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Editor-in-Chief

Randy S. Rabinowitz

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Labor & Employment Law

Occupational Safety and Health Law Committee
Section of Labor and Employment Law
American Bar Association

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State Regulation of Occupational Safety and Health

I. State Regulation Under the OSH Act

C. Preemption of State Safety and Health Requirements

1. Preemption of State Safety and Health Regulation

In *Empire State Restaurant and Tavern Association, Inc. v. New York State*,[1] food service and tavern owners asked a district court to enjoin New York State from enforcing a state law regulating smoking in a number of places, including bars and restaurants, based in part on OSHA preemption. The court rejected the argument that OSHA's air contaminant standards regulating "toxic and hazardous substances"[2] preempted state legislation regulating occupational tobacco smoke. Relying on interpretive letters available on OSHA's web site and on OSHA's withdrawal of its proposal to issue a standard on environmental tobacco smoke, the court decided that although "OSHA has established standards for regulation of a number of toxic and hazardous substance, some of which are included in tobacco smoke, OSHA has not promulgated any standards or regulations pertaining to tobacco smoke as a whole."[3] The court refused to issue a preliminary injunction.

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[1] 289 F. Supp. 2d 252, 20 OSH Cases 1417 (N.D.N.Y. 2003).
[2] 29 C.F.R. §1910.1000.
[3] 289 F. Supp. 2d at 255.

In *Dukes v. Sirius Construction, Inc.*,[4] the widow of a construction worker brought a negligence action against the City of Missoula for failing to enforce Montana's Scaffolding Act, which required that the city inspect to ensure that the named employers complied with applicable state and federal occupational safety and health laws. In reversing the lower court's dismissal of the claim against the city, the Montana Supreme Court rejected the city's reliance on *Gade v. National Solid Wastes Management Association*[5] and *Industrial Truck Association v. Henry*,[6] discussed in the Main Volume, and an earlier Montana case,[7] for its argument that the OSH Act has preempted the entire field of state health and safety regulation.[8] The Court concluded that Congress did not intend for the OSH Act to affect state workers' compensation laws or the remedies available to injured workers under the state's common law.

As noted in the Main Volume,[9] courts continue to hold that state causes of action protecting employees from retaliatory discharge for safety-related activity are not subject to OSH Act preemption.[10]

2. Preemption of Nonregulatory Forms of State Authority

a. State compensatory laws. As noted in the Main Volume,[11] the OSH Act's savings clause generally can be successfully invoked to defeat preemption defenses in occupational claims of personal injury brought pursuant to state law.

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[4] 73 P.3d 781, 20 OSH Cases 1237 (Mont. 2003).

[5] 505 U.S. 88, 15 OSH Cases 1673 (1992).

[6] 125 F.3d 1305, 18 OSH Cases 1033 (9th Cir. 1997).

[7] Thornock v. State, 745 P.2d 324, 13 OSH Cases 1511 (Mont. 1987). The Court in *Dukes* overruled *Thornock,* in which it had held that the OSH Act preempted the state's duty, imposed by the Montana Safety Act, to inspect hazardous places of employment.

[8] *Dukes*, 73 P.3d at 788.

[9] Main Volume Chapter 19, at page 619, note 15.

[10] Spielman v. Fisher Printing, Inc., No. 02 C 7454, 2003 WL 1090360 (N.D. Ill. Mar. 10, 2003) (unreported) (OSH Act did not preempt state law claim for retaliatory discharge, for the act "specifically contemplates that it will be supplemented by state tort law."); Gibbs v. Orkin Exterminating Co., 74 Fed. Appx. 747, No. 02-35539, 2003 WL 21995365 (9th Cir. Aug. 21, 2003) (Neither the provisions of Oregon's state plan nor the federal OSH Act preempted the employee's wrongful discharge claim; statutory preemption was "improper" when two independent legislative or common law causes of action "target distinct aspects of a defendant's conduct.").

[11] Main Volume Chapter 19, at page 622, §2.a. and note 30.

In *Sakellaridis v. Polar Air Cargo, Inc.*,[12] a district court rejected the defendants' argument that several federal laws, including the OSH Act, preempted the employee's personal injury claim brought under state law. The Court distinguished *Gade* on the grounds that the licensing laws at issue in *Gade* are preempted by the OSH Act while Section 4(b)(4), (the OSH Act's savings clause) provides that "protective labor laws" are not preempted.[13] The Court also rejected the defendant's argument that because the state tort law relies on the state's Industrial Code to provide the standard of care, that law is preempted by the OSH Act.[14]

Similarly, in *Fullen v. Philips Electronics North America Corp.*,[15] another district court remanded a case back to state court, holding that OSHA's Hazard Communication Standard (HCS) did not preempt employees' tort claims. The employees' state law claims—that the defendants either failed to communicate, purposely concealed, or fraudulently misrepresented the hazardous effects of working in the light bulb factory—were not preempted because the state claims do not seek to hold the defendants to a higher standard than required by federal law, the court held. Similarly, in *Anderson v. Airco, Inc.*,[16] the district court remanded back to state court a tort case arising out of alleged workplace exposure to vinyl chloride monomer, citing Sections 4(b)(4) and 18(a) of the OSH Act in support of its determination that neither OSHA's Hazard Communication Standard nor OSHA's vinyl chloride warning and labeling standard preempted state tort law.

In *Beadling v. William Bowman Associates*,[17] a New Jersey court held that neither the Federal Hazard Communication Standard (HCS)[18] enacted under the OSH Act, nor the Federal Hazardous Substances Act (FHSA),[19] preempted the plaintiffs' claim that warning labels should have been placed on the side of the industrial drum rather than on the top of the drum.

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[12] 104 F. Supp. 2d 160 (E.D.N.Y. 2000).
[13] *Id.* at 164.
[14] *See id.*
[15] 266 F. Supp. 2d 471 (N.D.W.Va. 2002).
[16] Prod. Liab. Rep. (CCH) ¶16,702, No. C.A. 03-123-SLR, 2003 WL 21842085 (D. Del. July 28, 2003).
[17] 809 A.2d 188 (N.J. Sup. Ct. 2002).
[18] 29 C.F.R. §1910.1200.
[19] Pub. L. No. 86-613 (1960), 74 Stat. 372.

The Court noted that the federal requirement to identify the hazardous chemical and provide appropriate hazard warnings does not "absolve the distributor from providing an appropriately located warning."[20]

For a more detailed discussion of the relationship between OSHA and tort law, see Chapter 23, The OSH Act, Workers' Compensation, and Workplace Tort Liability.

b. State criminal sanctions. As of 2004, federally approved state plans provide for a range of penalties for criminal willful violations.[21] The most common monetary penalty is a fine of up to $10,000 for a first offense, and up to $20,000 for a subsequent offense. These figures are consistent with the language of Section 17(e) of the OSH Act,[22] which provides for fines of not more than $10,000 or imprisonment for not more than six months, or both; for subsequent convictions, the fine is not more than $20,000 or imprisonment for not more than one year, or both. However, as a result of the federal Sentencing Reform Act of 1984, the maximum criminal fines which could be assessed under the OSH Act for a violation of Section 17(e) increased to not more than $250,000 for an individual and not more than $500,000 for an organization.[23] Some states impose significantly higher penalties that can range from up to $70,000–$100,000 for the first offense and up to $100,000–$250,000 for a subsequent offense.[24]

Most state statutes also authorize prison sentences for criminal violations to be imposed separately or along with the monetary penalties. Most commonly, states can impose imprisonment for up to six months for the first offense and up to one year for a subsequent offense, which is consistent with the federal OSH Act. However, for a first offense, many states provide for a sentence of up to one year.[25] For a subsequent

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[20] *Beadling,* 809 A.2d at 198.

[21] Cooperative & State Programs, Occupational Safety & Health Administration, *State Plan Penalties for Criminal Willful Violations* (Mar. 2004).

[22] 29 U.S.C. §666(e).

[23] *See* 18 U.S.C. §3571.

[24] *See, e.g.,* HAW. REV. STAT. §396-10; VA. CODE ANN. §40.1-49.4; WASH. REV. CODE ANN. §49.17.190.

[25] *See, e.g.,* ARIZ. REV. STAT. §23-418; CAL. LAB. CODE §6425; MICH. COMP. LAWS ANN. §408.1035, 21; VT. STAT. ANN. §210.

offense, the term of imprisonment can be as high as up to 4.5 years.[26]

California is unique in the criminal penalties that can apply. The California Labor Code includes criminal liability provisions that, depending upon the circumstances, could impose fines ranging from $5,000 to $3,500,000.[27] A "knowing or negligent" violation that results in a serious violation imposes penalties of up to $5,000 and a maximum of six months imprisonment.[28] A "willful" violation which causes death or permanent or prolonged impairment of the body of any employee can result in penalties for a first offense of up to $250,000 and/or three years imprisonment for individuals and up to $1,500,000 for corporations.[29] For a subsequent offense within seven years, the penalties increase to a maximum of $250,000 and/or four years in state prison for an individual and $3,500,000 for a corporation (with a minimum of $1,000,000).[30]

The California Penal Code also contains penalties for violations involving "serious concealed dangers." Corporations and managers must provide written notice to affected employees and the appropriate state agency (or CalOSHA) within 15 days after actual knowledge of the danger is acquired or immediately if there is an imminent risk of great bodily harm or death.[31] Failure to do so can result in up to three years in prison and/or fines of $25,000 for each manager and $1,000,000 for a corporation. It is also important to note that assessments by the State of California and its counties are added to each dollar paid in criminal penalties. At present, assessments are 240 percent of a fine.[32] Thus, for example, a $100 fine with assessments results in a total penalty of $340.

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[26] *See, e.g.,* 29 P. R. LAWS ANN. §361x.

[27] CAL. LAB. CODE §6425.

[28] CAL. LAB. CODE §6423(b).

[29] CAL. LAB. CODE §6425(a). "Willful" is defined as "simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." CAL. LAB. CODE §6425(e); CAL. PENAL CODE §7.

[30] CAL. LAB. CODE §6425(c).

[31] CAL. PENAL CODE §387.

[32] CAL. PENAL CODE §1464 (100% state assessment); CAL. PENAL CODE §1465.7 (20% state surcharge); CAL. GOV'T CODE §70372 (50% state court construction assessment); CAL. GOV'T CODE §76000 (70% county assessment).

Additionally, state prosecutors continue to have the option to prosecute those responsible for the occupational deaths and injuries of employees under general state criminal statutes. For more specific information, see Chapter 10, Civil Penalties and Criminal Sanctions, in this Supplement.

Since the publication of the Main Volume, the number of safety and health compliance officers employed nationwide has increased.[33] In 2004, state occupational safety and health agencies employ 1,351 safety and health compliance officers; federal OSHA employs 1,091.[34]

In 2003, the Virgin Islands converted from a plan covering private and public sector to a plan covering public employees only.[35]

III. Criteria for State Plans

A. Standards

2. State-Specific Standards

The Main Volume mentions two of OSHA's then high-priority rulemaking projects: the revision of the OSHA recordkeeping regulations and the proposed rule to require comprehensive workplace safety and health programs.[36] OSHA published the revision to its recordkeeping rule on January 19, 2001.[37] OSHA withdrew its Draft Proposed Safety and Health Program Rule on August 15, 2002.[38]

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[33] Main Volume, at page 628.

[34] Cooperative & State Programs, Occupational Safety & Health Administration, *Summary of State Safety and Health Staffing: Compliance & Total Budget FY 2004* and Office of Program Budgeting & Finance, 2004.

[35] 68 Fed. Reg. 43,457 (July 23, 2003).

[36] Main Volume Chapter 19, at page 634.

[37] See Chapter 5 for a more detailed discussion of OSHA's revised recordkeeping rules. The rules, at 66 Fed. Reg. 5916 (Jan. 19, 2001), finalized the revision to 29 C.F.R. Part 1904 Recording and Reporting Occupational Injuries and Illnesses and 29 C.F.R. §1952.4 Injury and Illness Recoding and Reporting Requirements. As described in more detail in the new regulations, state plans must promulgate recording and reporting requirements that are "substantially identical" to those in 29 C.F.R. Part 1904.

[38] 67 Fed. Reg. 74,783 (Dec. 9, 2002).

The Main Volume discussed, as examples of state-specific requirements, ergonomic standards in two states and bans in three states on workplace smoking.[39] The Washington ergonomics standard was invalidated on November 4, 2003, when Washington voters passed Initiative 841 repealing the State's standard, effective December 4, 2003. As of April 2004, 12 states (including many that do not have state plans) ban smoking in workplaces.[40]

D. Compliance Assistance [New Topic]

Section 21 of the OSH Act provides for training and employee education. [41] In 1998, Congress amended Section 21 of the Act by adding a Section 21(d) requiring the Secretary to establish and support cooperative agreements with the states to enable employers to consult with state personnel regarding the application of, and compliance with, the requirements of the OSH Act or the requirements of the State Plan.[42] All State Plans provide for a formal program of on-site consultation; most such programs are operated and funded separately from the State Plan under the authority of Section 21(d). State Plans also have authority to provide training and education under state law. Although these consultation activities are provided independently of any enforcement activity, they are coordinated with a state's enforcement program to focus on priorities identified by a state's strategic plan.[43] See also additional discussions in the Main Volume.[44]

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[39] Main Volume, at page 634.

[40] *See* Action on Smoking and Health (ASH), *at* http://www.ash.org/smokingbans.html.

[41] 29 U.S.C. §670.

[42] Occupational Safety and Health Administration Compliance Authorization Act of 1998, Pub. L. 105-197, 112 Stat. 638 (July 16, 1998) added subsection (d) to section 21 of the OSH Act, 29 U.S.C. §670.

[43] For more information on how each state implements its own incentives to promote voluntary compliance, see Grassroots Workplace Protection, 2002 OSHSPA Report State Plan Activity, Occupational Safety & Health State Plan Association at http://www.osha.gov/fso/osp/oshspa/Grass2002.pdf.

[44] See the discussions in Main Volume Chapter 2, Legislative History of the Occupational Safety and Health Act of 1970, at page 52, and Main Volume Chapter 17, Rights of Workers and Their Representatives, at page 585.

IV. OSHA Evaluation of State Plans

A. Revision of 29 C.F.R. Part 1953 [New Topic]

In September 2002, OSHA published its revision of 29 CFR Part 1953, Changes to State Plans.[45] The revised regulation streamlines the process for states to submit, and for OSHA to review and approve, changes to State Plans. The regulation also provides uniform timeframes for the adoption and submission of State Plan change supplements or other documentation. The final rule became effective November 25, 2002.

Major changes in the revision include:

— states must submit written supplements only when the State program change differs from the federal program; generally OSHA will seek public comment only if a state plan change differs significantly from the comparable federal program component and if OSHA believes that additional information is needed to determine compliance with the "effectiveness" criteria in Section 18(c) of the OSH Act;
— states are required to submit only one copy of plan supplements and may use electronic means for notification and submission; and
— all changes (with the exception of emergency temporary standards) must be submitted within 60 days of adoption.

Additionally, the revised regulation sets forth OSHA's longstanding interpretation of the OSH Act that a state with a federally approved State Plan "may modify or supplement the requirements contained in its plan, and may implement such requirements under state law, without prior approval of the plan change by Federal OSHA."[46] Such changes to an approved State Plan are subject to subsequent OSHA review and approval. Should OSHA's review result in a final determination to reject a state plan change, the State would have to take corrective action in order to maintain its "at least as effective" plan approval status.

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[45] 67 Fed. Reg. 60,122 (Sept. 25, 2002).
[46] 29 C.F.R. §1953.3.

Appendix E [Revised Appendix]

State Plan Post-Contest Administrative Review Procedures*

*June 2004

[*Editor's Note*: This guide to State Plan Post-Contest Administrative Review Procedures was originally prepared by the staff of the Occupational Safety & Health Review Commission and published in the Main Volume as Appendix E. The information included in Appendix E in this Supplement was obtained by the Office of State Programs, Occupational Safety & Health Administration. Stephanie Fichter, Program Analyst, OSHA, J.D., College of William & Mary Marshall-Wythe School of Law, 2002, was the principal author of revisions to this appendix. OSHA's Office of State Programs requested that each state update the description of plan contest procedures. Listed below are the detailed descriptions of state plan contest procedures provided by the states that responded to the request for updated information. Where updated information was not available, this is indicated by a statement noting that information, current as of 1999, appears in the Main Volume.]

STATE PLAN POST-CONTEST PROCEDURAL MODELS

1. No Administrative Review Procedure

Virginia—Contested OSH citations heard in Circuit Court. [*Editor's Note:* Information is current as of 1999, as published in the Main Volume.]

One Level of Administrative Review

Alaska—Occupational Safety and Health Review Board holds hearings.

Hawaii—Labor and Industrial Appeals Board holds hearings in OSHA and other cases; may remand to HIOSH before hearing. [*Editor's Note:* Information is current as of 1999, as published in the Main Volume.]

New Mexico—Occupational Health and Safety Review Commission holds hearings.

New York (Public Sector employees only)—Industrial Board of Appeals holds hearings in public sector OSH cases.

Oregon—Judges from the Workers' Compensation Board hold OSH hearings.

2. Two Levels of Administrative Review

a. Judge or Hearing Officer, then a Board or Commission

Arizona—Judges work for the Arizona Industrial Commission; appeal is to OSH Review Board, an independent agency. [*Editor's Note:* Information is current as of 1999, as published in the Main Volume.]

California—OSH Appeals Board judges hold hearings; discretionary review by the Board itself.
Kentucky—Hearing Officer from Attorney General's office under contract with Occupational Safety and Health Review Commission; discretionary review by the Commission.
Minnesota—Judges from Office of Administrative Hearings (central panel for 80 agencies); appeal is to OSH Review Board, and then the State Supreme Court.
North Carolina—Hearing Examiners (attorneys in private practice) hold hearings; appeal is to the Safety and Health Review Board.
[*Editor's Note:* Information is current as of 1999, as published in the Main Volume.]
Utah—Administrative Law Judge from Labor Commission holds hearings in OSH and other labor cases; appeal is to Appeals Board or Labor Commissioner.
Vermont—Hearing Officer (private attorney under contract) holds hearing; appeal is to Occupational Safety and Health Board.
Wyoming—Hearing Officer from the Labor Officer of Administrative Hearings (independent agency); OSH Commission reviews all Hearing Officer decisions in OSH cases.

b. One Commissioner (Board Member), then Full Commission (Board)
Connecticut (Public sector employees only)—One member of the Occupational Safety and Health Review Commission holds hearing in public sector OSH cases; may request review by full Commission.
Indiana—Judges are individual members of Board of Safety Review or attorneys in private practice appointed by Board; appeal is to the full Board.
[*Editor's Note:* Information is current as of 1999, as published in the Main Volume.]
South Carolina—Hearing held by single member of Occupational Heath and Safety Review Board; discretionary review by full Board.

c. Judge or Board, then Appeal to Board
Iowa—At discretion of Employment Appeals Board, judge or Board itself holds OSH hearing; if appealed to Board, mandatory review of judge's decision; discretionary rehearing if initial decision is from Board.
New Jersey (Public Sector employees only)—Hearings held by the Occupational Safety and Health Review Commission. Upon appeal, the Commission may elect to conduct

a hearing or forward the appeal to the Office of Administrative Law for a hearing by an Administrative Law Judge.
Tennessee—At the discretion of the Occupational Safety and Health Review Commission, hearings are held by the Commission or, less frequently, by judges of the Administrative Procedures Division of the Department of State; in either case, parties may ask the Commission for reconsideration.

d. Judge, then Administrative Appeal
Maryland—Hearings held by judges from Office of Administrative Hearings (central panel for many state agencies); appeal is to the Commissioner of Labor and Industry.
[*Editor's Note:* Information is current as of 1999, as published in the Main Volume.]
Puerto Rico—Hearings are held by judges employed by the Secretary of Labor; appeal is to the Secretary of Labor.
Virgin Islands (Public Sector employees only)—Administrative Law Judge holds hearings; appeal is to Commissioner of Labor.

e. Administrative Review, then Board Hearing
Nevada—After the contest is filed, there is a conference with the chief administrative officer of the Occupational Safety and Health Enforcement Section; if not resolved, a hearing is held by the Occupational Safety and Health Review Board.
[*Editor's Note:* Information is current as of 1999, as published in the Main Volume.]

3. Three Levels of Administrative Review
Michigan:
1) Review by issuing division of Bureau of Safety and Regulation;
2) If appeal is not resolved, appeal may be filed with Board of Health and Safety Compliance Appeals; hearing held by judges from Office of Hearings (of the Department of Consumer and Industry Services);
3) Judge's decisions may be appealed to the Board.

Washington:
1) Review by WISHA, which usually holds a *reassumption hearing* conducted by a reassumptions officer working in a WISHA regional office. The result of the hearing is that WISHA may affirm, withdraw or modify a citation in a *corrective notice of redetermination* (CNR);
2) CNR may be appealed to the Board of Industrial Insurance Appeals. An Industrial Appeals judge with the Board holds hearing;
3) Judge's decisions can be appealed to the Board.

STATE-BY-STATE SURVEY

ALASKA

One Level of Administrative Adjudicatory Review

Occupational Safety and Health Review Board—Consists of three private citizens appointed by the Governor for four-year terms: one from labor, one from industry, and one public member.

Number of Contests

1990–1994—50 to 60 per year; 1995—63; 1996—33; 1997—17; 1998—14; 1999—10; 2000—19; 2000—1; 2001—2; 2002—4; 2003—2

Number of Hearings

1990—10; 1991—13; 1992—7; 1993—4; 1994—6; 1995—3; 1996—4; 1997—0; 1998—1; 1999—2; 2000—1; 2001—2; 2002—4; 2003—2

Hearings

Cases are heard by the Board. A nonvoting Hearing Officer (private contract attorney) presides. There are formal adjudicatory hearings and full discovery is permitted.

Appeal From Administrative Decision

Board decisions may be appealed to the Alaska Superior Court and then the Alaska Supreme Court. The standard of review is "substantial evidence" on the facts and de novo on the law except if the Board's specialized expertise is involved in which case it is the "reasonable basis" test.

Union or Employee Participation

The employee representative is notified of the hearing and may request party status. The scope of union or employee contests is limited to the abatement date. The Alaska statute permits "A person affected by an order of the OSH Review Board" to appeal to the Superior Court, but the scope of this right has not been tested.

Retaliation Cases

Discrimination cases are decided by the Superior Court.

Alternative Dispute Resolution

Presently the Board does not employ any alternative dispute resolution.

Decision and Information Sources

Sandra Dallas
Administrative Support
Occupational Safety and Health Review Board
Alaska Labor Standards and Safety Division
P.O. Box 21149
Juneau, Alaska 99802
(907) 465-2709
(907) 465-2784 (FAX)
E-mail: oshreviewboard@labor.state.ak.us
Review Board: http://www.labor.state.ak.us/oshboard/home.htm

Information needed to get documents: Docket number or company name necessary to obtain copy of documents.
No charge for copies.

Alaska Department of Labor, Labor Standards and Safety Division: http://www.labor.state.ak.us/lss/oshhome.htm

ARIZONA

[*Editor's Note:* See information, current as of 1999, in the Main Volume.]

CALIFORNIA

Two Levels of Administrative Adjudicatory Review

1) Administrative Law Judges employed by the Occupational Safety and Health Review Board.

2) Occupational Safety and Health Review Board, a 3-member, full-time Board appointed by the Governor and confirmed by the Senate for 4-year terms, one member each from management, labor and the general public. The Board is within the Department of Industrial Relations but is an independent body. It has jurisdiction over both public (non-federal) and private employers.

Unusual Feature

In about two-thirds of the cases, Cal/OSHA is represented at the hearing by a compliance officer or other non-lawyer from the agency. Employers are also frequently unrepresented by counsel.

In California, the citation is considered the "complaint." A form is provided which, if filled out and returned by the employer, constitutes the "answer." On the form the employer identifies what it is appealing and checks a box next to its ground(s) for appeal. Affirmative defenses should be reflected on this form.

Number of Contests

2001—5,255 contests; 2002—5,367 contests.

Number of Hearings

Not available.

Hearings

Administrative Law Judges hold formal adjudicatory hearings. In a large number of cases one or both parties are not represented by counsel. Therefore, the Board attempts to keep the proceedings simple. For example, narrative testimony is permitted. The hearing is tape-recorded. Hearsay evidence is admissible but is not alone sufficient to support a finding of fact if an objection is made, unless it falls within a recognized exception. Judges rarely make on-site visits. A pre-hearing conference is held in every case by a judge. A different judge conducts the actual hearing if the case does not settle.

According to the Board, "The Board's approval is only needed for requests for subpoenas duces tecum and not for subpoenas, depositions, witnesses, or other documents. The Board's procedures do not provide for interrogatories and requests for admission."

Administrative Appeal

Any party may petition the Board to "reconsider" an Administrative Law Judge's decision within 30 days of service of the decision or the Board may reconsider an Administrative Law Judge's decision on its own motion within the same period. The petition must identify which issues it wants the Board to reconsider and include references to the record. (Grounds for review are specified in the statute.) An opposition may be filed within 30 days of service of the petition. If the petition is granted, the Board issues a written Decision After

Reconsideration. Within the past few years the Board has been inviting oral argument on some petitions. In one instance, the Board posted an invitation for amicus briefs on its website.

If the Board's interpretation of a standard differs from that of the Division of Occupational Safety & Health, the Board may reject the Division's interpretation. The Division may then file a writ of mandamus with any superior court.

Appeal From Final Administrative Decision

Any party may file a writ of mandate with a California superior court within 30 days of either the Board's Decision on Reconsideration or denial of a petition for reconsideration. Judicial review of agency findings of fact is under the substantial evidence test.

Union or Employee Participation

An employee or union may appeal the reasonableness of the abatement time. If a union requests and is granted party status, it may participate in all proceedings including settlement. Additionally, according to the Board, "A special interest group may be granted permission to participate as an intervenor on only those terms and conditions set forth in the board's order granting intervenor status."

Retaliation Cases

Any case of alleged discrimination is not handled by the Appeals Board. Instead, it is investigated by the Division of Labor Standards Enforcement (DLSE) in the Department of Industrial Relations. An informal administrative hearing on the alleged discrimination may be held by DLSE. If not disposed of at the administrative level, the Labor Commissioner files discrimination cases in superior court.

Alternative Dispute Resolution

A telephonic pre-hearing conference is held in every case by a different judge from the judge who will hold the hearing. The pre-hearing conference helps narrow or resolve some or all of the disputed issues. In more than 45 percent of the appeals before the Appeals Board, the parties settle all of their issues at the pre-hearing conference and the pre-hearing ALJ then issues an Order.

Decision and Information Sources

Executive Officer
California Occupational Safety and Health Appeals Board
1300 I Street, Suite 940
Sacramento, California 95814
(916) 322-5080
(916) 445-6331 (FAX)
Appeals Board: http://www.dir.ca.gov/dir/os&h/oshab/oshab.html

Information needed to get documents: Docket number needed to get copies of opinions.
Copies: $.50 per page. ALJ decisions and Board decisions on Westlaw software and on web site:

California OSHA: http://www.dir.ca.gov/DIR/os&h/occupational safety.html

CONNECTICUT

Private Sector Employees:

Federal OSHA requirements apply.

Public Sector Employees Only:

Two Levels of Administrative Adjudicatory Review

1) Connecticut Occupational Safety & Health Review Commission—Normally a citation contest is heard by one of the Commissioners. Commissioners are appointed by the Governor by reason of training, education, and experience and are not state employees: they represent many different occupations and have included lawyers, physical therapists, and business people.

2) A full panel of the Commission may decide to hold a review hearing. The Commission is an independent agency that is within the Department of Labor for administrative purposes only. Ordinarily, settlement is reached without a contest being filed, and, even when contests are filed, most cases are settled without a hearing before the Review Commission.

Unusual Feature

Connecticut's state plan is limited to public sector employees only.

Number of Contests

An average of 2 or 3 contests per year.

Number of Hearings

Approximately one every two years.

Hearings

Commissioners hold formal adjudicatory hearings. They are assisted by Review Commission counsel. Limited discovery is permitted at the discretion of the hearing officer. Requests for admission and requests for production of documents are permitted as of right. Interrogatories and depositions may be undertaken only at the discretion of the Commission, consistent with its intent to provide an expedited and informal hearing.

Administrative Appeal

Complainant can ask for review by the full Commission or appeal to the Connecticut Superior Court. Usually appeal is to the Court.

Appeal From Final Administrative Decision

Appeal is to the Connecticut Superior Court.

Union or Employee Participation

Unions and employees can contest the time period for abatement or can elect party status. If they are parties, they have a right to participate in settlement discussions.

Retaliation Cases

Under Conn. Gen. Stat. §31-379, complaints are filed with the Connecticut Labor Commissioner. Complaints are initially mediated and, if mediation fails, are scheduled for a formal administrative hearing. The hearing officer presiding over the hearing issues a proposed decision upon the close of evidence and, subsequent to the holding of oral argument and filing of briefs, if requested, the Labor Commissioner issues a final decision. If the employee prevails, possible damages include reinstatement, back pay, and reasonable attorney's fees. Parties aggrieved by the Commissioner's decision may

appeal to the Connecticut Superior Court. Employees do not have a private right of action.

Alternative Dispute Resolution

Presently there are no alternative dispute resolution procedures.

Decision and Information Sources

Director
Division of Occupational Safety and Health
Connecticut Department of Labor
38 Wolcott Hill Road
Wethersfield, Connecticut 06109
(860) 566-4550
(860) 566-6916 (FAX)

Information needed to get documents: N/A.
Charge for copies: $.25 per page.

CONN OSHA: http://www.ctdol.state.ct.us/osha/osha.htm

HAWAII

[*Editor's Note:* See information current as of 1999, in the Main Volume.]

INDIANA

[*Editor's Note:* See information current as of 1999, in the Main Volume.]

IOWA

Two Levels of Administrative Adjudicatory Review

1) Employment Appeal Board or Administrative Law Judge—The Board looks over a list of pending cases and decides which ones it wants to hear itself and which ones it will assign to an Administrative Law Judge. Generally, the lay Board will assign cases with discovery or complex legal and factual issues to a judge. The judges are employed by the Department of Inspections and Appeals and hear administrative cases of numerous kinds. There

are 3 members of the Board, who are appointed by the Governor for 6-year terms. One member represents management; one, labor; and one, the public. They serve full-time and, besides IOSH cases, have jurisdiction over unemployment insurance appeals, construction contractor registration appeals, Iowa Public Retirement System appeals, elevator appeals, and Boilers and Unfired Steam Pressure Vessels appeals. The Board is an independent body but under the umbrella of the Department of Inspections and Appeals.

2) Employment Appeal Board—Parties may appeal a judge's proposed decision to the Board or may ask the Board for a rehearing in the event that the Board was the initial decision-maker.

Number of Contests

1997—56; 1998—83; 2002—91; 2003—37

Number of Hearings

1997—1; 1998—4; 2002—3; 2003—4

Hearings

Formal adjudicatory hearings are held. Discovery is permitted and is sometimes extensive. Judges hold pre-hearing conferences for the purpose of setting discovery deadlines and a hearing date. The Board members have conducted hearings themselves on cases not assigned to a judge.

Administrative Adjudicatory Appeal

Parties may appeal a judge's proposed decision to the Board or ask the Board for rehearing in the event that the Board issued the initial decision. Review of a judge's proposed decision is mandatory, but rehearing is discretionary with the Board.

Appeal From the Final Administrative Adjudicative Decision

Appeal is to the District Courts of Iowa.

Union and Employee Participation

Unions may contest any issue concerning abatement. In cases where an employer contests the citation, a union may request party status. If so, unions participate fully in the process and are kept informed of settlement discussions while they are ongoing.

Retaliation Cases

The Iowa Division of Labor determines whether or not to bring a case alleging discrimination in the Iowa District Court.

Alternative Dispute Resolution

There are no formal alternative dispute resolution procedures.

Decision and Information Sources

Executive Officer
Employment Appeal Board
Lucas State Office Building, 4th Floor
Des Moines, Iowa 50319
(515) 281-4161
(515) 281-7191 (FAX)

Information needed to get documents: Documents should be requested by docket number or company name.
Charge for copies: $.25 per page.

Department of Inspection and Appeals: http://www.state.ia.us/government/dia

KENTUCKY

Two Levels of Administrative Adjudicatory Review

1) Hearing Officer—May be full-time employees of the Kentucky Occupational Safety and Health Review Commission. The Commission may also use contract Hearing Officers. Currently the Commission has a contract for the Attorney General's Office to provide attorneys who serve as Hearing Officers. These attorneys also act as Hearing Officers for many other agencies and statutes.

2) Kentucky Occupational Safety and Health Review Commission—The Commission is independent although it is affiliated with the Kentucky Labor Cabinet for administrative purposes only. There are 3 Commissioners who are appointed by the Governor for 4-year terms or until a successor is named. By law, the Commission members represent, respectively, labor, industry, and the public. The Commissioners serve part-time; the Commission meets one day a month.

Unusual Feature

Unions and employees may contest any aspect of the citation.

Number of Contests

An average of 140 contests per year.

Number of Hearings

An average of 25–30 hearings per year.

Hearings

Hearing Officers hold formal adjudicatory hearings. Parties have the right to exchange requests for admission and requests for production of documents (including the agency file), but interrogatories and depositions may only be exchanged by special order of the Hearing Officer. They generally will issue such orders in complex, high penalty, or willful cases. Hearing officers can make on-site visits but rarely do. They hold pre-trial conferences by telephone to discuss settlement, clarify issues, rule on witness lists, discuss subpoenas, etc. These conferences have helped reduce case cycle-time.

The Hearing Officer submits to the Commission findings of fact, conclusions of law, and a recommended order. If the recommended order is not called for review and no party petitions the Commission for review, the recommended order becomes a final order of the Commission.

Administrative Appeal

Review by the Commission of a Hearing Officer's decision is discretionary. Any party may petition for review. The Commission can direct a case for review *sua sponte* and has done so with some regularity.

Appeal of the Final Administrative Adjudicative Decision

Review Commission decisions may be appealed to the Franklin County Circuit Court.

Union and Employee Participation

Unions and employees may contest the reasonableness of the citation, penalties, or the length of time for abatement. They may also elect party status. Either way, they participate in or are kept informed about settlement discussions although they do not have the right to veto a settlement agreed to by the other parties.

Retaliation Cases

Discrimination cases are decided by the Commission after the citation has been issued. They are investigated by the discrimination branch of the OSH Compliance Division and prosecuted by the Office of the General Counsel. Thus, the procedure is essentially the same as that for compliance cases.

Alternative Dispute Resolution

There are no formal alternative dispute resolution procedures.

Other Types of Procedures

There is a provision for expediting proceedings available to the Commission, but it has rarely been used.

Decision and Information Sources

Assistant Director
Kentucky Occupational Safety & Health Review Commission
Kentucky Labor Department
4 Millcreek Park, Route 3
Frankfort, Kentucky 40601
(502) 573-5892
(502) 573-4819 (FAX)
KYOSH Review Commission: http://www.state.ky.us/agencies/labor/rchome.htm

Information needed to get documents: Docket number or company name.
Charge for copies: $.25 per page.

KYOSH: http://www.state.ky.us/agencies/labor/osh/index.htm

MARYLAND

[*Editor's Note:* See information current as of 1999, in the Main Volume.]

MICHIGAN

Two Levels of Administrative Review

1) Bureau of Safety and Regulation—The employer or employee representative must first file an appeal with the issuing division of

the Bureau of Safety and Regulation, which is part of the Department of Consumer and Industry Services. The Bureau is in the process of reorganizing into two enforcement divisions: a Construction Safety and Health Division and a General Industry Safety and Health Division, which will also handle discrimination cases.

2) Board of Health and Safety Compliance Appeals—If the appeal is not resolved with the issuing division, a formal notice of appeal may be filed with the Board of Health and Safety Compliance Appeals. There are 7 members of the Board appointed by the Governor and confirmed by the Senate to 4-year terms. Three members represent labor, three members represent management, and one represents the general public. They work on a per diem basis, and typically meet every 2 months. Although the Board is an independent agency, trials are conducted by Administrative Law Judges who are employed by the Office of Hearings, which is part of the Department of Consumer and Industry Services. These judges also hear wage-payment and barrier-free cases. Administrative Law Judge decisions may be appealed to the Board itself.

Number of Contests

An average of 430 contests per year.

Number of Hearings

For the last 5 years, there have been an average of 12 hearings on the merits each year in addition to an average of 21 default hearings.

Hearings

Administrative Law Judges from the Office of Hearings hold formal adjudicatory hearings. There are, however, no formal rules governing discovery. Parties may exchange interrogatories and requests for production of documents. Depositions may be taken only with the judge's permission. Parties tend to make liberal use of the Michigan Freedom of Information Act to obtain government files. Normally, there is no pre-trial conference although the parties may request one.

Appeal of the Administrative Law Judge's Decision

The judge's decision may be appealed to the Board of Health and Safety Compliance Appeals. Review by the Board is discretionary and any one Board member can direct a case for review.

Appeal of Final Administrative Adjudicatory Decision

The Board's decision may be appealed to a Michigan circuit court. Either party may file a petition for review.

Union or Employee Participation

When appealing to the issuing division of the Bureau of Safety and Regulation, a union or employee may contest only the abatement period. Before the Board, however, a union or employee may also contest the proposed classification and the proposed penalty. Unions and employees also may elect party status if the employer contests a citation.

Retaliation Cases

The General Industry Safety and Health Division, a special section of the Bureau of Safety and Regulation, brings discrimination cases. The initial trial is held before an administrative law judge from the Bureau of Hearings. The judge's decision may be appealed to a circuit court.

Alternative Dispute Resolution

There are no formal alternative dispute resolution procedures.

Decision and Information Sources

Director, Bureau of Hearings
Michigan Department of Consumer & Industry Services
611 Ottawa Drive
P.O. Box 30695
Lansing, Michigan 48909
(517) 335-2484
(517) 322-5016

Information needed to get documents: Docket number necessary to get copies of decisions.
Charge for copies: $.08 per page plus staff labor cost of $15.12 per hour.

Department of Consumer and Industry Service's Bureau of Safety and Regulation: http://www.cis.state.mi.us/bsr

MINNESOTA

Two Levels of Administrative Adjudicatory Review

1) Administrative Law Judge—The judges come from the Office of Administrative Hearings, which is a central panel office for 80 state agencies.

2) Occupational Safety and Health Review Board—The Governor appoints the 3 members of this independent Board to serve 4-year terms. They are to represent, respectively, labor, management, and the general public. Serving on the Board is a part-time obligation.

Number of Contests

There were approximately 287 contests in 2002.

Number of Hearings

Average of 6–10 per year.

Hearings

Judges conduct formal adjudicatory hearings. Discovery is permitted. Prehearing conferences are held on larger cases but may be held in any case at the request of either party.

Administrative Appeal

Review of a judge's decision is mandatory if an appeal is filed.

Appeal of Final Administrative Decision

Appeal is to the Minnesota Court of Appeals. Substantial evidence is the standard of review.

Union or Employee Participation

Unions and employees may contest any aspect of the citation or penalty. Alternatively, they may intervene as a matter of right if they are or represent an affected employee, or they can petition to intervene under the Office of Administrative Hearings' rules. They have input into settlement discussions if they have party status.

Retaliation Cases

The OSH Division investigates discrimination cases. If the agency determines that there is a prima facie case, the Attorney General's office litigates the case before an Administrative Law Judge. Employees also have a private right of action.

Alternative Dispute Resolution

The Office of Administrative Hearings makes both settlement judges and mediators available at the request of the parties. Some judges strongly encourage their use.

Decision and Information Sources

Office of Administrative Hearings
Administrative Law Section
Minnesota Department of Labor and Industry
100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138
(612) 341-7600
Jamie Anderson, Executive Secretary
OSHA Review Board
Minnesota Department of Labor and Industry
443 Lafayette Road North
St. Paul, Minnesota, 55155
(651) 284-5103
Email: jamie.anderson@state.mn.us
Office of Administrative Hearings: http://www.oah.state.mn.us/mission.htm

Information needed to get documents: Docket number and company name needed.
Charge for copies: ALJs: $.25 per page; Review Board: $.50 per page plus shipping, handling, and sales tax for copying.

Minnesota OSHA: http://www.state.mn.us/ebranch/doli/mnosha.html

NEVADA

[*Editor's Note:* See information current as of 1999, in the Main Volume.]

NEW JERSEY

Private Sector Employees:

Federal OSHA requirements apply.

Public Sector Employees Only:

One or Two Levels of Administrative Review

1) Occupational Health and Safety Review Commission—The Commission consists of 3 members appointed by the Governor from among persons who by reason of training, education, or experience are qualified to carry out the function of the Commission.

2) The Review Commission may elect to conduct a hearing or forward the appeal to the Office of Administrative Law for a hearing by an Administrative Law Judge. To date, all appeals have been settled informally prior to a hearing by the Commission.

Unusual Feature

New Jersey's state plan is restricted to public employees.

Number of Contests

An average of approximately 14 per year.

Number of Hearings

None to date. All cases have been settled informally without hearings.

Hearings

The Review Commission may subpoena and examine witnesses, require the production of evidence, administer oaths, and take testimony and depositions.

Appeal From Final Administrative Decision

Appeal is through the Appellate Division of the Superior Court.

Union and Employee Participation

Unions and employees may contest a case on any grounds.

Retaliation Cases

The Commissioner of Labor decides discrimination cases. Decisions may be appealed to the Office of Administrative Law. The Commissioner may then adopt, reject, or modify the recommended report and decision of the Administrative Law Judge and issue a final determination.

Alternative Dispute Resolution

Presently there are no alternative dispute resolution procedures.

Decision and Information Sources

Director
Office of Public Employees Occupational Safety & Health
New Jersey Department of Labor
1 John Fitch Plaza
P.O. Box 386
Trenton, New Jersey 08625-0386
(609) 292-7036
(609) 292-3749 (FAX)

Charge for copies: Fee varies according to number of copies requested.

NJ PEOSHA: http://www.state.nj.us/labor/lsse/lspeosh.html

NEW MEXICO

One Level of Administrative Adjudicatory Review

Occupational Safety and Health Review Commission—Consists of 3 private citizens appointed by the Governor and confirmed by the Senate to staggered 6-year terms. One member represents management, one represents labor, and one represents the general public.

Number of Contests

Approximately 30 per year.

Number of Hearings

Approximately one every two years.

Hearings

The Commission holds formal adjudicatory hearings. The Chairman of the Commission is the Hearing Officer unless someone else is designated. The other Commission members need not attend the hearing but generally do. Limited discovery is permitted. Parties may exchange: requests for the identity of witnesses, requests for the production of documents, requests for admissions, and interrogatories (not to exceed 15 in number without permission of the Hearing Officer). They also may take a deposition if it is necessary to preserve evidence. All other discovery may only be conducted with the permission of the Hearing Officer. A counsel from the state Attorney General's office often advises the Hearing Officer and drafts the Commission's decision based on the hearing record. The New Mexico Environment Department's Occupational Health and Safety Bureau's interpretation of the standards is entitled to deference but is not binding on the Commission.

Appeal From Final Administrative Decision

Appeal may be made in the District Court in Santa Fe County (where the Commission maintains its office) or where the hearing was held. The Commission's decision may be set aside if fraudulent, arbitrary, capricious, not supported by substantial evidence, or not in accordance with the law.

Union or Employee Participation

Unions and employees may contest the reasonableness of the abatement period. They are provided an opportunity to participate in the proceedings, including settlement discussion, but, in most cases, do not do so. They participate when an employer contests a citation by filing a notice of intervention.

Retaliation Cases

The New Mexico Department of the Environment, through its Occupational Health and Safety Bureau, conducts the initial investigation and, if the complaint is found to be meritorious, attempts to reach an administrative settlement. Failing that, the case is decided in the District Court upon the Department's filing of a petition.

Alternative Dispute Resolution

There are no formal alternative dispute resolution procedures.

Decision and Information Sources

Hearing Officer
State of New Mexico Occupational Health and Safety Review Commission
Harold Runnels Building
P.O. Box 26110
Santa Fe, New Mexico 87502
(505) 827-1603
(505) 827-2836 (FAX)

Information needed to get documents: Docket number and case name needed for request.
No charge for copies (unless lengthy document).

Department of the Environment's Environment Protection Division's Occupational Health and Safety Bureau: http://www.nmenv.state.nm.us/

NEW YORK

Private Sector Employees:

Federal OSHA requirements apply.

Public Sector Employees Only:

One Level of Administrative Adjudicatory Appeal

Industrial Board of Appeals—There are 5 Board members (one of whom must be a lawyer) who are appointed by the Governor and confirmed by the Senate to 6-year terms. They work on a per-diem basis, except for the Chairman, who serves on a full-time basis. The Board is an independent agency. The Governor also appoints a Counsel to the Board.

Unusual Feature

With respect to OSH cases, the Board only hears public sector cases, leaving the private sector cases to the federal enforcement and adjudicatory procedure. The Board, however, does hear cases under a variety of other labor statutes, which do cover private sector employees.

Number of Contests

An average of 150 per year.

Number of Hearings

An average of 100 per year.

Hearings

The Board holds formal adjudicatory hearings. For the most part, pre-trial matters are handled by the Board Counsel, who may refer them to the Board in some instances. Discovery is permitted.

The hearings are conducted by a designated Hearing Officer who is normally a Board member or Board Counsel. Any other Board member may attend, but need not do so. The designated Hearing Officer compiles the record in the case. After reviewing the record, the Board as a whole votes on the case.

Appeal From Final Administrative Adjudicatory Decision

Appeal may be taken to the New York Supreme Court, which is a trial court. The standard of review is "arbitrary and capricious."

Union or Employee Participation

Unions and employees may contest a case on any grounds. The Board is also liberal in granting intervenor status to those with an interest in the case.

Retaliation Cases

The Attorney General's office brings discrimination cases in the state Supreme Court (trial court), which are referred to it by the Division of Safety and Health.

Alternative Dispute Resolution

There are no formal alternative dispute resolution procedures.

Decision and Information Sources

Office of the Chairman
New York State Industrial Board of Appeals
Empire State Plaza, Building 2, 20th Floor
Albany, New York 12223
(518) 474-4785
(518) 473-7533 (FAX)

Information needed to get documents: Docket number and case name needed; if not known, year of issuance is needed.
Charge for copies: No copying charge unless multiple copies are requested.

New York Department of Labor's Division of Safety and Health: http://www.labor.state.ny.us/business_ny/employer_responsibilities/safety_health.html

NORTH CAROLINA

[*Editor's Note:* See information current as of 1999, in the Main Volume.]

OREGON

Informal Conference Procedure

The Appeals Section is an independent program within OR-OSHA responsible for processing appealed citations. Appeals specialists conduct informal conferences with employers throughout the state. Resolution is reached in about 90 percent of all informal conferences. Cases not achieving resolution are referred to the Workers' Compensation Board Hearings Division for a contested-case hearing. Opinions and orders from the Board can be appealed to the Oregon Court of Appeals.

One Level of Administrative Adjudicatory Review

Administrative Law Judge—Judges from the Workers' Compensation Board (WCB) hear contested OSH cases. (A contest is called a "request for a hearing" and may be filed either with the Oregon Department of Consumer and Business Services, Oregon Occupational Safety and Health Division (OR-OSHA), or the WCB.) There is a small group of about 6 judges at the WCB who hears all the OSH cases.

Unusual Feature

Presently, the filing of a contest suspends the enforcement action for nonserious violations but not for serious violations. Employers who receive serious citations may request expedited proceedings. Or. Rev. Stat. §654.078(6) allows an employer or employee to contest the period of time fixed for correction of a serious violation; any hearing on that issue shall be conducted as soon as possible and shall take precedence over the other hearings conducted by the board under the provisions of Or. Rev. Stat. §§654.001 to 654.295 and 654.750 to 654.780.

Number of Contests

An average of 700 contests per year.

Number of Hearings

An average of 20–25 per year. During the last five years, the average is less than 5 per year: 1999—2; 2000—2; 2001—4; 2002—3; 2003—6 (this number does not include administrative determinations on untimely appeals).

Hearings

Judges hold formal adjudicatory hearings. Discovery is permitted, and there is also some mandatory disclosure. Within 14 days after mailing of the notice that the case has been assigned to a judge, OR-OSHA must provide to the other parties all documents it has pertaining to the matter, including relevant rules. Within 14 days of OR-OSHA's mailings, the other parties must furnish to OR-OSHA copies of documents in their possession pertaining to the matter if copies of documents were not included in what it received from OSHA and not previously provided. Soon after an Administrative Law Judge is assigned a case, the ALJ usually holds a live or telephonic pre-trial conference with the parties to frame issues, discuss discovery, etc. Parties also have the option of using a judge other than the one assigned to the case for trial—a settlement judge—to mediate the case and may even request that a particular judge perform the mediation.

Appeal of Final Administrative Adjudicatory Appeal

Administrative Law Judge decisions may be appealed to the state Court of Appeals, which is a general jurisdiction appellate court.

Union or Employee Participation

Unions or employees may contest the abatement period. Under the WCB's Administrative Rules, unions and employees may also elect to participate as parties.

Retaliation Cases

Complaints must be filed with Oregon's Bureau of Labor and Industries, which investigates them like other discrimination cases. The employee then has a private right of action in the Circuit Court.

Alternative Dispute Resolution

WCB has a formal voluntary settlement judge program.

Decision and Information Sources

Administrator
Workers Compensation Board
2601 25th St. SE, Suite 150
Salem, Oregon 97303-1282
(503) 378-3308
(877) 311-8061 (Toll-free)
(503) 373-7742 (FAX)
Worker's Compensation Board: http://www.cbs.state.or.us/wcb/

Information needed to get documents: Docket number, company name needed to request copies of decisions.
Charge for copies: $.15 per page.

Department of Consumer and Business Service's Occupational Safety and Health Division: http://www.cbs.state.or.us/external/osha

PUERTO RICO

Two Levels of Administrative Adjudicatory Review

1) Administrative Law Judge—Employed by the Secretary of Labor.
2) Secretary of Labor—The Secretary of Labor is appointed by the Governor and is head of the Department of Labor and Human Resources.

Number of Contests

Average of 70 contests per year.

Number of Hearings

Average of 10 hearings per year.
Average of 20 hearings for adjudication on the merits per year.
Average of 50 transaction hearings per year.

Hearings

Judges hold formal adjudicatory hearings. There is full discovery. Judges occasionally make on-site visits. Pre-trial conferences are usually held if it appears that the case will not settle before the hearing. Evidence and the applicable law are discussed in order to reduce the areas of controversy by obtaining stipulations as to the facts and law.

Appeal From the Judge's Decision

Appeal may be made to the Secretary of Labor, who can affirm, modify or revoke the findings and conclusion of the judge based on the record or on additional evidence the judge may order to be submitted. Judges' decisions are rarely, if ever, appealed by the Secretary. Parties can also appeal to the Puerto Rico Court of Appeals through a writ of review of administrative decision.

Appeal From the Final Administrative Decision

Appeal may be made to the Puerto Rico Court of Appeals.

Union and Employee Participation

Unions and employees can contest only the abatement date. They may also participate in the hearing and in settlement discussions on request.

Retaliation Cases

The OSH legal division brings discrimination cases in the Superior Court.

Alternative Dispute Resolution

Presently there are no alternative dispute resolution procedures.

Decision and Information Sources

Information Officer
Technical Support Division
Commonwealth of Puerto Rico
Department of Labor and Human Resources
505 Munoz Rivera Avenue
San Juan, Puerto Rico 00918
(787) 754-2172
(787) 282-7975 (FAX)

Information needed to get documents: Name of parties involved or inspection report number, as well as date of inspection.
Charge for copies: $.20 per page.

SOUTH CAROLINA

Two Levels of Administrative Adjudicatory Review

1) Review by a Single Member—A single member of the South Carolina Occupational Health and Safety Review Board holds the hearing in a contested case.

2) Review by Full Board—The individual Board Member's decision may be appealed to the Full Board. The 6 members of the Board, one from each Congressional district, are selected by the member of the General Assembly for 4-year terms. The Board is independent; however, the Department of Labor, Licensing and Regulation is charged with providing the Board with support personnel and facilities. Performance on the Board is a public service; some are practicing attorneys, retired professionals, or business or professional people. There is no stipulation that Board members come from any particular party or sector.

Unusual Feature

There are no pleadings other than the citation and notice of protest.

Number of Contests

Fiscal year 2003—49 contested cases.

Number of Hearings

Fiscal year 2003—18 hearings.

Hearings

The individual Board members hold formal adjudicatory hearings and also handle any pre-trial matters that arise. Board members issue written decisions. There is no discovery as of right, but limited discovery is permitted upon application to the Board member when good cause is shown.

Appeal of the Board Member's Decision

Review of the individual Board member's decision by the full Board is at the discretion of the Board. The Board performs an appellate-style review with the Board member who heard the case recusing himself or herself. Review by the full Board is unusual.

Appeal of the Final Administrative Adjudicatory Decision

Appeal may be filed in the Court of Common Pleas of the county where the employer maintains its principal place of business or in the county where the violation is alleged to have occurred. The standard of review is substantial evidence.

Union or Employee Participation

Unions and employees may contest a citation on any grounds available to the employer and also may participate as parties in employer contests. They may participate in settlement discussions if they elect party status.

Retaliation Cases

Discrimination cases are heard in the Court of Common Pleas in the county in which the discrimination is alleged to have occurred.

Alternative Dispute Resolution

There are no formal alternative dispute resolution procedures.

Decision and Information Sources

OSHA Compliance Manager
South Carolina Department of Labor
Department of Licensing and Regulation
P.O. Box 11329
Columbia, South Carolina 29211-1329
(803) 734-9607
or
Joan Wilkie, Clerk of the Review Board
(803) 896-4374
South Carolina Office of Occupational Health and Safety Review Board: http://www.llr.state.sc.us/Osha/index.asp?file-osbrd.htm

Information needed to get documents: Docket number and company name are required.
Charge for copies: Varies with documents requested.

Department of Labor, Licensing and Regulation's Office of Occupational Safety and Health: http://www.llr.state.sc.us/osha.asp

TENNESSEE

Two Levels of Administrative Adjudicatory Review

1) Occupational Safety and Health Review Commission—There are 3 members of the Commission who are appointed by the Governor to 3-year staggered terms. Members need not come from any particular party or sector. Service on the commission is not full-time. The Commission is an independent body funded under the Tennessee Department of Labor and Workforce Development. The Commission usually holds the hearing in a case, although it may refer cases with complex legal issues to an Administrative Law Judge to hold hearings and issue an initial decision that is recommended to the Review Commission. Administrative Law Judges are employed by the Tennessee Secretary of State and are attorneys.

2) Reconsideration—After a hearing, a party may petition the Commission to reconsider an initial decision whether by an Administrative Law Judge or the Commission.

Unusual Feature

When the Commission presides at the hearing, its decision is issued orally. When an Administrative Law Judge presides at a hearing, the ALJ's decision is issued in writing, after the hearing, in the form of a Findings of Fact and Conclusions of Law that is recommended to the Commission.

The Commission sets the docket for its scheduled hearings rather than by agreement of the parties or agreement of the parties in conjunction with the judge.

Number of Contests

There were 49 contests in fiscal year 2003.

Number of Hearings

There were 14 formal hearings in fiscal year 2003.

Hearings

The Commission schedules hearings on a monthly basis in Nashville. The Commission members hold formal administrative adjudicatory procedures. It is not required that the Commission members be attorneys, and generally they are not. If a case is referred to an Administrative Law Judge, the case is usually set in conjunction with the parties.

Commissioners as well as counsel for the parties may question witnesses. While parties may appear pro se, unrepresented parties may not examine or cross-examine witnesses inasmuch it would be considered the unauthorized practice of law under Tennessee statute.

The commission permits full discovery. With the exception of what is protected by law, the agency file is considered to be a public record and is available under the public information statute.

Appeal of the Initial Decision

Parties may petition the initial order of the Commission or an Administrative Law Judge. If no action is taken within 20 days of filing, the petition for reconsideration is deemed denied. The granting of a petition for reconsideration tolls the 60-day time period during which a party may seek judicial review in the Chancery Court.

Appeal of the Final Administrative Adjudicatory Decision

An appeal may be filed in the Chancery Court.

Union and Employee Participation

Unions and employees may contest citations on any grounds and may request party status. They may be involved informally throughout the entire proceeding, including settlement discussions, whether or not they request party status.

Retaliation Cases

The Attorney General's Office prosecutes discrimination cases in the Chancery Court of the county where the employee lives.

Alternative Dispute Resolution

While there is no formal alternative dispute resolution procedure, the agency does conduct informal settlement discussions after a petition for contest has been made. During these discussions, counsel of TOSHA may request that the employer proffer a settlement offer. The TOSHA counsel may take the offer back to TOSHA or may recommend that all or part of the citation be amended or withdrawn as well as its associated penalties reduced. The recommendation must be approved by the manager of either health or safety and then the Administrator or Director of TOSHA.

Decision and Information Sources

Executive Director
Tennessee Occupational Safety & Health Review Commission
Andrew Johnson Tower, 2nd Floor
710 James Robertson Parkway
Nashville, Tennessee 37243-0662
Tennessee Department of Labor and Workforce Development:
http://www.state.tn.us/labor-wfd/
(615) 741-2547
(615) 741-5869 (FAX)

Information needed to get documents: Docket number, name of company and date of proceeding.
Charge for copies: $.25 per page.

UTAH

Two Levels of Administrative Adjudicatory Review

1) Administrative Law Judge—Judges are employed by the Labor Commission. They also hear Workers' Compensation, discrimination, safety, and fair housing cases.

2) Labor Commission or Appeals Board—Appeal of the judge's decision can be made to the Labor Commission or Appeals Board. There is only one Labor Commissioner, who is appointed by the Governor. There are 3 members of the Appeals Board, one each representing management, labor, and the public. The Appeals Board members serve on a part-time basis. The Board is also part of the Labor Commission.

Number of Contests

Approximately 12 per year.

Number of Hearings

Average of 3 per year.

Hearings

Judges hold formal administrative adjudicatory hearings. There is full discovery.

Appeal From the Judge's Decision

Any party may appeal to either the Labor Commission or the Appeals Board. Both the Commissioner and the Board make their decisions based on the record created by the Administrative Law Judge.

Appeal of the Final Administrative Adjudicatory Decision

Appeal may be filed in the Utah Court of Appeals. Review is under the substantial evidence standard.

Union and Employee Participation

Unions and employees can contest abatement time and may request party status.

Retaliation Cases

Discrimination cases are decided by the Labor Commission judges and are prosecuted by the enforcement agency in the same manner as OSH enforcement cases.

Alternative Dispute Resolution

Judges may assist the parties in the settlement process, but there are no formal alternative dispute resolution procedures.

Decision and Information Sources

Administrative Law Judge Decisions:
Adjudication Division
Utah Labor Commission
160 East Third Street
P.O. Box 856615
Salt Lake City, Utah 84114-6615
(801) 530-6856
(801) 530-6333 (FAX)

Commission and Appeals Board Decisions:
General Counsel's Office
Utah Labor Commission
160 East, 300 South
P.O. Box 146600
Salt Lake City, Utah 84114-6600
(801) 530-6953
Labor Commission: http://www.laborcommission.utah.gov

Information needed to get documents: Docket number, company, or case name.
Charge for copies: No charge, if not large quantity; otherwise, $.15 per page plus labor costs.

Utah Occupational Safety and Health: http://www.uosh.utah.gov

VERMONT

Two Levels of Administrative Adjudicatory Review

1) Hearing Officer—Although the VOSHA Review Board has the authority to conduct evidentiary hearings itself, its normal practice is to contract with private attorneys who serve as Hearing Officers. These attorneys do not otherwise represent employer or employees in VOSHA proceedings.

2) Vermont Occupational Safety and Health Review Board—Either party may petition the Board for reconsideration/review of the Hearing Officer's recommendation. The Board has 3 members appointed by the Governor for 6-year staggered terms. Service is not full-time. Although the statute does not specify that the Board have representatives from different sectors, in practice, an attorney is generally appointed as chairman, with a representative of management and a representative of labor as the remaining members. The Board has jurisdiction over both public and private employers. The Board is independent but is attached to the Vermont Department of Labor and Industry for administrative purposes.

Unusual Feature

The Board has two types of proceedings—formal and simplified. Cases involving the general duty clause and certain occupational safety and health regulations are not eligible for simplified proceedings, but most other cases are.

Number of Contests

Average of 150 per year.

Number of Hearings

Average of 6–10 hearings per year.

Hearings

The Hearing Officer conducts the trial, rules on motions, etc., and prepares a recommended decision that is submitted to the Review Board, which can accept or reject the recommended decision. There is a full evidentiary hearing. There is limited discovery permitted (requests to admit). All other discovery is only by permission of the Review Board (by delegation to the Hearing Officer). Hearing Officers normally require disclosure of witnesses who are expected to testify. In complex cases or in high penalty or high profile cases, at least one pre-trial conference is always conducted to sort out discovery request issues and procedural motions and to set a trial date. In other cases, a phone conference may be held. When simplified proceedings are elected, an informal settlement conference is conducted immediately prior to a scheduled formal hearing.

Appeal of the Hearing Officer's Recommended Disposition

Either party may petition the Review Board for reconsideration/review of the Hearing Officer's recommendations. Review is discretionary. VOSHA's interpretation of standards is given deference. The Board looks at whether the Hearing Officer's recommendation is supported by the evidence as well as the law.

Appeal of the Final Administrative Adjudicatory Decision

Appeal may be filed in the Vermont Superior Court. The standard of review is substantial evidence.

Union and Employee Participation

Employees or their representatives may contest the reasonableness of the abatement period. Their ability to participate as a party as to other matters is not yet resolved by statute or the Board. In a limited number of cases, they have been permitted informal participation rights (allowed to submit evidence and argument but not recognized as parties with formal appeal rights). Informal participation in settlement discussions has been permitted.

Retaliation Cases

Allegations of retaliation are brought as civil actions in the Superior Court. The statute grants a private right of action or the Attorney General may prosecute. In the case of a private right of action, an employee is not required to exhaust the VOSHA investigation procedure prior to commencing an action.

Alternative Dispute Resolution

There are no formal alternative dispute resolution procedures.

Decision and Information Sources

Deborah N. Doyle, Clerk
VOSHA Review Board
State Administration Building
133 State Street
Montpelier, Vermont 05633-6701
(802) 828-2775

Information needed to get documents: Docket number and/or company name needed to request copies.
Charge for copies: None.

Vermont Occupational Safety and Health Administration:
http://www.state.vt.us/labind/vosha.htm

VIRGIN ISLANDS

Private Sector Employees:

Federal OSHA requirements apply.

Public Sector Employees Only:

Two Levels of Administrative Adjudicatory Review

1) Administrative Law Judge.
2) Commissioner of Labor—The Commissioner can disapprove and reverse an Administrative Law Judge's decision, but never has. The Commissioner is appointed by the Governor.

Number of Contests

Average of 3–4 per year.

Number of Hearings

Average of 3–4 per year.

Hearings

A judge holds formal hearings and discovery is allowed if requested. A prehearing conference is always conducted.

Second Level of Administrative Review

The Commissioner of Labor must approve the judge's decision, but has not yet failed to approve any decision.

Appeal of the Final Administrative Decision

Appeal may be filed either in the Territorial Court or in the Federal District Court. No case has yet gone to court.

Union and Employee Participation

Unions and employees have not yet played any role in OSHA proceedings, but technically can file a notice of contest or request party status.

Retaliation Cases

The Division of Labor Relations, which is part of the Department of Labor, decides whether or not to refer a retaliation allegation to the Attorney General's Office.

Alternative Dispute Resolution

There are no formal alternative dispute resolution procedures.

Decision and Information Sources

Administrative Assistant Supervisor
Department of Labor
Occupational Safety and Health Division
3012 Golden Rock
Christiansted, St. Croix, Virgin Islands 00820
(809) 772-1315
(809) 772-4323

Information needed to get documents: N/A.
Charge for copies: None.

VIRGINIA

[*Editor's Note:* See information current as of 1999, in the Main Volume.]

WASHINGTON

Two Levels of Administrative Adjudicatory Review

1) Industrial Appeals Judge (IAJ)—There are two different categories of IAJs: Mediation Judges and Hearing Judges. Mediation IAJs are typically the more senior IAJs. Mediation IAJs may occasionally assist with the hearings process but do not serve as a Hearing IAJ on any case on which they have served as the Mediation IAJ. Hearing IAJs, typically the less senior IAJs, do not mediate cases. In addition to hearing WISHA appeals, the Hearing IAJs also hear cases involving the following matters: Industrial Insurance, Crime Victims Compensation, assessment under the Worker and Community Right to Know Act, suspension or revocation certificates involving asbestos projects, and safety procedures in late-night retail establishments. The IAJs are employed by the Board of Industrial Insurance Appeals.

2) The Board of Industrial Insurance Appeals (Board)—There are 3 members of this Board, who are appointed by the Governor to 6-year staggered terms. There is a labor member, a business member, and a public member who must also be an attorney. The members serve full-time and also have jurisdiction over the statutes referred to above. The Board is an independent state agency.

Unusual Feature

After a notice of appeal (equivalent to the notice of contest in the federal system) is filed, the Department of Labor and Industries (DLI) WISHA Services Division holds a "reassumption conference" (which is like an informal conference in the federal system) in about 95 percent of the cases. Such a conference is omitted when, for a variety of reasons, it is deemed unlikely to result in settlement or when the complexity of the case makes it unlikely that the reassumption deliberations will be completed within the 30-working-day time limit. (The parties may mutually agree to extend the limit to 45 working days.) After the conference, WISHA issues a "corrective notice of redetermination" (CNR) which may affirm, modify, or withdraw all or part of the citation. The employer may then appeal the CNR to the Board. Most contested citations are resolved during the "reassumption" phase, before the CNR is appealed to the Board.

Cases that are appealed to the Board are handled by the Attorney General's Office. Once the case is before the Board, the Board assigns the appeal to one of its mediation judges. These judges hold mediation conferences in most cases. The Attorney General's Office may, after consulting with the Department, determine that settlement of an appeal is appropriate. Cases may settle for a variety of

reasons and may include a penalty reduction. However, cases are not settled for less than what the Attorney General's Office feels the Department could receive through litigation. Settlement typically only results in penalty reductions and very rarely results in the violations being vacated.

About one quarter of the appeals are withdrawn by the employer before hearing. Only 20 percent of the remaining cases go to trial.

Number of Contests

On average, there are 1,000 to 1,300 contests per year filed with the DLI. From October 1, 2000, to September 30, 2001, DLI issued approximately 7,268 citations, and 1,005 contests were filed with DLI. Of the contested cases, the Department reassumed jurisdiction on 955 and sent 48 directly to the Board. Of the 955 that were reassumed, 213 were further appealed to the Board. From October 1, 2001, to September 30, 2002, DLI issued approximately 7,924 citations, and 1,314 were contested with DLI. Of the contested cases, the Department reassumed jurisdiction on 1,246 and sent 68 directly to the Board. Of the 1,246 that were reassumed, 310 were further appealed to the Board.

From July 1, 2000, to June 30, 2001, the Board received 303 appeals of contest. The prior year it received 389 appeals of contest. From July 1, 2001, to June 30, 2002, the Board received 391 appeals of contest.

Number of Hearings

On average, there are 100 final orders after hearings per year.

Hearings

Judges hold formal adjudicatory hearings. Discovery is permitted. Settlement conferences are routinely held after an appeal is filed.

Appeal of the Final Administrative Adjudicatory Decision

Appeals may be filed in the Superior Court (a trial court).

Union and Employee Participation

Union or employee representatives may participate in every phase of adjudication at the Board, although they may only contest the abatement date. Participation by union or employee representatives is entirely voluntary and hearings before the Board will proceed

even if they elect not to participate. There is no mechanism apart from contesting a case to obtain party status.

Retaliation Cases

Discrimination cases are investigated by the DLI and tried by the Attorney General's Office in the state Superior Court.

Alternative Dispute Resolution

The Board employs Mediation Judges who do nothing but facilitate settlement in WISHA and other cases under their jurisdiction. These are usually more senior judges. Most cases are handled by a Mediation Judge before being transferred to a Hearing Judge.

Decision and Information Sources

Joe Molenda, Public Information Officer (360) 902-4544
or Deanna Jackson (360) 902-5542
Department of Labor and Industries
P.O. Box 44632
Olympia, Washington 98504-4632
(360) 902-5529 (FAX)

Information needed to get documents: Employer name and inspection number needed to request copies of documents.
Charge for copies: $.15 per page, $.20 for copying pictures. Audio and video cassettes are available for $3.00 and $5.00 respectively. CDs (for digital photos) are $1.55 each.

Board of Industrial Insurance Appeals: http://www.biia.wa.gov
Washington Industrial Safety and Health Information:
http://www.wa.gov/lni/cnc/safety.htm

WYOMING

Two Levels of Administrative Adjudication

1) Hearing Officer—Hearing Officers are employees of the Office of Administrative Hearings, which is an independent state agency.

2) Wyoming Occupational Safety and Health Commission—There are 7 Commissioners appointed by the Governor and confirmed by the Senate for 6-year terms. There is one representative of management, one representative of labor, one medical doctor, and four at-large representatives. The Commission is attached to the Wyoming Department of Employment. It is required to meet 4 times per year and also reviews rules, regulations, and variances.

Number of Contests

Average less than one per year.

Number of Hearings

Average of less than one per year. The last hearing was held in 2003.

Hearings

Hearing Officers hold formal administrative hearings. Discovery is permitted. The Hearing Officer issues a recommended decision.

Appeal From the Hearing Officers' Recommended Decision

All of the Hearing Officers' recommended decisions are reviewed by the Commission. The recommended decisions are not final until the Commission approves, modifies or reverses them.

Appeal From the Final Administrative Decision

Appeals may be filed in the state district court.

Union and Employee Participation

The role of unions in Wyoming OSH procedures is minimal to none. Unions may contest the abatement time.

Retaliation Cases

Contested discrimination cases are heard by a Hearing Officer who recommends a decision to the Commission. The Attorney General's office presents the State's case.

Alternative Dispute Resolution

There are no formal alternative dispute resolution procedures.

Decision and Information Sources

Workers' Safety & Compensation Division
Department of Employment
1510 E. Pershing Blvd.
Cheyenne, Wyoming 82002
(307) 777-7700
(307) 777-3646 (FAX)

Information needed to get documents: Company name needed on a written request.
Charge for copies: None.

Wyoming Department of Employment: http://doe.state.wy.us/osha

Appendix F [New Appendix]

Cases Interpreting State Plans

[*Editor's Note*: This Appendix represents an effort to survey the significant judicial and administrative decisions issued by state authorities adjudicating legal questions arising in the states that operate OSHA-approved state plans. As described in Chapter 19 of the Main Volume, Section 18 of the OSH Act authorizes states to develop and administer federally approved State OSHA programs. These programs are authorized by, and operate under, state law, provided the requirements of Section 18 of the OSH Act have been met. Twenty-one states and one territory administer state plans covering the private and public sectors; three states and one territory administer state plans covering only the public sector. This represents the first effort to survey state OSHA case law, and the results are necessarily incomplete.

To produce this Survey of state case law, the ABA Section of Labor and Employment Law worked cooperatively with OSHA's Directorate of Cooperative and State Programs. OSHA requested that each state summarize significant decisions interpreting the state's legal authority with respect to safety and health. Each state responded differently to the survey. Some states responded by summarizing only judicial decisions. Others included both administrative and judicial decisions. Some states included cases discussing the relationship between OSHA and workers' compensation or tort claims. Other states did not. Some states did not respond to the survey. Therefore, the breadth of the material presented in Appendix F varies by state. In future Supplements to OCCUPATIONAL SAFETY AND HEALTH LAW, SECOND EDITION, the editors hope to expand this analysis of state law to provide state summaries that are more parallel.]

Table of Contents by State

[*Editor's Note*: See also the Finding List by Topic by State, below this Table of Contents list.]

Finding List by Topic by State

CALIFORNIA

Administrative Warrants

In *Salwasser Manufacturing Co., Inc. v. Occupational Safety and Health Appeals Board,*[1] the court detailed the criteria CalOSHA must meet to obtain a warrant to inspect a work site. The court held that CalOSHA must meet an "administrative probable cause" standard and need not comply with criminal probable cause standards to obtain an administrative warrant to inspect a work site in response to an employee complaint.[2] The court concluded that the primary purpose of a CalOSHA inspection is not to discover evidence of a crime but to enforce standards to assure safe and healthful working conditions for employees.[3] The appellate court adopted the standard established by the United States Supreme Court in *Marshall v. Barlow's, Inc.,* applied by the federal appeals courts.[4] Thus, CalOSHA warrants do not need to be issued to a peace officer, specify an activity which may be a crime, or contain independent corroboration of the complainant's statements in order to provide a substantial basis for the warrant. The court also noted that should a CalOSHA inspection evolve into a criminal investigation, then further access to gather evidence would require a showing of traditional criminal probable cause.[5]

Employee Misconduct Defense

California recognizes the "independent employee act" defense, which had previously been applied by the Occupational Safety and

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[1] 214 Cal. App. 3d 625, 262 Cal. Rptr. 836 (1989).
[2] *Id.* at 632.
[3] *Id.*
[4] See Chapter 8 in the Main Volume.
[5] *Salwasser Mfg.,* 214 Cal. App. 3d at 631–32.

Health Appeals Board.[6] The defense recognizes that employers can avoid responsibility for a violation if the violation was the result of an employee's disregard of company policy. The defense is not available when supervisors ignore company policy. To utilize the defense to vacate a citation, the employer must prove five elements: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program that includes training employees in safety matters relevant to their job assignments; (3) the employer effectively enforces its safety program; (4) the employer's policy enforces sanctions against employees who violate the safety program; and (5) the employee caused a safety infraction which he or she knew was contrary to the employer's safety requirement.[7] If the employer fails to prove any one the five elements, the defense is unavailable.[8]

Intent

A willful violation can be proven through evidence either that the employer intentionally violated a safety law or that an employer had actual knowledge of an unsafe or hazardous condition, yet did not attempt to correct it.[9] Criminal *mens rea* is not required.[10] Thus, the fact that the injured employee's supervisor was not aware that the electrical cables causing injury were energized was not a defense to the willful designation, because the supervisor knew safety orders required treating all electrical equipment as energized unless proven otherwise and yet he failed either to test the cable prior to the employee's exposure or ensure that the employee had sufficient training to identify the hazard.[11]

Jurisdiction

California OSHA (CalOSHA) rules do not apply to an employee of a tree trimming service employed by a homeowner. In *Fernandez v. Lawson*[12] a private homeowner, hired a tree trimming service. Fernandez, who was assigned to do the work, was seriously injury when he fell from a tree. Neither the tree trimming service nor

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[6] Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd., 167 Cal. App. 3d 1232, 213 Cal. Rptr. 806 (1985).

[7] *Id.* at 1239 (citing *In re* Mercury Serv., Inc., decided after reconsideration, No. 77-R4D1-1133, at 2–3 (Oct. 16, 1980)).

[8] *Id.*

[9] Rick's Elec., Inc. v. California Occupational Safety & Health Appeals Bd., 80 Cal. App. 4th 1023, 95 Cal. Rptr. 2d 847 (2000).

[10] *Id.* at 1036.

[11] *Id.* at 1038.

[12] 31 Cal. 4th 31, 1 Cal. Rptr. 3d 422, 20 OSH Cases 1249 (2003).

Fernandez was licensed to perform tree trimming services.[13] California law presumes that an unlicensed worker performing work for which a license is required is an employee rather then an independent contractor.[14] Fernandez sought damages for the homeowner's failure to follow OSHA safety regulations. The court rejected the claim, holding that a tree-trimmer hired by a homeowner for a noncommercial purpose is engaged in a "household domestic service" and not required to comply with CalOSHA regulations.[15] While limiting its holding to tree trimming services, the court specifically left open the possibility that other services requiring licensing might be considered household domestic services when performed for a noncommercial purpose.

The court sustained a claim of preemption in *Southern California Gas Co. v. Occupational Safety and Health Appeals Board.*[16] Southern California Gas Co. was cited for safety violations when two employees were injured attempting to vent natural gas from an interstate pipeline.[17] The CalOSHA Appeals Board upheld the citations. The court reversed, concluding that the language of the Natural Gas Pipeline Safety Act[18] is broad and, when read in conjunction with the detailed regulatory scheme, indicates Congressional intent not to permit states to regulate the design of equipment or its use in the operation or maintenance of interstate natural gas pipelines.[19] Because federal law has so thoroughly occupied the field, the court held, CalOSHA has no jurisdiction.[20]

In another preemption case, *United Air Lines, Inc. v. Occupational Safety and Health Appeals Board*,[21] CalOSHA cited United Airlines for failing to provide a guardrail on an unenclosed elevated work platform at a ground maintenance facility. United challenged CalOSHA's jurisdiction, claiming the Federal Aviation Authority had exclusive jurisdiction to regulate airline maintenance facilities. The California Supreme Court rejected the preemption claim, holding that although the FAA may have statutory authority to regulate the health and safety of ground personnel, it had not done so. It is not vested with such authority on occupational safety and health over the ground maintenance facility so as to divest CalOSHA of all jurisdiction.[22] The parties and Court agreed that California Labor

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[13] *Id.* at 34.
[14] CAL. LABOR CODE §2750.5.
[15] 31 Cal. 4th at 38.
[16] 58 Cal. App. 4th 200, 67 Cal. Rptr. 2d 892 (1997).
[17] *Id.* at 202.
[18] 49 U.S.C. §60101.
[19] 58 Cal. App. 4th at 205.
[20] *Id.* at 210.
[21] 32 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387 (1982).
[22] *Id.* at 775.

Code Section 6303 applied, which, for exemption purposes, requires that the health and safety jurisdiction over the place of employment be vested by law in, and actively exercised by, any other state or federal agency.[23] The Court held that although the FAA may have statutory authority to regulate the health and safety of ground maintenance personnel, it is not "vested by law" with the exclusive health and safety jurisdiction over a place of employment.[24] The Court further held that even if the FAA were vested with the requisite jurisdiction, the FAA had not actively exercised jurisdiction in this instance and, therefore, divesting CalOSHA of jurisdiction would be improper.[25] The Court also recognized that where the FAA had issued regulations, such as those governing in-flight safety, traditional supremacy clause principles would apply and the FAA would take precedence over a conflicting state regulation.[26] The citations issued against United were affirmed.[27]

Personal Protective Equipment and Tools

In *Bendix Forest Products Corp. v. Division of Occupational Safety and Health,*[28] the court upheld CalOSHA's authority to require an employer to furnish to its employees without charge gloves or mittens for the employees to wear while removing lumber from the drag chain of the dry kiln area of its plant.

In *Carmona v. Division of Industrial Safety*[29] the California Supreme Court overturned a decision that "short handled hoes" were not "unsafe hand tools."[30] The Court held CalOSHA erred in concluding that "unsafe hand tools" were limited to those which were improperly manufactured or maintained.[31] In the Court's view, when the manner of using tools causes harm to farm workers, the tools are unsafe.[32]

Walk-Around Pay

In *Division of Labor Standards Enforcement v. Texaco, Inc.*[33] CalOSHA brought an action to require the employer to pay "walk-around pay" for all time spent by nonmanagement employees during

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[23] *See* CAL. LAB. CODE §6303.
[24] *Id.* at 771.
[25] *Id.* at 777.
[26] *Id.* at 774.
[27] *Id.* at 778.
[28] 25 Cal. 3d 465, 600 P.2d 1339, 158 Cal. Rptr. 882 (1979).
[29] 13 Cal. 3d 303, 530 P.2d 161 (1975).
[30] *Id.* at 306.
[31] *Id.*
[32] *Id.* at 313.
[33] 152 Cal. App. 3d Supp. 1, 199 Cal. Rptr. 561 (1983).

a CalOSHA inspection. During the inspection, Texaco paid the regular wages of the participating management representatives. Texaco paid the regular wages of employee representatives only if one inspection team was operating, the employee was working on the inspection during his or her regular working shift, and the inspection did not result in overtime for the employee. Texaco argued that by participating in the inspection, the employees were on a voluntary mission unrelated to corporate concerns and that payments to employee representatives for walk-around duties while participating in the inspection were not required, citing *Leone v. Mobil Oil.*[34] The court rejected Texaco's argument and held that, under California law, fairness required that both management and employee representatives must be paid for all of their time in assisting CalOSHA with walk-around inspections.[35] The court's opinion also includes a detailed discussion of the "walk-around pay" issue.

CONNECTICUT

Jurisdiction

In *City of Norwich v. OSHRC*, the Commissioner of Labor determined that the city had committed four willful violations of the state OSHA regulations related to a city employee's reparation of a local gas distribution main in the city.[36] The city contested the citations on multiple grounds, including that the Review Commission lacked jurisdiction to cite the city because employees over which federal agencies have jurisdiction are excluded from Connecticut OSHA coverage.[37] The city argued that because the U.S. Department of Transportation (U.S.D.O.T.) can set and enforce standards and regulations pertaining to all aspects of gas pipeline facilities, Connecticut OSHA does not have jurisdiction, even though U.S.D.O.T. has not promulgated regulations pertaining to these exact hazards.[38] The Connecticut Superior Court affirmed the decision of the Review Commission to the contrary, finding that although the U.S.D.O.T. has the authority to regulate trench construction, it has not done so, and therefore if "the state regulations, which do cover trench construction, were

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[34] 523 F.2d 1153 (D.C. Cir. 1975).

[35] *Id.* at 17

[36] No. CV 93 053 14 50, 12 Conn. L. Rptr. 562, 1994 WL 592159 (Conn. Super. Ct. Oct. 25, 1994).

[37] *Id.* at *2.

[38] *Id.*

preempted in this case, then the workers would not have the protection of any government regulation."[39] As such, the state's enforcement of its OSH regulations was not preempted.[40]

Repeat Violation

In addressing the issue of repeat violations, the Superior Court of Connecticut held in *Water Pollution Control Authority, City of Bridgeport v. Commissioner of Labor* that the Water Pollution Control Authority (WPCA) was a successor to the Department of Public Works (DPW).[41] In this case, penalties were imposed by Connecticut OSHA against the WPCA for repeat violations.[42] WPCA contested the classification of "repeat," as the initial violations were assessed against the DPW.[43] The Commissioner of Labor argued that the WPCA was a successor to the DPW.[44] According to the court, "[b]ecause it was created from the DPW, performs the same functions for basically the same customers and with the same equipment and the same personnel as did the DPW," the WPCA is in fact a successor to the DPW and therefore properly cited for repeat violations.[45] Litigation of the "same employer" element of a repeat violation is rare.

INDIANA

Collateral Estoppel/Res Judicata

In *Commissioner of Labor v. Talbert Manufacturing Co.*, a complaint was brought on behalf of an employee who was allegedly discharged by his employer after filing an Indiana Occupational Safety and Health Administration (IOSHA) complaint.[46] While this action was pending, a dispute between Talbert and the employee was arbitrated under the terms of the union contract, and the employee's grievance was denied.[47] Subsequently, the trial court granted Talbert's motion for summary judgment, holding that res judicata and collateral estoppel barred the Commissioner's claim.[48] The Court of Appeals reversed the trial court, holding that a "completed arbitration proceeding does not bar a subsequent trial de novo under

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[39] *Id.* at *3.
[40] *Id.* at *4.
[41] No. CV 90 274144, 1992 WL 201922 (Conn. Super. Aug. 4, 1992).
[42] *Id.* at *1.
[43] *Id.* at *2.
[44] *Id.*
[45] *Id.* at *4.
[46] 593 N.E.2d 1229 (Ind. Ct. App. 1992).
[47] *Id.* at 1230.
[48] *Id.*

Indiana's OSHA laws."[49] This is consistent with several federal courts' holdings that neither the Secretary nor the Review Commissioner is bound by the results of a prior arbitration proceeding.[50]

Conflict of Interest

In *LTV Steel v. Commissioner of Labor*, the Supreme Court of Indiana addressed the unique issue of conflict of interest between an inspector and the company that the inspector was citing.[51] In *LTV Steel*, the safety and health officer employed by the Indiana Occupational Safety and Health Administration (IOSHA) to inspect LTV was "on layoff status with [a sister subsidiary of LTV steel] and enjoyed 'recall rights' of re-employment," as well as a vested pension with the sister subsidiary.[52] The Safety Board dismissed the citations because they were issued by an inspector that had a financial conflict of interest.[53] In reviewing this decision, the State Supreme Court found that this action "was in excess of the Safety Board's statutory jurisdiction" and remanded the matter to the Safety Board for further proceeding.[54]

Hearsay

The issue of hearsay in an administrative proceeding is addressed by the Indiana Court of Appeals in *Amoco Oil Co., Whiting Refinery v. Commissioner of Labor*.[55] In this case, the Indiana Department of Labor conducted an inspection at the Amoco facility following an explosion in which two individuals were killed and four injured.[56] Amoco appealed the safety orders that were issued and affirmed by the Board and the trial court.[57] Before the Indiana Court of Appeals, Amoco asserted that the trial court erred in sustaining the Board's final order because that order was based on hearsay.[58] Federally, while the Administrative Procedure Act does not preclude the use of hearsay evidence in formal administrative proceedings like those before the Review Commission, the Review Commission's current

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[49] *Id*. at 1233.

[50] *See, e.g.,* Marshall v. N.L. Indus., 618 F.2d 1220 (7th Cir. 1980); Reich v. SYSCO Corp., 870 F. Supp. 777 (S.D. Ohio 1994).

[51] 730 N.E.2d 1251 (Ind. 2000).

[52] *Id*. at 1254.

[53] *Id.* at 1253.

[54] *Id*. at 1262.

[55] 726 N.E.2d 869 (Ind. Ct. App. 2000).

[56] *Id*. at 871.

[57] *Id*.

[58] *Id*. at 872.

rules follow the approach of the Federal Rules of Evidence,[59] which prohibit hearsay subject to specific exceptions.[60] In Indiana, "[t]he admission of hearsay evidence is not . . . without limitation."[61] Instead, the court stated that, according to the Indiana Code, "if hearsay evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely on the hearsay evidence."[62] The court went on to find that the ALJ based his decision on evidence other than hearsay, and therefore affirmed the decision of the trial court and the Board.[63]

Intent

In *Commissioner of Labor v. Gary Steel Products Corp.*, the Indiana Court of Appeals affirmed the Commissioner's determination that a "bad motive" need not be present to impose a penalty for a "knowing" violation.[64] In this case, knowing citations were issued by IOSHA in connection with the cleanup of material containing asbestos.[65] Indiana's use of the word "knowing" is synonymous with the Federal OSH Act's use of the word "willful," which does not require proof of a "bad motive."[66] However, the trial court found that a heightened motive "necessary to the interpretation" of the "knowing" statute.[67] The Court of Appeals reversed, holding that IOSHA's decision to look to the federal law in interpreting the "knowing regulation was within the discretion, as the state statute was cloned after the federal regulation."[68]

Although urged to overrule its *Gary Steel Products* decision in *Union Tank Car, Fleet Operations v. Commissioner of Labor*, the Indiana Court of Appeals declined to do so.[69] In *Union*, after one employee was killed and one injured while cleaning a railroad tank car that did not contain adequate oxygen, Union Tank Car was cited for five knowing violations of the Indiana OSHA Act.[70] Union Tank Car urged the court to overrule the definition of knowing affirmed in *Gary Steel Products* and find a heightened motive requirement, but the court declined to revisit the issue.[71]

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[59] 29 C.F.R. §2200.71.
[60] FED. R. EVID. 803–807.
[61] 726 N.E.2d at 874.
[62] *Id*. at 875.
[63] *Id*.
[64] 643 N.E.2d 407 (Ind. Ct. App. 1994).
[65] *Id*. at 409–410.
[66] *Id*. at 411.
[67] *Id*. at 412.
[68] *Id*.
[69] 671 N.E.2d 885 (Ind. Ct. App. 1997).
[70] *Id*. at 887–88.
[71] *Id*. at 889–90.

Vagueness

With regard to affirmative defenses, the Indiana Court of Appeals addressed the issue of vagueness in *Midwest Steel Erection Co., Inc. v. Commissioner of Labor*.[72] In this case, Midwest Steel was cited by IOSHA for violating a standard requiring ladders or ramps for structures erected that are over 20 feet high.[73] A portion of the highway ramp under construction collapsed and a Midwest Employee was stranded with no means of egress. The employee was killed while attempting to climb down the uncollapsed portion of the ramp when it too collapsed.[74] Midwest asserted that the standard it was cited for violating was unclear in that it did not specify whether multiple stairways, ladders or ramps are required, and is therefore unenforceably vague.[75] The court held that the standard in question was ambiguous as to whether a single or multiple means of access is required; because the standard deprived Midwest of fair notice of its requirements, the court found it to be unconstitutionally vague.[76]

IOWA

Miranda *Warning*

The Iowa Supreme Court recently addressed whether Iowa Occupational Safety and Health Administration (IOSHA) inspectors must read employers *Miranda* warnings when investigating a possible criminal willful case.[77] After an employee fell to his death while working on a telecommunication tower, his employer was charged with willfully violating Iowa's Occupational Health and Safety Act, a serious misdemeanor.[78] An IOSHA inspector interviewed the company's president during the subsequent investigation. The company president later moved to suppress statements made during the opening conference "on the ground that they were secured in violation of [his] rights under the Fifth Amendment."[79] The court rejected the claim, holding that the IOSHA inspector's interview with the company president was not custodial and therefore the questioning did

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[72] 482 N.E.2d 1369 (Ind. Ct. App. 1985).
[73] *Id*. at 1370.
[74] *Id*.
[75] *Id*. at 1371.
[76] *Id*. at 1372.
[77] Iowa v. Trigon, Inc., 657 N.W.2d 441, 19 OSH Cases 2175 (Iowa 2003).
[78] *Id.* at 442.
[79] *Id*.

not require any *Miranda* warnings.[80] The decision is consistent with the federal interpretation.[81]

Striking Employees and Inspections

In two decisions by the Iowa Supreme Court, it was established that a striking union representative could accompany state OSHA inspectors during the inspection of manufacturer's plant.[82] The two cases in question arose from similar facts: a union representative at the employer's plant filed one complaint and a current plant employee filed another complaint alleging violations of the IOSH Act.[83] The union had been in an unfair labor practice strike for ten months in *Titan I* and for over two years in *Titan II*; however, the union was never decertified and was still the exclusive authorized representative of the manufacturer's employees.[84] When IOSHA inspectors arrived at the plant with a warrant to inspect, the employer agreed to allow the inspection but would not permit union representatives to participate.[85] The court, consistent with federal law, held that "[n]either the Act nor its regulations indicate any intent to exclude striking employees from inspections."[86]

KENTUCKY

Civil and Criminal Liability

In *Kentucky v. Lawson Mardon Flexible Packaging, Inc.*, the Kentucky Court of Appeals held that an employer can be required to pay KYOSH fines and can also be held criminally liable for safety violations.[87] The court concluded that civil penalties are not punitive and the bar against double jeopardy is not violated if civil penalties are imposed on an employer convicted of KYOSH Act criminal violations.[88] The same holds true for violators of the federal OSH Act.[89]

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[80] *Id.* at 445.

[81] *In re* Establishment Inspection of Caterpillar Inc. (*Caterpillar*), 55 F.3d 334, 17 OSH Cases 1243 (7th Cir. 1995).

[82] Titan Tire Corp. v. Labor Comm'r of the State of Iowa (*In re* Inspection of Titan Tire), 637 N.W.2d 115 (Iowa 2001); Titan Tire Corp. v. Labor Comm'r of the State of Iowa (*In re* Inspection of Titan Tire), 637 N.W.2d 125 (Iowa 2001).

[83] 637 N.W.2d at 118.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 129.

[87] 10 S.W.3d 488 (Ky. Ct. App. 1999).

[88] *Id.* at 492.

[89] *See* S.A. Healy Co. v. Occupational Safety & Health Review Comm'n, 138 F.3d 686 (7th Cir. 1998).

Jurisdiction

Kentucky Supreme Court in *Carman v. Dunaway Timber Co.,* refused to extend KYOSH coverage to a private businessman selling merchandise on the employer's property.[90] The court narrowly interpreted the Kentucky Occupational Safety and Health Administration (KYOSH) statute, stating that the businessman was not an employee, and therefore not a member of the class of persons intended to be protected by KYOSH regulations.[91]

Private Right of Action

Kentucky has refused to recognize a private right of action by an injured employee against an employer who allegedly violated KYOSH regulations.[92]

Remand

In *Secretary, Labor Cabinet v. Boston Gear, Inc.*, Kentucky's Supreme Court held that the Kentucky Occupational Safety and Health Review Commission has the authority to remand a case to a hearing officer after a recommended order has been issued.[93] The Court found that when necessary to gather more evidence and render more detailed findings, such a remand is within the Commission's authority.[94]

*Search Warrant*s

With regard to search warrants, Kentucky's Occupational Safety and Health (KYOSH) Act differs from the federal OSH Act in that it specifically provides that "[i]f an employer refuses . . . entry, then the Commissioner may apply to the Franklin Circuit Court for an order to enforce the right of entry."[95] The Kentucky Court of Appeals in *Stovall v. A.O. Smith Corp.* found that the language of the statute vests *exclusive* jurisdiction in the Franklin Circuit Court to issue a search warrant to enforce the right of entry.[96] The federal OSH Act authorizes the Secretary only to conduct inspections and

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[90] 949 S.W.2d 569 (Ky. 1997).
[91] *Id*. at 570.
[92] Stinnett v. Buchele, 598 S.W.2d 469 (Ky. Ct. App. 1980).
[93] 25 S.W.3d 130 (Ky. 2000).
[94] *Id*. at 134.
[95] KY. REV. STAT. ANN. §338.101(2) (Banks-Baldwin 2004).
[96] 676 S.W.2d 475 (Ky. Ct. App. 1984).

does not by its terms authorize the Secretary to seek a warrant.[97] Courts have concluded, however, that subject matter jurisdiction exists in federal district court to issue a warrant.[98]

In addressing the issue of warrants under the Kentucky OSH Act, the Kentucky Supreme Court, in *Yocom v. Burnette Tractor Co.*,[99] held that warrantless inspections are impermissible, the same conclusion reached by the Supreme Court in *Marshall v. Barlow's, Inc.*[100] In *Yocum*, Kentucky's highest court held that state inspection officials administering the KYOSH Act are not exempt from securing a search warrant if they want to conduct a non-consensual search of a place of employment.[101]

Furthermore, the court stated in *Kentucky Labor Cabinet v. Graham* that the exhaustion doctrine applies when a search warrant is challenged. An executed warrant may not be challenged in court immediately; instead, the employer must first exhaust its administrative remedies.[102] This is true both in Kentucky and under the federal OSH Act.

In *Kentucky Labor Cabinet v. Graham*, inspectors were denied access to three facilities.[103] The Labor Cabinet immediately obtained search warrants from the Franklin Circuit Court.[104] Kentucky officials executed the search warrants. Tyson sought to preserve its right to contest the validity of the warrant.[105] The Labor Cabinet objected to action by the Franklin Circuit Court after the warrant had been executed. The Kentucky Supreme Court held that when an employer contests an already-executed administrative search warrant issued by the Franklin Circuit Court, the Kentucky Occupational Safety and Health Review Commission alone has the power to decide whether the warrants were based on inaccurate affidavits.[106] This decision is in accord with federal law holding that challenges to the validity of an executed search warrant must be raised before the Occupational Safety and Health Review Commission.[107]

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[97] Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C.A. §657(a) (2004).

[98] *In re* Establishment Inspection of Gilbert & Bennett Mfg. Co., 589 F.2d 1335, 1344 (7th Cir. 1979); *In re* Establishment Inspection of Seaward Int'l, 510 F. Supp. 314, 316 (D. Va. 1980).

[99] 566 S.W.2d 755 (Ky. 1978).

[100] 436 U.S. 307, 6 OSH Cases 1571 (1978).

[101] 566 S.W.2d 755, 757 (Ky. 1978).

[102] 43 S.W.3d 247 (Ky. 2001).

[103] *Id.*

[104] *Id.* at 250.

[105] *Id.* at 250–51.

[106] *Id.* at 254–55.

[107] Main Volume, at 216–18.

Workers' Compensation Enhancements

KYOSH violations may increase a workers' compensation award for resulting injuries. In *Lexington-Fayette Urban County Government v. Offutt*, the Kentucky Court of Appeals held that a 15 percent enhancement in workers' compensation benefits can be awarded because the employer violated a general statutory duty to provide a safe place of employment.[108] Kentucky is one of a few states that grants increased workers' compensation awards to employees who are injured as a result of safety and health violations.[109]

Wrongful Discharge Suits

Kentucky courts have refused to grant dismissed employees the option of seeking judicial relief for wrongful discharge in violation of public policy for reporting an employer's violations of the KYOSH Act or refusing to violate the Act themselves. As with the OSH Act, Kentucky's Act provides protection for whistleblowers, and the district court held in *Hines v. Elf Atochem North American, Inc.* that wrongful discharge claims cannot be based on occupational safety and health statutes.[110] Such claims are preempted by the whistleblower provisions of the KYOSH Act, which provides the exclusive remedy for employees alleging unlawful discrimination.[111]

MARYLAND

Deference to ALJ Findings

In *Bragunier Masonry Contractor, Inc. v. Maryland Commissioner of Labor and Industry*, the Court of Appeals held that the Commissioner may review an administrative law judge finding that has not been specified for review.[112] This is similar to Occupational Safety and Health Review Commission proceedings, where the direction for review establishes OSHRC jurisdiction to review the entire case.[113]

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[108] 11 S.W.3d 598 (Ky. Ct. App. 2000).

[109] *See also* Childers v. International Harvester Co., 569 S.W.2d 675 (Ky. Ct. App. 1977).

[110] 813 F. Supp. 550 (W.D. Ky. 1993).

[111] *Id.* at 552.

[112] 684 A.2d 6, 10 (Md. Ct. Spec. App. 1996).

[113] 29 C.F.R. §2200.92(a).

Employee Misconduct Defense

The Maryland Court of Appeals also addressed the issue of affirmative defenses in *Maryland Commissioner of Labor and Industry v. Cole Roofing Co.*[114] This case arose from the inspection of a site where Cole Roofing Company was installing and repairing a flat roof. The roof was more than six feet off above ground and, therefore, MOSH fall protection requirements applied.[115] The MOSH inspector observed no fall protection system in place, and subsequently cited Cole Roofing for a serious violation of the fall protection standard.[116] Cole Roofing contested the citation, claiming that the violation was the product of unpreventable supervisor misconduct, since Cole had issued a written safety handbook whose requirements were not followed by the employees.[117] The Court of Appeals held that employee misconduct is an affirmative defense that the employer must plead and prove.[118] The Court recognized that the majority of Federal courts "hold that non-preventability of employee or supervisor misconduct is an affirmative defense on which the employer bears the burden of pleading and proof."[119] The Court acknowledged that the Fourth Circuit Court, which includes Maryland, had concluded otherwise, but stated that the majority view "is the more modern and better-reasoned view."[120]

General Duty Clause

In *Steelworkers v. Bethlehem Steel Corp.*, two steelworkers suffered heat stroke while working in separate furnace areas, eventually resulting in the death of both workers.[121] The employer was subsequently cited for a serious and willful violation of the MOSHA general duty clause for failure to provide a safe and healthful working environment.[122] The Maryland Court of Appeals had previously held that because the Maryland Occupational Safety and Health (MOSH) Act is patterned after the federal OSH Act, it should look to federal case law when interpreting the MOSH Act and Regulations.[123] In *Bethlehem Steel Corp.* it did so again, adopting the well-established

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[114] 796 A.2d 62 (Md. Ct. App. 2002).
[115] *Id.* at 65.
[116] *Id.* at 66.
[117] *Id.* at 66–67.
[118] *Id.* at 69.
[119] *Id.*
[120] *Id.*
[121] 472 A.2d 62, 63 (Md. Ct. App. 1984).
[122] *Id.* at 63-64.
[123] J.I. Hass Co. v. Department of Licensing & Regulation, 340 A.2d 255 (Md. Ct. App. 1975).

elements of a general duty clause violation under Maryland law. The Maryland Court of Appeals held that MOSH must demonstrate three elements: 1) a hazard exists; 2) the hazard is recognized; and 3) it is likely to cause death or serious physical harm.[124] Furthermore, the clause applies "when a reasonably prudent employer in the industry would have known that the proposed method of abatement was required under the job conditions where the citation was issued."[125] The Court of Appeals in *Bethlehem Steel* noted, however, that it did "not believe that industry custom and practice is a per se limitation under MOSH's general duty clause on the types of precautions required of an employer."[126]

Infeasibility

In *Bethlehem Steel Corp., v. Commissioner of Labor and Industry*, the Maryland Court of Appeals adopted the majority federal view that when a specific standard is cited, the employer has the burden of proving infeasibility of compliance as an affirmative defense.[127] In this case, a Bethlehem employee was fatally injured while working on a lathe in the employer's machine shop. During a subsequent investigation of the premises, Bethlehem was cited for violating MOSH's machine guarding requirements.[128] Bethlehem contested the citation, arguing that in this case, MOSH had not proved that guarding this particular machine was feasible.[129] The Maryland Court of Appeals affirmed the judgment of the Court of Special Appeals, finding that "the Commissioner correctly placed on Bethlehem the burden of proof . . . ."[130]

Multiemployer Worksite Defense

Bragunier Masonry Contractor, Inc. v. Maryland Commissioner of Labor and Industry[131] upholds the application of the *Anning-Johnson* defense for a subcontractor to escape liability on a multiemployer worksite.[132] The Court states that "[f]or the defense to be applicable, a subcontractor must show that it neither created nor controlled the hazard."[133] Additionally, the employer's efforts must

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[124] MD. CODE ANN., LAB. AND EMPL. §5-104.
[125] Donovan v. Royal Logging Co., 645 F.2d 822, 831 (9th Cir. 1981).
[126] *Id*. at 65.
[127] 662 A.2d 256, 257 (Md. Ct. App. 1995).
[128] *Id*.
[129] *Id.*
[130] *Id* at 264.
[131] 684 A.2d 6 (Md. Ct. Spec. App. 1996).
[132] Grossman Steel & Aluminum Corp., 4 OSH Cases 1185 (Rev. Comm'n 1976).
[133] 684 A.2d at 15.

be "at least a 'reasonable' and 'realistic' response as an alternative to literal compliance with applicable safety regulations."[134]

Repeat Violation

In *Commissioner of Labor and Industry v. Bethlehem Steel Corp.*, the Court of Appeals held that MOSH cannot establish a prima facie repeated violation simply by showing that the prior and present violations are for citations under the same standard.[135] This case arose after a Bethlehem employee was electrocuted by a deteriorating employee-provided toaster oven. This is in line with the majority of federal cases that "clearly hold that in order to sustain a repeated violation . . . there must be a 'substantial similarity of violative elements between the current and prior violations."[136]

Retaliation

In *Silkworth v. Ryder Truck Rental, Inc.*, the Maryland Court of Special Appeals held that the MOSH discrimination provision is an employee's exclusive remedy for a wrongful discharge related to safety and health complaints.[137] In *Silkworth*, however, the court may have misunderstood the procedural remedy available to an employee whose discrimination complaint is rejected by the Commissioner. MOSH viewed the Commissioner's decision not to pursue a discrimination case as a matter of prosecutorial discretion, not an order from which an appeal can be taken, as the court assumed.[138] In Maryland, no private action in tort for wrongful discharge exists because the state's workplace safety and health statute provides the exclusive remedy.[139] Likewise, Maryland does not permit workers to sue their employers for injuries resulting from willful violations of a MOSH regulation and thereby avoid the exclusivity of workers' compensation.[140]

Standard Setting

The Maryland Court of Appeals has held that an interlocutory injunction delaying the implementation of a Division of Labor and

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[134] *Id.*

[135] 684 A.2d 845 (Md. Ct. App. 1996).

[136] *Id.* at 853.

[137] 520 A.2d 1124, 1128 (Md. Ct. Spec. App. 1987).

[138] *See* MD. CODE ANN., LAB. AND EMPL. §5-215.

[139] *Id.*

[140] Johnson v. Moutaire Farms of Delmarva, Inc., 503 A.2d 708 (Md. Ct. App. 1986).

Industries regulation prohibiting smoking in an enclosed workplace is an improper exercise of judicial discretion where the plaintiffs were not likely to succeed on the merits of their challenge to the workplace smoking rule.[141] The court's opinion includes a full discussion of the Commissioner of Labor and Industry's rulemaking authority, and concludes that the Commissioner had a sufficient basis to find that a "significant risk" to employee health existed to justify a total ban on smoking in enclosed workplaces, with the limited exception of designated smoking areas.[142]

MINNESOTA

Retaliation

Minnesota has an anti-discrimination statute similar to Section 11(c) of the OSH Act.[143] Deborah Scott, while employed as a dialysis assistant and reuse technician at Miller-Dwan Medical Center, was exposed to the sterilent Renalin while performing her job duties.[144] When she became pregnant, she requested reassignment because the effects of Renalin on a developing fetus are not known.[145] Scott's request was denied. She then refused to work with what she believed to be a hazardous substance and was placed on unpaid leave until her child was born. Scott filed suit for discrimination under MNOSHA.[146] The Minnesota statute describing the rights of employees provides, in part, that "[a]n employee acting in good faith has the right to refuse to work under conditions which the employee reasonably believes present an imminent danger of death or serious physical harm."[147] The ALJ found that Miller-Dwan discriminated against Scott for her good faith refusal to work by placing her on involuntary unpaid leave.[148]

NEVADA

Knowledge Imputed

In *Administrator of the Division of Occupational Safety and Health v. Pabco Gypsum*, the Nevada Supreme Court addressed the

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[141] Fogel v. H & G Rest., Inc., 654 A.2d 449, 457 (Md. Ct. App. 1995).
[142] *Id*. at 459.
[143] 29 C.F.R. §1977.12(b).
[144] Commissioner v. Miller-Dwan Med. Ctr., No. 1-1901-11970-2, 1999 WL 1877754 (Minnesota Dep't of Lab. & Indus., Off. Admin. Hrgs., July 26, 1999), at *3.
[145] *Id*. at *8.
[146] *Id.*
[147] MINN. STAT. §182.654.
[148] *Id*. at *10.

issue of imputing knowledge from a builder to a building owner.[149] In that case, Pabco, a mining and manufacturing business, hired a temporary crew to construct a prefabricated steel building; the building collapsed during construction, injuring two workers.[150] The Court held that the builder's knowledge of deviations from standard building practice could be imputed to Pabco, stating that the company could have been aware of the condition with the exercise of reasonable diligence.[151]

Private Right of Action

In *Frith v. Harrah South Shore Corp.*, Frith, employed by Campbell Construction Company, was injured when he fell from scaffolding while working on Harrah South Shore's property.[152] Frith filed suit against Harrah under the common law as well as the Nevada Occupational Safety and Health Act."[153] The Nevada Supreme Court held that "the legislature did not intend to create any private civil remedy through the Occupational Safety and Health Act," and Frith was precluded from bringing such a suit.[154] The construction is analogous to interpretations of the OSH Act.[155]

NEW MEXICO

Jurisdiction

In *Inca Construction Co. v. Rogers*, the New Mexico Occupational Health and Safety Bureau issued citations to the employer after the completion of an investigation into the death of one of its employees.[156] At the time, Inca was a subcontractor on a United States Department of the Interior, Bureau of Reclamation (BOR) project.[157] Inca argued that the state bureau did not have jurisdiction to issue such citations.[158] The Court concluded otherwise in holding that Inca failed to show that the federal government had exclusive jurisdiction over the BOR site in question and therefore the Federal

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[149] 775 P.2d 701 (Nev. 1989).
[150] *Id.* at 702.
[151] *Id.*
[152] 552 P.2d 337, 339 (Nev. 1976).
[153] *Id.*
[154] *Id.* at 340.
[155] *Id.*
[156] 943 P.2d 548, 549 (N.M. Ct. App. 1997).
[157] *Id.*
[158] *Id.*

OSH Act and its regulations do not preempt application of the New Mexico Occupational Health and Safety Act and its regulations.[159]

Retaliation

In *Weidler v. Big J Enterprises*, the court addressed the issue of retaliatory discrimination.[160] Matthew Kehoe worked for Big J for several months in 1991.[161] Shortly before the end of his tenure, he called OSHA to report his concerns about the unsafe handling of sulfuric acid by Big J.[162] After being fired, Kehoe filed a complaint with the New Mexico Occupational Safety and Health Administration alleging that he had been terminated for raising safety concerns.[163] An investigator concluded that although Kehoe's supervisor claimed that he was fired because he was unproductive, he was actually discharged in retaliation for his reports to the New Mexico Occupational Safety and Health Administration.[164] The Secretary of the Environment Department filed a petition claiming that Big J terminated Kehoe for raising safety concerns and the two cases were consolidated.[165] The jury returned a verdict in favor of Kehoe.[166] On appeal, the court held that a violation of public policy as set forth in the nondiscrimination provisions of the New Mexico Occupational Safety and Health Act can support a retaliatory discharge claim.[167] The court stated that "New Mexico thus recognizes an employee's right to institute a private cause of action, not seeking enforcement of the statute as such, but to enforce his common-law right not to be discharged for reporting unsafe practices in the workplace."[168] Likewise, the court states that "nothing in the FedOSHA prohibits an employee from filing a common-law tort claim for retaliatory discharge or an action based upon a contract theory. . . . Nor was FedOSHA designed to preempt any common-law remedies workers might have under state law."[169]

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[159] *Id*. at 553.
[160] 953 P.2d 1089 (N.M. Ct. App. 1997).
[161] *Id*. at 1093.
[162] *Id*.
[163] *Id*. at 1094.
[164] *Id*. at 1093.
[165] *Id*. at 1094.
[166] *Id.*
[167] *Id*. at 1095.
[168] *Id*.
[169] *Id*.

OREGON

Confidentiality

Oregon's Safe Employment Act, like the Federal OSH Act, affords complainants the right to keep their identity confidential.[170] In *Hood Technology Corp. v. Oregon Occupational Safety and Health Division*, an employer sought to compel Oregon OSHA (OR-OSHA) to disclose the identity of an individual who filed a false complaint against it.[171] The court held that "the determination of whether the disclosure of a . . . complainant's identity would be contrary to the public interest turns not on the *per se* truth or falsity of the complaint, but on the complainant's good faith or bad faith in submitting the information. Where a complainant has acted in good faith, disclosure is contrary to the public interest."[172]

Credentials

In *Occupational Safety and Health Division v. Don Whitaker Logging, Inc.*, a logging accident occurred on premises of the employer that resulted in the hospitalization of employees.[173] Following the accident, a Compliance Officer (CO) interviewed one or more employees in the hospital; the CO did not notify the employer and show his credentials until the following day.[174] The court held that the applicable statute requiring presentation of appropriate credentials to the employer did not require such presentation for portions of the investigation occurring off-premises.[175] Likewise, the Occupational Safety and Health Review Commission has held that the requirement that inspectors present credentials applies only when the inspection is conducted on the worksite.[176]

Employee/Employer Participation

The Oregon Court of Appeals has three times addressed the need for presence of employee/employer representatives.

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[170] OR. REV. STAT. §654.062(4) (2004).
[171] 7 P.3d 564 (Or. Ct. App. 1999).
[172] *Id.* at 571.
[173] 862 P.2d 526, 527 (Or. Ct. App. 1994).
[174] *Id.*
[175] *Id.* at 528.
[176] *See* GEM Indus. Inc., 17 OSH Cases 1184 (Rev. Comm'n 1995).

- The court held in *Nygaard Logging Co. v. Division of Occupational Safety and Health* that informal interviews and depositions are not "proceedings" within the meaning of the Safe Employment Act provisions that give the employer the right to be represented by an attorney or other authorized representatives.[177] As such, during the course of an investigation, OR-OSHA officers are permitted to interview employees privately outside the presence of an employer or employer representative.[178] The same holds true federally.[179]
- In *Oregon Occupational Safety and Health Division v. Eslinger Logging, Inc.*,[180] the court held that the OR-OSHA's alleged violation of a statute requiring an employee representative to accompany an OR-OSHA official during the inspection of an accident site does not preclude OR-OSHA from using evidence it uncovered during the inspection as a basis for citations against the employer.[181]
- The same holds true if an OR-OSHA official does not provide the employer the opportunity to accompany the inspector during the inspection.[182]

Failure to Supervise

The Oregon Court of Appeals has also addressed the failure to supervise. In *Accident Prevention Division v. Roseburg Forest Products*,[183] while the labor union was striking against the employer, supervisory personnel were assigned to fill in for striking workers. Roseburg was cited for violating the Safe Employment Act after a supervisory employee was killed when a load of lumber fell from a forklift.[184] The court found that the employer knew that there was no supervisor, and as such could be held to have knowledge of a violation consisting of failure to supervise, even though the employer could not have known that an employee would walk between a stationary load and a moving vehicle.[185]

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[177] 995 P.2d 589, 595 (Or. Ct. App. 2000).
[178] *Id.*
[179] *See* Donovan v. Wollaston Alloys, Inc., 695 F.2d 1 (1st Cir. 1982).
[180] 967 P.2d 889, 892–93 (Or. Ct. App. 1998).
[181] *Id.* at 895.
[182] Oregon Occupational Safety & Health Div. v. Ostlie, 902 P.2d 580, 585 (Or. Ct. App. 1995).
[183] 806 P.2d 172 (Or. Ct. App. 1990).
[184] *Id.*
[185] *Id.* at 174.

Fall Protection

Oregon courts have held that compliance with fall protections rules is mandatory and no consideration is given to whether such protection is practical.[186] Additionally, under the fall protection regulation, a physical device is required and employee's work experience cannot constitute the required safety device or safeguard.[187] In *Oregon Occupational Safety and Health Division v. Affordable Roofing, Inc.*, an OR-OSHA compliance officer saw one of Affordable Roofing's employees working on a roof 28 feet above the ground without fall protection and cited the employer for not complying with fall protection requirements.[188] Affordable Roofing contested the citation, and the administrative law judge (ALJ) concluded that "because working on a roof was inherently dangerous and the addition of the toeboards likely would not have prevented an injury if a worker did fall, employer did not violate" the fall protection rule.[189] The court, however, held that the ALJ exceeded his authority in reviewing the citation by substituting his judgment for that of the Department's in deciding that the fall protection rule was not violated because the fall protection required was ineffective.[190] The court held that in fact the fall protection rule *was* violated where employees were working on a roof 28 feet above the ground without fall protection.[191]

Hazard Communication

Under Oregon's hazard communication standard, employers are required to develop and maintain a written hazard communication program.[192] Simply keeping an up-to-date binder of MSDSs does not fulfill the hazard communication standard's requirements.[193] A written plan must be contained in a single document and include information such as how the employer informs employees of the hazards of non-routine tasks.[194]

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[186] Oregon Occupational Safety & Health Div. v. Redi-Rooter, 826 P.2d 1052, 1053-1054 (Or. Ct. App. 1991).

[187] Oregon Occupational Safety & Health Div. v. Bellet Constr., 879 P.2d 1333, 1333 (Or. Ct. App. 1994).

[188] 865 P.2d 439, 439 (Or. Ct. App. 1993).

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] G & G Elec. & Plumbing Distribs. v. Oregon Occupational Safety & Health Div., 869 P.2d 378 (Or. Ct. App. 1994).

[193] *Id.* at 380.

[194] *Id.* at 381.

Inspections

When an investigation is prompted by an accident, the Oregon Court of Appeals has held that citations issued during the investigation are not limited to the circumstances immediately surrounding the accident.[195] A Fall Creek Logging employee was killed when a log fell and struck him in the upper back and neck.[196] The employee was not wearing an approved hard hat.[197] Several weeks prior to this incident, Fall Creek had been comprehensively inspected and cited for several alleged violations, including failure to ensure employees wear approved hard hats.[198] As a result, following the accident investigation, Fall Creek was cited for an alleged repeat violation of the hard hat standard.[199] The court held that OR-OSHA could issue a citation for a log truck driver's failure to wear a hard hat in spite of the fact that the violation was unrelated to the accident that triggered OR-OSHA's inspection of the work site.[200] The same holds true federally, where an inspection initially limited in scope can be expanded at the discretion of the inspector if other violative elements are observed.[201]

In *Oregon Occupational Safety and Health Division v. D & H Logging, Inc.*, an OR-OSHA compliance officer initiated an inspection which resulted in citations after observing D & H's logging operations from a public road. D & H argued that its workplace was improperly selected for inspection. The court rejected the argument and, instead, deferred to OR-OSHA's interpretation of its inspection rules, stating, "Where. . .the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the working of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted 'erroneously.' "[202] Under this decision, OR-OSHA is authorized to immediately schedule an inspection when it locates a qualified non-fixed worksite in a high-hazard industry.[203]

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[195] Oregon Occupational Safety & Health Div. v. Fall Creek Logging Co., 905 P.2d 241, 244 (Or. Ct. App. 1995).

[196] *Id*. at 242.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.* at 242.

[201] *See* Irving v. United States, 162 F.3d 154, 18 OSH Cases 1577 (1st Cir. 1998).

[202] Oregon Occupational Safety & Health Div. v. D & H Logging, Inc., 979 P.2 297, 300 (Or. App. 1999) (citing Don't Waste Oregon Comm. v. Energy Facility Siting, 881 P.2d 119 (1994)).

[203] *Id.*

Knowledge Imputed

In *Oregon Occupational Safety and Health Division v. Don Whitaker Logging, Inc.*, a crew supervisor signaled that it was safe to move logs while he and two other employees were standing in the path of the logs.[204] All three suffered injuries when they were hit by a log.[205] The court held that "proof that a supervisor . . . personally committed a safety violation, or knew or reasonably could have known of the presence of the violation, establishes" employer "knowledge" of that violation.[206] However, in Oregon, when a supervisor commits a violation, the Oregon code does not *require* that the supervisor's knowledge of that violation be imputed to the employer.[207] The federal OSH Act contains no provision analogous to the Oregon standard considered in *Don Whitaker Logging*.[208] Under federal law, actual or constructive knowledge of a supervisor is imputed to the employer, thus constituting a showing of knowledge.[209]

Lockout/Tagout Standard

Oregon has adopted a lockout/tagout standard identical to the federal one. In *Oregon Occupational Safety and Health Division v. PGE Co.*, PGE was cited for a violation of that standard.[210] OR-OSHA alleged that PGE violated the rule because lockout devices were used for purposes other than controlling energy.[211] PGE appealed. The Board held the lockout/tagout standard did not apply because PGE's facility was used for power generation, transmission and distribution, which are exempt from the scope of the rule.[212] The court reversed, however, holding that the exclusion applies only to facilities that directly generate, transmit, or distribute electric power and not to PGE's equipment storage building. [213]

Penalties

In the penalty arena, the Court of Appeals has held that an employer can be held responsible for violations at the premises of

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[204] 985 P.2d 1272, 1273 (Or. Ct. App. 1999)
[205] *Id*.
[206] *Id*. at 1276.
[207] Oregon Occupational Safety & Health Div. v. B & G Excavating, 976 P.2d 574 (Or. Ct. App. 1999).
[208] OAR 437-01-760(3)(c).
[209] *See* Daniel Const. Co., 10 OSH Cases 1549, 1552 (Rev. Comm'n 1994).
[210] 849 P.2d 544 (Or. Ct. App. 1993).
[211] *Id*. at 545.
[212] *Id*. at 546.
[213] *Id*. at 546–47.

its wholly owned subsidiary.[214] Additionally, it has held that an administrative law judge cannot reduce penalties below what is mandated by the governing rules.[215]

VERMONT

General Duty Clause

In *Green Mountain Power Corp. v. Commissioner of Labor and Industry*, an employee of Green Mountain, classified as a lineman first class, was killed when he came into contact with a live wire.[216] Under Green Mountain's policy, even when employees were under the immediate supervision of a foreman, all safety determinations regarding protective covering were to be made by the lineman first class.[217] In this situation, the foreman knew that there was inadequate protective covering, but failed to instruct the lineman to install additional covering.[218] The Vermont Supreme Court held that Green Mountain did not fulfill its statutory obligation to provide a workplace free from recognized hazards under the General Duty Clause by delegating the responsibility of implementing the company's safety policies to rank and file employees under the immediate supervision of managerial personnel.[219] The Court stated that such a delegation "does not comport with either the letter or the spirit of VOSHA."[220]

WASHINGTON

Citations

In *Inland Foundry v. Department of Labor and Industries*,[221] the Department of Labor and Industries (L&I) cited Inland Foundry Company, Inc. for failing to remedy 16 violations of the Washington Industrial Safety and Health Act and assessed penalties totaling $31,200. The employer argued that the citations failed to "describe with particularity" the violations as required by statute. The court rejected the argument, and after reviewing identical language in the OSH Act, agreed with the federal cases[222] that a citation meets the

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[214] Oregon Occupational Safety & Health Div. v. Jeld-Wen, Inc., 988 P.2d 418, 421 (Or. Ct. App. 1998).

[215] Accident Prevention Div. v. Asana, 821 P.2d 432 (Or. Ct. App. 1990).

[216] 383 A.2d 1046, 1048–49 (Vt. 1978).

[217] *Id.* at 1049.

[218] *Id.*

[219] *Id.* at 1053.

[220] *Id.*

[221] 106 Wash. App. 333 (Wash. App. 2001).

[222] Main Volume, at 158.

factual specificity requirement if, after considering the circumstances surrounding the alleged violations, the employer understands what regulations it violated and is provided with an adequate opportunity to prepare and present a defense.

Employee Misconduct Defense

In *Washington Cedar and Supply Co. v. State of Washington*[223] the court rejected an employer argument that the violations at issue resulted from "unpreventable and unforseeable" employee conduct. The court adopted an interpretation of the employee misconduct defense articulated by the Sixth Circuit in *Brock v. L. E. Myers Co.,*[224] which requires the employer to prove that its safety program is effective "in practice as well as in theory."[225] The court concluded that where an employer has previously been cited for the same conduct, an employer likely will have a difficult time proving that the employee misconduct defense applies, because the prior citations are evidence that the employer had notice that its enforcement program was not effective. Such notice makes subsequent misconduct forseeable.[226]

Grouped Violations

When the department has grouped multiple items in a violation, a penalty may still be assessed even if one item is vacated, where the remaining items support the penalty.[227]

Infeasibility

An employer has the burden of proof when it raises the affirmative defense that compliance with a safety standard is infeasible. The employer must prove first that the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that either (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and second that either (a) an alternative method of protection was used or (b) there was no feasible alternative means of protection.[228]

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[223] 83 P.3d 1012, 20 OSH Cases (BNA) 1489 (Wash. App. 2003).
[224] 818 F.2d 1270, 1276 (6th Cir. 1987).
[225] 83 P.3d at 1015.
[226] *Id.* at 1015–16.
[227] Tom Whitney Construction, Wash. BIIA No. 01 W0262 (2002).
[228] Longview Fibre Co., Wash. BIIA No. 98 W0524 (2000).

Penalties

In *Danzer v. Department of Labor and Industries*,[229] the Department of Labor and Industries (L&I) assessed a penalty of $42,000 against Edward L. Danzer, doing business as Danzco, for failure to abate a previously cited violation of the Washington Industrial Safety and Health Act. The Board of Industrial Insurance Appeals (BIIA) and the Superior Court affirmed the penalty assessment. On appeal, the employer argued that the severity rating supporting the penalty was excessive because (1) no Danzco employee had ever been injured while using an unguarded grinder, and (2) the Department had failed to show that using a grinder without a safety guard was unsafe. The court rejected the argument, affirming the criteria used by L&I to assess penalties. The court found that past history of actual injuries is not relevant in assessing the severity of violations. Instead, the proper focus is on the extent of injury that can potentially result if an accident occurs.

"Serious" Violation

In *Lee Cook Trucking v. Department of Labor and Industries*,[230] the court agreed with the Department of Labor and Industries (L&I) that a serious violation exists when there is a likelihood that, should injury result from the violation, death or serious physical harm would result. Lee Cook had argued that to prove a serious violation, L&I had to show a substantial probability that harm will result from the violation. The court deferred to L&I's interpretation of the statute it administers and relied upon a similar interpretation by the Ninth Circuit[231] of almost identical language defining a serious violation under Federal law.

Shareholders As Owners

In *Framers, Inc.,*[232] the Board of Industrial Insurance Appeals rejected an argument that because the workers exposed to the cited hazards were corporate officers and shareholders Washington Industrial Safety and Health Act (WISHA) regulations did not apply. The "officers" in this case were doing the same jobs as before becoming officers, exercised no control over the financial aspects of the

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[229] 16 P.3d 35, 104 Wash. App. 307 (2000).

[230] 36 P.3d 558, 109 Wash. App. 471 (2001).

[231] California Stevedore & Ballast Co. v. Occupational Safety & Health Review Comm'n, 517 F.2d 986, 988 (9th Cir. 1975).

[232] Wash. BIIA Nos. 01 W0465 and 02 W0366.

corporation, and collectively lacked majority control over the company. BIIA held that where the shareholders did not have practical control over the corporation or the workplace, they were employees under WISHA and the employer must comply with WISHA regulations.