imposition of criminal sanctions for the refusal. Also, even if it was a search, it was not unreasonable because the investigator was actually more concerned with the welfare of the child than any state of compliance of the mother. It was considered that public funds are involved in the welfare system, no uniformed police were involved, and a warrant, if obtained, would give more authority than actually needed or desired. Does the reasoning of this case allow a Department of Labor Compliance Officer to enter a commercial establishment with neither consent nor a search warrant? His intentions are to provide protection for the employee rather than the employer. There are no uniformed police involved, and to a certain degree there is a desire to establish or foster a working relationship with the employee representatives.<sup>73</sup> Nevertheless, the investigatory situation here is much closer to the *Camara* and *See* cases than the *James* case. An elaborate regulatory scheme has been established by the federal government. Enforcement of this scheme is, at least in part, done by the utilization of Compliance Officers who enter an employer's establishment and investigate his operations and workplace.<sup>74</sup> Routine violations of the OSH Act by the employer will quite frequently subject him to fairly large civil penalties.<sup>75</sup> It is entirely feasible that the Compliance Officer could uncover a train of violations that could subject the employer to criminal penalties.<sup>76</sup> Therefore, *See* interprets the fourth amendment so as to give the employer the right to demand that the Compliance Officer obtain a search warrant. Of course, this would nullify the no-notice provisions of the law.<sup>77</sup>

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<sup>71a</sup> *Id.* at 543.

<sup>72</sup> *Wyman v. James*, 91 S.Ct. 381 (1971).

<sup>73</sup> 29 U.S.C.A. § 651 (Supp. 1971).

<sup>74</sup> 29 U.S.C.A. § 657 (Supp. 1971).

<sup>75</sup> 29 U.S.C.A. § 666 (Supp. 1971).

<sup>76</sup> *Id.*

<sup>77</sup> 29 U.S.C.A. § 667(8) (Supp. 1971).

By refusing a warrantless search by a Compliance Officer, the employer has obtained time during which to eliminate at least the recognizable hazards.

*Authorized Representative*

The Daniels bill would have provided that:

A representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany any person who is making an inspection . . . of any workplace.<sup>78</sup>

This was substantially modified by the Steiger-Sikes proposal which would have authorized an accompaniment right to an employee representative only if the employer chose to accompany the Compliance Officer.<sup>79</sup>

Representatives of both the employer and the employees would have had the right to accompany the Compliance Officer in the Senate bill.<sup>80</sup> This approach was adopted by the conference committee.<sup>81</sup>

Therefore, an initial decision made by a Compliance Officer immediately prior to his inspection is to determine who, if anyone, is the authorized representative of the employees. The House and Senate laid this problem right in the Secretary's lap.

Congressman Perkins, in his report accompanying the Daniels bill out of the House Committee, felt that:

Although questions may arise as to who would be considered a duly authorized representative of employees, the Committee expects the Secretary of Labor to determine this question by promulgating regulations to act as guidelines for an inspector.<sup>82</sup>

Senator Williams urged the same approach when he indicated in his Senate Committee report that:

Although questions may arise as to who shall be considered a duly authorized representative of employees, the Bill provides the Secretary of Labor with authority to promulgate regulations for resolving this question. Where the Secretary is not able to determine the existence of any authorized representative of employees . . . the inspector shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.<sup>83</sup>

In accordance with this legislative intent, the Secretary has promulgated regulations to help determine who, if anyone, is the authorized representative. The pertinent regulation provides that the Compliance Officer will be in charge of the inspection and questioning of persons.<sup>84</sup> A representative of the employer and a representative

<sup>78</sup> H. R. 16785, 91st Cong., 2d Sess. § 9(e) (1970).

<sup>79</sup> H. R. 19200, 91st Cong., 2d Sess. § 9(b) (1970).

<sup>80</sup> S. 2193, 91st Cong., 1st Sess. § 8(e) (1969).

<sup>81</sup> LEGISLATIVE HISTORY, *supra* note 1, at 1190.

<sup>82</sup> *Id.* at 852.

<sup>83</sup> *Id.* at 151.

<sup>84</sup> 29 CFR § 1903.6(a).

of the employees will be afforded an opportunity to accompany the Compliance Officer during his inspection. Furthermore, this will be subject to the approval of the Compliance Officer.

Additionally,

In places of employment where groups of employees are represented by different representatives, a different employee representative for different phases of the inspection is acceptable to the extent it does not interfere with the inspection.

Furthermore,

In the interest of affording all employees an opportunity to be represented, more than one representative may accompany the compliance officer during any phase of the inspection, if the compliance officer so directs.<sup>84a</sup>

The latter phrase could cover two different fact situations. First, where the workplace operations are complex and crafts are overlapping. This could occur on a construction site, shipbuilding yard, or any other workplace where electricians, machinists, welders, and other employees would all be mingled together in the same area. Common sense and coordination would permit the Compliance Officer to settle this problem. But a second and more complicated situation arises where there is a jurisdictional dispute between two competing unions or where there is as of yet no recognized union. In the latter case, there might very well be a small but vocal neophyte organization claiming to represent the employees. The advent of the Department of Labor's Compliance Officer could create a stage for all types of activity. Does the regulation quoted above authorize the Compliance Officer to select a representative from each of the competing factions to accompany him on his inspection? A careful reading of the regulations would indicate not. The pertinent provision provides that:

In those cases where there is no authorized employee representative, the compliance officer shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.<sup>85</sup>

The use of the term "authorized employee representative" is crucial. Officials of two or more competing factions, neither of which has been recognized as the collective bargaining agent, probably would not be an "authorized" representative. "Authorized employee representative" has been defined in another context by the Secretary to mean:

A labor organization certified by the National Labor Relations Board as a bargaining representative for the effected employees. In the absence of certification, it shall be the organization which has a collective bargaining relationship with the employer. If no labor organization has been certified or has such a collective bargaining relationship . . . [it] shall mean any person or per-

<sup>84a</sup> 29 CFR § 1903.8.

<sup>85</sup> 29 CFR § 1903.8(b).

sons designated by the affected employees to represent them for the purposes of proceeding under this Act.<sup>86</sup>

Of course, in the context pertinent to this discussion, the Compliance Officer would not seek to determine who was the authorized representative if there are two non-recognized disputing factions. The above regulation would clarify the Compliance Officer's quest where there is a prior certification or collective bargaining agreement. Where there is neither an agreement nor certification but there are competing factions, he would be better advised to simply consult with a reasonable number of employees.

*Employee Time Spent In The Course Of The Investigation*

The question now arises as to whether an employer can refuse to pay an employee his regular rate of pay for that time during which the employee accompanied the Compliance Officer during the inspection or was questioned by the officer as a representative of the employees. Neither the OSH Act, legislative history, nor the regulations direct themselves to a solution of this problem. Of course, the inspection procedures:

shall be implemented so as to avoid any undue and unnecessary disruption of the normal operations of the employer's plant.<sup>87</sup>

Collective bargaining agreements could provide a solution in those instances where the plant is well organized.<sup>87a</sup> The Compliance Officer would usually select the shop steward as the authorized representative. Some collective bargaining agreements would specifically allow the steward to do a certain amount of such activity on company time. Indeed that might be his major function in helping to maintain harmonious labor relations in the plant.

However, the major problem will arise where the bargaining agreement is silent on this point or where there is no such agreement. The Act provides that an employer cannot discriminate against an employee for the reason of the employee availing himself of his rights under the Act.<sup>88</sup> Several rights are provided to employees. One of these is the right, under prescribed conditions, to accompany the Compliance Officer during the inspection. Another such right is that of being consulted about safety and health conditions in the plant. To be effective this inspection and consultation almost have to be done during working hours. Indeed it is mandatory that the inspection be conducted "during working hours and at other reasonable times . . . ."<sup>89</sup> To permit an employer to decline payment to an employee for those minutes or, at most, couple of hours he spends in consultation with the Compliance Officer would have a chilling effect on employee cooperation with the officer. Where the amount of such

<sup>86</sup> 29 CFR § 2200.1(f).

<sup>87</sup> 29 CFR § 1903.6(c).

<sup>88</sup> 29 U.S.C.A. § 660(c) (1) (Supp. 1971).

<sup>89</sup> 29 U.S.C.A. § 667(a) (2) (Supp. 1971).

time is reasonable and directly incident to the inspection, it would clearly be an employer discrimination violation to refuse to pay an employee who has been consulted by the Compliance Officer. Therefore, an employer cannot legally refuse to pay an employee for that period of time that he has been involved in an investigation.

### Enforcement

The first step in the enforcement procedures is the inspection of the worksite. This step has been considered earlier along with some of the pertinent questions raised.<sup>90</sup>

If the Secretary of Labor, upon investigation, "believes" there has been a violation of the general duty clause or a promulgated standard, he will issue a citation to the employer.<sup>91</sup> This citation must be issued with "reasonable promptness"<sup>92</sup> at the least and within six months of the alleged violation at most.<sup>93</sup> It must be in writing and describe with particularity the alleged violation. In addition, the citation will propose an abatement date. The unsafe condition must be eliminated within this proposed abatement period.<sup>94</sup>

Upon receiving the notice of citation and proposed abatement period, the employer has fifteen working days in which to file a notice of contest with the Secretary.<sup>95</sup> Regulations promulgated by the Secretary have defined "working days" as the five regular work days of the week.<sup>96</sup> Since weekends and the day of receiving the citation are not included, the employer will usually have at least twenty calendar days in which to file his notice of contest.

The Secretary could notify the employer of any proposed penalty in a second notification. There would again be fifteen working days for filing a notice of contest of the proposed penalty. Apparently the Secretary is authorized to follow the practice of notifying the employer of the citation and proposed abatement period in one initial letter and then subsequently to notify him of the proposed penalty in a second letter. Consequently, there would be two different fifteen day waiting periods involved. It is possible that an employer would be placed in a position of having to decide whether to contest a citation without knowing what the proposed penalty will be. Experience has shown though that the Department of Labor is apparently notifying the employer of the citation, abatement period, and proposed

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<sup>90</sup> See text at nn. 67-85 *supra*.

<sup>91</sup> 29 U.S.C.A. § 658(a) (Supp. 1971).

<sup>92</sup> 29 U.S.C.A. § 658(b) (Supp. 1971).

<sup>93</sup> 29 U.S.C.A. § 658(c) (Supp. 1971).

<sup>94</sup> 29 U.S.C.A. § 659(b) (Supp. 1971).

<sup>95</sup> The employer is required to post the citation. See 29 CFR § 1903.16.

<sup>96</sup> 29 CFR § 1903.21 (c) provides that: "'Working days' means Mondays through Fridays but shall not include Saturdays, Sundays, or Federal holidays. In computing 15 working days, the day of receipt of any notice shall not be included, and the last day of the 15 working days shall be included."

penalty in the same letter. Upon receiving this notification of all three elements, the employer can file a notice of contest to the citation, the abatement period, the proposed penalty, or any combination of the three.<sup>97</sup>

An employee or representative of employees can file a notice of contest concerning the proposed elimination period.<sup>98</sup> This would occur when such party feels that the proposed elimination period for the unsafe condition is too long. Such a notice of contest must also be filed within fifteen working days.

Under the Daniels bill, the Secretary would have had to notify the employer of a proposed citation within ten days after the inspection.<sup>99</sup> The employer would then have had fifteen working days in which to file a notice of contest. Once such a notice was filed, it would have been required that "the Secretary of Labor shall afford an opportunity for a hearing."<sup>100</sup> In this case, the Secretary would have held his own hearing to determine whether or not to affirm, modify, or vacate his own decision.<sup>101</sup> Subsequently, the employer would have had the right to appeal the Secretary's determination to the applicable Federal District Court. This internal enforcement and appeals procedure was rejected by the House and Senate in favor of a separation of powers approach.<sup>102</sup>

### Occupational Safety and Health Review Commission

Upon receiving a notice of contest, the Secretary will immediately transmit the notice and citation to the Occupational Safety and Health Review Commission.<sup>103</sup>

A Safety and Health Appeals Commission would have been established under the Steiger-Sikes substitute amendment.<sup>104</sup> As in the conference bill, the employer would have had fifteen working days in which to file a notice of contest.<sup>105</sup> Such notice would have been referred to the Appeals Commission which would have afforded an opportunity for a hearing.<sup>106</sup>

The Williams bill in the Senate would have provided for an appeal to be heard by a hearing examiner appointed by the Secretary of Labor.<sup>107</sup> This procedure, of course, was similar to that which would have been followed under the Daniels bill. Senator Javits proposed

<sup>97</sup> See 29 CFR §§ 1903.17 and 2200.7(b).

<sup>98</sup> *Id.*

<sup>99</sup> H. R. 16785, 91st Cong., 2d Sess. § 11(a) (1970).

<sup>100</sup> *Id.* at § 11(b).

<sup>101</sup> *Id.*

<sup>102</sup> LEGISLATIVE HISTORY, *supra* note 1, at 1112.

<sup>103</sup> 29 CFR 2200.7(c)(2).

<sup>104</sup> H. R. 19200, 91st Cong., 2d Sess. § 11 (1970).

<sup>105</sup> *Id.* at § 10(d).

<sup>106</sup> *Id.*

<sup>107</sup> S. 2193, 91st Cong., 1st Sess. § 6(a)(1) (1969); See LEGISLATIVE HISTORY, *supra* note 1, at 11-12.



an amendment to the Williams bill. This amendment which was adopted on the Senate floor provided for the establishment of an Occupational Safety and Health Review Commission.<sup>108</sup>

It was left to the conference committee to resolve further differences between the House and Senate bills. The House bill provided that a citation must be issued within 90 days of violation.<sup>109</sup> No limitations at all were specified in the Senate bill. A six-month statute of limitations was provided in the final bill.<sup>110</sup> Unlike the House proposal, the Senate bill allowed an employee or employee representative to file a notice of contest of a proposed abatement period.<sup>111</sup> This right was preserved in the final bill.<sup>112</sup>

Furthermore, the Occupational Safety and Health Review Commission was established as a three-man commission with its headquarters in Washington.<sup>113</sup> Its members are appointed by the President by and with the consent of the Senate.<sup>114</sup> Although specific qualifications for membership were not outlined in the OSH Act, it was felt that the need for advice and consent by the Senate would assure the appointment of qualified and experienced personnel.

Hearings held by the Commission will either be in Washington or, if deemed convenient, in the field.<sup>115</sup> One of the three members will be appointed Chairman by the President.

This Chairman will be responsible for the administrative operations of the Commission. Hearing examiners and other needed personnel will be appointed by the Commission, and the provisions of section 11 of the National Labor Relations Act are applicable to the jurisdiction and powers of the Commission.<sup>116</sup>

Determinations of the hearing examiners will become a final order of the Commission within thirty days unless the Commission requests a review.<sup>117</sup> A petition for review must be filed within five days. Nevertheless, the Commission upon motion of one of its mem-

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<sup>108</sup> LEGISLATIVE HISTORY, *supra* note 1, at 381; Senator Javits originally designated this commission as The Occupational Safety and Health Review Panel.

<sup>109</sup> H. R. 19200, 91st Cong., 2d Sess. § 10(c) (1970) provided: "The Secretary shall issue each citation within forty-five days from the concurrence of the alleged violation but for good cause the Secretary may extend such period up to a maximum of ninety days from such occurrence."

<sup>110</sup> 29 U.S.C.A. § 658(c) (Supp. 1971).

<sup>111</sup> *Id.*

<sup>112</sup> 29 U.S.C.A. § 661(c) (Supp. 1971).

<sup>113</sup> 29 U.S.C.A. § 661(a)(b)(c) (Supp. 1971).

<sup>114</sup> *Id.*

<sup>115</sup> 29 U.S.C.A. § 661(c) (Supp. 1971).

<sup>116</sup> 29 U.S.C.A. § 661(h) (Supp. 1971). Section 11 of the National Labor Relations Act provides the NLRB with various powers needed to fulfill its investigatory and quasi-judicial functions. See 29 U.S.C.A. § 161 (1964).

<sup>117</sup> 29 U.S.C.A. § 661(i) (Supp. 1971); 29 CFR 2200.42(c); See generally K. DAVIS, ADMINISTRATIVE LAW 184 (1965).

<sup>118</sup> 29 CFR 2200.42(a).

bers can certify an hearing examiner's decision within thirty days for review.<sup>119</sup>

Final decisions of the Commission can be appealed by any "adversely or aggrieved" party within sixty days.<sup>120</sup> This appeal can be made either to the Court of Appeals in the District of Columbia, the site of the original violation, or the principal office of the employer.<sup>121</sup> The substantial evidence on the record considered as a whole will be followed by the Court of Appeals in determining whether to affirm, modify, or vacate the Commission's ruling.<sup>122</sup>

### Discrimination Against Employees

The pertinent section of the OSH Act provides that:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.<sup>123</sup>

These limitations on employer discriminatory activity are similar to those in the Fair Labor Standards Act.<sup>124</sup> Since the provisions are similar, inquiry as to the judicial construction of the latter provision would be beneficial.

An initial question which may arise is whether an employer can legally discharge an employee who has complained to him about unsafe conditions at the worksite but has not in any way filed a complaint with the Secretary of Labor.

Courts have consistently refused to find a violation of the Fair Labor Standards Act where the employee has not been involved in one of the specifically protected activities. For example, a court has refused to enjoin the discharge of an employee even though it felt

inclined to think that probably the activities of [the employee]'s wife with the C.I.O. and her union activities, and the fact that [he] was probably agitating something under the Wage and Hour Law, possibly had more to do with his being fired than the fact that these records were missing.<sup>125</sup>

Another court concluded in dicta that it would be unreasonable to allow the discharge of an employee who had the courtesy to write a letter to his employer concerning a wage and hour complaint even though such employer would have been protected had he complained

<sup>119</sup> 29 CFR 2200.42(d).

<sup>120</sup> 29 U.S.C.A. § 660(a) (Supp. 1971).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> 29 U.S.C.A. § 660(c)(1) (Supp. 1971).

<sup>124</sup> 29 U.S.C.A. § 215(a)(3) (Supp. 1971) provides that: [It shall be unlawful for any person] to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

<sup>125</sup> *Fleming v. Stillman*, 48 F. Supp. 609 (D.C. Tenn. 1943).

first to the Department of Labor.<sup>126</sup> This opinion expanded the definition of the term "file" to include a preliminary letter to the employer. But it should be emphasized that the employee's activities were also protected for the alternate reason that there was an independent Wage and Hour Division investigation in process during this period. The interrelationship of the demand on the employer and the concurrent investigation cannot be ignored.

Therefore, the law is clear that the discrimination clause of the Fair Labor Standards Act

was intended to protect those employees who have made a positive and overt act within the language of the statute, and that some positive action on the part of an employee is mandatory . . . .<sup>127</sup>

A mere demand for back wages to the employer is not such a positive and overt act. Consequently, if the OSH Act's anti-discrimination clause is interpreted in the same manner as that of the Fair Labor Standards Act, the employee's actions are not protected.

The protection provisions of the OSH Act are broader than those of the Fair Labor Standards Act. The last phrase of the former law's protection clause protects an employee from the employer "because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."<sup>128</sup> These rights afforded by the OSH Act must be other than those of filing a complaint, instituting a suit, or providing testimony. Otherwise there would have been no reason for Congress to have added this last phrase to the antidiscrimination provisions of the law.

What are these other rights? It was the purpose of Congress to provide

that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions.<sup>129</sup>

The employer has a duty to provide a place of employment that complies with regulations and which is free from recognized hazards.<sup>130</sup> It seems apparent that an employee has a right to such a place of employment. The first three phrases of the antidiscrimination clause protect specified procedural activities of employees. The broader provisions of the fourth phrase would protect him in trying to obtain enforcement of rights guaranteed to him by the law. These rights stem from the obligations imposed upon an employer to provide a safe and healthful place of employment.

<sup>126</sup> *Goldberg v. Zenger dba Intermountain Appliance Co.*, 43 CCH L.C. § 31, 155 (D.C. Utah 1961).

<sup>127</sup> *Wirtz v. Valentine Lumber Co.*, 236 F. Supp. 616 (D.C.S.C. 1964).

<sup>128</sup> 29 U.S.C.A. § 660(c) (1) (Supp. 1971).

<sup>129</sup> 29 U.S.C.A. § 651(b) (Supp. 1971).

<sup>130</sup> 29 U.S.C.A. § 654 (Supp. 1971).

Furthermore, Congress intended to achieve safe and healthful working conditions by two means: first, the enforcement provisions of the law and second, by encouraging employers and employees to work together "to institute new and to perfect existing programs . . . ." <sup>131</sup> Senator Williams pointed out that:

It has been made clear to the committee that the most successful plant safety programs are those which emphasize employee participation in their formulation and administration; every effort should be made to maximize such participation throughout industry. <sup>132</sup>

This effort would be seriously compromised if an employee could be dismissed solely because he pointed out health and safety defects to his employer.

Therefore, an employer cannot legally discharge an employee who complains to him about unhealthy or dangerous working conditions at his place of employment.

### Imminent Dangers

#### *Legislative History*

Procedures to be used in counteracting imminent dangers created one of the major controversies during Congressional debate on the various safety bills. An imminent danger was generally agreed to include a condition that could reasonably be expected to cause death or serious injury before utilization of the regular enforcement procedures could eliminate the unsafe condition. <sup>133</sup> Such conditions could include oil fumes, oil slicks, leaky pipes, noxious fumes, and others. <sup>134</sup>

Questions arose as to who should initially determine whether an "imminent danger" condition existed. Furthermore, once an imminent danger was determined to exist, who could issue an order closing the work area while the unsafe condition is being eliminated. <sup>135</sup>

The Daniels bill provided that both of these determinations would have been made by the Secretary of Labor, who would have been authorized to issue an administrative order closing a workplace for as long as five days. <sup>137</sup> During this five day period, the Secretary would have been authorized to bring a civil action in the District

<sup>131</sup> 29 U.S.C.A. § 651(b)(1) (Supp. 1971).

<sup>132</sup> LEGISLATIVE HISTORY, *supra* note 1, at 150.

<sup>133</sup> S. 2193, 91st Cong., 1st Sess. § 6(a) (2) (1969); S. 4404, 91st Cong., 2d Sess. § 12(a) (1970); H. R. 16785, 91st Cong., 2d Sess. § 12(a) (1970); H. R. 19200, 91st Cong., 2d Sess. § 12(a) (1970).

<sup>134</sup> See Senator Saxbe's comments at 116 Cong. Rec. S. 18336, Nov. 17, 1970.

<sup>135</sup> LEGISLATIVE HISTORY, *supra* note 1, at 885.

<sup>136</sup> *Id.* at 886. For the constitutionality of a temporary administrative closing order issued without a proper hearing see *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); it is noteworthy that the collective bargaining agreement of the Pacific Coast Longshoring Contract Document, 1966-71, § 11, provides: "Longshoremen shall not be required to work when in good faith they believe that to do so is to immediately endanger health and safety." See Fairley, *Area Arbitration in the West Coast Longshore Industry*, 22 LAB. L. J. 566, 572 (1971).

<sup>137</sup> H. R. 16758, 91st Cong., 2d Sess. § 12(a) (1970).

Court seeking an injunction to have the unsafe worksite permanently closed.<sup>138</sup>

This administrative approach was rejected in the Steiger-Sikes bill.<sup>139</sup> Instead, the Secretary would have had no authority to close any worksite with an administrative order.<sup>140</sup> A temporary restraining order from a District Court would have been required for this. Before such a judicial order could have been in effect for more than five days, a full judicial hearing would have been required.<sup>141</sup>

A compromise approach was used in the Senate bill. This bill would have authorized the Secretary to bring a suit in the District Court seeking a temporary restraining order.<sup>142</sup> In addition, the Secretary would have been authorized to issue an administrative shut-down order where there was insufficient time to seek a judicial decree.<sup>143</sup> This order would have been effective for no longer than seventy-two hours.

Consequently, the conference committee was faced with a major difference between the House and Senate bills. The House bill did not permit any administrative closing orders while the Senate bill allowed a temporary seventy-two hour one. The conference committee decided that the final bill would authorize no administrative shutdown orders whatsoever.<sup>144</sup>

#### *Expedited Procedures*

The Secretary is authorized to request a preliminary injunction from a Federal District Court where the unsafe condition "can[not] be eliminated through the enforcement procedures otherwise provided" by the OSH Act.<sup>145</sup> Therefore, such an injunction cannot be granted in those instances where utilization of the normal enforcement procedures of the Act would eliminate the condition as rapidly as a court order.

Consequently, it is important to note that the Occupational Safety and Health Review Commission has promulgated expedited procedures which allow for a rapid determination of issues in extraordinary circumstances.<sup>146</sup> A hearing can be ordered with only twenty-four hours notice to the concerned parties.<sup>147</sup> The examiner is authorized to issue an oral order immediately after the hearing and all pleadings can be done orally. This procedure presumably could permit

<sup>138</sup> *Id.* at § 12(b).

<sup>139</sup> H. R. 19200, 91st Cong., 2d Sess. (1970).

<sup>140</sup> *Id.* at § 12.

<sup>141</sup> *Id.* at § 12(b).

<sup>142</sup> S. 2193, 91st Cong., 1st Sess. § 12(a) (1969).

<sup>143</sup> *Id.*, § 12(b).

<sup>144</sup> 29 U.S.C.A. § 662 (Supp. 1971).

<sup>145</sup> 29 U.S.C.A. § 662(a) (Supp. 1971).

<sup>146</sup> 29 CFR § 2200.6(f).

<sup>147</sup> 29 CFR § 2200.6(f)(2).

an initial determination within twenty-four hours of the employer's notice of contest.<sup>148</sup>

## Penalties

Penalties can be imposed upon employers who violate the provisions of the OSH Act.<sup>149</sup> Willful or repeated violations of either the general duty clause or applicable regulations can subject the employer to a \$10,000 civil penalty for each violation.<sup>150</sup> Of course, a suit under this section requires a showing that the alleged violations were either willful or repeated.

Similar guidelines should be used in determining willfulness under the OSH Act as have been followed under the Fair Labor Standards Act.<sup>151</sup> Therefore, whether the employer had knowledge of the applicable regulation becomes relevant. But, of course, "evil intent" is not required. The term "willful" means only that the act or omission was done voluntarily or consciously. The issue is whether the act was:

deliberate, voluntary, or intentional as distinguished from one committed through inadvertence, accident, or by ordinary negligence.<sup>152</sup>

In determining whether a violation is repeated, the results of prior investigations can be considered. The present law became effective on April 28, 1971,<sup>153</sup> and standards promulgated under it became effective in most instances either immediately,<sup>154</sup> August 27, 1971, or February 15, 1972.<sup>155</sup> Situations have arisen where employers have violated Longshoremen's and Harbor Workers' Compensation Act regulations before April, 1971, and subsequent to the OSH Act's effective date, violated the very same regulation as an OSH Act regulation.<sup>156</sup> Has there been a "repeated" violation of the regulation which could subject the employer to a \$10,000 fine? The penalty provisions speak of violations of the requirements of the Act.<sup>157</sup> But as to em-

<sup>148</sup> 29 CFR § 2200.6(f)(3).

<sup>149</sup> 29 U.S.C.A. § 666 (Supp. 1971).

<sup>150</sup> 29 U.S.C.A. § 666(a) (Supp. 1971).

<sup>151</sup> 29 U.S.C.A. § 201 *et seq.* (1964); Portal-to-Portal Act of 1947, 29 U.S.C.A. § 251 *et seq.* at 225(a) (1964).

<sup>152</sup> *Nabob Oil Co. v. United States*, 190 F.2d 478 at 480, *cert. den.* 342 U.S. 876 (1951).

<sup>153</sup> LEGISLATIVE HISTORY, *supra* note 1, at 1259.

<sup>154</sup> 29 U.S.C.A. § 655(a) (Supp. 1971).

<sup>155</sup> 29 CFR § 1910 *et seq.*

<sup>156</sup> *Hodgson v. American Shipbuilding Co.*, O.S.H.R.C. Docket No. 70 (1971); *Plain Dealer*, Sept. 15, 1971, at 1, col. 4. The Shipbuilding Regulations, 29 CFR 1502 *et seq.*, were allegedly violated in this case.

<sup>157</sup> 29 U.S.C.A. § 666(a) (Supp. 1971) provides that: "Any employer who willfully or repeatedly violates the requirements of section 654 of this Act, any standard, rule, or other order promulgated pursuant to section 655 or this title, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than \$10,000 for each violation." Other sections provide that a civil penalty of up to \$1,000 "will" be assessed for a serious violation and "may" be assessed for a non-serious violation. 29 U.S.C.A. § 29(b) and (c) (Supp. 1971).

ployees previously covered under the Walsh-Healey Act, the requirements are the same. They were incorporated under OSHA jurisdiction pursuant to Section 4(a) (2) of the Act.<sup>158</sup> Effective enforcement of both the OSH Act and the prior safety act would be seriously thwarted if employers who had previously violated safety regulations are allowed to start with a "clean slate" under the OSH Act.

Each of the penalty sections provide that civil penalties can be assessed.<sup>159</sup> How many violations can the Secretary find in a workplace and what criteria can be used to define or limit a violation? It is clear that a separate violation can be alleged for a failure to provide guards on separate machines.<sup>160</sup> But what occurs where two guards are required on the same machine? Does this result in the possibility of two violations? At this point, it would seem that the Secretary must heed the criteria that is used by the Review Commission in determining the reasonableness of a civil penalty. He must look at the "gravity of the violation."<sup>161</sup> Each separate violation of a standard can be alleged separately. But due consideration of seriousness has to be considered in assessing the proposed penalty.

### State Jurisdiction

A state agency can assert jurisdiction under state law "over any occupational safety and health issue to which no standard is in effect . . ." under the OSH Act.<sup>162</sup> Furthermore, if a state desires to assert jurisdiction in an area in which the Secretary has promulgated standards, it must submit a plan to the Secretary.<sup>163</sup> This plan must guarantee that the state will enforce standards "at least as effective" as the federal standards.<sup>164</sup> In addition, the investigative,<sup>165</sup> enforcement,<sup>166</sup> and penal<sup>167</sup> provisions of the state plan must be as comprehensive as those of the federal plan.

Although the overwhelming majority of states have submitted safety and health plans for approval to the Secretary,<sup>168</sup> a major

<sup>158</sup> 29 U.S.C.A. § 653(b) (2) (Supp. 1971).

<sup>159</sup> 29 U.S.C.A. § 666(a) to (d) (Supp. 1971). It is noteworthy that OHIO REV. CODE ANN. § 4101.16 (Page 1965) provides that: Every day during which any person or corporation, or any officer, agent, or employee thereof fails to observe and comply with any order of the department of industrial commission, or to perform any duty enjoined by . . . the Revised Code, constitutes a separate violation of such order or section.

<sup>160</sup> 29 CFR §§ 1910.211-222.

<sup>161</sup> 29 U.S.C.A. § 666(j) (Supp. 1971) provides that: The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

<sup>162</sup> 29 U.S.C.A. § 667 (Supp. 1971); *See generally* 29 CFR § 1901.

<sup>163</sup> 29 U.S.C.A. § 667(b) (h) (Supp. 1971).

<sup>164</sup> 29 U.S.C.A. § 667(c) (2) (Supp. 1971).

<sup>165</sup> 29 U.S.C.A. § 667(c) (3) (Supp. 1971).

<sup>166</sup> 29 U.S.C.A. § 667(c) (4) (Supp. 1971).

<sup>167</sup> *Id.*

<sup>168</sup> 6 BNA OCCUPATIONAL SAFETY AND HEALTH REP. 107 (1971).

problem still remains. Where there is no approved state plan covering an issue, is the state precluded from asserting enforcement jurisdiction over that issue? We know that if there is no federal standard, the state can assert jurisdiction. But does this mean that the existence of a federal standard precludes even concurrent jurisdiction by the state?

Federal intrusion into areas where state legislation was involved has occurred before. In *Pennsylvania v. Nelson*,<sup>169</sup> the Supreme Court considered the preemption of a state law by a federal law. Here the federal government had enacted legislation for the control of seditious activity. Pennsylvania sought to enforce its own legislation dealing with the same subject. Chief Justice Warren, speaking for the majority, held that the federal legislation had superseded the state law.<sup>170</sup>

His analysis utilized several criteria in looking at the federal legislative scheme. He first asked whether the scheme of federal regulation was so pervasive as to make the inference that Congress left no room for the states to supplement it.<sup>171</sup> As we have seen, the applicability of the OSH Act is as broad as permitted by the interstate commerce clause. The federal government now has the responsibility to promulgate occupational safety and health standards that control activities of employers in the nation in great detail and degree. Although a role for the individual states is recognized in the Act, it is only permitted to the extent that they may "develop plans in accordance with the provisions of this Act."<sup>172</sup> During the congressional hearings, it became clear that prior state conduct in this area had been, at best, disappointing, and, at worst, shocking. It is apparent that the federal government intended to attack this problem with new weapons of broad applicability.

Chief Justice Warren also asked whether the federal legislation is in a field in which the federal interest is so dominant as to preclude state legislation in the same field. Congress has determined that in the vital area of human lives occupational safety and health has become as large a problem as the questions of war and peace. Senator Williams has pointed out that more Americans have died as a result of industrial incidents than have died in Vietnam.<sup>173</sup> In addition, these problems have become of national magnitude and concern. Occupational safety and health in a manner similar to labor-management relations in earlier years will become an area of increased federal concern in the future.

He also considered whether continued enforcement of the state laws would create possible conflicts with the effective administration

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<sup>169</sup> *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

<sup>170</sup> *Id.* at 499.

<sup>171</sup> *Id.* at 502.

<sup>172</sup> 29 U.S.C.A. § 651(b)(11) (Supp. 1971).

<sup>173</sup> SOMERS AND SOMERS, *supra* note 3.



of the federal legislation.<sup>174</sup> Two problems must be considered here. First, enforcement of the state regulatory scheme might conceivably subject the employer to dual punishment. Second, those standards promulgated by the Secretary may be similar to those used by the state agencies. Concurrent state enforcement would permit a separate and probably less strict interpretation of these standards.

It seems, therefore, that:

Congress did not merely lay down a substantive rule of law . . . It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint, and notice, and hearing and decision, including judicial relief pending a final administrative order.<sup>175</sup>

Furthermore, there is no doubt that Congress intended to erect a broad federal scheme for the protection of all employees. Consequently, the courts should interpret this scheme of legislation as preempting state activity in that area.

### Conclusion

The OSH Act is a direct result of many decades of neglect by the states in the field of industrial safety and health. Their legislation and industrial safety commissions have largely failed to stem the increasing tide of death and injuries that occur daily throughout the nation. It was hoped that as a result of this new law this fatal tide would be reversed. Safety conditions in workplaces will be investigated, safety and health regulations promulgated, and violators penalized. But similar federal law in the field of mining has failed to substantially decrease fatalities and injuries. This is in large part because the agencies responsible for the enforcement of those laws have failed to live up to the degree of activity and aggressiveness expected of them by Congress. The future of the OSH Act and industrial safety in the United States now lies with the Department of Labor and the Occupational Safety and Health Review Commission. Too many prior state and federal laws have failed because of inadequate enforcement. Hopefully this will not occur with the OSH Act.

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<sup>174</sup> *Pennsylvania v. Nelson*, 350 U.S. 497, 507 (1956).

<sup>175</sup> *Garner v. Teamsters Local 776*, 346 U.S. 485 (1953); See *id.*, at 490-491: A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.